NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

R. A. HEDRICK

Judges

GERALD ARNOLD
HUGH A. WELLS
CLIFTON E. JOHNSON
EUGENE H. PHILLIPS
SIDNEY S. EAGLES, JR.
SARAH PARKER
JACK COZORT
ROBERT F. ORR
K. EDWARD GREENE
JOHN B. LEWIS, JR.
JAMES A. WYNN, JR.*

Retired Judges

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EDWARD B. CLARK
ROBERT M. MARTIN
CECIL J. HILL
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Assistant Director

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RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

---

*Elected and sworn in 30 November 1990 to replace Allyson K. Duncan.

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	ERNEST B. FULLWOOD	Wilmington
	GARY E. TRAWICK[2]	Burgaw
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6B	CY A. GRANT	Windsor
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7B-C	FRANK R. BROWN	Tarboro
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8B	PAUL MICHAEL WRIGHT	Goldsboro

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	WILLIAM H. FREEMAN	Winston-Salem
	JAMES A. BEATY, JR.	Winston-Salem
	WILLIAM Z. WOOD, JR.[10]	Winston-Salem
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	ROBERT E. GAINES	Gastonia
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28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	ZORO J. GUICE, JR.	Hendersonville
	LOTO GREENLEE-CAVINESS[15]	Marion
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30B	JANET MARLENE HYATT	Waynesville

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HOLLIS M. OWENS, JR.	Rutherfordton
DARIUS B. HERRING, JR.	Fayetteville

1. Elected to a new position and sworn in 1 January 1991.
2. Elected to a new position and sworn in 1 January 1991.
3. Elected and sworn in 16 December 1990 to replace Leon H. Henderson, Jr.
4. Elected and sworn in 1 January 1991 to replace Howard E. Manning, Jr.
5. Elected to a new position and sworn in 1 January 1991.
6. Elected and sworn in 1 January 1991 to replace Darius B. Herring, Jr.
7. Elected to a new position and sworn in 1 January 1991.
8. Elected to a new position and sworn in 1 January 1991.
9. Elected to a new position and sworn in 1 January 1991.
10. Elected and sworn in 1 January to replace James J. Booker.
11. Elected to a new position and sworn in 1 January 1991.
12. Elected and sworn in 1 January 1991 to replace Sam A. Wilson, III.
13. Elected and sworn in 1 January 1991.
14. Elected and sworn in 1 January 1991 to replace Raymond L. Warren.
15. Elected to a new position and sworn in 1 January 1991.

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	PATRICIA ANN TIMMONS-GOODSON	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
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	WILLIAM Y. MANSON	Durham
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	ERNEST J. HARVIEL	Burlington
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	CLARENCE W. CARTER	King
	OTIS M. OLIVER[16]	Mount Airy

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	ROLAND HARRIS HAYES	Winston-Salem
	WILLIAM B. REINGOLD	Winston-Salem
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	MARGARET L. SHARPE	Winston-Salem
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	JESSIE A. CONLEY[21]	Statesville
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	EDGAR B. GREGORY	Wilkesboro
	MICHAEL E. HELMS	Wilkesboro
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	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN	Boone
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	RONALD E. BOGLE	Hickory
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	NANCY L. EINSTEIN	Lenoir
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	ROBERT M. BRADY[22]	Lenoir
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	RICHARD D. BONER	Charlotte
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	H. BRENT MCKNIGHT	Charlotte
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	D. FRED COATS[29]	Nebo
30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

---

1. Appointed and sworn in 3 December 1990 as Chief Judge to replace John T. Chaffin who retired 30 November 1990.
2. Elected and sworn in 3 December 1990.
3. Appointed and sworn in 11 January 1991 to replace Wilton R. Duke, Jr. who took office on Superior Court 1 January 1991.
4. Elected to a new position and sworn in 3 December 1990.
5. Elected to a new position and sworn in 3 December 1990.
6. Elected and sworn in 3 December 1990.
7. Elected to a new position and sworn in 3 December 1990.
8. Elected to a new position and sworn in 3 December 1990.
9. Elected to a new position and sworn in 3 December 1990.
10. Elected to a new position and sworn in 3 December 1990.
11. Appointed and sworn in 1 January 1991 as Chief Judge to replace William C. Gore, Jr. who took office on Superior Court 1 January 1991.

12. Elected and sworn in 2 January 1991.
13. Elected and sworn in 1 October 1989 as Chief Judge.
14. Appointed and sworn in 3 December 1990 as Chief Judge to replace Peter M. McHugh who took office on Superior Court 1 January 1991.
15. Elected and sworn in 3 December 1990.
16. Elected to a new position and sworn in 3 December 1990.
17. Elected to a new position and sworn in 3 December 1990.
18. Elected and sworn in 3 December 1990.
19. Elected to a new position and sworn in 3 December 1990.
20. Elected and sworn in 3 December 1990.
21. Elected to a new position and sworn in 3 December 1990.
22. Elected to a new position and sworn in 3 December 1990.
23. Elected to a new position and sworn in 3 December 1990.
24. Appointed and sworn in 25 January 1991 to replace Robert P. Johnston who took office on Superior Court 1 January 1991.
25. Elected to a new position and sworn in 3 December 1990.
26. Elected to a new position and sworn in 3 December 1990.
27. Elected and sworn in 3 December 1990 to replace Robert L. Harrell who retired 30 November 1990.
28. Appointed and sworn in 1 January 1991 as Chief Judge to replace Loto Greenlee-Caviness who took office on Superior Court 1 January 1991.
29. Appointed and sworn in 16 January 1991.

ATTORNEY GENERAL OF NORTH CAROLINA

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THOMAS B. WOOD
THOMAS D. ZWEIGART

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16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON	Lumberton
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26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARY MILLS LAWRENCE v. KERMIT W. LAWRENCE, JR.

No. 8917DC1119

(Filed 7 August 1990)

1. Divorce and Alimony § 30 (NCI3d) — classification of property as separate — error — no gift intended to marital estate — remand for determination

The trial court erred in determining that an 8.6 acre tract of land was defendant's separate property, since defendant received the first one-half interest in the 8.6 acres by a partition deed between tenants in common, but the second one-half interest in the tract was conveyed by a deed which named plaintiff and defendant, as husband and wife, grantees and it was therefore held by the parties as tenants by the entirety. If no gift to the marital estate was intended at the time of the conveyance, defendant must show this by clear, cogent, and convincing evidence, and the case is remanded to determine if such evidence was presented.

Am Jur 2d, Divorce and Separation §§ 880, 888.

2. Divorce and Alimony § 30 (NCI3d)— use of separate property to purchase tract—presumption of gift to marital estate not rebutted

The trial court erred by relying on defendant's use of separate property to purchase a 24 acre tract to rebut the presumption of a gift to the marital estate; moreover, the trial court's findings that the property was "ancestral," that plaintiff did not know its location, and her lack of testimony that she understood that defendant intended to make a gift were irrelevant to the issue of whether the property was marital property.

Am Jur 2d, Divorce and Separation § 887.

3. Divorce and Alimony § 30 (NCI3d)— marital and separate property—source of funds approach improper

The trial court erred in using a source of funds approach to determine what portion of a 56.6 acre tract was marital property as opposed to separate property where defendant used some separate property to acquire the land; it was titled as entireties property; and defendant presented no evidence to rebut the presumption that defendant intended a gift to the marital estate.

Am Jur 2d, Divorce and Separation §§ 880, 888.

4. Divorce and Alimony § 30 (NCI3d)— presumption of gift to marital estate—burden of rebuttal on defendant

A deed to certain property which named as grantees defendant's partner and his wife and defendant and plaintiff as husband and wife created in the couples tenancies by the entirety, and the trial court erred in finding that plaintiff received this property as a tenant in common; therefore, the gift presumption arose, and the trial court's finding that plaintiff never introduced any evidence that the buying and selling of the real property was ever intended to be a part of the parties' marital estate was irrelevant, as defendant had the burden of showing that no gift was intended at the time of the conveyance.

Am Jur 2d, Divorce and Separation §§ 880, 888.

5. Divorce and Alimony § 30 (NCI3d)— partnership during marriage—classification of partnership property

Since the Court of Appeals has previously held that a spouse's interest in a professional partnership may be marital property, it is uncontradicted that defendant's partnership with his uncle existed during the parties' marriage, and the trial court erred in classifying some of the partnership property, the case is remanded for a reclassification of defendant's share of the partnership's property.

Am Jur 2d, Divorce and Separation § 899.

6. Divorce and Alimony § 30 (NCI3d)— investment trust—part marital and part separate property—findings proper—award of full value to defendant improper

Where there was some evidence to support the trial court's finding that 61.8% of an investment trust was separate property and the remaining 38.2% was marital property, the court's finding is binding on appeal, but the trial court erred in awarding the full value of the investment trust to defendant.

Am Jur 2d, Divorce and Separation § 889.

7. Divorce and Alimony § 30 (NCI3d)— education fund for children—court's imposition of trust in equitable distribution action improper

The trial court was without authority to impose a trust for the benefit of the parties' children on an education fund established by the parties, to appoint the parties as trustees, and to order that the children pay income taxes due on the fund, since only marital property is subject to distribution by the court in an equitable distribution proceeding, and the children were not parties to the action subject to the court's jurisdiction.

Am Jur 2d, Divorce and Separation § 1045.

8. Divorce and Alimony § 30 (NCI3d)— equitable distribution action—conversion of marital funds by plaintiff during marriage—finding improper

The trial court erred in determining that plaintiff had converted certain marital funds to her own use during the marriage and in treating the allegedly converted funds as part of the marital estate in making its equitable distribution order,

since property is not part of the marital estate unless it is owned by the parties on the date of separation, and defendant did not prove that any of this money was used to purchase assets which were owned by either of the parties on the date of separation.

Am Jur 2d, Divorce and Separation § 892.

Judge GREENE concurs in the result.

APPEAL by plaintiff from judgment entered 18 April 1989 by *Judge Clarence W. Carter* in SURRY County District Court. Heard in the Court of Appeals 11 April 1990.

This is an equitable distribution action. Plaintiff argues that the trial court erred in its classification of marital and separate property. Defendant inherited various tracts of land and some money, both before and after the marriage, and then bought or traded inherited real estate and money for other tracts of land. Additionally, some portions of the other tracts' purchase prices were paid with funds that were marital property. The real property acquired was titled in both spouses' names. The trial court found that the majority of the real property was the husband's separate property since it was purchased with separate property and the husband testified he did not intend to make a gift to the plaintiff. The court also classified some certificates of deposit as non-marital property but then purported to impose an "education trust" on the funds. Additionally, the court found that during the parties' twenty-year marriage plaintiff had withdrawn in excess of $53,000 from the parties' joint bank accounts without accounting for that money. The court used this finding as a distributional factor. Plaintiff appeals.

Davis & Harwell, by Fred R. Harwell, Jr., for plaintiff-appellant.

Franklin Smith for defendant-appellee.

EAGLES, Judge.

Plaintiff argues that the trial court erred in a number of respects. First, plaintiff argues that the trial court's classification of certain property as the husband's separate property was error. Second, plaintiff asserts that the trial court erred in placing certain funds in trust for the parties' children and appointing the parties trustees. Additionally, plaintiff asserts that the trial court erred in finding that she converted marital property to her own use during the

marriage and in considering that alleged conversion as a distributional factor. Finally, plaintiff argues that the trial court erred in failing to classify and distribute certain bank accounts held by the parties on the date of separation. For the reasons stated below, the order of the trial court is affirmed in part, reversed in part and remanded.

I. Classification of Property.

The first step in the equitable distribution process is the classification of the parties' property as marital property or separate property. G.S. 50-20(a). Plaintiff first argues that the trial court erred and abused its discretion in classifying portions of four parcels of real property and an interest in an investment trust as defendant's separate property. We agree in part and find that the trial court erred in its classification of the 8.6 acres in Mount Airy, the Mitchell County property, the 56.6 acres in Surry County and the Eads/Highway 601 property as separate property. However, we overrule plaintiff's assignment of error regarding the classification of 61.8% of the investment trust as separate property.

A. Industrial Park; 8.6 acres in Mount Airy.

[1] Plaintiff excepts to the following portion of finding of fact number 5:

> That on August 13, 1969, the Defendant withdrew from Workmen's Federal Savings and Loan the sum of $5,000.00 and used this said money to purchase the remaining one-half undivided interest in the 8.6 acres that he received by will from his grandmother's estate from his Uncle Claude Lawrence. That in addition to the one-half undivided interest in the 8.6 acres the Defendant received from his grandmother's estate $1,200.00 in cash. The evidence showed by way of final accounting that this property was distributed to the Defendant on October 1, 1965. This money was deposited in the Defendant's own savings account in the United Savings and Loan in Mount Airy, North Carolina. That the evidence further showed that the Defendant maintained the 8.6 acres as his own separate property and that he sold the tobacco poundage off this tract of land to an individual by the name of Guy Coe for the amount of $1,194.00.

The trial court concluded that this 8.6 acre tract is defendant's separate property, apparently based on a source of funds rationale,

and "[t]hat the evidence is clear, cogent and convincing that the Defendant never intended to make a gift of any portion of this property to the Plaintiff[.]"

Plaintiff argues that the trial court erred in determining that the 8.6 acre tract is defendant's separate property since the deed for this land names "Kermit W. Lawrence, Jr., and wife, Mary M. Lawrence" as the grantees. Plaintiff relies on G.S. 39-13.6(b) in arguing that a deed naming a man and wife as grantees vests title in the two as tenants by the entireties. Plaintiff's reliance is misplaced in this instance. G.S. 39-13.6 did not become effective until 1983, while the deed in question was executed on 13 August 1969. The common law rule governs this deed transfer. In general at common law a conveyance to husband and wife creates an estate by the entirety. However, where tenants in common partition a joint estate and convey a portion of the land to a cotenant of the tenancy in common and his or her spouse (who was not a cotenant), no estate by the entirety is created and the spouse does not acquire any title. *See Smith v. Smith*, 248 N.C. 194, 198-99, 102 S.E.2d 868, 871 (1958).

The deed conveying the 8.6 acres to plaintiff and defendant provides that the grantors, acting as tenants in common, agreed that 8.6 acres of the grantors' lands were Claude H. Lawrence and defendant's "fair part of the real property devised to the [grantors and grantees]." Thereafter, the deed recites that Claude H. Lawrence "desires to sell his part of the [8.6 acres] to Kermit W. Lawrence, Jr." Our reading of the deed leads us to the conclusion that defendant received one one-half interest in the 8.6 acres by a partition deed between tenants in common. Therefore, the deed did not create a tenancy by the entirety in the first one-half interest in the 8.6 acres. However, the second one-half interest received from Claude H. Lawrence was not conveyed by partition deed between tenants in common. The deed unambiguously states that Claude H. Lawrence conveyed his one-half interest in the 8.6 acres to defendant. Because plaintiff and defendant, as husband and wife, were both named grantees in this conveyance, the second one-half interest in the 8.6 acres is held by them as tenants by the entirety. Defendant bears the burden of showing by clear, cogent and convincing evidence that no gift to the marital estate was intended at the time of the conveyance. Defendant's only evidence regarding the 8.6 acres, other than the deed itself, was his testimony that he spent inherited, separate funds to purchase

and improve the property and that he sold the tobacco allotment on the property. We remand for a determination of whether there is clear, cogent and convincing evidence, sufficient to rebut the gift presumption.

Parenthetically, we note that defendant relies on G.S. 39-13.5 to argue that because the deed did not contain the required statement of intent, it could not create a tenancy by the entirety. Defendant's reliance is also misplaced. G.S. 39-13.5 became effective 1 October 1969 while the deed here was executed on 13 August 1969.

B. Mitchell County Property.

[2] Plaintiff excepts to finding of fact number 6 which states:

> That the Defendant used portions of money from his own savings account which had been willed, devised and bequeathed to him by his father and grandmother to purchase his aunt Georgia Buchanan's one-sixth undivided interest in the 36 acre tract in Mitchell County, North Carolina on December 18, 1970. The purchase price was withdrawn from the Workmen's Federal Savings and Loan account in the amount of $600.00. He also purchase[d] another one-sixth undivided interest in the same tract from his aunt Betty Morgan; that he withdrew the purchase price of $600.00 from his own savings account at the Northwestern Bank in Dobson, North Carolina (originally the Surry County Loan and Trust Company). That he also purchased from his aunt Jessie McKinney a one-sixth undivided interest in the same tract in Mitchell County in the amount of $600.00. That the money was withdrawn from his own savings account at the Northwestern Bank in Dobson, North Carolina. That the Defendant later traded his four-sixths undivided interest in the 36 acre tract of land in Penland, Mitchell County, North Carolina to his Aunt Betty Morgan for a 24 acre tract located on Conley Ridge Road, Penland, Mitchell County, North Carolina. This transaction was August 14, 1981, exhibit 10(a) and 10(b) of Defendant's Exhibit 23 introduced into evidence at the trial. That the defendant also traded his one-sixth undivided interest in the 1.5 acres deeded to him by his father on the 10th day of October, 1971 to his aunt Betty Morgan in Mitchell County, North Carolina for a 2.14 acre tract located and situated on Conley Ridge Road in Penland, Mitchell County, North Carolina and adjoining the 24 acre tract that he acquired from his aunt Betty Morgan. That the

> Defendant retains approximately 13% undivided interest in the remaining 1.5 acre where the house is located and situated thereon. This house is presently occupied by the Defendant's aunt Betty Morgan. That even though some of these deeds were received by the Defendant with the Plaintiff's name thereon as tenants by the entirety that no monies were ever spent to acquire any of the tracts of property in Mitchell County in the names of the parties except the monies that the Defendant received by will from his father and his grandmother. This property is ancestral property and has been in the Defendant's maternal ancestry for over 100 years. The Court further finds that when the Plaintiff took an appraiser to these tracts of land for an appraisal to be made in Mitchell County to testify in this cause, the Plaintiff did not know where the 24 acres or the 2.14 acres were located on Conley Ridge Road. That the Defendant testified that at no time did he ever intend to make a gift of any of these deeds to the Mitchell County property to his wife. That the Plaintiff did not testify that she understood that the Defendant intended to make her a gift of the Mitchell County property. The Court finds that the evidence is clear, cogent and convincing and of sufficient weight to rebut the presumption of gift created by the deeds being in the form of tenants by the entirety.

The trial court concluded that "all of the real property located in Mitchell County" is defendant's separate property. Plaintiff argues that the trial court erred in its reasoning regarding the presumption of gift to the marriage. We agree that the trial court erred in relying on certain facts to classify the property as separate property.

The deed to the 24 acre tract in Mitchell County names as grantees "Kermit W. Lawrence, Jr. and wife, Mary Mills Lawrence." "If a spouse uses separate funds to acquire property titled by the entireties, the presumption is that a gift of those separate funds was made, and the statute's interspousal gift provision applies." *McLean v. McLean*, 323 N.C. 543, 552, 374 S.E.2d 376, 382 (1988). The trial court erred by relying on defendant's use of separate property to purchase the 24 acre tract to rebut the presumption of a gift to the marital estate. Additionally, the findings that this property was "ancestral," that plaintiff did not know its location and her lack of testimony that she understood that defendant in-

tended to make a gift are irrelevant to the issue of whether this property is marital property.

The remaining basis for the trial court's determination that the gift presumption was rebutted is defendant's testimony that he did not intend to make a gift to his wife. "Whether defendant succeeded in rebutting the presumption of gift to the marital estate by clear, cogent and convincing evidence is a matter left to the trial court's discretion." *McLean v. McLean*, 88 N.C. App. 285, 290, 363 S.E.2d 95, 98-99 (1987), *aff'd*, 323 N.C. 543, 374 S.E.2d 376 (1988). The general rule is that "[u]pon appellate review of a case heard without a jury the trial court's findings of fact are conclusive on appeal if there is evidence to support them. . . ." *Draughon v. Draughon*, 82 N.C. App. 738, 740, 347 S.E.2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987). Although the trial court here found as a fact that defendant had rebutted the gift presumption, the court erred in relying on evidence that has no bearing on the issue. Accordingly, we remand to the trial court for a determination whether defendant's relevant evidence was sufficiently clear, cogent and convincing to rebut the gift presumption. We note that this court has affirmed findings that property is marital even though a donor spouse testified that a gift was not intended. *See Thompson v. Thompson*, 93 N.C. App. 229, 232, 377 S.E.2d 767, 768-69 (1989) (trial court did not err in determining that parties' home was marital property where only competent evidence that a gift was not intended was donor's testimony); *Draughon*, 82 N.C. App. at 739-40, 347 S.E.2d at 872 (although donor spouse testified that she did not intend a gift there was evidence to support trial court's finding that the property was marital).

C. Surry County Farm; 56.6 acres in Mount Airy.

[3] Plaintiff assigns as error finding of fact number 7 which states:

> That on December 21, 1972, the Defendant purchased 56.6 acre[s] of land located in Mount Airy Township for a purchase price of $25,000.00. The Defendant made a down payment of $5,000.00. That this $5,000.00 down payment came from the following sources: $965.19 withdrawn from the Defendant's own savings account at Workmen's Federal Savings and Loan; he withdrew from his own savings account at United Savings and Loan $1,737.14 and the remainder of the $5,000.00 down payment was withdrawn from the Northwestern Bank in Dobson,

> North Carolina. That these withdrawals took place on December 12, 1972. The said withdrawals are shown as item 9 of Defendant's Exhibit 23. That the total purchase price including principal and interest for said farm at the time it was paid off amounted to $29,200.00[.] That the $5,000.00 of the $29,200.00 was paid for from the Defendant's own savings accounts which was [sic] devised to him by his father and grandmother. That approximately 1.37 acres was surveyed off the 56.6 acre tract. That a note and deed of trust was [sic] executed to the Workmen's Federal Savings and Loan on the 1.37 acres by the parties for the sum of $25,000.00. This money was used to build the house which the parties lived in for several years prior to their separation which the Plaintiff and the youngest [sic] child are living in at the present time. That the balance due on the note and deed of trust at Workmen's Federal Savings and Loan as of the date of the separation on September 18, 1986 is $15,724.00.

The trial court also found, in finding number 13, that the "original purchase price" was paid in the following manner: $5,000 from defendant's own savings account, $15,540 from payments received from Hardee's of Lincolnton (apparently from the sale of the Eads property) and $8,660 from monies earned during the marriage. Therefore, the court concluded that 70.3% of the tract was separate property and 29.7% was marital. We agree with plaintiff's argument and hold that the trial court erred in determining that any portion of this property was separate property.

As we stated previously, when a spouse uses separate property (which includes proceeds from separate property) to acquire property that is titled as entireties property, a gift to the marriage is presumed. *McLean*, 323 N.C. at 552, 374 S.E.2d at 381. Here, the deed to the parties lists as grantees "Kermit W. Lawrence, Jr. and his wife, Mary Mills Lawrence." This creates a tenancy by the entireties. Defendant presented no evidence to rebut the presumption that defendant intended a gift to the marital estate. Therefore, the trial court erred in using a source of funds approach to determine what portion of the 56.6 acre tract was marital property as opposed to separate property. The source of funds analysis is not applicable until the donor spouse has rebutted the gift presumption by clear, cogent and convincing evidence. *Id.* at 552, 374 S.E.2d at 382.

D. Eads/Highway 601 Property.

[4] Plaintiff also assigns as error the following portions of findings of fact number 9 and 10:

> 9. . . . The partners [defendant and his uncle Romey Sawyers] bought several lots with houses located and situated thereon on both sides of Highway 601 a short distance from where said highway intersects with Highway 52, a total purchase price for all the real property purchased was $40,000.00. . . . That the partners paid $12,000.00 down payment on the $40,000.00 purchase price. That the Defendant-partner's share was withdrawn from the Northwestern Bank in Dobson, North Carolina from the account in his own name which he was willed, devised and bequeathed by his father and grandmother the sum of $6,000.00. That this withdrawal and conveyance is referred to in Defendant's Exhibit 23 admitted into evidence and referred to in the chart which is a part of Exhibit 23 as the Eads property. The partners rented the houses, collected the rents and used these monies to pay on the remaining $28,000.00 owed. That in addition to the rents which were applied to the principal and interest of the remaining balance on the note, the partners had to pay $1,700.00 additional monies—the defendant paid his share in the amount of $850.00 which was withdrawn from the Northwestern Bank in Dobson, North Carolina from his own individual account and this withdrawal took place on or about September 4, 1968. That on August 5, 1972, the partners sold to the Hardee's Food Chain of Lincolnton, North Carolina a lot on the north side of Highway 601 for the sum of $57,000.00. That each partner received $28,500.00 as their share. That these monies were to be paid in the following manner: Hardee's made a down payment on the purchase price of $15,000.00. That the partners acting in their individual capacity took the $15,000.00 and paid off the remaining balance on the note and deed of trust which secured the purchase price of the property on September 6, 1967. That there remained a balance owned [sic] by Hardee's of Lincolnton on the original purchase price $42,000.00 with an annual interest rate of 6%, owing to each of the partners the amount of $21,000.00. These payments have been paid in full, the last payment being made by Hardee's to the partners in 1982. On September 18, 1984, the Defendant and his partner Romey Sawyers acting in their capacity as partners, sold to

the Workmen's Federal Savings and Loan a certain portion of the land referred to as the Eads property located on the south side of Highway 601 for the sum of $50,000.00. That Workmen's Federal Savings and Loan paid to the partners a $10,000.00 down payment—$5,000.00 to each partner with the remaining balance to be paid in ten (10) payments to each partner at the rate of 10% interest on the outstanding balance. . . .

10. That during the course of the existence of the partnership both of the partners' wives received deeds in their names as tenants in common and signed deeds to Hardee's of Lincolnton and to the Workmen's Federal Savings and Loan in Mount Airy, North Carolina. That all of the funds paid for the property and received from the sales of the property were never common-mingled [sic] with the Plaintiff and Defendant's own marital assets. That the evidence is clear, cogent and convincing that this was a business transaction between the Defendant and his uncle Romey Sawyers and that their wives only signed the deeds because the buyers and their attorneys required them to do so. That the Defendant never intended to make a gift of this property to the marital estate. That the partners filed partnership tax returns each year which showed the debts and the income acquired and received by the partnership and that the Plaintiff never introduced any evidence that the buying and selling of the real property was ever intended to be a part of the Plaintiff and Defendant's marital estate. That the Defendant testified that all the transactions involving the Eads property was [sic] the result of the acts of the partnership alone and that neither partner ever intended to make a gift of any of the property, be it real or personal or cash, to either of their wives. That the evidence is clear, cogent and convincing that the Defendant never intended to make a gift of any of the property on Highway 601 in Surry County, North Carolina to the marital estate; that he intended for the property to be owned by the partnership and any income derived from the management and sale of said property was to be the separate property of each of the partners. That the Defendant introduced evidence which was clear, cogent and convincing to the Court which was of sufficient weight to overcome any presumption of gift to the marital estate of any of the real property bought and sold on the north and south side[s] of Highway

601, commonly referred to as the Eads property, sold to Hardee's of Lincolnton and Workmen's Federal Savings and Loan in Mount Airy, North Carolina.

The trial court concluded that the "Eads property," defendant's partnership interest and any proceeds from them were the defendant's separate property. We agree with plaintiff's argument that the trial court erred in relying on certain facts to classify this property as separate property.

The deed to the Eads property, which consists of two tracts of land, one on either side of Highway 601, names as grantees "Romey Sawyers and wife, Ruth Sawyers, and Kermit W. Lawrence, Jr., and wife, Mary Jo Lawrence." The trial court's finding that plaintiff received this property as a tenant in common is clearly erroneous. A deed naming a person and his or her spouse as the grantees creates in them a tenancy by the entireties, *Freeze v. Congleton*, 276 N.C. 178, 181, 171 S.E.2d 424, 426 (1970), even where the husband and wife are not the only grantees. *See Hartman v. Hartman*, 82 N.C. App. 167, 181, 346 S.E.2d 196, 204 (1986), *aff'd*, 319 N.C. 396, 354 S.E.2d 239 (1987). Therefore, the gift presumption arises. The trial court's finding that "Plaintiff never introduced any evidence that the buying and selling of the real property was ever intended to be a part of the Plaintiff and Defendant's marital estate" is irrelevant. Since the property was titled by the entireties, defendant (not plaintiff) has the burden of showing by clear, cogent and convincing evidence that no gift to the marital estate was intended at the time of the conveyance.

[5] Additionally, we note that this court has previously held that a spouse's interest in a professional partnership may be marital property. *See Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985). The rationale behind the *Weaver* decision applies to the instant case. It is uncontradicted that the partnership here existed during the parties' marriage. "[A]ll real and personal property acquired by either spouse or both spouses during the course of the marriage" is marital property. G.S. 50-20(b)(1). Because of the errors in the trial court, we remand for a reclassification of defendant's share of the partnership's property.

E. Investment Trust.

[6] Plaintiff argues that the trial court erred in determining that an investment trust was largely the separate property of the hus-

band. Plaintiff takes exception to the following portion of the trial court's finding of fact number 17:

> That the Defendant received by way of will from his father his father's interest in the Blue Ridge Investors Trust. . . . That at the time the parties were married, the Defendant's interest in the trust fund that he received by will from his father was worth $2,576.00. . . . That at the date of separation, the Defendant's interest in the trust fund was $35,966.00. This evidence was testified to by Hylton Wright, the President of the trust fund. That monies paid by the Defendant during the coverture of the marriage and the monies that he had invested in the trust fund prior to the marriage through and including the date of the separation and applying the verified growth percentage rate on a yearly basis to the trust fund is set out in the Defendant's Exhibit 23 [sic]. This computation shows that 38.2% of the $35,966.00 would be marital property and 61.8% would be separate property belonging to the Defendant. That the Court further finds that the Plaintiff never participated in the investment trust in any way and that the evidence as testified to before the Court is clear, cogent and convincing that the Defendant at no time ever intended to make a gift of the funds that he received from his father or the growth of those funds by and through investments over the years to the marital estate[.]

The trial court concluded that 61.8% of the trust was defendant's separate property and the remaining 38.2% was marital property but awarded the entire fund to defendant "as his separate property." The parties assert different sources of this property. Plaintiff asserts that the husband "bought into" the trust after his father died, while defendant alleges that he inherited his interest. Because there is some evidence in the record to support the trial court's finding that the husband inherited the interest, that finding is binding on appeal. Therefore, that portion of the trust which defendant inherited (and any passive appreciation of that portion) is the husband's separate property.

There is uncontradicted evidence that during the marriage the parties contributed $10 per month in marital funds to the trust. Therefore, some portion of this investment trust is marital property. The trial court determined that only 38.2% of defendant's interest in the trust was marital property. Although it is unclear

from the court's order, the court apparently relied on defendant's testimony and defendant's exhibit #23 regarding the annual growth of the fund. The trial court erred in relying on defendant's exhibit #23 since that exhibit was never offered or admitted into evidence. However, the statements from the investment trust were admitted into evidence by plaintiff and defendant testified that 61.8% of the fund was separate property and 38.2% of the fund was marital property. Defendant also gave a basis for his opinion. Since there is some evidence to support the court's finding, it is binding on appeal.

Plaintiff argues that the trial court erred in failing to use the formula from *Mishler v. Mishler*, 90 N.C. App. 72, 76, 367 S.E.2d 385, 387, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). We find no merit to plaintiff's argument that the *Mishler* formula is the *only* reasonable basis to determine that portion of the fund which is marital property as opposed to separate property. However, the court erred in awarding the full value of the investment trust to defendant. Plaintiff is entitled to share in the distribution of the marital property portion of the investment trust. Accordingly, we remand for equitable distribution of the marital property portion of the investment trust.

II. Education Trust for Children.

[7] Plaintiff also argues that the trial court erred in purporting to impose a trust for the benefit of the parties' children on an "education fund established by the parties," although the court determined the funds were not marital property. Plaintiff excepted to the following portion of finding number 12:

> The Plaintiff and Defendant agreed between themselves to place $20,000.00 of the said $35,000.00 [from the sale of an interest in a building supply business] into certificates of deposit at the Northwestern Bank in Dobson, North Carolina to be designated as the children's educational fund. . . . That while the Plaintiff was managing the family budget that she depleted these funds to an amount of approximately $21,000.00. . . . That an equal and equitable division of these funds between the two (2) sons as of February 7, 1988 plus any interest which the said account would draw from that date would be $9,989.36 plus any additional interest drawn to Kent William Lawrence and $14,593.61 plus any additional interest drawn to Keith Wilson Lawrence. The Court finds as a fact that the parties intended from the beginning and continuing through and to

> the date of the separation that this property would be a gift to the children to provide funds to pay for their college education[s].

Based on this finding the trial court concluded that the monies in the educational fund belong to the parties' two children. The court appointed plaintiff and defendant as trustees and ordered that the children shall pay the income taxes due on the fund.

In an equitable distribution proceeding, only marital property is subject to distribution by the court. G.S. 50-20(a). Therefore, the trial court was without authority to appoint the spouses as trustees of the fund. Further, the condition that the funds would be distributed to the children only after they complete four years of college is a creation of the court and one for which the trial court had no authority. Additionally, because the children were not parties to this action, to the extent the trial court purports to order the children to pay taxes on the fund the court acted without authority. Any resolution of how the educational fund is to be administered is not one within the court's jurisdiction in an equitable distribution proceeding and the order in this respect is null and void.

III. Plaintiff's Conversion of Marital Property.

[8] Plaintiff argues that the trial court erred in determining that the plaintiff converted certain marital funds to her own use during the marriage and in treating the allegedly converted funds as part of the marital estate in making its equitable distribution order. Property is not part of the marital estate unless it is owned by the parties on the date of separation. G.S. 50-20(b). Defendant did not prove that any of this money was used to purchase assets that were owned by either of the parties on the date of separation. Therefore, the trial court erred in concluding that this money was marital property.

IV. Failure to Consider Defendant's Transfer of Funds.

Plaintiff also argues that the trial court erred in failing to classify, value and distribute the monies in certain bank accounts. Plaintiff argues that on the date of separation there were funds in accounts held in both parties' names. Additionally, plaintiff argues that the trial court erred in failing to consider defendant's dissipation of marital assets after the date of separation but before the date of distribution. Our review of the record shows that the trial

court considered each of the parties' accounts. Additionally, plaintiff has shown no abuse of discretion by the trial court in this regard. Plaintiff's assignment of error is overruled.

V. Entry of Order.

Finally, plaintiff argues that the trial court erred in entering the order of equitable distribution. For the reasons stated above we agree with plaintiff's argument that the trial court erred.

In summary, we find that the trial court erred in classifying the 8.6 acres in Mount Airy, the Mitchell County property, the 56.6 acres in Surry County and the Eads/Highway 601 property as separate property. We affirm the court's classification of 61.8% of the investment trust as separate property, though we remand for equitable distribution of the 38.2% of the investment trust which is marital property. Additionally, to the extent the trial court's order attempted to resolve the administration of the educational fund belonging to the parties' children, the court's order is null and void. We also agree with plaintiff's argument that the trial court erred in concluding that certain money, allegedly converted by plaintiff to her own use during the marriage, was marital property. Plaintiff's argument that the trial court erred in failing to consider defendant's dissipation of assets is without merit. Accordingly, the order is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Judge WELLS concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

"When a spouse uses separate property in the acquisition of property titled by the entireties, a gift to the marital estate is presumed." *McLean v. McLean*, 323 N.C. 543, 555, 374 S.E.2d 376, 383 (1988); *McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E.2d 910, 917, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985) (a marital gift is presumed when one spouse, "from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties"). "This presumption is rebuttable only by clear, cogent and convincing evidence that a gift was not intended." *McLean*. Donor spouse has the burden of rebutting the presumption. *Id.* Whether donor spouse succeeds in rebutting the presump-

tion of gift to the marital estate by clear, cogent and convincing evidence remains "a matter left to the trial court's discretion." *Id.* (citation omitted).

The marital property presumption may be rebutted by the conveyance's inclusion of an "express statement of separate property intention." *Id.* Otherwise, evidence that a gift was not intended can be gathered from "circumstances which led to the execution" of the deed and the parties' action after execution of the deed. *See Szabo Food Service, Inc. v. Balentines, Inc.*, 285 N.C. 452, 462, 206 S.E.2d 242, 249 (1974). For example, evidence that the donor spouse continued to treat the property as his separate property after the conveyance is some evidence that he did not intend a gift. *See Waddell v. Carson*, 245 N.C. 669, 678, 97 S.E.2d 222, 229 (1957) (evidence that donor spouse paid taxes out of his salary was "competent for the jury to consider in arriving at plaintiff's intention at the time of the conveyance . . . tending to rebut the presumption of a gift of the property to his wife"). Competent evidence also includes evidence of the parties' intent, including the donor's intent, not to make a gift of the properties to the marital estate. Here, wife argues that the only competent evidence relating to intent is the parties' expression of intent at the time of conveyance. Wife's position is not supported in the law:

> For the truthfulness of the parties when upon the witness stand we must depend, as in the case of other witnesses, upon the obligation of their oath and their reputation for truth and veracity. If these can be relied upon for the truth of statements made in reference to acts and words of which the eye and ear may take notice, they may for the same reason be accepted as guarantees for the truth of statements made in respect to motives and intents of which the mind or inner man alone can take cognizance. Nor is there, in our judgment, any well-grounded reason for apprehending that this rule will obstruct rather than advance the ends of justice. There is no more danger of imposing upon the jury falsehood or pretense in respect of motives and intents than there is of doing the like in respect to visible or external circumstances. The jury can as readily distinguish between the false and true in respect to the former as to the latter. If the motive or intent assigned is inconsistent with the external circumstances, it must be discarded as false. If on the contrary they are consistent, there is no reason why they may not be true.

2 J. Wigmore, *Wigmore on Evidence* § 581 (3d ed. 1940); *see also Phifer v. Erwin*, 100 N.C. 59, 6 S.E. 672 (1888) (the court allowed a mortgagor to testify at trial that he had no intent to defraud); *State v. King*, 86 N.C. 603, 606 (1882), citing *Seymour v. Wilson*, 14 N.Y. 568 ("the assignor was allowed to say upon his examination [at trial] that it was not his purpose in making the conveyance to delay or defraud his creditors . . .").

I now apply these principles to the facts in this case.

8.6 Acre Tract

I agree with the majority that plaintiff-wife did not receive any *title* to defendant-husband's one-half interest in the 8.6 acre tract because he received it as a consequence of a partitioning proceeding among his fellow joint tenants. *See Smith v. Smith*, 248 N.C. 194, 102 S.E.2d 868 (1958). However, our inquiry does not end here. A separate question is whether husband's one-half interest represents separate or marital property. Because husband obtained the one-half interest by virtue of his grandmother's will, it qualifies as his separate property according to N.C.G.S. § 50-20(b)(2) (1982) (separate property includes property acquired by devise). Nonetheless, any *active* increase in this separate property must be classified as marital property. *Beightol v. Beightol*, 90 N.C. App. 58, 61, 367 S.E.2d 347, 349, *review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988) (*passive* appreciation of separate property is not considered marital property).

The other one-half interest in the 8.6 acre tract which husband purchased with what appears to be his separate property is presumed to be marital property, since it was titled in the entireties. The question here is whether husband has offered clear, cogent and convincing evidence of his contrary intention sufficient to rebut the marital gift presumption. On this issue, the trial court determined that husband "maintained the 8.6 acres as his own separate property and that he sold the tobacco poundage off this tract of land to an individual by the name of Guy Coy for the amount of $1,194.00." These findings reflect some competent evidence that could support the trial judge's conclusion that husband did not intend to make a gift to the marital estate. It is some evidence that he continued to treat the property as his separate property after it was titled by the entireties. Factors significant to the court's determination would be whether proceeds from the tobacco allotment sale was maintained as husband's separate property or

if it was commingled with marital funds and the degree to which husband maintained the 8.6 acres as his separate property supported by his separate funds.

Accordingly, I join the majority in vacating the trial court's conclusion that the entire 8.6 acre tract is husband's separate property and would remand for a new determination of that issue based on the above analysis.

Mitchell Property

I agree with the majority that the presumption of a marital gift cannot be rebutted by any of the following findings:

> This property is ancestral property and has been in the Defendant's maternal ancestry for over 100 years.
>
> . . .
>
> [W]hen the Plaintiff took an appraiser to these tracts of land for an appraisal to be made in Mitchell County to testify in this cause, the Plaintiff did not know where the 24 acres or the 2.14 acres were located on Conley Ridge Road.
>
> . . .
>
> That the Plaintiff did not testify that she understood that the Defendant intended to make her a gift of the Mitchell County property.

Furthermore, the fact that the properties were purchased with husband's separate property is immaterial.

However, the following finding is relevant and represents some evidence to support a conclusion that husband did not intend a marital gift:

> That the Defendant testified that at no time did he ever intend to make a gift of any of these deeds to the Mitchell County property to his wife.

Record evidence supports this finding. Husband testified in pertinent part:

> Q. All right now, did you at the time that her name was placed on the deed, did you intend to make her a gift of any portion of that land . . .
>
> A. No, sir.

Defendant's credibility as a witness was a matter for the trial judge to resolve, who obviously found this evidence credible. *See Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E.2d 871, *review denied*, 319 N.C. 103, 353 S.E.2d 107 (1987). I note that the evidence here is substantially different from the evidence offered by donor spouse in the *Thompson* decision:

> Q. Mr. Thompson, was it your intent to have your former wife's name placed on the deed?
>
> A. No, and this is the reason I asked twice first.

Thompson v. Thompson, 93 N.C. App. 229, 232, 377 S.E.2d 767, 768 (1989). In the *Thompson* decision, this court noted that evidence that donor spouse did not intend to have his wife's name placed on the deed did "not rise to the level of clear, cogent and convincing evidence of defendant's intention not to make a gift to the marital estate." *Id.* Here, defendant gave direct testimony that he did not intend to make a gift to his wife, sufficient evidence in my opinion to support, but not require, the trial judge's conclusion that donor spouse did not intend to make a gift to the marital estate.

Nonetheless, I agree with the majority that because the trial judge obviously has relied on evidence that has no bearing on the issue of whether wife rebutted the marital gift presumption, this issue must be remanded to the trial judge for a new determination.

Eads Property

I agree with the majority and its reasoning that the parties titled the property in such a manner so as to create a tenancy by the entireties, not a tenancy in common. Furthermore, I agree with the majority that husband had the burden of rebutting the marital gift presumption and, therefore, wife had no obligation to introduce, nor could she be penalized for failing to introduce, any evidence on this issue. However, some record evidence exists to support but not require a conclusion that husband rebutted the marital gift presumption, as reflected by the trial judge's finding:

> That all of the funds . . . received from the sales of the property were never common-mingled [sic] with the Plaintiff and Defendant's own marital assets.
>
> . . .

> That the Defendant never intended to make a gift of this property to the marital estate.
>
> . . .
>
> That the Defendant testified that all the transactions involving the Eads property was [sic] the result of the acts of the partnership alone and that neither partner ever intended to make a gift of any of the property, be it real or personal or cash, to either of their wives.

Along with this evidence, the trial court relied on findings which clearly were not appropriate, and this issue must be remanded to the trial court for a new determination.

Plaintiff's Conversion of Marital Property

I disagree with any majority suggestion that the trial judge treated the allegedly converted funds, here $53,000.00, as part of the marital estate. The trial judge concluded as a matter of law:

> that the Plaintiff converted to her own use the sum of $53,000.00[,] which is marital property which should be accounted for in the equitable distribution of the property between the parties.

However, in the distributional order it appears that the trial court considered the $53,000.00 conversion as a distributional factor:

> The Court does not order the Plaintiff to account for any portion of the $53,000.00 that she withdrew from the joint savings account. The Court will take this into consideration in arriving at a just and equitable distribution of marital property acquired by the parties and the difference in the income of the parties as of the date of the separation. The Court in its discretion finds that this would be just and proper under the facts in this case.

In an equitable distribution proceeding, the trial judge properly considers evidence of actual dissipation of marital assets for non-marital purposes by either spouse in anticipation of separation as a distributional factor, pursuant to N.C.G.S. § 50-20(c)(12). *See Smith v. Smith*, 314 N.C. 80, 88, 331 S.E.2d 682, 687 (1985) ("the only fault or misconduct that is 'just and proper' under N.C.G.S. § 50-20(c)(12) is that which dissipates or reduces marital property for non-marital purposes").

However, the evidence here does not support a finding that wife converted marital funds for non-marital purposes. Therefore, the trial court erred in considering this as a factor in the marital estate distribution. Record evidence supports the trial judge's finding that there existed a joint savings and checking account into which husband deposited money each month and that wife "had control and managed the family budget without any interference or supervision" by husband. This evidence creates a presumption that husband consented to wife's use of the funds "for purposes of sustaining the family or enhancing its standard of living." *McClure v. McClure*, 64 N.C. App. 318, 323, 307 S.E.2d 212, 215, *review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). Thus, husband had the burden of offering clear and convincing evidence that he did not consent to wife's use of the funds and that the funds wife withdrew exceeded normal family expenses. *See Spence v. Jones*, 83 N.C. App. 8, 348 S.E.2d 819 (1986), *disapp. on other grounds*, *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). At best, husband's evidence shows that wife made withdrawals from the joint spousal account for which she did not account. This evidence is very similar to the evidence presented to this court in the *Spence* decision by which defendant "merely showed that the funds withdrawn exceeded the expenses of the family." Here, as in *Spence*, husband offered no evidence to show that wife made non-marital use of the funds and so did not offer clear and convincing evidence that wife withdrew the funds without husband's consent and used the funds for purposes other than sustaining the family.

Distribution

On remand, if the trial judge determines that the property titled in the entireties is marital property, the trial judge also must consider as a factor in determining an equitable distribution of the marital property the fact that husband contributed this property to the marital estate from his separate properties pursuant to N.C.G.S. § 50-20(c)(12); *Armstrong*, at 404, 368 S.E.2d at 600; *see* Lawrence J. Golden, *Equitable Distribution of Property* § 5.27 (1983) (the presumption of marital property provides flexibility to the trial court in fashioning an equitable award); § 8.20 (the means for acquiring marital property is an important factor in determining equitable distribution).

NORTH BUNCOMBE ASSOCIATION OF CONCERNED CITIZENS, INC., SUCCESSOR TO THE FLAT CREEK UNINCORPORATED ASSOCIATION OF CONCERNED CITIZENS; GARY HENSLEY, PRESIDENT OF THE CORPORATION; AND GARY HENSLEY, INDIVIDUALLY AND WIFE, DEBBIE HENSLEY, PLAINTIFFS v. THOMAS RHODES, SECRETARY OF N.C. DEPARTMENT OF NATURAL RESOURCES & COMMUNITY DEVELOPMENT; STEPHEN G. CONRAD, DIRECTOR OF THE DIVISION OF LAND RESOURCES, N.C. DEPT. OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, INDIVIDUALLY AND AS DIRECTOR OF THE DIVISION OF LAND RESOURCES FOR THE DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT; CHARLES GARDNER, CHIEF OF LAND QUALITY SECTION, DIVISION OF LAND RESOURCES, N.C. DEPT. OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, INDIVIDUALLY AND AS THE CHIEF OF THE LAND MANAGEMENT SYSTEM; THOMAS CARROLL, MINING SPECIALIST, LAND QUALITY SECTION, DIVISION OF LAND RESOURCES AND COMMUNITY DEVELOPMENT, INDIVIDUALLY AND AS AN EMPLOYEE OF THE DEPARTMENT, DIVISION, AND SECTION; R. PAUL WILMS, DIRECTOR OF DIVISION OF ENVIRONMENTAL MANAGEMENT, N.C. DEPT. OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT IN HIS OFFICIAL CAPACITY; JAMES S. LOFTON, SECRETARY OF THE DEPT. OF ADMINISTRATION, IN HIS CAPACITY AS THE DESIGNATED DIRECTOR OF THE STATE AGENCY CHARGED WITH THE ADMINISTRATION OF NORTH CAROLINA ENVIRONMENTAL POLICY ACT; THE NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, A DIVISION OF THE STATE GOVERNMENT; AND VULCAN MATERIALS COMPANY, A NEW JERSEY CORPORATION, DEFENDANTS

No. 8928SC800

(Filed 7 August 1990)

1. Mines and Minerals § 1.1 (NCI3d); Administrative Law and Procedure § 52 (NCI4th)— mining permit—requirement of environmental impact statement—failure to exhaust administrative remedies—no judicial review

In an action to have a mining permit declared void and for injunctive relief, the trial court was without subject matter jurisdiction over plaintiffs' claim that Buncombe County had authority to require an environmental impact statement from defendant mining company, since the decision of defendant Department of Environment, Health, and Natural Resources to issue a mining permit was subject to judicial review only under the terms of the Administrative Procedure Act, and plaintiffs failed to exhaust their administrative remedies.

Am Jur 2d, Administrative Law §§ 595, 599.

2. Mines and Minerals § 1.1 (NCI3d); Administrative Law and Procedure § 52 (NCI4th) — unconstitutionality of Mining Act — failure to exhaust administrative remedies — no judicial review

Plaintiffs' failure to exhaust their administrative remedies before seeking judicial review precluded declaratory relief on their claim that the Mining Act was unconstitutional both facially and as applied and on their claim that the Department of Environment, Health, and Natural Resources failed to comply with the requirements of the Mining Act in issuing a permit to defendant mining company.

Am Jur 2d, Administrative Law §§ 595, 603.

3. Appeal and Error § 7 (NCI4th) — excessively long brief — costs taxed against attorney

Pursuant to Appellate Rule 35, the Court of Appeals assessed the portion of the costs of the appeal attributable to plaintiff appellants' excessively long brief against the attorney who filed it, with plaintiffs bearing the remainder of the costs of the appeal. Appellate Rule 28(j).

Am Jur 2d, Appeal and Error §§ 1019, 1021.

APPEAL by plaintiffs and defendants Department of Environment, Health and Natural Resources and Vulcan Materials Company from Order of *Judge Robert D. Lewis* entered 8 March 1989 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 15 February 1990.

Long, Parker, Hunt, Payne and Warren, by Steve R. Warren and Jeffrey P. Hunt, for plaintiff appellant-appellees.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Philip A. Telfer, for defendant appellant-appellee, Department of Environment, Health and Natural Resources.

Womble Carlyle Sandridge & Rice, by H. Grady Barnhill, Jr., and Keith A. Clinard, and R. Howard Grubbs, for defendant appellant-appellee, Vulcan Materials Company.

COZORT, Judge.

On 15 June 1987, Vulcan Materials Company, Inc. (Vulcan), pursuant to N.C. Gen. Stat. §§ 74-50, -51, submitted an application for a mining permit to the then North Carolina Department of

Natural Resources and Community Development, now known as the Department of Environment, Health, and Natural Resources, hereinafter DEHNR. On 10 June 1987, Vulcan had notified the Buncombe County Board of Commissioners and owners of land adjoining the site of the company's proposed quarry of Vulcan's forthcoming application. Plaintiff Gary Hensley and the predecessor organization to the North Buncombe Association of Concerned Citizens objected to the application, and DEHNR announced that a public hearing on Vulcan's application would be held on 6 August 1987. At the hearing, counsel for the plaintiffs' predecessor organization submitted material alleging numerous deficiencies in Vulcan's application, especially the company's failure to address the effects of "dewatering" (pumping, draining or otherwise removing water impounded or collected in the operation of the mine or quarry).

By letter dated 3 August 1987, DEHNR notified Vulcan that its application was deficient in several respects including the lack of data to support the conclusion that "mine dewatering will not have any impact on neighboring wells." On 18 August 1987, Vulcan submitted a revised application, enclosing a hydrologic investigation by C.R.S. Sirrine Environmental Engineers, which, according to Vulcan, indicated "that mine dewatering will not have any adverse impact on neighboring wells." On 16 September 1987, Thomas Carroll of the Land Quality Section, Division of Land Resources, DEHNR, wrote to R. B. Willard, senior mining engineer of Vulcan, to inform him that there remained "numerous deficiencies in the application, site plan, and erosion control design calculations. Because of the number and scope of the deficiencies noted in this letter, a meeting between personnel of this office and your company to review each item may be in order." On 18 April 1988, after further revisions in the site plan and application, DEHNR issued Vulcan a permit to operate a crushed stone quarry at the company's site near Weaverville.

Meanwhile, on 1 September 1987, the Buncombe County Board of Commissioners passed a resolution, directed solely at Vulcan, purporting to require the company "to prepare and furnish to the appropriate agencies of the state government an environmental impact statement as defined in NCGS 113A-4(2) and as authorized by NCGS 113A-8." Vulcan never complied with this resolution.

On 27 May 1988, seeking to have the permit declared void and seeking injunctive relief, plaintiffs filed in Buncombe County

Superior Court a complaint stating five claims, the first three of which requested declaratory judgment pursuant to N.C. Gen. Stat. § 1-253. The plaintiffs alleged, first, that N.C. Gen. Stat. §§ 74-46 to -68 (the Mining Act) on its face and as administered violates the Federal Constitution; second, that DEHNR failed to comply with requirements of the Mining Act in issuing a permit to Vulcan; and, third, that Buncombe County had authority to require an Environmental Impact Statement (EIS) from Vulcan and that [DEHNR's] action in the absence of an EIS rendered the "agency['s] action void." Fourth, the plaintiffs, pursuant to 42 U.S.C. § 1983, alleged that Thomas Rhodes, Stephen Conrad, Charles Gardner, and Thomas Carroll, acting in their individual and official capacities, violated the plaintiffs' due process rights under the Fourteenth Amendment. Fifth, the plaintiffs alleged that Vulcan's "project in any of its stages is a nuisance."

On 21 November 1988, the trial court issued a preliminary injunction, restraining Vulcan "from conducting any mining operations" on the site at issue. On 29 November 1988, the defendants other than Vulcan (the State defendants) moved for summary judgment. On 20 December 1988, Vulcan moved for summary judgment on the plaintiffs' first three claims. On 29 December 1988, the plaintiffs moved for summary judgment on their first three claims. After hearing these and other motions, the trial court granted partial summary judgment as follows: summary judgment in favor of all State defendants was allowed on claims one, two, four, and five; summary judgment in favor of defendant Vulcan was allowed on claims one and two; summary judgment for plaintiffs and against defendants Vulcan and DEHNR was allowed on claim three; and summary judgment in favor of the State defendants other than DEHNR was allowed on claim three. The court declared that "Mining Permit 11-08 issued to the Defendant Vulcan on April 18, 1988 is void." Finally, the court stayed, pending further orders, trial of claim five against defendant Vulcan.

[1] Turning to the questions presented on appeal, we address first the contention of defendants DEHNR and Vulcan that the trial court erred in granting summary judgment against them on the plaintiffs' third claim, the EIS claim. Among other assignments of error regarding the court's disposition of that claim, the defendants contend that the trial court lacked subject matter jurisdiction to invalidate the permit because the plaintiffs failed to exhaust their administrative remedies. We agree.

Regulations promulgated under the authority of § 74-63 of the Mining Act empower the Director, Division of Land Resources, Department of Environment, Health, and Natural Resources to issue, deny, modify, renew, suspend, and revoke permits. N.C. Admin. Code tit. 15A, r.5A.0202(a) [3/20/90]. The plaintiffs in the case below challenged the decision of Stephen Conrad, Director of DLR, to issue a permit to Vulcan without requiring the company to submit an EIS. When a dispute between a state agency and another person arises and cannot be settled informally, the procedures for resolving the dispute are governed by the Administrative Procedure Act (APA), N.C. Gen. Stat. §§ 150B-1 to -63. *See Vass v. Bd. of Trustees of State Employees' Medical Plan*, 324 N.C. 402, 405, 379 S.E.2d 26, 27-28 (1989). Thus, the proper course for the plaintiffs was to exhaust their remedies under the APA before seeking judicial review.

The purpose of the APA "is to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies," and the APA applies "to every agency as defined in G.S. § 150B-2(1), except to the extent and in the particulars that any statute, including subsection (d) of this section, makes specific provisions to the contrary." N.C. Gen. Stat. § 150B-1(b), (c) (1989). DEHNR is indisputably a state agency. N.C. Gen. Stat. § 150B-2(1) (1989). DEHNR is not among those agencies which the APA specifically exempts from its provisions. N.C. Gen. Stat. § 150B-1(d) (1989). The Mining Act provides that "[a]ny affected person may contest a decision of the Department [DEHNR] to deny, suspend, modify, or revoke a permit or a reclamation plan," but it does not exclude DEHNR or persons aggrieved by its decisions from the operation of the APA. N.C. Gen. Stat. § 74-61 (Cum. Supp. 1989). As our Supreme Court has held, the "General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly." *Vass*, 324 N.C. at 407, 379 S.E.2d at 29.

The procedural route that the plaintiffs could and should have taken is laid out in the APA. The pertinent sections provide, in part, as follows:

> Notwithstanding any other provision of law, if the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

N.C. Gen. Stat. § 150B-22 (1989).

> A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall also serve a copy of the petition on all other parties and shall file a certificate of service together with the petition. Any petition filed by a party other than an agency shall be verified or supported by affidavit and shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.
>
> The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

N.C. Gen. Stat. § 150B-23 (1989).

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

N.C. Gen. Stat. § 150B-43 (1989).

> To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.
>
> The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. . . . For good cause shown, however, the superior court may accept an untimely petition.

N.C. Gen. Stat. § 150B-45 (1989). As our Supreme Court held in *Vass*, which involved the decision of a state agency to deny a state employee's claim for medical expenses, we likewise hold here that the decision of DEHNR to issue a mining permit "was subject to judicial review only under the terms of the Administrative Procedure Act." *Vass*, 324 N.C. at 409, 379 S.E.2d at 30. Because the plaintiffs failed to exhaust the administrative remedies available under the APA, we hold that the trial court was without subject matter jurisdiction over the plaintiffs' third claim. *Id.*

[2] The plaintiffs' failure to exhaust their administrative remedies before seeking judicial review also precludes declaratory relief on their first and second claims.

Plaintiffs' first claim, liberally construed, alleges that the Mining Act is unconstitutional both facially and as applied. In their brief plaintiffs assert chiefly the unconstitutionality of the act as applied. They contend that their first "action [claim] is predicated upon the failure of the DLR (Division of Land Resources) or the Mining Commission to abide by the mandate of the Administrative Procedures [*sic*] Act . . . . As construed by the DLR, Plaintiffs have no rights under the Mining Act. Unless they are accorded due process by the informal procedures employed, the [Mining] Act is unconstitutional."

Plaintiffs' argument overlooks the opportunity to receive a formal, evidentiary hearing on the record provided by §§ 150B-23 to -37 of the APA. Upon appeal of a final decision of a contested case, § 150B-51 provides as follows:

> (b) Standard of Review.—After making the determinations, if any, required by subsection (a), the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. *It may also reverse or modify the agency'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 or capricious. [Emphasis added.]

As this Court held in *Porter v. Dept. of Insurance*, "[s]o long as the statutory procedures provide an effective means of review of the agency action, the courts will require parties to exhaust their administrative remedies." 40 N.C. App. 376, 381, 253 S.E.2d 44, 47, *disc. review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). That proposition was reaffirmed, specifically with regard to constitutional due process rights, by *Murphy v. McIntyre* in which the court held that "plaintiff's constitutional claim was properly dismissed for failure to exhaust her administrative remedies." 69 N.C. App. 323, 328, 317 S.E.2d 397, 400 (1984); *accord, In re DeLancy*, 67 N.C. App. 647, 651, 313 S.E.2d 880, 883, *disc. review denied*, 311 N.C. 756, 321 S.E.2d 130 (1984).

Likewise, the proper and necessary route for presenting the plaintiffs' second claim (failure of DEHNR to abide by the requirements of the Mining Act and rules promulgated under it) is provided by the APA. As we have noted, § 150B-23 of the APA provides that

[a]ny petition filed [with the Office of Administrative Hearings] by a party other than an agency . . . shall state facts tending to establish . . . that the agency:

(1) Exceeded its authority or jurisdiction;

(2) Acted erroneously;

(3) *Failed to use proper procedure*;

(4) Acted arbitrarily or capriciously; or

(5) *Failed to act as required by law or rule.* [Emphasis added.]

We note that on 12 July 1988, effective for agency decisions made on or after 1 October 1988, N.C. Gen. Stat. § 150B-23 was amended as follows:

> (f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition.

1987 N.C. Session Laws (Reg. Sess., 1988), c.1111, s.5. We note, too, that DEHNR Departmental Rules currently provide that

> (a) Any person entitled to a hearing under this Section may request a hearing within 60 days after receipt of notification of the action taken or proposed to be taken.
>
> (b) The hearing is to be conducted in accordance with G.S. 150B and 26 NCAC 3—Office of Administrative Hearings, Hearings Division.

N.C. Admin. Code tit. 15A, r.01B.0203 (02/22/90). However, the issues of (1) the applicable time limit when plaintiffs initiated the case below and (2) whether plaintiffs are now time-barred from commencing a "contested case" proceeding are not presented, and we do not decide them.

Turning last to the plaintiffs' fourth claim, brought under 42 U.S.C. § 1983, we note initially that plaintiffs in their brief abandon that claim as to Thomas Rhodes. As to the remaining defendants in claim four, having examined the record and briefs, we conclude

that plaintiffs' assignment of error to the trial court's order of summary judgment in favor of those defendants is without merit.

[3] Finally, we address the issue of the violation of the Rules of Appellate Procedure by former counsel for the plaintiffs. Ronald W. Howell, who filed the record on appeal and briefs for the plaintiffs before withdrawing from the case, filed a brief of 80 single-spaced pages of argument, a gross violation of Rule 28(j) of the N.C. Rules of Appellate Procedure. In our discretion pursuant to Rule 35 of the Appellate Rules, we assess the portion of the costs of the appeal attributable to plaintiff appellants' excessively long brief against Attorney Howell, with plaintiffs bearing the remainder of the costs of the appeal.

Because the trial court did not have subject matter jurisdiction over the first three claims, the case below must be remanded so that partial summary judgment in favor of the plaintiffs, with respect to the third claim, can be vacated and the declaratory judgment action dismissed. With respect to the fourth claim, the trial court's order of 8 March 1989 is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges WELLS and LEWIS concur.

STATE OF NORTH CAROLINA v. LARRY DAVID MURPHY

No. 8923SC962

(Filed 7 August 1990)

1. Rape and Allied Offenses § 5 (NCI3d)— first degree sexual offense—no evidence of sexual acts enumerated in statute—insufficiency of evidence of crime charged

Evidence was insufficient to support a charge of first degree sexual offense where it tended to show that defendant masturbated on his daughter's stomach, but there was no evidence that he attempted any of the sexual acts enumerated by N.C.G.S. § 14-27.1(4); the victim's testimony that she "grit [her] teeth" was insufficient evidence of fellatio, even in light of the victim's testimony that two days before the incident in question she

"had [her] teeth gritted" when defendant began forcing her to engage in fellatio; and testimony by two of the State's witnesses that, in prior statements, the victim had stated that defendant committed fellatio on the date in question was hearsay inadmissible for any purpose.

Am Jur 2d, Sodomy § 45.

2. **Rape and Allied Offenses § 4 (NCI3d)— rape of 10 year old— testimony by clinical psychologist—characteristics of sexually abused children—admissibility**

In a prosecution of defendant for first degree sexual offense, taking indecent liberties with a minor, and statutory rape, the trial court did not err in permitting a clinical psychologist to testify as to the characteristics of sexually abused children and as to which of those characteristics fit the victim in this case.

Am Jur 2d, Rape § 68.5.

3. **Criminal Law § 87.1 (NCI3d)— ten-year-old rape victim— leading questions permissible**

The trial court did not err in allowing the prosecutor to ask leading and/or repetitive questions of the victim on two occasions since the victim was ten years old at the time of trial; she was testifying about sexual matters; and she was testifying against her father who was present in the courtroom.

Am Jur 2d, Rape § 104.

4. **Criminal Law § 50.2 (NCI3d)— sexual abuse victim—opinion by school guidance counselor**

The trial court did not err in allowing a sexual abuse victim's school guidance counselor to state her opinion that the victim's pretrial statements to a social worker and a police officer were consistent with the account the victim had given her, since the opinion was clearly and rationally based on the witness's own perception, was helpful to the determination of whether and to what extent defendant had sexually abused the victim, and therefore was properly admissible as a lay opinion pursuant to N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Infants § 16; Rape §§ 68, 68.5.

5. Criminal Law § 169.5 (NCI3d) — pretrial statements by victim — testimony of social worker — no prejudicial error

Testimony by a social worker concerning certain pretrial statements made by a sexual abuse victim, even if erroneously admitted, was not prejudicial to defendant, since the evidence contained in the statements with regard to defendant's forcibly entering the victim's room and removing her clothes had no bearing on defendant's convictions for first degree sexual offense and taking indecent liberties with a minor.

Am Jur 2d, Infants § 16; Rape §§ 68, 68.5.

APPEAL by defendant from judgment entered 13 April 1989 in YADKIN County Superior Court by *Judge Thomas W. Seay, Jr.* Heard in the Court of Appeals 10 May 1990.

Defendant was indicted and tried on three counts of first degree sexual offense, three counts of taking indecent liberties with a minor, and one count of statutory rape. The charges stem from two separate events on 7 January 1989 and a single event on 9 January 1989.

The State's evidence tended to show that on the morning or afternoon of 7 January 1989, defendant, who is the victim's father, came into the victim's bedroom and told her to take off her clothes. Defendant then began touching the victim's breast area and her vagina, and inserted his fingers into her vagina. Later that same day, defendant again entered the victim's room and told her to take off her clothes. The victim refused, pushed defendant out of her room, and locked the door. Defendant broke the lock, came in, removed the victim's clothes, and began touching her vagina with his penis. Defendant attempted to insert his penis into the victim's vagina and then tried to insert it into her mouth. The victim at first refused to open her mouth, but when told to do so by defendant, victim complied and defendant proceeded to put his penis into her mouth. Then defendant masturbated onto the victim's stomach.

On 9 January 1989, victim was in her room when defendant entered, removed his clothes, and then removed the victim's clothes. Defendant did not touch her chest or her private parts, but he again masturbated onto her stomach.

At trial defendant was convicted of first degree sexual offense and taking indecent liberties with a minor on all three occasions. From sentences imposing three life terms and three three-year terms, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General K. D. Sturgis, for the State.

Zachary and Zachary, by W. Lee Zachary, Jr., for defendant-appellant.

WELLS, Judge.

[1] By his first assignment of error, defendant contends that the evidence was insufficient to support the charge of first degree sexual offense on 9 January and that the trial court committed reversible error in not granting his motion to dismiss. In ruling on a motion to dismiss, all evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Bell*, 311 N.C. 131, 316 S.E.2d 611 (1984). Whether the trial court erred in denying defendant's motion depends upon whether there was substantial evidence introduced as to each essential element of the offense charged and of defendant's being the perpetrator. *See State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1232, 84 L.Ed.2d 369 (1985).

In order for a charge of first degree sexual offense to withstand a motion to dismiss, there must be substantial evidence that defendant committed a sexual act. *See State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987). The requisite "sexual act" necessary for a conviction under the statute is defined as follows:

> . . . cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.1(4) (1986). The evidence introduced by the State concerning the commission of any of these offenses on 9 January 1989 consisted of the following testimony by the victim on direct examination:

Q. On Monday, January the 9th, something else bad happened?

A. Yes.

Q. Where did it happen?

A. My room.

. . .

Q. And, what happened?

A. He just came in.

Q. Okay, this time, when he came in, do you remember what he was wearing?

A. A T-shirt and some blue jeans pants.

Q. Blue jean pants? What was the first thing dad did?

A. He took off his pants and started, then he took off mine and he started rubbing his penis back and forth.

Q. Back and forth, now, what do you mean by rubbing his penis, who was rubbing his penis back and forth?

A. He was.

Q. He was? Where was he when he was rubbing his penis back and forth?

A. He was over me, and some white stuff come [sic] onto my stomach.

Q. Onto your stomach? How was he over you, Julie, can you explain that [to] us?

A. He was like laying down but with one arm on my bed, and the other arm around his penis.

Q. How, where were you?

A. On the bed laying down.

Q. Okay, were you facing him?

A. Yes.

Q. Okay, so he was above you?

A. Yes.

Q. And, you say he rubbed his own penis?

A. Yes.

. . .

Q. . . . Had he touched you again?

A. I do not believe so.

Q. You don't think so?

A. That's right.

Q. Touch you anywhere on your chest or in your private parts?

A. I do not believe so.

Q. You don't believe he did that this time?

A. (Shakes head).

Q. Did he say anything this time?

A. No.

Q. Did you do anything?

A. I just grit my teeth.

While this testimony clearly suggests that the victim's father masturbated in her presence, there is no evidence that he attempted any of the sexual acts enumerated by the statute. The State contends that in light of the victim's testimony about the assault on 7 January in which she testified that she "had [her] teeth gritted" when the defendant began forcing her to engage in fellatio, that the victim's statement that she "grit [her] teeth" on 9 January is sufficient evidence that the defendant attempted to commit fellatio on that occasion as well. We cannot agree. While it is true that fellatio may be accomplished by the "mere touching of the male sex organ to the lips or mouth of another," *State v. Bailey*, 80 N.C. App. 678, 343 S.E.2d 434, *rev. dismissed*, 318 N.C. 652, 350 S.E.2d 94 (1986), there must be some evidence that a touching, however slight, occurred. Here the victim's testimony about gritting her teeth is not as a matter of law sufficient to show that defendant's penis touched the victim's lips or mouth during the incident on 9 January. We must therefore reverse defendant's conviction on the charge of first degree sexual offense on 9 January 1989.

The State asserts that the victim's trial testimony regarding the events of 9 January is corroborated by two of the State's witnesses who testified that in prior statements the victim had stated that the defendant committed fellatio on 9 January. We disagree. This is not a situation analogous to those in which corroborative testimony containing new or additional information going beyond the specific facts brought out in trial testimony is properly admitted. *See, e.g., State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). Here the victim did *not* testify at trial that defendant committed fellatio on 9 January. Her prior statements to the contrary therefore went to facts not referred to in her trial testimony and were inadmissible as corroborative evidence. *See State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988) (citations omitted). Furthermore, even when a prior statement is properly admitted as corroborative evidence, it cannot be considered as substantive evidence of the facts stated. *See State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981). In the present case there was no express or implied statement of fact that a "sexual act" for the purposes of conviction of first degree sexual offense occurred on 9 January. The testimony of these witnesses concerning victim's prior statements to the contrary was, under the facts of this case, hearsay inadmissible for any purpose.

[2] Defendant next contends that the trial court erred by allowing Dr. Phillip Batton, a clinical psychologist, to testify as to the characteristics of sexually abused children and as to which of those characteristics fit the victim in this case. We have reviewed the challenged testimony and find no error. Our Supreme Court has recently confirmed that allowing experts to testify as to the "symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse" is proper. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987) (construing N.C. Rules of Evidence 702 and 703). Where scientific, technical, or other specialized knowledge will assist the fact finder in determining a fact in issue or in understanding the evidence, an expert witness may testify in the form of an opinion, and the expert may testify as to the facts or data forming the basis of that opinion. *Id.; see also In re Lucas*, 94 N.C. App. 442, 380 S.E.2d 563 (1989). Dr. Batton had seen the victim on two occasions and was qualified by the court as an expert in clinical psychology. His testimony as to the behavior exhibited by sexually abused children and his opinion concerning

which of these characteristics were exhibited by the victim had the potential to assist the jury in determining whether the victim was abused and in understanding the behavior patterns of sexually abused children. Like the *Kennedy* court, we find no error in the admission of testimony concerning the symptoms and characteristics of sexually abused children and the expert's opinion that certain symptoms exhibited by the victim were consistent with sexual or physical abuse.

Defendant, relying on *State v. Stafford*, 317 N.C. 568, 346 S.E.2d 463 (1986), also attempts to argue that any statements victim made to Dr. Batton on the Friday before trial were made in preparation for trial and constitute inadmissible hearsay. Our review of Dr. Batton's testimony reveals that he gave a detailed diagnostic narrative of the victim's signs and symptoms. We do not agree that his testimony had the same objectionable basis as that found in *Stafford*, and we therefore reject this argument.

[3] In his next two assignments of error defendant contends that the trial court erred by allowing the prosecutor to ask leading and/or repetitive questions of the victim on two occasions. We have reviewed both of these exchanges in the record and find no abuse of discretion on the part of the trial court.

Our Supreme Court has held that it is within the sound discretion of the trial court to allow leading questions on direct examination, and in cases involving children or an inquiry into delicate subjects such as sexual matters, the court is given wide latitude to exercise that discretion. *State v. Chandler*, 324 N.C. 172, 376 S.E.2d 728 (1989), and cases cited therein.

The victim in this case was 10 years old at the time of trial. She was not only testifying about sexual matters, but was testifying against her father who was present in the courtroom. Under the circumstances, leading questions were appropriate. These assignments are overruled.

[4] In his next assignment of error, defendant contends that the trial court committed prejudicial error by allowing Judy Felts, the victim's school guidance counselor, to state her opinion that the victim's pretrial statements to a social worker and a police officer were consistent with the account the victim had given her. Defendant argues that Felts' testimony was inadmissible lay opinion pursuant to N.C. Gen. Stat. § 8C-1 (1988), Rule 701 of the

N.C. Rules of Evidence and that the admission of this testimony was so prejudicial as to entitle him to a new trial. We disagree.

In *State v. Rhinehart*, 322 N.C. 53, 366 S.E.2d 429 (1988), our Supreme Court held that statements by two witnesses similar to that of Felts were properly admissible as lay opinion pursuant to Rule 701. This Rule provides as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

G.S. § 8C-1, Rule 701 (1988).

The court determined that both witnesses had "rendered lay opinions based upon their own personal perceptions" and "that these opinions were helpful to the determination of a fact in issue—namely, the precise nature of the sexual offense perpetrated by defendant." *Id.* Here the statement by Felts was to the effect that the victim had told the social worker (and the policeman) "very much the same thing" that she had previously told Felts. This opinion was clearly and rationally based on the witness's own perception and was also helpful to the determination of whether and to what extent defendant had sexually abused the victim. As such, it comes within the requirements of Rule 701 and was properly admitted.

[5] By his final assignment of error, defendant contends that the trial court erred by admitting testimony of Jill McCormick, a social worker, concerning certain pretrial statements made by the victim. The defendant argues that the testimony was not admissible as corroborative evidence because it contradicts, rather than corroborates, the victim's in-court testimony. Defendant contends that the admission of this testimony was prejudicial and requires that he be granted a new trial.

It is well settled that the burden is on the appellant not only to show error but to show that the error was prejudicial. *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981). An error is prejudicial if it is shown that there is a reasonable possibility that had the error not been committed a different result would have been reached at trial. *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988); N.C. Gen. Stat. § 15A-1443(a) (1988).

The testimony in question concerns the following: Regarding the first of the two incidents on 7 January 1989, McCormick testified that the victim told her that the defendant had forcibly entered her room by breaking the lock and then removed her clothes. Regarding the incident on 9 January, McCormick testified that the victim told her that defendant "[felt] around the victim's breast area" and then "[got] down to her private zone." The victim's trial testimony indicates that it was during the second assault on 7 January that defendant forcibly entered her room. Also, when questioned at trial as to whether defendant touched her anywhere on her chest or private parts on 9 January, the victim indicated that he had not.

Assuming *arguendo* that McCormick's testimony regarding these incidents was erroneously admitted, we are unable to conclude that defendant was prejudiced by its admission. Defendant was convicted of two counts of first degree sexual offense and two counts of taking indecent liberties with a minor on 7 January 1989. When, on 7 January, defendant forcibly entered the victim's room *i.e.*, whether during the first or second event, and removed her clothes has no bearing on his convictions for first degree sexual offense and taking indecent liberties with a minor. Neither the evidence of forcibly entering the room nor removing the victim's clothes was necessary to establish the elements of his offenses committed on that date; therefore, there is no reasonable possibility that without the testimony complained of, a different result would have been reached at trial. Likewise, in view of our reversal of defendant's first degree sexual offense charge, defendant's only remaining conviction for the events of 9 January 1989 was for taking indecent liberties with a minor. As to that charge, the victim unequivocably testified to the effect that her father masturbated onto her stomach. The State presented strong evidence in support of this offense and we conclude that there is no reasonable possibility that without the admission of this testimony a different result would have been reached.

The result of our disposition of defendant's appeal is:

As to No. 89CR98, first degree sexual offense, reversed.

As to Nos. 89CR96 and 89CR97, first degree sexual offense and indecent liberties, no error.

As to No. 89CR98, indecent liberties, no error.

Judges PARKER and DUNCAN concur.

STATE OF NORTH CAROLINA v. DWIGHT EUGENE HUNT

No. 8918SC1092

(Filed 7 August 1990)

1. **Assault and Battery § 27 (NCI4th); Riot and Inciting to Riot § 2.1 (NCI3d)— assault with deadly weapon—felonious rioting—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution of defendant for assault with a deadly weapon inflicting serious injury and for felonious rioting where it tended to show that defendant and three or four other men harassed three girls in a truck at a fast food drive-through; defendant was fighting with others who were present; he pulled a knife with a three-inch blade and cut three victims; and the wounds were severe. N.C.G.S. §§ 14-32(a), 14-288.2.

Am Jur 2d, Assault and Battery § 92; Mobs and Riots § 23.

2. **Criminal Law § 66 (NCI3d)— prior inconsistent out of court identification—requested instruction not given**

The trial court properly instructed the jury with respect to a prior inconsistent out of court identification and properly refused to give an instruction requested by defendant, as that instruction was inapplicable.

Am Jur 2d, Evidence § 371.

3. **Assault and Battery § 116 (NCI4th)— assault with deadly weapon charged—instruction on simple assault not required**

The trial court in a prosecution for felonious assaults was not required to instruct on simple assault where several witnesses testified to the fact that defendant cut his victims with a knife and that their injuries were serious.

Am Jur 2d, Assault and Battery § 53; Trial §§ 878, 880.

4. Criminal Law § 829 (NCI4th)— no evidence of companions' guilty pleas—instruction not required

Because no evidence of the guilty pleas of defendant's companions to the crimes in question was presented at trial, the trial court correctly concluded that to insert such information in the jury charge would be prejudicial to the State because it would not have the opportunity to rebut this evidence.

Am Jur 2d, Trial § 809.

5. Criminal Law § 884 (NCI4th)— requested instruction not timely—failure to preserve assignment for appellate review

Where defense counsel waited to request an instruction and object to its omission until after the jury had retired, he failed to preserve this assignment of error for appeal. Appellate Rule 10(b)(2).

Am Jur 2d, Trial § 911.

6. Criminal Law § 773 (NCI4th)— defense of intoxication—burden on defendant—instruction proper

The trial court did not err in instructing the jury that defendant had the burden of establishing the defense of intoxication, and defendant failed to preserve this assignment of error by noting his objection in the record before the jury retired. Appellate Rule 10(b)(2).

Am Jur 2d, Trial §§ 743, 744.

7. Criminal Law § 865 (NCI4th)— jury instructions—admonition not to take strong position

The trial court did not err in instructing the jury not to "stake themselves out" on a strong position immediately upon entering the jury room.

Am Jur 2d, Trial §§ 574, 656, 672.

APPEAL by defendant from a judgment entered 25 May 1989 in Superior Court, GUILFORD County by *Judge James M. Long*. Heard in the Court of Appeals 30 May 1990.

Defendant was charged with assault with a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, inflicting serious injury, and felonious rioting. Defendant

was convicted of three counts of assault with a deadly weapon inflicting serious injury and felonious rioting. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Valerie B. Spalding, for the State.

Robert S. Cahoon for the defendant-appellant.

LEWIS, Judge.

The facts presented at trial and pertinent to this appeal are as follows:

Elizabeth Sledge testified that on the night of 30 October 1988, she and her friends Josie Morton and Kelly Farmer drove to a local fast food restaurant in Greensboro. Ms. Sledge testified that she and her friends were in line at the drive-through window when four men approached her driver's window. The men banged on the window, demanding to know the girls' names and to be let in. She identified the defendant as one of the four men who had approached her car. She further testified that she called for help from two of her friends, Kyle Pertuis and Jeff Garback, who were also in a truck in the parking lot. As Pertuis and Garback approached the passenger side of the truck, a fight broke out and Ms. Sledge saw the defendant with a knife. She identified two of the other men in photographs and also saw the men who were injured in the fight, but did not see any of them with weapons.

Josie Morton, who was with Ms. Sledge, identified defendant as one of the group. She stated that she heard John Weiler tell defendant to leave everyone alone. She then saw defendant strike Weiler then pull out a white-handled deer knife, stab Weiler in the face, then throw the knife behind a shed in the parking lot. At that time, the girls pulled up to the drive-through window and told employees to call the police. After driving around, the girls observed the defendant walking onto High Point Road. Josie identified photographs of John Weiler and Peter Ampuja taken after they had been injured. She described three of the group of four men who harassed the girls as dark-complected, and defendant as different because he had blond hair.

Tripp Cowles, Todd Watson, Kyle Pertuis, John Weiler, and Peter Ampuja responded to the girls' request for help. Tripp Cowles identified the defendant as one of the four men who was harassing the girls. Cowles further testified that he saw defendant punch

John Weiler in the face. He also saw a cut on Weiler's face and defendant with a knife.

Kyle Pertuis testified that he saw defendant hit Weiler in the face and then saw defendant holding a knife. Pertuis saw that Ampuja and Weiler were badly cut.

Peter Ampuja saw Weiler in a fight with two of the men and went to his assistance. He saw Weiler without a knife walk away with his whole face "bloodied up." Ampuja testified that he approached the group of men and tried to take things under control; two of the men came up to him and began to fight. One of the men had blond hair and the defendant was the only man there with blond hair.

Kelly Farmer testified that she saw the defendant "come over from behind . . . with a knife and start slashing," cutting both Weiler and Ampuja on the face. She testified that she saw no one else with a knife.

Three other witnesses saw the defendant with a knife and there was evidence that none of the victims were armed.

I. Denial of Defendant's Motions to Dismiss and For Nonsuit

[1] Defendant argues first that there was insufficient evidence to submit any of the charges to the jury or to sustain convictions of three counts of assault with a deadly weapon inflicting serious injury and one count of felonious rioting. We disagree.

The elements of assault with a deadly weapon with intent to kill are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. G.S. § 14-32(a); *State v. Cain*, 79 N.C. App. 35, 46, 338 S.E.2d 898, 905, *disc. rev. denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). Under G.S. § 14-32(b), intent is not a prescribed element of assault with a deadly weapon inflicting serious injury. *State v. Curie*, 19 N.C. App. 17, 20, 198 S.E.2d 28, 30 (1973). A knife with a three-inch blade constitutes a deadly weapon *per se* when used as a weapon in an assault. *State v. Cox*, 11 N.C. App. 377, 380, 181 S.E.2d 205, 207 (1971). Considering the evidence in the light most favorable to the defense, we find that the evidence was sufficient to go to the jury and uphold a conviction for assault with a deadly weapon on John Weiler, Todd Watson and Peter Ampuja. It was for the

jury to sort out any discrepancies and assign weight to the testimony given. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

G.S. § 14-288.2 provides:

> (a) A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property . . .
>
> (c) Any person who willfully engages in a riot is guilty of a Class I felony, if: . . .
>
> (2) Such participant in the riot has in his possession any dangerous weapon or substance.

Several of the witnesses testified that they saw defendant in the company of three or four men harassing the girls in the truck. They also testified that defendant was fighting with the others present and that he pulled a knife and cut the three victims. The knife was identified at trial. Photographic evidence as well as testimony from treating personnel confirmed the severity of the knife wounds. This evidence was sufficient to go to the jury on a charge of felonious rioting. The trial court did not err by refusing to grant defendant's motion for a nonsuit or dismissal.

II. Instructions on Inconsistent Out-of-Court Identifications

[2] The trial court instructed the jury as set forth in Pattern Jury Instruction No. 104.90, Identification of a Defendant as Perpetrator of a Crime. The trial court refused to include the following portion of that instruction:

> You may take into account in your consideration of the credibility of any identification witness any occasion upon which the witness failed to make identification of the defendant and/or any occasion on which the witness made an identification not consistent with his in-court identification.

N.C. Pattern Jury Instruction 104.90 (March 1986). Defendant argues that the court erred in omitting this portion of the instruction. Evidence at trial tended to show that Todd Watson and John Weiler told police while they were being treated at the hospital for their injuries that someone other than the defendant had stabbed them.

The trial court refused to give the above-quoted instruction because it relates to photographic or police lineup identification. *See* Note 3, N.C. Pattern Jury Instruction 104.90 (March 1986). Instead, the judge instructed:

> I need to instruct you further that when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent with or which may be inconsistent with his or her testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because that statement was not made under oath at this trial. . . . If you believe that such earlier statement was made and that it is consistent with or inconsistent with the testimony of that witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witnesses' truthfulness in deciding whether you will believe or disbelieve his or her testimony at this trial.

We find that this instruction was sufficient to instruct the jury in this instance. The trial court did not abuse its discretion in refusing to instruct as the defendant requested.

III. Failure to Charge on Simple Assault

[3] Defendant argues that the trial court should have instructed on simple assault because "there was evidence upon which the jury could have concluded that" the defendant struck Weiler, Watson and Ampuja, but did not use a deadly weapon. Under G.S. § 14-32, a conviction for felonious assault requires a showing that a deadly weapon was used and that serious injury resulted. If only one of these is shown, then the offense is punishable only as a misdemeanor under G.S. § 14-33. *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983).

We find that the State presented more than enough evidence of both the use of a deadly weapon and resulting serious injury in all three assaults. Two eyewitnesses saw defendant cut Weiler's face with a knife. Several witnesses testified to the seriousness of his injuries. Watson testified both in and out of court that defendant was the one who cut him with a knife. His injuries were described by an emergency room attendant. Ampuja testified that he was unarmed and that he felt his ear being cut and noticed a blond man to his right. Another witness saw defendant approach

Ampuja swinging a knife. Under these circumstances the trial court was not required to charge on simple assault. *State v. Daniels*, 38 N.C. App. 382, 247 S.E.2d 770 (1978).

IV. Refusal to Allow Jury to Know That Three Others Had Pled Guilty to the Same Crimes For Which Defendant was on Trial

[4] At the close of all of the evidence the trial court directed counsel to research the issue of whether the court should take judicial notice of the guilty pleas entered by the defendant's companions, and whether this information should be disclosed to the jury. After hearing arguments, defense counsel moved to reopen the trial so that the court could take judicial notice of the guilty pleas and inform the jury that defendant's companions had entered guilty pleas for the same crimes for which defendant was being tried. The court denied this motion and charged the jury that it should not speculate as to why defendant's companions did not testify at his trial or why they were not tried with him. Defendant argues that the denial of his motion was prejudicial to his defense. However, it should be noted that the trial court raised this issue *sua sponte*. Defendant made no effort during trial to put on evidence that his companions had pled guilty to the same offenses, nor did he request the court to take judicial notice of their pleas. Because no evidence of their guilty pleas was presented at trial, the trial court correctly concluded that to insert such information in the jury charge would be prejudicial to the State because it would not have the opportunity to rebut this evidence. The trial court may only instruct the jury as to the law arising on the evidence given in the case.

V. Failure to Instruct That John Weiler's Written Statement was Substantive

[5] John Weiler did not testify at trial, but an unsworn written statement was admitted into evidence. This statement indicated that someone other than the defendant had stabbed him. Defendant argues that the trial court's failure to instruct the jury to consider this statement as substantive was prejudicial. Defendant made this request to the court after the jury had retired to deliberate. N.C.R. App. P. 10(b)(2) states, "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . ." The record indicates that there was a conference off the record with the judge.

However, counsel failed to note any objections to the instruction on the record before the jury retired. Because the record shows that defense counsel waited to request the instruction and object to its omission until after the jury had retired, he failed to preserve this assignment of error for appeal.

VI. Instruction on Defense of Intoxication

[6] Defendant argues that the trial court improperly instructed the jury that he had the burden of establishing the defense of intoxication. We disagree. As shown above, defense counsel failed to preserve this assignment of error by noting his objection on the record *before* the jury retired. N.C.R. App. P. 10(b)(2). Furthermore, "a defendant who wishes to raise [the defense of voluntary intoxication] has the burden of producing evidence . . . of his intoxication." *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536-37 (1988); *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989). This assignment is overruled.

VII. Instructing the Jury Not to Stake Themselves Out on a Strong Position Immediately Upon Entering the Jury Room

[7] The defendant contends that the trial court's instruction not to "stake themselves out" unduly interfered with the function, deliberations, and freedom of expression of each juror. In fact, every juror should be willing to hear what all members have to say; if only one vote could be taken, few if any jury verdicts would ever be returned. Mere failure to follow form instructions is not reversible error. *State v. Sanders*, 81 N.C. App. 438, 344 S.E.2d 592, *disc. rev. denied*, 318 N.C. 419, 349 S.E.2d 604 (1986). After giving the above admonition, the trial court went on to instruct that "no person is required to compromise his or her conviction for the purpose of reaching a unanimous verdict. As a matter of fact, that would be in violation of your oath." We find that the trial court did not err.

VIII. and IX.

Defendant appeals the failure of the trial court to set aside the guilty verdicts and for entering judgment on the guilty verdict, relying on the arguments set forth above. For the reasons previously discussed in this opinion, we overrule these assignments of error.

X. Conclusion

The defendant received a fair trial free of prejudicial error.

Affirmed.

Judges ORR and GREENE concur.

MARY TAY, PETITIONER-APPELLEE v. DAVID T. FLAHERTY, RESPONDENT-APPELLANT

No. 8918SC491

(Filed 7 August 1990)

1. **Social Security and Public Welfare § 1 (NCI3d); Attorneys at Law § 64 (NCI4th)— wrongful termination of food stamps— right to attorney's fees**

Where the Court of Appeals previously determined that respondent wrongfully terminated petitioner's food stamps, and petitioner filed for attorney's fees, the trial judge made adequate findings to show that he considered the factors required by N.C.G.S. § 6-19.1, including whether respondent acted without substantial justification in pressing its claim against petitioner, and N.C.G.S. § 1A-1, Rule 52(a)(1) requiring specific findings of fact was inapplicable, since the hearing on the petition for attorney's fees was not an "action" tried without a jury but was instead a motion pursuant to N.C.G.S. § 1A-1, Rule 7(b)(1).

Am Jur 2d, Welfare Laws §§ 27, 107.

2. **Social Security and Public Welfare § 1 (NCI3d)— wrongful termination of food stamps—sufficiency of evidence**

Evidence was sufficient to support the trial court's determination that respondent acted without "substantial justification" in terminating petitioner's food stamps within the meaning of N.C.G.S. § 6-19.1 where the evidence showed that DSS knew that under federal regulations it could not terminate petitioner's benefits unless she definitely refused to cooperate and that it could not terminate the benefits merely because she failed to cooperate; immediately after petitioner's benefits were cancelled, counsel for petitioner informed DSS, and thus

respondent, that DSS lacked any basis for seeking verification information as to the number of persons in petitioner's household in the first instance; and the trial court also knew that the Court of Appeals had ruled that DSS had no basis for seeking the verification information and therefore no proper basis for determining that petitioner refused to cooperate and for terminating petitioner's benefits.

Am Jur 2d, Welfare Laws § 108.

3. **Attorneys at Law § 64 (NCI4th)— final agency decision contested—award of attorney's fees proper**

The trial court did not abuse its discretion in awarding attorney's fees to petitioner who contested a final agency decision terminating her food stamps.

Am Jur 2d, Welfare Laws §§ 27, 107.

APPEAL by respondent from order entered 12 January 1989 by *Judge Russell Walker, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 16 November 1989.

Central Carolina Legal Services, Inc., by Sorien K. Schmidt and Stanley B. Sprague, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elizabeth G. McCrodden, for respondent-appellant (Secretary of the North Carolina Department of Human Resources).

PARKER, Judge.

This is an appeal from the trial court's order granting attorney's fees to petitioner pursuant to G.S. 6-19.1. In May 1986 petitioner, who had been receiving food stamp benefits for herself and her four children from the Guilford County Department of Social Services (herein "DSS"), was recertified to receive food stamps from May through October 1986. During the recertification process petitioner mentioned to her caseworker that one of her daughters might be attending college in the fall of 1986. In response to this statement petitioner's file was marked for future investigation. On 1 August 1986, the caseworker sent petitioner a letter requesting that petitioner provide information as to her daughter's student status, including information on tuition costs and information on grants, loans or scholarships which her daughter was receiving. The letter also stated that "Failure to provide the needed verifica-

tion or to contact us by 8/11/86 will be considered a refusal to cooperate and we may take action to close your case." Petitioner called DSS but was unable to reach her caseworker before the 11 August deadline.

On 12 August the caseworker sent plaintiff a letter notifying her that the food stamp benefits for her household had been terminated. Several days later petitioner succeeded in contacting the caseworker and petitioner told the caseworker that her daughter would be living on campus. Assuming that petitioner knew her food stamps had been terminated, the caseworker told petitioner that if she brought verification of her daughter's student status and reapplied for food stamps before the end of August she would not lose her benefits for September 1986. Petitioner never received the 12 August letter and, hence, did not know her benefits had been terminated. Petitioner sent verification of her daughter's student status by mail to her caseworker, but did not reapply for food stamps in August. Petitioner did not receive food stamps in September 1986.

After learning that her food stamps had been terminated, petitioner appealed to the Department of Human Resources pursuant to G.S. 108A-79. A hearing was held pursuant to Article 3, Chapter 150B of the General Statutes of North Carolina and on 10 November 1986 the hearing officer proposed to affirm the termination of petitioner's food stamps. The proposed decision became a final agency decision ten days later. On 11 December 1986 petitioner sought judicial review of the final agency decision pursuant to G.S. 150B-43. The Superior Court, with the Honorable Thomas W. Seay, Jr. presiding, affirmed the agency decision. Petitioner appealed to this Court. This Court reversed the Superior Court and held that DSS wrongfully terminated petitioner's food stamps. *Tay v. Flaherty*, 90 N.C. App. 346, 368 S.E.2d 403, *disc. rev. denied*, 323 N.C. 370, 373 S.E.2d 556 (1988). Petitioner filed for attorney's fees. After a hearing in Guilford County Superior Court, the Honorable Russell Walker, Jr. ordered respondent to pay petitioner $2,225.00 in attorney's fees.

Respondent brings forward three assignments of error on appeal. First, respondent contends that the trial court erred in finding as fact that respondent acted without substantial justification in pressing its claim against petitioner. Second, respondent asserts that the trial court erred in concluding as a matter of law that

respondent acted without substantial justification in denying petitioner's food stamps. Finally, respondent argues that the trial court erred in awarding attorney's fees to petitioner.

[1] Pursuant to his first assignment of error, respondent makes two arguments. First, respondent argues that the trial court's finding that respondent acted without substantial justification was not a proper finding of fact, but should have been denominated a conclusion of law. Second, respondent asserts that the trial court erred because it failed to make proper specific findings of fact as required by Rule 52(a)(1) of the N.C. Rules of Civil Procedure to support its determination that the agency lacked substantial justification. In his brief respondent contends that "[w]hat was necessary in order to provide a proper order was recapitulation of the facts, laws and regulations surrounding the respondent's action in terminating petitioner's food stamps and, based upon that recapitulation, serving as findings of fact, a conclusion about whether respondent's action was substantially justified."

General Statute 6-19.1 provides the following:

> In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150A-43 or any other appropriate provisions of law, unless the prevailing party is the State, *the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if*:
>
> (1) *The court finds that the agency acted without substantial justification in pressing its claim against the party; and*
>
> (2) *The court finds that there are no special circumstances that would make the award of attorney's fees unjust.*
>
> The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request. (Emphasis added.)

The trial judge in our view made adequate findings to show that he considered the factors required by the statute. *See Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988) (where this

Court, applying G.S. 6-21.1, held that because the statute defined the circumstances under which attorney's fees may be awarded the trial court was not required to make specific findings as to the plaintiff's entitlement to such an award, but was only required to make findings as to the quality and quantity of services rendered by counsel) and *Bryant v. Short*, 84 N.C. App. 285, 352 S.E.2d 245, *disc. rev. denied*, 319 N.C. 458, 356 S.E.2d 2 (1987) (where this Court, applying G.S. 6-21.5, held that the trial court need not make more detailed findings if it states that the pleadings raised no justiciable issue of law or fact because this was all the statute required for an award of attorney's fees). Finally, we note that under the language of G.S. 6-19.1, Rule 52(a)(1) is inapplicable as the hearing on the petition for attorney's fees was not an "action" tried without a jury. Since the action is already in existence, the petition is characterized as a motion filed pursuant to Rule 7(b)(1) of the N.C. Rules of Civil Procedure governing applications to the court for orders. Accordingly, this assignment of error is overruled.

[2] Next, respondent contends that the trial court erred in concluding as a matter of law that respondent acted without substantial justification in denying petitioner food stamps. In construing the term "substantial justification" in the context of G.S. 6-19.2, the language of which is identical to G.S. 6-19.1, this Court held that the burden was on the party against whom attorney's fees were assessed to show justification for denying access to public records. *N.C. Press Assoc., Inc. v. Spangler*, 94 N.C. App. 694, 381 S.E.2d 187, *disc. rev. denied*, 325 N.C. 709, 388 S.E.2d 461 (1989). This Court rejected the argument that "to be without substantial justification, the refusal must have been made in bad faith, frivolously or without any reasonable or colorable basis in law." In *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), the United States Supreme Court defined the term "substantially justified" for purposes of the attorney's fee award provision of the Equal Access to Justice Act (herein "EAJA"), 28 U.S.C.S. § 2412(d). The EAJA provides, in pertinent part:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C.S. § 2412(d)(1)(A) (Law. Co-op. 1990). In *Pierce* the Court held that under the EAJA the proper connotation for the term "substantially justified" is "justified to a degree that could satisfy a reasonable person" (i.e., an act having a reasonable basis both in law and fact). *Id.* at 565, 108 S.Ct. at 2550, 101 L.Ed.2d at 504-05. The Court went on to say that, "[t]o be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Id.* at 566, 108 S.Ct. at 2550, 101 L.Ed.2d at 505.

On the prior appeal, this Court examined the applicable provisions of the pertinent regulations contained in the Code of Federal Regulations and determined that DSS lacked any basis for requiring verification of any factor affecting petitioner's food stamp benefits at the time DSS required verification of the daughter's status and terminated petitioner's benefits for failure to provide such verification. *Tay v. Flaherty*, 90 N.C. App. at 349, 368 S.E.2d at 405. This Court also determined that, although petitioner's daughter planned to attend college, she actually did not leave petitioner's household until 14 August 1986 and, therefore, that under the applicable federal regulations petitioner's duty to report the change in the number of persons comprising the household did not arise until 14 August 1986. *Id.* at 350, 368 S.E.2d at 405. Based on these interpretations of the governing federal regulations, this Court held that the verification procedure which allowed DSS to terminate petitioner's food stamp benefits on 12 August 1986 for petitioner's alleged failure to cooperate by withholding information was not supported by the federal regulations and, therefore, violated G.S. 150B-51(b)(3).

The trial court's findings of fact are binding on appeal if there is evidence to support them, even though there is evidence which might sustain findings to the contrary. *See Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). The transcript of the trial court's hearing on the issue of attorney's fees, contained in the record on appeal, shows that the court was apprised of all of the facts in the case. The trial court had before it evidence showing that DSS knew that under federal regulations it could not terminate petitioner's benefits unless she definitely refused to cooperate and that it could not terminate the benefits merely because she failed to cooperate. The trial court also had evidence showing that immediately after petitioner's benefits were cancelled,

counsel for petitioner informed DSS, and thus respondent, that DSS lacked any basis for seeking verification information in the first instance. The court also knew that this Court had ruled that DSS had no basis for seeking the verification information and, therefore, no proper basis for determining that petitioner refused to cooperate and for terminating petitioner's benefits. This evidence was sufficient to allow the court to find that respondent lacked substantial justification in pressing its claim throughout this action regardless of respondent's evidence that the superior court judge and two other attorneys practicing in this area, who filed affidavits in support of respondent's petition for a rehearing in the Court of Appeals, agreed that respondent rightfully terminated the benefits. *See United States v. One 1984 Ford Van*, 873 F.2d 1281 (9th Cir. 1989) (under § 2412 of the EAJA, the trial court's agreement with the government in the initial case is not conclusive as to whether the government's position was reasonable).

[3] Finally, respondent contends that the trial court erred in awarding attorney's fees to petitioner. General Statute 6-19.1 specifies that the award of attorney's fees to the prevailing party under this statute is within the discretion of the trial judge upon his or her conclusion that certain criteria are present. Decisions within the discretion of the trial judge will be reviewed on appeal only upon a showing that the trial judge abused his discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Respondent has failed to show that the trial judge abused this discretion; therefore, this assignment of error is overruled.

The award of attorney's fees is affirmed.

Affirmed.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. WINDELL FLOWERS

No. 8923SC1007

(Filed 7 August 1990)

1. **Criminal Law § 1145 (NCI4th)— burglary committed in especially heinous, atrocious, or cruel manner—aggravating factor properly found**

In determining that defendant committed burglary in an especially heinous, atrocious, or cruel manner, the trial court did not err by considering evidence of joinable offenses where the record showed that defendant and another held the victim helpless during a fatal beating administered to her husband, thus subjecting her to physical and psychological suffering not ordinarily present when a burglary is committed.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Criminal Law § 1119 (NCI4th)— pattern of conduct causing serious danger to society—aggravating factor properly found**

The trial court did not improperly use defendant's conviction of other offenses as evidence of a nonstatutory aggravating factor that defendant "engaged in a pattern of conduct causing serious danger to society" when he committed larceny and breaking or entering where the record showed that defendant went to the victim's home on 13 December; when she refused to open the door, defendant and his companions left and went to a nightclub where they consumed quantities of liquor and got into a fight with several other people; during the course of the evening they armed themselves with a sawed-off shotgun; and armed and intoxicated they returned a second time to the victim's home on 14 December.

Am Jur 2d, Criminal Law §§ 598, 599.

3. **Criminal Law § 1160 (NCI4th)— 76-year-old victim—advanced age proper aggravating factor**

The trial court did not err in using the victim's advanced age to aggravate defendant's sentence for second degree kidnapping where record evidence showed that the victim's advanced age, 76, caused her to be more vulnerable to defend-

ant's restraint and removal of her from her home than most women of a younger age.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from judgment entered 4 May 1989 by *Judge Thomas W. Seay, Jr.* in WILKES County Superior Court. Heard in the Court of Appeals 11 May 1990.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Dennis R. Joyce for defendant-appellant.

GREENE, Judge.

Defendant assigns error to the court's findings of factors aggravating his sentences after jury conviction for the offenses of second degree kidnapping, felonious breaking and entering, and first degree burglary. The court imposed consecutive prison sentences of: fifty years for the offense of first degree burglary, finding in aggravation that the offense was especially heinous, atrocious or cruel; thirty years for the offense of second degree kidnapping, finding in aggravation that the victim was very old; and ten years for the offense of felonious breaking and entering, and larceny, finding in aggravation the nonstatutory factor that "defendant engaged in a pattern of [c]onduct causing serious danger to society." In mitigation of each of these offenses, the court found that defendant aided in the apprehension of another felon, but that for each offense, the aggravating factor outweighed the mitigating factor.

This is the third appeal of this case, the facts of which are set forth in *State v. Flowers*, 84 N.C. App. 696, 354 S.E.2d 240, *review denied*, 319 N.C. 675, 356 S.E.2d 782 (1987); and in *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985); *State v. Hayes*, 85 N.C. App. 349, 355 S.E.2d 267, *review allowed*, 320 N.C. 635, 360 S.E.2d 98, *reversed*, 323 N.C. 306, 372 S.E.2d 704 (1988). In the latter case, the Supreme Court reviewed conviction and sentencing of one of three men, including defendant, who broke into a rural home. The evidence adduced in these cases shows that defendant's co-defendant, Roberts, assaulted an elderly man who lived in the house and who died as a result of the assault. Defendant and the other co-defendant, Hayes, restrained and injured the elderly wife of the owner, Mrs. Greer. Mrs. Greer was seventy-six years

old at the time of the crimes. Defendant then went through the house, pilfering cash and other items. Mrs. Greer testified:

> I seen [sic] the one that was doing the pilfering around in the drawers. He had an object about this long and about that wide, kind of square and gray. He had a flashlight and I could see and that is what went so deep in my head up there and cut the gash there. . . . I was hit on top of the head up here with this metal piece or something and the blood started streaming down . . .

While Roberts was beating Mr. Greer, Mrs. Greer suggested that defendant and Hayes accompany her to the Greers' grocery store. Defendant and Hayes forced her to sit on the ground and left her alone so that they could get store keys from the house. Mrs. Greer got up and ran about 300 yards to a fence, where one of the defendants caught her. Hayes and defendant took her to the store, where she was knocked to her knees, tied up and left in the store. Defendant later confessed, implicating the two co-defendants. Because of the previous expositions, we do not repeat other facts in the record except where relevant.

The issues are: whether the trial court erred in (I) aggravating defendant's sentence for first degree burglary by finding that the crime was especially heinous, atrocious or cruel; (II) aggravating defendant's sentence for larceny and breaking and entering by finding that defendant engaged in a pattern of conduct causing serious danger to society; and (III) aggravating defendant's sentence for kidnapping by finding that the victim was very old.

I

[1] Defendant contends that the trial court "erred by considering evidence of joinable offenses" when it determined that defendant committed burglary in an especially heinous, atrocious or cruel manner. We disagree.

Sentencing factors in aggravation or mitigation must be supported by a preponderance of the evidence. *Flowers*, at 698, 354 S.E.2d at 242. The court may not use the commission of a joinable offense as an aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)(o) (1988). However, the court may use evidence necessary to prove an *element* of a joinable offense as an aggravating factor. *Hayes*, 323 N.C. at 312, 372 S.E.2d at 708; *State v. Taylor*, 322 N.C. 280,

367 S.E.2d 664 (1988) (the court can aggravate defendant's first degree burglary conviction with evidence showing an element of a joined felonious assault offense).

We presume that the trial court disregarded incompetent evidence unless there is affirmative evidence to the contrary. *State v. Willard*, 292 N.C. 567, 575, 234 S.E.2d 587, 591 (1977). A defendant challenging the court's imposition of sentence bears the burden of showing prejudicial error. *State v. Williams*, 65 N.C. App. 472, 478, 310 S.E.2d 83, 87 (1983).

> If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree.

N.C.G.S. § 14-51 (1986). In determining whether an offense is especially heinous, atrocious or cruel, " 'the focus should be on whether the facts of the case disclose . . . *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*' " *Hayes*, at 313, 372 S.E.2d at 708 (emphases in original) (citation omitted).

> The Fair Sentencing Act and our cases interpreting it establish several rules which determine what evidence a sentencing judge may properly consider in aggravating a crime covered by the Act. First, a conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined by or acts which form the gravamen of these convictions. . . . Second, evidence used to prove an element of a crime may not also be used to prove a factor in aggravation of the *same* crime. . . . Third, 'the same item of evidence may not be used to prove more than one factor in aggravation.' . . . Fourth, acts which could have been, but were not, the basis for other joinable criminal convictions may be used to aggravate the conviction for which defendant is being sentenced. Finally, *evidence* used in proving an element of one crime may also be used to support an aggravating factor of a separate, though joined, crime for which defendant is being sentenced.

Id., at 312, 372 S.E.2d at 707-708 (emphases in original) (citations omitted). The law of the case is that:

> Hayes and *Flowers* held Mrs. Greer helpless in the presence of the beating being administered to her husband by Roberts. . . . The kind of suffering, both physical and psychological, that Mrs. Greer endured at the hands of Hayes *and his accomplices* concomitantly with the burglary is not ordinarily present when a burglary is committed.

Id., at 313-14, 372 S.E.2d at 708 (emphases added).

Record evidence supports the court's finding of heinous, atrocious or cruel behavior during commission of the burglary. Here, the record shows that defendant subjected Mrs. Greer to physical and psychological suffering not ordinarily present when a burglary is committed. We presume that the trial judge did not consider incompetent evidence in aggravating defendant's sentence, because the record does not affirmatively disclose such consideration.

II

[2] Defendant contends that the court improperly used his conviction of other offenses as evidence of a nonstatutory aggravating factor that defendant "engaged in a pattern of [c]onduct causing serious danger to society" when he committed larceny and breaking or entering. We disagree.

For the court to find a nonstatutory aggravating factor, the evidence must relate to the offender's character or conduct. *State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983). "[E]vidence of acts unrelated to . . . joined convictions may properly be considered." *Hayes*, at 315, 372 S.E.2d at 709. The law of this case shows that defendant, along with his two co-defendants:

> first went to the Greer home on 13 December 1981. When Mrs. Greer refused to open the door, the three men left and went to a nightclub. While at the nightclub, they consumed quantities of liquor and got into a fight with several other people. During the course of the evening, they armed themselves with a sawed-off shotgun. Armed and intoxicated, they returned a second time to the Greer home on 14 December 1981. This evidence, all unrelated to the other crimes for which defendant [Hayes] was convicted, is enough to support the

> trial court's finding in aggravation that defendant [Hayes] engaged in a pattern of conduct causing serious danger to society.

Id.

The record shows that defendant participated in each of the types of conduct set out above. Accordingly, this evidence supports the court's finding of aggravation and we presume that the trial judge did not consider incompetent evidence in aggravating this sentence.

III

[3] Defendant argues that the trial court erred in using the victim's advanced age to aggravate defendant's sentence for second degree kidnapping because the finding is not related to the purposes of sentencing. We disagree.

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

N.C.G.S. § 14-39(a)(1) and (b) (1986).

The purpose of sentencing is to punish a criminal with the degree of severity that his culpability merits. *State v. Thompson*, 318 N.C. 395, 397-98, 348 S.E.2d 798, 800 (1986).

> There are at least two ways in which a defendant may take advantage of the age of his victim. First, he may 'target' the victim because of the victim's age, knowing that his chances of success are greater whe[n] the victim is very young or very old. . . . [Second,] the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or to defend himself. In either case, the defendant's culpability is increased.

Id., at 398, 348 S.E.2d at 800. A defendant is more blameworthy when the victim's age causes her to be more vulnerable, as when age impedes the victim from fleeing or fending off attack. *State v. Hines*, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985). When a victim's age makes her more vulnerable than most women to defendant's forced commission of an offense, aggravation of defendant's sentence is appropriate and relates to the purposes of sentencing. *State v. Williams*, 74 N.C. App. 574, 576, 328 S.E.2d 775, 776 (1985) (defendant raped and committed forcible and felonious burglary on the victim).

Record evidence shows that Mrs. Greer's advanced age caused her to be more vulnerable to defendant's restraint and removal of her from her home than most women of a younger age. As evidenced by her failed escape attempt, the victim may have been able to escape defendant's control if she had not been so elderly.

No error.

Judges ORR and LEWIS concur.

INTEGON GENERAL INSURANCE CORPORATION AND DONNIE RAY BRAXTON v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, LEITH OLDSMOBILE-NISSAN, INC., AND FILIPPO MANIACI

No. 8921SC1307

(Filed 7 August 1990)

1. Insurance § 88 (NCI3d)— garage liability policy—employee driving employer's car—employee's personal insurer as excess carrier

The trial court properly determined that defendant, which provided a garage liability policy for an employer, was the primary carrier for an employee who drove employer's car with its permission to test-drive it for a weekend and had a collision while doing so, and that plaintiff, which provided an automobile liability policy to the employee, was the excess carrier for the employee.

Am Jur 2d, Automobile Insurance §§ 217, 219, 222, 223, 389, 433.

2. Insurance § 100 (NCI3d)— employee driving employer's car— employee as "insured"—duty of insurer to defend

Defendant garage liability insurer had a duty to provide a defense for an employee involved in a collision while driving his employer's car with the employer's permission, and to pay attorney fees and litigation expenses incurred in that defense, since the employee was an "insured" within the meaning of the policy issued by defendant, and the policy specifically provided that defendant had the duty to defend an insured.

Am Jur 2d, Automobile Insurance §§ 217, 219, 222, 223, 389, 433.

APPEAL by defendant Universal Underwriters Insurance Company from judgment entered 19 October 1989 by *Judge James A. Beaty, Jr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 1 June 1990.

Greeson & Grace, P.A., by Michael R. Greeson, Jr., for plaintiff-appellee Integon General Insurance Corporation.

Petree Stockton & Robinson, by James H. Kelly, Jr., for defendant-appellant Universal Underwriters Insurance Company.

GREENE, Judge.

Defendant appeals the trial court's entry of declaratory judgment. The parties stipulated the facts, and following a non-jury trial the court entered judgment for the plaintiffs, Integon General Insurance Corporation (Integon) and Donnie Ray Braxton (Braxton). Defendant is Universal Underwriters Insurance Company (Universal).

Integon and Braxton filed this action to determine the parties' rights and liabilities as governed by an automobile liability policy of insurance which Integon issued to Braxton and a garage liability policy which Universal issued to Leith Oldsmobile-Nissan, Inc. (Leith). The relevant facts, as stipulated by the parties and adopted in the Findings of Fact of the trial court, are summarized as follows: at all relevant times Integon provided automobile liability insurance coverage for Braxton, and Universal provided such coverage for Leith in a garage liability policy. On 27 March 1988, Filippo Maniaci was allegedly injured in an automobile collision with a Buick owned by Leith and driven by Braxton, Leith's employee. With Leith's

permission, Braxton had taken the Buick for the weekend "for the purpose of trying the car out as a prospective buyer."

In Maniaci's suit against Braxton and Leith, Universal defended Leith, and Integon initially defended Braxton. Prior to trial of that suit, Integon and Braxton brought this declaratory judgment action against Universal to determine whether Universal's policy with Leith also required it to provide liability coverage and defense for Braxton in the Maniaci suit. After entry of the trial court's order determining Universal to be Braxton's primary carrier for the collision involving Leith's Buick, Universal settled the Maniaci suit on behalf of all parties.

Universal's policy with Leith states in pertinent part:

> INSURING AGREEMENT—WE will pay all sums the INSURED legally must pay as damages (including punitive damages where insurable by law) because of INJURY to which this insurance applies caused by an OCCURRENCE arising out of GARAGE OPERATIONS or AUTO HAZARD.
>
> . . .
>
> WE have the right and duty to defend any suit asking for these damages.
>
> . . .
>
> "AUTO HAZARD" means the ownership, maintenance, or use of any AUTO YOU own or which is in YOUR care, custody or control and:
>
> (1) used for the purpose of GARAGE OPERATIONS or
>
> (2) used principally in GARAGE OPERATIONS with occasional use for other business or non-business purposes or
>
> (3) furnished for the use of any person or organization.
>
> . . .
>
> WHO IS AN INSURED—
>
> . . .
>
> With respect to AUTO HAZARD:
>
> 1. YOU;

2. Any of YOUR partners, *paid employees*, directors, stockholders, executive officers, a member of their household or a member of YOUR household, *while using an AUTO covered by this Coverage Part*, or when legally responsible for its use. *The actual use of the AUTO must be* by YOU or *within the scope of YOUR permission*;

3. Any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission. [Emphases added.]

. . .

OTHER INSURANCE—The insurance afforded by this Coverage Part is primary, except it is excess:

(1) for PRODUCT RELATED DAMAGES and LEGAL DAMAGES;

(2) for any person or organization who becomes an INSURED under this Coverage Part as required by law.

Integon's policy with Braxton states in pertinent part:

INSURING AGREEMENT

We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

. . .

OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Based on the stipulated facts and on the insurance policies' language, the trial court entered the following Conclusion of Law and Judgment which are pertinent to this appeal:

3. The policy provided by Universal Underwriters Insurance Company to Leith Oldsmobile-Nissan, Inc. provided automobile liability coverage to Donnie Ray Braxton on March 27, 1988.

AND FURTHER based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW it is hereby ORDERED AND ADJUDGED that Universal Underwriters Insurance Company is the primary liability insurance carrier for the damages as a result of personal injuries sought by Filippo Maniaci as a result of the automobile accident on March 27, 1988.

It is FURTHER ORDERED AND ADJUDGED that Universal Underwriters Insurance Company provide a defense for Donnie Ray Braxton, including attorneys fees and litigation expenses, up to and in accordance with the policy limits provided by the policy issued by Universal Underwriters Insurance Company.

The issues presented are: (I) whether Universal provided primary liability insurance coverage for the damages sought by Maniaci against Braxton; and (II) whether Universal had a duty to defend Braxton.

I

[1] Universal argues that the trial court first erred by concluding that Universal's policy with Leith covered Braxton while he permissibly drove Leith's automobile. Second, Universal argues that even if its policy provided such coverage, a comparison of Integon's and Universal's policies shows Universal was not the primary insurer of Braxton. We disagree.

Insurance contracts are construed according to the intent of the parties, and in the absence of ambiguity, we construe them by the plain, ordinary and accepted meaning of the language used. *Williams v. National Mut. Ins. Co.*, 269 N.C. 235, 238, 152 S.E.2d 102, 105-106 (1967).

Integon's policy insured Braxton himself for the collision at issue, but if Braxton did not own the vehicle, Integon would provide insurance only in "excess over any other collectible insurance."

Universal was required to provide coverage for automobiles owned by Leith and operated by "paid employees . . . within the scope of . . . [Leith's] permission." The stipulated facts show that Leith furnished Braxton, Leith's paid employee, the Buick to test-

drive it for a weekend, and that Braxton's actual use of the Buick was within the scope of Leith's permission. The Universal policy insured Braxton because he falls within the second definition of 'insured' in the Auto Hazard portion of the policy. In this definition of 'insured,' there is no requirement that the employee use the automobile within the scope of his employment; he need only use it permissibly. Moreover, according to the clear language of the "Other Insurance" clause, Universal provided Braxton with primary insurance. Accordingly, we affirm the trial court's judgment declaring Universal primary carrier of coverage for Braxton, and Integon excess carrier for Braxton in these circumstances.

II

[2] Universal argues that the trial court erred in concluding and ordering that Universal had a duty to provide a defense for Braxton and to pay attorney fees and litigating expenses incurred in that defense. We disagree.

The trial court ordered Universal, as primary carrier, to "provide a defense for Donnie Ray Braxton, including attorney fees and litigation expenses, . . . in accordance with the policy limits. . . ." Universal argues "that because each carrier owed to its named insured a separate duty to defend (separate from the existence of any other coverage)[,] Integon should bear its own expenses with regard to the defense of its insured driver." Integon has an absolute obligation to provide a defense for Braxton that is separate from its undertaking to pay certain sums for which he might become liable. *See Fireman's F. Ins. Co. v. North Carolina Farm B.M.I. Co.*, 269 N.C. 358, 361, 152 S.E.2d 513, 516 (1967). Similar to the facts in the *Fireman's Fund* case, in Integon's policy the 'other insurance' clause (which defines Integon's status here as an excess carrier) relates "to the amount to be paid in discharging the liability, if any, of the insured to a third party claimant." *Id.*, 162 S.E.2d at 517. In addition, Integon's own policy gave rise to its duty to provide Braxton's defense, even though Universal was deemed the primary carrier for discharging Braxton's liability. *Id.*, at 361-62, 361 S.E.2d at 517. Specifically, the policy provided that Integon "settle or defend . . . any claim or suit asking for . . . damages. In addition to our limit of liability, we will pay all defense costs we incur." Integon's obligation to defend is not the issue. Rather, the present issue is whether Universal had an obligation to provide a defense for Braxton.

As primary carrier, Universal owed its insured both the duty to insure against liability and a duty to defend. The Universal policy states that it "will pay all sums the INSURED legally must pay as damages . . . because of INJURY to which this insurance applies. . . ." Furthermore, Universal has the "duty to defend any suit asking for these damages." Since we have already determined that Braxton is an 'insured,' Universal had the duty to defend him, and the trial court correctly ordered it to do so. Whether Integon is entitled to reimbursement from Universal for defense expenses incurred is an issue not before this court. *See Horace Mann Ins. Co. v. Continental Cas. Co.*, 54 N.C. App. 551, 557-58, 284 S.E.2d 211, 214-15 (1981) (under certain circumstances, if the amount for which the insured is sued is within primary coverage, the excess carrier may recover for monies expended in defense from primary carrier); *see generally*, Annotation, *Defense Costs—Primary and Excess Insurers*, 19 A.L.R.4th 107 (1983); Annotation, *Defense by Insurer—Co-Insurer's Duty*, 90 A.L.R.3d 1199 (1979).

Affirmed.

Judges ORR and LEWIS concur.

THE COUNTY OF RUTHERFORD BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY EX REL. PAMELA MARIE WATSON HEDRICK v. MELVIN VERNO WHITENER, II

No. 8929DC1147

(Filed 7 August 1990)

1. Rules of Civil Procedure § 56 (NCI3d)— affirmative defense raised by motion for summary judgment—no error

Absent prejudice to plaintiff an affirmative defense may be raised by a motion for summary judgment regardless of whether it was pleaded in the answer, but an affirmative defense sought to be raised for the first time in a motion for summary judgment must ordinarily refer expressly to the affirmative defense relied upon. Failure to do so will not bar the court from granting the motion on that ground if the affirmative defense was clearly before the trial court; furthermore, the pleadings are deemed amended if in fact the issue not raised

by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties.

Am Jur 2d, Summary Judgment § 11.

2. Rules of Civil Procedure §§ 15.2, 56 (NCI3d); Judgments § 44 (NCI3d)— defendant as father of child receiving public assistance—results in criminal trial admitted in evidence—res judicata

In a proceeding to establish defendant as the natural father of a child whose mother had been receiving public assistance on behalf of her child from plaintiff county, evidence was before the trial court that defendant had been tried previously in the criminal courts of Rutherford County and had been adjudicated not to be the father of the child; therefore, introduction of this evidence at the hearing on summary judgment indicated that the affirmative defense of *res judicata*, though not raised in defendant's answer or the motion to dismiss, was clearly before the trial court with the consent of both parties, and the pleadings were deemed amended.

Am Jur 2d, Bastards § 94; Judgments §§ 614, 616, 617.

3. Judgments § 36.2 (NCI3d)— prior criminal nonsupport action—present action for reimbursement of public assistance paid—no privity of parties

The State, which prosecuted a prior criminal nonsupport action in which defendant was determined not to be the father of the child in question, and plaintiff county, which in this action sought reimbursement in a civil action for public assistance paid, were not in privity, though both were interested in proving the same state of facts, and the doctrine of collateral estoppel thus did not bar the county's action against defendant.

Am Jur 2d, Bastards § 94; Judgments §§ 614, 616, 617.

APPEAL by plaintiff from order entered 1 September 1989 by *Judge Thomas N. Hix* in RUTHERFORD County District Court. Heard in the Court of Appeals 2 May 1990.

Hamrick, Bowen, Nanney & Dalton, by Robert L. Mebane, for plaintiff-appellant.

Robert L. Harris for defendant-appellee.

GREENE, Judge.

The County of Rutherford by and through its Child Support Enforcement Agency *ex rel.* Pamela Marie Watson Hedrick (County) appeals from summary judgment entered for the defendant.

In this civil action, the County, which administered the "Child Support Enforcement Program," sought to establish the defendant as the natural father of a child of Pamela Marie Watson Hedrick (mother). Mother had been receiving public assistance on behalf of her child from the County of Rutherford. The County also sought reimbursement from the defendant for "all past public assistance paid for or on behalf of the Defendant's minor child," and that the defendant be ordered to provide reasonable child support in the future. The County requested that the Clerk of Superior Court of Rutherford County be named as "designated payee for any and all child support payments received in this action and that the clerk be directed to transmit all child support payments received in this action to the North Carolina Department of Human Resources. . . ." The defendant filed an answer which, in addition to denying the material allegations in the complaint, requested that the complaint be dismissed for failure to state a claim "pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure."

When the County's claim came on for trial, the trial court accepted evidence outside the pleadings, treating the motion to dismiss as one for summary judgment. The evidence accepted outside the pleadings was reflected in one of the findings of fact entered by the trial court, which finding is undisputedly supported by the evidence. Specifically, the court found as a fact:

> That the Defendant, Melvin Verno Whitener, II, was prosecuted by the State of North Carolina through its attorney, Harold Caviness in the Superior Court of Rutherford County on March 8, 1988 in case number 85 CRS 7598 wherein Defendant was found not to be the father of [the child] born of the body of Pamela Marie Watson Hedrick on December 17, 1984 by a Jury Verdict rendered before the Honorable Chase B. Saunders and that the Superior Court of Rutherford County had proper jurisdiction of the case number 85 CRS 7598 *Noves*.

The court then concluded:

1. That the Plaintiff in this action is in privity with the State of North Carolina in the Rutherford County Superior Court Case No. 85 CRS 7598.

. . .

2. That the Doctrine of Res Judicata is applicable to this present action in that it would Bar relitigation of the issue of paternity which was raised in a prior proceeding involving the same parties.

Based on relevant findings and conclusions of law, the trial court granted summary judgment for the defendant and dismissed the complaint.

The issues presented are: (I) whether the failure of the defendant to plead *res judicata* is a bar to that issue being raised at hearing on summary judgment; and (II) whether a county which administers the "Child Support Enforcement Program" may seek, in a civil action, reimbursement from an individual for public assistance paid on behalf of a child, when that individual was adjudicated not to be the father of the child in a prior criminal action.

I

[1, 2] County argues that the summary judgment must be vacated because *res judicata* on which the judgment was based was not affirmatively pled either in the answer or in the motion to dismiss. We disagree.

Rule 8(c) of our Rules of Civil Procedure provides that *res judicata* is an affirmative defense and must be set forth affirmatively in the pleadings. N.C.G.S. § 1A-1, Rule 8(c) (1983). Nonetheless, our courts have held that where "responsive pleadings are not yet due" a party may raise an affirmative defense in a motion for summary judgment. *Dickens v. Puryear*, 302 N.C. 437, 442, 276 S.E.2d 325, 329 (1981). *Dickens* did not address the question of whether a party may assert an affirmative defense in a summary judgment motion *after* filing an answer in which no affirmative defense was alleged. There is a split of authority in the federal courts as to whether defendant should be allowed in this instance to assert the affirmative defense. *See* 2A J. Moore, *Moore's Federal Practice* § 8.28, at 8-206-07 (2d ed. 1990). To avoid a decision based on a pleading technicality, we now hold that "absent prejudice

to plaintiff, an affirmative defense may be raised by a motion for summary judgment regardless of whether it was pleaded in the answer or not." *Id.*, at 8-207.

Nevertheless, as noted in *Dickens*, an affirmative defense sought to be raised for the first time in a motion for summary judgment "must ordinarily refer expressly to the affirmative defense relied upon." 302 N.C. at 443, 276 S.E.2d at 329. In the absence of an expressed reference in the motion for summary judgment, if the "affirmative defense was clearly before the trial court," the failure to expressly mention the defense in the motion will not bar the trial court from granting the motion on that ground. *Id.*, at 443, 276 S.E.2d at 330. Furthermore, where a motion for summary judgment is supported by matters outside the pleadings, the pleadings are deemed amended if in fact the issue not raised by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties. N.C.G.S. § 1A-1, Rule 15(b) (1983); *see also Baker v. Chicago Fire & Burglary Detection, Inc.*, 489 F.2d 953, 955 n.3 (1973).

Here, neither the defendant's answer nor the motion to dismiss made any reference to the defense of *res judicata*. However, the record is clear that evidence was before the trial court that the defendant had been tried previously in the criminal courts of Rutherford County and had been adjudicated not to be the father of the child. Introduction of this evidence at the hearing on summary judgment indicates that the affirmative defense of *res judicata* was clearly before the trial court with the consent of both parties and the pleadings are deemed amended.

II

[3] The doctrine of *res judicata* has two aspects: claim preclusion and issue preclusion. Claim preclusion which precludes relitigation of claims is more generally referred to as *res judicata*. Issue preclusion, which "preclude[s] the parties or their privies in a former action from relitigating in a subsequent action issues necessarily determined in the former action," is more generally referred to as collateral estoppel. *State By and Through New Bern C.S.A. v. Lewis*, 311 N.C. 727, 730, 319 S.E.2d 145, 148 (1984); *see generally* 46 Am.Jur.2d *Judgments* §§ 396 and 397 (1969).

Here, since a civil action filed by the County against the defendant is not an attempt to relitigate the same claim litigated

in the previous action, this appeal presents a question of collateral estoppel, not *res judicata*. The defendant argues that the County is collaterally estopped from relitigating the issue of paternity since that issue was previously determined in favor of the defendant in the prior criminal action. For the defendant to prevail in his argument, two elements must exist:

> (1) The issue of paternity must necessarily have been determined previously and (2) the parties to that prior action must be identical or privies to the parties in the instant case.

Lewis, 311 N.C. at 731, 319 S.E.2d at 148.

In the present case, it is undisputed that the issue of paternity necessarily was determined in the prior criminal action because in that case the jury specifically answered on the verdict form that the defendant was not the father of the child in question. Furthermore, it is equally clear that while the defendants in both the criminal and civil actions are the same, the plaintiffs are not. In the first action the plaintiff was the State of North Carolina and in this action the plaintiff is the County of Rutherford.

The defendant argues that the facts presented in *Lewis* cannot be distinguished from the facts in this case and that accordingly the County is bound by the determination of paternity in the prior criminal action. We disagree.

In *Lewis*, the State of North Carolina was administering the Child Support Enforcement Program for Carteret County. *See generally* N.C.G.S. §§ 110-128 through 110-141 (1988). The State "by and through its New Bern Child Support Agency" filed an action seeking indemnification for public assistance paid on behalf of the children. The trial court held that the defendant was estopped from denying paternity of the children in question because of a prior criminal conviction for willful neglect of and refusal to support the children. *Lewis*, 311 N.C. at 729, 319 S.E.2d at 147. The *Lewis* Court held:

> The state herein is the same party which challenged defendant in the prior suit, pursuing its same financial interest in securing support payments by a parent for his children in both actions.

Id., at 734, 319 S.E.2d at 150. The Court then concluded that since the issue of defendant's paternity necessarily had been determined in the prior criminal action, collateral estoppel applied. *Id.*

Here we are not presented, as in *Lewis*, with the same parties. The question is whether the State of North Carolina, who prosecuted the criminal nonsupport action, and the County, who now seeks reimbursement in a civil action for public assistance paid, are in privity. Generally, "such privity involves a person so identified in interest with another that he represents the same legal right." 46 Am.Jur.2d *Judgments* § 532. "Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action." 46 Am.Jur.2d at 685-86.

> The term "privy" when applied to a judgment or a decree refers to one whose interest has been legally represented at the trial. . . . A trial in which one party contests his claim against another should be held to estop a third person only when it is realistic to say that the third person was fully protected in the first trial. There can be no such privity between persons as to produce collateral estoppel unless the result can be defended on principles of fundamental fairness and the due process sense.

46 Am.Jur.2d at 686.

Here, the State and County were interested in proving the same state of facts: that the defendant was the child's father. However, the County had no control over the previous criminal litigation, and nothing in the record indicates that the interest of the County was legally represented in the criminal trial. Furthermore, we are unable to distinguish the present case from the facts presented in *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976), and *Settle v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983). In *Tidwell*, the Court held there was no privity between the State who instituted a criminal action for nonsupport and the mother who later instituted a civil action for nonsupport. In *Settle*, the Court held there was no privity between the Child Support Enforcement Agency of Johnston County, who in a civil action sought indemnification for public assistance paid, and a child, who through his guardian ad litem sought support through a subsequent civil suit.

Accordingly, the trial court erred in concluding that the County was in privity with the State of North Carolina, and thus the doctrine of collateral estoppel does not bar the County's action

against this defendant in its effort to seek reimbursement for public assistance paid.

Reversed.

Judges ORR and LEWIS concur.

PINEHURST AREA REALTY, INC., PLAINTIFF v. THE VILLAGE OF PINEHURST, DEFENDANT

No. 8920SC1101

(Filed 7 August 1990)

1. **Municipal Corporations § 31.2 (NCI3d)— whether zoning ordinance enacted—question not raised at trial—issue not considered on appeal**

Plaintiff's question as to whether a zoning ordinance was indeed enacted, based on the purported failure by defendant to file and index properly the map which demonstrated the zoning boundaries in accordance with N.C.G.S. § 160A-77, was not raised during the trial; no information regarding this issue was included in the record; and the issue therefore was not properly before the Court of Appeals.

Am Jur 2d, Zoning and Planning §§ 56, 337, 338.

2. **Municipal Corporations § 31 (NCI3d)— zoning ordinance attacked on constitutional grounds—challenge barred by statute of limitations**

Plaintiff's challenge to a 1985 zoning law based on alleged state and federal constitutional violations was barred by the nine-month statute of limitations in N.C.G.S. § 160A-364.1.

Am Jur 2d, Zoning and Planning § 341.

3. **Municipal Corporations § 31.1 (NCI3d)— no measurable damages suffered by plaintiff—no standing to sue**

Plaintiff's allegations were insufficient as a matter of law to state any claim as to a 1987 rezoning which was less restrictive than the original zoning, where the rezoning not only allowed the current use to continue but also permitted even

broader uses of plaintiff's property; defendant rezoned the property to allow for the then-current uses; and plaintiff's vague allegation that it had been damaged in an unascertained amount due to lost opportunities for sale, use, and development of the property was speculative and showed that plaintiff had suffered no measurable damages.

Am Jur 2d, Zoning and Planning §§ 342, 343.

APPEAL by plaintiff from order entered 21 July 1989 by *Judge William H. Freeman* in MOORE County Superior Court. Heard in the Court of Appeals 11 April 1990.

Plaintiff is the real estate developer of a "residential community" which includes a golf course (hereinafter, "the country club property"). In addition, plaintiff owns a smaller tract adjoining the country club property upon which plaintiff maintains its place of business (hereinafter, "the office property"). Prior to July 1985, both properties were within the planning and zoning jurisdiction of Moore County. The country club property was zoned for "Residential Development" (RD) which permitted uses such as single and multi-family residences. The office property was zoned for "Business-1" (B-1) which permitted a wide variety of commercial uses.

On 3 June 1985, the North Carolina General Assembly ratified 1985 Session Law 308 which amended General Statute § 160A-360(a) and allowed defendant Village of Pinehurst the right to exercise its zoning and planning powers up to two miles beyond its corporate limits. Defendant published notices in the local newspaper of a public hearing "for the purpose of considering a proposed area for addition to the extraterritorial zoning jurisdiction of the Village of Pinehurst." Plaintiff was already aware of the area to be included in the extraterritorial jurisdiction of the Village, and knew that its property was to be included and so did not attend the public hearing. On 15 July 1985, the Village Council of defendant adopted an ordinance stating, in part:

That the area of extraterritorial limits of the Village of Pinehurst shall be amended and extended as shown and delineated on the map prepared by C.H. Blue and Associates, which map is attached hereto, and correspondingly described in exhibit "A" attached hereto and dated July 15, 1985.

Plaintiff alleges that no "Exhibit A" dated July 15, 1985 has ever been found, produced or proven. On 22 July 1985, the Board of Commissioners of Moore County relinquished extraterritorial zoning jurisdiction to defendant. When defendant extended its extraterritorial jurisdiction, it designated plaintiff's country club property "Public Conservation and Recreation" (PCR) and the office property "Office Professional" (OP). Plaintiff states that it did not learn of the rezoning until June 1986 when two of its representatives "happened to glance at a zoning map fastened to a wall in the office of the manager of the Village."

In January 1987, plaintiff requested that its office tract be rezoned from OP to "Neighborhood Commercial" (NC). Defendant amended its zoning ordinance to subdivide the former NC classification into two new classifications, NC-1 and NC-2 and then rezoned the office property NC-2. The NC-2 designation was less restrictive than OP.

Plaintiff filed a complaint challenging both the 1985 and the 1987 rezonings on state and federal due process grounds. Defendant moved to dismiss the complaint for failure to state a claim for which relief could be granted. Plaintiff filed a motion for summary judgment. The court granted defendant's motion and denied plaintiff's motion. Plaintiff appeals.

Allen & Pinnix, by Noel L. Allen and Paul C. Ridgeway, for plaintiff-appellant.

Petree Stockton & Robinson, by Penni P. Bradshaw and Robin E. Shea, for defendant-appellee.

LEWIS, Judge.

Plaintiff challenges two zoning actions by defendant, the 1985 zoning of plaintiff's property, and a 1987 rezoning.

I: The 1985 Zoning.

[1] Plaintiff states that a threshold question is the determination of whether a zoning ordinance was indeed enacted. The allegation is based on the purported failure by defendant to file and index properly the map which demonstrated the zoning boundaries in accordance with the G.S. § 160A-77. Since this question was not raised during the trial and no information regarding this issue is included in the record, it is not properly before this Court.

[2] Plaintiff also asserts that its claim is sufficient to raise a constitutional cause of action so as to invoke a three-year statute of limitations instead of the nine-month statute of limitations as provided by G.S. § 160A-364.1 for challenging zoning ordinances. G.S. § 160A-364.1 provides:

> A cause of action as to the validity of any zoning ordinance . . . adopted under this Article or other applicable law shall accrue upon adoption of the ordinance . . . and shall be brought within nine months as provided in G.S. § 1-54.1.

Plaintiff challenges the validity of the zoning on state constitutional grounds, arguing that the defendant failed to properly notify it of the impending zoning action affecting its property in violation of N.C.G.S. § 160A-364. In fact, defendant's published notice of the zoning action stated that the Village would consider extending its extraterritorial zoning jurisdiction, and the metes and bounds description included the land owned by appellant. That description put plaintiff on notice that changes would be made affecting its property. *See Stutts v. Swaim*, 30 N.C. App. 611, 228 S.E.2d 750, *disc. rev. denied*, 291 N.C. 178, 229 S.E.2d 692 (1976). Moreover, North Carolina case law indicates that the statute quoted above has been strictly construed. Petitioner in *In re Appeal of CAMA Permit* also alleged that the respondent town had failed to follow proper procedural rules. This Court concluded, however, that "even if the record disclosed that the Town of Bath had violated procedural rules . . . , petitioner is barred from attacking the validity of the amendment based on procedural grounds by the statute of limitations provided in G.S. § 160A-364.1. . . ." 82 N.C. App. 32, 41-42, 345 S.E.2d 699, 705 (1986).

Plaintiff characterizes this action as "a cause of action for deprivation of constitutional rights" and states that the United States Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed. 2d 254 (1985), has directed that such actions "be subject to the relevant state's personal injury statute of limitations" which in North Carolina is three years. The *Wilson* court was addressing federal civil rights actions under 42 U.S.C.S. § 1983 when it chose to apply the personal injury statute of limitations. We do not find *Wilson* controlling.

Zoning claims raise important public policy considerations. There is a strong need for finality with respect to zoning matters so that landowners may use their property without fear of a challenge

years after zoning has apparently been determined. North Carolina courts have not held that violations of federal constitutional claims in zoning actions extend the usual nine-month statute of limitations. In *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 344 S.E.2d 357, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 600 (1986), this Court held that plaintiff's claims for federal due process violations were barred by the nine-month statute of limitations. It is noteworthy that *Sherrill* was decided after *Wilson, supra.*

We hold plaintiff's challenge to the 1985 zoning law based on alleged state and federal constitutional violations is barred by the nine-month statute of limitations. The trial court properly dismissed plaintiff's complaint for failure to state a claim for which relief could be granted.

II: The 1987 Rezoning.

[3] Plaintiff contends that its rights were violated by defendant when plaintiff was given a more restrictive zoning than what it requested for its office tract. The rezoning was, however, *less* restrictive than the original zoning. The rezoning not only allowed the current use to continue but it also permitted even broader uses of plaintiff's property. Plaintiff made a vague allegation that it "has been damaged in an [sic] yet unascertained amount due to lost opportunities for sale, use and development of the properties." This is speculative and cannot stand. Plaintiff has done nothing to acquire a vested right to a less restrictive zoning and cannot recover speculative damages in an "unascertained amount" due to lost potential opportunities for development of the property. Defendant rezoned the property to allow for the then-current uses and plaintiff has suffered no measurable damages. Plaintiff's allegations are insufficient as a matter of law to state any claim as to the 1987 rezoning and thus were properly dismissed pursuant to Rule 12(b)(6).

Affirmed.

Judges ARNOLD and DUNCAN concur.

MARINA FOOD ASSOCIATES, INC., AND S. N. McKENZIE, PLAINTIFFS v. MARINA RESTAURANT, INC., CONVA P. KERSEY, ENRIQUE PAULA AND ROBERT P. CORBETT, JR., AND BENSON MARINE GROUP, INC., DEFENDANTS

No. 895SC1181

(Filed 21 August 1990)

1. **Compromise and Settlement § 6 (NCI3d)— breach of lease— offer to buy out lease—admissible**

There was no error in an action for breach of a lease agreement in admitting evidence of defendant's offer of $150,000 in January of 1986 to terminate the lease where there was no dispute concerning the repair or replacement of the roof in late January 1986 and the buy-out offer was therefore not an offer to settle or compromise a disputed claim. Moreover, the offer was evidence of the value of the lease and therefore relevant to the issue of damages. N.C.G.S. § 8C-1, Rule 402; N.C.G.S. § 8C-1, Rule 408.

Am Jur 2d, Compromise and Settlement §§ 14, 15, 48.

2. **Evidence § 13 (NCI3d)— breach of lease—letter from attorney to defendants and accountants—not privileged**

The court did not err in an action for breach of a lease by admitting into evidence a letter from an attorney to the individual defendants and their accountant. The letter in question was communicated to a third party and was therefore not a confidential communication protected by the attorney-client privilege.

Am Jur 2d, Witnesses § 203.

3. **Pleadings § 33.2 (NCI3d); Rules of Civil Procedure § 15 (NCI3d)— breach of lease—amendment of pleadings to add breach of covenant of quiet enjoyment and to clarify conversion claim—allowed**

The trial court did not err in an action for breach of a lease by allowing plaintiff to amend its pleadings to include breach of the covenant of quiet enjoyment and to clarify the claim of conversion of personal property. Plaintiff offered evidence of constructive eviction which, if found, constitutes a breach of the implied covenant of quiet enjoyment, plaintiff's claim for conversion was not objected to by defendants at

trial, and defendants' counsel signed and did not contest a pretrial order in which plaintiff stated that one of the issues for trial was conversion of personal property. N.C.G.S. § 1A-1, Rule 15(b).

Am Jur 2d, Pleadings §§ 315, 322, 323, 329, 330.

4. Corporations § 28 (NCI3d)— distribution of assets of corporation—liability of shareholders

The trial court did not err in an action for breach of a lease by granting partial summary judgment against individual defendants regarding liability for damages recovered against the corporate defendant where it was undisputed that the individual defendants were the only shareholders of the corporation, the assets of the corporation were assigned to them, the individual defendants were aware of the present action when they received distribution of the restaurant's assets, no assets or money were set aside for payment of any liability or claims arising from this action, and the distribution completely diminished the assets of the corporation. However, no appropriate factual determination was made to determine the extent of liability of the respective individual defendants and the case was remanded for the trial court to take evidence and make those findings.

Am Jur 2d, Corporations § 2870.

5. Landlord and Tenant § 8 (NCI3d)— replacement of roof—breach of lease—evidence sufficient

The trial court did not err in an action for breach of a lease by failing to replace the roof in a timely manner by denying defendants' motions for a directed verdict and judgment n.o.v. where plaintiff was the lessee and defendants the lessors; the lease agreement contained a statement to the effect that the lessee would keep the parking area and exterior, including the roof and outside walls, in good repair, normal wear and tear excepted; the lease agreement was prepared by defendant Marina's attorney; when it became apparent that the roof could not be repaired and had to be replaced, defendant Marina's attorney wrote to plaintiff requesting that plaintiff replace the roof; plaintiff's president met with Marina's and asserted that it was defendant Marina's obligation to replace the roof; plaintiff offered at one point to replace the roof and

deduct the cost from the rent; defendant Marina did not respond and did not raise the issue again; defendant Marina's attorney assured the president of plaintiff corporation in subsequent discussions that the roof would be replaced and never stated that it was not the landlord's responsibility to replace the roof; defendant Marina's attorney stated in response to repeated requests that the work had not been done due to the unavailability of the roofing company which defendants wanted to do the work; defendant Marina's attorney wrote to the individual defendants and their accountant advising them that it was his opinion that if the roof damage was normal wear and tear then it was defendants' problem to correct; the majority shareholder, officer and director of defendant corporation acknowledged in a conversation with the restaurant's manager that defendant corporation would have to replace the roof; and defendant Marina ultimately had the roof replaced.

Am Jur 2d, Landlord and Tenant §§ 774, 777, 828, 832.

6. Landlord and Tenant § 6.2 (NCI3d)— constructive eviction—breach of implied covenant of quiet enjoyment—evidence sufficient

The evidence was sufficient to support claims for constructive eviction and breach of the implied covenant of quiet enjoyment in an action arising from a leaking roof which ultimately had to be replaced. The landlord's breach of the lease rendered the premises unfit for plaintiff's purposes; such action constituted constructive eviction which automatically operated as a breach of the implied covenant of quiet enjoyment.

Am Jur 2d, Landlord and Tenant §§ 314-316, 333, 336.

7. Trover and Conversion § 2 (NCI3d)— breach of lease of real property—conversion of personal property—evidence sufficient

There was sufficient evidence of conversion of personal property in an action for breach of a real property lease where the evidence showed that in January 1986 plaintiff vacated the building due to the worsening condition of the interior of the restaurant; restaurant equipment and supplies remained in the building; representatives of plaintiff repeatedly testified that the closing was not meant to be permanent; plaintiff had exercised a five-year renewal option on the lease; plaintiff's

attorney received a letter from defendants stating that they were taking possession of the building after defendants closed on the sale of the building to a third party; and plaintiff's equipment and other fixtures remained in the building. Defendant Marina's actions in denying plaintiff access to its property was sufficient to support the verdict as to conversion.

Am Jur 2d, Conversion § 28.

8. **Landlord and Tenant § 13 (NCI3d)— breach of lease— damages—evidence sufficient**

The evidence was sufficient to show damages in an action for breach of a lease for a restaurant where the lessor's breach resulted in constructive eviction of the tenant. The tenant's general damages in such a case are the value at the time of the eviction of the unexpired term, less any rent reserved, and recovery may also include compensatory damages for pecuniary losses proximately resulting from the eviction.

Am Jur 2d, Landlord and Tenant §§ 183, 187, 323, 324, 326.

9. **Trover and Conversion § 4 (NCI3d)— breach of lease— conversion of personal property—award of damages—evidence sufficient**

There was sufficient evidence in an action for breach of a lease for a restaurant to support the jury's award of damages for conversion of plaintiff's personal property where the evidence viewed in the light most favorable to plaintiff established that the total value of all of the furniture and equipment owned by plaintiff corporation was $150,000; a videotape was made of the interior of the restaurant showing the equipment and other fixtures owned by plaintiff after defendant Marina took possession of the restaurant building; and the former manager of the restaurant testified that the value of the goods shown in the videotape was over $150,000.

Am Jur 2d, Conversion §§ 105, 108, 135.

10. **Landlord and Tenant § 13 (NCI3d)— breach of lease for restaurant—instructions on abandonment and surrender—no error**

There was no error in an action for breach of a lease for a restaurant concerning the court's alleged failure to instruct the jury on the issues of abandonment and surrender where the record clearly reflects that the trial court in-

structed the jury on the issue of abandonment of the premises by plaintiff and the court correctly refused to instruct on surrender because it is clear that plaintiff repeatedly expressed the intent to reopen the restaurant and intended no surrender. Being forced to abandon premises due to a constructive eviction does not automatically give rise to a surrender of the premises as that term is used in the law of landlord and tenant.

Am Jur 2d, Landlord and Tenant §§ 333, 345, 1095, 1096.

APPEAL by defendants from judgment entered 14 June 1989 in NEW HANOVER County Superior Court by *Judge Cy A. Grant.* Heard in the Court of Appeals 3 May 1990.

The original plaintiffs in this case, Marina Food Associates, Inc. and S. N. McKenzie, brought this action to recover damages for breach of a lease agreement against defendant Marina Restaurant, Inc. Plaintiffs subsequently amended their complaint to include the individual defendants, who were the only shareholders of the corporate defendant, and Benson Marine Group, Inc., which had purchased the property in question from defendant Marina Restaurant, Inc. At the conclusion of trial, motions for directed verdicts dismissing claims asserted by plaintiff McKenzie and counterclaims of defendants as to McKenzie were granted. Plaintiffs' claims against defendant Benson Marine Group and defendant Benson Marine Group's counterclaims against plaintiffs were also dismissed without prejudice. The motion for directed verdict by defendant Marina Restaurant, Inc. and the individual defendants was denied. The jury returned verdicts in favor of Marina Food Associates (plaintiff) on the issues of breach of the lease agreement, conversion of personal property, and damages. The motion for judgment notwithstanding the verdict by defendant Marina Restaurant, Inc. and the individual defendants (defendants) was denied. Defendants appeal.

Carr, Swails, Huffine & Crouch, by Auley M. Crouch, III; and Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, Jr., for plaintiff-appellee.

Burney, Burney, Barefoot & Bain, by Roy C. Bain and Mary Elizabeth Wertz, for defendant-appellants.

WELLS, Judge.

We note at the outset that plaintiff has not brought forward and argued its single cross-assignment of error; it is therefore deemed abandoned pursuant to Rule 28(b)(5) of the N.C. Rules of Appellate Procedure.

The pertinent facts are as follows: In January 1981, plaintiff leased property from defendant Marina Restaurant (Marina) for the operation of a restaurant. The initial term of the lease ran from 1 January 1981 to 28 February 1982, and contained three renewal options allowing extensions of one year, three years, and five years. The lease provided for a minimum annual rent of $40,000. Shortly after plaintiff began operating the restaurant, the roof began leaking. Plaintiff was able to deal with the leaks by periodically patching the roof and making other necessary repairs, such as replacing ceiling tiles that were damaged due to the leaks. During this time plaintiff also purchased restaurant equipment and other fixtures and renovated the restaurant.

During 1984 the leaking worsened and a series of discussions began between defendant Marina and plaintiff concerning the need to replace the roof. There was initial disagreement over who was obligated to replace the leaking roof. Over the course of 1985, conditions inside the restaurant deteriorated due to damage caused by the leaks. For this reason, plaintiff closed the restaurant in January 1986. Ultimately, defendant Marina had the roof replaced in March 1986.

In October 1985, Marina listed the restaurant property for sale. Plaintiff exercised its option to extend the lease for an additional five years in December 1985. Negotiations for the purchase of the property by Benson Marine Group began in January 1986.

After replacing the roof in March 1986, defendant Marina notified plaintiff that it could reopen the restaurant. Prior to reopening, plaintiff arranged for the necessary building inspections. The results of the inspections were to the effect that the building could not be reopened until repairs were made to the restaurant's interior.

Plaintiff brought this action in October 1986. On 22 December 1986 the sale of the property to Benson Marine Group was closed. At that time, all assets of defendant Marina were assigned to the shareholders, individual defendants in this action.

In this appeal defendants assign as error two evidentiary rulings, rulings allowing amendment of the pleadings, the instructions to the jury, the denial of their motions for directed verdict and for judgment notwithstanding the verdict. We find no error in the trial.

[1] Defendants' first two assignments of error concern evidentiary rulings made by the trial court. Defendants first contend that it was error to admit into evidence defendants' January 1986 offer of $150,000 to plaintiff to terminate the lease. In support of this contention defendants assert that the offer should have been excluded pursuant to N.C. Gen. Stat. § 8C, Rule 408 of the N.C. Rules of Evidence, or alternatively, pursuant to G.S. § 8C, Rule 402. We find these arguments to be without merit. First, Rule 408 does not apply unless there is an existing dispute when the offer "to compromise a claim which [is] disputed" is made. *See, e.g., Wilson County Bd. of Ed. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970); *Horton v. Goodman*, 68 N.C. App. 655, 315 S.E.2d 728 (1984). In the present case a series of discussions concerning the leaking roof had taken place throughout most of 1985. By the fall of 1985, defendant Marina had apparently agreed to replace the roof but wanted a specific roofing company to do the work. Plaintiff had exercised its option to renew the lease for five more years and was planning to reopen the restaurant after the roof was replaced. Consequently, in late January 1986, there was no dispute concerning the repair or replacement of the roof and the $150,000 buy-out offer was therefore not an offer to settle or compromise a disputed claim. Prior to its offer to plaintiff, defendant Marina had accepted an offer to sell the restaurant property to Benson Marine Group for $1.1 million. When plaintiff rejected defendant Marina's buy-out offer, the purchase price of the property was reduced to $925,000. Bill Benson of Benson Marine Group acknowledged that $150,000 of the reduction in price was attributable to the value of the lease. (The remaining $25,000 difference was attributable to the cost of replacing the roof.) It is clear that the buy-out offer was an effort on the part of defendant Marina to satisfy a condition of the sale of the restaurant property to Benson Marine Group and was not violative of Rule 408. Finally, the admission of the offer is also not barred by Rule 402. The offer was evidence of the value of the lease and is therefore relevant to the issue of damages in this case.

[2] Defendants also assert that the trial court erred in admitting into evidence a letter from attorney Douglas Fox to the individual defendants and their accountant. Defendants contend that the letter was protected by the attorney-client privilege. We disagree. The attorney-client privilege extends only to confidential communications. A communication intended to be disclosed to a third party is not confidential. *See* 1 *Brandis on North Carolina Evidence* § 62 (3d ed. 1988). The letter in question was communicated to a third party and was therefore not a confidential communication protected by the attorney-client privilege. These assignments are therefore overruled.

[3] Defendants next assign error to the grant of plaintiff's motion, pursuant to N.C. Gen. Stat. § 1A-1, Rule 15 (1983) of the N.C. Rules of Civil Procedure, to amend its pleading to include breach of the implied covenant of quiet enjoyment and to clarify that the claim of conversion of personal property applied to these defendants as well as to Benson Marine Group. In order to conform the pleadings to the evidence and raise issues tried by the express or implied consent of the parties, G.S. § 1A-1, Rule 15(b) authorizes amendment of pleadings at any point in trial, even after judgment. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E.2d 608 (1987), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988). The trial court's ruling on such a motion is not reviewable absent an abuse of discretion. *Id.* In the present case plaintiff offered evidence in support of constructive eviction. If found, constructive eviction as a matter of law constitutes a breach of the implied covenant of quiet enjoyment. *Dobbins v. Paul*, 71 N.C. App. 113, 321 S.E.2d 537 (1984). Furthermore, evidence in support of plaintiff's claim for conversion was not objected to by defendants at trial and defendants' counsel signed, and did not contest, a pretrial order in which plaintiff stated that one of the issues for trial was whether defendant Marina had converted personal property. These amendments did not prejudice defendants and were properly allowed.

[4] Defendants also argue that it was error to grant partial summary judgment against the individual defendants regarding liability for damages recovered against the corporate defendant in this action. We disagree. Former Chapter 55, in effect at the time of this action, provides that shareholders, as well as directors, are liable to the corporation for any unlawful amounts received by them. Unlawful amounts received by shareholders include any redemptive or purchase price or distribution from the corporation

at a time when the corporation is unable to meet its obligations in the ordinary course of business, or "*when the shareholder has knowledge that such receipt diminishes assets of the corporation*" in a manner contrary to the provisions of Chapter 55. N.C. Gen. Stat. § 55-54 (1982) (emphasis supplied). To that end, the procedures for dissolution of a corporation include the provision that a corporation adequately provide for the payment of all of its obligations before distributing assets among its shareholders. *See* N.C. Gen. Stat. § 55-119 (1982). It is undisputed that the individual defendants were the directors and only shareholders of the corporation and that on 22 December 1986 the assets of the corporation were assigned to them. The individual defendants were aware of the present action when they received distribution of the restaurant's assets. The undisputed testimony of Douglas Fox showed that no assets or sum of money had been set aside for the payment of any liability or claims arising out of this action. Obviously, the redemption or distribution completely diminished the assets of the corporation, thus subjecting the individual defendants to liability for corporate obligations. Defendant correctly points out, however, that shareholders' liability under Chapter 55 is limited to the amount received by them. *See* G.S. § 55-54.

The record before us indicates that no appropriate factual determination has been made to determine the extent of liability of the respective individual defendants. While partial summary judgment was correctly entered as to their being liable, we must remand for the trial court to take evidence and make findings as to the extent of liability of each individual defendant. When that has been accomplished, the judgment of 14 June 1989 shall be appropriately modified.

[5] Defendants next contend that plaintiff's evidence was insufficient to support the jury's verdict that defendant Marina breached the lease agreement, converted personal property of plaintiff, and that plaintiff suffered damages as a result. A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). In ruling on a defendant's motion for directed verdict under N.C. Gen. Stat. § 1A-1, Rule 50, the plaintiff's evidence must be taken as true and all the evidence must be taken in the light most favorable to the plaintiff. *Id.* All conflicts in the evidence must be resolved in plaintiff's favor and he is entitled to the benefit of every inference that could reasonably be drawn in his favor.

West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985). Only where the evidence, when so considered, is insufficient to support a verdict in the plaintiff's favor should the defendant's motion be granted. *Id.* If there is even a scintilla of evidence to support plaintiff's prima facie case then the motion should be denied. *Burris v. Shumate*, 77 N.C. App. 209, 334 S.E.2d 514 (1985). A motion for judgment notwithstanding the verdict is essentially the renewal of a prior motion for a directed verdict, and the same rules regarding the sufficiency of the evidence to go to the jury are equally applicable. *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 319 S.E.2d 290, *disc. rev. denied*, 312 N.C. 622, 323 S.E.2d 923 (1984).

Whether defendant Marina breached its lease agreement with plaintiff depends upon whether it had a duty to replace the roof and, if so, whether its failure to do so in a timely manner resulted in a constructive eviction.

In the absence of a lease agreement to the contrary, a landlord is under no common law obligation to repair leased premises. *See, e.g., Harrill v. Refining Co.*, 225 N.C. 421, 35 S.E.2d 240 (1945) and cases cited therein. The lease agreement at issue contained a provision regarding repairs which the court found to be ambiguous. An ambiguous clause in a lease is construed in favor of the lessee, particularly where the lease was drafted by the lessor. *See Coulter v. Finance Co.*, 266 N.C. 214, 146 S.E.2d 97 (1966) and cases cited therein. In addition, the intent of the parties, where not clear from the contract, may be inferred from their actions. *See Branch Banking and Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 332 S.E.2d 186 (1985). Subsequent conduct of the parties is admissible to show their intent when the meaning of a contract is ambiguous. *See MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E.2d 271 (1983).

The evidence tended to show the following: The lease agreement contained a statement to the effect that the lessee "will keep the parking area and the exterior of said building including roof and outside walls in good repair, normal wear and tear excepted." The lease agreement was prepared by defendant Marina's attorney, Douglas Fox. In March 1985, when it became apparent that the roof could no longer be repaired, but instead had to be replaced, Fox wrote to S. N. McKenzie requesting that plaintiff replace the roof. Sam Poole, president of plaintiff corporation, subsequently met with Fox and asserted that it was defendant Marina's

obligation to replace the roof. At one point, plaintiff, through Poole, offered to replace the roof and deduct the cost from the rent. Defendant Marina did not respond to this overture and, after the initial request that plaintiff replace the roof, defendant did not raise the issue with plaintiff again. In subsequent discussions about replacing the roof, Fox assured Poole that the roof would be replaced and never stated that it was not the landlord's responsibility to replace the roof. In answer to repeated questions as to why work had not yet begun, Fox told Poole and McKenzie that it was due to the unavailability of the roofing company defendant wanted to do the work. In December 1985 Fox wrote to the individual defendants and their accountant advising them that it was his opinion that if the roof damage was "normal wear and tear" then it was "our problem to correct." In a conversation with the restaurant's manager, Conva P. Kersey, majority shareholder, officer and director of defendant corporation, acknowledged that defendant corporation would have to replace the roof. Ultimately, defendant Marina had the roof replaced in March 1986.

When taken in the light most favorable to the plaintiff, we hold that this was sufficient evidence to support the jury's verdict that defendant had breached its lease agreement regarding repair of the roof.

[6] Additional claims associated with breach of the lease agreement which defendants contend were not supported by the evidence include constructive eviction and breach of the implied covenant of quiet enjoyment. We disagree. An act of a landlord which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing the tenant to abandon them, amounts to a constructive eviction. 49 Am. Jur. 2d, *Landlord and Tenant*, § 576 (1970). Put another way, when a landlord breaches a duty under the lease which renders the premises untenable, such conduct constitutes constructive eviction. 1 *American Law of Property*, § 3.51 (1952 & Supp. 1962). Furthermore, a lease includes the implied covenant of quiet enjoyment. *Andrew & Knowles Produce Co. v. Currin*, 243 N.C. 131, 90 S.E.2d 228 (1955); *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E.2d 362 (1964). Where a lessee has been constructively evicted, the covenant of quiet enjoyment has also been breached. *Dobbins, supra.*

Based on our conclusion that the evidence of breach of the lease was sufficient to support the jury's verdict, we must reject

defendants' contentions with regard to these claims as well. The landlord's breach of the lease rendered the premise unfit for plaintiff's purposes. Such action constituted constructive eviction which automatically operated as a breach of the implied covenant of quiet enjoyment.

[7] Defendants' second asserted ground for directed verdict is that plaintiff failed to produce sufficient evidence that defendant converted the personal property of plaintiff. Conversion is the unauthorized assumption and exercise of right of ownership over goods or personal property belonging to another to the alteration of their condition or the exclusion of the owner's rights. *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981). The evidence showed that in January 1986 when plaintiff vacated the building due to the worsening condition of the interior of the restaurant, restaurant equipment and supplies it had purchased remained in the building. Representatives of plaintiff repeatedly testified that the closing was not meant to be permanent but rather that it was their intent to reopen the restaurant. Plaintiff had exercised a five-year renewal option on the lease. Then, on 22 December 1986, when defendants closed the sale of the building to Benson Marine Group, plaintiff's attorney received a letter from defendants stating that they were taking possession of the building. Plaintiff's equipment and other fixtures remained in the building. The essence of conversion being wrongful deprivation of an owner's property by another, defendant Marina's actions in denying plaintiff access to its property was sufficient to support the jury's verdict as to conversion. *Id.*

[8] Defendants' final contention with regard to their motions for directed verdict and judgment notwithstanding the verdict is that the evidence was insufficient to show that plaintiff suffered damages as a result of defendant's conduct. We disagree. A breach of a lease agreement by the lessor may give rise to a claim for damages by the lessee. *See, e.g., Produce Co. v. Currin, supra.* In this case the lessor's breach resulted in constructive eviction of the tenant. It is well settled that a tenant may recover damages that proximately result from a wrongful eviction. *Burwell v. Brodie*, 134 N.C. 540, 47 S.E. 47 (1904); *Goler Metropolitan Apartments, Inc. v. Williams*, 43 N.C. App. 648, 260 S.E.2d 146 (1979), *disc. rev. denied*, 299 N.C. 328, 265 S.E.2d 395 (1980). A tenant's general damages in such a case are the value, at the time of the eviction, of the unexpired term, less any rent reserved. *See generally* 52 C.J.S., *Landlord and Tenant*, § 461(4) (1968). However, a tenant's

recovery is not limited to the value of the leasehold interest only, but may also include compensatory damages for pecuniary losses proximately resulting from the eviction, including conversion of personal property and, in the case of a business, loss of profits when such loss is ascertainable to a reasonable degree of certainty. *Id.* at § 461(1). Therefore, plaintiff's evidence as to the value of its lease was sufficient to support the jury's verdict for damages resulting from breach of the lease agreement.

[9] Likewise, the evidence was sufficient to support the jury's award of damages for conversion of plaintiff's personal property. The measure of damages for conversion is the fair market value of the chattel at the time and place of conversion, plus interest. *Esteel Co. v. Goodman*, 82 N.C. App. 692, 348 S.E.2d 153 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987) (fair market value defined as price a willing buyer would pay a seller willing, but not compelled, to sell). A plaintiff must present evidence that will furnish a basis for determination of damages; however, it is not necessary to prove damages with absolute certainty. *Id.* (citations omitted). The evidence viewed in the light most favorable to plaintiff established that the total value of all of the furniture and equipment owned by the corporation was in excess of $150,000. After defendant Marina took possession of the restaurant building, a videotape was made of the interior of the restaurant showing the equipment and other fixtures owned by plaintiff. Raymond Williams, the former manager of the restaurant, testified that the value of the goods shown in the videotape was over $150,000. This evidence was sufficient to support the jury's award of damages for conversion.

Defendants also assign as error the trial court's instructions to the jury on the issues of breach of the landlord's duty to repair, breach of the covenant of quiet enjoyment, ambiguity, and conversion contending that the evidence was insufficient to warrant the instructions. Based on our review of the record we agree with the trial court's ruling as a matter of law that the language in the lease regarding repairs is ambiguous. Our affirmative resolution of the question concerning the legal sufficiency of the evidence to take the case to the jury on the remaining issues makes it unnecessary for us to address this assignment further.

[10] Defendants next assert that the trial court erred in refusing to instruct the jury on the issues of abandonment and surrender.

We note first of all that the record clearly reflects that the trial court instructed the jury on the issue of abandonment of the premises by plaintiff. As to the court's refusal to give an instruction on the issue of surrender as it applies to the law of landlord and tenant, we find no error. Although often treated similarly by courts, the terms abandonment and surrender have essentially different meanings. 1 C.J.S. *Abandonment* § 2 (1985). Abandoning a right or thing, without regard to who, if anyone, may thereafter appropriate or possess it, is essentially different from the surrender of such right or thing to an ascertained and designated person. *Id.* The surrender of a lease requires the lessor and lessee to *mutually agree* to the termination of the term or cancellation of the lease; however, the surrender may be accomplished by act and operation of law as well as by express agreement. 51C C.J.S. *Landlord and Tenant* § 120 (1968) (emphasis added). Obviously, there was no express agreement to surrender the lease in this case. Nor do we find a surrender by operation of law as defendant contends. A surrender by operation of law is based to some extent on principles of estoppel and occurs where the parties do some act or acts from which it is necessarily implied that they have both agreed to consider the surrender as made. *Id.* at § 124. Whether surrender by operation of law will be implied must depend on the facts of each particular case. *Id.* On the facts of this case, it is clear that plaintiff intended no surrender, but rather repeatedly expressed the intent to reopen the restaurant. Being forced to abandon premises due to a constructive eviction does not automatically give rise to a surrender of the premises as that term is used in the law of landlord and tenant. Refusal to submit a requested instruction is not error when instructions given fully and fairly present issues in controversy. *Tan v. Tan*, 49 N.C. App. 516, 272 S.E.2d 11 (1980), *disc. rev. denied*, 302 N.C. 402, 279 S.E.2d 356 (1981). The facts of this case do not imply a surrender by operation of law and the trial court did not err in refusing to give the instruction. This assignment of error is overruled.

For the reasons given above, we find no error in the trial, but remand for further proceedings to determine the appropriate extent of liability of each individual defendant.

No error in the trial; remanded for modification of judgment.

Judges PARKER and DUNCAN concur.

CAROLYN M. SPROLES AND HUSBAND, CHARLES B. SPROLES, PLAINTIFFS v. DAVID REED GREENE, TRAVELERS INDEMNITY INSURANCE COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, DEFENDANTS

JAMES A. PHILLIPS AND WIFE, RITA L. PHILLIPS, PLAINTIFFS v. DAVID REED GREENE, TRAVELERS INDEMNITY INSURANCE COMPANY AND AETNA CASUALTY & SURETY COMPANY, DEFENDANTS

CAROLYN M. SPROLES AND HUSBAND, CHARLES B. SPROLES, PLAINTIFFS v. TRAVELERS INDEMNITY COMPANY OF AMERICA, UNITED STATES FIDELITY AND GUARANTY COMPANY AND THE AETNA CASUALTY & SURETY COMPANY, DEFENDANTS

CAROLYN M. SPROLES AND HUSBAND, CHARLES B. SPROLES, PLAINTIFFS v. INTEGON GENERAL INSURANCE CORPORATION, DEFENDANT

No. 8824SC641

(Filed 21 August 1990)

1. **Insurance § 69 (NCI3d)— business automobile insurance— underinsured motorist coverage—unavailability to injured employee**

Underinsured motorist coverage on vehicles owned by a nursery business was not available to employees injured while riding in a vehicle not owned by the nursery even though the employees were on a business trip at the time of the accident.

Am Jur 2d, Automobile Insurance § 322.

2. **Insurance § 69.1 (NCI3d)— amount of underinsured motorist coverage**

The underinsured motorist coverage of an automobile policy per person and per accident was the same amount as the personal injury liability coverage by operation of N.C.G.S. § 20-279.21(b)(4) even though the policy stated lower limits.

Am Jur 2d, Automobile Insurance § 322.

3. **Insurance § 69 (NCI3d)— underinsured motorist coverage— policy limits exhausted—inapplicable to loss of consortium claim**

The underinsured motorist coverage of an automobile policy did not apply to a husband's loss of consortium claim based on injuries to his wife where the insurer's maximum liability

for injuries to the wife will be exhausted by payment of that amount toward the wife's unsatisfied judgment against the tortfeasor.

Am Jur 2d, Automobile Insurance §§ 293, 426, 450.

4. **Insurance § 69 (NCI3d)— underinsured motorist coverage—two policies—maximum liability—amount paid by tortfeasor's insurer**

The trial court erred in allowing each of two underinsured motorist insurers to reduce its maximum liability by the $25,000 paid to the injured party by the tortfeasor's liability insurer. Rather, only the aggregate amount of the two coverages should have been reduced by the $25,000 payment, and the maximum liability of each insurer should have been reduced by only $12,500.

Am Jur 2d, Automobile Insurance § 298.

5. **Judgments § 55 (NCI3d)— prejudgment interest—amount not covered by liability insurance**

An automobile liability insurer was liable for prejudgment interest on plaintiff's entire $750,000 judgment against its insured, not just on the $25,000 covered by liability insurance. N.C.G.S. § 24-5(b).

Am Jur 2d, Automobile Insurance § 428.

6. **Judgments § 55 (NCI3d)— automobile insurance—interest on judgment—offer to pay policy limit**

Interest on a judgment against a tortfeasor did not stop upon an offer by the tortfeasor's automobile insurer to pay its policy limit but continued until the date that the policy limit was actually paid into court. A clause of the automobile liability policy providing that the insurer's duty to pay interest ends when it pays that part of the judgment which does not exceed its limit of liability conflicts with N.C.G.S. § 24-5 and is thus without effect.

Am Jur 2d, Automobile Insurance § 428.

7. **Insurance § 69 (NCI3d)— underinsured motorist coverage—no reduction for workers' compensation**

N.C.G.S. § 20-279.21(e) does not permit an insurance carrier to reduce the underinsured motorist coverage in a per-

sonal automobile insurance policy by amounts paid to the insured as workers' compensation benefits.

Am Jur 2d, Automobile Insurance §§ 293, 316.

8. **Insurance § 69.1 (NCI3d)— underinsured motorist coverage— policy limit—no reduction for payment by another insurer**

An underinsured motorist insurer's policy limit obligation was not reduced by an underinsured motorist payment received by the injured insured from another insurer. A provision of the policy limiting an injured insured's recovery to the highest applicable limit of liability under any one policy conflicts with N.C.G.S. § 20-279.21(b)(4) and is unenforceable.

Am Jur 2d, Automobile Insurance §§ 327, 328.

APPEAL by plaintiffs and defendant United States Fidelity and Guaranty Company from order entered 15 January 1988 and judgment entered 5 February 1988 by *Judge Charles C. Lamm, Jr.* in MITCHELL County Superior Court. Heard in the Court of Appeals 10 January 1989.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Roy W. Davis, Jr. and Michelle Rippon, for plaintiff appellants-appellees Sproles.

Patla, Straus, Robinson & Moore, by Harold K. Bennett, for plaintiff appellants-appellees Phillips.

Harrell & Leake, by Larry Leake, for defendant appellant-appellee United States Fidelity and Guaranty Company.

Palmer, Miller, Campbell & Martin, P.A., by Douglas M. Martin, for defendant appellee Aetna Casualty and Surety Company.

Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn and Glenn S. Gentry, for defendant appellee Integon General Insurance Corporation.

PHILLIPS, Judge.

The appeals in these consolidated cases are from an order and judgment establishing the rights and obligations of the parties under certain automobile insurance policies issued by the defendant insurance companies. Each plaintiff—except Charles B. Sproles, who was not there and sued only for lost consortium—was seriously

injured on 27 January 1984 when the GMC station wagon they were riding in was struck by a Chevrolet automobile operated by defendant Greene, whose car was insured by defendant Integon General Insurance Corporation for the minimum bodily injury limits of $25,000 per person and $50,000 per accident. Greene's liability to the Phillips has not yet been determined; his liability to the Sproles was established at $950,000 by a judgment entered in case number 86CVS152 on 17 July 1987—$750,000 to Mrs. Sproles, $200,000 to Mr. Sproles. On Greene's liability to Mrs. Sproles, Integon paid the court $27,312.36 on 30 July 1987; the payment covered Greene's $25,000 policy limit, prejudgment interest on $25,000 from the time suit was filed, and Greene's other court costs. Denying that its policy covers Mr. Sproles' judgment Integon has paid nothing on it. The actions allege that underinsured motorist insurance provided by the following policies apply to the damages of some or all of the plaintiffs; a policy issued by Travelers Insurance Company on the station wagon which was owned by Avery County Recapping Company, Inc. and operated by James A. Phillips; a policy issued by United States Fidelity and Guaranty Company on the personal automobiles of the Sproles; and a policy issued by Aetna Casualty & Surety Company on the business of Lakeview Nursery and Garden Center, Inc., the employer of the Phillips and Mrs. Sproles, who were on a business trip for Lakeview at the time. Aetna's policy also provided workers' compensation insurance for Lakeview's employees and Mrs. Sproles has received various payments thereunder.

After considering the provisions of the various policies and the other evidence presented by the parties, the court made in substance the following adjudications:

> (a) The underinsured motorist coverage in Travelers' policy on the station wagon, with limits of $100,000 for the accident, is available to both sets of plaintiffs and is primary to other coverages of this type; its maximum liability was reduced to $75,000 by Integon's $25,000 and $50,000 policy on Greene's vehicle.
>
> (b) The underinsured motorist coverage in Aetna's policy on Lakeview Nursery and Garden Center is not available to any of the plaintiffs because the policy covered only vehicles belonging to Lakeview.

(c) The underinsured motorist coverage in USF&G's policy on the Sproles' vehicles is available to Mrs. Sproles but does not apply to Mr. Sproles' consortium claim; the coverage limits are $100,000 for the accident, though the policy's liability limits are $300,000 per accident and $100,000 per person; the limits must be credited with the $25,000 Mrs. Sproles received from Integon; no credit is due USF&G for Travelers' underinsured motorist payments or the workers' compensation payments that Aetna made to Mrs. Sproles.

(d) Integon's liability policy on Greene's car does not apply to any of the consortium claims; Integon is not liable for prejudgment interest on the Sproles' judgments and has paid all the post-judgment interest due.

The adjudications as to Travelers were settled by that company paying $58,250 to the Sproles and agreeing to pay the Phillips $41,750 in the event they obtain judgment against Greene for that much more than the $25,000 available to them under Integon's policy. Six of the remaining adjudications are challenged by one or more of the plaintiffs and two others are challenged by USF&G. The challenged holdings are addressed in sequence.

I.

PLAINTIFF'S APPEAL

A.

The holding that the underinsured motorist insurance provided by Aetna's policy with Lakeview Nursery and Garden Center is not available to any of the plaintiffs because the coverage applied only to vehicles owned by Lakeview.

[1] This holding by the trial court is correct and we affirm it. The policy states in "ITEM TWO. SCHEDULE OF COVERAGES AND COVERED AUTOS" that the only autos covered by its uninsured motorist insurance (of which underinsured motorist insurance is a type, G.S. 20-279.21(b)(4)) were autos classified as Class 2 vehicles by ITEM THREE of the policy. That item defines Class 2 vehicles as "Only those *autos you* own." This means, of course, that the coverage applied only to vehicles owned by the policyholder, Lakeview Nursery and Garden Center, Inc. Though no vehicle owned by Lakeview was involved in the collision and the vehicle they were injured in was owned by Avery County Recapping Company,

plaintiffs argue that the policy terms can and should be construed to cover the vehicle in which they were riding because it was a business policy designed to cover Lakeview's nursery operation, and the Phillips and Mrs. Sproles were employees on a business trip when injured. Though these facts are undisputed, they do not justify expanding the policy terms beyond those explicitly agreed to by the contracting parties. For in obtaining the insurance, as the application shows, Lakeview had the option of having it cover vehicles of several different classifications, including Class 1, defined as "ANY AUTO," or Class 9, defined to include borrowed vehicles used in connection with the business, but chose to cover only its own vehicles. That limitation having been agreed to by the parties to the policy, it is binding upon us and the plaintiffs.

B.

The holding that USF&G's underinsured motorist insurance limits on the Sproles' vehicles are $100,000 for the accident, as the policy states, though the policy's bodily injury liability limits are $300,000 for each accident and $100,000 for each person.

[2] This holding is erroneous and we reverse it. G.S. 20-279.21(b)(4) as it now exists, following the 1985 amendment, explicitly requires, in substance, that unless rejected by the policyholder each automobile insurance policy issued in this state must have underinsured motorist coverage in the same amount as the personal injury liability coverage. Recently our Supreme Court held that G.S. 20-279.21(b)(4) as it existed when this policy was issued, though not as clearly written, meant the same thing. *Proctor v. N. C. Farm Bureau Mutual Insurance Co.*, 324 N.C. 221, 376 S.E.2d 761 (1989). So notwithstanding the lower limits stated in the policy, since the Sproles admittedly did not reject the underinsured motorist coverage and the policy has liability limits of $100,000 per person and $300,000 per accident, the underinsured motorist coverage is in the same amount by operation of the statute. Upon remand, therefore, this ruling must be modified to provide that USF&G's underinsured motorist coverage limits are $100,000 per person and $300,000 per accident.

C.

The holding that USF&G's underinsured motorist insurance coverage does not apply to the consortium claim of Mr. Sproles.

[3] This adjudication is correct and we affirm it. The Limit of Liability provision in the bodily injury section of the USF&G policy states that:

> The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. Subject to this limit for "each person", the limit of liability shown in the Declarations for "each accident" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident. . . This is the most we will pay as a result of any one auto accident regardless of the number of . . . [c]laims made; . . .

The Limit of Liability provision in the Uninsured Motorists Coverage section of the policy states the same thing. These clear and unambiguous provisions, not forbidden by law, are binding upon the parties. Under these provisions and our ruling in B above, USF&G's maximum liability for the bodily injury sustained by Mrs. Sproles is $100,000, and since that liability will be exhausted upon paying that amount against her unsatisfied judgment against Greene, we need not determine whether the coverage would apply to Mr. Sproles' derivative claim based upon Mrs. Sproles' injury if her damages were less than $100,000. *Robinson v. Seaboard System Railroad, Inc.*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

D.

The holding that USF&G's liability to Mrs. Sproles is reduced by the $25,000 she received from the tort-feasor's insurer.

[4] The trial court erred in granting both USF&G and Travelers a $25,000 reduction in their obligation because of the single $25,000 payment Integon made for the underinsured Greene. G.S. 20-279.21(b)(4) (1983) provides in pertinent part that:

> The insurer shall not be obligated to make any payment because of bodily injury to which underinsured motorist insurance coverage applies and that arises out of the ownership, maintenance, or use of an underinsured highway vehicle until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements,

> and provided the limit of payment is only the difference between the limits of the liability insurance that is applicable and the limits of the underinsured motorist coverage as specified in the owner's policy. . .

The trial court's holding was apparently based upon *Davidson v. United States Fidelity and Guaranty Co.*, 78 N.C. App. 140, 336 S.E.2d 709 (1985), *aff'd*, 316 N.C. 551, 342 S.E.2d 523, *reh'g denied*, 317 N.C. 342, 346 S.E.2d 138 (1986), where it was held that the underinsured motorist limits had to be reduced by the $25,000 the insured received from the tort-feasor's insurance company. But that case involved only one underinsured motorist policy with limits of $25,000 and is not authority for the proposition that each of several applicable underinsured motorist policies must be reduced by the amount paid for the tort-feasor. Our law is rather that an insured may collect under multiple underinsured motorist policies up to, but not more than, his actual loss and that a carrier having accepted a premium for underinsured motorist coverage may not deny coverage on the ground that other such insurance is available to the insured. *Moore v. Hartford Fire Insurance Company*, 270 N.C. 532, 155 S.E.2d 128 (1967). Thus, in this case, the two underinsured motorist coverages available to Mrs. Sproles in the aggregate amount of $200,000 should have been reduced by $25,000, the only payment Integon made, rather than $50,000; the maximum liability of each carrier should have been reduced by $12,500 rather than $25,000; and the judgment entered against USF&G should have been for $87,500, rather than $75,000. *See Schmick v. State Farm Mutual Insurance Co.*, 704 P.2d 1092, 103 N.M. 216 (1985); *Connolly v. Royal Globe Insurance Co.*, 455 A.2d 932 (Me. 1983).

E.

> *The holding that Integon is liable for prejudgment interest on only $25,000 of Mrs. Sproles' $750,000 judgment against its insured.*

[5] This holding is erroneous and we reverse it. Integon's policy states in pertinent part that "[i]n addition to our limit of liability, we will pay all defense costs we incur." Prejudgment interest, provided for by G.S. 24-5, is a "cost" within the meaning of an insurance contract. *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985). Before being amended in 1985, G.S. 24-5 was construed as requiring prejudgment interest on only the portion of a judgment covered by liability insurance. *Wagner v. Barbee*, 82 N.C. App. 640,

347 S.E.2d 844 (1986), *disc. rev. denied*, 318 N.C. 702, 351 S.E.2d 761 (1987). That limitation on the tort-feasor's liability for prejudgment interest was removed by the amendment made effective 1 October 1985 which caused the statute to read as follows:

> (b) Other Actions—In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

The amendment applies to this case; for the terms of its enactment excluded from its application only pending litigation, and this action was not filed until May, 1986, several months after the amendment's effective date. Upon remand prejudgment interest on Mrs. Sproles' $750,000 judgment must be taxed against Greene, less the interest already paid.

F.

The holding that Integon has paid the post-judgment interest our law requires.

[6] This holding is erroneous and we reverse it. It is based upon the undisputed fact that on the date the judgments against Greene were filed Integon orally offered to pay its policy limit, prejudgment interest, and the costs to plaintiffs, but it did not pay those sums into court until thirteen days later. In arguing that the court correctly ruled that interest on the judgment stopped upon its offer to pay Mrs. Sproles the amount due under its policy, Integon points to the following provision of the policy:

> In addition to our limit of liability, we will pay on behalf of a covered person:
>
> . . . .
>
> 3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.

This policy limitation conflicts with G.S. 24-5 and is therefore without effect. *Nationwide Mutual Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). G.S. 24-5 specifically provides that a noncontractual judgment "bears interest from the date the action

is instituted *until the judgment is satisfied*," (emphasis supplied), and no part of Mrs. Sproles' judgment was satisfied by Integon's offer to pay its policy limits thereon. For in the absence of a stipulation to the contrary, a money judgment is satisfied only by paying the obligated amount into court. *See* the word "satisfaction," Black's Law Dictionary 1204 (5th ed. 1979). Thus, upon remand the costs against Greene must be retaxed to include interest on Mrs. Sproles' judgment until the date its policy limits were paid into court.

II.

DEFENDANT USF&G'S APPEAL

A.

The holding that USF&G's maximum underinsured motorist insurance obligation to Mrs. Sproles is not reduced by the workers' compensation payments she has received or will receive from Aetna.

[7] This holding is correct and we affirm it. In contending that this holding is erroneous USF&G relies upon the following language in the "limit of liability" section of its policy:

> Any amounts otherwise payable for damages under this coverage shall be reduced by all sums:
>
> . . . .
>
> 2. Paid or payable because of the bodily injury under any of the following or similar law:
>
> a. workers' compensation law; or
>
> b. disability benefits law.

It contends that this policy language is specifically authorized by G.S. 20-279.21(e), which provides as follows:

> (e) Such motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

Though this statute appears to only make plain that the mandatory liability policy required by the Motor Vehicle Safety and Financial Responsibility Act does not have to provide either workers' compensation coverage or insurance against liability for damaging property which the insured owns, controls, or is transporting, it has been construed to reduce a carrier's underinsured motorist coverage liability under some circumstances. In *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 517 (1989), under the authority of G.S. 20-279.21(e) a carrier was permitted to reduce its underinsured motorist coverage liability under a *business auto insurance policy* by the workers' compensation payments which the insured employee had received.

The circumstances of that case are quite different from those in this one, however, and that decision does not authorize the reduction of USF&G's liability here. In *Manning* the business auto insurance policy involved was purchased by plaintiff's employer, who instead of rejecting the underinsured motorist coverage, as it had a right to do, obtained it for the employee's protection with the provision reducing its liability by any workers' compensation paid to the employee; the workers' compensation coverage for the injured employee was also paid for by the employer who obtained it from an affiliate of the motor vehicle insurer; and the amount of plaintiff's damage was not established, the parties stipulating only that it was "not less than" the $100,000 insurance limit, against which the tort-feasor's carrier had paid its $25,000 limit and the workers' compensation carrier had paid $59,000. Based upon these circumstances, the court concluded that reducing the carrier's underinsured motorist insurance obligation by the workers' compensation payments that the employee had received would serve the public policies—(1) of relieving employers of the wasteful burden of providing duplicate insurance coverages for its employees (workers' compensation and underinsured motorist coverages); and (2) of preventing the employee from receiving a "double recovery" for the same injury.

In this case USF&G's policy is not a business policy, it is a "Personal Auto Policy"; the policy was not paid for by Mrs. Sproles' employer, she and her husband paid for it; the workers' compensation insurance was not provided by USF&G or an affiliate; and Mrs. Sproles' damages have been established at an amount far in excess of any kind of insurance that is available to her. Thus, reducing USF&G's liability to Mrs. Sproles by the workers'

compensation she has received from Aetna would not serve either of the secondary public policies enunciated in *Manning*. Instead, it would disserve the dominant public policy behind the Financial Responsibility Act, that of making insurance available for the compensation of innocently injured accident victims, and leave unfulfilled the Sproles' purpose in buying the coverage in the first place. Nothing in G.S. 20-279.21(e) suggests to us that our General Assembly intended to authorize any such absurdity.

Other jurisdictions, in the absence of an authorizing statute, have held the policy provision relied upon by USF&G void against public policy. *See O'Bar v. MFA Mutual Insurance Co.*, 275 Ark. 247, 628 S.W.2d 561 (1982); *Sweeney v. Hartford Accident & Indemnity Co.*, 136 N.J.Super. 591, 347 A.2d 380 (1975). And where such policy provisions are authorized the better holdings have setoff the injured claimant's workers' compensation payments against the damages sustained, rather than against the carrier's limits. *Lombardi v. Merchants Mutual Insurance Co.*, 429 A.2d 1290 (R.I. 1981); *The American Insurance Co. v. Tutt*, 314 A.2d 481 (D.C.App. 1974). Such holdings not only serve the main public policy that led to the enactment of financial responsibility acts in the first place—making compensation available to innocent victims of financially irresponsible motorists, *American Tours, Inc. v. Liberty Mutual Insurance Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986); *Moore v. Hartford Fire Insurance Company Group*, 270 N.C. 532, 155 S.E.2d 128 (1967)—they also support the equally important policy of requiring sellers of goods and services to deliver what they have been paid for. In this case USF&G was paid to insure Mrs. Sproles against being damaged by a financially irresponsible motorist and while her damages by such a motorist remain unpaid USF&G's obligation to her should not be reduced or eliminated because part of her loss has been paid by someone else.

B.

The holding that USF&G's policy limit obligation to Mrs. Sproles was not reduced by the underinsured motorist insurance payment that she received from Travelers.

[8] This holding is correct and we affirm it. USF&G's contention to the contrary is based upon this provision of its policy:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability

for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy.

This policy provision conflicts with G.S. 20-279.21(b)(4) and is therefore unenforceable. In addition to making the underinsured motorist coverage limits in an automobile policy the same as the liability limits, unless the policyholder rejects the coverage, *Proctor v. North Carolina Farm Bureau Mutual Insurance Company*, 324 N.C. 221, 376 S.E.2d 761 (1989), G.S. 20-279.21(b)(4) requires that multiple underinsured motorist coverage available to an innocently injured accident victim be stacked or aggregated. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). This statutory mandate would avail nothing if insurance carriers could limit an injured insured's recovery to the maximum amount due under one policy.

As to plaintiffs' appeal—affirmed in part; reversed in part.

As to defendant USF&G's appeal—affirmed.

Judges COZORT and GREENE concur.

FRED GOODMAN v. WENCO MANAGEMENT, WENDY'S FOODS, INC., D/B/A WENDY'S OLD FASHIONED HAMBURGERS AND GREENSBORO MEAT SUPPLY COMPANY, INC.

No. 8915SC1279

(Filed 21 August 1990)

1. **Food § 1 (NCI3d); Sales § 6.1 (NCI3d)— hamburger—bone—implied warranty of merchantability**

Taking into consideration the concurring and dissenting opinions, directed verdict should not have been granted for defendant Wendy's on a claim for breach of implied warranty of merchantability arising from a bone in a hamburger where Wendy's was a merchant within the terms of N.C.G.S. § 25-2-104(1); the sale of the hamburger to plaintiff was a sale of goods within the meaning of N.C.G.S. § 25-2-105(1); none of the exclusions or modifications of N.C.G.S. § 25-2-316 are applicable, so that there was a breach of an implied warranty

of merchantability if the hamburger was not fit for the ordinary purposes for which it was sold; the evidence was not so unequivocal that a court could state as a matter of law that it came from meat in the hamburger; under the principles of *Adams v. Great Atlantic & Pacific Tea Company*, 251 N.C. 565, it could not be said as a matter of law that a bone of the size allegedly found by plaintiff is natural to ground beef; if natural, it clearly remains a jury question as to whether a consumer could reasonably anticipate finding a piece of bone of that size in ground beef; and the fact that the ground beef may have complied with all state and federal regulations is only some evidence which the jury may consider in determining if the product was merchantable.

Am Jur 2d, Food §§ 84, 89, 91, 94; Sales §§ 749, 751, 755, 777.

2. **Food § 1.1 (NCI3d)— hamburger—bone—negligence**

Taking into consideration the concurring and dissenting opinions, directed verdict was properly granted for defendant Wendy's on a negligence claim arising from a piece of bone in a hamburger.

Am Jur 2d, Food §§ 84, 89, 91, 94; Sales §§ 749, 751, 755, 777.

3. **Food § 1 (NCI3d)— hamburger—bone—implied warranty of merchantability**

Taking into consideration the concurring and dissenting opinions, the trial court erred by granting summary judgment for Greensboro Meat Supply Co., Inc. (GBMS) on a claim for breach of implied warranty of merchantability arising from a bone in a hamburger where there was a genuine issue as to whether the bone was in the ground beef and, if so, whether GBMS's production of this meat constituted a breach of the implied warranty of merchantability.

Am Jur 2d, Food §§ 84, 89, 91, 94; Sales §§ 749, 751, 755, 777.

4. **Food § 1.1 (NCI3d)— hamburger—bone—negligence**

Taking into consideration the concurring and dissenting opinions, the trial court did not err by granting summary

judgment for Greensboro Meat Supply Co., Inc. (GBMS) on a negligence claim arising from a bone in a Wendy's hamburger.

Am Jur 2d, Food §§ 84, 89, 91, 94; Sales §§ 749, 751, 755, 777.

Judge ARNOLD concurring in part and dissenting in part.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiff from order entered 21 December 1987 by *Judge Anthony M. Brannon* in ORANGE County Superior Court and judgment entered 24 May 1989 by *Judge B. Craig Ellis* in ORANGE County Superior Court. Heard in the Court of Appeals 4 June 1990.

Brenton D. Adams for plaintiff-appellant.

Faison & Brown, by O. William Faison and Reginald B. Gillespie, Jr., for defendant-appellee Wenco Foods, Inc.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Sanford W. Thompson, IV and Kari Lynn Russwurm, for defendant-appellee Greensboro Meat Supply Company.

GREENE, Judge.

Plaintiff appeals the trial court's grant of summary judgment for Greensboro Meat Supply Company, Inc. (GBMS) and its directed verdict at the end of plaintiff's evidence for Wenco Management, Wenco's Foods, Inc., d/b/a Wendy's Old Fashioned Hamburgers (Wendy's).

In his complaint, the plaintiff alleged that Wendy's was negligent and breached its implied warranty of merchantability by preparing and serving a hamburger sandwich containing bone. Plaintiff also alleged that GBMS was negligent and breached its implied warranty of merchantability by processing and providing to Wendy's ground beef used in the sandwich.

At trial, plaintiff's evidence tended to show that on 28 October 1983, he purchased a double hamburger sandwich with "everything" on it. In addition to the bun and burger, his testimony mentions lettuce, tomato, ketchup and other unspecified "toppings" or "condiments." About halfway through the sandwich, he bit a hard substance. He spit out a chewed mass of burger, bun and condiments and found a piece of bone therein. Because the "majority of that mass was meat," the plaintiff concluded the bone had been

in the meat. However, he admitted that the bone could possibly have been in the bun, toppings or condiments. He stated he could not be "sure" what portion of the sandwich concealed the bone.

The plaintiff stated the bone was "possibly the size of my small fingernail," but more triangular with a slant off to one side. He took the bone home, measured it and found it between one-sixteenth and one-eighth inch thick. "It was thick on one side and shaved down on the other." Its length was about one and one-half inches, and the width was one-quarter inch at its widest, from which it narrowed to a point. Plaintiff later lost the bone.

As a result of biting the bone, the plaintiff broke two teeth, and damaged a third which later was extracted. He incurred substantial dental expenses for root canal surgery, temporary and permanent crowns, and tooth extraction.

In support of its motion for summary judgment, GBMS offered the pleadings and the plaintiff's deposition, which contained essentially the evidence plaintiff offered at trial and described above.

In granting Wendy's motion for directed verdict, the trial judge entered a written judgment which provided in pertinent part:

> The Court first considered the negligence issue. It appears to the Court upon a careful review of the law that the doctrine of *res ipsa loquitur* does not apply. The Plaintiff's evidence, taken in the light most favorable to him, shows that the ground beef obtained by the Defendant was purchased from a processing plant which was approved by the U.S. Department of Agriculture and had meat inspectors on site. The Defendant's standards for ground beef exceeded those of the U.S. Department of Agriculture, and the Defendant's inspection procedure was effective quality control and more than met the duty of care owed by the Defendant to the Plaintiff. The Plaintiff offered no evidence from which reasonable minds could conclude that the Defendant had failed to meet any duty of care owed to the Plaintiff, and the Court directs verdict in favor of the Defendant on the issue of negligence.
>
> The Court next considered the issue of implied warranty of fitness for purpose and, based upon the case law and the facts in the instant case, concludes that the bone in the hamburger patty was a natural part of the ground beef and not a substance warranted against by an implied warranty of mer-

chantability. The Court hereby directs verdict in favor of the Defendant on this issue as well.

The issues presented are: (I) in an action against Wendy's, whether a piece of bone in a hamburger sandwich is sufficient evidence to overcome a motion for directed verdict (A) in an action for breach of implied warranty of merchantability and (B) in an action for negligent preparation of the hamburger sandwich; and (II) in an action against GBMS, whether a piece of bone found in a hamburger sandwich, prepared with hamburger supplied by GBMS, is sufficient to overcome a motion for summary judgment for GBMS (A) in an action for breach of implied warranty of merchantability and (B) in an action for negligent processing of the ground beef.

I

Wendy's

On appeal from the granting of a motion for directed verdict, the evidence supporting plaintiff's claim is taken as true and considered in the light most favorable to him, granting him the benefit of every reasonable inference supporting his claim. *Adler v. Lumber Mut. Fire Ins. Co.*, 10 N.C. App. 720, 179 S.E.2d 786, *aff'd*, 280 N.C. 146, 185 S.E.2d 144 (1971). If the evidence considered in this manner is sufficient to justify a verdict for the plaintiff, the motion must be denied. *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979).

A

Implied Warranty of Merchantability

[1] The Uniform Commercial Code provides:

> Unless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

N.C.G.S. § 25-2-314(1) (1986). A merchant is defined as:

> . . . a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or

> skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

N.C.G.S. § 25-2-104(1) (1986). Goods are defined as:

> . . . all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. . . .

N.C.G.S. § 25-2-105(1) (1986).

To be merchantable, goods "must be at least such as . . . are fit for the ordinary purposes for which such goods are used . . ." N.C.G.S. § 25-2-314(2)(c) (1986).

Wendy's was a merchant within the terms of the statute, and the sale of the hamburger to the plaintiff was a sale of "goods" within the meaning of the statute. None of the exclusions or modifications of § 25-2-316 are applicable. Therefore, there exists a breach of an implied warranty of merchantability if the hamburger was not fit for the ordinary purposes for which it was sold. Generally, a restaurant "makes an implied warranty that the food which it serves is fit for human consumption, even though the restaurant in the exercise of all possible care could not have discovered its unwholesome nature." R. Anderson, *Uniform Commercial Code* § 2-314.183 (1983).

When a plaintiff has been injured by a substance in food or drink, the courts have used various tests to determine whether that food was fit for ordinary purposes for which it was sold. Some courts apply a "foreign/natural" test which generally holds that:

> when the plaintiff is injured by a substance in food or drink there is no warranty liability if the substance was one that was natural to the food, as cherry pits in cherries, crabshell in crab meat, or fish bones in fish. Conversely, warranty liabilities imposed upon the merchant seller of food if the substance in the food that causes the harm of the plaintiff was a substance that was foreign to the food, such as a nail, a piece of glass, or a piece of wire.

Anderson, § 2-314.184. Other courts apply a "reasonable expectation" test which generally provides that:

> When the plaintiff is injured by a substance in food . . . courts ignore whether the substance was natural or foreign to the food and direct inquiry to whether it was reasonable to expect the presence of the substance in the food. If it was not reasonable to expect the presence of the harm-causing substance, warranty liability can be imposed. In contrast, if it was reasonable to expect the substance in the food, the plaintiff is barred from exposing himself to the expectable risk. In effect, this view regards anything that was not expectable as "foreign;" and changes the frame of reference so that "foreign to expectations" takes the place of "foreign to food."

Anderson, § 2-314.185.

In North Carolina, in a pre-Uniform Commercial Code case, the Court was faced with an alleged breach of an implied warranty when the plaintiff sued for damages to his tooth which he received when he bit a partially crystallized kernel of corn while eating corn flakes. *Adams v. Great Atlantic & Pacific Tea Co.*, 251 N.C. 565, 112 S.E.2d 92 (1960). In affirming a directed verdict for the defendant grocery store, the *Adams* Court concluded:

> The instant case is one *where* the substance causing the injury is natural to the corn flakes, and not a foreign substance, *and where* a consumer of the product might be expected to anticipate the presence of this substance in the food.

251 N.C. at 572, 112 S.E.2d at 98 (emphases added).

We do not read *Adams*, as defendants suggest, as adopting a true "foreign/natural" test. Our reading of *Adams* is that the Court established a two-part inquiry: (1) whether the substance causing the injury is natural or foreign; and (2) if natural, whether "a consumer of the product might be expected to anticipate the presence of this substance in the food." Therefore, a plaintiff could recover under *Adams* for breach of implied warranty if either he could show that the substance was foreign or if he could show it was a natural substance but one that a consumer might not expect or anticipate. Accordingly, the *Adams* test leads to approximately the same result as the 'reasonable expectation' test; it simply does so by somewhat circuitous analysis.

In an opinion consistent with *Adams*, this court held that the *quantity* of "naturally occurring unshelled filberts" was the determinative factor in whether the filberts were merchantable within the meaning of § 25-2-314(2)(c). *Coffer v. Standard Brands*, 30 N.C. App. 134, 141, 226 S.E.2d 534, 538 (1976).

Applying the *Adams* principles to the facts of this case in determining whether the hamburger was fit for the ordinary purposes for which it was sold, we determine the trial court erred in granting the directed verdict. First, the evidence of the source of the bone is not so unequivocal that a court could state, as a matter of law, that it came from the meat in the hamburger sandwich. Plaintiff stated that he believed the bone came from the beef portion of his hamburger because the mass of chewed sandwich he spit out was mainly beef. However, he also stated the bone could have come from the bun, the condiments or the toppings. He stated he could not be "sure" of its actual source. From this evidence the jury could conclude that the bone came from the beef portion of the hamburger sandwich, but it certainly is not barred from concluding that it came from some other portion or that it is impossible to tell in which portion of the sandwich the bone was concealed.

Second, even if a jury were to determine that the bone came from the beef portion of the sandwich, the *Adams* test would not support directed verdict for defendant. It must first be determined whether a bone the size of the one plaintiff allegedly found is natural or foreign to ground beef. While a steak bone is natural as a matter of law to a T-bone steak and a fish bone natural as a matter of law to whole fish, we are not prepared to say as a matter of law that a bone of the size allegedly discovered by the plaintiff is natural to ground beef. Furthermore, even if natural, it clearly remains a jury question as to whether a consumer could reasonably anticipate finding a piece of bone of the size in question in ground beef.

We also reject Wendy's argument that since the hamburger in question complied with all state and federal regulations for ground beef that the meat was merchantable as a matter of law. The fact that the ground beef may have complied with all state and federal regulations is only some evidence which the jury may consider in determining if the product was merchantable. *Cf. Collingwood v. G.E. Real Estate Equities, Inc.*, 324 N.C. 63, 68-69, 376 S.E.2d

425, 428 (1989) (compliance with state building code is evidence of due care but is not conclusive). In any event, as we have noted, since we cannot say that the bone came from the beef, proof that the hamburger meat itself complied with all state and federal regulations could not support entry of directed verdict for defendant Wendy's.

B

Negligence

[2] N.C.G.S. § 106-129 provides in pertinent part:

> A food shall be deemed to be adulterated:
>
> (1) a. If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this paragraph if the quantity of such substance in such food does not ordinarily render it injurious to health;

N.C.G.S. § 106-129(1)(a) (1988). It is a misdemeanor offense to sell any adulterated food. N.C.G.S. §§ 106-122 and 106-124 (1988).

Were a jury to determine that a bone of the size described by the plaintiff was of a quantity (or size) which ordinarily renders a hamburger sandwich injurious to health, then a violation of § 106-29 is proven and a *prima facie* case of negligence established if a jury determines the violation was a proximate cause of the injury. *See Lutz Ind. v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955) (violation of ordinance constitutes negligence per se when ordinance imposes a specific duty for the protection of others and breach of such duty is proximate cause of injury).

II

GBMS

[3] Summary judgment is an extraordinary remedy, and it is warranted only when there is no dispute as to material facts and the moving party deserves judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102, *cert. denied*, 303 N.C. 710 (1981). In ruling on a summary judgment motion, the trial court must view the record in the light most favorable to the party opposing the motion. *Peterson v. Winn-Dixie of Raleigh, Inc.*, 14 N.C. App. 29, 187 S.E.2d 487 (1972). To be entitled to

summary judgment, the movant must conclusively establish "a complete defense or legal bar to the nonmovant's claim." *Virginia Electric & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). "The burden rests on the movant to make a conclusive showing; until then, the nonmovant has no burden to produce evidence." *Id.*

A

Warranty of Merchantability

The plaintiff averred that he injured himself biting a bone while eating a hamburger sandwich sold by Wendy's, and that GBMS supplied Wendy's with beef with which Wendy's made the hamburger patties. The only evidence defendant produced at summary judgment related to the fact that the plaintiff believed the bone came from the beef patty. According to GBMS, this sets up the 'foreign/natural' standard as a bar to plaintiff's recovery.

Application of the *Adams* test would not, for the reasons heretofore asserted, bar plaintiff's recovery against GBMS because the appropriate inquiry would be whether a bone of the size described by the plaintiff was natural to ground beef, and if so, whether it was what a consumer could reasonably expect to find in ground beef.

Since a genuine issue exists as to whether the bone was in the ground beef, and if so, whether GBMS's production of this meat for Wendy's constituted a breach of GBMS's implied warranty of merchantability, we reverse the trial court's grant of summary judgment for GBMS on this issue.

B

Negligence

[4] The plaintiff averred that the defendant was negligent in producing or processing the ground beef, that GBMS sold the ground beef to Wendy's, and that GBMS's negligence in preparing the ground beef was a proximate cause of plaintiff's injury. At the time the trial court granted summary judgment, GBMS had presented no evidence conclusively establishing that the plaintiff could not succeed in its claim. The evidence produced by the defendant related only to the *Adams* test. Therefore, we must reverse the trial court's grant of summary judgment on this issue also.

Reversed and remanded.

Judge ARNOLD concurs in part and dissents in part.

Chief Judge HEDRICK dissents.

Judge ARNOLD concurring in part and dissenting in part.

I vote to affirm summary judgments and directed verdicts relating to all claims based on negligence. However, I believe the claims for implied warranty of merchantability should go to the jury. Therefore, I vote to reverse and remand the implied warranty claims brought by plaintiff.

Chief Judge HEDRICK dissenting.

In my opinion, the forecast of evidence in this case is not sufficient to withstand the motion for summary judgment of defendant, Greensboro Meat Supply Company, Inc., with respect to plaintiff's claim for negligence or breach of the implied warranty of merchantability. Likewise, in my opinion, the evidence offered at trial is not sufficient to take the case to the jury against defendants Wenco Management, Wendy's Foods, Inc., d/b/a Wendy's Old Fashioned Hamburgers (Wendy's) with respect to either negligence or breach of the implied warranty of merchantability.

I vote to affirm the summary judgment for defendant Greensboro Meat Supply Company, Inc., and the judgment directing a verdict for defendants Wenco Management, Wendy's Foods, Inc., d/b/a Wendy's Old Fashioned Hamburgers (Wendy's).

ADDIE FORREST, EMPLOYEE, PLAINTIFF v. PITT COUNTY BOARD OF EDUCATION, EMPLOYER, SELF-INSURED (STATE BOARD OF EDUCATION), DEFENDANT

No. 8910IC1183

(Filed 21 August 1990)

1. **Appeal and Error § 369 (NCI4th)— settlement of record—settled upon defendant signing stipulation and settlement agreement**

Defendant's motion on appeal to dismiss plaintiff's appeal on the ground that the record was not filed within 15 days after being settled was denied where the record on appeal was filed on 31 October 1989; defendant argues that the record was settled on 3 October 1989 pursuant to a letter from plaintiff's attorney to the chairman of the Industrial Commission; plaintiff contends that the letter constitutes information to the Commission concerning the proposed record and was not an agreement; plaintiff subsequently filed the record on appeal with minor changes with the Industrial Commission on 19 October; and defendant signed the stipulation and settlement of record on 19 October 1989, but inserted 3 October as the date the parties reached agreement. The record was not settled under Rules 12 and 18 of the North Carolina Rules of Appellate Procedure until defendant signed the stipulation and settlement on 19 October.

Am Jur 2d, Appeal and Error § 444.

2. **Appeal and Error § 409 (NCI4th)— workers' compensation award—evidence not included in record—findings presumed supported by evidence**

Plaintiff failed to show that the full Industrial Commission erred by awarding plaintiff a 15% disability rating based on testimony by her surgeon rather than a 20% to 25% rating recommended by her treating physician where plaintiff did not provide the Court of Appeals with transcripts of the proceedings, depositions, or other necessary documents pursuant to Rule 9(c) of the N.C. Rules of Appellate Procedure; when the evidence is not in the record on appeal, it is presumed that the findings of fact are supported by competent evidence and are therefore conclusive on appeal. Moreover, the record presented here contains no evidence that the Commission erred

in denying plaintiff permanent and total disability benefits and the record is furthermore void of evidence that the Commission erred in denying plaintiff a 10% late penalty under N.C.G.S. § 97-18.

Am Jur 2d, Workmen's Compensation §§ 549, 550, 617.

3. Master and Servant §§ 75, 94.1 (NCI3d)— workers' compensation—medical expenses—findings insufficient

An Industrial Commission opinion and award was remanded for further findings on the issue of whether plaintiff complied with N.C.G.S. § 97-25 in seeking medical treatment where there were no findings of fact indicating whether approval for any of plaintiff's treatment was sought within a reasonable time and whether the services performed affected a cure or rehabilitation. The Commission does not have to preclude payments for physician's services solely because approval was not previously requested; under N.C.G.S. § 97-25, a plaintiff must seek approval within a reasonable time not necessarily prior to the services or surgery rendered by the physician.

Am Jur 2d, Workmen's Compensation §§ 398, 399.

4. Master and Servant § 94.2 (NCI3d)— opinion and award of full Commission—issue not addressed—remanded

An opinion of the Industrial Commission in a workers' compensation action arising from a slip and fall in a cafeteria freezer was remanded where plaintiff requested payment of the noncontested award; defendant failed to deduct the percentage for a fee to plaintiff's attorney and pay the attorney separately; the Commission directed defendant to prepare another check to plaintiff's attorney which resulted in an overpayment to plaintiff and her attorney; defendant requested that the Full Commission address the matter, but it did not do so in its opinion and award; and defendant subsequently requested the Commission to modify its opinion and award but there was no evidence that the Commission made such modification. The Commission has a duty to consider all aspects of a case before it. N.C.G.S. § 97-91.

Am Jur 2d, Workmen's Compensation §§ 644, 646.

Judge LEWIS dissents.

APPEAL by plaintiff from opinion and award entered 13 June 1989 from the Industrial Commission by William H. Stephenson, Chairman. Heard in the Court of Appeals 4 May 1990.

On 1 February 1985, plaintiff sustained an accident during the scope and course of her employment as a cafeteria manager at one of defendant's public schools. The accident occurred when plaintiff slipped and fell in the cafeteria freezer and injured her back.

This case was heard before Honorable John Charles Rush, Deputy Commissioner, on 5 December 1985 in Greenville, North Carolina. In an opinion and award entered 18 December 1987, Deputy Commissioner Rush granted certain benefits to plaintiff and denied others.

Plaintiff appealed to the Full Commission. After a hearing on 25 May 1989, the Full Commission modified the opinion and award entered by Deputy Commissioner Rush by increasing the amount of permanent partial disability awarded to plaintiff from 10% to 15%.

From the opinion and award of the Full Commission entered 13 June 1989, plaintiff appeals. Defendant also cross-appeals from this opinion and award.

Hugh D. Cox for plaintiff-appellant and plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. Sigsbee Miller, for defendant-appellee and defendant-appellant.

ORR, Judge.

Plaintiff argues four assignments of error on appeal and defendant argues one assignment of error on cross-appeal. For the reasons below, we affirm in part, vacate in part and remand for further action consistent with this opinion.

[1] The first issue this Court must address is whether to dismiss plaintiff's appeal upon defendant's motion on the ground that plaintiff allegedly failed to file the record on appeal within 15 days after the record was settled pursuant to the Rules of Appellate Procedure. We find no merit to this issue and therefore deny defendant's motion.

Under Rule 12(a) of the N.C. Rules of Appellate Procedure, "Within 15 days after the record on appeal has been settled by any of the procedures provided in . . . Rule 18, . . . , the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." Rule 18 discusses in greater detail the methods by which the record on appeal may be settled when the appeal is taken from administrative agencies to this Court.

The record on appeal in the case before us was filed with this Court on 31 October 1989. Defendant argues that the record was settled on 3 October 1989 pursuant to a letter from plaintiff's attorney to Chairman Stephenson, in which plaintiff's attorney states:

> I wanted to let you know that [defendant's attorney] and I have verbally agreed to a Settlement of the Record in [this matter] . . . . I will be forwarding a new Copy of the Record for signature by a member of the Commission so that the record can be settled within the appropriate time.
>
> I am mailing this letter on October 3, which is prior to the date which I am to request a Judicial Settlement of the Record in accordance with the applicable Appellate Rules of Appellate Procedure.

Plaintiff contends that this letter constitutes information to the Commission concerning the proposed record on appeal and is not an agreement to the record on appeal. We agree. This letter contains conflicting evidence that it was in fact a final agreement of settlement of the record on appeal.

Plaintiff subsequently filed the record on appeal with minor changes with the Industrial Commission on 19 October 1989 pursuant to Rule 18(d)(2) of the N.C. Rules of Appellate Procedure. Defendant signed the Stipulation and Settlement of the Record on Appeal on 19 October 1989, but the date of 3 October 1989 was inserted by defendant as the date upon which the parties reached agreement on the record on appeal.

Based upon the above evidence of record, we find that the record on appeal was not settled under Rule 12 and Rule 18 of the N.C. Rules of Appellate Procedure until defendant signed the Stipulation and Settlement of the Record on Appeal on 19 October 1989. Therefore, we deny defendant's motion to dismiss on these grounds.

Plaintiff's Appeal

[2] Plaintiff first contends that the Full Commission erred by awarding plaintiff a 15% disability rating based upon testimony by plaintiff's surgeon, instead of a 20%-25% rating recommended by her treating physician.

In reviewing an opinion and award of the Industrial Commission, this Court is limited to two questions of law: "(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." *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) (citation omitted). The Commission is the sole judge of the credibility of the witnesses and the weight given to their testimony, and may assign more credibility and weight to certain testimony than other testimony. Moreover, the determination of the Commission is conclusive upon appeal even though the evidence may support two contrary findings. *Id.* at 697, 308 S.E.2d at 336 (citation omitted).

The Commission's "findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them." *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981), *citing*, *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390-91 (1980). "[I]f the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary." *Id.* at 406-07, 276 S.E.2d at 750 (citations omitted). The plaintiff has the burden of proof in establishing whether or not a disability exists. *Hall v. Chevrolet Co.*, 263 N.C. 569, 577, 139 S.E.2d 857, 862 (1965).

We note that plaintiff did not provide this Court with transcripts of the proceedings, depositions or other necessary documents pursuant to Rule 9(c) of the N.C. Rules of Appellate Procedure. When the evidence is not in the record on appeal, it is presumed that the findings of fact are supported by competent evidence, and are therefore conclusive on appeal. *Bethea v. Bethea*, 43 N.C. App. 372, 374, 258 S.E.2d 796, 798 (1979), *disc. review denied*, 299 N.C. 199, 261 S.E.2d 922 (1980); *Christie v. Powell*, 15 N.C. App. 508,

190 S.E.2d 367, *cert. denied*, 281 N.C. 756, 191 S.E.2d 361 (1972); 1 Strong's N.C. Index 4th, Appeal and Error, § 409 pp. 892-93.

With these basic principles in mind, we find that plaintiff has failed to show that the Full Commission erred in denying plaintiff's claim for the disability rating recommended by her treating physician, Dr. Boone. Moreover, the record on appeal presented to this Court contains no evidence that the Commission erred in denying plaintiff permanent and total disability benefits under N.C. Gen. Stat. § 97-31 (1985). We further find that the record is void of evidence that the Commission erred in denying plaintiff a 10% late penalty payment under N.C. Gen. Stat. § 97-18.

[3] Plaintiff's remaining assignment of error concerns whether the Commission erred in concluding as a matter of law that medical expenses benefits should be denied to S.C. Boone, M.D. under § 97-25.

The Deputy Commissioner made the following finding of fact on this issue, which is conclusive on appeal.

> 4. A friend of the plaintiff's suggested the plaintiff see Dr. S.C. Boone in Raleigh. On August 22, 1985, the plaintiff saw Dr. Boone who admitted the plaintiff to the hospital for the period from August 25, 1985 to September 3, 1985 and then saw her on September 24, 1985 and October 24, 1985. Dr. Boone surgically removed a small disc at the L5-S1 on August 26, 1985. After the surgery Dr. Boone treated the plaintiff with medications and physical therapy through December 11, 1985. At the last office visit (October 24, 1985) the plaintiff still complained about back and leg pain. A doctor did not refer the plaintiff to Dr. Boone. The plaintiff went to Dr. Boone on her own.

The Deputy Commissioner then concluded as a matter of law that:

> 4. The plaintiff chose to see Dr. S.C. Boone on her own. She, therefore, is not entitled to have the medical expenses she incurred with and under the direction of Dr. Boone paid under the provisions of the Workers' Compensation Act. G.S. 97-25.

The Full Commission subsequently affirmed the Deputy Commissioner's findings of fact on this issue and stated,

> Insofar as the treatment rendered by Dr. Boone, defendants are not obligated to pay for same. The fee schedule of the

North Carolina Industrial Commission provides (page 18) that 'charges for a major surgical operation and incidental care will not be approved unless the operation was first authorized by the Industrial Commission, insurance carrier or self-insuring employer, except in cases of emergency.' There is no evidence that the surgery performed by Dr. Boone was in the category of an emergency. Neither is there evidence that the surgery was authorized. In our opinion, on this issue the hearing commissioner reached the correct result.

We note that any Fee Schedule prepared by the Industrial Commission is superseded by N.C. Gen. Stat. § 97-25 (1985). Therefore, we must rely solely upon this statute in determining whether the Commission erred in its conclusion of law. Under § 97-25:

> Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.
>
> . . .
>
> If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission.
>
> Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.

N.C. Gen. Stat. § 97-25 (1985).

Under this statute, a claimant has the right to choose a physician, but this right is subject to the approval of the Industrial Commission, and the treatment sought must be to effect a cure or provide rehabilitation. *Lucas v. Thomas Built Buses*, 88 N.C. App. 587, 590, 364 S.E.2d 147, 150 (1988). Moreover, the claimant must obtain Industrial Commission approval for the selected physician within a reasonable time after procuring the services of the physician. If a plaintiff seeks approval of the physician within a reasonable time, if the Commission approves a plaintiff's choice and if the treatment sought is to effectuate a cure or rehabilitation, then the employer has a statutory duty under § 97-25 to pay for the treatment. *See Lucas; Hudson v. Mastercraft Div., Collins & Aikman Corp.*, 86 N.C. App. 411, 358 S.E.2d 134, *disc. review denied*, 320 N.C. 792, 361 S.E.2d 77 (1987).

In the case *sub judice*, the Deputy Commissioner specifically found that plaintiff sought treatment from Dr. Boone on her own, and that there was no approval by the Industrial Commission at any time. The Full Commission affirmed these findings, and relying on the Fee Schedule, further found that Dr. Boone's treatment of plaintiff was not an emergency.

The findings of fact and conclusions of law before us indicate that plaintiff sought treatment from a physician she personally selected as authorized by § 97-25. The first question that must be answered is whether approval was sought within a reasonable time.

Relying on the Fee Schedule ("charges for a major surgical operation and incidental care will not be approved unless the operation was *first* authorized" (emphasis added)), the Full Commission stated in its Full Opinion and Award that there was no evidence "that the *surgery* was authorized." (Emphasis added.) There are no findings of fact, however, indicating whether approval for *any* of Dr. Boone's treatment of plaintiff was sought within a reasonable time.

The Commission's findings and conclusions appear to indicate that approval for a physician's services, including surgery, must be sought *prior to* the surgical procedure and once before the Commission cannot be considered. This is not the law in this State. In *Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980), our Supreme Court stated,

> We therefore construe the statute [§ 97-25] to obtain approval of the Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment.
>
> . . .
>
> The Industrial Commission is primarily an administrative agency of the State, and its jurisdiction as an administrative agency is a continuing one. [Citations] The Industrial Commission acts in a judicial capacity only in respect to a controversy between an employer and employee. [Citation] The existence of such a controversy does not operate to divest the Commission of its administrative powers. Obviously, an appeal of an award of the Industrial Commission does not support that agency's authority to accept notification of an employee's decision to select his own doctor; neither does an appeal deprive the Commission of its jurisdiction to accept the submission of a claim. It may well be that the determination of the particular claim will be delayed until the outcome of the appeal. Nevertheless, the Commission has *jurisdiction* to receive the claim and is, in fact, the only agency vested with that jurisdiction. [Citation]

299 N.C. at 593-94, 264 S.E.2d at 63-64.

The above *Schofield* analysis indicates that the Commission does not have to preclude payments for a physician's services solely because approval for those services was not previously requested. Under § 97-25, a plaintiff must only seek approval within a *reasonable* time not necessarily prior to the services or surgery rendered by the physician. The Commission should have addressed this issue when the case came before it requesting, in part, payment (and by inference) approval of Dr. Boone's fees for services rendered. If Dr. Boone was an acceptable choice for a treating physician and the request before the Commission was made in a reasonable time, the next issue to be determined would be whether the services performed effected a cure or rehabilitation. If so, the fees should be paid. We find no findings of fact or conclusions of law addressing these issues as required by the statute.

Therefore, we vacate the portion of the Full Commission's opinion and award dealing with this issue and remand for further findings supported by competent evidence that plaintiff either did or did not comply with § 97-25 using the above analysis and the

pertinent case law. In making this determination on remand, we caution the Commission to mold its findings of fact and conclusions of law to conform to the statute and not necessarily the Fee Schedule.

Defendant's Appeal

[4] Defendant argues that the Full Commission erred by not ruling upon defendant's motion for a credit for an amount of previous overpayments to or on behalf of plaintiff.

On 19 October 1988, plaintiff requested payment of the "non contested" award, and defendant agreed to make such payment. Defendant failed to deduct the percentage for a fee to plaintiff's attorney and pay the attorney separately. The Commission then directed defendant to prepare another check to plaintiff's attorney, which resulted in an overpayment to plaintiff and her attorney.

Defendant requested that the Full Commission address this matter, but it did not do so in its opinion and award of 13 June 1989. On 27 June 1989, defendant requested the Commission to modify its opinion and award to reflect defendant's entitlement to the overpayment. There is no evidence in the record before us that the Commission has made such modification.

Because the Commission has a duty to consider all aspects of a case before it, we direct the Commission to consider this issue upon remand. N.C. Gen. Stat. § 97-91 (1985).

In conclusion, we affirm the opinion and award of the Full Commission in part, vacate in part and remand for further action consistent with this opinion.

Affirmed in part, vacated and remanded.

Judge GREENE concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

In paragraph four of his conclusions of law, the Deputy Commissioner found that the plaintiff "is not entitled to have the *medical expenses* as to Dr. Boone paid. . . ." The Full Commission further stated that "charges for a major surgical operation *and incidental care* will not be approved unless. . . ." It went on to find that

the "surgery" was not authorized. It is my opinion that taken in context, considering the whole opinion, the Full Commission made adequate findings and conclusions that plaintiff failed to produce any evidence that the plaintiff's surgery and all incidental treatment necessarily connected thereto was authorized. If there is any competent evidence in the record to support the findings of the Commissioner, that determination is conclusive on appeal. *Dolbow v. Holland Industries, Inc.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *cert. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). Since the surgery and all incidental care by Dr. Boone clearly was not authorized, there is no need to run the Commission through the hoops again. In this respect, I dissent from the majority.

JOANN W. WADDLE AND JACQUELINE E. SIMPSON v. JACK SPARKS AND GUILFORD MILLS, INC.

No. 8918SC1031

(Filed 21 August 1990)

1. **Trespass § 2 (NCI3d)— intentional infliction of emotional distress—sexual harassment by supervisor—sufficient forecast of evidence**

Plaintiff's forecast of evidence presented genuine issues of material fact for the jury in an action against her former supervisor for intentional infliction of emotional distress based on various sexually connotative statements and offensive actions.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 17; Trespass §§ 8, 18.

2. **Master and Servant § 29 (NCI3d)— negligent retention of supervisor—sufficient forecast of evidence**

Plaintiff's forecast of evidence was sufficient to maintain her claim against defendant employer for negligent retention of her supervisor where it would permit a jury to find that the supervisor's behavior constituted the intentional infliction of emotional distress, the supervisor was acting within the course and scope of his employment, and defendant employer impliedly ratified the supervisor's behavior after plaintiff

reported the supervisor's actions to the employer's personnel director.

Am Jur 2d, Master and Servant § 213.

3. **Trespass § 2 (NCI3d) — intentional infliction of emotional distress — statute of limitations — insufficient forecast of evidence**

A second plaintiff's forecast of evidence was insufficient to establish a claim against her former supervisor for intentional infliction of emotional distress where there was no evidence that any of the incidents upon which plaintiff relied took place within the three year statute of limitations period.

Am Jur 2d, Master and Servant § 357.

Judge LEWIS concurring in part and dissenting in part.

APPEAL by plaintiffs from judgment entered 8 June 1989 by *Judge Russell G. Walker, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 4 April 1990.

On 20 April 1988, plaintiffs filed a complaint against defendants alleging intentional and negligent infliction of mental distress against defendant Sparks and negligent hiring and retention of defendant Sparks by defendant Guilford Mills. Defendants filed motions for summary judgment on 24 April and 26 April 1989. The trial court granted these motions on 15 June 1989.

From the orders granting summary judgment to defendants, plaintiffs appeal.

Ling & Farran, by Jeffrey P. Farran, for plaintiff-appellants.

Smith Helms Mulliss & Moore, by Martin N. Erwin and Michael A. Gilles, for defendant-appellee Guilford Mills, Inc.; and Haines, Short, Campbell & Ferguson, by W. Marcus Short, for defendant-appellee Jack Sparks.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment for defendants. For the reasons below, we hold that the trial court erred in granting summary judgment for defendants against plaintiff Waddle and affirm the summary judgment against plaintiff Simpson.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983), a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." This remedy permits the trial court to decide whether a genuine issue of material fact exists; it does not allow the court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C. App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In a summary judgment proceeding, the trial court must determine if there is a triable material issue of fact, viewing all evidence presented in the light most favorable to the nonmoving party. *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), *disc. review denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). Summary judgment is generally inappropriate when a state of mind such as intent or knowledge is at issue. *Valdese Gen. Hosp. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986) (citation omitted). With these general principles in mind, we now turn to whether the trial court erred in granting summary judgment against plaintiffs.

Both plaintiffs argue that summary judgment was improper regarding their claims of intentional infliction of emotional distress. The elements of this tort are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). This tort also may lie where a "defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Id.* The statute of limitations for the tort of intentional infliction of emotional distress is three years. *Id.* at 444, 276 S.E.2d at 330.

I.

Plaintiff Waddle's Action

Plaintiff Waddle's allegations in the complaint and her testimony at her deposition indicate the following acts occurred within three years of the 20 April 1988 date of the complaint.

1. Plaintiff began her employment for Defendant Guilford Mills (hereinafter Guilford Mills) in 1970, and voluntarily terminated her employment (rather than be fired) in October 1987. Defendant Sparks began his employment as Waddle's shift supervisor in early 1983. At all times alleged, Sparks acted within the course and scope of his employment for Guilford Mills.

2. Sometime in March 1986, plaintiff and some other workers were threading a machine and one worker mentioned greasing the balls. Waddle heard Sparks state something to another employee to the effect of, "what are you worrying about Bill's balls for?"

3. In the fall of 1985, Waddle had a cut on her finger which became infected with pus. When she went to the supervisor's office to have her finger treated, Sparks stated, "yeah, Joann's got a pussy finger. Walt's going to have to work on Joann's pussy." As someone else was coming into the office Sparks stated, "You can't go in there right now. Walt's working on Joann's pussy finger." Waddle testified that as the defendant spoke he paused between the words "pussy" and "finger."

4. Waddle testified that beginning in 1983, Sparks constantly used sexual innuendoes and injected sexual statements into ordinary conversations, which continued throughout Waddle's employment.

5. On two occasions in 1983, Sparks attempted to brush up against Waddle's breasts. This behavior continued until sometime in 1984. Waddle testified that she was continually watching for Sparks' attempts to rub against her so that she could get away from him.

6. Sometime in March or April 1985, plaintiff and Sparks were examining some fabric and Waddle commented that the fabric "has four holes the way it's supposed to." Sparks replied, "do you have four holes? I bet you know how to use all of them, don't you?"

7. As early as the fall of 1985, Waddle complained about Sparks to Assistant Plant Manager Ed Gray about several things including Sparks' "vulgar and filthy" mouth. Sparks acknowledged in his deposition that he had received a verbal reprimand from Plant Manager John Moffitt concerning his vulgar language.

8. In November or December 1985, Waddle complained to Personnel Director Brenda Shelton about Sparks' unfair treatment concerning job assignments and his "filthy mouth."

[1] Viewing the above evidence in the light most favorable to Waddle, we hold that the trial court erred in granting summary judgment in favor of defendants. First, there are sufficient facts alleged to raise a question of whether Sparks' conduct was extreme and outrageous. The allegations are sufficient to establish that Sparks' behavior constituted more than insults or unflattering opinions.

Second, there are sufficient facts to raise a question of what Sparks intended by his behavior. There is not enough evidence before the trial court to make a conclusive determination that Sparks *did not intend* to cause severe emotional distress to Waddle. Sparks testified that there was no truth to any of Waddle's allegations. Therefore, there was no emotional distress to Waddle and no intent on his (Sparks) part to create emotional distress. However, when there is a question of intent, summary judgment is usually inappropriate. *See Valdese Gen. Hosp. v. Burns*, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

Moreover, Waddle alleged that she was humiliated and upset over the situation at work with Sparks' alleged sexual harassment and was intimidated. Viewing this evidence in the light most favorable to Waddle, it is not conclusive proof of emotional distress, but it at least raises an issue of fact for a jury.

[2] Third, with regard to plaintiff's complaint that defendant Guilford Mills negligently retained Sparks as an employee, the evidence raises enough questions concerning whether Sparks was acting in the course and scope of his employment and whether his behavior was impliedly ratified by Guilford Mills after Waddle reported Sparks to Brenda Shelton. Before an employer may be held liable for negligent retention of an employee, plaintiff must establish that the incompetent employee committed a tortious act resulting in injury to plaintiff, and that prior to the act, the employer knew or had reason to know of the employee's incompetency. *Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942). Waddle's evidence raises such inferences here.

There is evidence in the case *sub judice* that some of Sparks' behavior was reported to Ms. Shelton. There is no evidence before

us concerning what Ms. Shelton did with the information she obtained from Waddle. There is certainly no evidence that Sparks was ever confronted after December 1985 with the information available to Ms. Shelton. Therefore, we hold that summary judgment was granted improperly in favor of Guilford Mills with regard to plaintiff Waddle.

Finally, defendants argue that plaintiffs' claim for relief is grounded in assault and battery (not intentional infliction of emotional distress); and therefore, the statute of limitations is one year instead of three years. Under this affirmative defense, plaintiffs' claim would be completely barred because none of the alleged incidents occurred within one year of April 1988 when plaintiffs filed their complaint. We find this argument to be completely without merit. *See Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981), and the cases cited therein. (In order for an action to lie in assault and battery, there must be an apprehension of immediate harmful or offensive contact, as distinguished from one in the future. Threats, without an offer or attempt to show violence, are not assaults.)

II.

Plaintiff Simpson's Claims

[3] Plaintiff Simpson began working at Guilford Mills in 1983 and terminated her employment in 1986. The forecast of Simpson's evidence indicates that her supervisor, Sparks, engaged in a course of behavior including the use of foul language, sexual innuendoes, and obscene gestures toward her and other employees. Many of her allegations and testimony in her deposition are similar to Waddle's as reviewed above.

Simpson, however, can place no time period in which Sparks allegedly intentionally inflicted emotional distress. She was unable to place a day, month or year on any of the specific events she alleged. Therefore, viewing the evidence in the light most favorable to Simpson, she is unable to prove that any of the specific acts she alleged occurred after March 1985, which would have placed them within the three year statute of limitations period.

Simpson did not allege or testify to a single act by Sparks or a group of acts by Sparks that occurred within the limitations period. The following exchange is one example of Simpson's response concerning when the incidents alleged occurred.

Q. When did that occur?

A. I can't say for sure.

Q. How long before you left?

A. I have no idea.

Q. Could it have been as much as a year?

A. It might have.

Q. Maybe more?

A. I don't know. I don't remember.

Q. You have no idea when that occurred?

A. No.

Q. You can't even tell us which year it occurred in?

A. No. Like I said, there was lots of them.

There is simply no evidence to indicate that any of the alleged incidents regarding Simpson took place within the three year statute of limitations period. For this reason, we hold that the trial court did not err in granting summary judgment to defendant Sparks against plaintiff Simpson.

Moreover, we hold that the trial court did not err in granting summary judgment to Guilford Mills against plaintiff Simpson. Because the evidence is insufficient to establish Simpson's claim against Sparks, Simpson may not maintain an action against Guilford Mills based upon its negligence in employing or retaining Sparks. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

In summary, we hold that the trial court erred in granting summary judgment against plaintiff Waddle and did not err in granting summary judgment against plaintiff Simpson and remand to the trial court for action consistent with this opinion.

Affirmed in part; reversed in part; and remanded.

Judge GREENE concurs.

Judge LEWIS concurs in part and dissents in part.

Judge LEWIS concurring in part and dissenting in part.

I respectfully dissent from the majority regarding plaintiff Waddle's claims. I do not believe she has made out a claim for intentional infliction of emotional distress or negligent hiring.

One of the key elements of the tort of intentional infliction of emotional distress is proving that the defendant intentionally or recklessly caused severe emotional distress. *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 621-22 (1979). Furthermore, for purposes of summary judgment, we must decide whether, as a matter of law, the conduct complained of "may reasonably be found to be sufficiently outrageous as to permit recovery." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 490, 340 S.E.2d 116, 121, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

The majority opinion cites an occasion when defendant Sparks made a comment about "Bill's balls." I think it is important to note that this statement was in response to a female worker's comment to him, whereby the worker shouted to Sparks, "Jack, listen over here. Frances is worried about whether Bill's greased his balls or not." Sparks responded, "what are you worrying about Bill's balls for." These comments were not directed at the plaintiff and were obviously made in response to some off-color joking made by another female employee.

The comments made by defendant Sparks about Waddle's "pussy finger" relative to an infected finger with pus and her having "four holes" and knowing how to use them, were directed at Waddle. Even if we assume that the plaintiff has shown that these comments could reasonably be found to be sufficiently outrageous as to permit recovery, she still must show that these statements were intended to cause and *did* cause her *severe* emotional distress. Waddle alleged that she was continually upset and frequently cried. However, she has made no showing on this point. Her deposition reveals only one incident where she testified that she was crying:

> I went in the office where he [Sparks] was-was when I first started threading . . . I went in and told him that Virginia McKee had left the machine that she was working on with me and had gone off to a machine with Frances Russell to work. And that instead of Virginia going on to the next machine like she was supposed to with a cutout, she left the cutout for me. And I told him, I was getting the dirty work. And

> he said, 'No, No. Virginia would never do anything like this. Virginia would never do that.'. . . And I was crying, very upset. I sat there until I got through crying. He talked to me a little bit, and he said, 'Virginia-Virginia's not like that, she'd never do that.'

This is the *only* testimony offered by the plaintiff that she was emotionally distressed by the defendant's conduct. She also stated that she complained to her supervisors about the conduct and eventually left her job. There is no other testimony to show that Sparks intended to cause or did cause Waddle severe emotional distress. This is hardly a showing of distress at all, much less severe distress. The above testimony has nothing to do with any conduct by defendant Sparks. Plaintiff admits that she never directly complained to Sparks about any of his alleged remarks. Plaintiff has completely failed to show that Sparks intended to cause and did in fact cause her severe emotional distress. Plaintiff apparently was upset by "Virginia's" actions much more than Sparks.

As one offended by the language in "R" rated movies, having seen only one in the last five years, I certainly do not sanction vulgar or even off-color innuendo. Our business here is not to impose our personal preferences but to follow the law as we see it. I do not see proof of "extreme or outrageous" behavior here nor intentional infliction of "severe" emotional distress nor any forecast of proving any of it.

I would also affirm the dismissal of Waddle's claim as to the negligent retention of an employee. Before an employer can be held liable, plaintiff must show that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency. *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942). Intentional infliction of emotional distress by Sparks is the underlying tortious conduct relied upon by Waddle to establish her claim. Because I believe Waddle has failed to make out the underlying tort, she may not maintain an action based upon Guilford Mills' retention of Sparks. *See Hogan v. Forsyth Country Club Co., supra.* I would therefore affirm the order of the trial court.

JO ANNE McCORMACK HAYES v. RODDY HAYES

No. 8914DC1284

(Filed 21 August 1990)

1. **Divorce and Alimony § 19.5 (NCI3d)— integrated property settlement—court-ordered support payments—modification—no termination upon remarriage**

Court-ordered support payments which are a part of an integrated property settlement agreement are not true alimony and are thus not subject to modification by the trial court and do not terminate as a matter of law upon remarriage of the dependent spouse.

Am Jur 2d, Divorce and Separation §§ 420, 681, 846.

2. **Divorce and Alimony § 19.5 (NCI3d)— separation agreement—incorporation into court order—request of parties—when support provision modifiable**

The opinion in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), does not permit modification of support payments which are part of an integrated property settlement agreement simply because the agreement was included in a court order pursuant to the request of the parties. However, that decision does allow modification of support payments included in a court-ordered decree at the request of the parties when the support payments are not part of an integrated agreement.

Am Jur 2d, Divorce and Separation §§ 706, 846, 872.

3. **Divorce and Alimony § 19.5 (NCI3d)— separation agreement—consent order—support and property division provisions—presumption of separability—burden of proof**

Where the issue of separability of support and property settlement provisions of a separation agreement incorporated into a consent judgment is not adequately addressed by the agreement itself, there is a presumption that the provisions therein are separable, and the party opposing modification of the support provision had the burden of proof on the issue of separability by a preponderance of the evidence.

Am Jur 2d, Divorce and Separation §§ 706, 846, 872.

4. Divorce and Alimony § 19.5 (NCI3d) — separation agreement — consent order — support and property division provisions — separability — necessity for hearing

Where a separation agreement incorporated into a consent order did not contain explicit, unequivocal language concerning the separability or integration of support and property division provisions, the trial court erred in concluding that the agreement was an integrated property settlement without conducting an evidentiary hearing to determine the intent of the parties on this issue, since the court in effect ignored the presumption of separability.

Am Jur 2d, Divorce and Separation §§ 706, 846, 872.

5. Divorce and Alimony § 19.5 (NCI3d) — consent order incorporating separation agreement — unwritten consent

The trial court's order incorporating and amending a separation agreement was a "consent" order even though the parties did not execute written consents to the order where the parties indicated their consent in open court prior to the entry of the order and did not object to the inclusion of the separation agreement in the order, and the agreement itself contemplated that it would be included in a court order.

Am Jur 2d, Divorce and Separation §§ 706, 846, 872.

APPEAL by defendant from order entered 12 September 1989 by *Judge Richard G. Chaney* in DURHAM County District Court. Heard in the Court of Appeals 30 May 1990.

Pulley, Watson, King & Hofler, P.A., by Tracy K. Lischer and Donna B. Slawson, for plaintiff-appellee.

Lewis & Anderson, P.C., by Susan H. Lewis and Robert A. Monath, for defendant-appellant.

GREENE, Judge.

Defendant (husband) appeals from the order of the trial judge denying his motion to terminate court-ordered alimony.

The record reveals that on 10 November 1987, the plaintiff (wife) and husband entered into a "Contract of Separation and Property Agreement" (Agreement). Among other things, the Agreement provides that husband is to pay to the wife the sum of $280.00

"per month in alimony, payments to continue until the death of Husband or Wife or remarriage of Wife, which ever occurs first." The Agreement further divides the real and personal properties between the parties and determines child custody and child support. Included in the Agreement is the statement that the parties accept the provisions of the Agreement as a full release and in satisfaction of all property rights "including all rights to an equitable distribution of real and personal property as provided by the 'Equitable Distribution of Property Act' pursuant to N.C.G.S. § 50-20." Paragraph 24 of the Agreement provides:

> 24. The Provisions of this Contract of Separation and Property Agreement shall be incorporated in the decree of absolute divorce and this Contract of Agreement shall be merged in such decree . . .

On 11 January 1988, the wife filed an action requesting alimony, custody of the minor children, divorce from bed and board, and child support. She further requested that the separation Agreement executed on 10 November 1987 be declared null and void on the grounds that the Agreement was signed by the wife under duress from the husband and "against the advice of counsel, at a moment when the [husband] was intolerably abusive."

On 11 October 1988, the parties appeared before the trial court and announced in open court that they had reached an agreement on the issues raised in the wife's complaint. In open court, as reflected in a "Memorandum of Consent" the parties agreed to the following:

> Regarding alimony, the separation agreement will be modified to provide that the husband will pay $280.00 per month in alimony, which will continue until October 31, 1993, or until the wife remarries. And the wife, of course, will limit any claim she has to alimony to this $280.00 per month for the five years. And at that time, it will expire.

The terms of the Agreement were first stated to the court by the attorneys for the parties, and subsequently the trial court, as reflected in the "Memorandum of Consent," inquired of both parties if they in fact understood and agreed to the statements of their attorneys.

On 14 December 1988, based on the consent of the parties given in open court on 11 October 1988, the trial court entered an order providing in pertinent part:

FINDINGS OF FACT

. . .

7. That the [wife] and the [husband] entered into a Separation Agreement dated November 10, 1987, which is incorporated as if fully set out herein and amended as indicated in paragraph 11.

. . .

11. That the parties have resolved the matters of Alimony and Property Division, and have stipulated in open court to amend the Separation Agreement between the parties' as follows.

. . .

b. [the provisions of the Agreement] regarding alimony shall be amended as follows:

"The Husband shall pay to the wife the sum of $280.00 per month in alimony, such payment to continue for a period of five (5) years. Husband shall not be obligated to pay alimony in excess of $280.00 per month nor shall he be obligated to pay alimony for more than five (5) years. This amount is to be paid through the Clerk of Court, Durham County."

. . .

IT IS THEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

. . .

4. The [husband] shall pay the [wife] $280.00 per month as alimony for five years, or through the month of September, 1993, the payments to be made by the 5th of each month through the Clerk of Court, Durham, North County [sic].

5. That the Separation Agreement, (as amended by the parties in Paragraph 11 of the Findings of Fact of this Order) except as modified by this Order shall be and is hereby incorporated herein by reference and the same as if fully set out herein

in words and figures and said Separation Agreement is made a part of this Judgment.

The parties did not execute written consents to the 14 December 1988 order.

On 13 May 1989, the wife remarried. On 26 July 1989, the husband filed a motion requesting the court to modify its previous order for support on the grounds that the wife had remarried and that "alimony was to stop upon remarriage." The husband's motion came on for hearing on 12 September 1989, and the trial court after reading "the authorities presented . . . the original Agreement and . . . the judgment on December 1988" expressed the opinion that the "judgment itself is unambiguous." The court then concluded:

> It's my opinion that the alimony provision was not, in fact, an alimony provision; that it was part of the settlement between the parties, and I think the judgment is clear on that. And, therefore, the alimony provision would not be modifiable. Therefore, would not terminate upon remarriage of the [wife].
>
> So I don't find the need to hear evidence, but I do find that it is not subject to being terminated on that basis.

On 28 November 1989, the trial court entered a written order which provided in pertinent part:

> THIS CAUSE coming on to be heard during the week of 11 September 1989 on the [husband]'s Motion to terminate alimony on the grounds of the [wife]'s remarriage . . . the court having examined the record, including a Contract of Separation and Property Agreement signed by the parties on 10 November 1987, a transcript of a Memorandum of Consent stated in open court on 18 October 1988 following a full day's hearing, an Order of the court dated 14 December 1988 amending and incorporating the Contract of Separation and Property Agreement; the Court also having considered arguments of both counsel, Memoranda of law submitted by [wife]'s counsel, and case authority submitted by both counsel, the Court hereby makes the following:

FINDINGS OF FACT

. . .

4. On 11 October 1988, the parties appeared before the undersigned Judge on [wife]'s Motion for Child Support. [Wife] was represented by Tracy K. Lischer and [husband] was represented by Attorney Samuel Roberti. After a day's hearing, the parties reached agreement not only on child support but also on all issues raised in [wife]'s Complaint to set aside the Contract of Separation and Property Agreement. The parties incorporated the Contract of Separation and Property Agreement into an Order drafted by [husband]'s attorney and signed on 14 December 1988. The Order further modified certain of the terms of the Contract of Separation and Property Agreement. More specifically, the parties agreed that [wife] would receive the marital home and alimony for five years and that [husband] would receive the marital business, which included assets of a rental house, a building, and equipment.

5. [Husband]'s counsel announced the agreement in open court and [husband]'s counsel drafted the Order signed by the Court on 14 December 1988, which was reviewed by both counsel.

. . .

8. [Husband] contends that [wife]'s alimony should be terminated pursuant to N.C.G.S. § 50-16.9. [Wife] contends that the support provision is not alimony as defined by N.C.G.S. § 50-16.9, but that the support provision and the division of property constitute reciprocal consideration, so that the entire agreement would be destroyed by a modification of the support provision.

. . .

11. There is no finding of fault in either the 14 December 1988 Order or the Contract of Separation and Property Agreement which the Order amends and incorporates. There is no reference to any of the fault grounds enumerated in N.C.G.S. § 50-16.2 which are necessary to uphold an award of true alimony.

12. There is no finding that [wife] is a dependent spouse pursuant to N.C.G.S. § 50-16.2 or that [husband] is the supporting spouse pursuant to N.C.G.S. § 50-16.2 in either the 14 December 1988 Order or the Contract of Separation and Prop-

erty Agreement which it amends and incorporates, which findings are necessary to uphold a true alimony award.

13. There is no finding in either the 14 December 1988 Order or the Contract of Separation and Property Agreement that [wife] is in need of support from [husband] or that [husband] has the ability to pay support or that the amount of support is reasonable under the circumstances, which findings are necessary to uphold an award of true alimony.

14. While the 14 December 1988 Order does specifically state that child support is always within the Court's jurisdiction and that the parties understand that it is modifiable upon a showing of changed circumstances, there is no such statement as to alimony, the Order stating that, "Husband shall not be obligated to pay alimony in excess of $280.00 per month . . . ."

. . .

16. In the 14 December 1988 Order, the [wife] gives up her right to request an increase in alimony or to receive alimony for longer than five years, neither of which provision was in the original Contract of Separation and Property Agreement.

. . .

18. The 14 December 1988 Order further provides that it resolves [wife]'s Complaint to set aside the Contract of Separation and Property Agreement and the incorporated language provides that the parties have settled "all of their respective property rights, and all other rights, duties, and liabilities of each of the parties with respect to and arising out of the marriage (p. 1 Contract of Separation and Property Agreement) . . . for and in consideration of the agreements, stipulations, and covenants herein contained (p. 2 Contract of Separation and Property Agreement) . . . ."

CONCLUSIONS OF LAW

. . .

2. That the language of the Judgment of 14 December 1988 amending and incorporating the Contract of Separation and Property Agreement dated 10 November 1987 is unambiguous.

3. That the document dated 14 December 1988 and amending and incorporating the document dated 10 November 1987 adequately indicate the parties' intent that the support provisions be integrated with and not separable from the property provisions.

4. That parol evidence is therefore not necessary to clarify the Order of 14 December 1988 and the incorporated and amended Contract of Separation and Property Agreement, which terms are unambiguous and to be construed by the Court as a Matter of Law, and the presumption of separability does not properly arise.

5. That the agreement to pay $280.00 per month until September, 1993 is not true alimony, but is in consideration for and inseparable from [wife]'s release of her right to more alimony for a longer term, [wife]'s receipt of the marital home, [husband]'s receipt of the marital business and its assets, and [wife]'s surrender of her right to bring an action to set aside the Contract of Separation and Property Agreement.

6. Insofar as the transcript of the Memorandum of Consent dated 18 October 1988 differs from the Order of 14 December 1988 drafted by [husband]'s counsel, reviewed by counsel for both parties, and signed by the Judge, the Order controls. Notwithstanding that conclusion, however, the Court looks at the whole agreement of the parties and not just the denomination of one provision or another.

7. The Court therefore concludes: that the language of the Judgment of 14 December 1988, which incorporates and amends the Contract of Separation and Property Agreement of 10 November 1987 is unambiguous; that it is a valid property settlement that releases all claims of each party against the other; and that the support provisions are in consideration for and inseparable from the property settlement provisions and are not "true alimony," but part of an integrated property settlement which is not modifiable by the Court even if contained in a Court-ordered Consent Judgment.

. . .

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that [husband]'s Motion to terminate alimony be denied and that [husband] continue to pay to the [wife] $280.00 per month through

the month of September 1993, said payments being made as part of an integrated property settlement, to be continued to be paid through the Clerk of Court, Durham County, North Carolina.

The dispositive issue is whether the husband's court-ordered $280.00 per month payment to the wife is true alimony. If it is true alimony, it terminates upon remarriage of the dependent spouse. N.C.G.S. § 50-16.9(b) (1987). If not true alimony, it does not terminate upon remarriage of the dependent spouse.

[1] Whether the support payments are in fact alimony does not depend on whether the order refers to it as "alimony" but instead on whether the support payments constitute "reciprocal consideration" for the property settlement provisions of the order. *White v. White*, 296 N.C. 661, 666, 252 S.E.2d 698, 701 (1979). If the support and property provisions exist reciprocally, the order is considered to reflect an integrated agreement, and the support payments are not alimony in the true sense of the word. *Marks v. Marks*, 316 N.C. 447, 455, 342 S.E.2d 859, 864 (1986). Court-ordered support payments which are part of an integrated agreement are not subject to modification by the trial court nor do they terminate as a matter of law upon remarriage of the dependent spouse. *Id.*

[2] We reject any argument that the opinion in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), permits modification of support payments which are part of an integrated agreement simply because the agreement was included in a court order pursuant to the request of the parties. The *Walters* Court indeed held that "court ordered separation agreements . . . are modifiable. . . ." *Id.*, at 386, 298 S.E.2d at 342. However, the Court also held that such agreements are modifiable to the extent and "in the same manner as any other judgment in a domestic relations case." *Id. Walters* did not change, for example, the law in North Carolina that property settlement provisions of a separation agreement included in a consent decree are "beyond the power of the judge to modify without the consent of both parties." *Holsomback v. Holsomback*, 273 N.C. 728, 732, 161 S.E.2d 99, 102-03 (1968). This is so regardless of whether the property settlement provisions are part of an integrated agreement. Likewise, *Walters* did not change the law in North Carolina which prohibits the modification of support provi-

sions of an integrated property settlement agreement. *See Marks*, 316 N.C. at 455, 342 S.E.2d at 864. However, since support payments not part of an integrated agreement are modifiable by law, N.C.G.S. § 50-16.9(a), *Walters* would allow such support provisions to be modified if included in a court ordered decree at the request of the parties.

[3] Given these principles of law, we must determine whether the support provision of the order at issue is part of an integrated agreement or is in fact separate. The resolution of this issue requires a determination of the intent of the parties regarding integration or non-integration of the provisions of the separation agreement. *White*, 296 N.C. at 667-68, 252 S.E.2d at 702. In *White*, the Court adopted what it considered a "sensible approach for dealing with the issue of separability of provisions in a consent judgment or separation agreement in cases in which the question is not adequately addressed in the document itself." *Id.*, at 671-72, 252 S.E.2d at 704. Specifically, the Court held that

> there is a presumption that provisions in a separation agreement or consent judgment made a part of the court's order are separable and that provisions for support payments therein are subject to modification upon an appropriate showing of changed circumstances.

Id., at 672, 252 S.E.2d at 704. The effect of this presumption is to place the burden of proof on the issue of separability on the party claiming that the agreement is integrated, here the wife. This presumption of separability prevails unless the party with the burden to rebut the presumption proves by a preponderance of the evidence that an integrated agreement was in fact intended by the parties. *Marks*, 316 N.C. at 457, 342 S.E.2d at 865. However, where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs. *See Acosta v. Clark*, 70 N.C. App. 111, 114, 318 S.E.2d 551, 554 (1984) (separation agreement expressly stated that the support provisions were independent of the property settlement provisions); *see also Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E.2d 381, 385 (1978) (same); *Henderson v. Henderson*, 55 N.C. App. 506, 507, 286 S.E.2d 657, 659 (1982), *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983) (order included language that provisions of judgment were integrated). In those cases where no such explicit clauses exist, an evidentiary hearing

to determine the parties' intent is required. 316 N.C. at 457, 342 S.E.2d at 865.

[4] Here the trial court refused to conduct an evidentiary hearing and concluded that the 10 November 1987 order was unambiguous as a matter of law. The court further concluded that the 10 November 1987 document adequately indicated the parties' intent "that the support provisions be integrated with and not separable from the property provisions." The trial court rejected any presumption of separability.

We disagree with the conclusions of the trial court because the separation agreement did not contain explicit, unequivocal provisions on integration or non-integration. Thus, we hold that an evidentiary hearing was required to determine the intent of the parties regarding whether the agreement was separable or integrated. Therefore, we vacate the order of the trial court and remand for an evidentiary hearing on the separability/integration issue.

On remand, evidence of the negotiation between the parties is admissible, *Rowe v. Rowe*, 305 N.C. 177, 185, 287 S.E.2d 840, 845 (1982), to clarify the provisions of the order. Here the parties arguably agreed that the $280.00 payment was fixed and not modifiable. Such provisions are generally against public policy and of no force and effect in non-integrated agreements. *See Acosta*, 70 N.C. App. at 114, 318 S.E.2d at 554 (agreement of parties that judgment is not modifiable found to be immaterial). However, as in *Rowe*, evidence of negotiation is admitted to clarify the uncertainty created by the language of the agreement. 305 N.C. at 185, 287 S.E.2d at 845.

[5] Finally, we reject the husband's argument that the December 1988 order was not in fact a "consent order" and that the principles applied in this opinion are not applicable. While the parties did not execute their written consent to the court order, they indicated their consent in open court prior to the entry of the order and did not object to the inclusion of the Agreement in the order. Furthermore, the Agreement itself contemplated that it would be included in a court order. Clearly, the parties presented their Agreement to the court for its approval, and this submission is sufficient to bring it within the principles applied in this opinion. *See Acosta*, 70 N.C. App. at 113, 318 S.E.2d at 553 (applying *Walters* in absence of any showing the parties executed written consent to court order);

see also Cavenaugh v. Cavenaugh, 317 N.C. 652, 659, 347 S.E.2d 19, 24 (1986) (same).

Vacated and remanded.

Judges ORR and LEWIS concur.

STATE OF NORTH CAROLINA v. LINWOOD ROGER RIGGS

No. 893SC1232

(Filed 21 August 1990)

1. **Indictment and Warrant § 17.2 (NCI3d)— breaking or entering motor vehicle—indictment—variance in date—not prejudicial**

The trial court did not err by failing to dismiss an indictment for breaking or entering a motor vehicle and felonious larceny because the indictment listed the date of the offenses as 17 May 1989 and the state's evidence at trial established that the offenses occurred on 15 May 1989. Defendant's evidence showed that he did not participate in the crimes and the variance in the date was not prejudicial. Furthermore, the fact that the date listed on the arrest warrant differed from that charged by the indictment is of no relevance to the question of whether defendant was harmed by the time variance.

Am Jur 2d, Indictments and Informations §§ 115, 261, 262.

2. **Criminal Law § 91 (NCI4th)— breaking or entering motor vehicle and larceny—no probable cause hearing—indictment—no error**

There was no error in a prosecution for breaking or entering a motor vehicle and felonious larceny where no probable cause hearing was held during defendant's confinement because the law is well settled that there is no necessity for a preliminary hearing after a grand jury returns a bill of indictment.

Am Jur 2d, Criminal Law § 412.

3. Larceny § 6.1 (NCI3d)— felonious larceny—value of stolen items

There was no error in a prosecution for felonious larceny in the admission of testimony about the value of stolen wine where defendant elicited further testimony about the wine's value on cross-examination and himself introduced evidence sufficient for the jury to convict him of felonious larceny.

Am Jur 2d, Larceny §§ 45, 46, 159.

4. Burglary and Unlawful Breakings § 126 (NCI4th)— breaking or entering motor vehicle—evidence sufficient

The evidence of breaking or entering a motor vehicle was sufficient to withstand defendant's motion to dismiss where a witness testified that she saw defendant walk toward a truck with two others; she subsequently heard a loud noise; defendant and the two others returned carrying boxes of wine; the padlock to the trailer and the wine were discovered to be missing the next morning; and neither defendant nor anyone else had authority to enter the truck and remove the wine. N.C.G.S. § 14-56.

Am Jur 2d, Burglary §§ 45, 50.

5. Criminal Law § 1186 (NCI4th)— aggravating factor—prior convictions twenty years old

The trial court did not abuse its discretion when sentencing defendant for breaking or entering a motor vehicle and felonious larceny by finding that the aggravating factors outweighed the mitigating factors and sentencing defendant to maximum terms where the aggravating factors were unrelated convictions occurring 20 years in the past. N.C.G.S. § 15A-1340.4(a)(1)o sets no time limit governing prior convictions considered as aggravating factors.

Am Jur 2d, Criminal Law § 599.

6. Criminal Law § 1014 (NCI4th)— breaking or entering motor vehicle and felonious larceny—newly discovered evidence—new trial denied

Defendant's motion for a new trial on charges of breaking or entering a motor vehicle and felonious larceny based on newly discovered evidence that one of two companions was the sole perpetrator was denied because it could not be said that the new evidence was probably true, the new evidence

was merely cumulative, and defendant failed to show due diligence.

Am Jur 2d, New Trial §§ 418, 428, 445-449.

APPEAL by defendant from judgment entered 8 August 1989 in CRAVEN County Superior Court by *Judge Joseph R. John.* Heard in the Court of Appeals 6 June 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, for the State.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III, for defendant-appellant.

DUNCAN, Judge.

Defendant-appellant, Linwood Roger Riggs, appeals his convictions of breaking or entering into a motor vehicle and felonious larceny. The judge sentenced defendant to five-years imprisonment for the felonious breaking-or-entering conviction and to a consecutive ten-year term for the larceny offense. In addition to this appeal, defendant petitions this court for appropriate relief on the ground of newly-discovered evidence. We find no error in the trial of defendant's case, and we deny the Motion for Appropriate Relief.

I

The State presented evidence showing that on Monday, 15 May 1989, a truck owned by East Carolina Distributing Company was parked outside the company's warehouse. The truck contained wine that was to be shipped to Raleigh, North Carolina, the following Wednesday. Employees arriving at work on the morning of 16 May noticed that a padlock had been broken off the rear door of the truck. Approximately 24 cases of wine were missing from the vehicle. Following an investigation by the New Bern Police Department, defendant was arrested for the crime along with Jose Seijo ("Seijo") and James Bolton ("Bolton"). Two women, Cynthia Ann Marker ("Marker") and Donna Chambers, who were in the company of defendant, Seijo, and Bolton at the time of the break in, were not charged.

At trial, Marker testified that on the night of 15 May she heard Riggs, Seijo, and Bolton discuss breaking into the truck. Marker and Donna Chambers told the three they did not want

to participate and walked across the street. After one of them picked up a metal object, defendant, Seijo, and Bolton walked toward the truck. Marker then heard a loud noise. Defendant, Seijo, and Bolton then walked back toward the street, carrying with them some wine and some boxes.

Defendant's evidence, which consisted of Seijo's testimony, showed that defendant did not participate in the break in.

Seijo testified that Bolton, after unsuccessfully attempting to persuade Seijo to help, went to the Distributing Company. Later that evening, Bolton came with a case of wine to defendant's sister's apartment. Seijo then helped Bolton carry away more wine that was hidden behind a rock, and defendant purchased one of the cases for his nephew.

The jury returned guilty verdicts on both counts. At the sentencing hearing, defendant's prior criminal convictions were found as the only aggravating factors. These prior convictions had occurred more than 20 years in defendant's past. The judge found that the aggravating factors outweighed the mitigating factors of defendant's intoxication at the time of the crimes, and he imposed the maximum sentence on each count.

Additional facts will be set out below.

II

[1] Defendant first assigns as error the trial judge's failure to dismiss the indictment because it listed the date of the offenses as 17 May 1989, although the State's evidence at trial established that the offenses occurred on 15 May 1989. Defendant adds that because one of the offenses charged in the indictment (breaking and entering into a motor vehicle) differed from that named in the arrest warrant (breaking and entering a building), specifying the time the offenses occurred was "more of the essence."

As defendant ackowledges, it is well established "that variance between allegation and proof as to time is not material where no statute of limitations is involved." *State v. Trippe*, 222 N.C. 600, 601, 24 S.E.2d 340, 341 (1943) (citations omitted); N.C. Gen. Stat. § 15-155 (1983). Our inquiry is whether, because of the variance, defendant was misled and thus deprived of an opportunity to present his defense. *See State v. Ramey*, 318 N.C. 457, 472, 349 S.E.2d 566, 575 (1986). We see no such deprivation. Seijo testified that

on 15 May 1989—the time of the offense as shown by the evidence—Bolton, and not defendant, broke into the truck and removed the cases of wine. Defendant's evidence, therefore, showed that he did not participate in the crimes and, had this evidence been believed by the jury, would have entitled defendant to acquittal. We fail to see, therefore, how the variance between the date listed on the indictment and the time of the offense as proved at trial was in any way prejudicial to defendant.

Furthermore, the fact that the offense listed on the arrest warrant differed from that charged by the indictment is of no relevance to the question whether defendant was harmed by the time variance. An arrest warrant issues upon probable cause that an offense has been committed and that the person to be arrested was the perpetrator. *State v. Martin*, 315 N.C. 667, 676, 340 S.E.2d 326, 331 (1986) (citation omitted). 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. *See State v. Moorefield*, 33 N.C. App. 37, 42, 234 S.E.2d 25, 27, *disc. review denied and appeal dismissed*, 292 N.C. 733, 236 S.E.2d 702 (1977). That the warrant listed a different charge from that subsequently returned in the indictment did not require, therefore, that the judge dismiss the latter. Thus, the focus of our inquiry remains the variance between the date of the offense listed on the indictment and the proof adduced at trial. Having held that defendant was not deprived of his opportunity to defend himself, we overrule this assignment of error.

III

[2] Defendant next contends that error was committed because no probable cause hearing was held during his confinement. Once again, he argues that the alleged error was compounded by the variations involving the charge and date of the offenses. The law is well settled that there is no necessity for a preliminary hearing after a grand jury returns a bill of indictment. *See State v. Hudson*, 295 N.C. 427, 431, 245 S.E.2d 686, 689 (1978). The function of a preliminary hearing is to determine whether probable cause exists to believe that a crime has been committed by the defendant. *Id.* at 430, 245 S.E.2d at 689. That same purpose is served when

a grand jury determines the existence of probable cause and returns an indictment. *See id.* at 430-31, 245 S.E.2d at 689. Once an indictment has been handed down, moreover, jurisdiction over the matter lies in the superior court, and no probable cause hearing may then be held in district court. *See State v. Vaughn*, 296 N.C. 167, 171, 250 S.E.2d 210, 213 (1978), *cert. denied*, 441 U.S. 935, 60 L.Ed. 2d 665 (1979) (citations omitted).

Once he was indicted, the superior court was empowered to try defendant on the charges, and defendant was not entitled to have the indictment dismissed because he had not been given a preliminary hearing. We overrule this assignment of error.

IV

[3] By his third assignment of error defendant asserts that the trial judge erred by allowing Benjamin Stone, an employee of East Carolina Distributing, to testify about the value of the stolen wine. Assuming, *arguendo*, that error occurred when the judge allowed this testimony during direct examination, defendant, on cross-examination, elicited further testimony from Stone about the wine's value. At defendant's request, in fact, Mr. Stone brought to court an invoice showing that value. This invoice was admitted in evidence as Defendant's Exhibit B, and, at defendant's request, Mr. Stone read the price of the wine from the invoice. Thus, defendant himself introduced evidence sufficient for the jury to convict him of felonious larceny. We overrule this assignment of error.

V

[4] Defendant alleges by his fourth assignment of error that the trial judge erred by failing to dismiss the breaking and entering charge at the close of all the evidence, and again erred by failing to set aside the verdict convicting him of that offense.

On a motion to dismiss, all evidence must be considered in a light most favorable to the State. *E.g., State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 586 (1988). Discrepancies and contradictions are for resolution by the jury, and the State is given the benefit of every reasonable inference of fact. *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977) (citations omitted); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The trial judge must decide whether there exists substantial evidence of each element of the offense charged. *Brown*, 310 N.C. at 566, 313 S.E.2d at 587. Our review of the record reveals that the trial

judge properly ruled that the evidence submitted by the State was sufficient to withstand defendant's motion to dismiss.

Proving the crime of breaking or entering into a motor vehicle requires a showing of 1) a breaking or entering 2) without consent 3) into any motor vehicle 4) containing goods, freight, or anything of value 5) with the intent to commit any felony or larceny therein. N.C. Gen. Stat. § 14-56 (1986). Marker testified that she saw defendant, along with Seijo and Bolton, walk toward the truck. After that, she heard a loud noise (a "pow"). Defendant, Seijo, and Bolton then emerged carrying boxes of wine. Benjamin Stone testified that, the next morning, the padlock to the tractor-trailer was missing and, when the truck was opened, wine was discovered missing. He further testified that neither defendant nor anyone else had authority to enter the truck and remove the wine. In a light most favorable to the State, this evidence was sufficient to show each of the elements of the crime charged, and that defendant actively participated in the breaking and entering.

Having held that the evidence was sufficient to allow the jury to decide the question of defendant's guilt for breaking and entering, we find no abuse of discretion in the judge's refusal to set aside the verdict. *See, generally, Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). We overrule this assignment of error.

VI

[5] Defendant next asserts that the trial judge erred when he imposed maximum terms after finding, as aggravating factors, unrelated convictions which had occurred 20 years in the past. Defendant argues that the judge erred further by finding that these aggravating factors outweighed the mitigating factors.

N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1988) sets no time limit governing which of a defendant's prior convictions may be considered as aggravating factors by the trial judge. *See State v. Lane*, 77 N.C. App. 741, 744, 336 S.E.2d 410, 412 (1985); *State v. Moxley*, 78 N.C. App. 551, 557, 338 S.E.2d 122, 125 (1985), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 904 (1986). Moreover, a trial judge "may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa." *Moxley*, 78 N.C. App. at 555, 338 S.E.2d at 124-25 (citation and internal

punctuation omitted). The trial judge acted within his discretion. We find no error.

VII

[6] Finally, defendant has moved for a new trial on the ground of newly-discovered evidence. This evidence stems from Bolton's testimony at his own trial that Seijo was the sole perpetrator of the break in. Defendant contends that this testimony, coupled with Seijo's, would have prevented the State from carrying its burden on the breaking and entering charge.

The prerequisites for a new trial on the ground of newly-discovered evidence are these:

1. That the witness or witnesses will give newly-discovered evidence.

2. That such newly discovered evidence is probably true.

3. That it is competent, material, and relevant.

4. That due diligence was used and proper means were employed to procure the testimony at the trial.

5. That the newly discovered evidence is not merely cumulative.

6. That it does not tend only to contradict a former witness or to impeach or discredit him.

7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

E.g., State v. Cronin, 299 N.C. 229, 243, 262 S.E.2d 277, 286 (1980). We cannot say, given the testimony of Marker that defendant went with Seijo and Bolton to the Distributing Company, that Bolton's evidence is probably true. Furthermore, it is merely cumulative of Seijo's testimony that defendant did not participate in the break in. The jury at a second trial would be confronted with the same task as that faced by the original jury: to believe Marker's testimony or to believe Bolton's and Seijo's. Thus, we cannot say with any degree of certainty that a different result would be reached at a second trial.

Finally, the record is silent about any effort on the part of defendant's trial lawyer to obtain Bolton's testimony. Defendant alleges in his Motion that "Trial counsel [said] that he inquired

into calling Bolton as a witness, however he was not allowed to do this at [defendant's] trial because Bolton's attorney was not available." Beyond this assertion, there is nothing in the record indicating that defendant took any action to procure Bolton's testimony. Defendant, in short, has also failed to show due diligence.

VIII

We hold that defendant received a fair trial, free from prejudicial error, and we deny defendant's Motion for Appropriate Relief.

No error.

Judges COZORT and ORR concur.

THE TOWN OF CHAPEL HILL, PLAINTIFF-APPELLEE v. JOSEPH BURCHETTE AND ELSIE SESSOM BURCHETTE, DEFENDANT-APPELLANTS

No. 8915SC1234

(Filed 21 August 1990)

1. **Eminent Domain § 7.1 (NCI3d)— condemnation—entirety property—taking on separate dates**

The contention in a condemnation action that defendants owned their property by entireties and that plaintiff could therefore not acquire the property unless it did so simultaneously was not raised below and could not be raised on appeal; furthermore, plaintiff properly filed an amended complaint naming the wife, and, although plaintiff acquired title on separate dates, N.C.G.S. Chapter 40A contains no requirement that title to condemned property be divested simultaneously.

Am Jur 2d, Eminent Domain §§ 131, 249, 320.

2. **Eminent Domain § 7.7 (NCI3d)— condemnation—answer—challenge to power to condemn not presented**

Defendants in a condemnation action did not assert a challenge to the town's power to condemn the property where the original answer by defendant Joseph Burchette contested only the amount of compensation due, so that title to Joseph Burchette's interest vested in plaintiff at that time, and, since

an amended complaint was new only to the extent that it added Elsie Burchette as a defendant, Joseph Burchette's answer to the amended complaint could not effectively raise the defense of lack of public purpose. Elsie Burchette never filed an answer to the amended complaint and therefore her interest in the property vested in plaintiff 120 days from the date of service.

Am Jur 2d, Eminent Domain §§ 25, 395, 397.

3. **Eminent Domain § 3.1 (NCI3d)— condemnation—recreational facilities—public purpose**

The trial court did not err in a condemnation action by finding that plaintiff was authorized to acquire land for parks, recreational programs and facilities through the exercise of eminent domain or by finding that the land was being taken for a public purpose. N.C.G.S. § 40A-3(b)(3) vests municipalities with the power of eminent domain to establish, enlarge, or improve parks, playgrounds and other recreational facilities, and N.C.G.S. § 160A-353(3) authorizes the use of eminent domain by municipalities to acquire land for parks, recreational programs and facilities. Plaintiff stated in its original complaint that the property was being taken for the purpose of creating parks, playgrounds and recreational facilities.

Am Jur 2d, Eminent Domain §§ 25-29, 60.

4. **Rules of Civil Procedure § 36 (NCI3d)— condemnation—lack of access to property—request for admissions—failure to respond**

The trial court did not err by concluding in its final order in a condemnation action that the property did not have any means of egress or ingress where the lack of access was established by defendant's failure to respond to plaintiff's requests for admissions on the issue.

Am Jur 2d, Eminent Domain §§ 175, 279.

5. **Eminent Domain § 13.4 (NCI3d)— condemnation—compensation—amounts awarded supported by evidence**

The trial court did not err in a condemnation proceeding by finding that the value of the property was $14,000 where no exceptions were taken to the admission of testimony con-

cerning the value of the land and the amount awarded was within the wide range established by the evidence.

Am Jur 2d, Eminent Domain §§ 427, 443.

APPEAL by defendants from judgment entered 12 July 1989 in ORANGE County Superior Court by *Judge F. Gordon Battle.* Heard in the Court of Appeals 10 May 1990.

Defendants, husband and wife, own property against which plaintiff Town brought a condemnation action. The original complaint was filed 29 April 1987 and named only defendant Joseph Burchette. On 27 January 1988 Joseph Burchette answered plaintiff's complaint, raising only the issue of just compensation. Plaintiff was granted leave to file an amended complaint adding defendant Elsie Burchette as a party defendant on 23 May 1988. On 15 August 1988 defendants' original counsel was allowed to withdraw and defendants proceeded *pro se* until after giving notice of appeal in July 1989.

On 14 November 1988, an order was entered ruling that defendant Joseph Burchette's interest in the property at issue vested in the Town upon the filing of his original answer in January 1988 and that the Town had the power to acquire the subject property. On 22 May 1989 an order was entered stating that there was no means of egress or ingress to the property. Both defendants appeared at a hearing to determine the amount of just compensation on 11 July 1989. The trial court determined the property to be worth $14,000. Defendants appealed.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Michael W. Patrick and Marilyn A. Bair, for plaintiff-appellee.

Loflin & Loflin, by Thomas F. Loflin III, for defendants-appellants.

WELLS, Judge.

[1] Defendants attempt to argue that because they held the property as tenants by the entirety, plaintiff could not acquire title to their interest unless it did so simultaneously. In support of this argument defendants rely on plaintiff's failure to name Elsie Burchette as a defendant in the original complaint. We note that defendants did not raise this argument below. A contention not raised in the trial court may not be raised for the first time on

appeal. *See, e.g., Williams v. Burlington Industries, Inc.*, 75 N.C. App. 273, 330 S.E.2d 657 (1985), *rev'd on other grounds*, 318 N.C. 441, 349 S.E.2d 842 (1986). Furthermore, plaintiff properly filed an amended complaint and memorandum of taking naming Elsie Burchette as a party defendant. Once Elsie Burchette was served, this procedural flaw was remedied. Although plaintiff acquired title to defendants' interest in the property on separate dates, Chapter 40A contains no requirement that title to condemned property be divested simultaneously. We therefore overrule this assignment of error.

[2] Defendants next assert that defendant Joseph Burchette's second answer, filed after the Town had amended its complaint to include defendant Elsie Burchette, effectively asserted a challenge to the Town's power to condemn the property. Defendants also assign as error the trial court's finding that defendant Elsie Burchette's interest in the property was acquired by plaintiff in March 1989 due to Elsie Burchette's failure to respond to the amended complaint. Both these assignments are without merit.

The plaintiff is a public condemnor. The exclusive procedures to be used in this State by all local public condemnors are found in Chapter 40A of the General Statutes. N.C. Gen. Stat. § 40A-42 (1984) in pertinent part provides:

> (b) [T]itle to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor:
>
> (1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or
>
> (2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. § 40A-46;
>
> . . .

G.S. § 40A-42(b)(1)(2). The original answer of defendant Joseph Burchette contested only the amount of compensation due; it did not contest the power of plaintiff to condemn the property. Pursuant to the statute, title to Joseph Burchette's interest vested in plaintiff at that time. The plaintiff's filing of the amended complaint did not void Joseph Burchette's original answer. A defendant

is entitled to amend his answer to meet the contents of a *new* complaint. *Halsey Co., Inc. v. Knitting Mills, Inc.*, 38 N.C. App. 569, 248 S.E.2d 342 (1978) (emphasis supplied). However, the amended complaint in this case was "new" only to the extent it added Elsie Burchette as a defendant. The remaining allegations were identical to those in the original complaint. Joseph Burchette's answer to the amended complaint attempted to challenge the power of plaintiff to condemn the property; there was no response to the addition of Elsie Burchette as a party defendant. We therefore conclude that Joseph Burchette's answer to the amended complaint could not effectively raise the defense of lack of public purpose.

Likewise, the statute controls the effect of failure to answer a complaint containing a declaration of taking. Defendant Elsie Burchette has never filed an answer to the amended complaint; therefore, by operation of law her interest in the property vested in plaintiff 120 days from the date of service. *See also* N.C. Gen. Stat. § 40A-46 (1984). These assignments are accordingly overruled.

[3] Defendants also contend that it was error to find that plaintiff was authorized to acquire land for parks, recreational programs and facilities through the exercise of the power of eminent domain. With regard to both the interlocutory order which initially ruled that the land was being taken for a public purpose and the finding to that effect in the final order, defendants argue that the record did not support a finding that the park was for the public use or benefit. We disagree. N.C. Gen. Stat. § 40A-3(b)(3) (Supp. 1989) vests municipalities with the power of eminent domain to establish, enlarge, or improve parks, playgrounds and other recreational facilities. Likewise, N.C. Gen. Stat. § 160A-353(3) (1987) authorizes the use of eminent domain by municipalities to acquire land for parks, recreational programs and facilities. Plaintiff stated in its original complaint that the property was being taken "for the purpose of creating parks, playgrounds and recreational facilities." Condemning land for use as a public park is clearly authorized by law. *See, e.g., City of Charlotte v. Russo*, 82 N.C. App. 588, 346 S.E.2d 693 (1986). This assignment is overruled.

[4] Defendants next assign as error the trial court's conclusion in the final order that the property did not have any actual means of egress or ingress. This conclusion was based on an earlier order stating that there was no means of access to the property. This conclusion was properly relied upon by the trial court at the hearing

on just compensation. Lack of access was established at a hearing on 22 May 1989 by defendants' failure to respond to plaintiff's requests for admissions on the issue of no record means of egress or ingress. The record in the present case shows that defendants were served with the requests for admissions but did not respond within 30 days after service. This court has previously held that N.C. Gen. Stat. § 1A-1, Rule 36 (1983 & Supp. 1989) means "precisely what it says." *Overnite Transportation Co. v. Styer*, 57 N.C. App. 146, 291 S.E.2d 179 (1982) (citation omitted). In order to avoid having requests for admissions deemed admitted, a party must respond within the period of the rule if there is any objection whatsoever to the request. *Id.* By failing to respond to plaintiff's request for admissions, defendants allowed the lack of access to be judicially established. This assignment is therefore without merit and it is accordingly overruled.

[5] Defendants also contend that the trial court erred in finding that the value of the property was $14,000 at the time of the taking. Defendants assert that there was no evidence to support the amount awarded by the trial court; however, no exceptions were taken to the admission of testimony concerning the value of the land. Based on our review of the record, we conclude that there was sufficient evidence to support the award of $14,000. Defendant Joseph Burchette testified that in his opinion the property was worth $100,000. On cross-examination he admitted that his estimate assumed access to the property. Plaintiff's appraiser testified that were the property not landlocked, his estimate of its value would be $10,000 per acre, or "something less than $20,000." However, based on the fact that the property was landlocked, plaintiff's appraiser estimated its value at the time of the taking to be $9,000. Clearly, there was wide variation between the values as testified to at the hearing. Nevertheless, the amount of compensation awarded by the trial court was within the range established by the evidence. *See, e.g., Board of Transportation v. Powell*, 21 N.C. App. 95, 203 S.E.2d 328 (1974) (as long as properly instructed, juries' verdicts upheld even though amount of award did not represent an exact value testified to but rather was within the range established by competent evidence).

Defendants' remaining assignment of error attacks the trial court's entry of judgment that plaintiff was entitled to acquire by eminent domain a fee simple interest in defendants' property. Defendants rely on their previous arguments asserting lack of public

purpose and failure to acquire an interest in property held by tenants by the entirety. We have addressed these arguments *supra*, found them to be without merit, and overruled them. We likewise overrule this assignment.

The decision of the trial court is

Affirmed.

Judges PARKER and DUNCAN concur.

REBECCA S. HALE, ADMINISTRATRIX OF THE ESTATE OF GARLAND HOUSTON HALE, PLAINTIFF v. WILLIAM C. LEISURE AND NORTH AMERICAN VAN LINES, INC., DEFENDANTS

CONSOLIDATED AT THE TRIAL LEVEL WITH: PAULINE INMAN, ADMINISTRATRIX OF THE ESTATE OF KEITH D. INMAN, PLAINTIFF v. WILLIAM C. LEISURE AND NORTH AMERICAN VAN LINES, INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS AND

REBECCA S. HALE, ADMINISTRATRIX OF THE ESTATE OF GARLAND HOUSTON HALE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. UNION OIL COMPANY OF CALIFORNIA AND GENERAL MOTORS CORPORATION, THIRD-PARTY DEFENDANTS

No. 8913SC1283

(Filed 21 August 1990)

1. Appeal and Error § 391 (NCI4th)— record on appeal—denial of extension of time to file

Plaintiff's motion for an extension of time to file the record on appeal was denied by the appellate court where the appealed order was entered on 15 May 1989; the 150 day time limit for filing the record on appeal expired on 12 October 1989; the record was settled on 15 November 1989 and filed on 28 November 1989; plaintiff did not file a motion for an extension of time with the appellate court until 14 February 1990; and no extension of time had been granted by the appellate court under Appellate Rule 12.

Am Jur 2d, Appeal and Error §§ 292, 293.

2. Appeal and Error § 291 (NCI4th)— belated appeal—moot and interlocutory issues—certiorari denied

Plaintiff's petition for a writ of certiorari to permit review of the issues presented in an appeal from an order for which the record on appeal was not filed within the time limits of Appellate Rule 12(a) was denied where one issue is now moot and the remaining issues pertaining to discovery and evidentiary matters are interlocutory.

Am Jur 2d, Appeal and Error §§ 47, 50, 761.

APPEAL by plaintiff from order entered 20 February 1989 by *Judge E. Lynn Johnson* and orders entered 22 March 1989 and 15 May 1989 by *Judge D. B. Herring, Jr.* in BRUNSWICK County Superior Court. Heard in the Court of Appeals 30 May 1990.

This case on appeal involves only plaintiff Hale (hereinafter plaintiff) and defendant North American Van Lines (hereinafter defendant).

Plaintiff appeals from the above order of 22 March 1989, concluding, *inter alia*, that defendants had not willfully violated the North Carolina Rules of Civil Procedure, had not violated other orders in the case and should not be held in contempt of court. Plaintiff also appeals from the order of 15 May 1989, concluding that the court did not have jurisdiction to proceed with plaintiff's motion for sanctions and motion to compel and stayed discovery pending defendant's appeal in the *Inman* case. (The *Inman* case was consolidated with the case before us at the trial court.) Finally, plaintiff appeals from the order of 2 February 1989 to the extent that this order did not strike defendant's answer.

Plaintiff further seeks to have this Court make appropriate rulings regarding the trial court's jurisdiction following notice of appeal by defendants in the *Inman* case which included issues related to discovery orders entered after the above notice of appeal.

On 14 February 1990, plaintiff filed a motion to extend time to file the record on appeal with this Court and in the alternative, a motion for certiorari to permit review of the issues on appeal. In response, defendant filed a motion to dismiss plaintiff's appeal and response to plaintiff's motions. These motions are also before this panel for consideration.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams; and Dixon, Duffus & Doub, by J. David Duffus, Jr., for plaintiff-appellant Hale.

Anderson, Cox, Collier & Ennis, by Donald W. Ennis, for defendant-appellee North American Van Lines.

ORR, Judge.

The dispositive issue on appeal is whether plaintiff's motion for extension of time, or in the alternative, motion for certiorari should be granted by this Court. For the reasons below, we deny plaintiff's motion for extension of time and motion for certiorari and dismiss the appeal.

I.

Motion for Extension of Time

The following facts are pertinent to this case on appeal.

On 11 December 1986, plaintiff filed a wrongful death lawsuit which arose from an automobile accident on 20 October 1986. The accident occurred when defendant Leisure allegedly lost control of a tractor-trailer truck and swerved into the opposite lane of traffic colliding with the car in which decedents Hale and Inman occupied. At the time of the accident, defendant Leisure was driving the tractor-trailer truck as an employee of defendant North American Van Lines.

The procedural history of this suit, which has become the subject of this appeal, is lengthy. Plaintiff filed numerous motions to compel defendants to answer interrogatories and produce documents in 1987, 1988 and 1989. Plaintiff's first motion to compel was granted on 27 April 1987. A subsequent motion to compel was granted on 1 September 1987.

On 30 September 1987, the Estate of Keith D. Inman (hereinafter Inman), filed a wrongful death lawsuit against Leisure and defendant. The *Inman* and *Hale* cases were consolidated for trial on 4 May 1988. On 4 May 1988, defendant was found to be in contempt of court in the *Inman* case.

Plaintiff filed another motion to compel and motion for sanctions based upon defendant's alleged failure to participate in proper discovery. On 15 August 1988, these motions were heard along

with motions in the *Inman* case. On 24 August 1988, Judge Johnson entered sanctions in the *Inman* case, striking defendant's answer for its discovery abuses. On 2 February 1989, Judge Johnson entered sanctions in the *Hale* case, but the sanctions did not strike defendant's answer.

On 2 March 1989, Hale filed a motion to compel and motion for sanctions under Rules 11, 26, 33, 34 and 37 of the N.C. Rules of Civil Procedure alleging continued discovery abuses. On 29 March 1989, Judge Herring entered an order denying Hale's motions. Hale again filed a motion for sanctions and motion to compel in April 1989. On 15 May 1989, Judge Herring entered an order finding, *inter alia*, that the trial court did not have jurisdiction to proceed "as the result of the Notice of Appeal by the Defendant North American Van Lines to the Sanctions Order entered by [Judge Johnson on 2 February 1989]."

Plaintiff filed notice of appeal of Judge Herring's Order on 15 May 1989. Judge Herring allowed plaintiff 75 days to serve the record on appeal and allowed defendant 75 days thereafter to serve its objections or proposed alternative record on appeal. The record on appeal was settled on 15 November 1989 and filed with this Court on 28 November 1989.

Under Rule 12 of the N.C. Rules of Appellate Procedure,

> (a) Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, *but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.*

App. R. 12(a) (1989). (Emphasis added.) We note that this rule applies to all judgments entered prior to 1 July 1989. Regardless of the time limits set by the trial court, the party appealing the trial court's order has no longer than 150 days from its notice of appeal to file the record on appeal with this Court. App. R. 12(a); *Roberts v. Roberts*, 97 N.C. App. 319, 388 S.E.2d 164 (1990). The 150-day time limit may be extended only by the appropriate appellate court. App. R. 27(c); *Roberts; State v. Ward*, 61 N.C. App. 747, 301 S.E.2d 507, *disc. review denied*, 309 N.C. 825, 310 S.E.2d 357 (1983).

[1] In the case before us, plaintiff gave notice of appeal on 15 May 1989. The record on appeal should have been *filed* with this

Court on or before 12 October 1989. It was not settled until 15 November 1989 and filed 28 November 1989, some 47 days after the filing deadline with this Court. At no time during these months did plaintiff file a motion for an extension of time with this Court. It was not until 14 February 1990 that plaintiff filed such motion with this Court. Because no extension of time within which to file the record on appeal was granted by this Court under Rule 12 of the N.C. Rules of Appellate Procedure, the motion for an extension of time will be denied. *See Roberts; Construction Co. v. Roofing Co.*, 46 N.C. App. 634, 265 S.E.2d 506 (1980).

II.

Motion for Certiorari

[2] In its motion for extension of time filed 14 February 1990, plaintiff also moved, in the alternative, for certiorari to permit review of the issues on appeal in this case. For the reasons below, we deny this motion on the grounds that the issues in this case are interlocutory and that plaintiff failed to file the record on appeal pursuant to Rule 12(a) of the N.C. Rules of Appellate Procedure.

Plaintiff argues five issues on appeal, most of which pertain to discovery or evidentiary issues. Plaintiff's issue concerning whether the trial court erred in determining that it did not have jurisdiction to proceed in plaintiff's case pending appeal to this Court in the *Inman* case is now moot. This Court issued its unanimous opinion in the *Inman* appeal on 6 February 1990, affirming Judge Johnson's order of 9 January 1989. Our Supreme Court denied discretionary review of this case on 10 May 1990. Presumably, this case is now at the trial level and ready to proceed.

We hold that plaintiff's remaining issues pertaining to discovery and evidentiary matters are interlocutory. It is well settled in this state that orders concerning discovery matters are interlocutory and do not affect a substantial right which would be lost if the order was not reviewed before a final judgment. *Casey v. Grice*, 60 N.C. App. 273, 274, 298 S.E.2d 744, 745 (1983) (citation omitted).

Moreover, the appellate courts in this state consistently discourage fragmentary and partial appeals. *See Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 375 S.E.2d 161 (1989). We consider discovery and evidentiary issues, such as those appealed in the case *sub judice*, to be fragmentary and partial issues which,

in the interest of judicial economy, should not be considered by this Court.

For the reasons above, we deny plaintiff's motions and dismiss the appeal.

Appeal dismissed.

Judges ARNOLD and LEWIS concur.

WILLARD S. PERRY, FOR HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. UNION CAMP CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF v. THE ESTATE OF CLARENCE PARKER ALFORD AND PEERLESS INSURANCE COMPANY, THIRD PARTY DEFENDANTS

No. 899SC1295

(Filed 21 August 1990)

Rules of Civil Procedure § 23 (NCI3d) — certification as class action denied — no error

The trial court did not err by refusing to certify plaintiff's action as a class action where plaintiff sought to certify as a class the heirs of Frank O. Alford, who are cotenants of certain real property and who were allegedly injured by defendant's alleged wrongful cutting of trees from that property; defendant had a timber deed from Clarence Alford, Administrator of Frank Alford's estate; defendant filed a third party complaint against the estate of Clarence Alford; some of the proposed class members are heirs of both Frank Alford and Clarence Alford and others are not; affidavits filed with the court show that several heirs do not support the action; and two affiants admit having had actual notice of the sale of the timber deed. It thus appears that the proposed class members are not united in interest from the outset and that each does not share an interest in the same issue of law or fact which predominates over other issues affecting only individual class members. N.C.G.S. § 1A-1, Rule 23.

Am Jur 2d, Parties §§ 65, 66, 68, 70.

APPEAL by plaintiff from Order of *Judge Robert H. Hobgood* entered 7 July 1989 in FRANKLIN County Superior Court. Heard in the Court of Appeals 31 May 1990.

J. Michael Weeks for plaintiff appellant.

Jolly, Williamson and Williamson, by Ben N. Williamson; and Brooks, Pierce, McLendon, Humphrey & Leonard, by Jill R. Wilson, for defendant appellee.

COZORT, Judge.

Plaintiff appeals from the trial court's order denying plaintiff's motion to certify his suit as a class action. We affirm.

Plaintiff filed a Complaint on 24 September 1987 against defendant Union Camp Corporation. In his Complaint, plaintiff alleged that he represented a class consisting of "bona fide owners as tenants in common with the Plaintiff" of land which was part of the estate of Frank O. Alford. According to the Complaint, the Administrator of the Estate of Frank O. Alford, Clarence Parker Alford (now deceased), failed to join plaintiff and other heirs as parties to a special proceeding under N.C. Gen. Stat. § 28A-17-1 by which the sale of a timber deed to defendant was authorized. Plaintiff sought to have defendant's timber deed declared null and void and further sought damages for the alleged wrongful removal of timber from the land.

Defendant filed Answer alleging that it had purchased the timber from Clarence Parker Alford in his capacity as Administrator of the estate of Frank O. Alford for the sum of $428,001.00, that the sale was approved by the clerk of superior court, that it had cut timber for three years without complaint from plaintiff or the other heirs, and that the heirs knew of the Administrator's plans to sell the timber to create assets to pay inheritance taxes owed by the estate. Defendant also denied plaintiff's right to maintain a class action. Defendant subsequently filed a Third Party Complaint against the estate of Clarence Parker Alford and the Peerless Insurance Company as surety for the lawful administration of the estate of Frank O. Alford.

Plaintiff thereafter filed a Motion to Determine Propriety of Class Action and Notice of Hearing. Attached to the motion were plaintiff's affidavit in support of his motion and a list of the names and addresses of the 35 parties alleged to have an interest in

the land as tenants in common. In response to plaintiff's Motion, six parties filed affidavits in which they stated that they were heirs of Frank O. Alford and Clarence Parker Alford, that they did not support plaintiff's action, that plaintiff did not have the best interests of the heirs in mind, and that plaintiff's "ill feelings toward his inheritance from the estate of Frank O. Alford distinguish him from most of the other heirs." Two affiants further stated that they were fully aware of the sale of the timber to Union Camp prior to execution of the timber deed and that, as heirs, they received the benefits of that sale. The matter thereafter came on for hearing before the trial court, which concluded that "there are not sufficient elements present to justify a class action" and denied plaintiff's motion. Plaintiff appealed.

Rule 23(a) of the North Carolina Rules of Civil Procedure provides:

> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

A party who seeks to avail himself of the mechanism provided by Rule 23 has the burden of establishing the prerequisites to bringing a class action and the propriety of proceeding on behalf of the class. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987). Those prerequisites include (1) the existence of a class, (2) that the named representative will fairly and adequately represent the interests of all class members, (3) that there is no conflict of interest between the representative and class members, (4) that class members outside the jurisdiction will be adequately represented, (5) that the named party has a genuine personal interest in the outcome of the litigation, (6) that class members are so numerous that it is impractical to bring them all before the court, (7) that adequate notice of the class action is given to class members. N.C. Gen. Stat. § 1A-1, Rule 23 (1989); *Crow v. Citicorp*, 319 N.C. 274, 354 S.E.2d 459. Whether a suit should proceed as a class action is a matter largely left to the discretion of the trial court. *Id.* at 282, 284, 354 S.E.2d at 465, 466; Wright, Miller & Kane, Federal Practice and Procedure: Civil § 1785.

In the present case, plaintiff sought to certify a class of heirs of Frank O. Alford who are cotenants of certain real property

and who allegedly were injured by defendant's alleged wrongful cutting of trees from that property. Defendant, who had a timber deed executed by Clarence Parker Alford, Administrator of Frank O. Alford's estate, and approved by the court, filed a third-party complaint against the estate of Clarence Parker Alford. Some of the proposed class members are heirs of both Frank O. Alford and Clarence Parker Alford; others are not. Affidavits filed with the court show that several heirs do not support the action; two affiants admit having had actual notice of the sale of the timber deed. Thus, it appears that the proposed class members are not united in interest from the outset and each do not share an interest in the same issue of law or fact which predominates over issues affecting only individual class members. *Id.* at 280, 354 S.E.2d at 464. We therefore hold that the trial court, in the exercise of its discretion, properly refused to certify plaintiff's action as a class action.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA, PETITIONER v. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION, RESPONDENT

No. 8928SC1301

(Filed 21 August 1990)

Administrative Law and Procedure § 30 (NCI4th)— rejection of site specific study—agency action—contested case

An order of the Superior Court affirming an administrative law judge's dismissal of petitioner's petition for lack of jurisdiction was remanded for further appropriate proceedings where petitioner arranged for a site specific study of streamflow requirements for its Craggy Dam Project after being issued a license exemption from the Federal Energy Regulatory Commission (FERC); the study was submitted to respondent and the U.S. Fish and Wildlife Service (USFWS) in compliance with a condition contained in the exemption that a site specific study would be accepted as an alternate determination of

minimum streamflow if it met with the approval of respondent and USFWS; respondent in cooperation with USFWS rejected the site specific study and imposed streamflow requirements that substantially differed from those established by the study; and petitioner filed a petition for a contested case hearing. There is clearly a dispute between respondent agency and petitioner concerning the minimum streamflow requirements for petitioner's hydroelectric power project; the dispute involves a determination of petitioner's rights, duties or privileges; there was not a resolution of the dispute through informal procedures; and petitioner properly initiated an administrative proceeding to determine its rights, duties, or privileges. Although it is true that a federal agency issued the license exemption, federal law has not preempted state action to the extent that the respondent has the opportunity to impose project specific conditions on petitioner.

Am Jur 2d, Administrative Law §§ 776, 777, 781.

APPEAL by petitioner from order entered 15 September 1989 in BUNCOMBE County Superior Court by *Judge Hollis M. Owens*. Heard in the Court of Appeals 31 May 1990.

In August 1983 petitioner applied to the Federal Energy Regulatory Commission (FERC) for an exemption from licensing for its Craggy Dam Project, a small hydroelectric power plant to supply power for the operation of petitioner's sewerage treatment plant. Pursuant to federal law, respondent and the United States Fish and Wildlife Service (USFWS) were informed of petitioner's application and allowed to comment concerning terms and conditions necessary to prevent loss of or damage to fish or wildlife resources. Respondent provided FERC with comments on petitioner's application for exemption, including recommendations regarding minimum streamflow requirements.

On 25 January 1984 FERC issued a license exemption to petitioner which included respondent's conditions concerning minimum streamflow requirements. The exemption stated that "alternative flows which may be determined by the applicant via utilization of site specific studies approved by the Wildlife Resources Commission and the U.S. Fish and Wildlife Service" would also be acceptable.

Petitioner arranged for a site specific study to be conducted and submitted the results to respondent. Respondent rejected the

lower flow requirements supported by the site specific study. Petitioner then filed a petition with the Office of Administrative Hearings (OAH) for a contested case hearing regarding the rejection of its site study results. An administrative law judge (ALJ) dismissed the petition for lack of jurisdiction. Petitioner filed a petition in Buncombe County Superior Court for judicial review of the ALJ's order. From the superior court's order affirming the order of the ALJ, petitioner appeals.

Roberts Stevens & Cogburn, P.A., by Allan P. Root and Gwynn G. Radeker, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Melissa L. Trippe, for respondent-appellee.

WELLS, Judge.

The issue on appeal is whether the superior court erred in affirming the decision of the ALJ dismissing petitioner's petition for lack of jurisdiction. The ALJ concluded that no agency action as contemplated by the "contested case" requirement of an "administrative proceeding" as set forth in N.C. Gen. Stat. § 150B-2(2) (1987) had taken place on the part of respondent. Petitioner contends that respondent's rejection of its study and of its request for lower streamflow requirements constituted agency action giving rise to a dispute which ultimately became a "contested case" over which the OAH has jurisdiction. We agree.

N.C. Gen. Stat. § 150B-22 (1987) of the North Carolina Administrative Procedure Act (APA) in pertinent part provides:

> It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing . . . , should be settled through informal procedures. . . . [however] Notwithstanding any other provision of law, if the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

G.S. § 150B-22.

After being issued a license exemption from FERC for the Craggy Dam Project in 1984, petitioner arranged for a site specific study of streamflow requirements for the project. The study was submitted to respondent and the USFWS in compliance with the condition contained in the exemption that a site specific study would be accepted as an alternate determination of minimum streamflow if it met with the approval of respondent and USFWS. In a letter to petitioner, respondent, in cooperation with USFWS, rejected the site specific study and imposed streamflow requirements that substantially differed from those established by the site specific study. After its site specific streamflow study was rejected, petitioner filed a verified petition for a contested case hearing with the OAH in July 1988.

In the present case there is clearly a dispute between respondent agency and petitioner concerning the minimum streamflow requirement for petitioner's hydroelectric power project. The dispute involves a determination of petitioner's "rights, duties, or privileges," because petitioner's option pursuant to the clause in its license exemption to use an alternate streamflow in the operation of its power plant was foreclosed by respondent's refusal to approve the alternate flows. There was no resolution of the dispute through informal procedures. Consequently, petitioner properly initiated an administrative proceeding to determine its rights, duties, or privileges in light of respondent's rejection of its site specific study.

Respondent attempts to argue that its action in this case could not constitute agency action because the state is preempted from acting in this area by the federal government. While it is true that FERC, a federal agency, issued the license exemption, to the extent that respondent has the opportunity to impose project specific conditions on petitioner, federal law has not preempted state action. This record shows that it is state action—not federal—which has imposed upon petitioner the streamflow requirements from which it seeks relief.

We hold that in the present context, respondent's rejection of petitioner's site specific study constituted agency action giving rise to a "dispute between an agency and another person" (petitioner is a "person" pursuant to N.C. Gen. Stat. § 150B-2(7) (1987)). When petitioner filed its verified petition for a contested case, the dispute effectively became a contested case over which the OAH has jurisdiction. We therefore reverse the order of the superior

court affirming the ALJ's dismissal of petitioner's petition and remand to the Superior Court of Buncombe County for entry of judgment remanding this case for further appropriate proceedings consistent with this opinion.

Reversed and remanded.

Judges PARKER and DUNCAN concur.

MARGARET Y. BISHOP, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, O'BERRY CENTER, RESPONDENT-APPELLANT

No. 898SC777

(Filed 21 August 1990)

State § 12 (NCI3d)— dismissal of state employee—procedural violation—back pay and attorney fees

Although a state agency had just cause to terminate petitioner's employment, its dismissal procedure violated petitioner's due process rights where the final decision to discharge her was made before she was given an opportunity to respond to the charges and those who did the firing did not confer after hearing petitioner's response. An award of back pay to petitioner was authorized by 25 N.C.A.C. 1B .0432(c) since there was in effect no pre-dismissal conference, and an award of attorney fees was authorized by N.C.G.S. § 126-4(11) where back pay was ordered.

Am Jur 2d, Public Officers and Employees §§ 259, 260, 288, 297.

APPEAL by respondent from order entered 12 May 1989 by *Judge Herbert O. Phillips, III*, in WAYNE County Superior Court. Heard in the Court of Appeals 18 January 1990.

Before being discharged on 15 October 1986 petitioner was working as a Developmental Technician I at O'Berry Center in Goldsboro and had been a permanent state employee for more than six years. During her employment she had received numerous oral and written warnings for not reporting to work at the times

scheduled and for failing to follow different unit procedures. On 4 October 1986, in violation of written policy, petitioner lit and smoked a cigarette in a patient's bedroom. Doris Bunch, petitioner's supervisor, upon observing the incident, ordered her to extinguish the cigarette and she did so. On 5 October 1986 Bunch, through a subordinate, directed petitioner and two of her co-workers to scour as well as wipe clean the bathtubs of their patients. Petitioner told her superior that scouring the tubs was not a normal duty for those in her job classification and she wiped but did not scour the tubs. Bunch reported petitioner's actions to Cluster 6 Administrator Kenneth R. Lee, who interviewed various officials, conferred with his supervisor, Deputy Division Director Ada K. Melvin, and reviewed petitioner's personnel file, but did not interview petitioner or otherwise seek to obtain her version of the events reported. On 13 October 1986 Lee recommended to Melvin that petitioner be dismissed and Melvin signed an Employee Disciplinary Action Report dismissing petitioner. On that same day Lee wrote and signed a letter to petitioner dismissing her effective 15 October 1986. On 15 October 1986 Lee had Doris Bunch and Nan Horne, the Center's Active Treatment Coordinator, sign the Employee Disciplinary Action Report, and in a meeting with petitioner Lee went over the 13 October 1986 termination letter, which outlined petitioner's prior warnings and counseling and stated that she was being dismissed for smoking in a patient's bedroom on 4 October 1986 and for refusing to clean and scour the bathtubs used by her patients on 5 October 1986 as ordered. Petitioner denied that she smoked in a patient's bedroom on 4 October 1986 and stated that she did not scour the bathtubs on 5 October 1986 because it was not her regular duty and that trouble she had with a patient that day caused her to forget the instruction. In the meeting Lee gave petitioner the termination letter with the attached Disciplinary Action Report. Lee, Horne and Bunch did not confer or deliberate after hearing petitioner's responses and her comments were not added to the Employee Disciplinary Action Report. Lee submitted a memorandum dated 20 October 1986 to Melvin outlining the pre-dismissal conference and petitioner's responses to the allegations against her.

Petitioner's dismissal was appealed to the Office of Administrative Hearings, where the Administrative Law Judge found facts similar to those stated above and concluded that although respondent had just cause to terminate petitioner's employment

its procedure in doing so violated petitioner's due process rights and recommended that the State Personnel Commission award petitioner back pay from 15 October 1986, her termination date, through 19 October 1987, when the appeal was heard. The Full State Personnel Commission adopted the Administrative Law Judge's findings of fact and conclusions that respondent had just cause to terminate petitioner's employment, but rejected the conclusion that petitioner's due process rights had been violated and denied petitioner any relief. In reviewing the final agency decision Judge Herbert O. Phillips, III concluded that respondent had just cause to terminate petitioner's employment, but its dismissal procedures violated her due process rights and awarded petitioner back pay and attorneys fees.

Eastern Carolina Legal Services, Inc., by Wesley Abney, for petitioner appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General John R. Corne and Associate Attorney General Valerie B. Spalding, for respondent appellant.

PHILLIPS, Judge.

Respondent appellant does not question any of the foregoing facts upon which the several adjudications are based. Its only contentions are that the trial court erred in concluding that the dismissal procedures violated Bishop's due process rights and in awarding her back pay and attorneys fees. Neither contention has merit in our opinion.

That petitioner had a property interest of continued employment which the Due Process Clause of the United States Constitution protected is not disputed. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972); *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). The essential due process requirements for discharging a state employee who has such a property interest have been stated to be that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 84 L.Ed.2d 494, 506 (1985). In other cases it has been held that the employee's opportunity to be heard must be meaningful in time and in manner.

Armstrong v. Manzo, 380 U.S. 545, 14 L.Ed.2d 62 (1965); *Nantz v. Employment Security Commission*, 28 N.C. App. 626, 222 S.E.2d 474, *aff'd*, 290 N.C. 473, 226 S.E.2d 340 (1976). Here petitioner's opportunity to be heard was not meaningful since the final decision to discharge her was made before she was given an opportunity to respond to the charges and those who did the firing did not confer after her response was made.

The award of back pay to petitioner is authorized by 25 N.C.A.C. 1B .0432 *Remedies for Procedural Violations*, which states that:

> (c) Failure to conduct a pre-dismissal conference shall be deemed a procedural violation. Further, the remedy for this violation shall require that the employee be granted back pay from the date of the dismissal until a date determined appropriate by the commission in light of the purpose of pre-dismissal conferences. Reinstatement shall not be a remedy for lack of a pre-dismissal conference.

Since petitioner had already been dismissed before Lee and the others conferred with her, there was no pre-dismissal conference under the provisions of the rule. Due to a typographical error the trial court inadvertently ordered back pay from *5* October 1986—rather than from *15* October 1986, when petitioner was dismissed—through 19 October 1987, the date of the hearing before the Administrative Law Judge. Correcting this is a clerical matter. The award of attorneys fees was also proper, since G.S. 126-4(11) authorizes the assessment of reasonable attorneys fees against a state agency in cases where back pay is ordered.

In view of the foregoing petitioner's cross-assignments of error need not be determined.

Affirmed.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. GARY DEVONE BUCKOM

No. 908SC162

(Filed 21 August 1990)

Constitutional Law § 66 (NCI3d)— court's ex parte communication with jury—denial of right of confrontation

Defendant's constitutional right to be present at every stage of his trial was violated by the trial court's *ex parte* meeting and discussion with the jury during a recess before the verdict was rendered, and defendant is entitled to a new trial on two armed robbery charges where the record fails to show that defendant's defense was not prejudiced by his absence from the *ex parte* meeting.

Am Jur 2d, Trial § 1001.

APPEAL by defendant from judgment entered 13 September 1989 by *Judge Samuel T. Currin* in WAYNE County Superior Court. Heard in the Court of Appeals 3 August 1990.

Defendant was charged in proper bills of indictment with two counts of robbery with a dangerous weapon in violation of G.S. § 14-87. The jury found defendant guilty as charged and he was sentenced to consecutive forty year prison terms. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show that Quick Mart #1 on Ash Street in Goldsboro was robbed on 26 January 1989 between 1:30 and 2:00 a.m. During the robbery, the robber held a small paring knife to the night manager's neck and demanded that he open the cash register. When the manager was unable to get the cash register open, the robber put the knife on the counter, knocked the cash register to the floor and ran away with the cash drawer which contained approximately $45 in cash and food stamps and two credit cards.

After being picked up near the Quick Mart, defendant was driven to the store for possible identification. The night manager was unable to identify him as the robber at that time, but did at trial. The missing cash register was found at a nearby school the following morning.

On 27 January, two men came into the Quick Mart #3 on Arrington Bridge Road and Route 117 south of Goldsboro and used a Texaco credit card stolen the day before from Quick Mart #1 to buy gas, cigarettes and brake fluid. When the cashier opened the cash drawer during the transaction, the man pulled out a pocketknife and demanded all the money. The cashier by way of both a photographic lineup and a show-up at district court identified the defendant as the robber.

Fingerprints taken from the paring knife, the credit card and the cash register drawer could not be identified as belonging to the defendant.

Defendant's girlfriend testified on his behalf and stated the defendant was with her in bed on the night in question. She further testified that she and defendant awoke together 27 January. On cross-examination, she testified that she was not sure if the defendant remained in her apartment throughout the night.

On appeal, defendant brings forth two questions for this Court's review. By Assignment of Error number one, defendant contends that the trial court committed reversible error by engaging in an *ex parte* communication with the jury during the trial. We agree and therefore hold that defendant is entitled to a new trial.

Although not noted in the trial transcript, an *ex parte* communication by the trial judge to the jury before a verdict was rendered is revealed in two affidavits found in the record on appeal. Irvin J. Craig, Jr. states in his affidavit of 9 February 1990 that he was a juror in the present case and that the trial judge twice met with the jurors in the jury room behind closed doors in the absence of defendant, any counsel, or the court reporter. One meeting was after defendant's sentence was pronounced, but the other "occurred during a recess in the presentation of evidence in the defendant's trial, prior to the rendering of the verdict." Benjamin B. Sendor, a special assistant to the Appellate Defender, states in his 9 February 1990 affidavit that he interviewed Craig and two other jurors. In separate interviews each juror said that an

ex parte meeting and discussion between the trial judge and the jurors occurred during a recess prior to rendering of the verdict. The State makes no showing to dispute the claims made in these affidavits.

Our Supreme Court addressed such *ex parte* communications between a trial judge and the jury before the verdict is rendered in *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987). In that case, the trial judge told the court reporter that he would administer the admonitions to the jury in the jury room. Because there was no indication in the record to the contrary, the Court assumed that the trial judge did as he said he would. The Court held that such *ex parte* communications violated the rights of the accused to be present at every stage of his trial. The Court further held that the State could not show that the error was harmless beyond a reasonable doubt because the defendant, counsel and the court reporter were all absent.

In the present case, like *Payne*, defendant, counsel and the court reporter were absent during the trial judge's communication with the jury. Unlike the trial judge in *Payne*, the trial judge in this case did not even tell the court reporter that he planned to speak to the jury in the jury room. We note also that in this case defendant was proceeding *pro se* and therefore had no benefit of counsel. We cannot distinguish this case from *Payne*, or the more recent *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990) (following three unrecorded private bench conferences, three potential jurors were excused by the trial judge), although the Supreme Court subsequent to *Payne* has done so under certain facts. *See State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, --- U.S. ---, 110 S.Ct. 2587, 110 L.Ed.2d 268 (1990) (following *ex parte* communications between trial judge and a juror, juror was replaced with an alternate); *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *cert. granted, judgment vacated*, --- U.S. ---, 110 S.Ct. 1466, 108 L.Ed.2d 604 (1990) (following in-chambers examination of juror by the trial judge the juror was removed for cause); *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989), *cert. granted, judgment vacated*, --- U.S. ---, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990) (record established that *ex parte* communications were not prejudicial); *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *cert. granted, judgment vacated*, --- U.S. ---, 110 S.Ct. 1463, 108 L.Ed.2d 601 (1990) (court reporter was present during *ex parte* interviews with jurors and provided counsel with transcripts).

The record in this case does not disclose at what point the trial judge met with the jury nor does it recite the content of the meeting and discussion. We therefore cannot say that the absence of defendant at the time of the communication, particularly since he represented himself, did not prejudice his defense. For these reasons, *Payne* is applicable to this case. The *ex parte* communications between the trial judge and the jury amounted to error requiring a new trial of defendant.

In light of our holding above, we find it unnecessary to discuss Assignment of Error number two.

New trial.

Judges WELLS and EAGLES concur.

MARY ANNE SUMMER, PLAINTIFF v. WILLIAM J. ALLRAN, III AND ALLRAN & ALLRAN, DEFENDANTS

No. 8926SC1114

(Filed 21 August 1990)

Attorneys at Law § 49 (NCI4th)— attorney malpractice—failure to prove damages

In an attorney malpractice action in which plaintiff alleged that she suffered lost alimony, reduced child support and an inadequate share of marital property as a result of defendant attorney's negligent preparation of a separation agreement, plaintiff's evidence was insufficient to establish that she sustained any damages proximately caused by defendant attorney's negligence, and a directed verdict was properly entered in favor of defendant attorney and his law firm, where the evidence showed that plaintiff filed suit against her former husband to set aside the separation agreement and for alimony, increased child support and equitable distribution; the separation agreement was set aside; plaintiff's claims for alimony and increased child support were dismissed; and plaintiff and her former husband agreed to a property settlement which was incorporated into a consent order.

Am Jur 2d, Attorneys at Law §§ 208, 223, 226.

PLAINTIFF appeals from judgment entered 5 June 1989 in MECKLENBURG County Superior Court by *Judge W. Terry Sherrill.* Heard in the Court of Appeals 11 April 1990.

Plaintiff and her former husband, Garry Summer, separated in December 1981 at which time plaintiff contacted defendant William J. Allran, III regarding preparation of a separation agreement. Over the course of several weeks, three drafts of an agreement were prepared and on 5 February 1982 the third and final draft was signed by plaintiff and Garry Summer. Subsequently, plaintiff instituted an action to have the separation agreement set aside and for divorce, alimony, child custody and support, and equitable distribution of the marital property. Plaintiff also brought an action for legal malpractice against defendant Allran and his law firm in December 1983. That action was voluntarily dismissed by plaintiff in October 1985, but was refiled as the present action on 18 September 1986.

Trial of the malpractice action was held during the 22 May 1989 session of Mecklenburg County Superior Court. At the close of the evidence, the trial court granted defendants' motion for directed verdict. Plaintiff appeals.

Tucker, Hicks, Hodge and Cranford, P.A., by John E. Hodge, Jr. and Fred A. Hicks, for plaintiff-appellant.

Bailey & Dixon, by David M. Britt, Gary S. Parsons and Alan J. Miles; and Carpenter & James, by James R. Carpenter, for defendant-appellees.

WELLS, Judge.

Plaintiff argues on appeal that the trial court erred in granting defendants' motion for directed verdict at the close of all the evidence. She contends that the evidence of attorney malpractice was sufficient to go to the jury. For the reasons which follow, we disagree.

In ruling on a motion for directed verdict, the trial court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985) and cases cited therein. Only where the evidence, when so considered, is insufficient to support a verdict in the nonmovant's favor should the motion for directed verdict be granted. *Id.* Apply-

ing these principles to the present case, defendants are not entitled to a directed verdict unless plaintiff has failed as a matter of law to show actionable negligence. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E.2d 816 (1981).

In order to show actionable negligence in a legal malpractice action, the plaintiff must prove by the greater weight of the evidence that the attorney breached the duties owed to his client as set forth by *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954), and that this negligence proximately caused damage to the plaintiff. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985). Specifically, when a plaintiff brings suit for legal malpractice, plaintiff must show that but for the negligence of defendant, plaintiff would have suffered no "loss." In order to meet this burden, plaintiff must prove three things: (1) that the original claim was valid; (2) it would have resulted in a judgment in plaintiff's favor; and (3) the judgment would have been collectible. *Id.; see also Bamberger v. Bernholz*, 326 N.C. 589, 391 S.E.2d 192 (1990) (*reversing* 96 N.C. App. 555, 386 S.E.2d 450 (1989) for reasons stated in dissenting opinion of Lewis, J.).

In this case plaintiff contends that, as a result of negligent legal representation by defendant Allran and his law firm, she suffered "loss" in the form of lost alimony, reduced child support, and an inadequate share of the couple's marital property. Plaintiff's contentions must fail, however, because the record reveals that plaintiff's claims have already been addressed and that, in fact, the resulting judgments either were not in plaintiff's favor or were settled by mutual agreement between plaintiff and Garry Summer. Plaintiff testified that a few months after signing the separation agreement drafted by defendant Allran, she filed suit against her former husband in Mecklenburg County. In that action, plaintiff asked for equitable distribution of marital property, temporary alimony and "subsistence" and for the separation agreement to be set aside. The case was transferred to Gaston County. An order was issued in Gaston County dismissing the claims for temporary alimony and "subsistence" and granting the claim for setting aside the separation agreement. A subsequent order dated 7 April 1983 was also entered in Gaston County. It addressed issues including custody, possession of the marital residence until the minor child entered college, and a timetable for the sale of two residences (the marital home and a rental house) owned by plaintiff and Garry Summer. The order also stated that pending sale of the residences,

Garry Summer would receive the rental income and apply it to monthly payments against the residences in satisfaction of plaintiff's obligation toward the encumbrances, and ordered that upon the sale of either of the residences, the proceeds from the sale would be distributed in accordance with the provision of the separation agreement. No other order was entered in that case and plaintiff did not appeal from any of the trial court's rulings. Finally, there was also testimony by Martin Brackett, Garry Summer's divorce attorney, to the effect that at some point in November 1984 an agreement was reached between plaintiff and Garry Summer concerning various aspects of their property settlement. This agreement was reached prior to final hearing on the matters and became part of a consent order entered with the court in June 1985.

On these facts we must agree with the trial court that the evidence, even when taken in the light most favorable to plaintiff, is insufficient to establish that negligence on the part of defendants was the proximate cause of any damages sustained by plaintiff. Rather, the evidence shows that plaintiff was, in fact, unable to prevail with regard to two of her claims—alimony and increased child support—that she in effect "settled" the equitable distribution claim by reaching an out-of-court property agreement which was later incorporated into a consent order. By entering into the consent order disposing of her property claims against her former husband, plaintiff lost her right to assert a negligence claim against defendants concerning distribution of marital property. *See Stewart v. Herring*, 80 N.C. App. 529, 342 S.E.2d 566 (1986); *Compare McCabe v. Dawkins*, 97 N.C. App. 447, 388 S.E.2d 571 (1990). Proximate cause being necessary to establish actionable negligence, plaintiff's failure to show proximate cause entitled defendants to a directed verdict as a matter of law.

Affirmed.

Judges EAGLES and GREENE concur.

VIRGINIA ABELS v. RENFRO CORPORATION, AETNA CASUALTY & SURETY AND OR PMA GROUP

No. 8910IC1124

(Filed 21 August 1990)

1. **Master and Servant § 91 (NCI3d)— workers' compensation— claim filed more than two years from accident—denied**

The Industrial Commission did not err by denying plaintiff's claim arising from a back injury where plaintiff continued to work following the accident, was switched to light duty by defendant and lost no time from work, continued to have trouble and was treated by several doctors, all of the bills were paid by defendant, no agreement concerning compensation or liability was ever entered into, and the claim was denied upon the ground that it was not filed within two years of the accident. Filing a workers' compensation claim within two years after the accident upon which it is based is a condition precedent to the Industrial Commission acquiring jurisdiction and paying an employee's medical bills is not enough to establish estoppel.

Am Jur 2d, Workmen's Compensation §§ 482, 484.

2. **Master and Servant § 96.1 (NCI3d)— workers' compensation— finding that plaintiff's evidence not credible—within Commission's province**

The findings of the Industrial Commission in a workers' compensation claim were not disturbed by the Court of Appeals where the claim was denied upon findings that plaintiff's evidence was not credible. The Industrial Commission is a trier of fact in workers' compensation cases and as such determines the weight and credibility of the evidence. N.C.G.S. § 97-86.

Am Jur 2d, Workmen's Compensation §§ 550, 561.

APPEAL by plaintiff from Opinion and Award filed 13 June 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 May 1990.

Franklin Smith for plaintiff appellant.

Johnson, Bell & Francisco, by George Francisco, for defendant appellee Renfro Corporation.

PHILLIPS, Judge.

Plaintiff's appeal is from the denial of two different claims for workers' compensation. Both decisions are correct and we affirm them.

[1] The first claim, not filed with the Industrial Commission until 7 October 1987, was based upon an accident that occurred in defendant corporation's textile mill in Mount Airy on 15 June 1984. The accident, not disputed by defendants, was that plaintiff slipped on a cardboard box, fell to the floor, and hurt her back. Other facts not disputed are that: After reporting the injury to her supervisor plaintiff continued to work, and did not seek medical attention until two or three days later when an orthopedic surgeon diagnosed her as having a lumbosacral strain and started a course of conservative treatment. During the treatment period plaintiff was switched to light duty by defendant and lost no time from work. During the two years or so that followed she continued to have trouble with her back and was treated by several other doctors, all of whose bills were paid by defendants. But no agreement concerning compensation or liability was ever entered into and when the claim was eventually filed with the Industrial Commission defendants denied it upon the ground that it was not filed "within two years after the accident," as G.S. 97-24(a) requires. When the claim was heard the Commission found facts somewhat as stated above, and that defendants did not induce or mislead plaintiff into not filing the claim within the time required, and held that the claim was barred as a matter of law.

Under the facts established the Commission could not have properly done otherwise. For filing a workers' compensation claim within two years after the accident upon which it is based is a condition precedent to the Industrial Commission acquiring jurisdiction over it, *Montgomery v. Horneytown Fire Department*, 265 N.C. 553, 144 S.E.2d 586 (1965), and this claim was not filed within that time. Plaintiff's argument that paying her medical bills estop defendants from denying the claim cannot be accepted, because voluntarily paying an employee's medical bills is not enough to establish an estoppel, *Barham v. Kayser-Roth Hosiery Co., Inc.*, 15 N.C. App. 519, 190 S.E.2d 306 (1972), and that is the only evidence of estoppel that plaintiff can point to or the record contains. For the proof required to establish an estoppel in cases like this *see Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

[2] Plaintiff's other claim, filed on 21 November 1987, alleges that her cervical spine was injured on 26 June 1987 when another employee inadvertently struck her with a box of socks. This claim was denied upon findings that plaintiff's evidence with respect to it is not credible. Since the Industrial Commission is the trier of the facts in workers' compensation cases, G.S. 97-86, and as such determines the weight and credibility of the evidence, *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980), the findings were within the Commission's province and cannot be disturbed by us. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980).

Affirmed.

Judges ARNOLD and COZORT concur.

CURRIN-DILLEHAY BUILDING SUPPLY, INC. v. GEORGE W. FRAZIER AND WIFE, EDNA M. FRAZIER

No. 909DC144

(Filed 21 August 1990)

Appeal and Error § 203 (NCI4th)— notice of appeal—requirement of filing with clerk of court

Defendants' appeal is dismissed where they only gave notice of appeal in open court but failed to file notice of appeal with the clerk of superior court and to serve copies thereof on all other parties as required by Appellate Rule 3(a).

Am Jur 2d, Appeal and Error §§ 317-319.

APPEAL by defendants from judgment entered 14 September 1989 by *Judge C. W. Wilkinson, Jr.* in GRANVILLE County District Court. Heard in the Court of Appeals 3 August 1990.

Plaintiff instituted this action seeking to recover the balance due for various building materials purchased by defendants. Defendants filed an answer denying the material allegations of the complaint. A jury determined that the parties entered into a contract which was subsequently modified by the parties and that

plaintiff was entitled to recover $11,986.08 from defendants. The trial court reduced this amount by $3,088.17. Such reduction was agreed upon by the parties as a set-off and judgment was entered in favor of plaintiff for $8,897.91. Defendants gave notice of appeal in open court.

Royster, Royster & Cross, by H. Norman Thorp, III and James E. Cross, Jr., for plaintiff-appellee.

C. C. Malone, P.A., by C. C. Malone, Jr., for defendants-appellants.

ARNOLD, Judge.

Prior to 1 July 1989, notice of appeal in civil actions could be given either in writing or orally in open court. Appellate Rule 3(a), however, was amended on 8 December 1988 to provide that an appeal in a civil action is taken, effective for all judgments entered on or after 1 July 1989, by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties. This, defendants have not done. Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed. *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E.2d 46 (1976). Accordingly, this appeal is

Dismissed.

Judges WELLS and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 AUGUST 1990

BALLOU ENTERPRISES, INC. v. SOUTHERN RAILWAY CO. No. 893SC578	Carteret (87CVS940)	Trial court's judgment is reversed
BROOKS v. ATKINSON No. 8910DC1263	Wake (88CVD833)	Affirmed & remanded to district court for determination of attorney's fees
GOODSON v. COGBURN No. 9030SC193	Haywood (89CVS423)	Appeal Dismissed
IN RE SMITH No. 9014SC77	Durham (86J136)	Affirmed
IN RE STROUD No. 9025DC118	Catawba (88J81)	No Error
LEE v. VISION CABLE OF NORTH CAROLINA No. 8926SC1336	Mecklenburg (88CVS6134)	Affirmed
MANESS v. PERDUE FARMS, INC. No. 8920SC1324	Moore (89CVS091)	Affirmed
SHERER v. BCDR, LTD. No. 8910DC602	Wake (87CVD5478)	No error as to all issues except libel. New trial on issue of libel.
SMITH v. WASHINGTON No. 8914DC1218	Durham (88CVD3862)	Affirmed
SOUTH ATLANTIC PRODUCTION CREDIT ASSN. v. GREEN No. 903SC122	Pitt (88CRS1087)	Affirmed
STATE v. ELLIS No. 9018SC73	Guilford (89CRS30313) (89CRS30314) (89CRS30315) (89CRS30316)	No Error
STATE v. KLINEDINST No. 901SC52	Currituck (89CRS932)	No Error
STATE v. PETERS No. 906SC95	Northampton (89CRS306)	No Error
STATE v. ROMINGER No. 9021SC71	Forsyth (89CRS7211)	No Error

IN THE MATTER OF THE ADOPTION OF P. E. P.

No. 8915SC1182

(Filed 4 September 1990)

1. Adoption or Placement for Adoption § 23 (NCI4th)— adoption— not fraudulent

There was competent evidence to support each disputed finding relating to fraud arising from an adoption proceeding in which the biological mother, a resident of Michigan, arranged an adoption through The Way International, a religious organization, before the child was born; she came to North Carolina for the birth of the child and returned to Michigan afterwards; an interlocutory decree was entered on 17 November 1988; the biological mother filed [on 27 December 1988] a motion for relief from the interlocutory decree alleging fraud after seeing a television show on religious cults; and the trial judge found that she had willingly and voluntarily consented to the adoption of the child and that her consent was not procured by fraud.

Am Jur 2d, Adoption §§ 44, 47.

2. Adoption or Placement for Adoption § 23 (NCI4th)— adoption— fraud, undue influence, duress not present

The trial court's findings in an action for relief from an interlocutory adoption decree supported its conclusion that the birth mother's consent was not obtained by fraud, undue influence, or duress where the birth mother contended that she had been defrauded by the attorney for the adoptive parents in that he told her that she must be present in North Carolina to effectuate the adoption and that it was all right for him to pay or arrange payment for most of her expenses, and did not suggest that she seek independent legal counsel. The attorney's testimony at the hearing contested those allegations and, even if true, his conduct did not constitute fraud; the birth mother does not indicate that any of these factors induced her to consider placing her child for adoption; there was sufficient evidence to support the court's finding that she willingly and voluntarily consented to the adoption; and

there was no evidence that she ever expressed dissatisfaction with any aspect of the adoption in North Carolina.

Am Jur 2d, Adoption §§ 44, 47.

3. Evidence § 48.1 (NCI3d)— adoption—expert on cults—not qualified

The trial court did not abuse its discretion in an action for relief from an interlocutory adoption decree by refusing to accept an expert in the area of destructive cults and behavioral modification where plaintiffs made no effort to establish that the witness's purported area of expertise has received general acceptance in relevant academic or scientific communities or that it conformed to a generally accepted theory of specialized knowledge.

Am Jur 2d, Expert and Opinion Evidence §§ 6, 55-59.

4. Adoption or Placement for Adoption § 3 (NCI4th)— adoption—best interest of child

The trial court did not err in an action for relief from an interlocutory adoption decree by concluding that it was in the best interest of the child to remain in the custody of the adoptive parents where the trial judge properly considered all of the pertinent circumstances and the uncontested findings alone adequately support the conclusion.

Am Jur 2d, Adoption §§ 81, 82.

5. Adoption or Placement for Adoption § 3 (NCI4th)— adoption—no requirement that biological parents be unfit

The trial court did not err in an action for relief from an interlocutory adoption decree by finding that adoption was in the best interest of the child without finding that the biological parents were unfit or by refusing to admit testimony about The Way International. Plaintiffs offer no support for their argument that biological parents must be found unfit in order to reach the conclusion that adoption is in the best interest of the child, and the adoption statute and the case law make it clear that the trial court must be guided by a balancing of the interests resolved in favor of the best interest of the child. There was no basis on which the disputed testimony

could have been admitted, and any error in excluding the evidence was harmless.

Am Jur 2d, Adoption §§ 81, 82.

6. **Adoption or Placement for Adoption § 26 (NCI4th) — adoption — biological father — failure to contest — estoppel**

The trial court did not err in an action seeking to set aside an interlocutory adoption decree by finding that the alleged biological father should be estopped from attacking the decree because he had actual notice of the proceedings and failed to take any action prior to the entry of the order. The findings clearly indicate that the court was not persuaded that Rowe was the father and, therefore, it is not clear that he had any rights under the adoption statute. Even if he was entitled to notice, his actual notice rendered the defect procedural and does not automatically require that the proceeding be set aside.

Am Jur 2d, Adoption § 54.

7. **Adoption or Placement for Adoption § 3 (NCI4th) — adoption — procedural irregularities — best interest of child**

Irregularities in an adoption proceeding did not require that an interlocutory adoption decree be dismissed where the defects in the proceeding were procedural. Procedural defects are among many factors to be considered, but the clear legislative policy of this state places the interests of the child above procedural defects. The bar is cautioned, however, that disregard of required procedures can result in dismissal of an adoption proceeding and that strict adherence to established procedures is always the better rule.

Am Jur 2d, Adoption §§ 76, 82.

Judge DUNCAN dissenting.

APPEAL by plaintiffs-intervenors from order entered 25 May 1989 in ORANGE County Superior Court by *Judge Craig B. Ellis*. Heard in the Court of Appeals on 3 May 1990.

Coleman, Bernholz, Bernholz, Gledhill & Hargrave, by G. Nicholas Herman, for plaintiff-appellees.

Levine and Stewart, by Donna Ambler Davis, for defendant-appellants.

WELLS, Judge.

A petition for the adoption of the child PEP was instituted in Orange County and an interlocutory decree allowing the adoption by the PEPs was entered on 17 November 1988. On 27 December 1988, Pamela Rogers and William Rowe, plaintiffs-intervenors (plaintiffs hereinafter in this case), petitioned the court to have the interlocutory decree vacated and for the petition for adoption to be dismissed. Following a hearing on the Rogers-Rowe motion, on 25 May 1989 the trial court entered an order denying the Rogers-Rowe motion, affirmed the entry of the interlocutory decree, and remanded the matter to the Clerk for further proceedings in the adoption. Plaintiffs appealed.

Pamela Rogers is the biological mother of the infant PEP. William Rowe asserts that he is the child's biological father. In December 1987, PEP was conceived by Rogers who was then living in Michigan with Rowe, her daughter from a former marriage, and an infant son who was fathered by Rowe. Rogers and Rowe were experiencing financial and other difficulties during this period and in late May 1988, Rogers left Rowe and moved in with her mother. It was at this point that Rogers first contemplated giving up her unborn child for adoption and made preliminary contact with an adoption agency in Michigan.

When Sheryl Piccirillo, a friend of Rogers, learned that Rogers was considering placing her child up for adoption, Piccirillo suggested to Rogers that placement could be arranged through The Way International, a religious organization. A few days later, Doug Hargrave, an attorney from Orange County, North Carolina, flew to Michigan to meet with Rogers. This meeting, which took place 4 June 1988, was held to discuss the possible adoption of Rogers' unborn child by a couple in North Carolina. The couple, the PEPs, lived in Orange County, North Carolina. The PEPs had hired Hargrave to represent them in the adoption after being contacted by a representative of The Way International. The PEPs had been told by the representative that a woman in Michigan wanted to put her child up for adoption.

On 11 June 1988, a process server tried to serve Rogers with a summons in connection with a custody action being instituted by Rowe. Rogers called Hargrave and told him about the process server. Hargrave arranged for Rogers and her two children to

fly to North Carolina on 12 June 1988. Rogers remained in North Carolina until September 14 or 15 of 1988.

After spending two days at the home of Hargrave, Rogers spent the remainder of her time in North Carolina in the home of Laura Smith, a nurse and acquaintance of Hargrave. Over the course of the summer, Smith was paid approximately $900 by Hargrave to cover room and board for Rogers and her two children. Rogers did not work while she was in North Carolina. Her financial needs, including any prenatal care and delivery expenses at North Carolina Memorial Hospital which were not covered by Medicaid, were met by Hargrave. Hargrave sometimes used his personal funds and sometimes used funds given him by the PEPs in order to effectuate the adoption. After Rogers returned to Michigan in September, Hargrave arranged for her to rent an apartment and paid for the first two months' rent.

While Rogers was in North Carolina her family did not know her exact whereabouts. In early August, Rogers allowed her daughter to return to Michigan in order to avoid a custody battle with her ex-husband. The airfare for this flight was also taken care of by Hargrave.

Rogers was interviewed by a social worker from the Orange County Department of Social Services on 29 August 1988. The same social worker interviewed the PEPs, both together and separately. The social worker visited the PEPs at home after the baby was placed with them.

After the birth of the child on 9 September 1988, Rogers returned to Michigan. An interlocutory decree was entered in the adoption on 17 November 1988. In late November or early December 1988, Rogers saw a television show which had as its theme destructive and religious cults. On the show, The Way International was portrayed as a cult. On 27 December 1988, Rogers filed her Motion for Relief From Interlocutory Decree on grounds that fraud had been committed upon her, and that she had signed the Consent to Adoption under undue influence and duress. Other facts appear in the opinion as necessary.

The order entered in this case contains sixty-two findings of fact and six conclusions of law. Plaintiffs except to thirteen of these findings and one conclusion. The findings of fact not excepted to are therefore binding on this court. *Harris v. Walden*, 314 N.C.

284, 333 S.E.2d 254 (1985). When a judge sits without a jury it is presumed that the court disregards incompetent evidence, and if the court's findings are supported by competent evidence, they will be sustained. *Murchak Corp. v. Caldwell*, 301 N.C. 689, 273 S.E.2d 281 (1981).

In their first assignment of error plaintiffs contend that the trial court erred in finding that Rogers willingly and voluntarily consented to the adoption of her child and in concluding that her consent was not procured by fraud, undue influence or duress. Plaintiffs also assert that the trial court erred in finding that Rogers was aware that she could not revoke her consent to the adoption after the entry of the interlocutory decree and in finding that the decision to place the child with the PEPs was made after months of consideration, thought, and reflection. Finally, plaintiffs contend that the trial court erred in excluding testimony about The Way International, the religious organization to which Hargrave, the PEPs, Smith and Piccirillo belong and to which Rogers belonged at one time, and in sustaining an objection to testimony concerning who paid for an airline ticket for Rogers' daughter to fly back to Michigan in August 1988.

[1] Plaintiffs first contend that Rogers was "defrauded" into signing a consent form allowing defendants to adopt her child; therefore, the trial court's findings and conclusions to the contrary are erroneous.

Our appellate courts are bound by the trial court's findings of fact where there is some evidence to support those findings, even though the evidence *might* sustain findings to the contrary. *In re Montgomery*, 311 N.C. 100, 316 S.E.2d 246 (1984). (Emphasis ours.) In addition, N.C. Gen. Stat. § 48-11(a) in part provides that consent to adoption cannot be revoked after three months from the date of the giving of consent *or* after the entry of an interlocutory decree. Either the entry of an interlocutory decree or the passage of three months, whichever comes first, cuts off the time period for revoking consent. After the statutory period to revoke consent terminates, consent to adopt may only be revoked upon a showing of fraud in obtaining the consent. *See In re Shamp*, 82 N.C. App. 606, 347 S.E.2d 848 (1986).

Plaintiff specifically excepts to the following findings:

52.

Pamela Rogers willingly and voluntarily consented to the adoption of the child by the [PEPs].

53.

That even though there was an error in the length of time set forth on the Consent to Adoption form, Rogers was aware upon the filing of the Interlocutory Decree that she could [not] revoke her consent.

54.

That the decision made by Pamela Rogers to place her child with the PEPs was not a hurried one, but was one made after months of consideration, thought and reflection.

Plaintiffs also excepted to the following conclusion by the court:

1. Pamela Rogers knowingly and voluntarily consented to the adoption of her child by Mr. W. PEP and Mrs. P. PEP, and there was no fraud, undue influence or duress by anyone to induce her to give her consent to the adoption.

Our review of the record shows that there is competent evidence to support each disputed finding. For example, Rogers testified at the hearing that she told Hargrave that it was fine with her for the PEPs to leave the hospital with the child; this was so noted by the trial court in an uncontested finding of fact. In addition, Jane Maskey, a social worker with Orange County DSS, testified that when she interviewed Rogers in August 1988, Rogers told her she was not being forced to place the child for adoption. Rogers also testified that it was in May 1988, after leaving Rowe, that she first told Piccirillo that she wanted to place the baby for adoption. After coming to North Carolina, Rogers repeatedly denied that she knew who was the father of her child. Rogers also testified that after returning to Michigan in September 1988, she contacted Hargrave's office several times regarding the progress of the adoption; however, the first time she raised the issue of not going through with the adoption was in November or December 1988, after seeing the television show on cults and after the interlocutory decree had been entered.

Also before the trial court was a consent to adoption form signed by Rogers and filed in Orange County on 13 September

1988. The paragraph immediately above Rogers' signature contained the following language:

> I understand and agree that my Consent to Adoption may not be revoked after whichever of the following comes first: (1) entry or an interlocutory decree of final order of adoption, regardless of whether or not an interlocutory decree has been entered; or (2) three months from the giving of this Consent.

The phrase "three months" had been marked through and "30 days" inserted in its place. While the facts are in dispute as to whether the phrase "three months" was crossed out before or after Rogers signed the consent form, Rogers testified that she had read the consent form before signing it on 12 September 1988.

Because these findings are sufficiently supported by competent evidence we overrule this assignment of error.

[2] We also hold that these findings, coupled with the uncontested findings, support the trial court's "conclusion" that Rogers' consent was not obtained by fraud, undue influence, or duress. Plaintiffs contend that Hargrave defrauded Rogers by: (1) telling her that she must be present in North Carolina in order to effectuate the adoption of her child in North Carolina; (2) telling her that it was alright for him to pay for, or arrange for payment of, most of her expenses while she was in North Carolina; and (3) failing to suggest that Rogers seek independent legal advice regarding the adoption since he was retained by the PEPs, whose interest might be in conflict with that of Rogers. Because of these alleged misrepresentations and failure to advise, Rogers contends that her consent to adoption was obtained by fraud. We disagree. First, Hargrave's testimony at the hearing contests these allegations. Secondly, even if plaintiffs' allegations are accepted as true, Hargrave's conduct, while questionable, and arguably in violation of N.C. Gen. Stat. § 48-37 (1984), did not constitute fraud in obtaining her consent. In addition, Rogers does not indicate that any of these factors induced her to consider placing her child for adoption. Indeed, Rogers' own testimony and behavior show the contrary. For example, it was Rogers who first raised the idea of adoption prior to ever having met Hargrave. After her initial meeting with Hargrave, it was Rogers who next contacted Hargrave after a process server appeared at her door.

Plaintiffs' argument that Rogers was placed under duress and undue influence is similarly unpersuasive. While we agree with plaintiffs that it would have been preferable for Rogers to have interacted with a social worker from DSS on more than one occasion, this is not required by statute. There was sufficient evidence to support the trial court's finding that Rogers willingly and voluntarily consented to the adoption. There is no evidence in the record to the effect that while she was in North Carolina Rogers ever expressed dissatisfaction with any aspect of the adoption. This assignment is therefore overruled.

[3] In their next assignment of error plaintiffs contend that the trial court erred by refusing to accept Cynthia Kisser as an expert in the area of destructive cults and behavioral modification. We disagree. The competency of a witness to testify as an expert is within the sound discretion of the trial court, and its determination will not ordinarily be disturbed by a reviewing court. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980). A finding that a witness is *not* qualified as an expert is not reversible error, unless there was abuse of discretion or the ruling was based on an erroneous view of the law. 1 *Brandis on North Carolina Evidence* § 133 (3d Ed. 1988). The witness gave her professional and academic background which included bachelors and masters degrees in American studies; her current position as executive director of The Cult Awareness Network, a national, nonprofit organization which acts as a clearinghouse for information on destructive cults; and a previous position as director of an agency that did research in the areas of mind control and destructive cults. Plaintiffs made no effort to establish that Ms. Kisser's purported area of expertise has received general acceptance in relevant academic or scientific communities or that it conformed to a generally accepted theory of specialized knowledge. Based on this record, we find that the court did not abuse its discretion in refusing to qualify Kisser as an expert in the area of destructive cults and mind control.

[4] Plaintiffs next assign as error the trial court's "conclusion of law" that it is in the best interest of the child to remain in the custody of the PEPs. The exception plaintiffs actually note in the record and reference in their brief is finding of fact number 62; however, because this finding is more properly labelled a conclusion of law and because the trial court also concluded that it would be in the best interest of the child to remain in the care, custody

and control of the PEPs, we proceed to review whether the trial court's conclusion is supported by the findings in this case.

As in child custody and support cases, the trial court in an adoption case is given wide discretion. *See In re Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977). The trial court is in the best position to determine what is in the best interest of the child. *White v. White*, 90 N.C. App. 553, 369 S.E.2d 92 (1988). It is often a difficult determination and the trial court is in the best position to observe the parties and evaluate the evidence. *Id.; see also Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985). The determination as to what is in the best interest of the child should be made by weighing the totality of the circumstances. *Spinks, supra.*

As we have previously stated, findings of fact not challenged on appeal are presumed to be supported by competent evidence and are binding on this court. *Harris, supra.* Among the unchallenged findings in the present case are the following:

> 48.
>
> Mr. [PEP] is employed . . . and makes $46,000 per year income.
>
> 49.
>
> Mrs. [PEP] is a homemaker and stays at home with the child. The child is being well cared for by the [PEPs].
>
> 50.
>
> The PEPs are fit and proper persons to have the care, custody and control of the minor child.
>
> 51.
>
> Pamela Rogers and William Rowe have had a difficult relationship. Rogers decided to move from their joint residence and took their child, Benjamin, with her. Rowe tried to find her and tried to serve a summons on her in a court action. Rogers left Michigan to avoid the service of the summons and kept her whereabouts secret from him while she was in North Carolina. After she returned to Michigan, they engaged in a court action over Benjamin until they reached the aforementioned consent order.

These uncontested findings alone adequately support the trial court's conclusion that it was in the child's best interest to remain with

the PEPs. Our review of the trial court's findings and conclusions and of the transcript of the hearing persuades us that Judge Ellis properly considered all of the circumstances pertinent to reaching his conclusion that it was in the best interest of this child to remain in the custody of the PEPs. *See Spinks, supra.*

[5] In addition to their assertion that the conclusion was not supported by the evidence, plaintiffs also contend that the trial court erred in failing to find that Rogers and Rowe were unfit parents and by refusing to admit testimony about The Way International by Kisser and Rogers and Mr. PEP. We do not agree. First, plaintiffs offer no support for their argument that biological parents must be found unfit in order to reach the conclusion that an adoption is in the best interest of the child. Rather, the adoption statute, Chapter 48, and our case law precedents make it clear that while the trial court must be guided by a balancing of interests, these in turn must always be resolved in favor of what is in the best interest of the child under the circumstances of a particular case. Secondly, there was no basis on which Kisser's testimony could be admitted. The trial court had refused to qualify her as an expert. She had no other connection with any of the parties in this case beyond a telephone conversation with Rogers after the Cult Awareness Network's telephone number was flashed on the screen during the Geraldo Rivera show on cults and a brief meeting with Rogers the night before the hearing. Finally, the trial court's ruling on the admission of testimony by Rogers and Mr. PEP concerning practices of The Way International, even if error, was harmless in this context.

[6] Plaintiffs also assign as error the trial court's finding that Rowe should be estopped from attacking the interlocutory decree because he had actual notice of the proceedings and had failed to take any action prior to the entry of the order. Plaintiffs assert that failure to serve Rowe with notice of the adoption pursuant to N.C. Gen. Stat. § 1A-1, Rule 4 (1983) requires that the interlocutory decree be set aside and the adoption proceeding dismissed.

The trial court's findings clearly indicate that the court carefully considered the question of whether Rowe was the father of the child and that the court was not persuaded that he was the father. Under these circumstances it is not clear that Rowe had *any* rights under the adoption statute, including the right to notice. Even if he was entitled to notice pursuant to Rule 4, Rowe's actual

notice of the proceeding renders the defect procedural in nature and does not automatically require that the proceeding be set aside. This procedural defect aspect of this case must be resolved against plaintiffs consistently with the discussion and reasoning on plaintiffs' final assignment, next following.

[7] In their final assignment of error plaintiffs contend that "irregularities" in this adoption proceeding require that the adoption petition be dismissed and the minor child returned to them. Plaintiffs specifically argue that the interlocutory decree should be dismissed for the following reasons: (1) Hargrave told Rogers that if she wanted to place the baby for adoption in North Carolina she would have to come to North Carolina when in fact there is no such requirement in Chapter 48. (2) Rowe never consented to the adoption. (3) At some point the time period on the consent to adoption form was altered from "90 days" to "30 days." (4) G.S. § 48-37, which addresses the prohibition against compensation for placing or arranging placement of a child for adoption, may have been violated.

This court has previously addressed the issue of procedural defects in an adoption proceeding. *See, e.g., In re Kasim*, 58 N.C. App. 36, 293 S.E.2d 247, *disc. rev. denied*, 306 N.C. 742, 295 S.E.2d 478 (1982) (trial court dismissed adoption proceeding after concluding that insufficient consent rendered the proceeding procedurally defective—reversed and remanded for determination of whether it was in best interest of the child to dismiss or continue the proceeding). Based on the language of G.S. § 48-1 and the discretion granted to the trial court by G.S. § 48-20(a) regarding the dismissal of an adoption proceeding, the court in *Kasim* concluded that the child's best interests should be paramount in the court's consideration of a motion to dismiss. Thus, in considering all the factors which might bear on the question of dismissal, procedural defects become one of many factors to be considered. All factors considered by the trial court should relate to the legislative policy stated in G.S. § 48-1:

> (1) The primary purpose of this Chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by person unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their adoptive homes by

biological parents who may have some legal claim because of a defect in the adoption procedure.

. . .

(3) When the interest of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this Chapter should be liberally construed.

In making his conclusions the trial court in this case was properly guided by the clear legislative policy of this state which places the interests of the child above procedural defects. While we do not condone *any* procedural defects in adoption proceedings, we agree with the trial court that the best interest of the minor child comes before the interest of Rowe in procedural exactitude. The procedural defects present here, and any alleged unprotected rights that may exist in Rowe's favor, should be resolved in favor of the minor child. In this case such a resolution requires that the adoption proceeding be allowed to continue. We are aware of our Supreme Court's opinion in *In re The Adoption of Clark*, 327 N.C. 61, 393 S.E.2d 791 (1990), where the court held that an unwed biological father not be bound by an order terminating his parental rights. There, the father was not served with notice of the termination proceedings, nor was he aware of the proposed adoption of his child. Our facts are clearly distinguishable. In this case, plaintiff Rowe had actual notice of the adoption proceedings, but failed to timely act on that notice. We therefore affirm the order of the trial court. We nevertheless admonish members of the bar who attempt to arrange adoptions that strict adherence to established procedures always is the better rule. When pitted against the welfare of an innocent child, procedural defects may not always mandate dismissal of an adoption proceeding; however, disregard of required procedures can result in dismissal of an adoption proceeding, with possible tragic consequences.

Affirmed.

Judge PARKER concurs.

Judge DUNCAN dissents.

Judge DUNCAN dissenting.

I

The Legislature cannot have intended that our adoption laws would permit this result. I recognize that a trial judge, who hears the testimony and observes the witnesses, is the person best able to find the facts of a case. When competent evidence supports those findings, moreover, they properly bind an appellate court, whose view of the case is limited to the cold record. Judge Ellis deserves commendation for his patient and thorough consideration of the fiercely conflicting evidence presented to him at trial. I cannot, however, agree with the conclusion he reached, and I cannot concur with the conclusion reached by the majority on appeal. In its best light, the record in this case shows a consistent and apparently deliberate failure to adhere to the laws of this State, a failure the courts should not sanction by any remote implication. By upholding this adoption, we necessarily reward a circumvention of the law, and, from that, I dissent.

One cannot look at any aspect of this case and come away untroubled. At the very least, there is a flagrant statutory violation. N.C. Gen. Stat. § 48-37 (1984) flatly declares that "No person . . . shall offer or give . . . compensation, consideration, or thing of value for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption." The majority states that—so long as Rogers' allegations are accepted as true—Hargrave's conduct "arguably" violated this statute. To the contrary, I believe it is *inarguable* upon the facts as found by the *judge* that § 48-37 was violated.

Hargrave's dealings with Rogers began with his purchase of airline tickets to enable her to leave Michigan a step ahead of a process server and ended, following the birth and relinquishment of her child, with his giving her $1,500.00. (The one clearly erroneous finding in the record involved this last payment, which the trial judge thought to be for a lease, but which—as defendants' counsel conceded at oral argument—was given Rogers *in addition to* the lease money.) While she was in North Carolina, Hargrave paid for Rogers' room and board, gave her expense money, and paid part of her physician's fees. Throughout all this, Hargrave was the attorney for the PEPs. The facts are disputed about who isolated Rogers from her family, but it is undisputed that she

was not in contact with them while here and that, during this period, Hargrave paid her bills. His contention that he did so out of love for someone he hardly knew is inherently incredible. Hargrave's munificence was either an instance of the kindness of strangers, or it was consideration for the child his clients adopted.

Standing alone, such a violation would prove troubling. But it does not stand alone. At virtually every turn, there are examples of proper procedure being bypassed so as to "speed things along." The time period for revocation of consent was shortened on the consent form to 30 days. Rogers' meeting with social worker Jane Maskey of the Orange County DSS took place while Rogers was experiencing contractions and was in physical discomfort. Maskey testified that because of Rogers' condition, she (Maskey) "didn't think it was the appropriate time to give [Rogers] counselling or anything else." Following the child's birth, the PEPs were allowed to leave North Carolina Memorial Hospital with the child in their custody. Gloria Rentrope, a clinical social worker with the hospital, testified that such a release is not in accord with normal hospital procedure and that it was a deviation she has allowed only three or four times during her twelve years there.

These procedural transgressions were further compounded. The majority holds that the question of notice is moot because Rowe had actual knowledge of the adoption. The notice issue, however, is noteworthy for another reason. According to Jane Maskey, when, as happened here, the director of Social Services is named as a child's guardian for purposes of consent to an adoption, notice by publication is given in the county where the child was conceived. No one contends that PEP was conceived in Orange County, North Carolina, yet that is where Hargrave published notice. The consequence of this procedural glitch was anything but harmless. In Maskey's view, DSS "would have said we don't want the interlocutory entered until we give this person in Michigan a chance to come forward if he's going to come forward; and we wouldn't have expected him to come forward [if notice were given] in Orange County."

Maskey testified that, had DSS been aware of them, the irregularities in this case would have resulted in the interlocutory's not being entered prior to the expiration of 90 days from the birth of the child. Well within this 90-day period, Rogers filed her Motion for Relief From Interlocutory Decree. In short, had proper procedure—including proper notice procedure—been followed,

Rogers would have been afforded adequate time to revoke her consent, and would have done so within the allowable period.

I agree that procedural defects should not outweigh the best interests of the child. The procedural irregularities in this case, however, seem purposeful, and designed to facilitate—as indeed happened—a "quick" and irrevocable adoption. Rogers may not be the victim of fraud, and any single procedural aberration, looked at in isolation, may not appear to be sufficient to void the adoption. When *viewed together*, however, the defects in this case are substantial and serious enough that we set a dangerous precedent by holding that this adoption may stand in spite of them. For public-policy reasons, to say to future parties that the courts of North Carolina will not endorse conduct that suggests a child was purchased, I would reverse the order of the trial judge. The majority's warning of tragic consequences comes, in this case, too late.

II

At the very least, I would remand this case for additional findings.

First, I believe the judge erred by excluding the testimony of Cynthia Kisser as to the alleged behavioral-modification practices of The Way International. The judge sustained defendants' objection that Kisser's expertise did not conform to an area of generally accepted explanatory theory and that her testimony was not relevant. The majority holds that the judge ruled correctly because "plaintiffs made no effort to establish that Ms. Kisser's purported area of expertise has received general acceptance in relevant academic or scientific communities . . . ." However,

> [e]xpert testimony is properly admissible when it can assist the [trier of fact] in drawing certain inferences from facts and the expert is better qualified than the [trier of fact] to draw such inferences. It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. This Court has not adhered exclusively to the view that expert testimony must be based upon 'generally accepted' scientific methods. It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.'

State v. Evangelista, 319 N.C. 152, 163-64, 353 S.E.2d 375, 383-84 (1987) (citations omitted). It is the reliability of the scientific method, and not its popularity within a scientific community, that is the relevant focus. *State v. Bullard*, 312 N.C. 129, 149, 322 S.E.2d 370, 381-82 (1984). The judge, of course, enjoys "wide latitude of discretion" when deciding whether to allow expert testimony. *Evangelista*, 319 N.C. at 164, 353 S.E.2d at 384. That discretion, however, must be exercised in light of the correct standard. Accordingly, I would remand for a proper finding as to Kisser's qualifications and, if she is found to be qualified, for additional findings of fact that include a consideration of her testimony.

Second, I respectfully disagree with the majority that the exclusion of evidence about the practices of The Way International was "harmless in th[e] context" of determining PEP's best interests. In determining a child's best interests, the judge may properly consider the parents' religious beliefs and practices. *Cf. In re Custody of King*, 11 N.C. App. 418, 419, 181 S.E.2d 221, 221 (1971) (in finding changed circumstances, trial judge entered finding that mother participated in local church activities); *see Rogers v. Rogers*, 490 So.2d 1017, 1019 (Fla. Dist. Ct. App. 1986) (adopting holding of Alabama Supreme Court that beliefs and practices may be considered as factor in custody determination, but award of custody may not be conditioned on restriction of parent's First Amendment rights); *see generally* Annotation, *Religion as Factor in Child Custody and Visitation Cases*, 22 A.L.R.4th 971 (1983). In this case, every relevant factor should have been considered, and I would not hold that the failure to do so was harmless.

STATE OF NORTH CAROLINA v. JAMES KEITH ROSS

No. 8929SC1143

(Filed 4 September 1990)

1. Homicide § 9 (NCI3d)— self-defense—court's requirement of written notice—no plain error

The trial court did not commit plain error in requiring defendant to submit a written notice of intent to rely upon

self-defense in a homicide case even if there is no statutory requirement for such notice.

Am Jur 2d, Homicide §§ 139, 519; Trial § 92.

2. **Homicide § 9 (NCI3d)— intent to rely on self-defense—court's remarks to jury venire—no plain error**

It was not plain error for the trial court to inform the jury venire of defendant's intent to rely upon self-defense even though the court's action may have been error had defendant objected or moved for a mistrial.

Am Jur 2d, Homicide §§ 139, 519; Trial § 92.

3. **Criminal Law § 34.7 (NCI3d)— murders—prior homosexual activities by defendant—admissibility to show motive and pattern of conduct**

The testimony of a teenage boy about homosexual activities the defendant engaged in with him and the two teenage victims was admissible in a murder prosecution to show motive and a pattern of conduct toward the victims consistent with the State's theory that defendant killed the victims after they threatened to expose defendant's sexual orientation and his activities to the community unless they were paid by him to keep quiet. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 321, 325, 326.

4. **Criminal Law § 86.2 (NCI3d)— prior conviction over ten years old—cross-examination of defendant—waiver of objection**

Even if the trial court erred in ruling that the prosecution could cross-examine defendant about a conviction more than ten years old, defendant's objection was waived when defendant himself testified about the conviction on direct examination. N.C.G.S. § 8C-1, Rule 609(b).

Am Jur 2d, Evidence § 330.

5. **Criminal Law § 88.4 (NCI3d)— relationship with victim—direct testimony—cross-examination as to details**

Where defendant testified in a murder prosecution that he had had a homosexual relationship with one victim, it was permissible for the State to bring out the details of that relationship on cross-examination of defendant.

Am Jur 2d, Witnesses §§ 468, 492.

6. Criminal Law § 430 (NCI4th)— murder of teenage boys—jury argument that defendant was homosexual pedophile

In a prosecution of defendant for the murder of two teenage boys, the prosecutor's jury argument that "the fact that [defendant] was a homosexual pedophile is an extremely important aspect of this case; because that sort of thing is illegal under the laws of the State of North Carolina" constituted a reasonable inference from the evidence and was not improper.

Am Jur 2d, Homicide § 463; Trial §§ 218, 260, 262.

7. Criminal Law § 438 (NCI4th)— jury argument—defendant as wolf in sheep's clothing—impropriety cured by instruction

Any impropriety in the prosecutor's biblical references in his jury argument implying that defendant was a wolf in sheep's clothing was removed when the trial court admonished the prosecutor to keep his argument within the evidence.

Am Jur 2d, Homicide § 463; Trial §§ 218, 260, 262.

8. Criminal Law § 436 (NCI4th)— murder of teenage boys—jury argument—defendant's desire toward other boys—inference supported by evidence

In a prosecution of defendant for murder of two teenage boys, the prosecutor's jury argument that, if defendant can deceive the jury, "then he can be out on the street and get his hands on more young boys within a day or two . . . And that is the ultimate driving force in his life" constituted a reasonable inference supported by defendant's admissions about his sexual relations with minor males and evidence of his prior conviction of forced carnal knowledge of a minor male.

Am Jur 2d, Homicide § 463; Trial §§ 218, 260, 262.

9. Criminal Law § 1185 (NCI4th)— aggravating factor—prior conviction—prayer for judgment continued or juvenile adjudication not shown

The statement in the record of a 1970 Virginia felony conviction of defendant that the court "doth defer imposition of a sentence" did not show that a prayer for judgment continued was entered so as to prevent the trial court from using the conviction to aggravate defendant's sentence for second degree murder. Nor was the Virginia conviction improperly considered on the ground that it was a juvenile adjudication

where the certified record of the conviction did not specify that the proceeding was a juvenile adjudication, since the certified record is prima facie evidence of the facts set out therein.

Am Jur 2d, Criminal Law §§ 598, 599.

Judge GREENE dissenting.

APPEAL by defendant from a judgment entered 28 March 1989 by *Judge Claude S. Sitton* in MCDOWELL County Superior Court. Heard in the Court of Appeals 1 June 1990.

On 12 August 1985 a jury convicted defendant of two counts of first-degree murder. Defendant was given two death sentences. On appeal, defendant was granted a new trial. *See State v. Ross*, 322 N.C. 261, 367 S.E.2d 889 (1988).

On 13 March 1989, defendant was convicted of two counts of second-degree murder. He was sentenced to two consecutive life sentences. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles M. Hensey, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant.

LEWIS, Judge.

I.

Defendant first argues that the trial court erred in requiring defendant to file with the court a written notice of intent to rely upon self-defense and by telling the jury venire of defendant's intent to rely upon this defense. Defendant did not object to the written statement of intent relative to self-defense. No North Carolina statute requires a defendant to give notice of an intent to assert "self-defense" as a defense. (*See, e.g.*, G.S. § 15A-959 which requires defendants to file notice of reliance upon an insanity defense.) The defendant argues that by telling the jury venire that he had filed an affirmative defense of self-defense, the trial judge irreparably prejudiced his case because it implied that he admitted responsibility for the deaths of the two victims. However, defendant made no objection to the trial judge's preliminary comments. Rule 10 of the North Carolina Rules of Appellate Procedure requires a party to present a timely objection in order for the question to

be preserved for appeal. Further, defense counsel's opening statement immediately following jury selection contained the following:

> That Jim Ross left the room for a few minutes and when he came back into the room these boys had Jim's .9 millimeter automatic handgun and they had it on, and they not only threatened him, but they tried to kill him.
>
> I would also contend that they had his axe which was there in the same room over by the wood stove. They threatened him with that axe and tried to kill him with that. And that Jim had no alternative. He could not retreat. That the only thing he could do is protect himself in self-defense and save his own life.

Having failed to preserve this issue for appeal, we must decide whether, under the circumstances before us, the trial court committed "plain error." N.C.R. App. P. 10(c)(4).

[1] After carefully reviewing the record in this case we conclude that the trial court did not commit plain error when it required defense counsel to submit a written notice of intent to rely upon self-defense. While there is no statutory requirement for such notice, neither is there any prohibition against it. While we strongly caution against such methods as standard practice without legislative enactment, we hold that under the unique circumstances of this particular case, it was not plain error to require the defense to file notice of intent to rely upon self-defense.

[2] We also conclude that it was not plain error for the trial judge to inform the jury venire of counsel's intent to rely upon self-defense. *See* G.S. § 15A-1213; *State v. Hart*, 44 N.C. App. 479, 261 S.E.2d 250 (1980). Had the defendant objected or moved for mistrial, the trial court's actions may well have been error. It is manifestly clear from the record that the defense was prepared to present self-defense as its only possible theory of the case. It is likewise apparent from the record that counsel for the defendant failed to object or move for a mistrial based upon the court's remarks, and that such remarks were at least tacitly approved by counsel's silence. Furthermore, if counsel had chosen not to place any evidence before the jury of self-defense, the judge could have instructed the jury at the close of the evidence not to consider self-defense in its deliberations. *Id.* Our standard is "plain error" and

under these unique circumstances we find no plain error in the court's remarks.

II.

[3] The defendant argues in his second assignment of error that the trial court erred in allowing the testimony of a teenage boy about homosexual activities the defendant engaged in with him and the two victims on previous occasions. The State's theory in this case was that the defendant killed the two victims, also teenage boys, after they threatened to expose the defendant's sexual orientation and his activities to the community unless they were paid by him to keep quiet. Specifically, the State sought to prove that one of the victims was shot while performing a sexual act with the defendant.

We hold that this evidence was highly relevant and that its relevance substantially outweighed any danger of unfair prejudice, confusion or misleading of the jury. The witness was previously in the presence of the defendant with the victims and he observed the victims engaging in homosexual acts with the defendant. This testimony was used to show motive and a pattern of conduct toward the victims consistent with the State's theory of the case. It was properly admitted. *See* G.S. § 8C-1, Rule 404(b) (1988).

III.

[4] Defendant also argues that the court erred in admitting evidence of a conviction which was more than ten years old. The evidence was that the defendant had been convicted on 18 May 1970 of a felony of forced carnal knowledge of a male of eleven years of age. Prior to the evidentiary portion of the trial, the trial court conducted a voir dire examination regarding prior convictions. Judge Sitton ruled that the conviction had probative value as to veracity and that the prosecution would be allowed to cross-examine the defendant as to this felony. Defendant argues that the judge failed to detail the specific facts and circumstances which supported its finding that the probative value of admitting the conviction justified waiving Rule 609(b)'s general prohibition against admitting convictions more than ten years old. G.S. § 8C-1, Rule 609; *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985), *disc. rev. denied*, 315 N.C. 393, 338 S.E.2d 882 (1986).

Even if the trial court did err by ruling that the State would be permitted to cross-examine the defendant about his 1970 convic-

tion, this objection was waived when the defendant himself testified as to the convictions on direct examination:

> Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence could be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). (Citations omitted.) The defendant himself "opened the door" to cross-examination on his prior convictions.

IV.

Defendant next contends that the State was impermissibly allowed to cross-examine the defendant about "bad acts" of the defendant which did not relate to the defendant's character for truthfulness. Most of the questions objected to related to alleged homosexual activities of the defendant. On direct examination the defendant admitted that he was a bisexual (but that most of his relationships had been with men), that he had a prior conviction for a sexual offense involving a young boy, and that he had been engaged in an ongoing homosexual relationship with one of the victims, a fifteen-year-old teenage boy. The questions asked by the State relating to the defendant's activities with other persons not connected to this case were objected to by defense counsel and sustained by the trial court. Another line of questions asked by the State about whether the defendant showed one of the victims any homosexual movies at his house was objected to and subsequently withdrawn by the State. Therefore, these assignments of error are without merit.

[5] Other matters asked about and excepted to which were overruled by the trial court dealt with specific details of the defendant's activities with one of the victims. The defendant testified on direct examination that he had had a sexual relationship with this victim. It was permissible for the State to bring out the details of that relationship:

> [I]t remains true that the North Carolina practice is quite liberal and, under it, cross-examination may ordinarily be made to serve three purposes: (1) *to elicit further details of the story related on direct, in the hope of presenting a complete picture less unfavorable to the cross-examiner's case*; (2) to

bring out new and different facts relevant to the whole case; and (3) to impeach the witness, or cast doubt on his credibility.

1 Brandis, *North Carolina Evidence 3d*, Witnesses § 35 (1988) (emphasis added). It was not prejudicial error to admit this testimony.

V.

Defendant further argues that portions of the State's closing arguments were outside the evidence and prejudicial to the defendant. The control of the argument of counsel must be left largely to the discretion of the trial judge, and his rulings will not be disturbed absent a showing of gross abuse of discretion. *State v. Woods*, 56 N.C. App. 193, 196, 287 S.E.2d 431, 433, *cert. denied*, 305 N.C. 592, 292 S.E.2d 13 (1982). After reviewing the statements objected to by defendant in closing argument, we find that the State's arguments were not improper. "An attorney may . . . argue any position or conclusion with respect to a matter in issue." G.S. § 15A-1230(a) (1988).

[6] Defense counsel objected to the following statements made to the jury about defendant's sexual activities: "[T]he fact that Mr. Ross was a homosexual pedophile is an extremely important aspect of this case; because that sort of thing is illegal under the laws of the State of North Carolina and every other State." The judge admonished the district attorney to refrain from arguing the law of other states. We find that otherwise this statement is a reasonable inference from the evidence presented at trial. Defendant admitted to being bisexual, he admitted receiving counseling for pedophilia, and that he had been convicted of a crime against nature involving an eleven-year-old boy in 1970. The State's theory was that the defendant killed the two victims to keep his criminal activities from being exposed to the community. It was permissible for the State to argue this theory to the jury. We reject this assignment of error.

[7] The next exception relates to biblical references made by counsel inferring that the defendant was a wolf in sheep's clothing. The trial court again admonished the State to keep its argument within the evidence. This prompt admonition removed any impropriety. *See State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

[8] The statements that form the basis of defendant's exception number 45 are as follows:

> Because you know what he wants to do, if he can deceive you, the final and last challenge, then he can be out on the street and get his hands on more young boys within a day or two . . . And that is the ultimate driving force in his life. . . .

We find that it was not a gross abuse of discretion to allow the prosecution to make these statements. The defendant's admissions about his sexual relations with minor males when considered with his prior conviction supported the State's argument. The defendant's sexual preferences and activities formed the basis of the State's theory for the motive of defendant in killing the two teenage males. It was therefore appropriate subject matter for closing arguments by the State.

VI.

[9] Finally, defendant argues that the trial court erred when it aggravated defendant's sentence based upon a valid 1970 conviction in Virginia. Defendant argues that the 1970 conviction is equivalent to a prayer for judgment continued. We find this argument to be without merit. The certified court record states that the defendant pleaded guilty to the charges against him and that the court found him guilty of abduction with intent to defile. Simply because the indictment states that it "doth *defer* imposition of a sentence . . . ," does not mean that it was a prayer for judgment continued. We reject this assignment of error.

Defendant also argues that the trial court improperly considered this conviction in the sentencing phase because there was insufficient evidence to establish that the 1970 Virginia conviction was not a juvenile adjudication which would not amount to a conviction under Virginia law. Va. Code § 16.1-179. However, the certified copy of the 1970 Virginia court record was offered and received into evidence. It did not specify that the proceeding was a juvenile adjudication. The certified record is *prima facie* evidence of the facts set out therein. G.S. § 15A-1340.4(e). The defense offered no evidence to contradict this record. We hold that the trial court properly considered this conviction in aggravation of the defendant's sentence.

The defendant received a fair trial free of prejudicial error.

No error.

Judge ORR concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the conclusions of the majority that it was not plain error "to require the defense to file notice of intent to rely upon self-defense . . . [and] for the trial judge to inform the jury prior to voir dire of the counsel's intent to rely upon self-defense."

Traditionally, the criminal law, unlike the practice in civil law, "has not required the defendant to specifically plead his defense. A plea of not guilty ordinarily brings into issue all possible defenses to the substantive charge." 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.4, at 511 (1984); *see State v. Todd*, 264 N.C. 524, 530, 142 S.E.2d 154, 159 (1965) (plea of not guilty entitles defendant to rely on more than one defense, including self-defense). By statute, North Carolina has created an exception to this general rule by requiring a defendant who intends to raise the defense of insanity to "file a notice of his intention to rely on the defense of insanity." N.C.G.S. § 15A-959(a) (1988). Any further restriction on the defendant's right to assert any defense is a matter which should be reserved for the General Assembly as it is not within the province of this court to carve out such exceptions. Surely the question of whether to require a defendant to give pre-trial notice of his intention to rely on self-defense should not, as the majority suggest, be left to the discretion of the trial judge.

The State does not argue that either the state or federal constitution requires that such notice be given, but instead suggests that "disclosure of an affirmative defense prior to trial is entirely proper." The determination of whether pre-trial notice of self-defense is proper presents not only complex questions of federal and state constitutional law, *see Wardius v. Oregon*, 412 U.S. 470, 37 L.Ed.2d 82 (1973) (notice of alibi statute invalidated as violating federal due process clause); *Williams v. Florida*, 399 U.S. 78, 26 L.Ed.2d 446 (1970) (notice of alibi procedure found consistent with constitutional provisions prohibiting self-incrimination); *Scott v. State*, 519 P.2d 774 (Alaska 1970) (notice of alibi order violated state constitutional privilege against self-incrimination notwithstanding that U.S.

Supreme Court had determined that it did not violate federal constitution), but also presents basic questions of the desirability of creating a notice of self-defense procedure. The desirability of such a procedure is clearly within the province of the General Assembly. *See* N.C.G.S. § 15A-959, Official Commentary (General Assembly specifically rejected requirement that defendant give pre-trial notice of alibi defense).

Furthermore, I believe the error of requiring the defendant to give a pre-trial notice of his intention to use self-defense became more egregious when the trial court revealed this information to the jury. Because this error, in my opinion, was fundamental and seriously affected the fairness of the defendant's trial, I conclude the error to have been plain error, *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), which in this case requires a new trial.

STATE OF NORTH CAROLINA v. STEPHEN LOUIS MOORE

No. 8929SC1224

(Filed 4 September 1990)

1. Grand Jury § 3.3 (NCI3d)— purposeful selection of black foreman—no constitutional violation

A black defendant challenging the selection of the grand jury foreman under *State v. Cofield*, 320 N.C. 297 (1987), cannot be heard to complain that his constitutional rights have been violated when the trial court purposefully selects a black foreman in an effort affirmatively to address the defendant's allegation of racial discrimination. To the extent that the second *State v. Cofield* opinion, 324 N.C. 452 (1989), might indicate a different result by its ruling that the presiding judge must consider *all* grand jurors in selecting a grand jury foreman, it is prospective only and thus not controlling in this case in which the indictment was returned in October 1987.

Am Jur 2d, Grand Jury § 14.

2. Grand Jury § 3.3 (NCI3d)— appointment of black foreman—suggestion by district attorney—removal of white foreman—jury tampering not shown

The district attorney's suggestion to the presiding superior court judge that a black individual be appointed as foreman of the grand jury which indicted defendant in order to address concerns raised by the first *Cofield* decision does not show that the judge exceeded his authority under N.C.G.S. § 15A-622(c) in removing the white foreman or that there was unlawful prosecutorial tampering with the grand jury in violation of defendant's constitutional rights.

Am Jur 2d, Grand Jury § 14.

3. Constitutional Law § 60 (NCI3d)— jury selection—investigation of racial discrimination—limiting disclosure of records to previous four years

The trial court did not deny defendant a reasonable opportunity to investigate and produce evidence of racial discrimination in the jury selection process by limiting its order compelling disclosure of jury selection records to the previous four years where the evidence showed that the county had changed its method of compiling its lists of prospective jurors at the beginning of that four-year period and, even more recently, had rewritten its computer program to improve the random selection procedure, and it appeared that defendant would be unable to make out a prima facie case of racial discrimination if he could not produce evidence of racial discrimination in the selection process or a substantial disparity in the number of blacks in the venires during that four-year period.

Am Jur 2d, Grand Jury § 14.

4. Constitutional Law § 60 (NCI3d)— jury selection—racial discrimination—denial of additional expert witness assistance

The preliminary conclusion of an expert appointed by the court to assist defendant in investigating racial discrimination in the grand and petit juries that the lists used for jury selection might not include "all categories of the population in the proportions in which they exist in the county" did not show a reasonable likelihood that blacks are systematically excluded from the jury venire, and the trial court thus did not err in the denial of defendant's motion for additional expert witness

assistance to conduct a study comparing the racial composition of the lists and census data about the racial composition of the county.

Am Jur 2d, Grand Jury § 14.

Judge DUNCAN dissenting.

APPEAL by defendant from Judgment of *Judge Melzer A. Morgan, Jr.*, entered 12 May 1989 in RUTHERFORD County Superior Court. Heard in the Court of Appeals 6 June 1990.

Attorney General Lacy H. Thornburg, by Associate Attorney General Debra C. Graves, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

COZORT, Judge.

Defendant appeals from his conviction of second-degree murder. The primary issue for decision on appeal is whether the trial court erred in selecting a black, upon the district attorney's recommendation, to replace a white grand jury foreman before the defendant, a black, was reindicted after his first conviction had been set aside and a new trial ordered by the North Carolina Supreme Court. We find no error.

Defendant, a black man, was convicted on 12 May 1989 in Rutherford County, by a special venire selected from McDowell County, of second-degree murder in the 1983 killing of defendant's former girlfriend, a white woman. An earlier conviction of first-degree murder was vacated by the North Carolina Supreme Court, which granted a new trial because of error in the trial court's ruling on a venue issue. *See State v. Moore*, 319 N.C. 645, 356 S.E.2d 336 (1987).

In September of 1987, prior to his second trial, defendant, both *pro se* and through counsel, filed motions to quash the indictment and the jury array on grounds of racial discrimination, to inspect jury records, and for the appointment of an expert witness. The motions to quash the indictment and to dismiss the venire were ultimately denied.

At trial, the State introduced evidence tending to show: In July 1981, Louise Tate, who supervised the adult basic education

classes at a minimum security prison in Rutherford County, became romantically involved with defendant, Stephen Louis Moore, an inmate and volunteer teacher at the prison. Defendant stayed at Tate's home when he obtained home passes and work release and, when defendant was paroled in April of 1983, they began living together. In the fall of 1983, Tate attempted to end the relationship, but defendant would not leave her alone. In October, defendant physically assaulted Tate. He continued to harass and threaten her, and Tate requested and received assistance from local law enforcement agencies, although she declined to take out a warrant. Tate changed the locks on her doors and nailed her windows shut to keep defendant out of her house. Tate and a friend, Anne Johnson, established an arrangement whereby Johnson would telephone Tate each evening at 9:30 and 11:30 to check on Tate's safety.

On 6 December 1983, Johnson called Tate at 9:30 but did not get an answer. When she called again at 11:30, Tate answered the telephone and said, "Stephen is here," in a "breathless" voice. The telephone then hit the floor and Johnson heard scuffling in the background. Johnson testified that Tate returned to the telephone and said, "I got home and he grabbed me. He won't leave." Tate then said, "Put that thing down," and told Johnson to call back in five minutes. Johnson called back and Tate, who sounded "a million miles away," asked Johnson to "talk to Stephen." Johnson yelled at defendant to get off Tate's property or she would call the police. Defendant warned her that, if she called the police, "there would be no more Louise." Johnson called Tate's landlord, Joseph Carpenter, and a deputy sheriff. Carpenter and a friend forced entry through the back door and found Tate's body lying in a pool of blood. She had been stabbed six times and shot twice. One stab wound passed through her heart and was potentially fatal. One gunshot wound entered her left temple and was fired at close range, possibly at a distance of one inch or less. Defendant fled the jurisdiction and was apprehended in North Dakota.

Defendant testified that he did not believe that Tate really wanted to end their relationship. On 6 December 1983, he went to Tate's house to talk. They argued and physically fought. He spoke briefly to Johnson on the phone but Johnson hung up on him. Tate came toward him with a kitchen knife, there was a struggle, and defendant grabbed the knife and stabbed Tate. Tate grabbed a pistol from under the bed, but defendant took it from

her and shot her twice. He then fled because he was afraid of "the Klan."

Defendant was found guilty of second-degree murder and sentenced to 50 years in prison. Defendant appealed.

By his first assignment of error, defendant contends that his conviction must be vacated because the trial court erred in denying his motions to quash the 5 October 1987 indictment based on allegations that the foreman of the grand jury was selected on the basis of race in violation of Article I, §§ 19 and 26, of the Constitution of North Carolina. In support of this assignment of error, defendant relies on *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987).

In *Cofield*, the Supreme Court held that race discrimination in the selection of a grand jury foreman was unlawful under the state and federal constitutions and that a black defendant alleging that members of his race were excluded from the grand jury foreman selection process would, if his case were proved, be entitled to have the verdict and judgment against him set aside. We find the *Cofield* opinion inapposite to the facts before us.

The record shows that the first indictment against defendant was returned on 25 February 1985 by a Rutherford County grand jury headed by a white foreman. On 7 July 1987, the North Carolina Supreme Court issued its decision in *Cofield*. In September of 1987, defendant made motions to quash the indictment based on race discrimination in the selection of the grand jury foreman. District Attorney Alan Leonard approached Superior Court Judge Lamar Gudger, informed him of defendant's motion, the *Cofield* decision, and the fact that no black individual had ever been appointed a grand jury foreman in Rutherford County. District Attorney Leonard suggested to the judge that a black grand juror be appointed as foreman. Judge Gudger agreed and replaced the current white foreman with a black individual. On 5 October 1987, the grand jury, with the black grand jury foreman, indicted defendant for the murder of Louise Tate.

[1] At a pretrial hearing held on 14 October 1987, Superior Court Judge Hollis M. Owens, Jr., ruled that the return of a new bill of indictment by a grand jury headed by a black foreman mooted defendant's objection to the indictment on that basis. The court therefore denied defendant's motion to quash the indictment. On 4 April 1989, defendant filed a *pro se* motion to quash the new

indictment on the ground that the black foreman was selected on the basis of race and in violation of statutory requirements. That motion was denied. On appeal he contends that, since a black individual was purposefully chosen as foreman and since the district attorney admitted that he contacted Judge Gudger in order to address the *Cofield* issue, the denials of his motions were erroneous as a matter of law. We do not agree. A black defendant bringing a challenge to the selection of a grand jury foreman under *Cofield* cannot be heard to complain that his constitutional rights have been violated when the trial court purposefully selects a black foreman in an effort affirmatively to address the defendant's allegations of race discrimination. The Supreme Court's second *Cofield* opinion, 324 N.C. 452, 379 S.E.2d 834 (1989), ruling that the presiding judge must consider *all* grand jurors in selecting a grand jury foreman, applies only in that case and prospectively. *See id.* at 461, 379 S.E.2d at 839. Therefore, to the extent that *Cofield* might indicate a different result in the instant case, it is not controlling.

[2] We further reject defendant's contention that his conviction must be vacated because the district attorney's action in bringing this matter to the attention of the trial court constituted unlawful tampering with the grand jury in violation of defendant's constitutional rights, and because the removal of the white foreman did not comply with N.C. Gen. Stat. § 15A-622. We find nothing improper in the district attorney's suggesting to the presiding superior court judge that a black individual be appointed as grand jury foreman to address concerns raised by the *Cofield* decision. That fact does not suggest that Judge Gudger exceeded his authority under § 15A-622(c) or that there was unlawful prosecutorial tampering with the grand jury in violation of defendant's constitutional rights. We therefore hold that the trial court did not err in refusing to quash the indictment on those grounds. This assignment of error is overruled.

[3] Defendant next contends that he is entitled to a new trial because the trial court erred in denying his motions to compel disclosure of jury records. The record discloses that defendant filed pretrial motions to inspect jury selection records, including source lists, master lists, jury commission minutes, and other records for the previous 27 years. The trial court ordered the Rutherford and McDowell County clerks of court to provide defendant with records for the four-year period from 1 January 1984 through December 1987. When defendant's motions to quash the indictment

and jury venire were heard at pretrial hearings held in March and May of 1988, defendant offered no evidence in support of his motions, which were denied. On appeal, defendant contends that the trial court denied him a reasonable opportunity to investigate and produce evidence of discrimination. We do not agree.

Due process of law requires that no one shall be condemned in his person or property without notice and an opportunity to be heard in his defense. *State v. Covington*, 258 N.C. 495, 500, 128 S.E.2d 822, 826 (1963). Thus, a defendant who seeks evidence in support of a motion to quash an indictment on the ground of race discrimination must be given a reasonable opportunity to investigate and produce evidence. *Id.* (quoting *State v. Perry*, 248 N.C. 334, 339, 103 S.E.2d 404, 407-08 (1958)). What is "reasonable" depends on the facts of the particular case. *Id.* To establish a prima facie case of systematic racial discrimination, a defendant generally must produce statistical evidence establishing that blacks were underrepresented on the jury and evidence that the selection procedure was not racially neutral or that, for a substantial period in the past, relatively few blacks have served on juries notwithstanding a substantial population of blacks in the county. *Cofield*, 320 N.C. at 308, 357 S.E.2d at 629 (quoting *State v. Foddrell*, 291 N.C. 546, 554, 231 S.E.2d 618, 624 (1977)).

Based on the record before this Court, we find that the trial court did not err in limiting its order compelling disclosure to the previous four years. The evidence showed that, in 1984, Rutherford County had changed its method of compiling its lists of prospective jurors and that, even more recently, the County had rewritten its computer program to improve the random selection procedure. If defendant could not produce evidence of racial discrimination in the jury selection process utilized during the most recent four years, and during the time of his indictment and trial, or evidence of a substantial disparity in the number of blacks comprising the venire during that four-year period, then he would not be able to make out a prima facie case of racial discrimination. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in denying defendant's Motion for Additional Expert Witness Assistance. The record discloses that, on 28 September 1987, defendant filed a Motion for Appointment of Expert Witness to assist in producing evidence of racial discrimination in the selection of the grand jury

that indicted him and in the selection of its foreman. By *pro se* motion, defendant also requested expert witness assistance in analyzing jury selection procedures in Rutherford and McDowell Counties. On 8 December 1987, Judge Owens issued an order appointing Gary Thomas Long, Ph.D., to study the processes used to select grand juries in Rutherford County and petit juries in McDowell County.

On 11 February 1988, Long filed an affidavit with the court in which he stated that both Rutherford and McDowell Counties use voter registration and licensed drivers lists from which lists of prospective jurors are randomly selected. The "computerized random selection procedures employed in these counties should yield a list of jurors that is a representative cross-section of the lists," but not necessarily of the populations of the counties as a whole. In his opinion, "there is a reasonable possibility that the lists used for jury selection in both McDowell and Rutherford Counties do not include all categories of the population in the proportions in which they exist in the county," and, therefore, in order to determine racial bias, he would need to make an additional study in which the racial composition of the lists would be compared to census data about the racial composition of the county. When defendant's Motion for Additional Expert Witness Assistance came on for hearing, the trial court denied the motion.

An indigent criminal defendant has a right to the assistance of an expert in the preparation of his defense if he shows a "specific necessity" for that assistance. N.C. Gen. Stat. § 7A-450(b) (1989); *State v. Moore*, 321 N.C. 327, 335, 364 S.E.2d 648, 652 (1988). A threshold showing of necessity is accomplished upon demonstration that the defendant "(1) . . . will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case." *Id.* Defendant contends that he made a sufficient showing of necessity and that the denial of his motion was error entitling him to a new trial. We disagree. The jury selection procedures used in Rutherford and McDowell Counties were in accordance with statutory requirements. *See* N.C. Gen. Stat. § 9-1 (1989). The expert's preliminary conclusion that the lists used for jury selection might not include "all categories of the population in the proportions in which they exist in the county" does not show a reasonable likelihood that a further study would show that blacks are

systematically excluded from the venire. Accordingly, we overrule this assignment of error.

Defendant's last assignments of error raise questions regarding an evidentiary ruling by the trial court, a ruling on the State's challenge to a potential juror, and a portion of the charge to the jury. We have carefully reviewed these remaining assignments of error and find them to be without merit.

For the foregoing reasons, we conclude that defendant received a fair trial, free of prejudicial error.

No error.

Judge ORR concurs.

Judge DUNCAN dissents.

Judge DUNCAN dissenting.

An expert witness was appointed to study the jury-selection process in Rutherford and McDowell Counties to determine whether there existed a basis for defendant's charge of discrimination in jury selection. After he conducted a preliminary study, the expert determined that there was a "reasonable possibility" that the voter-registration and licensed-drivers lists did not include a proportional representation of all categories of the population of those counties. The expert specified that misrepresentation on the basis of race and gender was "especially likely." He concluded, however, that "additional study [was] necessary to determine this." Defendant, consequently, moved that the expert be appointed to perform the additional study. A different judge summarily denied that motion and, today, the majority summarily holds that, because the jury-selection procedure complied with statutory requirements, "[t]he expert's preliminary conclusion . . . does not show a reasonable likelihood that a further study would show that blacks are systematically excluded from the venire." Because I do not share the majority's certainty about what additional study might or might not reveal, I dissent.

The majority refrains from articulating what more this defendant could have done to make a sufficient showing of necessity for the expert's continued assistance. At the outset, Judge Owens was satisfied that defendant had adequately demonstrated the need

for a preliminary study of the jury-selection systems. With that study having shown a basis for further investigation, it is illogical to hold that defendant, at this point, has somehow failed to demonstrate a need for expert help. We are not faced here with " 'little more than undeveloped assertions that the requested assistance would be beneficial.' " *State v. Bridges*, 325 N.C. 529, 532, 385 S.E.2d 337, 338 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323-4 n.1, 86 L. Ed. 2d 231, 236 n.1 (1985)). Rather, we have a neutral expert who is of the opinion that there is a "reasonable possibility" that certain groups are under-represented on the lists from which grand and petit juries are drawn in McDowell and Rutherford Counties. In my view, defendant should have been allowed the continued assistance of the expert and, therefore, I dissent.

STATE OF NORTH CAROLINA v. REGINALD JEROME LOVE

No. 8910SC1254

(Filed 4 September 1990)

1. **Process § 6 (NCI3d)— subpoenas duces tecum—quashal for broadness**

In a prosecution for rape, sexual offense, and indecent liberties, the trial court did not err in quashing subpoenas *duces tecum* issued to the Wake County Mental Health Center, Wake Medical Center, Wake County Department of Social Services, and Wake County Public Schools requesting the production of all files and records relating to the child victim where the subpoenas made no reference to a specific time period, date, or contents and thus were too broad, and the trial court was not satisfied that the records sought contained any patently material evidence.

Am Jur 2d, Witnesses §§ 14, 22.

2. **Courts § 9 (NCI3d)— quashal of subpoenas duces tecum—another judge not overruled**

The trial court's ruling allowing a motion to quash subpoenas *duces tecum* did not result in one superior court judge overruling another because another judge had suggested at

a pretrial hearing that defense counsel could subpoena records not in the district attorney's possession.

Am Jur 2d, Courts § 201.

3. Process § 6 (NCI3d)— quashal of subpoenas duces tecum— court's inspection of documents unnecessary

Unlike the procedure following a request for disclosure of evidence within the State's possession which requires an *in camera* inspection by the trial court, there is no requirement that the trial court review the records and files of nonparties sought pursuant to a subpoena *duces tecum* prior to quashing the subpoena.

Am Jur 2d, Depositions and Discovery § 424; Witnesses § 22.

4. Criminal Law § 50.2 (NCI3d)— admissibility of lay opinion testimony

Testimony by the mother of an alleged rape, sexual offense and indecent liberties victim that the victim had never lied to her about anything of this magnitude was admissible lay opinion testimony under N.C.G.S. § 8C-1, Rule 701 since it was based on the perception of the witness and was helpful to an understanding of her other testimony.

Am Jur 2d, Expert and Opinion Evidence §§ 30, 53, 54.

5. Criminal Law § 50.1 (NCI3d); Rape and Allied Offenses § 4 (NCI3d)— qualification of experts—symptoms of sexually abused children—victim's symptoms

The trial court did not err in qualifying a hospital counselor as an expert in counseling for sexually abused children and a pediatrician as an expert in child sexual abuse; furthermore, the court properly permitted these witnesses to testify as to the symptoms and characteristics of sexually abused children and to state their opinions that symptoms exhibited by the victim were consistent with sexual abuse.

Am Jur 2d, Rape § 68.5.

6. Criminal Law § 904 (NCI4th); Rape and Allied Offenses § 19 (NCI3d)— indecent liberties—disjunctive instruction—unanimous verdict

Defendant's right to a unanimous verdict was not violated by the trial court's instruction that an indecent liberty is an immoral, improper or indecent touching or act by defendant upon the child or an inducement by defendant of an immoral or indecent touching by the child.

Am Jur 2d, Infants § 16; Rape § 108.

7. Rape and Allied Offenses § 7 (NCI3d)— first degree rape—first degree sexual offense—life sentences not cruel and unusual

Mandatory life sentences imposed on defendant for first degree rape and first degree sexual offense do not constitute cruel and unusual punishment.

Am Jur 2d, Criminal Law §§ 626, 627, 629, 630; Rape §§ 115, 116.

APPEAL by defendant from judgment entered 23 June 1989 in WAKE County Superior Court by *Judge I. Beverly Lake, Jr.* Heard in the Court of Appeals 7 June 1990.

Defendant was indicted on 8 May 1989 for one count of first degree rape, one count of first degree sexual offense, and one count of taking indecent liberties with a minor. The State's evidence tended to show that in March 1988 the ten-year-old victim was living with her mother, defendant, her brother, infant step-brother, and grandmother. The victim testified that on 18 March 1988 she was in her room reading when defendant came into her room, pulled down his pants and underwear, pulled down her underpants, and put his "thing" in her. The victim also testified that defendant had fondled her breasts, digitally penetrated her vagina, and made her put her mouth on his "thing."

Defendant was found guilty on all charges and sentenced to two concurrent life sentences for rape and first degree sexual offense, and to a consecutive term of five years for indecent liberties. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error defendant contends that the trial court erred in quashing subpoenas *duces tecum* upon Wake County Mental Health Center, Wake Medical Center, Wake County Department of Social Services, and Wake County Public Schools.

N.C. Gen. Stat. § 15A-903(d) (1988) grants a defendant in a criminal case access as of right to documents and tangible objects that are "within the possession, custody or control of the State. . . ." However, the reports and records at issue in this case were not within the prosecutor's possession, custody, or control; therefore, they were not subject to discovery as of right. *See State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986) (No common law right of discovery in criminal cases, therefore, criminal defendant's right of access to documents determined by statute). Another alternative for the production of documents not subject to the criminal discovery statute is the use of a subpoena *duces tecum*. The subpoena *duces tecum* is the process by which a court requires that particular documents or other items which are material to the inquiry be brought into court. *Id.*

The intended purpose of the subpoena *duces tecum* is to require the production of a *specific* document or items *patently* material to the inquiry or as a notice to produce the original of a document. *See generally Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E.2d 37 (1966). Consequently, the subpoena *duces tecum* "must *specify* with as much precision as is fair and feasible, the *particular documents* desired." *Id.* A party is not entitled to have a mass of records and other documents brought into court in order to search them for evidence. *Id.*

One way to test the relevancy and materiality of documents required by a subpoena *duces tecum* is a motion to quash the subpoena. This motion gives the court the opportunity to determine the apparent relevancy of the documents. *Id.* When the propriety of a subpoena *duces tecum* is challenged, the question is addressed to the sound discretion of the trial court, and is not subject to

review absent a showing of abuse of discretion. *Id.; see also Newell, supra.*

In this case three motions by the defendant, including a motion for a bill of particulars and a so-called "Brady Motion" requesting disclosure by the State of various statements and reports, were heard prior to trial by Judge Donald Stephens. Judge Stephens noted that the district attorney has an obligation to provide documents and other tangible objects that it has; however, if the district attorney does not have the requested reports, the court cannot enter an order compelling disclosure of the reports. Judge Stephens suggested that defense counsel could subpoena the records he was seeking and the necessity of disclosing them could be determined at a later hearing.

Immediately prior to trial on 19 June 1989, the trial court considered defendant's motion *in limine* concerning subpoenas the defendant had caused to be issued to Wake Medical Center, Wake County Public Schools, Wake County Mental Health Center, and Wake County Department of Social Services. The prosecutor made an oral motion to quash the subpoenas. After reviewing the subpoenas and hearing the arguments of counsel, the trial court granted the motion to quash the subpoenas, with the exception of medical records relating to an October 1988 examination of the victim.

With the exception of the medical report concerning a specific playground accident in October 1988, the trial court was not satisfied that the records subpoenaed by defendant contained any patently material evidence. The disputed subpoenas requested *all* files and records relating to the child and made no reference to a specific time period, date, or contents. Such broad categories are inappropriate for subpoenas *duces tecum. Newell, supra.* Despite being confronted with the subpoenas and the motion to quash immediately prior to jury selection, the trial court nevertheless held a lengthy discussion with the defense counsel and the prosecuting attorney regarding defendant's justifications for seeking the various records. Clearly, this is not a case where specific documents were kept from defendant. On the contrary, on the one occasion when defendant stated with precision the document he sought and why it was needed, the report was made available. To the extent the remaining subpoenas were quashed, we find no abuse of discretion.

[2, 3] Defendant also argues that the trial court's ruling on the motion to quash was erroneous because it resulted in one superior

court judge impermissibly overruling another and that the trial court was required to review the documents requested and seal them for appellate review. These arguments are without merit. First, it is disingenuous to categorize Judge Stephens' comment at the pretrial motions hearing concerning the possible use of subpoenas to obtain records not in the possession of the district attorney, but sought by defendant, as an "order." Second, unlike the procedure following a request for disclosure of evidence within the State's possession which requires an *in camera* inspection by the trial court, *see, e.g., State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 103 S.Ct. 503, 74 L.Ed.2d 642 (1982), there is no requirement that a trial court review the records and files of non-parties sought pursuant to a subpoena *duces tecum* prior to quashing the motion. *See, e.g., Vaughan, supra. But cf. State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988) (State's interest in maintaining confidential files and defendant's right to access information necessary to preparation of his defense properly balanced by an *in camera* review of the records by the trial court). Finally, defendant, relying on *Pennsylvania v. Ritchie*, 480 U.S. 139, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), argues that he had a right under the Federal Constitution to have the documents noticed in the subpoenas reviewed *in camera* by the trial court. We disagree. *Ritchie* is factually distinguishable from the present case in several significant respects. Compliance with the subpoena in *Ritchie* was not based on precision or specificity. Rather, the issue of primary concern in *Ritchie* was the extent to which a state statute protecting the public's interest in keeping sensitive documentary information confidential precluded disclosure in criminal prosecutions. Here the trial court's concern was the overbreadth of the subpoena and, to an extent, the lack of any showing of materiality (with the exception of the October 1988 medical report). We therefore do not find *Ritchie* controlling on these facts.

[4] In his second assignment of error defendant contends that the trial court erred in allowing the victim's mother, Angela Winston, to testify as follows:

> Q. Has she ever lied to you about anything of this magnitude?
>
> A. Not—not in this manner.

Defendant contends that this was improper lay opinion testimony and that its admission requires a new trial. Rule 701 of the North Carolina Rules of Evidence permits opinion testimony by a lay

witness where the opinion is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. N.C. Gen. Stat. § 8C, Rule 702 of the N.C. Rules of Evidence (1988). Angela Winston's testimony was based on her own perception. Prior to making the challenged statements, she had repeatedly testified that at first she did not believe the incidents between her daughter and defendant had occurred. She had also related various occasions when the victim had lied to her in the past. When read in context, the challenged testimony was helpful to the jury in understanding her testimony and its admission was proper. This assignment is overruled.

[5] Defendant next contends that the trial court erred in qualifying Kimberly Crews, a counselor at Wake Medical Center, and Dr. Denise Everette, a pediatrician at Wake Medical Center, as experts and in allowing them to testify as to their opinions concerning symptoms and characteristics of sexually abused children and to state their opinions that the victim exhibited symptoms that were consistent with sexual abuse. We disagree.

Whether or not a witness is qualified as an expert is a question of fact and is a determination ordinarily within the exclusive province of the trial judge. *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985). To qualify as an expert, one need not be a specialist or have a license from an examining board or be engaged in any particular profession. As long as study, experience, or both makes the witness better qualified than the jury to draw appropriate inferences from the facts, he may be qualified as an expert. *Id.; see also* 1 *Brandis on North Carolina Evidence* § 133 (3rd ed. 1988). A finding by the trial court that the witness is qualified will not be reversed unless there was no competent evidence to support it or the court abused its discretion. *Young, supra* (citations omitted).

Kimberly Crews was qualified by the court as an expert in counseling for sexually abused children. Ms. Crews testified that she had counseled children suspected of being sexually abused for five years and had interviewed between 500 and 600 children in her capacity as a sexual abuse counselor. She had a bachelor's degree in psychology, a master's degree in counseling, and had attended specialized training in the areas of sexual abuse counseling and investigation. Dr. Denise Everette was qualified as an expert in the field of child sexual abuse. Dr. Everette testified that after

receiving her MD, she completed a pediatrics residency. Dr. Everette also testified that she had attended various educational workshops on child sexual abuse and that she conducts workshops and gives lectures on child sexual abuse throughout North Carolina. During the course of her career, Dr. Everette testified that she has seen 300 children for evaluation of suspected sexual abuse. We conclude that there was ample evidence in the record to support the trial court's qualification of Ms. Crews and Dr. Everette as experts in their respective areas.

The matters testified to by these experts were properly admitted. Allowing experts to testify as to the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse is proper. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). Where scientific, technical, or other specialized knowledge will assist the fact finder in determining a fact in issue or in understanding evidence, an expert witness may testify in the form of an opinion. *Id.* The fact that such evidence may support the credibility of the victim does not automatically render it inadmissible. *Id.* We have reviewed the challenged testimony and find it to be well within the range of admissibility. These assignments are therefore overruled.

[6] In his fourth assignment of error defendant contends that the trial court committed plain error in instructing the jury on the charge of indecent liberties. The trial court instructed the jury as follows:

> [T]hat the defendant willfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper, or indecent touching or act by the defendant upon the child or an inducement by the defendant of an immoral or indecent touching by the child.

Defendant argues that the instruction denied him the constitutional right to a unanimous verdict. Defendant relies on *State v. Britt*, 93 N.C. App. 126, 377 S.E.2d 79 (1989), in support of this argument. Our Supreme Court has recently overruled *Britt* on this issue. *See State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). The identical instruction regarding indecent liberties was upheld in *Hartness*. This assignment is accordingly overruled.

[7] In his final assignment of error, defendant argues that the concurrent life sentences he received for his convictions for first degree rape and first degree sexual offense constitute cruel and unusual punishment in violation of his state and federal constitutional rights. Defendant admits the challenged statutes have been addressed in prior decisions and were not found to be violative of the eighth amendment. Nevertheless, he argues that mandatory life sentences constitute cruel and unusual punishment when applied to him. This assignment is without merit. Defendant's case is indistinguishable from those in which mandatory life sentences have been imposed for first degree sexual offense or first degree rape. *See, e.g., State v. Higgenbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985) (imposition of mandatory sentence of life for first degree sexual offense not violative of the eighth amendment) and *State v. Peek*, 313 N.C. 266, 328 S.E.2d 249 (1985) (mandatory life sentence for first degree rape not unconstitutionally excessive). Even consecutive life sentences for the identical crimes have been upheld as constitutionally valid. *See State v. Ysaguire*, 309 N.C. 780, 309 S.E.2d 436 (1983). This assignment is accordingly overruled.

Defendant received a fair trial, free from prejudicial error. Accordingly, we find

No error.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE TURNAGE

No. 893SC1323

(Filed 4 September 1990)

Homicide § 21.7 (NCI3d)— second degree murder—evidence insufficient

The evidence of second degree murder was not sufficient where statements by defendant only a few hours after the incident indicate that the shooting was accidental. Defendant's statement, offered by the State, was wholly exculpatory and was not contradicted or shown to be false by any other facts or circumstances in evidence; indeed, the evidence offered by

the State more closely corroborates defendant's statement than contradicts it.

Am Jur 2d, Homicide §§ 53, 112, 253, 337, 425.

Judge GREENE dissenting.

APPEAL by defendant from *Reid (David E.), Judge*. Judgment entered 6 April 1989 in Superior Court, CRAVEN County. Heard in the Court of Appeals 20 August 1990.

Defendant was charged in a proper bill of indictment with murder in violation of G.S. 14-17. The jury found defendant guilty of second degree murder.

The evidence presented by the State tends to show the following: Defendant, Jerry Wayne Turnage, and the victim, Carolyn B. Turnage, were married but separated about three months before the victim's death. The victim and her daughter, Tracy, age 16, lived in the home previously occupied by the couple at 2105 Waters Street in New Bern. Defendant lived with his sister in a mobile home at 504 Howell Road in New Bern.

On the night before the shooting, Tracy spent the night with defendant, her adoptive father, on Howell Road. Defendant asked Tracy that night what she would do if something happened to him and to her mother. Tracy noticed a gun in a holster on the floor by the couch that night and the following morning.

After returning to the home on Waters Street that morning, Tracy heard her mother call defendant and ask him to come to the house on Waters Street to fix the washing machine. Her mother instructed Tracy (who stayed home from school that day) to call her if defendant took anything. Defendant fixed the washing machine and took a picture from the wall with him when he left. Tracy called her mother at work and told her of defendant's actions.

The victim worked at Raleigh Federal Savings Bank in New Bern. On 17 November 1988 she left work at about 10:30 to 10:45 visibly upset. She had been crying. Sometime during that morning, the victim had called defendant and left the following message on his answering machine: "I want my goddamn pictures back and you better stay out of the house because if you want your ass nailed, it is going to be nailed. I am tired of you fucking around."

Carolyn Turnage arrived at the mobile home around 11:00 to 11:15 and asked defendant's sister if she could speak with defendant in private. She appeared to defendant's sister to be tense or angry. The victim and defendant went into defendant's bedroom. After a few minutes, he came out of the bedroom, got the separation agreement he had received in the mail that morning, and returned to the room. A few minutes later, defendant's sister heard a gunshot. Defendant came out of the bedroom, crying and upset, and said, "Oh my God! I have killed my wife. It was an accident. Call an ambulance." Emergency medical personnel arriving shortly after 11:30 found defendant kneeling beside the victim's body pressing a compress to her head.

Officers from the Craven County Sheriff's Department arrived at the trailer at 11:37 a.m., before the ambulance. They entered the trailer after being told by defendant's sister that her brother's wife had been shot. The officers placed defendant in their car and advised him of his *Miranda* rights. While defendant remained in the car, several officers entered the trailer and examined the bedroom. Defendant subsequently was transported to the Sheriff's Department. He was advised a second time of his *Miranda* rights, then dictated and signed a statement relating the following: The victim had come to the mobile home and asked to speak with him privately. In the bedroom, they began arguing over the separation papers. The victim got mad and said she was going to take everything defendant had including his father's gun which was lying on the bed. She grabbed the gun. They struggled over it and she kicked him in the groin. They both fell. The gun fired as they fell, shooting the victim in the head. Defendant yelled for his sister to call an ambulance. He moved the victim in an attempt to get her to his truck and to the hospital. Defendant tried to resuscitate the victim and applied a compress to the wound. According to defendant's statement, the victim initially fell on or near the telephone, the bed, and some barbells lying beside the bed.

The bedroom was photographed and evidence was collected immediately after the victim's body was removed. A .22 calibre pistol was found on the floor where the body had been. The gun's safety mechanism was off. A cartridge casing was found on the bed. Blood was found near the telephone, on the barbells, and on and around the window. A white tee-shirt and a gun holster were on the floor near the victim's feet, and the separation agreement lay on the bed.

According to defendant's account of the shooting made after he signed the written statement, while grappling over the gun, the couple stood up from the bed where they were sitting. The victim kicked defendant in the groin. Both parties fell backwards and the gun discharged.

Experts testified that significant amounts of lead residue were found on the victim's hands and small amounts of powder residue from the gun were found on defendant's hands. No fingerprints of value were found on the gun or the holster. The gun and its safety mechanism were in proper working order and did not misfire when tested. The gun was at least two feet from the victim's head when it fired. The bullet entered the left side of the victim's head and travelled slightly forward toward the front of the skull, and downward.

Defendant did not testify but offered the testimony of his sister and witnesses as to his good character. He also offered evidence tending to show that the gun had misfired on at least one previous occasion.

The jury found defendant guilty of second degree murder and he appealed from a judgment imposing a prison sentence of twenty years.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James Peeler Smith, for the State.

David P. Voerman for defendant, appellant.

HEDRICK, Chief Judge.

We consider only the question of whether the evidence, when considered in the light most favorable to the State, is sufficient to withstand defendant's motion for judgment as of nonsuit.

Defendant in this case was convicted of second degree murder in the death of his wife. "Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Hutchins*, 303 N.C. 321, 346, 279 S.E.2d 788, 803 (1981). An essential element of second degree murder is the intent to inflict an injury that results in death. Thus, "to convict a defendant of murder in the second degree, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased." *State v. Williams*, 235

N.C. 752, 753, 71 S.E.2d 138, 139 (1952). Relying largely on statements made by defendant to various law enforcement officials and on expert testimony concerning the firing of the gun, the State in this case attempted to show that defendant intentionally shot his wife in the head, causing her death.

Statements made by defendant only a few hours after the incident on 17 November 1988 indicate that the shooting was accidental. "When evidence introduced by the State consists of exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by those statements." *State v. Meadlock*, 95 N.C. App. 146, 149, 381 S.E.2d 805, 806 (1989). *See also State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972); *State v. Wagner*, 50 N.C. App. 286, 273 S.E.2d 33 (1981). "The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him, does not prevent the State from showing that the facts concerning the homicide were different from what the defendant said about them." *State v. Bolin*, 281 N.C. 415, 425, 189 S.E.2d 235, 241-42 (1972). In this case, the State failed to show that the shooting did not correspond to defendant's statement.

The statement of defendant, offered into evidence in this case by the State, is wholly exculpatory and is not contradicted or shown to be false by any other facts or circumstances in evidence. The testimony of the ballistics experts and the medical examiner does not contradict the statements of defendant in any significant way. Indeed, the evidence offered by the State more closely corroborates defendant's statement than contradicts it.

We hold the evidence in this case is not sufficient to permit the jury to find that defendant intentionally shot his wife with a .22 calibre pistol causing her death. The case of *State v. Bright*, 237 N.C. 475, 75 S.E.2d 407 (1953), is distinguishable. There, the Court said, "[t]here was evidence . . . that admittedly the defendant's hand was on the trigger when the pistol was discharged." *Bright* at 478, 75 S.E.2d at 408. Here, the exact words of defendant in his written statement, relied upon by the State, are as follows:

> She got mad and said she was going to take everything I had down to my last screw, my business; everything. My dad's gun was laying on the bed and she said she was even going to take it and grabbed it. I tried to grab it away from her and we stood up. About the same time I was trying to get

> the gun away from her, she kicked me and I fell backwards and as I was falling backwards, I heard the gun go off.

No construction of the evidence in the present case will yield an inference that defendant's hand was on the trigger or even that defendant had the gun or any part of it in his hand or in his control at any time immediately preceding the discharge of the weapon causing his wife's death. The evidence here gives rise only to speculation, and the judgment must be reversed.

Reversed.

Judge ARNOLD concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that the evidence offered by the State does not contradict the defendant's statement in any significant way. I believe the State's circumstantial evidence does contradict the defendant's statement and that reasonable minds might accept the evidence as adequate to support a conclusion that the defendant intended to inflict an injury on his wife which resulted in her death. *See State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 651-52 (1982) (motion to dismiss must be denied if substantial evidence exists of each element of the crime and that defendant was perpetrator of the offense).

Specifically, the State offered the following competent evidence: that the bullet entered the victim's head on the left side, traveled downward, and slightly forward from the back of the head to the front; that there was gunshot residue on the palm and back of the left hand of the victim and on the palm of the right hand of the victim; that no gunshot residue was found in the area of the wound itself; that the defendant was a hunter aware of correct gun safety and that the only loaded weapon found on the defendant's premises after the killing had the safety on; that the weapon involved in the killing was tested and it was determined that the safety device functioned properly and the weapon did not discharge when struck against the floor; and that approximately two weeks before the victim was killed, the daughter heard a scream coming

from the victim's bedroom and upon observation noticed her mother on the bed with the defendant standing over her and choking her.

The evidence in this case is very similar to the evidence offered by the State in a voluntary manslaughter case, *State v. Bright*, 237 N.C. 475, 75 S.E.2d 407 (1953). In *Bright*, the State offered the statement of the defendant that the killing was an accident. The Court held that the State's other evidence showing "the absence of powder burns, the location and direction of the fatal wound, the conduct of the defendant, and his statement that he and the deceased were 'scuffling' at the time the pistol was fired" was sufficient to support a reasonable inference that the shooting was intentional and required submission of the issue to the jury. *Id.* at 478, 75 S.E.2d at 408. Likewise, here the trial court was correct in denying the defendant's motion to dismiss and in submitting the issue to the jury. As the State argues, a jury could reasonably infer from the evidence that the weapon that killed the victim had the safety on and the defendant intentionally released the safety; that the victim was seated on the bed and that the defendant intentionally discharged the weapon while he was standing; and that the hands of the victim were in a position parallel to the path of the bullet and not on the weapon at the time of its discharge.

As I find no prejudicial error in the remaining assignments of error raised by the defendant, I would affirm the conviction of second-degree murder.

STATE OF NORTH CAROLINA v. BELVA PHIPPS RICHARDSON

No. 896SC1130

(Filed 4 September 1990)

1. Criminal Law § 34.4 (NCI3d) — admissibility of evidence of other offenses

Evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused.

Am Jur 2d, Evidence § 321.

2. Criminal Law § 34.8 (NCI3d)— soliciting arson—evidence of other solicitations of crimes—admissibility to show common plan

In a prosecution of defendant for soliciting two youths to commit arson and conspiracy to commit arson, evidence that defendant had previously solicited these same youths to commit other crimes and had provided transportation for them was admissible to show a common plan or scheme. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 326.

3. Criminal Law § 34.7 (NCI3d)— planning of another crime—admissibility to show motive

Testimony by an arson victim that she quit being friends with defendant when defendant said she wanted to find someone to kill her husband was admissible to show defendant's motive in soliciting the burning of the victim's mobile home.

Am Jur 2d, Evidence § 325.

4. Criminal Law § 39 (NCI3d)— defendant's planning of another crime—admission for rebuttal purpose

In a prosecution of defendant for solicitation of youths to burn the victim's mobile home and conspiracy to commit arson, testimony concerning defendant's plan to have her own mobile home burned by youths was admissible to explain or rebut evidence previously elicited by defendant even though it might not otherwise have been admissible.

Am Jur 2d, Evidence § 321.

5. Criminal Law § 89.3 (NCI3d)— prior statements of witness—admissibility for corroboration

Statements made to a detective by a youth allegedly solicited by defendant to burn the victim's mobile home that he was "tired of what [defendant] had had him doing" and that he was ready to "get out of the stealing and burning" were admissible to corroborate testimony by the youth at trial that he had told detectives that defendant had had him steal and set a fire for her, although the statements went beyond the testimony of the youth, since they added credibility or weight to his testimony.

Am Jur 2d, Witnesses § 641.

6. Criminal Law § 39 (NCI3d)— statements concerning stealing for defendant—admissibility for rebuttal purpose

In a prosecution for solicitation and conspiracy to commit arson, a detective's testimony as to statements by a youth allegedly solicited to burn the victim's mobile home concerning his "stealing" for defendant was properly admitted to rebut defendant's evidence that the youth was making up the statements about defendant's role in the burning of the mobile home in order to extricate himself from his own legal troubles.

Am Jur 2d, Witnesses § 641.

7. Criminal Law § 3 (NCI4th); Conspiracy § 8 (NCI3d)— solicitation and conspiracy to commit arson—no double jeopardy

Defendant's right to be free from double jeopardy was not violated by her convictions for both solicitation to commit arson and conspiracy to commit arson since solicitation is not a lesser included offense of conspiracy and the elements of the two crimes are different.

Am Jur 2d, Conspiracy § 37; Criminal Law §§ 161, 162, 277, 278.

APPEAL by defendant from judgment entered 16 May 1989 in NORTHAMPTON County Superior Court by *Judge J. Herbert Small.* Heard in the Court of Appeals 31 May 1990.

Defendant was charged with first degree arson, attempted burning of personal property, soliciting arson and conspiracy to commit arson. The evidence at trial tended to show that on 14 April 1988 a mobile home, in which Betty Avent was living, was set on fire. Portions of the exterior were charred and there was smoke throughout but nothing inside the mobile home burned and none of the residents were injured. There was a strong smell of gasoline at the rear of the mobile home after the fire was extinguished.

The fire was set by Tracy Davis, then age 16, and Acey Whitaker, then age 18. They poured gasoline from gallon jugs on the mobile home and on Avent's car which was parked nearby. Davis then lit the match that started the fire. Davis and Whitaker testified that defendant had driven them to Avent's trailer and dropped them off. After setting the fire, they ran to a nearby truckstop where defendant was waiting to pick them up. The State's

evidence tended to show that defendant solicited Davis and Whitaker to burn Avent's mobile home because of a conflict which had arisen between defendant and Avent.

Davis and Whitaker were charged with first degree arson, attempted burning of personal property, and conspiracy to commit arson. In exchange for their testimony at defendant's trial, they were allowed to plead guilty to second degree arson and conspiracy to commit arson.

At the close of the State's evidence, the trial court dismissed the charge of attempted burning of personal property. The jury acquitted defendant of first degree arson, but convicted her of solicitation to commit arson and conspiracy to commit arson. Defendant was sentenced to consecutive sentences of six years for the solicitation charge and ten years for the conspiracy charge. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Norma S. Harrell, for the State.

Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover; and Johnson and Jones, by Bruce C. Johnson, for defendant-appellant.

WELLS, Judge.

Defendant first contends that the trial court erred in admitting testimony that she had committed several other alleged criminal offenses. Defendant's contention is that the evidence of these other alleged crimes, wrongs, or acts should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 404 of the N.C. Rules of Evidence (1988).

After a *voir dire* hearing, Betty Avent was allowed to testify that in the ten-month period preceding the burning of her mobile home, defendant had encouraged Whitaker and Davis to commit crimes for defendant's benefit and had provided transportation for Davis in order that the unlawful acts could be carried out. Specifically, defendant objects to Avent's testimony that Davis shoplifted from stores in Rocky Mount after being told to do so by defendant; that Davis—again at defendant's urging—spray painted the car of a motel clerk with whom defendant had had a disagreement; and that defendant had asked Whitaker to burn her [defendant's] mobile home because she did not want it to be repossessed.

Under Rule 404(b) "[e]vidence 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." G.S. § 8C-1, Rule 404(b). However, such evidence may be admissible for other purposes, including "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Evidence of other crimes is not limited to the exceptions set out in the rule. *State v. Weaver*, 318 N.C. 400, 348 S.E.2d 791 (1986); *see also State v. Rosier*, 322 N.C. App. 826, 370 S.E.2d 359 (1988). (Evidence of other offenses showing common scheme or plan to commit the offense with which defendant was charged held relevant and admissible pursuant to Rule 404(b).)

[1] Recent cases decided by our Supreme Court have made clear that since the enactment of the North Carolina Rules of Evidence, effective 1 July 1984, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused. *See, e.g., State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), and cases cited therein. Even though evidence may tend to show other crimes, wrongs, or acts by defendant and his propensity to commit them, it is nevertheless admissible so long as it is also relevant for some other purpose. *Id.* (citations omitted). Relevant evidence is any evidence which has a 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 of the N.C. Rules of Evidence (1988). When incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of Rule 403 of the N.C. Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 403 of the N.C. Rules of Evidence (1988); *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). In the present case the trial court concluded that the evidence was admissible under Rule 404(b) for the purpose of showing defendant's intent, plan, design, or mode of operation and that its probative value outweighed its prejudicial effect.

[2] Defendant denied asking Davis and Whitaker to burn Avent's trailer; therefore, evidence that defendant had, on previous occasions, solicited or attempted to solicit Davis or Whitaker to commit crimes was relevant and admissible as probative of a common plan or design (scheme) on the part of defendant to solicit others to do unlawful acts for her benefit. These incidents are very similar

to the offenses with which defendant is charged in that the same youths were solicited to do some act that defendant wanted carried out and, on the occasions when the acts were carried out, defendant provided necessary transportation. Additionally, all of the events took place within a ten-month period; therefore, remoteness is not an issue. Under these circumstances we hold that the evidence was sufficiently similar to justify its admission as proof of a common plan or scheme.

Finally, defendant has not shown that the evidence should have been excluded under the balancing test of Rule 403. The trial court specifically admitted evidence of the alleged prior offenses for the limited purpose of considering whether there existed in defendant's mind a plan, scheme or design involving the crimes charged. The jury was so instructed prior to beginning their deliberations. This argument is overruled.

[3] Defendant also contends that Avent should not have been allowed to testify that she [Avent] quit being friends with defendant when defendant said she wanted to find someone to kill her [defendant's] husband. We disagree. Avent's testimony that defendant planned to have her own husband killed was relevant to show the relationship between defendant and Avent and was also admissible as probative of defendant's possible motive in soliciting the burning of Avent's mobile home. The State's theory was that defendant solicited Whitaker and Davis to burn Avent's mobile home because of a dispute that had arisen between defendant and Avent. Evidence showing how the relationship between defendant and Avent deteriorated from one of friendship and confidence sharing to one of animosity was therefore relevant and admissible.

[4] Defendant also contends that testimony from two other witnesses regarding other alleged crimes, wrongs, or acts was improperly admitted. We have reviewed these assignments and find them to be without merit. On two separate occasions testimony concerning defendant's plan to have her own mobile home burned—either by Whitaker or two other youths—was elicited by the State. Both times this testimony was offered to explain or rebut evidence previously elicited by defendant. It is well settled that when one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such later evidence would be in-

competent or irrelevant had it been offered initially. *State v. Albert*, 303 N.C. 173, 277 S.E.2d 439 (1981).

[5] In her next assignment of error, defendant contends that the trial court erroneously admitted into evidence oral out-of-court statements made by Davis to two police detectives. Defendant argues that the testimony was not admissible as corroborative evidence because it went beyond Davis' earlier testimony. We deal first with the testimony of Detective Wardie Vincent.

After Davis had testified, Detective Vincent testified over objection that Davis had told him that he was "tired of what Belva had had him doing and he was ready to get out of it" and that he was ready to "get out of the stealing and burning." The trial court instructed the jury to consider the statements only for the purpose of corroborating Davis' previous testimony. Davis had previously testified that when he was picked up by the detectives for an unrelated offense that he had also told them that defendant "has [him] steal for her and stuff and she had [him] set a fire" and that he "told [Vincent] about [defendant], everything that had been going on." The prior statement of a witness need not merely relate to specific facts brought out in the witness's trial testimony to be corroborative. *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). As long as facts not referred to in the trial testimony add weight or credibility to the testimony, they are corroborative and therefore properly admissible. *Id.* This prior statement of Davis tended to add strength and credibility to his trial testimony and its admission was not error.

[6] The testimony of Detective Warren concerning prior statements made by Davis concerning his "stealing for Belva Richardson" presents a different question. There was no instruction limiting Detective Warren's testimony to corroboration. The State contends, however, that this testimony was not offered for corroboration, but in rebuttal to defendant's evidence that Davis was making up the statements about defendant and her role in the burning of Avent's trailer because Davis hoped that by doing so he could extricate himself from his own legal trouble. We conclude that Detective Warren's testimony was admissible as rebuttal evidence. *See State v. Albert, supra.* Even if it were error to admit Warren's testimony, defendant has not met her burden of showing that the error was so prejudicial that had it not been admitted a different

result would likely have been reached. *See* N.C. Gen. Stat. § 15A-1443 (1978).

[7] In her final assignment of error defendant contends that her convictions for both solicitation to commit arson and conspiracy to commit arson violate her constitutional right to be free from double jeopardy. We note that defendant did not raise this question in the trial court. Appellate courts will not ordinarily consider a constitutional question raised for the first time on appeal. *State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988). However, we proceed to address this additional issue in the exercise of our supervisory jurisdiction. *Id.* Defendant contends that soliciting arson is essentially an invitation to enter into a conspiracy to commit arson and that solicitation by its nature is a lesser included offense of conspiracy.

Soliciting another person to commit a felony is a crime in North Carolina. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 54 L.Ed.2d 281 (1977). Counseling, enticing or inducing another to commit a crime is the gravamen of the crime of solicitation. *Id.* Solicitation is complete when the request to commit a crime is made, regardless of whether the crime solicited is ever committed or attempted. *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986). Conspiracy, on the other hand, is the agreement of two or more persons to do an unlawful act or to do a lawful act by an unlawful means. *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978). The reaching of an agreement is an essential element of conspiracy. *Id.* It is certainly possible to solicit another to commit a crime without the agreement essential to a conspiracy ever being reached. *See, e.g., Looney, supra* (Conspiracy is not a lesser included offense of accessory before the fact based on similar reasoning). We therefore hold that solicitation is not a lesser included offense of conspiracy, the elements of the two crimes in question are different, and no problem with double jeopardy arises on these facts.

For the reasons stated above, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and DUNCAN concur.

RALPH MULLINAX, PLAINTIFF v. FIELDCREST CANNON, INCORPORATED, EMPLOYER, SELF-INSURED, CARRIER, DEFENDANTS

No. 8910IC1367

(Filed 4 September 1990)

1. **Master and Servant § 69.3 (NCI3d) — workers' compensation — settlement agreement — physician's report — absence of compensable asbestosis — no mutual mistake**

The Industrial Commission erred in setting aside a Form 21 settlement agreement for defendant to compensate plaintiff for disability from asbestosis because of "mutual mistake" based on a report by the Advisory Medical Committee of the Industrial Commission that plaintiff does not have "compensable asbestosis," since the issue of whether plaintiff has compensable asbestosis was decided by the parties when they entered into the settlement agreement, and the record does not disclose that the settlement agreement was entered into because of a mistake of fact common to both plaintiff and defendant.

Am Jur 2d, Workmen's Compensation § 465.

2. **Master and Servant § 99 (NCI3d) — workers' compensation — attorney fees for appeals**

A Court of Appeals decision reinstating a settlement agreement required "the insurer to make, or to continue payments of benefits" within the meaning of N.C.G.S. § 97-88 so that plaintiff is entitled to an award of attorney fees as part of the costs of defendant employer's appeal from the Deputy Commissioner to the Full Commission and the appeal to the Court of Appeals.

Am Jur 2d, Workmen's Compensation § 644.

APPEAL by plaintiff from an order of the North Carolina Industrial Commission entered 2 October 1989. Heard in the Court of Appeals 22 August 1990.

On 7 April 1988, plaintiff and defendant entered into an agreement on Industrial Commission Form 21 whereby defendant agreed to compensate plaintiff for 104 weeks of disability from asbestosis resulting from plaintiff's employment with defendant. On 25 April 1988, the Industrial Commission approved the parties' settlement

agreement. On 11 April 1988, defendant received a copy of the Industrial Commission's Advisory Medical Committee Report indicating that plaintiff did not have compensable asbestosis within the meaning of G.S. 97-53(24). On 9 May 1988, defendant filed a motion to set aside the Form 21 Agreement, and on 14 February 1989, a hearing on defendant's motion was held before Deputy Commissioner Christine Denson.

Following the hearing, the Deputy Commissioner made detailed findings of fact, conclusions of law, and entered an order denying defendant's motion to set aside the consent agreement. On 2 October 1989, the Full Commission, in an opinion authored by Commissioner J. Harold Davis, and concurred in by Commissioner J. Randolph Ward and Chairman Wm. H. Stephenson, entered the following:

> This matter is before the Full Commission on defendant's appeal from an Opinion and Award filed by Deputy Commissioner Christine Y. Denson on February 22, 1989.
>
> The Full Commission have [sic] reviewed the record in its entirety together with the able briefs and arguments of counsel. The Full Commission is of the opinion that the decision reached by Deputy Commissioner Denson was incorrect. The issue in this case is whether a motion to set aside a Form 21 Agreement on the grounds of error due to mutual mistake, misrepresentation, or excusable neglect, per G.S. 97-17.
>
> Based on all the competent evidence of record, the undersigned makes the following [findings of fact:]
>
> 1. On September 11, 1987, plaintiff filed a Form 18 Notice of Accident to the Employer, claiming he had contracted the occupational disease of asbestosis during his employment with Fieldcrest Cannon, Incorporated between 1971 and 1987 while employed as a pipe fitter.
>
> 2. The medical records of plaintiff from Dr. Douglas Kelling stated that the plaintiff's chest x-ray is strongly suggestive of asbestosis, along with an appropriate exposure history.
>
> 3. Defendant agreed based on Dr. Kelling's report that since the diagnosis of asbestosis automatically establishes 104 weeks of disability, the plaintiff having been exposed to asbestos

while working at Fieldcrest Cannon, that he would be entitled to 104 weeks of compensation if he had contracted asbestosis.

4. A Form 21 Agreement was prepared and sent to plaintiff's attorney on April 1, 1988.

5. On April 11, 1988, defendant received a copy of the Advisory Medical Committee report dated March 2, 1988 that indicated evidence of exposure to asbestos seems likely based on pleural and diaphragmatic plaquing with calcification. The Advisory Medical Committee found no evidence of parenchymal asbestosis by either radiograph, the presence of exertional dyspnea, the presence of crackling rales or the presence of digital clubbing. Plus, the diffusing capacity for carbon monoxide is normal on the occasions which would be strong evidence against such disease. This report was by Dr. Allen Hayes, M.D., a pulmonary specialist and member of the Advisory Medical Committee of the Industrial Commission, and also a member of the Industrial Commission Occupational Disease Panel as well as the only doctor who examines patients with claims of asbestosis. Dr. Hayes' determination was that plaintiff did not have compensable asbestosis. This conclusion was unanimously concurred by the other two physicians on the Advisory Medical Committee. Dr. Hayes explained in his deposition that there are two types of asbestosis, pleural asbestosis and parenchymal asbestosis, the difference being pleural asbestosis involves the lining of the lung and parenchymal asbestosis involves the solid substance of the lung. The compensation system compensates those people who have the disease of the lungs and not those who have the disease in the pleura.

Based upon the foregoing findings of fact, the undersigned enters the following [conclusion of law:]

The parties settled by way of Form 21 Agreement on the mistaken belief that plaintiff had compensable asbestosis. Plaintiff does not, according to the Industrial Commission Panel Physicians, whose opinion is definitive under the procedure set by the Industrial Commission. Plaintiff does not have the disease, that is the mistake of fact. Defendant tendered the Form 21 Agreement to plaintiff's attorney, believing plaintiff had asbestosis, and plaintiff executed the agreement to the effect that he had asbestosis. Plaintiff later discovered by receipt of the panel's report that he did not have asbestosis. The

agreement was therefore executed under a mutual mistake of fact and entitles defendant to have the agreement set aside.

Based upon the foregoing findings of fact and conclusion of law, the undersigned makes the following [award:]

The Opinion and Award by Deputy Commissioner Denson dated February 22, 1989 is REVERSED and the Motion to set aside the Form 21 Agreement is hereby ALLOWED.

Plaintiff appealed.

Lore & McClearen, by R. James Lore, and Taft, Taft & Haigler, by Thomas F. Taft and Robin E. Hudson, for plaintiff, appellant.

Smith Helms Mulliss & Moore, by J. Donald Cowan and Jeri L. Whitfield, for defendant, appellee.

HEDRICK, Chief Judge.

[1] The Full Commission correctly stated, "[t]he issue in this case is whether [to allow] a motion to set aside a Form 21 Agreement on the grounds of error due to mutual mistake, misrepresentation, or excusable neglect, per G.S. 97-17." Thus, the only issue before us is whether the Full Commission erred in setting aside the Form 21 settlement agreement entered into between plaintiff and defendant, and approved by the Commission, because of the "mutual mistake" of the parties.

G.S. 97-17 in pertinent part provides:

> . . . [N]o party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement.

There is no evidence, contention, or finding in this record that the agreement, Industrial Commission Form 21, was obtained by "fraud, misrepresentation, or undue influence." The Commission set the agreement aside on the grounds of "mutual mistake of fact." Our courts have long held that:

> . . . [A] contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties

> and by reason of it each has done what neither intended . . . however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words, it must be of the essence of the agreement, the sine qua non, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.

Financial Services v. Capitol Funds, 288 N.C. 122, 135-36, 217 S.E.2d 551, 560 (1975); *In re Will of Baity*, 65 N.C. App. 364, 367, 309 S.E.2d 515, 517 (1983).

Plaintiff contends that there was no "mutual mistake of fact" in entering into the settlement agreement. Defendant, on the other hand, argues the "mutual mistake" was "the erroneous belief that plaintiff had asbestosis." The Full Commission stated, "[p]laintiff does not have the disease, that is the mistake of fact." This statement, whether it be a conclusion of law or a finding of fact, is not supported by the record. Defendant may have entered into the agreement on the "mistaken belief" that plaintiff had compensable asbestosis, but that was not the motivation for plaintiff's entering into the agreement. The Commission seemed to conclude or find as a fact that plaintiff did not have compensable asbestosis because the Advisory Medical Committee of the Industrial Commission stated that "plaintiff did not have compensable asbestosis." That question, however, was never decided by the Commission because there has never been a hearing or decision with respect to whether plaintiff has compensable asbestosis. The report of the Advisory Medical Committee with respect to this issue is and could be only evidentiary.

The issue of whether plaintiff has compensable asbestosis was decided by the parties when they entered into the settlement agreement. No party will be allowed "to deny the truth of the matters" set out in the settlement agreement except where such agreement has been obtained by "fraud, misrepresentation, undue influence or mutual mistake." G.S. 97-17.

In the present case, the record simply does not disclose that the settlement agreement was entered into because of a mistake of fact common to both plaintiff and defendant. The decision of the Full Commission will be reversed and the matter remanded to the Full Commission for reinstatement of the Form 21 Agree-

ment entered into by the parties and approved by the Commission. Defendant should be required to pay interest on all sums which should have been paid since the parties entered into the settlement agreement. G.S. 97-86.2.

[2] Plaintiff further contends that he "should be awarded attorney's fees for the defendant's appeal under G.S. 97-88." We agree.

G.S. 97-88 provides:

> 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 part of the bill of costs.

Our decision requires "the insurer to make, or to continue payments of benefits," and we hold plaintiff is entitled to have his attorney's fee paid by defendant as part of the costs of plaintiff's defending defendant's appeal from the Deputy Commissioner to the Full Commission and the appeal to this Court. Defendant, in our opinion, had no reasonable basis for appealing the decision of the Deputy Commissioner to the Full Commission and requiring plaintiff to appeal to this Court to obtain the benefits under the settlement agreement approved by the Commission.

With respect to this matter, we remand the case to the Industrial Commission for the entry of an order requiring defendant to pay to plaintiff's attorney, as a part of the costs, a reasonable fee for representing plaintiff in the appeal from the Deputy Commissioner to the Full Commission and thence to this Court.

Reversed and remanded.

Judges ARNOLD and GREENE concur.

LEXINGTON AEROLINA, INC., PLAINTIFF v. MURRAY AVIATION, INC., DEFENDANT

No. 9026SC22

(Filed 4 September 1990)

Process § 14.2 (NCI3d)— sale of aircraft—by North Carolina corporation to Michigan corporation—sufficient minimum contacts

The trial court did not err in denying defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) in an action to recover the contract price for the sale of an aircraft where plaintiff North Carolina corporation had two aircraft which defendant Michigan corporation agreed to buy, and the first airplane was delivered but the sale of the second aircraft collapsed. There were multiple contacts with North Carolina, including the physical presence of defendant's corporate officers in the state as well as the use of the State's banking system for defendant's economic transactions; North Carolina had an interest in providing plaintiff with a forum for this dispute in that the contract, although made in Michigan, was to be performed in North Carolina, defendant utilized a North Carolina bank as escrow agent to transfer the balance due on the first aircraft, defendant's employees were physically present in North Carolina, and there was a relative lack of significant activity relating to the transaction in Michigan; defendant admits that there is no disparity between the parties regarding the convenience of litigating in the opposing parties' state; and the use of a North Carolina bank as escrow agent would reasonably forewarn defendant of the possibility of being subject to the courts of this state.

Am Jur 2d, Process §§ 186, 187, 190.

APPEAL by defendant from *Saunders (Chase B.), Judge*. Order entered 2 November 1989 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 August 1990.

This is a civil action wherein plaintiff, Lexington Aerolina, Inc., seeks to recover from defendant, Murray Aviation, Inc., the contract price for the sale of an aircraft. Defendant made a motion pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure to dismiss the action for lack of personal jurisdiction over defendant. After a hearing on defendant's motion, the trial judge

made findings of fact which are summarized as follows: This breach of contract action is made by a North Carolina corporation against a Michigan corporation. Defendant has never been domesticated, authorized to do business, or engaged in activity in North Carolina other than the transactions leading up to litigation.

In 1988, defendant contacted the manufacturer of Casa Aircraft in Virginia to inquire about purchasing two used aircraft. The manufacturer told defendant that plaintiff had two such planes and informed plaintiff of defendant's interest in them. Plaintiff's president then telephoned defendant's agent in Michigan. Subsequently, three employees of defendant (including the corporate treasurer and the directer of operations) came to North Carolina to inspect the planes. No negotiations took place on this visit. The parties negotiated over the telephone, and on 21 November 1988, defendant mailed a sales proposal to plaintiff. Two days later, plaintiff mailed back to Michigan a counterproposal for the sale of the aircraft. Plaintiff's counteroffer was accepted and returned along with a $15,000 deposit. The contract required plaintiff to make some alterations on the aircraft. The first plane was delivered to defendant in Florida after the stipulated changes had been made in Pennsylvania. Payment was made through a North Carolina bank acting as an escrow agent for defendant.

This action stems from the collapse of the sale of the second aircraft. Service of summons and complaint was made upon defendant by certified mail in Michigan. From an order denying defendant's motion to dismiss, defendant gave notice of appeal.

Timothy M. Stokes for plaintiff, appellee.

Bailey, Patterson, Caddell & Bailey, P.A., by G. Russell Kornegay, III, and T. Scott White, for defendant, appellant.

HEDRICK, Chief Judge.

Plaintiff concedes for the purposes of this appeal, that the contract was made in Michigan rather than in North Carolina, thus dispensing with defendant's first argument. The parties also agree that (1) the exercise of jurisdiction in this litigation falls within the scope of North Carolina's "long-arm" statute (specifically G.S. 1-75.4(5)c, authorizing jurisdiction in any action which "[a]rises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or

receive within this State, or to ship from this State goods, documents of title, or other things of value"), and (2) "specific" rather than "general" jurisdiction should be exercised since the litigation arises out of a nonresident defendant's contacts with the State. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986).

While conceding that the transactions leading up to litigation fall within the scope of North Carolina's "long-arm" statute, defendant's second argument challenges the exercise of personal jurisdiction by the superior court of this State as a violation of the Due Process clause of the 14th Amendment to the United States Constitution.

The examination of due process focuses on the contacts between the nonresident defendant and the forum state.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283 (1940)). The "minimum contacts" requirement may be satisfied with a single contract "which ha[s] substantial connection with [the forum] State." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 2 L.Ed.2d 223, 226 (1957). In *McGee*, the United States Supreme Court allowed jurisdiction over a foreign corporation based on a single life insurance policy mailed to the forum state with premiums mailed from the forum state to the corporation. Additionally, it has been determined that "if a contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie." *Staley v. Homeland, Inc.*, 368 F. Supp. 1344, 1350 (E.D.N.C. 1974).

The case *sub judice* involves a single contract for the sale of two aircraft. Therefore, we must examine whether the contacts between Murray Aviation in Michigan and Lexington Aerolina were sufficient to establish a "substantial connection" with North Carolina such that *in personam* jurisdiction may be exercised over Murray Aviation. We agree with defendant's assessment of the contacts

between North Carolina and defendant as "minimal," but hold that they are sufficient to satisfy due process.

Five factors have often been considered by this Court when analyzing whether sufficient minimum contacts exist to avoid offending "traditional notions of fair play and substantial justice": (1) quantity of contacts; (2) nature and quality of contacts; (3) source and connection of cause of action to the contacts; (4) interest in the forum state; and (5) convenience to the parties. *Church v. Carter*, 94 N.C. App. 286, 291, 380 S.E.2d 167, 170 (1989); *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 302, *disc. rev. denied and appeal dismissed*, 313 N.C. 604, 330 S.E.2d 612 (1985); *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 531, 265 S.E.2d 476, 479 (1980). The only contacts between defendant and North Carolina involve the sales contract and breach thereof, i.e., the cause of action. These contacts include the visit by three Murray Aviation employees to North Carolina, various telephone calls between the Michigan and North Carolina corporations, a purchase proposal sent from Michigan to North Carolina on 21 November 1988, the signing and returning of the contract to plaintiff in North Carolina, a $15,000 deposit sent to plaintiff in North Carolina, the delivery of the balance of the purchase price for the first plane ($820,000) to a North Carolina bank acting as escrow agent for defendant, the subsequent delivery of the purchase price to plaintiff, and the delivery of a $50,000 deposit on the second aircraft by defendant. Additionally, the Casa Aircraft manufacturer might be considered to have acted as an agent of, or on behalf of, defendant in notifying plaintiff of defendant's interest in the aircraft. These multiple contacts with North Carolina included, significantly, the physical presence of defendant's corporate officers in the State, as well as the use of the State's banking system for defendant's economic transactions.

The North Carolina Supreme Court has held that the courts of this State have personal jurisdiction over nonresident defendants with fewer contacts than defendant in this case. Personal jurisdiction has been found to exist over a defendant who had taken no action in this State, had no agents operating in this State, and had not been physically present in this State. In *Tom Togs, Inc., supra*, the Court found that sufficient minimum contacts existed between the State and a defendant who had dealt only with the plaintiff's independent agent in New York. A "substantial connection" to North Carolina was found based on the contract's formation

in North Carolina and the defendant's knowledge that the contract would be substantially performed in North Carolina. In comparison, the quantity and quality of contacts in the case at hand are sufficient.

The fourth factor to consider is the interest of the forum state. "It is generally conceded that a state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Tom Togs, Inc.* at 367, 348 S.E.2d at 787 (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L.Ed.2d 528, 541 (1985)). The contract, although made in Michigan, was to be performed in North Carolina. The fact that conversion and repair work were done on one plane in Pennsylvania is incidental. The contract stated only that such work was the responsibility of the North Carolina plaintiff, without regard to locale. Additionally, defendant utilized a North Carolina bank as escrow agent to transfer the balance due on the first aircraft. These two factors, combined with the physical presence of defendant's employees in North Carolina and the relative lack of significant activity relating to the transaction in Michigan, strengthen North Carolina's interest in providing plaintiff with a forum for this dispute.

The fifth factor to consider is convenience to the parties. Defendant admits in his brief that there is no disparity between the parties regarding the convenience of litigating in the opposing party's state. The only material witnesses to the actual contract for the second aircraft are the two corporate presidents who signed it.

It is essential to an examination of due process "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L.Ed.2d 490, 501 (1980). There must be some action "by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protections of its laws." *Goldman v. Parkland*, 277 N.C. 223, 229, 176 S.E.2d 784, 788 (1970). The economic connections between Murray Aviation and North Carolina are substantial and significant. The use of a North Carolina bank as escrow agent would reasonably forewarn defendant of the possibility of being subject to the courts of this State.

We hold the trial judge did not err in denying defendant's Rule 12(b)(2) motion to dismiss, and the order will be affirmed.

Affirmed.

Judges ARNOLD and GREENE concur.

RUSHING CONSTRUCTION COMPANY v. MCM VENTURES, II, INC.

No. 8920DC1222

(Filed 4 September 1990)

1. **Landlord and Tenant § 13.1 (NCI3d)— expiration of lease— option to renew—also expired**

An option to renew a lease of a restaurant ended when defendant tenant failed to renew the lease before the term expired because the option to renew was not independent of the contracted term; when the lease expired, so did the option.

Am Jur 2d, Landlord and Tenant § 1182.

2. **Landlord and Tenant § 14 (NCI3d)— expiration of lease— holding over—new rental amount**

A tenancy for a restaurant became a tenancy from month to month when defendant stayed on at the previous rental after the expiration of the lease. Plaintiff had the right to terminate the lease upon giving seven days notice, which it did by requesting possession by June 1, 1989 and stating that after that time the monthly rent would increase to $4,000. Defendant obligated itself to pay the new rent by continuing to occupy the premises after being notified of the new rental.

Am Jur 2d, Landlord and Tenant §§ 71, 1190.

APPEAL by defendant from judgment entered 25 July 1989 by *Judge Kenneth W. Honeycutt* in UNION County District Court. Heard in the Court of Appeals 10 May 1990.

Defendant operates a restaurant in the Town of Indian Trail upon premises leased from plaintiff on 23 December 1986 for an initial term of two years. After defendant had occupied the premises for two months beyond the initial term the parties disagreed as to whether defendant had exercised its option to renew the lease and as to the rent that was due. Plaintiff's actions for rent and

summary ejectment, consolidated for trial, were tried upon an agreed statement of facts by Judge Honeycutt, who held that defendant had not renewed the lease, was liable for rent under a new agreement made as a month to month tenant, and was required to vacate the premises.

The lease agreement, prepared by defendant lessee's attorney, in pertinent part, provides that:

> ONE: The initial term of this lease shall be for a period of two (2) years, beginning on January 1, 1987, and ending on December 31, 1988. The Lessee has the right to occupy and use the premises beginning December 30, 1986. The Lessee shall have the right and option to purchase or extend said lease as hereinafter set forth.
>
> TWO: As rental for said premises, Lessee shall pay the Lessor the sum of One Thousand Six Hundred Dollars ($1600.00) each calendar month during the initial term hereof, said rental payment being due and payable on the 1st day of each month.
>
> . . . .
>
> TWELVE: Except as otherwise provided herein, if at the expiration or termination of this lease, Lessee shall hold over for any reason, the tenancy of Lessee shall thereafter be from month to month only and shall be subject to all other terms and conditions of this lease in the absence of a written agreement to the contrary.
>
> . . . .
>
> FIFTEEN: Lessee shall have a continuing option for a period of eight (8) consecutive years to renew this lease on the same terms and conditions as contained herein except as modified below. The first such renewal term shall be for a period of three (3) years commencing January 1, 1989, and ending on December 31, 1991. Thereafter renewal terms shall be for a period of one (1) year commencing each January 1st and ending each December 31st. During any renewal term the terms of this lease shall be modified as follows:
>
> a. Base rent shall be Two Thousand Dollars ($2,000) per month, with additional rent due in an amount of three percent (3%) of the amount by which Lessee's net sales

> in any calendar year exceed Five Hundred Fifty Thousand Dollars ($550,000.00). Any such addition [sic] rent due shall be paid on an annual basis of sales over 550,000 [sic] based on annual receipts according to Sales Tax Report on or before January 31st of the following year.

Before the initial term expired on 31 December 1988 defendant did nothing to renew the lease and after it expired defendant continued to occupy the premises without explanation. For the months of January and February, 1989 defendant paid plaintiff the same monthly rent as before, $1,600, whereas the base monthly rent for a new term was $2,000. On 28 February 1989 defendant notified plaintiff by mail that it wanted to exercise its option to renew the lease and the next day delivered two checks for $400 and one for $2,000. The checks were returned by the lessor's attorney on 6 March 1989 by a letter stating in substance that since the option was not exercised before the term expired the lessor had made other arrangements for the property and needed possession by 1 June 1989, and that as a holdover, month to month tenant defendant would be charged $1,600 per month until that date and $4,000 per month thereafter. In responding on 9 March defendant's lawyer asserted, *inter alia*, that under Section Fifteen of the lease defendant had a "continuing option" to renew the lease and the exercise was timely. Defendant's $2,000 checks for the April and May, 1989 rent were returned by plaintiff.

From the agreed facts the court found and concluded that the option to renew the lease was not timely exercised; that by holding over after the initial term expired defendant became a tenant from month to month; that plaintiff's notice of the rent increase to $4,000 a month effective 1 June 1989 was an offer to rent the premises on that basis; and that by continuing to occupy the premises after that time defendant accepted the offer and is obligated accordingly.

Griffin & Brooks, by James E. Griffin, for plaintiff appellee.

Griffin, Caldwell, Helder & Lee, P.A., by W. David Lee, for defendant appellant.

PHILLIPS, Judge.

[1, 2] This appeal turns upon whether defendant's exercise of its option to renew the lease was timely. In our opinion the option was not timely exercised and the judgment appealed from is affirmed.

The following legal principles apply: Nothing else appearing, the general rule is that a lessee must exercise an option to renew its lease at or before the original term expires. 50 Am. Jur. 2d *Landlord and Tenant* Sec. 1182 (1970); Annotation, *What Constitutes Timely Notice of Exercise of Option to Renew or Extend Lease*, 29 A.L.R.4th 956 (1984). When the rental for the option renewal period is the same as for the initial term and a tenant holds over and pays it it is presumed that it intended to exercise its option. *First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946). But when the additional term is at an increased rental and the tenant stays on but does not pay the increase that intent is negated. *Coulter v. Capitol Finance Co.*, 266 N.C. 214, 146 S.E.2d 97 (1966); 50 Am. Jur. 2d *Landlord and Tenant* Sec. 1190 (1970). A month to month tenancy may be terminated upon seven days notice. G.S. 42-14. In a month to month tenancy a landlord's timely notice increasing the rental is an offer to rent the property for the increased amount and the tenant's continued occupancy after the effective date of the increase is an acceptance of the offer. *Melson v. Cook*, 545 So.2d 796 (Ala. Civ. App. 1989); *Stanford v. Mountaineer Container Co.*, 88 N.C. App. 591, 364 S.E.2d 153 (1988).

In this instance defendant having failed to renew the lease before the initial term expired, the option to renew ended and by staying on at the previous rental the tenancy became one from month to month. Plaintiff had a right to terminate the lease upon giving seven days notice; and this it did by requesting possession by 1 June 1989 and stating that after that time the monthly rent would increase to $4,000. By continuing to occupy the premises after being notified of the new rental, defendant obligated itself to pay it. If this was not the law, providing in a lease for its extension would be pointless and an owner's right to control the use of his property would be greatly reduced without, and even contrary to, its agreement.

Nor does it help defendant, as it argues, that the lease is ambiguous and that ambiguities in a lease are generally construed in favor of the lessee. *Kearney v. Hare*, 265 N.C. 570, 144 S.E.2d 636 (1965). For leaving aside the fact that the drafting of the instrument by defendant's attorney might require that the ambiguities be construed in plaintiff's favor, *Jones v. Palace Realty Co.*, 226 N.C. 303, 37 S.E.2d 906 (1946), the "continuing option" granted by the lease, from whatever angle viewed, was dependent upon a term of the lease, either initial or renewal, being in effect. The

option was not independent of the term contracted for; when the lease term expired so did the option. It was a "continuing" option for whatever period the lease term existed or was extended to. It did not continue after the lease term ran out and defendant chose not to extend it.

Affirmed.

Judges ARNOLD and COZORT concur.

HEATHER HILLS HOME OWNERS ASSOCIATION v. CAROLINA CUSTOM DEVELOPMENT COMPANY, INC., SAINT ANDREWS PROPERTIES, RICHARD B. ANDERSON AND RICHARD E. FORD

No. 8921SC1109

(Filed 4 September 1990)

1. **Corporations § 31 (NCI3d) — negligent curb and gutter work — liability of successor corporation — summary judgment for defendants improper**

Summary judgment should not have been granted for defendant Saint Andrews Properties and its two partners where plaintiff alleged that paving, curbing and guttering had been negligently constructed by defendant Carolina Custom Development Co., Inc. and had caused water damage to condominium units and common areas, that the corporation deeded all of the lots it owned to defendant Saint Andrews Properties, a partnership, and then dissolved, that defendant Saint Andrews is a successor organization to the corporation and that the individual defendants are general partners, and that plaintiff recover jointly and severally of all of the defendants. Defendants, as movants, had the burden of showing that plaintiff's action is unenforceable, and neither the affidavits nor the papers relating to the sale of the property from Carolina Custom Development to Saint Andrews showed that Saint Andrews is not a successor organization to Carolina Custom Development.

Am Jur 2d, Corporations §§ 2704, 2705.

2. Corporations § 28 (NCI3d)— negligent paving and guttering— corporation dissolved—liability of director

Summary judgment was properly granted for defendant Anderson in an action for negligent paving and guttering by a dissolved corporation of which Anderson had been a director where plaintiff's allegations, liberally viewed, cannot be construed to allege that the company's assets were distributed by its officers without providing for its known and reasonably ascertainable liabilities.

Am Jur 2d, Corporations § 2870.

APPEAL by plaintiff from order entered 1 May 1989 by *Judge Lester P. Martin, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 29 May 1990.

Law Firm of Victor M. Lefkowitz, by Geoffrey C. Mangum, for plaintiff appellant.

House & Blanco, by Peter J. Juran, for defendant appellees Saint Andrews Properties and Richard B. Anderson.

Henry P. Van Hoy, II for defendant appellee Richard E. Ford.

PHILLIPS, Judge.

Plaintiff's action against defendants Saint Andrews Properties and the individual defendants was dismissed by an order of summary judgment. The complaint alleges in substance that some paving, curbing and guttering in the Heather Hills subdivision in Winston-Salem that the subdivision owner, defendant Carolina Custom Development Company, Inc., negligently constructed between 1981 and 1985 caused water damage to some condominium units and common areas which plaintiff is responsible for maintaining; that before the corporation was dissolved it deeded all lots still owned to defendant Saint Andrews Properties, a partnership, on 27 November 1985; that defendant Saint Andrews is a successor organization to the corporation and the individual defendants are general partners therein; and that for the damage caused by the negligence of defendant corporation it is entitled to recover jointly and severally of all the defendants.

[1] The actions against Saint Andrews and its partners were properly dismissed only if the pleadings, affidavits and other materials

of record establish as a matter of law that Saint Andrews Properties is not a successor organization of the dissolved corporation. This is so because the complaint alleges that plaintiff's damage was caused by Carolina Custom Development Company and under the allegations made the partnership and its partners can be liable to plaintiff for that company's obligations only if the partnership succeeded to its interests, as the complaint alleges.

Of the several ways that an organization can succeed to the interests of a corporation whose property it buys the only way that defendant partnership could be the successor of defendant corporation under the record in this case is if it was "a 'mere continuation' of the selling corporation" and had somewhat "the same shareholders, directors, and officers." *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988). *See also Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), *cert. denied in Beck v. Morrison Pump Co., Inc.*, 435 U.S. 1013, 56 L.Ed.2d 395 (1978). In undertaking to establish that Saint Andrews Properties is not a successor organization of the dissolved corporation and is not composed of substantially the same investors as the corporation, the appellees relied upon the affidavits of defendants Anderson and Ford, the partnership agreement, the corporation's deed to Saint Andrews Properties, and other papers relating to the sale. Though the deed and other documents are in proper form, they do not establish the relationship between the two organizations, and the affidavits of defendants Anderson and Ford were submitted for that purpose. In pertinent part Anderson's affidavit states:

> 8. . . . That deed shows that taxable consideration in the amount of $1,047,500.00 was paid for the property in question.
>
> 9. Although several members of the partnership were also shareholders in the corporation, a number of partners were not involved in the corporation and the partnership was formed for the purpose of purchasing from the corporation at arm's length certain properties for a separate commercial enterprise.

Ford's affidavit, in the same vague, indirect, conclusory vein, states:

> 5. Some of the partners of Saint Andrews Properties were also shareholders in the corporation; however, a substantial number of the partners in Saint Andrews Properties were not involved in the corporation. The partnership dealt with

> the corporation at arms length in the purchase of the properties for a separate commercial enterprise to be carried out by the partnership.

These affidavits, more conclusory than factual, do not establish, as appellee movants had the burden to establish, that Saint Andrews is not a successor organization of the seller corporation. They do not identify the partners and say which ones were and were not investors in the corporation and to what extent; they do not say what amount of money, if any, each partner put into the partnership; they do not say that the purchase price recited in the deed was in fact paid to the corporation or explain how payment was made; they do not say what the fair market value of the lots was. These voids in appellees' forecast of evidence are not filled by the bare assertion that the transaction between the two organizations was at arm's length; and that assertion is contradicted to some extent by the fact that the corporate seller's deed to the partnership was executed by two partners of the buyer—defendant Anderson as President, and defendant Ford as Secretary. That plaintiff did not contradict defendants' affidavits does not establish, as appellees argue, that summary judgment was correctly entered and the appeal is frivolous. Defendants, as movants, had the burden of showing that plaintiff's action is unenforceable and since their affidavits and other materials do not show that, a response was not required. *Steel Creek Development Corp. v. James*, 300 N.C. 631, 268 S.E.2d 205 (1980). Thus, in dismissing the action alleged against defendant Saint Andrews and its two partners the order is erroneous, and we reverse it.

[2] Plaintiff's argument that an issue of fact also exists as to defendant Anderson's liability as a director of the developing corporation has no basis. No such claim has been alleged against him. The basis for defendant Anderson's liability that plaintiff apparently had in mind was that created by former G.S. 55-32(e) (1982), still in force when plaintiff's cause arose, which reads as follows:

> (e) The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known or reasonably ascertainable debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed,

> to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

As is plainly stated the basis for holding a director liable for the debts of his dissolved corporation under this statute is distributing the company's assets without providing for "all known or reasonably ascertainable . . . liabilities of the corporation." The complaint in this case does not allege that any such distribution was made; nor does it allege that Carolina Custom Development Company's liability to plaintiff was either known or reasonably ascertainable when the distribution was made. All that the complaint alleges along this line is that: Before the corporation was dissolved the condominium units it still owned "became the property of Saint Andrews Properties"; Anderson was the president and director of the corporation; and plaintiff is entitled to recover of all the defendants jointly and severally for the damage caused by Carolina Custom Development Company's negligence. These allegations, liberally viewed, cannot be construed to allege that the company's assets were distributed by its officers without providing for its known or reasonably ascertainable liabilities. Sifted down, they only allege that defendant Anderson was an officer and director when the corporation was dissolved, and under our law that is no basis for holding one liable for a corporation's debts. No claim of director's liability having been alleged against defendant Anderson, the dismissal of that claim is affirmed.

Affirmed in part; reversed in part.

Judges ARNOLD and COZORT concur.

LARRY JAMES PENUEL v. WILLIAM S. HIATT, COMMISSIONER NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 894SC679

(Filed 4 September 1990)

Automobiles and Other Vehicles § 113 (NCI4th)— mandatory revocation of driver's license—superior court review by certiorari

The superior court had authority to review the mandatory revocation of petitioner's driver's license by a writ of certiorari.

Am Jur 2d, Automobiles and Highway Traffic § 144.

APPEAL by respondent from Orders entered 12 April 1989 by *Judge James R. Strickland* in ONSLOW County Superior Court. Heard in the Court of Appeals 6 February 1990.

The facts of this case are set out in *Penuel v. Hiatt*, 97 N.C. App. 616, 389 S.E.2d 289 (1990). On 16 July 1990, petitioner filed a petition to rehear pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. This Court granted the petition to rehear on 31 July 1990.

Warlick, Milsted, Dotson & Carter, by John T. Carter, Jr., for petitioner appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the Division of Motor Vehicles, respondent appellant.

ARNOLD, Judge.

In the decision reported in *Penuel v. Hiatt*, 97 N.C. App. 616, 389 S.E.2d 289 (1990), this Court vacated the order of the superior court directing the Division of Motor Vehicles [hereinafter DMV] to restore petitioner's driving privileges. This Court then remanded the proceeding to the superior court for entry of an order reinstating the order of the DMV denying the restoration of petitioner's driving privileges. This decision was based on our reasoning that the superior court had no jurisdiction to review the DMV's order denying petitioner's request for conditional restoration of his driving privileges. We held that the superior court did not have jurisdiction because N.C. Gen. Stat. § 20-25 did not provide for superior court review of mandatory license revocations and also because petitioner had

failed to show any arbitrary or capricious act by the DMV in denying the restoration.

After our opinion in *Penuel* was filed, our Supreme Court addressed the issue of whether a superior court has authority to review mandatory license revocations by the DMV. In *Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990), the petitioner's driving privileges were permanently revoked by the respondent-Commissioner pursuant to N.C. Gen. Stat. § 20-17(2) and N.C. Gen. Stat. § 20-19(e). The petitioner filed a petition in superior court asking for review of the Commissioner's actions. The respondent answered and moved to dismiss for lack of jurisdiction. The superior court denied the motion to dismiss and held that the respondent erred in permanently revoking the petitioner's driving privileges. Our Supreme Court held that although the petitioner did not have a right to appeal the mandatory revocation under G.S. § 20-25 or under Chapter 150B of the North Carolina General Statutes, the Administrative Procedure Act, the Commissioner's actions could be reviewed by the superior court by writ of certiorari. This is because petition for "*certiorari* is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law." *Davis* at 465, 390 S.E.2d at 340 (quoting *Russ v. Board of Education*, 232 N.C. 128, 130, 59 S.E.2d 589, 591 (1950)). Justice Webb, writing for the Court, stated "that if a petition alleges facts sufficient to establish the right of review on certiorari its validity as a pleading is not impaired by the fact the petitioner does not specifically pray that the court issue a writ of certiorari." *Id.*

In the present case, as in *Davis*, the petitioner pled sufficient facts to show he did not have a right to appeal from a final decision of an agency. He could then petition for a writ of certiorari to have the case reviewed by the superior court. Thus, we hold the superior court did have jurisdiction to review the case. Accordingly, the order of the superior court is affirmed.

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. FRANKLIN RAY HYDER

No. 8924SC1340

(Filed 18 September 1990)

1. **Indictment and Warrant § 12.2 (NCI3d)— indictment—name of county changed—no error**

The trial court did not err in a prosecution for delivering a controlled substance by granting the State's motion to strike "Watauga County" and insert "Mitchell County." Although N.C.G.S. § 15A-923(e) provides that a bill of indictment may not be amended, the defendant could not have been misled or surprised as to the nature of the charges against him and the substitution of Mitchell County for Watauga County did not amount to an impermissible amendment of the indictment as it did not alter the charge.

Am Jur 2d, Indictments and Informations §§ 174, 180, 188, 192.

2. **Criminal Law § 162.2 (NCI3d)— hearsay—objection not timely—right to argue on appeal waived**

Defendant in a prosecution for delivering a controlled substance did not object in apt time and thereby waived his right to argue on appeal that an out-of-court statement was hearsay.

Am Jur 2d, Appeal and Error §§ 562, 603; Evidence § 494.

3. **Criminal Law § 169.3 (NCI3d)— out-of-court statement—fact established by other evidence—no prejudice**

There was no prejudice in a prosecution for delivering a controlled substance from the admission of an out-of-court statement that defendant was growing marijuana in Tennessee where that fact had already been established without objection.

Am Jur 2d, Appeal and Error §§ 562, 603; Evidence § 494.

4. **Criminal Law § 1196 (NCI4th)— sentencing—mitigating factor—no evidence**

The trial court did not abuse its discretion in a prosecution for delivering a controlled substance by not considering defendant's physical condition as a mitigating factor. The only mention of defendant's physical condition was in defense

counsel's argument, the State did not stipulate to the existence of this mitigating factor, and, under *State v. Swimm*, 316 N.C. 24, there was no evidence that defendant's physical condition was before the court.

Am Jur 2d, Criminal Law §§ 527, 598, 599; Drugs, Narcotics, and Poisons § 48.

5. **Criminal Law § 1117 (NCI4th)— sentencing—involvement of children in drugs—not improperly considered**

There was no error in sentencing defendant to maximum terms for delivery of a controlled substance and delivery of a controlled substance to a person under sixteen years of age while defendant was over eighteen years of age. Although defendant contends that the judge's statements clearly indicate that he believed that both of defendant's sons began using marijuana after defendant delivered it to them and that there is no evidence that one of the sons ever used marijuana, it is clear that defendant was sentenced prior to any comment made about defendant's son's use of drugs and the record contains statutory aggravating factors supporting the sentence.

Am Jur 2d, Criminal Law §§ 527, 598, 599; Drugs, Narcotics, and Poisons § 48.

APPEAL by defendant from judgment entered 3 October 1989 by *Judge Samuel A. Wilson III* in MITCHELL County Superior Court. Heard in the Court of Appeals 20 August 1990.

Lacy H. Thornburg, Attorney General, by J. Charles Waldrup, Assistant Attorney General, for the State.

Kyle D. Austin for defendant-appellant.

GREENE, Judge.

The defendant appeals from a judgment entered 3 October 1989, which judgment was based upon a jury verdict convicting defendant of two violations of N.C.G.S. § 90-95(a)(1) (1985), delivery of a controlled substance (file number 88CRS827) and delivery of a controlled substance to a person under 16 years of age while defendant was over 18 years of age (file number 88CRS826).

On 11 July 1988, a Mitchell County grand jury indicted the defendant for two violations of N.C.G.S. § 90-95(a)(1). The first

indictment, 88CRS826, accused the defendant of delivery of a controlled substance to a person under 16 years of age by a person over 18 years of age. In the top left corner of the indictment, "Watauga," not "Mitchell," was placed as the county from which the indictment was issued. On 14 September 1989, the defendant moved to dismiss the indictment because of this error. At trial, the State moved "to strike the word Watauga County and insert in lieu thereof Mitchell County." The trial court denied the defendant's motion and granted the State's motion on the grounds that "the designation of the county as 'Watauga' in the indictment issued by the grand jury in Mitchell County was a typographical error and has no way mislead [sic] the Defendant of the nature of the charges against him."

The State's evidence at trial tended to show that in August 1987 the defendant delivered a brown paper bag containing fifteen to twenty plastic bags full of marijuana to his two sons, Tim and Dale Hyder. When the defendant's sons received the marijuana, they took it behind their house and concealed it. At that time, Tim was 17 years old, and Dale was 15 years old. The boys lived with their mother in Mitchell County, and the defendant lived in Tennessee.

In August and September of 1987, Michael Nash (Nash), a deputy sheriff in Mitchell County, worked as an undercover officer. On three separate days in early September, Nash purchased a total of approximately 112 grams of marijuana from the defendant's sons. After the boys were arrested for charges relating to the sale of the marijuana, they each gave statements to two other Mitchell County sheriffs concerning various items, including the fact that the defendant had delivered the marijuana to them in August 1987. At his arraignment, the defendant entered a plea of not guilty on both charges. The defendant presented no evidence at trial.

As punishment for 88CRS826, the trial judge sentenced the defendant to the maximum term of imprisonment, thirty years. As punishment for 88CRS827, the trial judge sentenced the defendant to the maximum term of imprisonment, five years. On appeal, the defendant seeks either a new trial or a new sentencing hearing.

The issues are: (I) whether the trial court erred in denying defendant's motion to dismiss the indictment in 88CRS826; (II)

whether the trial court erred in allowing two separate portions of an out-of-court statement to be read into evidence, (A) the first portion concerning a statement made by the defendant to Dale Hyder and (B) the second portion concerning a matter within Dale's personal knowledge; (III) whether the trial court erred in refusing to consider the defendant's physical condition as a mitigating factor; and (IV) whether the trial court considered improper nonstatutory aggravating factors in reaching its conclusion to impose the maximum sentences upon the defendant.

I

[1] Defendant argues that the trial court violated N.C.G.S. § 15A-923(e) (1988) by improperly amending the indictment in 88CRS826 when the trial court granted the State's motion "to strike the word Watauga County and insert in lieu thereof Mitchell County." We disagree.

N.C.G.S. § 15A-923(e) instructs that "[a] bill of indictment may not be amended." The statute does not define the term "amendment." Our courts, however, have defined the term to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. rev. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978). The trial court concluded that the error in the first indictment was a mere typographical error that in no way misled the defendant as to the nature of the charges against him. We agree. The defendant could not have been misled or surprised as to the nature of the charges against him, and the substitution of Mitchell County for Watauga County did not amount to an impermissible amendment of the indictment under N.C.G.S. § 15A-923(e) as it did not alter the charge in the indictment. *See also State v. Price*, 310 N.C. 596, 313 S.E.2d 556 (1984) (change of date of offense was not an amendment as the change related to time, not an essential element of the murder charge); *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990) (trial court properly allowed State's motion to correct three indictments where indictments referred to victim as Pettress Cebron, but victim's name actually was Cebron Pettress); *State v. Kamtsiklis*, 94 N.C. App. 250, 380 S.E.2d 400 (1989) (conspiracy charges not substantially altered by changing dates in indictments); *State v. Marshall*, 92 N.C. App. 398, 374 S.E.2d 874 (1988) (addition of victim's last name to one

of four indictments not amendment as defendant was not misled or surprised as to the nature of the charges against him).

II

[2] At trial, the State called as a witness Coy Hollifield (Hollifield), the sheriff in Mitchell County. Without objection, Hollifield began reading into evidence the statement given by Dale Hyder when he was arrested. After Hollifield had read nearly two pages of the statement, the defendant began generally objecting to various portions of the statement. The first portion concerned a statement made by the defendant to Dale Hyder. The second portion apparently concerned facts about which Dale had firsthand knowledge.

A

The first portion of the statement appears in the transcript as follows:

> Q. All right. What, if anything, did he [Dale] at that time tell you Sheriff Hollifield?
>
> A. Vernon Bishop was the man that actually did the interview, of course, I asked questions as we went down, and I'll just read the interview, if that's okay with you. Vernon asked the question, do you ahh go by Franklin or by Dale, and he stated Dale. Vernon asked, stated said I'm Vernon Bishop and this is Danny Braswell and this is Sheriff Hollifield I guess your attorney has already told you what is going on, Dale stated yeah. Vernon, what basically what I need to know is where you got the marijuana that you sold to the undercover agent during the undercover campaign. Dale, I got it from my dad. And then I asked him a question, are you taping this now, and we were taping the conversation between us, and Vernon said yes, and he asked your dad's full name, and Frank—or Dale answered Franklin Ray Hyder. I asked a question, ahh I said, Dale is it and he said yes. And then I asked a question, what other name does your father go by, and he stated that he didn't go by any other name that he knew of. Vernon asked the question, ahh the first transaction was around the first of September, when did you bring the marijuana—when did he bring the marijuana to you, Dale stated about the last of August, middle or last of August. Vernon, okay, what time of the day or night was it, do you remember? Dale, it was the night. Vernon, now was it—how was it packaged, we want

to get specific here, and I asked the question, ahh I was just, and then I said I was writing my questions down to ask when you got through, and that was my first question, Dale stated, it was in a brown grocery bag and it was in, the marijuana was in freezer bags. Vernon asked the question, plastic, Dale answered yes. Vernon, okay, he had this, he had individually packaged in freezer bags in a big paper sack. Dale answered yes. Vernon, how many small packages were there? Dale, I guess twenty. Vernon, about how many marijuana—how much marijuana was in the individual bags? Dale stated about an ounce. Vernon, about an ounce in each bag? Dale stated yes. Vernon, what was the conversation that took place when he went—when he came up, came over the mountain with the marijuana? What went on? Dale, he just said keep this for me, and try to sell it—

MR. AUSTIN: OBJECTION and MOVE TO STRIKE.

THE COURT: OVERRULED.

The defendant argues that the entire statement was hearsay and that the only purpose for which the statement could have been properly admitted would have been to corroborate Dale's earlier testimony. However, since the statement did not corroborate Dale's testimony at trial, the defendant argues that such a purpose was not served. Therefore, the statement should not have been allowed into evidence. We do not address the merits of the defendant's argument because the defendant failed to object to the statement in a timely manner.

"[U]nder Rule 103 of the North Carolina Rules of Evidence, error may not be predicated on a ruling admitting evidence unless a *timely objection* or motion to strike appears in the record." *State v. Reid*, 322 N.C. 309, 312, 367 S.E.2d 672, 674 (1988) (emphasis added); *see also* N.C.G.S. § 15A-1446(a) (1988) and N.C.R. App. P. 10(b)(1). A timely objection is one " 'made in apt time, that is, as soon as the opponent has the opportunity to learn that the evidence is objectionable.' " *State v. Edwards*, 274 N.C. 431, 434, 163 S.E.2d 767, 769 (1968) (citation omitted). "Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal." N.C.G.S. § 15A-1446(b) (1988); *see also Reid*; 1 Brandis, *Brandis on North Carolina Evidence* § 27 (3d ed. 1988). Applying these rules to the trial court's alleged error, the defendant did not object in apt

time and thereby has waived the right to argue the alleged error in this appeal. As to the alleged error regarding this statement, the defendant's objection was made after Hollifield had read into evidence Dale Hyder's answer to the officer's questions. The objection was simply too late as the defendant was fully aware throughout the reading of the statement that it was an out-of-court statement offered for the truth of the matters contained within it.

B

[3] The second portion of Dale Hyder's statement to which the defendant assigns error concerns a matter apparently within Dale's personal knowledge. The defendant generally objected to portions of Dale's statement which show that Dale knew that the defendant grew marijuana in Tennessee. The relevant portions of Dale's statement appear in the transcript as follows:

> A. Dale, yes. Vernon, did he ever tell you where he got the marijuana? Dale, he grew it—
>
> MR. AUSTIN: OBJECTION.
>
> THE COURT: OVERRULED.
>
> Q. Vernon, he told you he grew it? Dale, I know he did. Vernon, but did you ever—but did he ever tell you that? And then I asked the question, did you see where he grew it at, is that what you are telling us?
>
> MR. AUSTIN: OBJECTION.
>
> THE COURT: OVERRULED.
>
> A. Dale, yes. And I made the statement okay. Dale, I know for a fact he grew it. I asked the question, go ahead and talk to him then. Vernon, you saw it growing? Dale stated yes. I asked the question where at? Dale stated in his garden behind his house. I asked the question in Tennessee? Dale stated yes;

The defendant argues that the trial court erred in admitting this portion of the statement because Dale had not previously testified as to this matter and that therefore the statement did not add weight to his earlier testimony. The defendant therefore argues that admission of this portion of the statement violates a recent Supreme Court case, *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). Assuming *arguendo* that the evidence was improperly

admitted, the defendant was not prejudiced by its admission. Earlier testimony by the defendant's other son, Tim, revealed the fact that Tim knew that his father grew marijuana in Tennessee. This testimony was admitted without objection. Therefore, the fact that the defendant grew marijuana in Tennessee had already been established without objection. Our Supreme Court has stated on various occasions that prejudicial error cannot be shown when "preceding testimony given without objection is substantially the same as the testimony challenged." *Stockwell v. Brown*, 254 N.C. 662, 667, 119 S.E.2d 795, 798 (1961). *See also Wilson County Board of Ed. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970); *Hall v. Atkinson*, 255 N.C. 579, 122 S.E.2d 200 (1961). Based upon the settled law, the defendant was not prejudiced by admission of Dale's statement.

III

[4] The defendant assigns error to the trial court's refusal to consider the defendant's physical condition as a mitigating factor to the crimes. The defendant argues that the uncontested evidence proves that he suffered from serious medical problems which constitute a mitigating factor. We disagree.

"Where evidence in support of a mitigating factor is uncontradicted, substantial and inherently credible, it is error for the trial court to fail to find that mitigating factor. . . . The defendant has the burden of establishing mitigating factors by a preponderance of the evidence." *State v. Grier*, 70 N.C. App. 40, 48, 318 S.E.2d 889, 894-95 (1984) (citations omitted). "Finding that a mitigating factor exists is within the trial judge's discretion and will not be disturbed on appeal absent a showing that the court's ruling was so arbitrary that it could not be the result of a reasoned decision." *State v. Kinney*, 92 N.C. App. 671, 678, 375 S.E.2d 692, 696 (1989). Here, because the defendant did not meet his burden of establishing the existence of a mitigating factor, the trial court did not abuse its discretion in refusing to find that the defendant suffered from serious medical problems.

Our Supreme Court has ruled that "statements made by defense counsel during argument at the sentencing hearing do not constitute evidence in support of statutory mitigating factors. . . . Such statements may, of course, constitute adequate evidence of the existence of aggravating or mitigating factors if the opposing party so stipulates." *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986) (citation omitted). In this case, the only mention of

the defendant's physical condition was in defense counsel's argument at the sentencing hearing. No other testimony appears in the record which would support the assertion that the defendant suffered from serious medical problems. Likewise, the State did not stipulate to the existence of such a mitigating factor. Therefore, under *Swimm*, there was no evidence of the defendant's physical condition before the trial court for it to consider.

IV

[5] At the end of the sentencing hearing, and after the trial judge had informed the parties as to which aggravating and mitigating factors he had found, the judge sentenced the defendant on both convictions. After sentencing was complete, the trial judge lectured the defendant as follows:

> Mr. Hyder, I want to say to you I find this crime particularly despicable, not only did you involve someone under sixteen, but it was your own son, and you have prior to this the evidence is that you, they had not been involved with drugs following your delivery of this substance to them they began using, moreover they sold it in this community, and but for your criminal action that would not have occurred, and I am therefore imposing the severest penalty I can. The Defendant is in your custody.

Based on the above-quoted passage, the defendant argues that the trial court clearly believed that both of the defendant's sons began using marijuana after the defendant delivered it to them. The defendant argues that because there is no evidence in the record to support any finding that Tim Hyder ever used marijuana, the trial court erred in considering Tim's drug use as an aggravating factor. We find this immaterial as the record is clear that the defendant was sentenced prior to any comment made to the defendant about his son's use of drugs. Since the record contains statutory aggravating factors to which the defendant does not complain, and since these factors support the sentence rendered by the trial court, we find no error. *State v. Flowers*, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

LIBERTY FINANCE CO. & GEM & CO., PARTNERS IN A NORTH CAROLINA PARTNERSHIP KNOWN AS LIBERTY FINANCE COMPANY, AND J. HAROLD SMITH, JAMES H. SMITH, JR., WILLIAM H. SMITH AND ALYSE S. COOPER, GENERAL PARTNERS IN A NORTH CAROLINA PARTNERSHIP KNOWN AS GEM & CO. v. NORTH AUGUSTA COMPUTER STORE, INC.

No. 8918DC1371

(Filed 18 September 1990)

1. **Appeal and Error § 418 (NCI4th)— failure to set forth argument—failure to state basis for error**

Defendant abandoned two assignments of error by failing to set forth an argument in its brief for one and failing to state the basis on which the error was assigned for the other; however, the court chose to address the merits of defendant's argument concerning that assignment of error.

Am Jur 2d, Appeal and Error §§ 691-693.

2. **Process § 14.2 (NCI3d)— personal jurisdiction over nonresident corporate defendants—long-arm statute**

N.C.G.S. § 1-75.4 and N.C.G.S. § 55-145 authorize the exercise of personal jurisdiction over defendant where defendant was an out-of-state corporation which applied for and received a line of credit from a North Carolina company, used that line of credit to purchase computer equipment from the North Carolina company, and then failed to make payments for the equipment.

Am Jur 2d, Process §§ 190, 191.

3. **Process § 14.3 (NCI3d)— nonresident corporate defendant—minimum contacts**

Defendant in an action to collect money owed to plaintiff as an assignee of an account receivable arising from the purchase of computer equipment did not meet its burden of showing error in the denial of its motion to dismiss for lack of jurisdiction. Defendant merely alleged that the court relied on incompetent evidence and did not direct the court to any particular place in the record which would support its position; moreover, there was evidence which supported the trial court's findings that the defendant applied for credit from a North Carolina company, ordered computer equipment on the approved line of credit, and a North Carolina corporation ac-

cepted the equipment order in North Carolina and shipped the equipment to defendant in South Carolina. The acceptance of the computer order was the last act needed to form the contract and the contract was accordingly made in North Carolina, so that there was a substantial connection with North Carolina; defendant purposefully acted to avail itself of the privilege of conducting activities within the State of North Carolina by entering its order for computer products with the North Carolina company; and traditional notions of fair play and substantial justice are not offended by requiring defendant to litigate in North Carolina.

Am Jur 2d, Process §§ 190, 191.

APPEAL by defendant from order entered 19 October 1989 by *Judge Thomas G. Foster* in GUILFORD County District Court. Heard in the Court of Appeals 22 August 1990.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks, for plaintiff-appellees.

Stern, Graham & Klepfer, by Donald T. Bogan, for defendant-appellant.

GREENE, Judge.

The defendant appeals from an order entered on 20 October 1989 denying its motion to dismiss for lack of personal jurisdiction.

The trial court found the following facts: During 1988, Computer Components Corporation (Components) conducted its business of selling computer equipment out of Wake County, North Carolina. In conducting its business, Components would receive and accept orders for computer equipment from its customers, and then Components would ship the equipment to its customers.

During the latter part of 1988, North Augusta Computer Store, Inc. (defendant) sought credit from Components when a representative of the defendant filled out a credit application and forwarded that application from its place of business in South Carolina to Components in North Carolina. Later in the year, a Components' representative telephoned the defendant and informed the defendant's representative that credit had been approved for the defendant. During this telephone conversation, the defendant ordered computer equipment from Components. During this conversation,

the Components' representative was in North Carolina, and the defendant's representative was in South Carolina. In early December 1988, Components shipped the ordered equipment to the defendant.

During 1988, Liberty Finance Company (plaintiff) was a North Carolina company engaged in accounts receivable financing. After Components shipped the equipment to the defendant, Components, pursuant to a financing arrangement with the plaintiff, assigned to the plaintiff the account receivable due and owing from the defendant for the shipped equipment. Under this arrangement, Components assigned to the plaintiff all its rights, title, and interest in the account receivable due and owing from the defendant.

On 16 December 1988, Components filed for relief under Chapter 7 in the United States Bankruptcy Court for the Eastern District of North Carolina. On 22 December 1988, the plaintiff filed a motion for relief from stay in the Chapter 7 case involving Components. Plaintiff sought an order permitting it to proceed with the collection of the accounts receivable which Components had assigned to the plaintiff. On 24 January 1989, the United States Bankruptcy Court entered an order which authorized the plaintiff to take such steps as were necessary to collect the accounts receivable assigned to the plaintiff by Components.

On 26 June 1989, the plaintiff filed this action against the defendant to collect the amount allegedly due and owing from the defendant to the plaintiff as assignee of an account receivable. On 26 July 1989, the defendant filed a motion to dismiss the complaint for lack of personal jurisdiction. The trial court denied the motion concluding that North Carolina statutes authorize its exercise of *in personam* jurisdiction over the defendant, and that exercise of this jurisdiction does not violate the defendant's rights to due process.

The issue presented by this appeal is whether personal jurisdiction may be exercised over an out-of-state defendant who applied for and received a line of credit from a North Carolina company, used that line of credit to purchase computer equipment from the North Carolina company, but then failed to make payments for the equipment it received under the line of credit.

[1] We note at the outset that the defendant has abandoned its first assignment of error. In it, the defendant assigned error to

the trial court's alleged consideration of hearsay statements contained in the plaintiffs' affidavits when the district court ruled on the defendant's motion to dismiss. As the defendant failed to set forth an argument in its brief on this assignment of error, the assignment is taken as abandoned. N.C.R. App. P. 28(b)(5). *See In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 341 S.E.2d 588, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 139 (1986) (party must argue assignment of error in order to obtain appellate review).

We additionally note that the defendant has abandoned its second assignment of error. "Each assignment of error shall . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). *See Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E.2d 435 (1988) (assignment of error must state grounds upon which the error is assigned). Here, the defendant's second assignment of error reads as follows:

> 2. The trial court erred in denying Defendant's Motion to Dismiss.
>
> (EXCEPTION NOS. 8-10)

This assignment of error fails to state the basis upon which the error is assigned and is therefore deemed abandoned. However, we have chosen to suspend application of N.C.R. App. P. 10(c)(1) and address the merits of the defendant's argument regarding this assignment of error pursuant to N.C.R. App. P. 2.

[2] To decide the issue of whether or not personal jurisdiction exists over an out-of-state defendant, we must make a two-part inquiry. *Tompkins v. Tompkins*, 98 N.C. App. 299, 301, 390 S.E.2d 766, 767 (1990). First, we must decide if the transaction at issue is covered by a "long arm" statute. *Cherry, Bekaert & Holland v. Brown*, 99 N.C. App. 626, 394 S.E.2d 651 (1990). If so, we must then decide if exercise of the statutory grant of jurisdiction violates the federal due process clause. *Id.* As to the first step in the required analysis, the trial court concluded that both N.C.G.S. § 1-75.4 (1983) and N.C.G.S. § 55-145 (1982) authorized its exercise of personal jurisdiction over the defendant. As we agree, and as neither party questions the trial court's conclusion on this matter, we proceed to the real issue in this case, that is, whether exercise of jurisdiction over the defendant will violate the requirements of due process.

[3] The due process clause requires that

> there must exist 'certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' . . . In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice. . . . This relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.'

Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citations omitted). Because the defendant challenged the trial court's authority to exercise personal jurisdiction under the due process clause requirements, the plaintiff had the burden before the trial court to establish jurisdiction. *Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

The defendant argues that the plaintiff could not have met its burden of proving jurisdiction because the plaintiff "offered no competent evidence to support the District Court's assertion of personal jurisdiction," and that therefore, the trial court relied upon incompetent evidence in concluding that minimum contacts existed. We disagree. Since the defendant argues that the trial court relied on incompetent evidence in reaching its decision, the defendant has the burden of showing that the trial court relied on such evidence. *Best v. Best*, 81 N.C. App. 337, 344 S.E.2d 363 (1986). Here, the defendant has merely alleged that the trial court relied on incompetent evidence and has not directed this Court in its brief to any particular place in the record which would support its position. Thus, the defendant has not met its burden of showing error on the trial court's part. Moreover, even if the plaintiff presented some incompetent evidence to the court, if there was "competent evidence in the record supporting the court's findings, we [will] presume that the court relied upon it and disregarded the incompetent evidence." *Best*, 81 N.C. App. at 342, 344 S.E.2d at 366. Here, it is not disputed that the following evidence contained in the defendant's affidavits was competent:

North Augusta Computer Store, Inc. agreed to purchase equipment from Computer Components Corporation following a phone solicitation placed from Computer Components Corporation to me at North Augusta Computer Store, Inc. in North Augusta, South Carolina on November 22, 1988. I am the only person who spoke directly with the representative of the Computer Components Corporation. I had one telephone conversation with the caller on November 22, 1988 where the representative from Computer Components Corporation announced that we had been authorized for a Ten Thousand Dollars ($10,000.00) line of credit which we could use immediately to purchase product from Computer Components Corporation. During the one phone conversation I had with the Computer Components Corporation representative, I put the caller on hold and checked with the president of our company, Daniel Sanders, for authorization to purchase products from Computer Components Corporation. Upon receiving authorization, I returned to the Computer Components Corporation representative and ordered various products from Computer Components Corporation, to be delivered to North Augusta, South Carolina.

In December of 1988, North Augusta Computer Store, Inc. received various equipment from the Computer Components Corporation which was delivered to our retail store in North Augusta, South Carolina. The product which we received from Computer Components Corporation has never worked and is not in conformance with our contract to purchase such a product.

We quote the following from her second affidavit:

The long-hand printing on the Credit Application, except for the notations in a different handwriting and not in designated lined areas, is my handwriting. Additionally, the signature and date at the end of the Credit Application is my handwriting.

. . . .

In my job as Secretary and Treasurer of North Augusta Computer Store, Inc., I have routinely received unsolicited credit applications in the mail from many, many vendors. I routinely fill out and return these credit applications, in case our company may need more vendors in the future. This is a particularly routine function in the fall, prior to the Christmas

sales season, when new vendors may be required to accommodate increased Christmas sales.

Included in the affidavits is a copy of the credit application which shows that Components' address was in North Carolina.

This evidence supports the trial court's findings that the defendant applied for credit from a North Carolina company; that defendant ordered computer equipment on an approved line of credit; that Components accepted the defendant's equipment order in North Carolina and shipped the equipment to the defendant in South Carolina. These findings support, within the due process clause, the trial court's conclusion that it had jurisdiction over the defendant.

Due process is satisfied if the defendant entered into a contract with plaintiff which has a "substantial connection" with the forum state and such connection was the result of "*an action of the defendant purposefully directed toward the forum state.*" *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112, 94 L.Ed.2d 92, 104 (1987) (emphasis in original). A "substantial connection" exists if the contract is made in the state attempting to exercise jurisdiction. *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 145, 330 S.E.2d 44, 46 (1985). "[A] contract is made in the place where the last act necessary to make it binding occurred." *Tom Togs, Inc.* at 365, 348 S.E.2d at 785. Here the acceptance by Components in North Carolina of the defendant's computer order was the last act needed to form the contract. Accordingly, the contract was made in the State of North Carolina and therefore the contract has a "substantial connection" with North Carolina. Furthermore, when the defendant entered its order for computer products with the North Carolina company, it purposefully acted in a manner so as to avail itself of the "privilege of conducting activities" within the State of North Carolina and thus invoked "the benefits and protections of [the North Carolina] laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 1298, *reh'g denied*, 358 U.S. 858, 3 L.Ed.2d 92 (1958); *see also Asahi*, 480 U.S. at 112, 94 L.Ed.2d at 104.

We find this case indistinguishable from *Wohlfahrt v. Schneider*, 66 N.C. App. 691, 311 S.E.2d 686 (1984). In that case, the defendant, a Texas resident, purchased various pieces of medical equipment from the plaintiffs, North Carolina residents. Incident to this *single* purchase, the defendant executed a promissory note for the balance

of the purchase price. Although the defendant was supposed to make payments due under the note to the plaintiffs in North Carolina, the defendant made no such payments. The plaintiffs sued the defendant. The defendant moved to dismiss the case on the grounds that the North Carolina courts had no personal jurisdiction over him. This Court disagreed holding that

> due process depends upon whether it is fair and reasonable to require a non-resident defendant to litigate the particular case involved in the forum state. Requiring the defendant to litigate his obligation under the note here seems entirely fair to us. He is the one that promised to make the note payments here, and in doing so he must have anticipated that here is where he would be sued if the payments were not made.

Wohlfahrt, 66 N.C. App. at 694, 311 S.E.2d at 688.

We conclude that the traditional notions of fair play and substantial justice are not offended by requiring the defendant to litigate in the North Carolina courts its alleged failure to make payments due to the plaintiff. The defendant should reasonably have anticipated being haled into court in North Carolina should it fail to make payments for the computer equipment. Therefore, the order of the trial court denying the defendant's motion to dismiss is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. JEFFERY V. CLEMMONS, DEFENDANT-APPELLANT

No. 8914SC1332

(Filed 18 September 1990)

1. Criminal Law § 3 (NCI4th); Obstructing Justice § 2 (NCI3d)—solicitations of obstruction of justice—attempt to obstruct justice—indictments not duplicitous

The trial court properly refused to quash as duplicitous two of the three indictments charging defendant with solicitation of obstruction of justice in a specific criminal case, attempt

to commit obstruction of justice in such case, and solicitation of obstruction of justice in future cases, since each indictment alleges a separate and distinct criminal offense.

Am Jur 2d, Criminal Law § 162; Obstructing Justice § 102.

2. **Criminal Law § 3 (NCI4th); Obstructing Justice § 2 (NCI3d)— solicitation to obstruct justice in future cases—sufficiency of indictment**

An indictment was sufficient to charge defendant with solicitation of obstruction of justice where it alleged that defendant solicited the loss prevention manager of a K-Mart store to refer wealthy individuals he should charge with shoplifting or larceny to defendant as a bondsman and to accept money from defendant as a bribe for declining to prosecute those individuals, since there was no requirement of a pending case for the crime of solicitation, and the indictment was sufficient to protect defendant from double jeopardy.

Am Jur 2d, Criminal Law § 162; Obstructing Justice § 102.

3. **Obstructing Justice § 1 (NCI3d)— attempt to obstruct justice—sufficiency of evidence**

Defendant's conviction of an attempt to obstruct justice was supported by evidence that he delivered six hundred dollars to a K-Mart loss prevention manager to cause the manager to tell the district attorney that he had made a mistake and to dismiss a larceny case even though the manager never intended to persuade the district attorney to dismiss the larceny case.

Am Jur 2d, Obstructing Justice §§ 25, 110.

4. **Obstructing Justice § 1 (NCI3d)— solicitation of obstruction of justice—pending case unnecessary**

The presence of a pending case is not an essential element of solicitation of obstruction of justice.

Am Jur 2d, Criminal Law § 162; Obstructing Justice § 12.

5. **Criminal Law § 6 (NCI4th); Obstructing Justice § 2 (NCI3d)— solicitation and attempt to obstruct justice—infamous misdemeanors—jurisdiction of superior court**

Indictments for solicitation to obstruct justice and attempt to obstruct justice charged infamous misdemeanors which

became Class H felonies under N.C.G.S. § 14-3(b) so as to give the superior court jurisdiction over the offenses where the indictments alleged that the offenses were infamous and detailed actions by defendant involving elements of deceit and intent to defraud.

Am Jur 2d, Criminal Law § 24; Obstructing Justice § 102.

6. **Criminal Law § 823 (NCI4th)— testimony by undercover agents or informants—instruction not required**

The trial court properly refused to instruct the jury concerning the testimony of undercover agents or informants where a witness reported a crime to the police and cooperated with the police in their efforts to gather evidence of the crime but was not in the employ of the police and did not receive payment for his cooperation.

Am Jur 2d, Trial §§ 687, 689.

7. **Obstructing Justice § 1 (NCI3d)— instructions—solicitation to obstruct justice in future cases**

The trial court did not commit plain error in instructing the jury on the offense of solicitation to obstruct justice in future cases.

Am Jur 2d, Obstructing Justice § 112.

APPEAL by defendant from judgments entered 17 August 1989 by *Judge Robert H. Hobgood* in DURHAM County Superior Court. Heard in the Court of Appeals 20 August 1990.

On 3 April 1989, defendant was indicted on two charges of soliciting obstruction of justice and one charge of attempting to obstruct justice. The defendant was convicted and sentenced on all charges. From these judgments, defendant appeals.

At trial, evidence was presented tending to show the following facts: On Wednesday, 16 November 1988 defendant approached Nicholas Butler, Loss Prevention Manager at the K-Mart store on Avondale Drive in Durham, and told Butler he wanted to speak with him regarding Cecilia Friemark, a woman charged with larceny in an incident at the store on the previous day. Defendant told Butler he wanted to speak with him in private, so they went to the store's security office.

Defendant had posted bond for Friemark, whom he described as wealthy and said she wanted the whole thing to disappear. Defendant told Butler that Butler was the one who could make that happen and suggested that Butler could make some money as a result. Butler told defendant he needed a couple of days to think about the offer, and suggested they meet on Friday, 18 November.

On Thursday, 17 November Butler went to the District Attorney's office and related the previous day's conversation with the defendant. From there Butler was taken to the Durham Police Department, where he again told what had taken place the day before. On Friday, 18 November police set up surveillance outside the K-Mart store, placed a microphone in the security office, and set up a tape recorder in the office next to the security office.

When defendant arrived, he and Butler went to the security office to discuss what defendant wanted Butler to do. Defendant suggested Butler could take a dismissal or tell the District Attorney that he had made a mistake in the *Friemark* case and say he was not going to prosecute. When Butler asked what Friemark's offer was, defendant went outside to speak with her. Upon his return, he told Butler her offer was six hundred dollars. Again defendant left to speak with Friemark, and returned to say that she would have the money on Monday, 21 November. Defendant said he would call Butler on Saturday, 19 November to arrange a time to meet on Monday, 21 November and then asked if he were going to get a commission.

On 21 November police again established their surveillance inside and outside the store. Defendant arrived with a check for six hundred dollars made out to defendant's wife. After showing it to Butler, defendant left to have his wife cash the check. Defendant returned, counted out six hundred dollars in cash, and handed it to Butler. During this same meeting defendant told Butler that there might be cases in the future where Butler would apprehend someone who was well off, and he could refer them to defendant for bail bonds. In such event defendant stated that "we can do this again. We can make ourselves some money here." After defendant left, Butler turned the six hundred dollars over to the Durham police officers.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William P. Hart, for the State.

Loflin & Loflin, by Thomas F. Loflin, III, for defendant appellant.

ARNOLD, Judge.

[1] In his first assignment of error, defendant contends the trial court erred in refusing to quash two of the three bills of indictment as being duplicitous of a single offense. We do not agree.

The first indictment charges defendant with solicitation of obstruction of justice in the case of *State v. Friemark*. "The gravamen of the offense of solicitation to commit a felony lies in counseling, enticing, or inducing another to commit a crime." *State v. Tyner*, 50 N.C. App. 206, 207, 272 S.E.2d 626, 627 (1980), *disc. review denied*, 302 N.C. 633, 280 S.E.2d 451 (1981). Between 16 and 18 November 1988, defendant requested that Butler speak with the District Attorney and get the case dismissed. Defendant told Butler he would make some money for doing so. Accordingly, defendant's act of requesting that Butler get the *Friemark* case dismissed constituted the complete offense of solicitation.

The second indictment charges defendant with attempt to commit obstruction of justice in the *Friemark* case. On 21 November defendant paid Butler six hundred dollars to have the case dismissed. "Attempt to commit a felony . . . involves an intent to commit the felony indicated and an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." *Tyner*, 50 N.C. App. at 207, 272 S.E.2d at 627. Attempt, unlike solicitation, requires an overt act. "In our view, solicitation to commit a felony and attempt to commit a felony are two separate and distinct offenses. The crime of solicitation, unlike attempt, does not involve an overt act toward the commission of the underlying felony, as the crime of solicitation is complete with the mere act of 'enticing or inducing.'" *Id.*

The third indictment charges defendant with solicitation of obstruction of justice in future cases involving Butler as a witness for the State arising from Butler's position as Loss Prevention Manager. This solicitation made on 21 November differs from the solicitation of 16-18 November both in time and intent. Defendant sought to establish a system of referrals from Butler of wealthy

individuals he charged with shoplifting or larceny, and then seek dismissals in return for payment of money.

Each indictment specifically alleges three separate and distinct criminal offenses. The trial court correctly refused to quash two of the three indictments as duplicitous.

[2] Defendant next assigns error to the trial court's refusal to quash or dismiss the third indictment because it failed as a matter of law to charge any criminal conduct. Defendant asserts that there must be a pending case before one may solicit to obstruct justice. "The offense of solicitation is complete with the act of solicitation, even though there never could be acquiescence in the scheme by the one solicited, *State v. Keen*, 25 N.C. App. 567, 214 S.E.2d 242 (1975), and even where the solicitation is of no effect." *Tyner*, 50 N.C. App. at 207, 272 S.E.2d at 627. There is no requirement of a pending case.

Defendant further argues that the third indictment is insufficient as a matter of law to protect him from future double jeopardy. For an indictment to be good, it must lucidly and accurately allege all the offense's essential elements. One purpose of this requirement is to protect a defendant from double jeopardy. *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953).

The indictment charged defendant with soliciting Nick Butler on 21 November to refer wealthy individuals he had charged with larceny or shoplifting to defendant as bondsman, and accept payments of money from defendant as a bribe to have Butler then decline to prosecute these individuals. The indictment is sufficiently lucid and accurate to allow defendant to defend himself against any future charges arising from this particular act of solicitation.

Defendant's third assignment of error is that the trial court erred in refusing to dismiss the second and third indictments at the close of all evidence, as in the case of nonsuit. The State must offer substantial evidence of each element of the charged offense to survive a motion for judgment of nonsuit.

[3] Defendant alleges that Butler never intended to persuade the District Attorney to dismiss the *Friemark* case and therefore no attempt occurred as the second indictment charges. "[W]hen a defendant has the specific intent to commit a crime and under the circumstances as he reasonably saw them did the acts necessary to consummate the substantive offense, but, because of facts unknown

to him essential elements of the substantive offense were lacking, he may be convicted of an attempt to commit the crime." *State v. Hageman*, 307 N.C. 1, 13, 296 S.E.2d 433, 441 (1982). Defendant delivered six hundred dollars in cash to Butler for the purpose of causing Butler to tell the District Attorney that he had made a mistake and to dismiss the *Friemark* case.

[4] Defendant contends the State failed to present evidence of a pending case, which defendant asserts is an essential element of the third offense charged. As discussed earlier, the presence of a pending case is not an essential element of solicitation of obstruction of justice.

The State offered substantial evidence of each element of the charged offenses. The trial court correctly refused to grant defendant's motion for nonsuit at the close of the evidence.

[5] Defendant's fourth assignment of error is the trial court lacked subject matter jurisdiction because the indictments charged misdemeanor offenses. Both solicitation to obstruct justice and attempt to obstruct justice are misdemeanors under the common law. Under N.C. Gen. Stat. § 14-3(b) (1979), for a misdemeanor at common law to be raised to a Class H felony, it must be infamous, or done in secret and with malice, or committed with deceit and intent to defraud. If the offense falls within any of these categories, it becomes a Class H felony and is punishable as such. *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986).

Each of defendant's three indictments charged that the offenses were infamous, which the statute requires to raise the offenses to a Class H felony. In addition, the indictments detailed defendant's actions involving elements of deceit and intent to defraud.

> At common law, . . . an infamous crime is one whose commission brings infamy upon a convicted person, rendering him unfit and incompetent to testify as a witness, such crimes being treason, felony, and *crimen falsi*. This latter term means any offense involving corrupt deceit, or falsehood by which the public administration of justice may be impeded, such as perjury, subornation of perjury, forgery, bribery of witnesses, conspiracy in procuring non-attendance of witnesses, barratry, counterfeiting, cheating by false weights or measures, and conspiring to accuse an innocent person of crime.

State v. Surles, 230 N.C. 272, 283-84, 52 S.E.2d 880, 888 (1949) (Ervin, J., dissenting, quoting Burdick: *Law of Crimes*, section 87).

In *State v. Preston*, 73 N.C. App. 174, 176, 325 S.E.2d 686, 688 (1985), a defendant was convicted of obstruction of justice by the State with evidence proving the elements of deceit and intent to defraud, but the indictment failed "to charge the essential elements of deceit and intent to defraud which are necessary to elevate the misdemeanor offense of obstruction of justice to a felony." As a result the judgment was vacated. Here defendant was indicted for infamous offenses under the common law and G.S. § 14-3(b). As such the offenses are Class H felonies and are properly before the Superior Court under N.C. Gen. Stat. § 7A-271 (1985).

[6] The fifth error argued by defendant was the trial court's refusal to instruct the jury concerning testimony of undercover agents or informants. N.C.P.I., Crim. 104.30. Defendant had raised an entrapment defense. Butler reported a crime to police and cooperated with police in their efforts to gather evidence of the crime. Butler was not in the employ of the police and did not receive payment for his cooperation. The trial court correctly refused to give the requested instruction.

Defendant's sixth assignment of error is the trial court committed plain error in instructing the jury on the law regarding an attempt to commit obstruction of justice. Defendant failed to object to the instruction at trial and cannot assign as error any portion of the jury charge. N.C.R. App. P. 10(b)(2). While the trial court did not utilize the pattern jury instruction (N.C.P.I., Crim. 201.10), the instruction given was a correct statement of law. *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). When no objection is made in the trial court, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction . . . ." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203, 212 (1977)). The instruction given does not constitute plain error.

[7] Defendant's final assignment of error is the trial court committed plain error in instructing the jury on the third offense of solicitation to commit obstruction of justice in future cases. Defendant failed to object to this jury instruction at trial and cannot assign as error any portion of the jury charge. N.C.R. App. P. 10(b)(2). The trial court did not commit plain error by giving the jury in-

structions on solicitation to obstruct justice. *Odom*, 307 N.C. 655, 300 S.E.2d 375. As discussed earlier, the State presented evidence of the offense and the trial court correctly instructed the jury on the issue.

For the reasons set forth above, we find

No error.

Chief Judge HEDRICK and Judge GREENE concur.

SUZANNE P. BUNTING, PLAINTIFF v. BOYD G. BUNTING, DEFENDANT

No. 9022DC20

(Filed 18 September 1990)

Appeal and Error § 205 (NCI4th)— notice of appeal—not timely

An appeal was dismissed where the trial judge conducted a hearing on 18 September 1989; announced in open court what his order would be; directed counsel to prepare a formal order and signed and entered the formal order on the same day; the order signed and entered on 18 September was filed in the Office of the Clerk on 2 November; and defendant gave notice of appeal on 9 November. N.C.G.S. § 1-279.1 and Rule 3(c) of the North Carolina Rules of Appellate Procedure provide that a party must give notice of appeal from a judgment or order within 30 days after its entry; the record affirmatively demonstrates that defendant did not give notice of appeal within 30 days after the entry of the order on 18 September. Inasmuch as the trial judge announced his order in open court and directed counsel to prepare the formal order which he signed and entered on the same day and at the same session of court, N.C.G.S. § 1A-1, Rule 58, paragraph three has no application.

Am Jur 2d, Appeal and Error §§ 296, 302.

Judge GREENE dissenting.

APPEAL by defendant from *Fuller, Judge*. Judgment entered 18 September 1989 in District Court held in IREDELL County. Heard in the Court of Appeals 27 August 1990.

Benbow and Phillips, by C. David Benbow, for plaintiff, appellee.

Rudisill & Brackett, P.A., by Curtis R. Sharpe, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

On 18 September 1989, Judge Fuller conducted a hearing, announced in open court what his order would be, and directed counsel to prepare the formal order. At the same session of court, on the same day, he signed and *entered* the formal order from which defendant purports to appeal. The record also discloses that on the same date, defendant requested the court reporter to prepare and deliver to defendant's counsel a copy of the transcript of the proceedings. The order entered and signed by Judge Fuller on 18 September 1989 was "filed" in the Office of the Clerk on 2 November 1989. Defendant, on 9 November 1989, gave notice of appeal "to the North Carolina Court of Appeals from the findings, conclusions, order and *entry of order* by the Honorable George T. Fuller, District Court Judge, filed in the Office of the Clerk of Superior Court of Iredell County on November 2, 1989" (emphasis added).

G.S. 1-279.1 and Rule 3(c) of the North Carolina Rules of Appellate Procedure provide that a party must give notice of appeal from a judgment or order "within 30 days after its entry." The appellate court obtains no jurisdiction if the appealing party fails to give notice of appeal within the time prescribed by the statute or rule. *See Gualtieri v. Burleson*, 84 N.C. App. 650, 353 S.E.2d 652, *disc. review denied*, 320 N.C. 168, 358 S.E.2d 50 (1987). In the present case, the record affirmatively demonstrates defendant did not give notice of appeal "within 30 days" after the entry of the order on 18 September 1989, and thus, we have no jurisdiction to hear the appeal. Inasmuch as Judge Fuller announced his order in open court and directed counsel to prepare the formal order which the judge signed and entered on the same day, at the same session of court, G.S. 1A-1, Rule 58, paragraph three has no application in this case.

Appeal dismissed.

Judge ARNOLD concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I

I disagree with the majority's conclusion that the defendant's appeal must be dismissed because defendant failed to file a timely notice of appeal. The majority premises its conclusion upon what I believe to be an incorrect determination that entry of the trial court's order occurred on 18 September 1989, the date the order was allegedly signed by the judge. "[T]he date of entry of judgment 'does not depend on the date of formal signing . . . .' " *Stachlowski v. Stach*, 98 N.C. App. 668, 669, 391 S.E.2d 849, 850 (1990). Instead, the date of entry is determined by Rule 58 of our Rules of Civil Procedure.

N.C.G.S. § 1A-1, Rule 58 provides:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Here, the first paragraph of Rule 58 does not control a determination of when entry of order occurred because recovery was not for "only a sum certain or costs." The second paragraph of

Rule 58 does not control this case because the record does not reflect that the trial judge directed the clerk to make a notation in the minutes. When the trial judge fails to direct the clerk to make a notation in the minutes of the verdict or decision, then "under the second paragraph of Rule 58, the judgment was not entered in open court . . . ." *Morris v. Bailey*, 86 N.C. App. 378, 388, 358 S.E.2d 120, 126 (1987). When the first two paragraphs do not resolve the issue, entry of order is determined by paragraph three.

When an order is not entered in open court, three separate events must occur before entry of order will be deemed complete. N.C.G.S. § 1A-1, Rule 58. First, the clerk must receive an order from the trial judge for the entry of the order. Second, the order must be filed. Third, the clerk must mail notice of the order's filing to all parties. Here, the record does not reflect whether the clerk mailed the required notice to all of the parties, and therefore we cannot, without speculation, determine whether all of the formal requirements of entry of order occurred. However, in this case, based on the fact that the defendant filed notice of appeal on 13 November 1989, it is clear that the defendant had notice at some point between 2 November 1989 and 13 November 1989 of the filing of the order. Accordingly, the order was entered at some point between the date of the filing of the order and the date of the notice of appeal. The fact that the record does not reveal the precise time of notice is immaterial. The defendant's notice of appeal is well within the 30-day limitation period of Appellate Rule 3(c), as the earliest the order could have been entered was 2 November 1989, the date of the filing of the order. Accordingly, I address the merits of this appeal.

II

The defendant appeals from an order entered 2 November 1989 which increased both the amount and duration of the defendant's child support obligation.

The facts relevant to this appeal are as follows: Suzanne Bunting (plaintiff) and Boyd Bunting (defendant) were married on 20 September 1969, they separated on or about 3 June 1978, and they were divorced on 24 July 1979. During their marriage, they had two children, Jacqueline Bunting and Jeffrey Bunting (Jeffrey). On the date of their separation, the parties entered into a separation agreement under which the defendant agreed to pay child

support for both children to the plaintiff in the total amount of $300.00 per month. On 20 November 1979, the plaintiff brought an action in the Iredell County District Court seeking modification of the defendant's child support obligation. On 12 February 1980, the trial court entered its order which increased the defendant's child support obligation to $375.00 per month. On 26 March 1981, the trial court again modified its prior order by increasing the amount of the defendant's child support obligation to $400.00 per month. On 15 May 1989, the plaintiff filed both a motion requesting that the defendant be held in contempt and a motion to increase child support. At this time, as the defendant's daughter was eighteen years of age, the defendant had stopped making child support payments with regard to her. The defendant was only paying $200.00 per month in child support to the plaintiff for their sixteen-year-old son, Jeffrey. When the matter came on for hearing before the trial court, the parties informed the court that they had agreed to dismiss the contempt motion, and that the only matter for the district court to decide was whether to increase the defendant's child support obligation for Jeffrey.

After hearing the evidence, the trial court made findings of fact. Based upon these findings of fact, the trial court concluded that "[t]here has been a substantial and material change of circumstances since the entry of the last Order justifying an increase in child support." The trial court then ordered, among other things, the defendant to pay $800.00 per month in child support for Jeffrey, $400.00 to be paid on the first day of each month and $400.00 to be paid on the fifteenth day.

The issue presented for review is whether the plaintiff produced evidence of her actual past expenditures for her son sufficient to support the trial court's conclusion that a change in circumstances had occurred.

By statute, a child support order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C.G.S. § 50-13.7 (1987). The party seeking modification of the order has the burden of showing that circumstances have changed which affect the welfare of the child. *Daniels v. Hatcher*, 46 N.C. App. 481, 484, 265 S.E.2d 429, 432, *disc. rev. denied*, 301 N.C. 87 (1980). In deciding whether there has been a change in circumstances, the trial court

> must determine the present reasonable needs of the subject minor child . . . To properly determine the child's present reasonable needs, the trial court must hear evidence and make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay. . . . *The evidence of actual past expenditures is essential to the trial court's proper determination of the child's present reasonable needs.*

Norton v. Norton, 76 N.C. App. 213, 216, 332 S.E.2d 724, 727 (1985) (emphasis added). If a trial court orders modification of a prior child support order when the movant has failed to produce evidence of actual past expenditures, the trial court's order will be reversed on appeal. *Norton.*

My review of the record in this case reveals no evidence of the actual past expenditures for Jeffrey. The plaintiff argues that she testified as to her actual past expenditures for Jeffrey, and that these expenditures are disclosed in her affidavit as well. I first note that my review of the record shows that the plaintiff failed to introduce her affidavit into evidence. Second, the testimony to which the plaintiff directs this Court is as follows:

> Q. Would you say that the expenses that you have shown on your Affidavit, that they would be equal for one of the two children, that is, that—for example, you have food at home—$280.00. The food for Jeff would be 140 and for Jackie would be 140?
>
> A. Yes.
>
> Q. And would that be true for each of the other expenses for the children?
>
> A. Yes.
>
> Q. All right. So we could go through the column that's listed children, and divide that by two, and that would be a fair statement of your expenses for Jeff?
>
> A. Right.

This testimony does not establish the plaintiff's actual past expenditures for Jeffrey, rather it demonstrates what her present food expenses were at the time of trial with regard to her two children. Because the plaintiff failed to provide the trial court with evidence

of her actual past expenditures for Jeffrey, the trial court did not have before it the essential evidence it needed to determine properly Jeffrey's present reasonable needs, and thus the plaintiff failed to meet her burden of proving a change in circumstances. *Mullen v. Mullen*, 79 N.C. App. 627, 631, 339 S.E.2d 838, 841 (1986). Therefore, since the trial court's conclusion of law on changed circumstances is not supported by the evidence, I would reverse the trial court's order.

MUTUAL BENEFIT LIFE INSURANCE COMPANY, PLAINTIFF v. CITY OF WINSTON-SALEM, DEFENDANT

No. 8921SC1384

(Filed 18 September 1990)

1. **Principal and Agent § 5 (NCI3d)— group life insurance— negotiation—apparent authority of agent**

There was no prejudicial error in a declaratory judgment action to determine coverage under a group life insurance policy in the denial of defendant's motion for a directed verdict on the issues of actual and apparent authority where the jury answered the issue of actual authority in plaintiff's favor so that there was no prejudice, and there was sufficient competent evidence to allow the jury to believe that the City was justified in believing that Mutual Benefit conferred apparent authority on the agent to alter the policy by adding an attachment.

Am Jur 2d, Insurance § 120.

2. **Trial § 38.1 (NCI3d)— apparent authority of insurance agent— request for instruction—given in substance**

The trial court did not err in its instructions on apparent authority in a declaratory judgment action to determine coverage under a group life insurance policy where the court did not give plaintiff's requested instruction but properly instructed the jury on the substance of the effect on apparent authority of known limitations.

Am Jur 2d, Trial §§ 592, 596.

3. Trial § 38.1 (NCI3d)— jury instructions changed without notice to counsel—requested instruction given in substance—no prejudice

The trial court did not err by changing the jury instructions without notice to counsel and after jury arguments where the court instructed the jury on the substance of plaintiff's requested instruction.

Am Jur 2d, Trial §§ 592, 596.

4. Insurance § 3 (NCI3d)— group life insurance—attachment as a part of contract

The trial court did not err in a declaratory judgment action to determine insurance coverage by denying defendant's motions for a directed verdict, judgment n.o.v., and a new trial on the issue of whether a contract was formed which included an attachment where defendant's evidence shows that defendant intended the attachment to be part of the contract from the beginning; furthermore, plaintiff's arguments contending lack of consideration for the attachment as a separate contract or contract modification were rejected because the attachment became part of the contract, if ever, at the formation of the contract.

Am Jur 2d, Insurance § 295.

5. Appeal and Error § 505 (NCI4th)— issues not reached by jury—no prejudice

Plaintiff did not demonstrate prejudice in a declaratory judgment action to determine insurance coverage on the issues of modification and unfair and deceptive trade practice where the jury did not reach those issues.

Am Jur 2d, Declaratory Judgments §§ 228, 229.

6. Trial § 11 (NCI3d)— opening and closing argument by defendant—discretion of court

There was no error in a declaratory judgment action to determine insurance coverage where defendant opened and closed the arguments to the jury despite introducing evidence. The decision to open and close in this case was within the discretion of the trial court.

Am Jur 2d, Trial § 213.

APPEAL by plaintiff from judgment entered 9 October 1989 in FORSYTH County Superior Court by *Judge Howard R. Greeson, Jr.* Heard in the Court of Appeals 23 August 1990.

Plaintiff, Mutual Benefit Life Insurance Company [Mutual Benefit], instituted this declaratory judgment action seeking a determination of the coverage provided under a group life insurance contract with defendant, City of Winston-Salem [the City].

At trial, the evidence tended to show that in September 1986 the City's then current group life insurance company, Hermitage Health and Life Insurance Company, went into receivership. Subsequently, in late October 1986, Guy Bridges, licensed agent for Mutual Benefit, presented to City officials a group life insurance proposal on behalf of Mutual Benefit. The City and Mutual Benefit began negotiations to place the City's Employee Group Life Insurance coverage with Mutual Benefit.

The City desired to make changes to the proposed coverage and informed Bridges of the desired changes. Among the changes proposed was that the City desired Mutual Benefit to pick up coverage for three employees who had been approved as disabled and eligible for waiver of premium coverage by the prior carrier. The City also proposed that Mutual Benefit review for and provide premium waiver for several out of work employees who claimed disability but had yet to be approved.

Mutual Benefit's agent, Bridges, forwarded the requested changes to Paul M. Lee, Regional Group Manager of Mutual Benefit's Regional Group Sales Office in Atlanta, Georgia. On October 24, 1986, Lee wrote Bridges a letter confirming that Mutual Benefit would continue coverage for the three previously approved employees. The evidence tended to show that Lee orally informed Bridges that Mutual Benefit had approved the City's other requested changes. The City incorporated the requested changes into an "Attachment." Bridges forwarded the "Attachment" by letter dated October 31, 1986 to Lee, along with the City's preliminary application and initial $12,000 premium. Bridges' letter to Lee stated in part that coverage was to be in accordance with the attachment to the application.

Subsequently, Clifford S. Korte, Vice-President of Mutual Benefit, wrote a letter informing City Manager, Bryce A. Stuart, that the City's preliminary application for group life insurance had

been approved. Korte then referred any questions to Mutual Benefit's Regional Group Sales Office in Atlanta. On December 10, 1986 Lee wrote a letter from the Regional Group Sales Office to City Manager Stuart. Lee included with his letter the "Attachment" with his signature. Lee stated that the "Attachment" was approved after review with the home office and was binding with his signature.

In the spring of 1987 the City submitted claims to Mutual Benefit on persons covered by the "Attachment." Mutual Benefit denied coverage on the grounds that Lee was not authorized to sign the "Attachment." Mutual Benefit argued that the contract explicitly states that only the executive officers had authority to approve policy changes.

The court below denied plaintiff's motion for directed verdict at the close of the evidence. The jury verdict in favor of defendant found that Lee had apparent authority to make the "Attachment" part of the contract. The court denied plaintiff's motions for judgment notwithstanding the verdict and new trial. Plaintiff appeals.

Petree Stockton & Robinson, by James H. Kelly, Jr. and Barbara E. Brady, for plaintiff-appellant.

City Attorney's Office, by Sherry R. Dawson, for defendant-appellee.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., for defendant-appellee.

WELLS, Judge.

Plaintiff-appellant contends the trial court erred in denying its directed verdict motion on the issues of actual and apparent authority.

[1] In its first assignment of error, plaintiff contends that the trial court erred in denying its motion for directed verdict on the issue of actual authority. The jury having answered the issue of actual authority in plaintiff's favor, plaintiff was not prejudiced by the denial of its motion for a directed verdict on that issue. *See McCall v. Warehousing, Inc.*, 272 N.C. 190, 158 S.E.2d 72 (1967).

Plaintiff also contends the trial court erred in denying its motion for directed verdict as to the issue of apparent authority. A motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. *See Kelly v. Harvester*

Co., 278 N.C. 153, 179 S.E.2d 396 (1971). In passing on a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn therefrom must be resolved in favor of the nonmovant. *See Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988).

The principal is bound not only by the acts of the agent within the agent's express authority, but also by acts of the agent within the scope of his apparent authority. *See Morpul Research Corp. v. Westover Hardware, Inc.*, 263 N.C. 718, 140 S.E.2d 416 (1965). "[Apparent authority] is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses; however, the determination of the principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974).

Plaintiff contends that since the policy contains an express limitation that only executive officers, president, vice president, secretary, treasurer or mathematician can alter the policy and that Lee did not qualify for any of these positions, defendant knew or in the exercise of reasonable care should have known that Lee was not authorized to enter into the contract. We must therefore determine whether sufficient competent evidence was presented at trial to allow the jury to find that the City was justified in believing that Mutual Benefit conferred apparent authority on Lee to alter the policy by adding the "Attachment." We find that such evidence was presented.

Defendant's evidence includes the fact that Mutual Benefit placed Lee in the position sounding in broad authority: Regional Group Manager of Mutual Benefit's Regional Group Sales Office in Atlanta, Georgia. Defendant also presented evidence that Mutual Benefit has a history of allowing "managers" to alter contracts. The specimen policy presented to the City included an "Attachment" which altered the terms of that policy. Mark S. White, Manager, Group Client Services, Department-II, authorized the changes. Defendant further presented evidence that Clifford Korte, Vice President of Mutual Benefit, wrote a letter to the City referring all questions about the policy to the Regional Group Sales

Office in Atlanta. This evidence persuades this Court that the trial court properly allowed the issue of apparent authority to go to the jury. Plaintiff relies heavily on *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9 (1985), which involved a similar question. *Pearce* turns on the fact that the agent had no apparent authority to modify a *preexisting* contract in light of the express language that policy alterations were limited to executive officers only. The case at hand is distinguishable by the fact that the parties were still negotiating the terms of the policy rather than modifying a *preexisting* contract. Here, defendant's evidence tended to show that defendant reasonably believed that Lee had apparent authority to negotiate the policy terms. Even if a contract had been formed with the "Attachment" viewed as a contract modification, the evidence discussed above was sufficient for the jury to find that plaintiff's conduct naturally and justly led the City to believe the pertinent provisions of the policy were modified or waived. *See Childress v. Trading Post*, 247 N.C. 150, 100 S.E.2d 391 (1957).

[2] In its second and third assignments of error, plaintiff contends the trial court's jury instructions on the issue of apparent authority were improper and prejudicial. We disagree. Plaintiff requested special instructions regarding the effect of the contract's language limiting policy changes to executive officers only. Plaintiff's requested instruction, in essence, stated that this limiting language eliminated apparent authority. The trial court refused to instruct the jury verbatim pursuant to plaintiff's request. However, the trial court did properly instruct the jury on the substance of known limitations' effect on apparent authority. ". . . [T]he court is not required to charge the jury in the precise language of the request so long as the substance of the request is included in language which does not weaken its force." *King v. Higgins*, 272 N.C. 267, 158 S.E.2d 67 (1967). We overrule these assignments.

[3] In its fourth assignment of error, plaintiff contends the trial court erred by improperly changing the jury instructions without notice to counsel and after jury arguments. As noted above, the trial court instructed the jury on the substance of plaintiff's requested instruction. Since the jury instruction did not constitute a change in the plaintiff's requested instruction, plaintiff's assignment of error is without merit.

[4] In its fifth assignment of error, plaintiff contends that the trial court erred in denying its motion for directed verdict, judg-

ment notwithstanding the verdict, and new trial on the issue of whether a contract was formed which included the "Attachment." We disagree. Defendant's evidence shows that from the beginning of the negotiations with plaintiff, defendant intended the "Attachment" to be part of the contract. We further agree with defendant's argument that the "Attachment" became a part of the contract, if ever, at the formation of the contract. Therefore, plaintiff's arguments contending lack of consideration for the "Attachment" as a separate contract or contract modification are rejected.

[5] In its sixth and eighth assignments of error, plaintiff contends the trial court erred in denying its motion for directed verdict on the issue of ratification and unfair and deceptive trade practices, respectively. Due to the fact that the jury did not reach these issues at trial, plaintiff has not demonstrated any prejudice. *See McCall, supra.*

In its seventh assignment of error plaintiff contends that the trial court erred in denying its motion for new trial on the grounds of manifest disregard by the jury of the instructions given by the court, insufficiency of the evidence to justify the verdict, and a verdict contrary to the law and facts of this case. For the reasons discussed above we disagree.

[6] Plaintiff finally assigns as error the trial court's permitting defendant to open and close the arguments to the jury. Plaintiff argues that since defendant introduced evidence at trial, Rule 10 of the General Rules of Practice for the Superior and District Courts prevents defendant from both opening and closing. Plaintiff fails to support his contention with authority and we do not read this meaning into Rule 10 of the General Rules of Practice for the Superior and District Courts. Rule 10 states:

> In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

The decision to allow defendant to open and close in this case was within the discretion of the trial judge. *See Helig v. Insurance Co.*, 222 N.C. 231, 22 S.E.2d 429 (1942); *Pinner v. Southern Bell,*

60 N.C. App. 257, 298 S.E.2d 749, *disc. rev. denied*, 308 N.C. 387, 302 S.E.2d 253 (1983). We find no abuse of discretion.

No error.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. MICHAEL LINEBERGER

No. 8926SC1361

(Filed 18 September 1990)

1. **Criminal Law § 113 (NCI4th)— discovery—failure to comply—motion to dismiss denied**

The trial court did not err in a prosecution for assault with a deadly weapon by denying defendant's motion to dismiss based on the State's failure to provide the complete police investigatory report during discovery. Statements made by witnesses to law enforcement officers are not discoverable evidence and, under N.C.G.S. § 15A-904(a), defendant lacked the authority to request the production of the report. There was no constitutional violation because the record establishes that neither the prosecutor nor the investigating officer intentionally withheld any portion of the report, the trial judge specifically considered that the jury was made fully aware of the omitted documents and their contents, the investigating officer was extensively cross-examined about an inconsistency between the testimony of the State's witnesses and an annotation in the report, and both the incomplete report and the complete report were published to the jury for comparison and were admitted into evidence as two separate defense exhibits. N.C.G.S. § 15A-903(d).

Am Jur 2d, Depositions and Discovery §§ 437, 443.

2. **Criminal Law § 201 (NCI4th)— Speedy Trial Act—commencement of 120 days—indictment**

The trial court did not err in an assault prosecution by denying defendant's motion to dismiss under the Speedy Trial Act where defendant was tried 87 days after his indictment.

The clear and unambiguous language of N.C.G.S. § 15A-701(a1) as applied to the present facts establishes that the relevant event which occurred last and triggered the running of the 120-day period was defendant's indictment.

Am Jur 2d, Criminal Law §§ 854, 855.

APPEAL by defendant from judgment entered 15 June 1989 by *Judge Robert W. Kirby* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 21 August 1990.

Defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury in violation of G.S. § 14-32 and of discharging a firearm into occupied property in violation of G.S. § 14-34. Upon a jury verdict of guilty, defendant was sentenced to seven years imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Joseph P. Dugdale, for the State.

Smith Helms Mulliss & Moore, by James G. Middlebrooks, for defendant-appellant.

JOHNSON, Judge.

The pertinent facts are as follows: Defendant was arrested on 27 July 1988 and thereafter waived a probable cause hearing on 16 August 1988. On 2 December 1988, defendant filed a motion to dismiss for lack of a speedy trial pursuant to G.S. §§ 15A-701 *et seq.* The grand jury returned true bills of indictments for assault with a deadly weapon with intent to kill inflicting serious injury and for discharging a firearm into occupied property on 5 December 1988.

The State's evidence at trial tended to show, *inter alia*, that in the early morning hours of 29 June 1988, defendant drove his car in the traffic lane to the left of a vehicle driven by Timothy Johnson. Then, according to the State's witness, defendant partially rolled down the front passenger window and fired two shots at the Johnson vehicle. One of those shots struck Lynn Covington, a passenger in Johnson's vehicle, entering her upper arm and lodging in her chest.

Defendant's evidence tended to show that he had picked up a hitchhiker prior to the incident and that it was the hitchhiker,

not the defendant, who fired the shots at the Johnson vehicle, and injured Ms. Covington.

During defendant's case in chief, it was discovered that the State inadvertently failed to include the back side of two report forms and a supplemental page upon which the investigating officer made an entry indicating that a prospective witness for the State had previously identified the person who fired the pistol as "Ron." Defendant presented no evidence suggesting that the State intentionally withheld this information or that the district attorney's office had any prior knowledge that this information existed. The trial judge found that neither the prosecutor nor the police department willfully withheld exculpatory information and that the jury was provided a full opportunity and, in fact, did hear testimony and argument regarding the omission of portions of the investigating officer's report prior to reaching a verdict. Defendant's motion to dismiss all charges was subsequently denied.

[1] The primary question presented on appeal is whether the trial court committed reversible error in denying defendant's motion to dismiss the charges based on the State's failure to provide the complete police investigatory report during discovery. Under the particular facts in this case, we find no error.

Specifically, defendant argues that the State had a duty to provide him with a complete copy of the police investigatory report pursuant to G.S. § 15A-903 and the United States Constitution. Initially, we note that there is no common law right to discovery in criminal cases. *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977). Thus, questions concerning discovery must be resolved by reference to statutes and due process principles. *State v. Batts*, 93 N.C. App. 404, 411, 378 S.E.2d 211, 214 (1989), *citing State v. McDougald*, 38 N.C. App. 244, 248 S.E.2d 72 (1978), *disc. rev. denied, appeal dismissed*, 296 N.C. 413, 251 S.E.2d 472 (1979).

G.S. § 15A-903(d) provides that:

> Documents and Tangible Objects.—Upon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, . . . tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are

> intended for use by the State as evidence at the trial, or were obtained from or belonged to the defendant.

The above-mentioned section is restricted by G.S. § 15A-904(a) which provides that:

> . . . this Article does not require the production of . . . statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

See also State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988). Statements made by witnesses to law enforcement officers are not discoverable evidence. *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983). Therefore, defendant lacked the requisite statutory authority to request the production of the police investigatory report.

As to defendant's argument that the omitted portions of the police investigatory report were discoverable under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the failure of the State to produce the requested information violated his right to due process by denying him the opportunity to effectively cross-examine witnesses, we disagree. *Brady* merely requires the disclosure, upon request, of *favorable* evidence to the accused. It does not require the disclosure of *all* evidence. *State v. Alston, supra.*

While we recognize that the Supreme Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment," *Brady v. Maryland, supra* at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, we also recognize that the State's obligation to disclose such evidence to defense counsel begins *at trial. State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In clarifying the *Brady* rule, the Supreme Court in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), held that a general request for all exculpatory information does not create a prosecutorial duty to respond with the production of all information. Moreover, the Court held that the Constitution does not require that the defendant be allowed broad discovery of all of the prosecution's files. *Id.* at 109, 96 S.Ct. at 2400, 49 L.Ed.2d at 353. In evaluating whether the suppression of such information violated defendant's right to due process, "the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect

of the nondisclosure on the outcome of the trial." *State v. Alston, supra* at 337, 298 S.E.2d at 642. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id. quoting United States v. Agurs*, 427 U.S. at 109-10, 96 S.Ct. at 2400, 49 L.Ed.2d at 353.

The record in the case *sub judice* establishes that neither the prosecutor nor the investigating officer intentionally withheld any portion of the investigative report. Also, the record indicates that the trial judge, prior to ruling on defendant's motion to dismiss, specifically considered that the jury was made fully aware of the omitted documents and their contents. Further, the investigating officer was extensively cross-examined about the inconsistency between the testimony of the State's witnesses and the annotation in the police investigatory report which indicated that the suspect was originally identified as "Ron." Moreover, both the incomplete investigative report as it was presented to the defense counsel and the complete investigative report were published to the jury for comparison and were admitted into evidence as two separate defense exhibits.

In our view, defendant has failed to establish that the outcome of the trial would have been different had the omitted evidence been made available to him prior to the time the State's witnesses had been excused. Thus, this assignment of error is overruled.

[2] Next, defendant contends that the trial court improperly denied his speedy trial motion. Specifically, defendant argues that for purposes of the Speedy Trial Act, the State was required to bring him to trial within 120 days from the date he was arrested, not the date he was indicted. In support of this argument, defendant relies principally on *State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983). We find defendant's reliance on this case to be appropriate. This assignment of error is nevertheless overruled.

Initially, we note for the sake of clarity that the Speedy Trial Act was repealed by the Legislature as of 1 October 1989. In view of the fact that the defendant's arrest and subsequent convictions arose prior to this time, defendant is permitted to rely upon G.S. §§ 15A-701 *et seq.*

As noted by the defendant, G.S. § 15A-701(a1) provided in pertinent part that:

> [t]he trial of the defendant charged with a criminal offense shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, *whichever occurs last.* (Emphasis added.)

In *State v. Koberlein, supra,* Justice Mitchell for the Court stated that:

> When enacting the statute under review here [G.S. § 15A-701(a1)], we assume that the legislature intended the phrase "whichever occurs last" to have its ordinary meaning and to indicate that, of the triggering events listed in the statute, that event occurring *last in fact* will trigger the running of the 120 day period within which the defendant must be brought to trial. (Emphasis in original.)
>
> Where, as here, the language of a statute is clear and unambiguous, there is not room for judicial construction and the courts must give the statute its plain and definite meaning as adopted by the legislature.

Id. at 605, 308 S.E.2d at 445. We reject defendant's argument that the event which triggered the running of the 120 day period of the Speedy Trial Act was his arrest on 27 July 1988. The clear and unambiguous language of G.S. § 15A-701(a1), when applied to the present facts, establishes that the relevant event which occurred last and triggered the running of the 120 day period was defendant's indictment on 5 December 1988. Inasmuch as only 87 days elapsed between the defendant's indictment and the date of his trial, defendant's speedy trial motion was properly denied. This assignment of error is overruled.

For the reasons stated, we find that the defendant received a fair trial free of prejudicial error.

No error.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA v. ARTHUR FRANK ELIASON

No. 8922SC1354

(Filed 18 September 1990)

Arrest and Bail § 147 (NCI4th)— DWI—pretrial release delayed—motion to dismiss denied

The trial court did not err in a prosecution for driving while impaired by denying defendant's pretrial motion to dismiss based upon an unwarranted and illegal incarceration where defendant was arrested for driving while impaired; transported to the breathalyzer room at the courthouse and informed of his rights; unsuccessfully attempted to call an attorney; tested .14 and .15 on the breathalyzer; was taken to the magistrate's office where the magistrate was informed of the breathalyzer results, a previous conviction in 1973 in South Carolina, and a bond forfeiture arising from that charge; the magistrate asked about defendant's residence and employment; defendant was told that his release would be conditioned on the posting of a $300 secured bond, although certain property would be ineligible to use to secure his release; defendant asked to phone his wife but was told that he would have to wait until he was taken up to jail; defendant's wife arrived shortly thereafter to attempt to post his bond but had brought a tax listing for ineligible property; and defendant's wife then secured the services of a bail bondsman and defendant was released after being incarcerated for nearly three hours. Although the magistrate did not inquire into all of the statutory considerations set out in N.C.G.S. § 15A-534(c), there was no substantial statutory violation which would warrant dismissal of the charges against defendant given all the other information which the magistrate had before her.

Am Jur 2d, Bail and Recognizance § 29.

APPEAL by defendant from judgment entered 30 August 1989 in DAVIDSON County Superior Court by *Judge Preston Cornelius.* Heard in the Court of Appeals 21 August 1990.

Defendant was arrested and charged with driving while impaired, a violation of N.C. Gen. Stat. § 20-138.1. He was transported to the breathalyzer room at the Davidson County Courthouse to be tested. He was informed of his rights regarding the test before

it was administered, including his right to have a witness present. He attempted to call an attorney, but was unsuccessful. Two tests were then administered which showed blood alcohol concentrations of .14 and .15. The arresting officer then checked the defendant's driving record and discovered a previous conviction for driving while impaired in 1973 in South Carolina, and a bond forfeiture arising out of that charge.

Defendant was then taken to the magistrate's office. The magistrate was informed of the breathalyzer results, the previous conviction, and the bond forfeiture. The magistrate also asked about defendant's residence and employment. Defendant was then informed of the charges pending against him, his right to communicate with counsel and friends, and that his release would be conditioned on the posting of a $300.00 secured bond. The magistrate explained that certain property would be ineligible to use to secure his release. Defendant asked to be able to phone his wife, but was told by the magistrate that he would have to wait until he was taken up to the jail.

Defendant's wife arrived at the courthouse shortly thereafter to attempt to post his bond. She brought a tax listing with her, but it was for property that was ineligible to secure the bond. She then secured the services of a bail bondsman, and defendant was released. He was incarcerated for nearly three hours.

Defendant was convicted in district court and appealed to superior court. Defendant made a pretrial motion to dismiss the charges for violations of his constitutional and statutory rights resulting from what he claimed to be an unwarranted and illegal incarceration. This motion was denied 10 July 1989. Defendant was then convicted of driving while impaired on 29 August 1989. From judgment entered on the verdict, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Hal F. Askins, for the State.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for defendant-appellant.

WELLS, Judge.

Defendant's sole argument on appeal is that the trial court erred in denying his pretrial motion to dismiss. In denying defendant's motion, the trial court made extensive findings of fact as

to defendant's arrest, confinement and release on secured bond; and concluded that defendant's motion should be denied.

We note initially that defendant has failed to properly except or assign error to any of the trial court's findings of fact. Therefore, these facts are presumed to be correct and are binding on appeal. *State v. Ward*, 66 N.C. App. 352, 311 S.E.2d 591 (1984). We limit our review to whether these facts support the trial court's conclusions. *Id.*

Defendant contends that the trial court erred in denying his motion to dismiss because the magistrate who determined the condition of his pretrial release failed to inquire into various considerations mandated by the North Carolina General Statutes and the local policy of the 22nd Judicial District before setting the $300.00 secured bond. We find no error.

In order to warrant dismissal of a charge under N.C. Gen. Stat. § 20-138.1(a)(2), a defendant must make a sufficient showing of a substantial statutory violation and of prejudice arising therefrom. *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). *Knoll* involved three DWI cases (*State v. Knoll*, *State v. Warren*, and *State v. Hicks*) which had been consolidated for review. In *Knoll*, the magistrate set defendant's bond without inquiring into any of the conditions which affect the setting of a bond. Defendant had to wait in jail for an hour before he was allowed to call his father, and his father was told that he would not be allowed to post his bond for six hours. In *Warren*, the defendant was not informed of his right to communicate with counsel and friends. Two individuals attempted to post his bond but were told that defendant would have to remain in jail until 6:00 a.m. before he could be bailed out. In *Hicks*, the defendant was not informed of his right to communicate with counsel and friends. The magistrate set his bond without inquiring into any of the conditions affecting the setting of a bond, and refused to allow defendant to post his own bond despite the fact that he had the funds to do so. The Court held that each of the defendants had made a sufficient showing of a substantial statutory violation to warrant dismissal.

Defendant in this case has not made such a sufficient showing. He was properly informed of his rights to communicate with counsel and friends and that he could be released upon posting the bond. There was no "hold" placed on his release. Defendant's sole contention is that the magistrate acted improperly in setting a secured

bond without inquiring into various "crucial considerations" mandated by statute and local policy.

The relevant statute is N.C. Gen. Stat. § 15A-534(c) (1989):

> In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

The magistrate had information regarding the nature of the offense charged, the weight of the evidence, defendant's employment, his residence, level of intoxication, record of convictions, and the bond forfeiture which would at least indicate a failure to appear at court proceedings. She failed to inquire into defendant's character and mental condition, and proceeded without information regarding his financial resources, length of residence in the community and family ties, though defendant did inform her that he was married before he was taken from the magistrate's office to the jail.

We do not quarrel with defendant's contention that a magistrate must proceed in accordance with N.C. Gen. Stat. § 15A-534 in setting conditions for pretrial release. We do not, however, discern any substantial statutory violation which would warrant dismissal of the charges against the defendant based on a failure to inquire into every individual factor, given all the other information which the magistrate had before her in setting the bond. Defendant has also failed to show how inquiry into these considerations would have required the magistrate to proceed any differently in setting the conditions of pretrial release.

We also find no violation of any state or federal constitutional right warranting dismissal of the charge. A court on motion of the defendant must dismiss the charges against him if it determines that the criminal defendant's constitutional rights have been flagrantly violated and there has been such irreparable prejudice to the

defendant's preparation of his case that there is no remedy but to dismiss. N.C. Gen. Stat. § 15A-954(a)(4) (1973).

In *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971), the Court held that those charged with driving while impaired have the same constitutional right of access to counsel and witnesses and to confront accusers as any other accused. The analysis focuses on whether *access* to counsel, family and friends was denied. *See State v. Gilbert*, 85 N.C. App. 594, 355 S.E.2d 261 (1987). In *Hill*, defendant's attorney posted his bond, but was not allowed to secure defendant's release or even to see him because of a policy of holding DWI defendants for four hours. In *State v. Ferguson*, 90 N.C. App. 513, 369 S.E.2d 378, *disc. rev. denied*, 323 N.C. 367, 373 S.E.2d 551 (1988), this Court held that if a witness arrived timely under the breathalyzer statute and was unable to gain access to the accused despite reasonable efforts to do so, it would constitute a flagrant violation of defendant's constitutional right to gather witnesses and would require dismissal of all charges.

Defendant's argument in this case focuses on the magistrate's failure to inquire into all of the statutory considerations before setting the conditions of his pretrial release. In *Gilbert*, the defendant was not informed that he had the right to be released. He was allowed to speak with his brother in the magistrate's office, but the magistrate refused to set conditions of release despite his brother's request that he do so. Defendant was held in jail without bail for over four hours. This court found no constitutional violation, holding:

> . . . there is no evidence that defendant requested, or was denied access to anyone. In fact, defendant saw his brother shortly after he was administered the breathalyzer test.

Id. at 597, 355 S.E.2d at 264.

There is no basis in this case to suggest that defendant was denied access to anyone. He was allowed to attempt to call an attorney, and was allowed to call his wife from the jail only minutes after he asked to do so in the magistrate's office. There is no evidence that he or his wife requested to see each other, or that his wife was denied access to him. Defendant was informed of the proper method for posting a property bond and what property was ineligible but neglected to tell his wife. The only condition placed on defendant's access to counsel and friends was that he

would not be released from jail before a $300.00 secured bond was posted. There was no violation of defendant's constitutional rights which would warrant dismissal of the charges against him.

No error.

Judges EAGLES and LEWIS concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS INC., LOWDER FARMS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., CONSOLIDATED INDUSTRIES, INC., AND W. HORACE LOWDER, DEFENDANTS, AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER, R. LOWDER HARRELL, EMILY P. LOWDER, CORNELIUS AND MYRON P. LOWDER, INTERVENING DEFENDANTS

No. 8920SC1100

(Filed 18 September 1990)

Contempt of Court § 8 (NCI3d)— civil and criminal contempt— appeal—authority of trial court

A trial court ruling that it was without authority to hold defendant Lowder in contempt because of pending appeals was reversed and remanded for further proceedings where plaintiffs filed a motion for an order to show cause why defendant Horace Lowder should not be held in contempt in that his appeals on behalf of the corporate defendants, when he has no standing to appeal, are in violation of a trial court order enjoining him from exercising any form of control or management of the business of any of the corporate defendants; the motion requested that the trial court consider both criminal contempt and civil contempt; and the trial court ruled after a hearing that it was without authority to hold defendant Lowder in contempt because his then pending appeals of trial court orders divested the court of jurisdiction. The issue of civil contempt based on appeals which have been resolved is moot, but the trial court has jurisdiction to consider criminal contempt and the court would have jurisdiction to consider

civil contempt for future filing of appeals in violation of court directives.

Am Jur 2d, Contempt § 54.

APPEAL by plaintiffs from Order of *Judge Howard R. Greeson, Jr.*, entered 31 July 1989 in STANLY County Superior Court. Heard in the Court of Appeals 4 April 1990.

Moore & Van Allen, by Frank C. Patton, III, for plaintiff appellants.

W. Horace Lowder, pro se, defendant appellees.

COZORT, Judge.

On 4 April 1989, the plaintiffs filed a motion for an order to show cause why defendant Horace Lowder should not be held in contempt for violating a permanent receivership order as well as injunctions of the trial court. The motion requested that the trial court consider both criminal contempt and civil contempt. After a show cause hearing, the trial court ruled on 31 July 1989 that it was without authority to hold defendant Lowder in contempt because his then pending appeals of trial court orders divested the court of jurisdiction. The plaintiffs contend that the trial court has authority to hold defendant Lowder in contempt for violating its injunctions, judgments, and permanent receivership order despite his appeals of subsequent court orders. We agree.

The case below is the latest installment in litigation that began over ten years ago as a shareholder's derivative action and an individual action for damages and other relief. The facts and procedural history of this matter are set out in a number of reported decisions. See *Lowder v. All Star Mills, Inc.*, 82 N.C. App. 470, 472, 346 S.E.2d 695, 696-97 (1986). For our purposes it is sufficient to note the following: (1) on 12 February 1979 the trial court enjoined Horace Lowder from

> (a) Managing, or in any way attempting to manage, any portion of the business or businesses operated by any of the corporate Defendants.
>
> (b) Communicating in any way to employee [*sic*] of any of the corporate Defendants concerning business of the corporate Defendants, unless specifically requested by the Receivers.

(c) Going on the premises of any land owned or leased by any of the corporate Defendants, without the express permission, on each occasion, of the Receivers.

(d) Exercising any form of dominion, control, or management over the business of any of the corporate Defendants.

(2) on 25 January 1984 the court entered judgment against Horace Lowder for misappropriating a corporate opportunity; (3) on 30 April 1984, the court entered judgment ordering the dissolution and liquidation of All Star Mills, Inc., Lowder Farms, Inc., and Consolidated Industries, Inc., and making permanent the receivership already established; (4) both of these judgments were affirmed by *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649, *disc. review denied*, 314 N.C. 541, 335 S.E.2d 19 (1985).

Despite these final judgments, defendant Lowder, purporting to act on behalf of the corporate defendants, has appealed nearly every subsequent order entered by the trial court to effectuate dissolution and liquidation. This Court has reiterated that defendant "Lowder has no standing to appeal on behalf of the corporate defendants which are now in receivership." *Lowder v. All Star Mills, Inc.*, 91 N.C. App. 621, 622, 372 S.E.2d 739, 740, *disc. review denied*, 324 N.C. 113, 377 S.E.2d 234 (1988). Nevertheless, Lowder has continued to appeal trial court orders, most recently the court's orders of 25 April 1989 denying certain claims filed with the receivers and approving legal, accounting, and receivers-trustees fees.

On appeal the plaintiffs contend that the trial court erred in ruling that it was without authority to hold Horace Lowder in "contempt for appealing various orders to the North Carolina Court of Appeals in the name of the corporate defendants." Contempt proceedings may be divided into two kinds:

> criminal and civil. Criminal proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders. Civil proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors.

Galyon v. Sutts, 241 N.C. 120, 123, 84 S.E.2d 822, 825 (1954).

Plaintiffs contend that defendant Lowder should be held in contempt of court because his appeals on behalf of the corporate

defendants, when he has no standing to appeal, are in violation of the trial court's order of 12 February 1979, enjoining him from "[e]xercising any form of dominion, control, or management over the business of any of the corporate Defendants." Plaintiffs also contend that defendant Lowder's appeals are in violation of the court's order of permanent receivership, contained in the final judgment of 30 April 1984. The ability to comply with a contempt decree is a prerequisite to civil contempt proceedings. Dobbs, Handbook on the Law of Remedies § 2.10 (1973). Thus, a dismissal or other resolution of any of Horace Lowder's latest appeals would render the plaintiffs' appeal moot as to *civil* contempt proceedings based on the appeals which have been resolved. However, *criminal* contempt proceedings may still be pursued to punish defendant Lowder for disobedience of the trial court's orders.

Lowder argues that his latest appeals divested the trial court of its authority not only as to those cases but also as to enforcement of the court's previous orders and judgments. We reject that argument. An appeal stays "further proceedings in the court below upon the judgment appealed from . . . but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." N.C. Gen. Stat. § 1-294 (1989). Defendant Lowder's subsequent appeals could have no effect upon the court's judgment of 30 April 1984 which has long since become final.

In summary the result of the appeal is: (1) the issue of civil contempt proceedings based on Horace Lowder's appeals which have been resolved is moot; (2) the trial court has jurisdiction to consider criminal contempt based on Horace Lowder's violations of court directives; and (3) the trial court would have jurisdiction to consider civil contempt for Horace Lowder's future filing of appeals in violation of court directives. The trial court's order of 31 July 1989 is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER, DEFENDANTS, AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER[,] CORNELIUS AND MYRON P. LOWDER, INTERVENING DEFENDANTS

No. 8920SC1029

(Filed 18 September 1990)

1. **Appeal and Error § 510 (NCI4th)— frivolous appeal—remand for sanctions**

An appeal from trial court orders denying claims filed with receivers and approving accounting, legal, and other fees was frivolous and was remanded to the trial court for a hearing on sanctions under Rule 34 of the North Carolina Rules of Appellate Procedure.

Am Jur 2d, Appeal and Error §§ 912, 1024.

2. **Corporations § 14 (NCI3d); Receivers § 12.4 (NCI3d)— claim for attorney fees and wages during receivership—denied**

The trial court did not err by denying the majority shareholders' claim for attorney fees and by denying a claim for wages during the receivership where the intervening defendants, who were claiming attorney fees, had not been successful at any time in the litigation and there was thus no basis for awarding attorney fees, and the claim for wages was without basis because the party claiming wages had been discharged by the receivers and ordered not to interfere in any way with any of the companies in receivership.

Am Jur 2d, Receivers §§ 285, 293.

APPEAL by defendants All Star Mills, Inc., Lowder Farms, Inc., All Star Foods, Inc., All Star Hatcheries, Inc., All Star Industries, Inc., Consolidated Industries, Inc., W. Horace Lowder and Billy Joe Hudson from Orders of *Judge Thomas W. Seay, Jr.*, entered 25 April 1989 in STANLY County Superior Court. Heard in the Court of Appeals 4 April 1990.

Moore & Van Allen, by Jeffrey J. Davis, James P. McLoughlin, Jr., and Frank C. Patton, III, for plaintiff appellees.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by William C. Kluttz, Jr., for receiver appellees.

Billy Joe Hudson, pro se.

W. Horace Lowder, pro se.

COZORT, Judge.

[1] This appeal is the latest in a long series of vexatious appeals brought by defendant W. Horace Lowder, acting purportedly on behalf of the corporate defendants. The case below has its origins in a derivative action brought more than ten years ago by certain minority shareholders on behalf of All Star Mills, Inc. ("Mills"), Consolidated Industries, Inc. ("Consolidated"), and Lowder Farms, Inc. ("Farms"). After trial the jury found that Horace Lowder had misappropriated a corporate opportunity of Mills through the formation and operation of All Star Foods, Inc. ("Foods"), All Star Industries, Inc. ("Industries"), and All Star Hatcheries, Inc. ("Hatcheries"). Based on the jury's verdict, judgment was entered in January 1984 by which the assets of Foods, Industries, and Hatcheries were impressed with a constructive trust in favor of Mills. After a subsequent bench trial on the dissolution and liquidation phase of the case, the court entered judgment in April 1984, making permanent the receivership of Mills, Consolidated, and Farms previously ordered in February 1979; Foods, Hatcheries, and Industries came under the receivership by virtue of the constructive trust. The judgment of April 1984 ordered the liquidation and dissolution of Mills, Farms, and Consolidated. Both the January and April 1984 judgments were affirmed by this Court in *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649, *disc. review denied*, 314 N.C. 541, 335 S.E.2d 19 (1985).

In the case below Horace Lowder assigns error to the 25 April 1989 Orders of the trial court (1) denying certain claims filed with the receivers and (2) approving accounting, legal, and receivers-trustees fees and directing payment from the liquidating trust of Lowder Farms, Inc., until allocation can be finally determined. Because defendant Lowder lacks standing to represent the nominally defendant corporations, we address none of his assignments of error and dismiss his appeal.

As this Court has previously held, "[Horace] Lowder has no standing to appeal on behalf of the corporate defendants which are now in receivership." *Lowder v. All Star Mills, Inc.*, 91 N.C. App. 621, 622, 372 S.E.2d 739, 740, *disc. review denied*, 324 N.C. 113, 377 S.E.2d 234 (1988). As the Court noted,

> "the only person who may appeal is the 'party aggrieved.' " . . . A receiver appointed by the court represents both the owners and the creditors. Thus, if a substantial right of the corporations is affected, the permanent receivers are the parties aggrieved. [A]fter the appointment of receivers is affirmed or becomes final, only the receivers or an attorney representing the receivers may file notice of appeal on behalf of the corporations.

Id. at 624, 372 S.E.2d at 741 (citations omitted).

In this appeal, as in many previous appeals, the essence of Horace Lowder's argument is that the trial court exceeded its jurisdiction and authority by entering any order whatsoever. That argument has been repeatedly rejected. We find that this appeal, on the same grounds that have proved baseless in past appeals, is patently frivolous. We thus remand the cause to the trial court for a hearing, pursuant to Rule 34(c) of the North Carolina Rules of Appellate Procedure, to determine whether the sanctions provided by Rule 34(b)(2) or (b)(3) should be imposed.

[2] Turning to the appeal of the intervening defendants, we note that, apart from repeating Horace Lowder's argument, they contend that the trial court erred in denying the majority shareholders' claim for attorney's fees and in denying Billy Joe Hudson's claims for wages during the receivership. Both contentions are without merit.

Regarding the first contention, the Business Corporation Act in effect at the pertinent times in the course of this litigation provided that, in a shareholders' derivative action,

> (d) If the action on behalf of the corporation is successful, in whole or part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action.

> (e) In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action.

N.C. Gen. Stat. § 55-55(d), (e) (1975). At no time in this litigation have the intervening defendants been successful. *See Lowder v. All Star Mills, Inc.*, 82 N.C. App. 470, 346 S.E.2d 695 (1986) (affirming award of attorneys' fees to plaintiffs under § 55-55(d) because of their success in the original derivative actions); and *Lowder on Behalf of Doby v. Doby*, 79 N.C. App. 501, 340 S.E.2d 487, *disc. review denied*, 316 N.C. 732, 345 S.E.2d 388 (1986) (affirming award of attorneys' fees under § 55-55(e) to be paid by Horace Lowder and the intervening defendants as unsuccessful plaintiffs in subsequent derivative actions). Thus, there is no basis for awarding attorneys' fees to the intervening defendants.

Regarding their second contention, it is sufficient to note that on 12 February 1979 Billy Joe Hudson was discharged by the receivers and on 23 February 1979 Billy Joe Hudson was enjoined "not to interfere in any way or manner whatsoever with any of the assets or properties or employees of the companies in receivership."

As the trial court found in its Order of 25 April 1989, Hudson's claim for wages is without legal basis.

As to the intervening defendants, the trial court's Orders of 25 April 1989 are affirmed.

As to defendant Horace Lowder, the appeal is dismissed.

Affirmed in part; dismissed in part; and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

FAYMA J. NYE, PLAINTIFF v. KENNETH E. NYE, DEFENDANT

No. 8910DC1268

(Filed 18 September 1990)

Divorce and Alimony § 21.9 (NCI3d)— equitable distribution— unequal division of property—no error

The trial court did not err in an equitable distribution action by finding that an unequal distribution was equitable where plaintiff was awarded one hundred percent of the marital assets and defendant one hundred percent of the sale price of a five percent stock interest in a closely-held corporation which he had helped to organize. The finding of fact that defendant's stock had no net value when the parties separated was based largely on the value testimony of defendant's experts, who testified that the stock then had no market and net value because it was minority stock in a company that was then losing money and apparently would continue doing so. Although plaintiff contended that the court disregarded the testimony of her expert to the effect that the stock's value when the parties separated was substantially the same as it was a year later when the company was sold, the court did not overlook or fail to consider the testimony of plaintiff's expert, but simply did not believe it.

Am Jur 2d, Divorce and Separation §§ 900, 901, 930, 947.

APPEAL by plaintiff from judgment entered 24 May 1989 by *Judge Fred M. Morelock* in WAKE County District Court. Heard in the Court of Appeals 29 May 1990.

Stratas & Weathers, by Nicholas A. Stratas and Aida Fayar Doss, for plaintiff appellant.

Wyrick, Robbins, Yates & Ponton, by Robert A. Ponton, Jr., for defendant appellee.

PHILLIPS, Judge.

In this action for equitable distribution the trial court found that an unequal distribution is equitable and awarded plaintiff one hundred percent of the marital assets valued at $116,226.20 and defendant one hundred percent of the $568,545.75 sale price of

his five percent stock interest in Jet Corr, Inc., a closely held corporation that defendant helped organize. Defendant's stock was sold incident to the purchase of Jet Corr, Inc. by another concern a year after the parties separated. The sale proceeds were awarded to defendant upon findings that the shares had no net value when the parties separated and the post-separation appreciation was largely due to defendant's efforts in helping obtain additional financing which enabled the company to acquire some needed new equipment and led to it being bought. Other findings were to the effect that when the parties separated defendant still owed nearly $100,000 on the stock, and the company was underfinanced and losing money, with no apparent prospects of doing better. Though plaintiff argues to the contrary, all of the court's findings of fact are supported by competent evidence, the established facts of the case are as stated in the findings, *Duke v. Hill*, 68 N.C. App. 261, 314 S.E.2d 586 (1984), and the award to defendant was not error.

The finding of fact that defendant's stock had no net value when the parties separated, crucial to the validity of the judgment, is based largely on the value testimony of defendant's experts, who testified in substance that the stock then had no market and net value because it was minority stock in a company that was then losing money and apparently would continue doing so. Nevertheless, plaintiff strongly contests this finding upon the ground that the court disregarded the testimony of her expert witness to the effect that the stock's value when the parties separated was substantially the same as it was a year later when the company was sold. The argument has no merit. For the court did not overlook or fail to consider the testimony of plaintiff's expert as plaintiff's argument implies, it simply did not believe it. Because in stating that it disregarded the testimony the court expressly found that the testimony of this witness was not credible, and determining the credibility of the evidence was the court's province as finder of the facts. *Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986). For a fact finder to disbelieve the testimony of a witness is not an error of law.

It having been established by the court's findings of fact that defendant's stock had no value when the parties separated and that its increase in value was largely due to his efforts, the award of the post-separation increase to defendant was authorized by

G.S. 50-20(c)(11a) and (12). *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Affirmed.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 SEPTEMBER 1990

BURLINGTON IND., INC. v. BURLINGTON COAT FACTORY WAREHOUSE CORP. No. 9018SC104	Guilford (89CVS9839)	Affirmed
CREED v. CREED No. 9017DC242	Surry (87CVD860)	No Error
EVERETT v. WINN DIXIE STORES No. 904SC338	Onslow (87CVS2497)	Affirmed
GREENE v. CRABTREE No. 9010SC236	Wake (88CVS11410)	Dismissed
HACKMAN v. HACKMAN No. 904DC252	Onslow (88CVD2114)	Affirmed
HEACOX v. DURHAM LIFE INSURANCE CO. No. 8918SC1399	Guilford (88CVS1672)	Affirmed
IN RE MILLWOOD No. 9027DC407	Gaston (89-J-324)	No Error
LATIMER AND ASSOCIATES, INC. v. FUNDER AMERICA, INC. No. 8914SC1204	Durham (88CVS00258)	No Error
MID-STATE FORD, INC. v. ELDRIDGE No. 8911DC1372	Lee (88CVD836)	Affirmed
MORTON v. FAHY No. 903SC455	Carteret (88CVS269)	Appeal Dismissed
RIDDLE v. WATKINS No. 8915DC970	Orange (87CVD563)	Affirmed in part, reversed in part and remanded
ROBINSON v. FORBES No. 9020SC237	Richmond (87CVS560)	Affirmed
ROOFTOP BALLOONS v. CITY OF BURLINGTON No. 8915SC1314	Alamance (89CVS735)	Affirmed
STATE v. ALLEN No. 909SC424	Person (88CRS1576)	No Error

STATE v. BROUCHET No. 9014SC354	Durham (88CRS31809) (88CRS31810) (89CRS2073)	No Error
STATE v. BYERS No. 9012SC278	Cumberland (89CRS28202)	Affirmed
STATE v. CARTER No. 903SC132	Pitt (89CRS17286)	No Error
STATE v. FOUST No. 9018SC185	Guilford (88CRS54760) (88CRS54761)	No Error
STATE v. HANKINS No. 8918SC810	Guilford (88CRS20699) (88CRS20723) (88CRS57387)	No Error
STATE v. HARRIS No. 903SC448	Pitt (88CRS17871) (88CRS17872) (88CRS17873) (88CRS17874)	No Error
STATE v. HAWKINS No. 9017SC388	Surry (88CRS6839) (89CRS1814)	Affirmed
STATE v. JONES No. 9014SC319	Durham (89CRS10458) (89CRS10669) (89CRS10670) (89CRS10671) (89CRS10672) (89CRS10673) (89CRS10674) (89CRS10977) (89CRS10978)	No Error
STATE v. KINDLEY No. 9019SC257	Randolph (88CRS58596)	No error in the trial; remanded for resentencing
STATE v. LEE No. 9019SC215	Rowan (89CRS3859)	No Error
STATE v. MARTIN No. 9026SC374	Mecklenburg (89CRS21521)	No Error
STATE v. McKIVER No. 9013SC307	Bladen (89CRS1874) (89CRS1875)	Affirmed

STATE v. MOORE No. 905SC442	Pender (89CRS213) (89CRS214)	No Error
STATE v. MORRISON No. 9016SC327	Robeson (89CRS4192) (89CRS4193)	No Error
STATE v. REED No. 9016SC317	Robeson (89CRS4133)	No Error
STATE v. SMITH No. 907SC365	Wilson (88CRS7487)	No Error
STATE v. SURRETT No. 9011SC267	Johnston (89CRS6623) (89CRS6624)	Affirmed
STATE v. THOMPSON No. 9024SC408	Watauga (89CRS4226)	No Error
STATE v. TURNER No. 9016SC280	Robeson (89CRS9577)	Affirmed
STATE v. WALLER No. 903SC302	Pitt (89CRS753)	Affirmed
STATE v. WHARTON No. 9018SC423	Guilford (88CRS31186) (88CRS31187) (88CRS31188) (88CRS31189) (88CRS31190) (88CRS31191) (88CRS20408) (88CRS20409) (88CRS20410) (88CRS20421)	No Error
STATE v. WOODELL No. 9020SC228	Richmond (89CRS4297)	No Error
STATE v. WRAY No. 9027SC289	Cleveland (89CRS1972) (89CRS1973) (89CRS1974)	No Error
STATE EX REL. DAVIS v. JONES No. 909DC351	Warren (87CVD220)	Vacated & remanded
UMSTEAD v. RODENHIZER No. 9014SC9	Durham (82CVS281)	Affirmed

FILED 18 SEPTEMBER 1990

COTTON v. STANLEY No. 9010SC6	Wake (83CVS2708)	Reversed & Remanded
CRIDDLE v. GODWIN No. 8912SC1242	Cumberland (82CVS5009)	Reversed
FREEMAN v. WORSLEY OIL CO. No. 9012SC17	Cumberland (84CVS1490)	No Error
FRYE v. KELLEY No. 9019DC329	Rowan (86CVD1612)	Affirmed
IN RE GREEN No. 9014DC413	Durham (89J160)	Affirmed
MAULTSBY v. HAMILTON BEACH No. 902SC281	Beaufort (89CVS339)	Affirmed
PRICE v. PRICE No. 9024DC23	Madison (87CVD121)	Affirmed
RHINEHART v. LEONARD ALUMINUM UTILITY BLDGS. No. 9026SC513	Mecklenburg (88CVS6975)	Affirmed
STATE v. BARRETT No. 9018SC209	Guilford (89CRS22274)	No Error
STATE v. BLACK No. 9026SC339	Mecklenburg (89CRS43606) (89CRS43610)	No Error
STATE v. BLAND No. 905SC509	Pender (89CRS2540) (89CRS2541) (89CRS3484)	No Error
STATE v. BLANKS No. 8913SC1379	Bladen (89CRS200) (89CRS201) (89CRS2290)	No Error
STATE v. BRADSHAW No. 8927SC1375	Gaston (88CRS16819) (88CRS16824) (88CRS16825) (88CRS27363)	Affirmed
STATE v. CAMPBELL No. 9011SC479	Harnett (89CRS10816) (89CRS10817)	Affirmed

STATE v. CHRISTMAS No. 9010SC430	Wake (89CRS45171)	No Error
STATE v. MAYNOR No. 8916SC1386	Robeson (89CRS991)	Reversed
STATE v. McKENDALL No. 9011SC328	Lee (89CRS5423) (89CRS5424) (89CRS5426) (89CRS6468)	No Error
STATE v. MEADOWS No. 9018SC159	Guilford (86CRS61588) (86CRS61589)	No Error
STATE v. NEIL No. 903SC427	Pitt (89CRS16809)	No Error
STATE v. OXENDINE No. 894SC1394	Onslow (89CRS5795) (89CRS10588)	No Error
STATE v. PATTERSON No. 9018SC188	Guilford (87CRS39128)	Affirmed
STATE v. PHARR No. 9026SC395	Mecklenburg (89CRS58352)	No Error
STATE v. ROSE No. 908SC287	Wayne (88CRS10454)	Reversed & Remanded
STATE v. WAGONER No. 9023SC488	Wilkes (89CRS3061) (89CRS3062) (89CRS3063) (89CRS3064) (89CRS3065)	No Error
STATE v. WARREN No. 8915SC980	Alamance (88CRS16936)	Reversed for a new sentencing hearing
WALNUT EQUIPMENT LEASING CO. v. PIZZA INN OF AHOSKIE No. 906DC39	Hertford (88CVD493)	Affirmed
WHEELER v. CANIPE No. 8929DC847	Rutherford (86CVD0427)	Affirmed

JUDITH CAMAC COHEN, PLAINTIFF v. MARVIN ALAN COHEN, DEFENDANT

No. 8925DC1161

(Filed 2 October 1990)

1. **Divorce and Alimony § 24 (NCI3d)— child support—order prior to equitable distribution—no error**

The trial court did not err by entering a child support order prior to determination of a pending equitable distribution action. The language of N.C.G.S. § 50-20(f) contemplates that a child support order may precede an equitable distribution order, and no child support order is ever final. Delaying the child support order in this case until after the equitable distribution issue was decided would have prolonged an already long-pending case.

Am Jur 2d, Divorce and Separation § 923.

Divorce and separation: effect of trial court giving consideration to needs of children in making property division—modern status. 19 ALR4th 239.

2. **Divorce and Alimony § 24.9 (NCI3d)— child support—findings—sufficient**

The trial court made sufficient findings of fact to support its child support order of $37,871.89 a year for two children where the court adjusted the payment downward from $57,500; the record is replete with evidence that the family had enjoyed a very high standard of living; the trial court incorporated by reference defendant's affidavit that outlined his expenses and debts; the ability of the father to pay was not an issue; and the findings regarding the wife's estate demonstrated the requisite specificity despite the trial court's reluctance to place an exact dollar figure on plaintiff's estate.

Am Jur 2d, Divorce and Separation §§ 1039-1042.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 1864.

3. **Divorce and Alimony § 24.6 (NCI3d)— child support—percentage of custody—evidence sufficient**

There was sufficient evidence in a child support action to support the finding that defendant had physical custody

of the children ten percent of the time and therefore should pay ninety percent of the support expenses during that period.

Am Jur 2d, Divorce and Separation §§ 1039-1042.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 1864.

4. Divorce and Alimony § 24.1 (NCI3d)— child support—guidelines—not considered

The trial court did not err in a child support action by failing to consider the child support guidelines then in effect where the guidelines were only advisory in nature at the time the order was entered. The trial judge at that time was neither required to follow nor refer to the advisory guidelines in his order.

Am Jur 2d, Divorce and Separation §§ 1039-1042.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 1864.

5. Divorce and Alimony § 24.1 (NCI3d)— child support—use of formula—no error

The trial court did not err in its use of a formula in determining the final child support payment, although a portion of the award was reduced, where the trial judge used a cost-sharing formula adjusted to reflect monies saved by the custodial parent while the children were visiting the non-custodial parent and to reflect the cost of transporting the children between the two houses for visitation. The visitation reduction portion of this formula was rejected because it ignored the fact that certain costs of the custodial parent are not removed when a child visits a non-custodial parent. It was noted that North Carolina adopted guidelines based on the income-sharing approach for determining child support as of 1 July 1990, and that use of any cost-sharing formula by a trial judge is now improper in North Carolina.

Am Jur 2d, Divorce and Separation §§ 1039-1042.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 1864.

6. Divorce and Alimony § 24.1 (NCI3d)— child support—retroactive—actual expenditures

The trial court did not err in a child support action by awarding retroactive child support based solely on evidence of actual expenditures. Although plaintiff wife contended that defendant should be ordered to pay retroactive support at the prospective rate, retroactive support is based solely on the amount actually expended for the support of the minor children during the time in question.

Am Jur 2d, Divorce and Separation §§ 1039-1042.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 1864.

7. Divorce and Alimony § 24.1 (NCI3d)— child support—income tax exemption—assigned to husband

The trial court did not err in a child support action by assigning to defendant husband the right to claim the minor children as dependents for income tax purposes. N.C.G.S. § 105-149, which until 1989 provided that the parent furnishing the chief support of the child was entitled to the exemption, has been repealed in an apparent effort to bring North Carolina's tax laws into conformity with the 1984 revisions of federal tax statutes. Federal law provides that the custodial parent may waive the right to claim an exemption, and several courts have held that a trial court may order a custodial parent to waive the right to claim the exemption.

Am Jur 2d, Divorce and Separation §§ 1019, 1020, 1025.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under sec. 152(e) of the Internal Revenue Code (26 U.S.C.S. sec. 152(e)). 77 ALR4th 786.

8. Divorce and Alimony § 27 (NCI3d)— child custody and support—attorney fees

The trial court did not err by failing to award attorney fees where the case involved both child support and child custody from June of 1986 until 8 March 1988, when the child custody issue was resolved through negotiations arbitrated by the trial judge after trial began; the trial judge determined that as of 8 March the proceeding became one of only child

support in which he had to make the additional finding that defendant had refused to provide adequate support at the time the action was instituted in order to award attorney's fees; the trial judge found that defendant had provided adequate support when the suit was first filed and refused to award attorney's fees; and the judge found that even if the action was both a custody and support case plaintiff had sufficient means to defray the expenses of the suit.

Am Jur 2d, Divorce and Separation § 597.

Amount of attorneys' fees in matters involving domestic relations. 59 ALR3d 152.

APPEALS by plaintiff and defendant from order entered 26 May 1989 by *Judge Jonathan L. Jones* in CATAWBA County District Court. Heard in the Court of Appeals 3 May 1990.

Plaintiff filed this complaint on 6 June 1986 seeking alimony, custody of the two minor children of the parties, child support and attorney fees. Defendant filed various responsive motions in August 1986 and responsive pleadings and a counterclaim in March 1987. Reply to the counterclaim was filed in May 1987. Defendant was allowed to amend his counterclaim to include a claim for equitable distribution of the marital property. Defendant filed an Offer of Judgment pursuant to Rule 68 in December 1987. Plaintiff filed a Voluntary Dismissal of her alimony claim and a Motion in the Cause concerning payment of retroactive child support in March 1988.

Trial in this matter began on 8 March 1988. Upon the call of the case, the trial judge conducted a pretrial conference, which was followed by a period of negotiations over child custody and visitation with the judge acting as an informal referee. Agreement on these two issues was reached. Trial on the issue of child support continued for several days, and the trial judge filed his written order concerning child support on 7 October 1988. On 14 October 1988, defendant filed a motion requesting a new trial.

A hearing was held on defendant's motion and by a Final Order filed on 26 May 1989 the 7 October 1988 Order was withdrawn and the relief sought by defendant in his Rule 59 motion was granted in part and denied in part. The Final Order contained seventy Findings of Fact and twenty-five Conclusions of Law. Among those, the trial judge found that the annual expenditures necessary

to support the two children at their accustomed standard of living was $57,600. To determine the actual child support payment required of the non-custodial parent, which in this case is the father, the trial judge used a formula that factored in the relative incomes of two parties and the percentage of time the children spent with each parent. The trial judge made one other adjustment to the amount derived from applying the formula and determined that defendant father must pay $37,871.89 annually or $3,156 a month for the support of the two children. From this Order, both parties appealed.

Long & Cloer, by Samuel H. Long, III, for plaintiff appellant and plaintiff appellee.

Rudisill & Brackett, by Curtis R. Sharpe, Jr., for defendant appellant and defendant appellee.

ARNOLD, Judge.

[1] First, we examine the assignments of error brought forth by defendant on his cross-appeal. Defendant contends it was error for the trial judge to enter the child support Order prior to a determination of the equitable distribution issue then pending in the action. On 15 October 1987, defendant amended his Answer and Counterclaim to add a plea for equitable distribution. The amendment was filed more than sixteen months after this case was originally filed and as the matters of child custody and support were moving toward trial. With substantial assets at issue, the equitable distribution matter was clearly going to require lengthy discovery. The time period for discovery on the equitable distribution claim had run less than half its course when the child support and custody matters went to trial on 8 March 1988.

Defendant cites several Court of Appeals cases that contain language and reasonable policy reasons advancing his position on this issue. *See Soares v. Soares*, 86 N.C. App. 369, 371, 357 S.E.2d 418, 419 (1987). Nevertheless, we find the governing statute dispositive. The second sentence of N.C. Gen. Stat. § 50-20(f) (1987) provides: "After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7." This language obviously contemplates that a child support order may precede an equitable distribution order. No child support order is ever final and delaying

the child support order in this case until after the equitable distribution issue was decided would have prolonged an already long-pending case. The trial court's decision was intelligent and proper under the statute. Defendant's assignment of error here is overruled.

[2] Next defendant contends that the trial judge made insufficient findings of fact to support the child support Order. Specifically, defendant argues the trial court failed to make findings concerning defendant's expenses or the value of plaintiff's estate. A trial court hearing a child support matter is required to find facts and from those facts state its conclusions of law. Child support is determined by considering the needs and accustomed standard of living of the children and the wealth of the parents. *Dishmon v. Dishmon*, 57 N.C. App. 657, 292 S.E.2d 293 (1982). N.C. Gen. Stat. § 50-13.4(c) (1989 Cum. Supp.) provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet 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.

While defendant attacks two specific findings of the Order, the gist of his contention here is that the support payment ordered is too high. In his brief, he states, "The suggestion that over $57,500.00 per year is needed for support and maintenance of two children . . . shocks the conscience."

First, we remind defendant that the trial judge adjusted the support payment down almost $20,000 to $37,871.89. We also point out that the primary focus of any child support payment is the needs of the child, a determination largely measured by the "accustomed standard of living of the child." The record in this case is replete with evidence that prior to the dissolution of the marriage, the Cohen family enjoyed a very high standard of living. More to the point, a review of the record and transcript indicates the evidence supports the findings under attack here by defendant.

In a child support matter, the trial judge must make written findings of fact that demonstrate he gave "due regard" to the "estates, earnings [and] conditions . . . of each party." G.S. § 50-13.4(c). While defendant's expenses were not discussed in the Order, in Finding of Fact 45 the trial judge incorporated by reference defend-

ant's affidavit that outlined his expenses and debts. Moreover, under the circumstances of this case, detailed findings concerning defendant's expenses were not necessary. Based upon defendant's own testimony, the trial court found that defendant could pay any support amount the court might order, up to and including the amount requested by the plaintiff in her affidavit—$71,318.04 per year. The ability of the father to pay simply was not an issue here.

Concerning plaintiff's estate, the court found that she is currently earning $22,000 per year; that she and defendant will share in a sizeable marital estate, but that equitable distribution had not yet been made; that during the marriage and since the separation defendant had controlled all the substantial assets of the parties; and that during the trial defendant had transferred to plaintiff stock with an approximate gross value of $250,000. The trial judge also made the following two findings:

> 40. The Plaintiff-wife has debts of approximately $100,000.00, the main portion of which were incurred by her for attorney fees, as set forth in her Affidavit and testimony.
>
> 41. [I]t is unclear to the Court to what extent the assets which she now possesses will be available to contribute to the support of children, and any attempt to estimate such would be speculative by the Court. The Court also notes that despite the substantial face value of the stock transferred to the Plaintiff by the Defendant during the course of the trial, in order for the Plaintiff to utilize those assets it will be necessary for her to liquidate the stock and thereby incur some tax liability in an amount which is also unknown to the Court. The Court finds accordingly, that any effort to determine the true net worth of the Plaintiff's assets would be speculative and inappropriate.

Defendant argues that the trial court's refusal to specify the value of plaintiff's estate was error. We disagree. A trial judge must make conclusions of law based on factual findings specific enough to show the appellate courts that the judge took *due regard* of the parties' estates. *Dishmon*, 57 N.C. App. 657, 660, 292 S.E.2d 293, 295. The findings referred to above demonstrate the requisite specificity required of a trial judge in a matter such as this despite his understandable reluctance to place an exact dollar figure on plaintiff's estate. Defendant's assignment of error is overruled.

[3] Defendant next contends the trial court erred in determining that between December 1986, when the parties separated, and the entry of the Final Order in this matter in May 1988, that defendant had physical custody of the children ten percent of the time and therefore should pay ninety percent of the support expenses during that period. Contrary to defendant's contention, the record contains evidence sufficient to support this finding. The temporary custody orders pursuant to which Mr. Cohen visited with his children between the separation of the parties and the trial afforded him visitation with the children at least one weekend a month, two weeks during the summer of 1987 and a week at Christmas of 1987. These visitation periods total approximately ten percent of the period in question. Other evidence in the record indicates that because of the highly contentious feelings between plaintiff and defendant even less visitation actually occurred during portions of that period. Defendant's assignment of error on this issue is overruled.

[4] Now we turn to plaintiff's assignments of error. First, she contends that the trial court erred by setting the amount of child support too low. Specifically, she faults the trial judge for his failure to consider North Carolina's Child Support Guidelines then in effect in determining the child support payment. *See* G.S. § 50-13.4(c1). She also contends that the formula employed by the trial judge to determine defendant's support payment does not properly consider her ability to provide support relative to the ability of defendant pursuant to G.S. § 50-13.4(c) and the applicable case law. *See Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985). Finally, she argues that the trial court's equal division between plaintiff and defendant of the estimated $5,000 a year to transport the children between North Carolina and Pennsylvania pursuant to the visitation order is unfair in light of the fact that plaintiff's gross income is one-tenth that of defendant's.

The trial court's Order makes no mention of North Carolina's Child Support Guidelines. G.S. § 50-13.4(c1). However, at the time the Order was entered in June 1989, these Guidelines were only advisory in nature. The Guidelines became presumptive as of 1 October 1989. 1989 N.C. Sess. Laws c. 529, s. 9. (The advisory Guidelines in effect when this Order was entered, which became presumptive in October 1989, have since been rewritten. New presumptive guidelines became effective 1 July 1990. Administrative Office of the Courts, North Carolina Child Support Guidelines

AOC-A-162 (July 1990)). Therefore, at the time this Order was entered, the trial judge was neither required to follow nor refer to the advisory guidelines in his Order. *Morris v. Morris*, 92 N.C. App. 359, 374 S.E.2d 441 (1988).

[5] Plaintiff next assigns as error the use by the trial judge of a formula in determining the final child support payment. Plaintiff argues that the formula is faulty on its face and that its application was error. While we disagree with most of plaintiff's contentions, we are very wary of this formula and might well reject its utilization entirely in most other contexts. However, with one modification, we will not disturb its use here.

Essentially all child support formulas fall into one of two categories. They are either "cost-sharing" or "income-sharing" formulas. *See* Giampetro, *Mathematical Approaches to Calculating Child Support Payments: Stated Objectives, Practical Results, and Hidden Policies*, 20 Family L.Q. 373 (1986); Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 Harvard Women's L.J. 1 (1983). The formula used in this case is a cost-sharing formula. Under this approach, the payment of each party is equal to a fraction that represents the relationship between the party's incomes which is then multiplied by the cost of raising the child. In this case, the trial court found that defendant's average annual gross income is $200,000 and plaintiff's gross income is $22,000. To determine defendant's support payment, the following calculations are made: (a) add plaintiff's gross income to defendant's gross, which yields a total of $222,000; (b) divide defendant's income by the total for both parties or $200,000 divided by $222,000, which yields the fraction 9/10; (c) multiply the annual needs of the children by 9/10 or $57,600 times 9/10, which yields $51,891.89. Plaintiff, on the other hand, is responsible for 1/10 of the support payment, which would be $57,600 minus $51,891.89 or $5,708.11. Stated another way, because defendant here earns 9/10 of the total income of both supporting parents he should pay 9/10 of the costs to support the children.

The formula used in this case involves one further step. After the above calculations are made, the payment of the non-custodial parent, in this case defendant, is further reduced by subtracting from his support payment an amount calculated to represent monies the custodial parent saves while the children are visiting with the non-custodial parent. According to the child custody arrange-

ment in this case, the children spend eighty percent of each year with the mother and twenty percent with the father. Applying our numbers to the last step in this formula: (a) multiply the non-custodial parent's portion of the support payment by the amount of time the children will spend with him, or $51,891.89 times twenty percent, which yields $10,378.38; (b) then subtract $10,378.38 from $51,891.89, which yields $41,513.51. Although we fail to understand why, the trial judge then subtracted from $41,513.51 the product of the annual support obligation of the mother, or $5,708.11, multiplied by the amount of time (twenty percent) the father has the children, which yields $1,141.62. This calculation, $41,513.51 minus $1,141.62, yields a support payment of $40,371.89.

The trial judge made one final adjustment to the support amount. He estimated that the expense of transporting the two children between the defendant's home in North Carolina and plaintiff's home in Pennsylvania pursuant to the visitation agreement would be $5,000 a year. He split this expense evenly between the two parties and subtracted plaintiff's portion of this obligation, $2,500, from defendant's payment of $40,371.89, which yields the support payment of $37,871.89.

The cost-sharing formula used in this case was developed by an attorney named Maurice Franks. Franks, *How to Calculate Child Support*, Case & Comment, January-February 1981 at 3. However, Franks' formula has been severely criticized over the past decade and now stands almost entirely discredited. *See* Giampetro, *supra*, at 378-82; Hunter, *supra*, at 12; Polikoff, *The Inequity of the Maurice Franks Custody Formula*, 8 District Lawyer 14 (November/December 1983). One author states:

> The Franks formula is merely the worst of those formulas which reflect the "cost-sharing" approach to child support awards. . . . [It] seeks a means to keep child support awards as low as possible. It has never been accepted as legitimate by any court. In fact, no one seeking to address the failure of the current child support system to provide adequately for the rearing of children in single parent families considers the Franks proposal to have any merit whatsoever.

Polikoff, *supra*, at 15, 16.

Another author compared seven child support formulas using a hypothetical family, and the Franks formula produced the lowest

payment of the seven. Hunter, *supra*, at 11. Of the states that have enacted presumptive child support guidelines, none have adopted the Franks formula. Polikoff, *supra*, at 16. And while several courts have utilized a part of the Franks method, we have failed to uncover any case that has employed the entire formula in determining a support payment. *See Smith v. Smith*, 290 Or. 675, 626 P.2d 342 (1981); *Young v. Williams*, 583 P.2d 201 (Ala. 1978); *Williams v. Budke*, 186 Mont. 71, 606 P.2d 515 (1980).

The primary criticism of the cost-sharing approach is the inherent illogic in attempting to determine the cost of raising a child without looking at the economic status of the parents. Franks takes the position that the costs of raising a child are virtually the same regardless of the income of the parents. While in the case before us it is clear that the trial judge took into consideration more than just the basic needs of raising the two children, such may not always be the case when this formula is employed. In most cases the application of this formula places an inequitable burden on the custodial parent, which is usually the lower income-producing mother. Hunter, *supra*, at 10. Furthermore, it is apparent that Maurice Franks, who wrote "How to Avoid Alimony," and "Winning Custody: A No-Holds-Barred Guide for Fathers," is "an advocate for the financial interests of men, not for the best interest of children or for equity in post-divorce arrangements." Polikoff, *supra*, at 15. It is also clear that support awards often produce tremendous inequities in the standards of living of the two post-divorce homes. One study showed that the post-divorce standard of living for fathers increases forty-two percent, while the post-divorce standard of living for mothers and their children decreases seventy-three percent. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. Rev. 1181, 1251 (1981). The application of the Franks formula simply perpetuates and even worsens an already inequitable situation.

Nevertheless, we stop short of rejecting outright all aspects of this formula as applied in the case before us. First, the Franks formula and all other cost-sharing formulas can no longer be used in North Carolina. As of 1 July 1990, our state adopted guidelines based on the income-sharing approach for determining child support. These guidelines were promulgated by the Conference of Chief District Judges in accordance with G.S. § 50-13.4(c1). Income-sharing formulas ignore the problem of attempting to determine

the cost of raising a child and are based instead on the assumption that each parent will contribute all of his or her income to one fund. Then the formulas provide a method for equitably dividing the income among the family members. Income-sharing formulas seek to equalize the financial burden of divorce so that all family members experience about the same proportional reduction in their standard of living after the divorce. Polikoff, *supra*, at 14. While no support formula is without its problems, the income-sharing approach appears to address some of the built-in inequities of the cost-sharing approaches. Because use of any cost-sharing formula by a trial judge is now improper in North Carolina, we are not concerned by any precedent our partial endorsement of the Franks formula may otherwise establish.

Second, we are less concerned by the use of the Franks formula because it is apparent that the trial judge considered the "accustomed standard of living" of the children and not simply their basic requirements when he found that the annual needs of the two children totaled $57,600. Also we note that more flexibility must be accorded to trial judges in determining child support payments when the incomes of the parties involved are very high. Formulas are designed for application to typical situations and work best when average incomes are involved. Adjustments must be made when abnormally high or low numbers are involved. For example, North Carolina's new guidelines provide that when the combined gross incomes of the parents exceed $120,000, the "child support should be determined on a case-by-case basis." Administrative Office of the Courts, North Carolina Child Support Guidelines at 2. The combined annual incomes of the parents is $222,000. Thus, we are more reluctant in this particular case to reject the use of this formula.

We do reject, however, the application of the "visitation reduction" portion of the Franks formula. As we noted above, after the child support amount is divided proportionately between the parents according to their income, the Franks formula subtracts an amount of money calculated to represent what the custodial parent saves in expenses while the child is visiting with the noncustodial parent. The trial judge reduced defendant's portion of the support obligation from $51,891.89 down to $41,513.51 based on this theory. This reduction of twenty percent represents the amount of time each year the children will spend with defendant

under the visitation agreement. However, a reduction of the child support payment based on this factor was improper.

The visitation reduction factor is based on the faulty premise that when a child is visiting the non-custodial parent, the custodial parent is relieved of her support costs for that period. However, this ignores that certain costs of the custodial parent, such as housing and some portions of utilities and transportation expenses, are not removed when a child visits the non-custodial parent. Our review of the case law indicates that when one parent has *primary* custody and the visitation period with the non-custodial parent is relatively short—such as the twenty percent annual visitation period involved here—courts have denied motions by non-custodial parents to decrease their support obligations by claiming credit for money spent on a child during visitation. *See Young*, 583 P.2d 201; *Williams*, 186 Mont. 71, 606 P.2d 515; *Smith*, 290 Or. 675, 626 P.2d 342.

Alternatively, when the time a child spends with the non-custodial parent increases to an amount where both parents significantly share in the physical custody of the child, then it is clear that the custodial parent's costs for supporting the child will drop and some adjustment in the support payment should be made. North Carolina's new guidelines offer sound guidance in this area. Under our new system, an adjustment in the support obligation of the non-custodial parent is reduced *only* when each parent has the child for more than thirty-three percent of the year. Administrative Office of the Courts, Worksheet B Child Support Obligation Joint or Shared Physical Custody AOC-CV-628 (July 1990). For the foregoing reasons, we hold it was error to reduce defendant's support payment based on a visitation reduction factor when the period of visitation with him constituted only twenty percent of the year. We reverse this portion of the trial court's Order.

[6] Plaintiff next contends that it was error for the trial court to enter an award of retroactive child support in an amount of $12,165 for the eighteen-month period that began when the parties separated in November 1986 and ran until entry of the prospective child support award in May 1988. The court found, based on evidence of actual expenditures made for the children during the period, that defendant should have paid $25,515 or an average of $1,417.50 a month in support during the period. The court also found that defendant paid only $13,350 in support during that period and ordered

him to pay the difference which totaled $12,165. Plaintiff argues that defendant should pay the same amount in retroactive support for the eighteen-month period as the court ordered him to pay in prospective child support or $4,800 a month. However, retroactive child support is based solely on the amount actually expended for the support of the minor children during the time period in question. *Hicks v. Hicks*, 34 N.C. App. 128, 130, 237 S.E.2d 307, 309 (1977); *Warner v. Latimer*, 68 N.C. App. 170, 174-75, 314 S.E.2d 789, 792-93 (1984). Plaintiff's assignment of error is overruled.

[7] Plaintiff next excepts to the portion of the Order assigning to defendant the right to claim the minor children as dependents for income tax purposes. She concedes the assignment was correct under North Carolina law for North Carolina taxes, but contends it was invalid for federal tax purposes. We agree with plaintiff that assigning the exemption to defendant was valid under North Carolina, but we do so for a different reason than the one she cited. Further, we hold the assignment also was valid as applied to federal income taxes.

Plaintiff concedes the validity of the Order for purposes of North Carolina taxes citing N.C. Gen. Stat. § 105-149(a)(5)c, which until 1989 provided that the parent furnishing the chief support for the child, not the parent with primary custody, was entitled to claim the child as a tax exemption. If G.S. § 105-149 were applicable here, defendant could claim the children as dependents. However, that statute has been repealed in an apparent effort by the General Assembly to bring North Carolina's personal income tax laws into conformity with the 1984 revisions of the federal tax statutes. 1989 N.C. Sess. Laws c. 728, s. 1.3. Under federal law, the custodial parent, not the parent paying primary support, is entitled to claim the support exemption for a child under circumstances such as are present here. 26 U.S.C.A. § 152(e)(1) (Supp. 1990). However, the federal law also provides that the custodial parent may waive this right to claim the exemption. 26 U.S.C.A. § 152(e)(2).

In recent years, several jurisdictions have examined the question of whether a trial court may *order* a custodial parent to waive the right to claim the exemption. Several courts have held that such an order is valid. *Hughes v. Hughes*, 35 Ohio St. 3d 165, 518 N.E.2d 1213 (1988); *McKenzie v. Jahnke*, 432 N.W.2d 556 (1988); *Fleck v. Fleck*, 427 N.W.2d 355 (1988); *Nichols v. Tedder*, 547 So.2d

766 (1989). Following this line of case law, we hold that assigning the dependency exemption to defendant for all income tax purposes was valid.

[8] Finally, plaintiff contends that the trial court erred in failing to award plaintiff attorney fees *pendente lite* and in the Final Order. The trial court found that plaintiff incurred approximately $80,000 in attorney's fees in this matter. N.C. Gen. Stat. § 50-13.6 (1987) provides that where both child custody and child support are at issue, the trial court may award attorney fees "to an interested party acting in good faith who has insufficient means to defray the expenses of the suit." *Id.* Where only the issue of child support is present, however, the trial court must make an additional finding of fact that the party ordered to furnish support had refused to provide adequate support at the time of the institution of the proceeding. G.S. § 50-13.6; *Arnold v. Arnold*, 30 N.C. App. 683, 228 S.E.2d 48 (1976).

This case involved issues of both child support and child custody from June of 1986 until 8 March 1988, when the child custody issue was resolved through negotiations largely arbitrated by the trial judge. These negotiations occurred after trial of this matter had already begun. Nevertheless, the trial judge determined that as of 8 March 1988 the proceeding became one of only child support in which case to award attorney's fees he had to make the additional finding that defendant refused to provide adequate support at the time the action was instituted. On this point, the trial judge found that defendant had provided sufficient support when suit was first filed, and as a result, he refused to award plaintiff attorney's fees. In addition, the court found that even if the action was deemed to be both a custody and support case such that a finding of inadequacy of support at the initiation of the case was not a condition precedent for awarding attorney's fees, plaintiff had sufficient means with which to defray the expenses of the suit as of 10 May 1988 when defendant released to plaintiff approximately $250,000 worth of stock.

A trial judge is permitted considerable discretion in determining whether or not attorney's fees should be allowed in child support or custody cases. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971). A decision to disallow attorney's fees is limited only by the abuse of discretion rule. *Puett v. Puett*, 75 N.C. App. 554, 331 S.E.2d 287 (1985). Plaintiff herein has failed to show an

abuse of discretion by the trial court or the concomitant prejudice to her through the trial court's failure to award attorney's fees as she requested. Thus, we overrule her assignment of error here.

As to plaintiff's remaining assignments of error, we have reviewed the record and the transcript and found them to be without merit.

To summarize, we vacate the portion of the Order that reduces defendant's share of the support payment because of any visitation credit. The remainder of the Order is affirmed.

Affirmed in part and reversed in part.

Judges PHILLIPS and COZORT concur.

R. L. MARTIN, JR. v. RAY LACKEY ENTERPRISES, INC., AND VILLAGE INN PIZZA PARLORS, INC.

No. 8910SC1344

(Filed 2 October 1990)

1. **Assignments § 4 (NCI4th)— assignment of lease—unambiguous language—no question of fact**

The language of an assignment of a lease by plaintiff lessor to a bank presented no factual dispute for the jury as to whether plaintiff assigned all or merely a portion of his rights under the lease where the assignment unambiguously gave the bank only the right to collect the rent due under the lease in the event of default by plaintiff on a promissory note and limited the bank's right to collect rent to the amount necessary to discharge plaintiff's debt.

Am Jur 2d, Landlord and Tenant §§ 98, 528.

2. **Landlord and Tenant § 6 (NCI3d)— breach of lease—failure to pay real estate taxes**

Where provisions of a lease required the lessee to pay "all real estate taxes levied upon and assessed against the premises" and defined default as the failure to pay rent "or to observe or perform any of the obligations of Lessee other-

wise provided for herein," the clear intent of the parties was that a breach would occur when the lessee failed to pay the real estate taxes against the property as they became due.

Am Jur 2d, Landlord and Tenant §§ 357, 364.

3. Assignments § 4 (NCI4th); Landlord and Tenant § 19 (NCI3d)— assignment of rent to bank as security—lessee's failure to pay real estate taxes—lessor as real party in interest—bank not necessary party

Where a lessor assigned to a bank the right to collect rent due under a lease only as security for the payment of a promissory note, the lessor retained all other rights in the lease and was the real party in interest entitled to prosecute a claim against the lessees for breach of the lease by failing to pay real estate taxes on the leased property. Furthermore, the bank was not a necessary party to the lessor's action since the assignment did not give the bank the right to collect taxes from the lessees. N.C.G.S. § 1A-1, Rules 17(a), 19(a); N.C.G.S. § 1-57.

Am Jur 2d, Landlord and Tenant § 528.

4. Landlord and Tenant § 19 (NCI3d); Limitation of Actions § 4.6 (NCI3d)— failure to pay taxes on leased property—breach of lease—accrual of action

A breach of a lease occurred and the statute of limitations began to run when defendant lessees failed to pay real estate taxes on the leased property as they became due on an annual basis, not when plaintiff lessor gave defendant lessees written notice of default and defendants failed to cure within the applicable time specified by the lease. Therefore, the statute of limitations of N.C.G.S. § 1-52 barred plaintiff's recovery against defendants for taxes which became due more than three years prior to the institution of plaintiff's action against defendants.

Am Jur 2d, Landlord and Tenant § 180.

5. Equity § 2 (NCI3d)— taxes due under lease—laches inapplicable

Plaintiff lessor's action against defendant lessees to recover real estate taxes required by the lease to be paid by the lessees was not barred by laches because subleases required the subtenants to pay taxes due on the leased property and

defendants' right of action against their subtenants is barred by the statute of limitations since defendants' right to sue a subtenant for nonpayment of the taxes was not conditional upon plaintiff first suing defendants for nonpayment of the taxes.

Am Jur 2d, Equity §§ 166, 169.

APPEAL by defendants from order filed 19 September 1989 by *Judge Henry W. Hight, Jr.*, in WAKE County Superior Court. Heard in the Court of Appeals 20 August 1990.

Clifton & Singer, by Richard G. Singer, for plaintiff-appellee.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for defendant-appellants.

GREENE, Judge.

The plaintiff, R. L. Martin, Jr., brought this action against the defendants, Ray Lackey Enterprises, Inc. (RLE) and Village Inn Pizza Parlors, Inc. (VIPPI), alleging that the defendants had breached a lease agreement by failing to pay real estate taxes and insurance premiums as required under the lease. From a summary judgment for the plaintiff, the defendants appeal.

On February 20, 1976, the plaintiff leased certain property to RLE and VIPPI to be used as a restaurant. In addition to the obligation to pay rent, the pertinent sections of the lease agreement provided as follows:

> *Section 5.01: Lessee's Obligations to Pay.* Lessee shall pay and discharge, in addition to the rent herein reserved . . . all real estate taxes and assessments levied upon and assessed against the premises. . . .
>
> *Section 13.01: Default.* It shall be an event of default by Lessee hereunder if Lessee shall fail to pay the rent provided for herein or to observe or perform any of the obligations of Lessee otherwise provided for herein. . . .
>
> *Section 13.02: Lessor's Substitution of Performance.* If Lessee shall be in default hereunder, Lessor shall have the right to make any payment or perform any act required of Lessee under any provision of this lease. . . . All payments made and all costs and expenses incurred by Lessor in connection with any exercise of such right, together with interest

thereon at the maximum rate of interest then permitted by Law from the respective dates of the making of such payments or the incurring of such costs and expenses, shall be reimbursed by Lessee immediately upon demand. Notwithstanding the foregoing, nothing herein shall imply any obligation on the part of Lessor to make any payment or perform any act required of Lessee.

Section 13.03: Lessor's Remedies. In the event of default by Lessee hereunder which shall remain uncured thirty (30) days after receipt by Lessee of written notice of such default, or fifteen (15) days after in the case of nonpayment of rent or any other sum due hereunder, Lessor may at once thereafter or at any time subsequently during the existence of such breach or default, (i) enter into and upon the premises or any part thereof and repossess the same, expelling and removing therefrom all persons and property . . . and (ii) either (a) terminate this lease, holding Lessee for damages for its breach or (b) without terminating this lease, re-let the premises or any part thereof upon such terms and conditions as shall appear advisable to Lessor.

On August 17, 1976, the plaintiff and his wife made a written assignment of a number of leases to Clyde Savings and Loan Association (Clyde), expressly including the lease to VIPPI. The assignment provided "that Clyde shall be entitled to collect rents provided for by the above-described leases only after there has been default by MARTINS in the payment of the promissory note hereinbefore described. . . ." The assignment was made as additional security on a promissory note executed by the Martins and already secured by a deed of trust.

On November 30, 1978, as the result of a default on the promissory note, the Martins gave written notice to VIPPI to make all future payments under the lease directly to Clyde.

On April 15, 1986, the plaintiff filed suit. For the purposes of this appeal, the relevant portion of the complaint alleged a claim of $18,280.41, representing real estate taxes paid by the plaintiff to Wake County and the City of Raleigh from 1977 through and including 1985.

The defendants filed a Motion to Dismiss and Answer on May 19, 1986. The defendants admitted that they had not paid the real estate taxes, but set out certain defenses discussed below.

The issues presented are: Whether the trial court erred in granting the plaintiff's motion for summary judgment upon the grounds that (I) the pleadings raise a genuine issue of material fact; and (II) as a matter of law, the plaintiff's claim is barred by (A) the absence of a real party in interest; (B) the statute of limitations; and (C) the doctrines of waiver and laches.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c). Thus, the test for granting summary judgment is twofold: Is there a genuine issue of material fact, and, if not, is any party entitled to judgment as a matter of law? *Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102, *disc. rev. denied*, 303 N.C. 710 (1981). Under the first part of the test, an issue is genuine if it can be maintained by substantial evidence. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897, *reh'g denied*, 281 N.C. 516 (1972); *Godwin Sprayers v. Utica Mutual Insurance Co.*, 59 N.C. App. 497, 296 S.E.2d 843 (1982), *disc. rev. denied*, 307 N.C. 576, 299 S.E.2d 646 (1983). A fact is material if it would establish any material element of a claim or defense. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982). Under the second part of the test, summary judgment is proper only where the trial court finds that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law. *Godwin Sprayers*, 59 N.C. App. at 499, 296 S.E.2d at 845.

I

The defendants argue that the trial court erred by granting summary judgment because there are genuine issues of material fact which are properly decided by a jury.

[1] The defendants first contend that the assignment of the lease by the plaintiff to Clyde presents a factual dispute as to whether the plaintiff assigned all or a portion of his rights under the lease.

Generally, the interpretation of an assignment is governed by rules applicable to the interpretation of a contract. 3 Williston on Contracts § 431 (3d ed. 1960). When parties use clear and unambiguous terms, a contract can be interpreted by the court as a matter of law. *Mountain Fed. Land Bank v. First Union Nat. Bank*, 98 N.C. App. 195, 200, 390 S.E.2d 679, 682, *disc. rev. denied*, 327 N.C. 141, 394 S.E.2d 178 (1990). The contract language is given the interpretation that the parties intended at the time of formation, as discerned from their writings and actions. *Id.* While the intent of the parties is at the heart of a contract, intent is a question of law where the writing is free of any ambiguity which would require resort to extrinsic evidence or the consideration of disputed fact. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973). Since we find no ambiguity regarding the subject matter of the assignment, the plaintiff's intent can be interpreted without resort to extrinsic evidence.

The assignment unambiguously provides only for the assignment of the right to collect the rent due under the lease, and only as security in the event of default by the plaintiff on the promissory note delivered to Clyde. Clyde's right to collect the rent under the lease is further limited to the amount necessary to discharge the plaintiff's debt. The language of the assignment raises no factual issue.

[2] The defendants next contend that the language of the lease raises a factual issue as to when breach occurred for purposes of the running of the statute of limitations.

The interpretation of a lease is governed by the same rules of contract interpretation given above. As with the assignment, we find no ambiguity in the terms of the lease that would create a jury question. Section 13.01 of the lease clearly defines default as the failure to pay rent "or to observe or perform any of the obligations of Lessee otherwise provided for herein. . . ." Section 5.01 of the lease clearly provides that in addition to rent, the lessee is to pay "all real estate taxes levied upon and assessed against the premises. . . ." The clear intent of the parties was that breach would occur when the lessee failed to pay the real estate taxes levied against the property as they came due. Again, no factual issue is presented.

II

The defendants next argue that, as a matter of law, the plaintiff's claim is barred by the defenses raised by the defendant, and that summary judgment was improper.

A

[3] The defendants first contend that the plaintiff could not properly prosecute this claim in that Clyde, and not the plaintiff, is the real party in interest.

Under N.C.G.S. § 1-57 (1983) and N.C.R. Civ. P. 17(a), every claim must be prosecuted by a real party in interest. A real party in interest is one who will be benefited or injured by a judgment in the case, and who has a legal right under substantive law to enforce the claim in question. *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 249, 314 S.E.2d 801, 803 (1984).

The plaintiff, as lessor, remained ultimately responsible for the payment of the taxes assessed against his property, and the lease language requiring the tenant to pay the taxes does not relieve the lessor of the duty. *Hunt v. Cooper*, 194 N.C. 265, 139 S.E. 446 (1927). Furthermore, the owner/mortgagor of the property remains responsible for the taxes even where the property has been mortgaged, or, as here, where an assignee/mortgagee becomes entitled to the rights arising from the property and held as security. *Cf. Hood ex rel. Planter's Bank & Trust v. McGill*, 206 N.C. 83, 173 S.E. 20 (1934) (tax liability did not shift to the mortgagee where, upon default by the mortgagor, the mortgagee took possession of the premises and collected rents and profits). Accordingly, it is the plaintiff, and not Clyde, who benefits from a judgment requiring the reimbursement of taxes paid by the plaintiff.

While the plaintiff benefits from a judgment, the question remains as to whether he retained the right to enforce the defendants' obligation under the lease to pay the taxes. The terms of the assignment determine the rights and interests of the assignor and the assignee. 6 Am. Jur. 2d *Assignments* § 119 (1963). The assignor generally retains any rights which are not passed to the assignee by the assignment. 6A C.J.S. *Assignments* § 96 (1975).

As we have stated, the language of the assignment clearly establishes that the plaintiff assigned only the right to the rent payments as security. Therefore, the plaintiff retained all other

rights under the lease, including the right to enforce the tax obligation. Thus, the plaintiff is a real party in interest.

Furthermore, we reject the defendants' contention that Clyde was a necessary party, and that the suit could not be maintained unless Clyde was joined. Our Rules of Civil Procedure provide that "those who are united in interest must be joined as plaintiffs or defendants." N.C.R. Civ. P. 19(a). "While a party may waive its right to be sued by a real party in interest, Rule 19 requires the court to join as a necessary party any persons 'united in interest' and/or any persons without whom a complete determination of the claim cannot be made." *J & B Slurry Seal Co. v. Mid-South Aviation*, 88 N.C. App. 1, 17, 362 S.E.2d 812, 822 (1987). A person is deemed to be "united in interest" with another party when that person's presence is necessary for the court to determine a claim without prejudicing the rights of a party before it or of others not before the court. *Ludwig v. Hart*, 40 N.C. App. 188, 252 S.E.2d 270, *disc. rev. denied*, 297 N.C. 454, 256 S.E.2d 807 (1979). Since Clyde received no right in the assignment to collect taxes from the defendants, their presence in the case was not necessary for a complete determination, and any judgment entered could not prejudice either Clyde or the defendants.

B

[4] The defendants next argue that, as a matter of law, the recovery of at least a portion of the taxes is barred by the statute of limitations. A contract not under seal, as here, falls within a three-year statute of limitations as provided by N.C.G.S. § 1-52 (1983). The defendants contend that since the plaintiff's claim is for taxes paid by the plaintiff from 1977 to 1985, the plaintiff is barred from recovery of all taxes which came due before three years prior to April 15, 1986, when the plaintiff instituted this suit. We agree.

The plaintiff concedes that the applicable limitation period is three years, and he agrees that real estate taxes are levied and become due on an annual basis. The plaintiff argues, however, that under Section 13.03 of the lease, the statute of limitations did not begin to run until after the plaintiff gave the defendants written notice of default and the defendants failed to cure within the applicable time specified by the lease.

Generally, our statutes of limitation do not begin to run until the claim accrues, and the claim does not accrue until the injured

party is at liberty to sue or is entitled to institute an action. *Nationwide Mutual Ins. v. American Mutual Liability Ins.*, 89 N.C. App. 299, 365 S.E.2d 677 (1988). A cause of action for the breach of a contract accrues at the time of the breach which gives rise to the right to a cause of action. *U.S. Leasing Corp. v. Everett, Creech, Hancock & Herzig*, 88 N.C. App. 418, 363 S.E.2d 665, *disc. rev. denied*, 322 N.C. 329, 369 S.E.2d 364 (1988).

Both parties concede that the real estate taxes were levied upon and assessed against the premises on an annual basis. The language of the lease makes clear that breach occurred when the defendants failed to pay the taxes as they came due. Upon breach, the plaintiff's cause of action accrued as to the unpaid taxes, and the statute of limitations began to run.

The plaintiff mistakenly relies upon sections of the lease which pertain to the plaintiff's various potential remedies, and have no bearing on the determination of when a breach occurs or when the statute of limitations begins to run. When the defendants defaulted by failing to pay the taxes as they became due, the plaintiff had three basic remedies which he could exercise. He could immediately bring an action to enforce the defendants' obligation to pay, or he could pay the taxes himself as provided by Section 13.02 of the lease, and then be reimbursed by the defendants, or he could give written notice of default and repossess the premises if not cured within the time period specified by the lease. Regardless of the alternative, each is but a remedy available to the plaintiff. Each remedy arises upon default as defined by the lease, and each remedy must be exercised, if at all, within the three-year statute of limitations which begins to run upon default. "[T]he cause of action accrues when the *breach* occurs, and the contract in question clearly defines breach or default as failure to make the required payments." *U.S. Leasing Corp.*, 88 N.C. App. at 427, 363 S.E.2d at 670 (an analogous case where the Court noted that both sides had mistakenly interpreted contract provisions regarding remedies in the event of default as bearing upon the accrual of plaintiff's cause of action).

Generally, where obligations are payable in installments, the statute of limitations runs against each installment independently as it becomes due. *U.S. Leasing Corp.*, 88 N.C. App. at 426, 363 S.E.2d at 669. Here, the defendants' tax obligation became due on an annual basis, and the statute of limitations ran independently

on each annual default. The record indicates that the plaintiff filed suit on April 15, 1986. Accordingly, the plaintiff's recovery of all taxes which became due prior to April 16, 1983 is barred by the statute of limitations. Since the record provides us with only a lump sum of $18,280.41, representing taxes which became due from 1977 to 1985, we remand to the trial court for a determination of the tax amount not barred by the statute of limitations.

C

The defendants make a combined argument that this case is barred by waiver or laches or both.

As to waiver, Section 19.01 of the lease provides that no waiver of any right, agreement or condition "shall be binding upon either of the parties hereto unless in writing and signed by the party to be charged therewith." The record is silent as to the existence of any written waiver and the defendants cannot now assert waiver as a defense.

[5] The defendants contend that the doctrine of laches is applicable because the defendants entered into a number of subleases during the years in question, and that those subleases required the sub-tenants to pay taxes due on the leased property. They argue that they have suffered from the plaintiff's delay in enforcing the defendants' tax obligation in that the defendants' right of recovery for taxes against their sub-tenants is now barred by the statute of limitations. We disagree.

The record does not show, nor do the defendants argue, that the defendants' right to sue the sub-tenant for nonpayment of the taxes was in any way conditional upon the plaintiff first suing the defendants for nonpayment of the taxes. Accordingly, the plaintiff's delay is immaterial and did not prejudice the defendants' claim under the sublease.

Affirmed in part, reversed in part and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

JAMES M. WARD, ADMINISTRATOR OF THE ESTATE OF JAMES WILLIAM WARD, PLAINTIFF v. LARRY McDONALD, DEFENDANT

No. 895SC1351

(Filed 2 October 1990)

1. **Trial § 10.1 (NCI3d)— remark by court—need to shorten trial—no improper opinion**

The trial court did not improperly express an opinion in remarking to the jury about the need to shorten the length of this wrongful death trial. N.C.G.S. § 1A-1, Rule 51(a).

Am Jur 2d, Trial §§ 91, 1065, 1066.

2. **Automobiles and Other Vehicles § 474 (NCI4th)— driver's license—absence of motorcycle endorsement—negligence per se—proximate cause**

It was negligence per se for the decedent to operate a motorcycle in this state without a motorcycle endorsement on his driver's license. However, such negligence was not actionable unless his failure to have the proper endorsement was a proximate cause of his death.

Am Jur 2d, Automobiles and Highway Traffic §§ 625, 626, 1023.

Lack of proper automobile registration or operator's license as evidence of operator's negligence. 29 ALR2d 963.

3. **Automobiles and Other Vehicles §§ 37, 474 (NCI4th)— driver's license—absence of motorcycle endorsement—testimony not prejudicial**

Plaintiff was not prejudiced by a highway patrolman's testimony in a wrongful death case that plaintiff's intestate, who was operating a motorcycle, did not have a motorcycle endorsement on his driver's license at the time of the accident where the testimony was offered on the issue of contributory negligence, and the jury was instructed not to consider that issue.

Am Jur 2d, Automobiles and Highway Traffic §§ 625, 626, 1023.

Lack of proper automobile registration or operator's license as evidence of operator's negligence. 29 ALR2d 963.

4. Trial § 52.1 (NCI3d)— denial of new trial on damages issue

The trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the issue of damages in a wrongful death action where the jury awarded plaintiff the amount stipulated by the parties as the total medical and funeral expenses incurred by plaintiff because of his intestate's death.

Am Jur 2d, Damages §§ 1029, 1031; New Trial §§ 394, 403, 408.

APPEAL by plaintiff and cross-appeal by defendant from judgment entered 3 July 1989 by *Judge Napoleon B. Barefoot* in NEW HANOVER County Superior Court. Heard in the Court of Appeals 21 August 1990.

Plaintiff, as Administrator of the Estate of James William Ward, instituted this civil action against defendant on 13 August 1987 to recover damages for the alleged wrongful death of James William Ward, who died 13 October 1986 as a result of a collision in New Hanover County, North Carolina. Defendant thereafter filed an answer denying the material allegations of plaintiff's complaint. On 11 November 1987, defendant filed an amendment to his answer alleging that plaintiff's intestate was contributorily negligent. On 30 November 1987, plaintiff filed a reply, denying the same, and seeking sanctions against defendant pursuant to G.S. § 1A-1, Rule 11. Plaintiff's motion for sanctions was subsequently denied by Judge Bradford Tillery.

On 18 May 1989, defendant filed for, but was denied, a motion for leave to supplement his answer by Judge Napoleon Barefoot.

The matter thereafter came on for trial on 19 June 1989. The jury returned a verdict reflecting that the plaintiff's intestate was killed by the negligence of the defendant and awarded plaintiff $8,350.42.

On 30 June 1989, plaintiff filed a motion for a new trial on the issue of damages pursuant to G.S. § 1A-1, Rule 59. The motion was, however, denied on 14 July 1989. Both the plaintiff and the defendant appeal the 3 July 1989 judgment.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellant.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick and John L. Coble, for defendant-appellee.

JOHNSON, Judge.

The pertinent facts are as follows: On 13 October 1986 at approximately 9:30 p.m., James Ward (hereinafter "decedent," "intestate" or "Ward") was operating a 1981 Yamaha motorcycle in a southerly direction on U.S. Highway 117 approaching its intersection with Centennial Drive in New Hanover County. At the same time, defendant Larry McDonald was operating a 1986 Dodge truck in a northerly direction. Defendant's truck and Ward's motorcycle collided just as they approached the intersection of U.S. Highway 117 and Centennial Drive. Ward died as a result of the collision.

The testimonial account of James Richard Laughter, Sr., an employee of General Electric, is as follows: While traveling in a southerly direction on U.S. Highway 117 on 13 October 1986, he noticed a motorcycle behind him that was, in his opinion, traveling between 35 and 40 m.p.h. As he approached the turn lane for the southernmost entrance to the General Electric Plant outside of Wilmington, he slowed his vehicle to approximately 20 to 25 m.p.h. As he got midway down the turn lane, the motorcyle passed him going approximately 25 to 30 m.p.h. The motorcyle then proceeded down U.S. Highway 117 in a normal manner. At this time, the defendant's vehicle was stopped at the intersection waiting to turn left onto Centennial Drive. As the motorcycle proceeded in its lane of travel, he noticed that the traffic signal for traffic proceeding in a southerly direction was green. When the motorcycle reached a point approximately 20 feet from the intersection, defendant's truck turned into the path and struck the left side of James Ward's motorcycle. As a result of the collision, Ward was thrown approximately 41 feet. Although Ward's headlight was illuminated and his taillights were on, Laughter saw no brake lights come on the motorcycle as it entered the intersection.

At the time of the collision, Laughter was approximately 15 to 20 feet behind another car in the right-hand turn lane. The other car, driven by Kenneth Kornegay, was approximately 7 to 8 car lengths from the intersection when the accident occurred. Testimony elicited from Kornegay confirmed Laughter's statement that the signal for traffic proceeding south was green. He further testified that defendant's truck was stopped at the signal for northbound traffic, with his left-turn signal on. Kornegay did not, however, see the accident.

Trooper Howard L. Higgins of the North Carolina Highway Patrol testified that there were no skid marks at the point of impact which occurred in the middle of the southbound lane on U.S. Highway 117. As a result of his investigation, Trooper Higgins charged defendant with failing to yield the right of way and death by motor vehicle.

At trial, the parties stipulated, and the judge so instructed, that the total of the medical and funeral bills incurred by the plaintiff was $8,350.42.

On appeal, plaintiff brings forth six Assignments of Error. Defendant brings forth an additional three Assignments of Error on cross-appeal. Inasmuch as there is an appeal and a cross-appeal, we will first address the legal questions raised by plaintiff we believe to be decisive. We then will discuss the questions raised by defendant on cross-appeal.

PLAINTIFF'S APPEAL

[1] First, plaintiff contends that the trial judge committed prejudicial error in remarking to the jury about the need to shorten the length of the trial. We disagree.

Unquestionably, G.S. § 1A-1, Rule 51(a) provides that:

> . . . a judge shall not give an opinion as to whether or not a fact is fully or sufficiently proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.

In the instances where a plaintiff alleges that he has been deprived of his right to a fair trial by improper remarks in the hearing of the jury, we must first determine whether the trial judge's remarks, in light of the circumstances under which they were made, were improper. We must then determine whether such remarks were prejudicial. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

After considering the complained of remarks made by the trial judge and the circumstances in which they were made, we find them to be something other than opinions. Assuming, *arguendo*, that the remarks were improper, we nonetheless find them to be lacking in prejudice. Accordingly, the trial court properly denied plaintiff's motion for a new trial. This assignment is overruled.

Second, plaintiff contends that the trial court erred in admitting testimony that the decedent did not have a motorcycle endorsement at the time of the accident. We disagree.

G.S. § 20-7(a1) provides that

> [n]o operator's or chauffeur's license issued on or after October 1, 1979 shall authorize the licensee to operate a motorcycle unless the license has been appropriately endorsed by the Division to indicate that the licensee has passed special road and written (or oral) tests demonstrating competence to operate a motorcycle. . . .

A violation of the above-quoted statute is negligence *per se*. *See Hoke v. Greyhound Corporation*, 226 N.C. 692, 40 S.E.2d 345 (1946).

> According to the uniform decisions of this Court, the violation of a statute imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence *per se*, but before the person claiming damages for injuries sustained can be permitted to recover he must show a causal connection between the injury received and the disregard of the statutory mandate. (Emphasis in original.)

Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954). "What is the proximate cause of an injury is ordinarily a question for the jury to decide." *Hoke*, *supra* at 698, 40 S.E.2d at 350. It is to be determined in light of the surrounding circumstances. *Id.*

[2, 3] Under the facts in the instant case, it was clearly negligence *per se* for the decedent, who lacked a motorcycle endorsement at the time of the accident, to have been driving a motorcycle in this State. Such negligence, however, is not actionable unless his failure to have the proper endorsement was either the proximate cause or one of the proximate causes of his death. *Id.* Having reviewed the complained of evidence, we find that the testimony of Trooper Higgins that Ward did not have a motorcycle endorsement at the time of the accident was offered on the issue of contributory negligence. While the issue of whether the decedent was contributorily negligent was not submitted to the jury, the jury was subsequently instructed not to consider this affirmative defense. In the absence of evidence showing that the jury acted contrary to the court's instructions, we find no prejudicial effect of Trooper Higgins' testimony. This assignment is overruled.

[4] Last, plaintiff contends that the trial court abused its discretion in failing to award plaintiff a new trial on the issue of damages. Based upon the applicable standard of appellate review and the evidence presented at trial, we find no abuse of discretion.

The standard for appellate review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and order of a new trial is prohibitive. *Pearce v. Fletcher*, 74 N.C. App. 543, 328 S.E.2d 889 (1985). As previously set forth, the inherent and traditional principles provide that appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing the heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. Realizing that such principles are well entrenched, we nevertheless find it necessary to reaffirm settled law.

> While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915).
>
> The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. The judge is not a mere moderator, but is an integral part of the trial, and when he perceives that justice has not been done it is his duty to set aside the verdict. His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence. *Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936, 937 (1902).

Worthington v. Bynum, supra at 482-83, 290 S.E.2d at 602-03.

In North Carolina, the recovery for a wrongful death action is based largely on the losses suffered by the individual beneficiaries. *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *cert. denied*,

306 N.C. 744, 295 S.E.2d 480 (1982). Our wrongful death statute was designed by the General Assembly to compensate, as fully as possible, persons for the loss of their decedent. *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 291 S.E.2d 897, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982). As articulated in G.S. § 28A-18-2(b), damages recoverable for death by wrongful act include the following:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, willful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

We note that

> [t]he present monetary value of the decedent to the persons entitled to receive the damages will usually defy any precise mathematical computation. [Citations omitted.] *Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury* . . . The fact that the full extent of the damages must be a matter of some speculation is no ground for refusing all damages. [Citations omitted.] . . . "The damages

> in any wrongful death action are to some extent uncertain and speculative. A jury may indulge in such speculation where it is necessary and there are sufficient facts to support speculation." (Citations omitted.) (Emphasis added.)

Beck v. Carolina Power & Light Co., *supra* at 381-82, 291 S.E.2d at 902, *quoting Brown v. Moore*, 286 N.C. 664, 673, 213 S.E.2d 342, 348-49 (1975). Guided by these principles, we turn to the instant case.

Plaintiff presented the testimony of, *inter alios*, Retha Ward, the decedent's mother, and Robert Bunting, an economist, in an attempt to show "the present monetary value" of Ward to his parents. The jury, as the sole judges of whether the plaintiff sustained damages, was authorized to award actual damages or, if they found none, to award nominal damages. In so doing, the jury determined the relative weight and credibility to be given to the testimony of each witness and found actual damages. We are unable to adopt plaintiff's contention that the jury arbitrarily ignored his proof of damages. Thus, we find no abuse of discretion. This assignment is overruled. Accordingly, the trial court's order denying plaintiff's motion for a new trial is affirmed.

DEFENDANT'S CROSS-APPEAL

We note at the outset that defendant's cross-appeal is conditioned upon the outcome of plaintiff's appeal. In view of the fact that this Court has affirmed the trial court's order denying plaintiff's motion for a new trial, defendant's appeal is dismissed.

In sum,

Plaintiff's appeal is affirmed.

Defendant's cross-appeal is dismissed.

Affirmed; dismissed.

Judge PARKER concurs.

Judge PHILLIPS concurs in the result.

CARLTON J. PARKER, EMPLOYEE-PLAINTIFF v. THOMPSON-ARTHUR PAVING COMPANY, EMPLOYER, AND CIGNA, CARRIER-DEFENDANTS

No. 8910IC1400

(Filed 2 October 1990)

Master and Servant § 91 (NCI3d)— workers' compensation—estoppel to assert time limitation for filing claim

Defendant employer was equitably estopped from asserting the two-year time limitation of N.C.G.S. § 97-24(a) as a bar to plaintiff's claim for compensation for a shoulder injury where plaintiff was injured on 8 December 1985; plaintiff immediately reported his injury to his employer, and the employer paid his medical bills following the accident and 1986 and 1987 medical bills incurred due to complications with his shoulder; in a meeting between plaintiff and the employer's agent in August 1987, still within the two-year period for filing a claim, plaintiff advised the agent of his plans to have corrective shoulder surgery in December 1987 during the employer's annual winter layoff period; the employer's agent indicated that the shoulder surgery proposed for December "would be fine" but that concurrent hand surgery to repair a previous unrelated injury would not be covered by workers' compensation; plaintiff was informed by the employer on 15 December 1987 that workers' compensation would not pay for his surgery; and plaintiff then filed a claim on 7 January 1988, nearly two months after the time for filing had expired.

Am Jur 2d, Workmen's Compensation §§ 489, 490.

APPEAL by defendants from Opinion and Award of the Industrial Commission entered 3 October 1989. Heard in the Court of Appeals 23 August 1990.

Plaintiff seeks Workers' Compensation benefits for injuries allegedly sustained in the course of his employment with defendant employer on 8 December 1985.

At the time of his injury, plaintiff had been employed by defendant Thompson-Arthur Paving Co. for about 20 years. He has a ninth grade education. On 8 December 1985 he was adding oil to his truck when he dropped the oil can into the engine and in his attempt to retrieve the can he slipped, causing his body

to fall into the engine and dislocating his shoulder. He reported his injury immediately to his employer. The employer paid plaintiff's medical bills following the accident and also paid his 1986 and 1987 medical bills which accrued due to complications with his shoulder. Plaintiff did not file a claim with the Industrial Commission, as required by G.S. § 97-24(a), during this time. In August, 1987, plaintiff saw his orthopedic surgeon, who recommended surgery on the shoulder. Plaintiff and his surgeon agreed that the surgery would be scheduled for the following December, during the time of year when the paving company was normally shut down for the winter season. On or about 13 August 1987, plaintiff met with his supervisor and Janet Moretz, the company safety director, and informed them of the planned surgery. In that meeting Moretz indicated that the shoulder surgery proposed for December "would be fine" but that concurrent hand surgery to repair an old injury unrelated to the shoulder would not be covered by Workers' Compensation. There was no discussion then as to payment of medical bills for the proposed shoulder surgery. On or about 10 December 1987, plaintiff informed Moretz that the shoulder surgery was scheduled for 21 December 1987. On 15 December 1987, Moretz and plaintiff's supervisor informed plaintiff that Workers' Compensation would not pay for his surgery. Plaintiff then filed a claim on 7 January 1988, nearly two months after the time for filing had expired.

In a hearing before the Industrial Commission, defendants alleged that the Industrial Commission does not have jurisdiction to hear plaintiff's claim because he did not file within two years of the accident as required by G.S. § 97-24(a). In a ruling affirmed by the Full Commission, Chief Deputy Commissioner Sellers held that the defendants were equitably estopped from asserting the two year time limitation as a bar to plaintiff's right to compensation. Defendants appeal.

Ling & Farran, by Jeffrey P. Farran, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Clayton M. Custer, for defendant-appellants.

JOHNSON, Judge.

Although defendants bring forth two issues, they are subsumed into one issue on appeal: whether the Industrial Commission erred in concluding: (a) that defendants are equitably estopped from

pleading the two year time limit for filing under G.S. § 97-24(a) as a bar to jurisdiction, and (b) that plaintiff detrimentally relied as a matter of law on statements of defendant's agent.

The jurisdiction of the Industrial Commission is limited by statute. *Letterlough v. Atkins*, 258 N.C. 166, 128 S.E.2d 215 (1962). "The right to compensation under [the Workers' Compensation Act] shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident." G.S. § 97-24(a). The two year limitation has repeatedly been held to be a condition precedent to the right to compensation and not a statute of limitations. *Montgomery v. Horneytown Fire Dept.*, 265 N.C. 553, 144 S.E.2d 586 (1965); *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 309 S.E.2d 273 (1983), *disc. rev. denied*, 311 N.C. 407, 319 S.E.2d 281 (1984); *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985). A consequence of finding the timely filing of a claim to be a condition precedent is that the failure to do so becomes a jurisdictional bar to the right to receive compensation. *McCrater v. Engineering Co.*, 248 N.C. 707, 104 S.E.2d 858 (1958); *Barham v. Kayser-Roth Hosiery Co.*, 15 N.C. App. 519, 190 S.E.2d 306 (1972); *Weston v. Sears Roebuck & Co.*, *supra*. The general rule is that a jurisdictional bar cannot be overcome by consent of the parties, by waiver or by estoppel. *Hart v. Motors*, 244 N.C. 84, 92 S.E.2d 673 (1956); *Clodfelter v. Furniture Co.*, 38 N.C. App. 45, 247 S.E.2d 263 (1978). Prior to the 1985 decision in *Belfield v. Weyerhaeuser Co.*, *supra*, the question was unresolved whether "under all circumstances a party to a proceeding before the Industrial Commission can, or cannot, be estopped to attack its jurisdiction over the subject matter. . . ." *Hart v. Motors*, *supra*. In *Belfield v. Weyerhaeuser Co.* this Court faced the question squarely and held that a party could be equitably estopped from asserting the two year time limitation in G.S. § 97-24 as a bar to jurisdiction.

While *dicta* in *Weston v. Sears Roebuck & Co.* ("[Previous cases] suggest that the jurisdictional bar created by a failure to file a timely claim may be overcome on a theory of equitable estoppel where facts indicate intentional deception of the employee by the employer." *Weston v. Sears Roebuck & Co.* at 313, 309 S.E.2d at 276.) and the *Belfield* decision indicate that estoppel may be applied in compensation cases where intentional deception is found, the question remains whether estoppel may apply on facts which are less egregious.

"The law of estoppel applies in compensation proceedings as in all other cases." *Biddix v. Rex Mills*, 237 N.C. 660, 665, 75 S.E.2d 777, 781 (1953). 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. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice. *In re Will of Covington*, 252 N.C. 546, 114 S.E.2d 257 (1960). In *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E.2d 669 (1953), our Supreme Court added the following language to the first element: "([c]onduct) . . . at least, which is otherwise than, and inconsistent with, those which the party afterwards attempts to assert." *Id.* at 177, 77 S.E.2d at 672.

This view of equitable estoppel was recently applied in *Meachum v. Board of Education*, 59 N.C. App. 381, 297 S.E.2d 192 (1982), *disc. rev. denied*, 307 N.C. 577, 299 S.E.2d 651 (1983). In *Meachum v. Board of Education*, plaintiff schoolteacher experienced severe medical problems which interfered with her teaching. She applied for and took disability retirement benefits on the recommendation of the school finance officer who assured her that "the retirement aspect was just a formality because the state regulations provide that the benefits stop automatically when one returns to work." *Id.* at 384, 297 S.E.2d at 193. However, when she attempted to return to work she was, for the first time, informed that disability retirement was tantamount to a resignation. Defendant's agents, at the time they made their assurances, were unaware that by taking retirement disability plaintiff would be adversely affecting her status as a career teacher. Plaintiff was similarly unaware of this and had made no attempt to investigate. The *Meachum* Court held that defendants were estopped to deny plaintiff her status as a "career teacher" where their assurances were reasonably calculated to convey to her the impression that filing for disability retirement benefits was a suitable option for her to pursue in her circumstances, this impression of the facts was wholly inconsistent with defendant's later assertion, and the conduct "conveyed the impression that plaintiff would not lose any status previously obtained despite the lack of an affirmative promise that plaintiff would be rehired." *Id.* at 386, 297 S.E.2d at 196. It was undisputed

that both plaintiff and defendants acted in good faith and that when defendants gave the assurances to plaintiff they were unaware of the true facts. In finding that defendants were estopped by their conduct, the *Meachum* Court relied on *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E.2d 441 (1979), where a plaintiff wife was allowed a claim of estoppel based on defendant husband's innocent, but misleading, representations and conduct. The *Hamilton* Court noted that "neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied." *Hamilton v. Hamilton*, 296 N.C. at 576, 251 S.E.2d at 443. Furthermore, the Court quoted with approval:

> "[A] party may be estopped to deny representations made when he had no knowledge of their falsity, or which he made without any intent to deceive the party now setting up the estoppel. . . . [T]he fraud consists in the inconsistent position subsequently taken, rather than in the original conduct. It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party."

Id. at 576-77, 251 S.E.2d at 443, *quoting* H. McClintock, Equity § 31 (2d ed. 1948).

We hold that under the facts of this case, defendants are estopped from asserting the two year time limit as a defense to plaintiff's claim. Plaintiff was injured on 8 November 1985. Defendant was immediately made aware of the injury. Defendant paid plaintiff's medical expenses in 1985, 1986 and 1987. In a face-to-face meeting between plaintiff and his employer's agent in August, 1987, still within the two year period for filing, plaintiff advised the agent of his plans to have corrective surgery in December, 1987, during the annual layoff period. The agent's response was that this "would be fine" but that the proposed concurrent surgery on the hand to correct a previous unrelated injury would not be covered by Workers' Compensation. The agent's verbal acquiescence to plaintiff's proposed surgery made in a face-to-face meeting, the fact that it was planned to occur at a future time which would be of benefit to both employer and plaintiff in terms of work schedule, and the specific reference to Workers' Compensation with regard to the hand, reasonably led plaintiff to believe that the surgery would be covered by Workers' Compensation. Defendant is estopped to now assert that it is not.

Defendants are correct in their contention that mere payment of medical benefits does not constitute estoppel under G.S. § 97-24(a). *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E.2d 777 (1953); *Barham v. Kayser-Roth Hosiery Co.*, 15 N.C. App. 519, 190 S.E.2d 306 (1972). In the case *sub judice*, almost two years of voluntary medical benefit payments were made by the employer without controversy. This was followed by a conversation in which the employer's agent specifically advised plaintiff as to the nonapplication of Workers' Compensation to cover future surgery on his *hand* but in that same conversation remained silent with regard to coverage of the proposed concurrent *shoulder* surgery, which surgery was the specific subject matter of the conversation. Thus, while acquiescing in the future date of that surgery, which was planned for a date beyond the statutory period, defendant undertook to advise plaintiff with regard to Workers' Compensation coverage in such a way that plaintiff was misled to his detriment. This occurred at a time when plaintiff still could have complied with the statutory requirements for filing. A reasonable person in plaintiff's position would have inferred from this conversation that his shoulder surgery would be covered. It is not necessary to show, and we do not imply, that defendant was specifically aware, at the time of the conversation, that the surgery would occur outside the statutory period or that defendant deliberately tried to mislead plaintiff as to the coverage. *Hamilton v. Hamilton, supra.*

The award of the Industrial Commission is

Affirmed.

Judges PHILLIPS and PARKER concur.

MARVIN JESSE HARRIS, PLAINTIFF v. SOUTHERN RAILWAY COMPANY, A VIRGINIA CORPORATION, DEFENDANT

No. 902SC85

(Filed 2 October 1990)

Railways § 2 (NCI3d)— action to relocate railroad crossing—no authority to order

The trial court erred by requiring defendant to construct and maintain a railway crossing on plaintiff's land at the location requested by plaintiff where plaintiff acquired a 116.65-acre parcel of land in 1983; the property was divided into western and eastern portions by defendant's railroad easement; plaintiff used the western portion for agricultural purposes and the eastern for residential development; the sole access from the eastern to the western portion was by crossing defendant's easement and railroad tracks using a 16-foot wide railroad crossing; there was another crossing which had not been used for decades; plaintiff requested that defendant upgrade and relocate the crossing in 1987; defendant refused unless plaintiff would abandon the existing crossing, bear the cost of construction, and agree to indemnify defendant and provide liability insurance for $2,000,000; plaintiff refused to indemnify or insure defendant and brought this action to obtain adequate access to his western property; plaintiff began developing the western property for residential purposes during the pendency of this action; and the trial court ordered defendant to construct and maintain the crossing at the location requested by plaintiff. The trial court had no authority under common or statutory law to direct defendant to move its railroad crossing to the location requested by plaintiff; defendant does have a duty to maintain crossings over existing private or public roads and plaintiff may bring an action against defendant to repair and upgrade the crossing. N.C.G.S. § 62-226, N.C.G.S. § 136-69, N.C.G.S. § 62-224.

Am Jur 2d, Railroads §§ 91-94, 97.

APPEAL by defendant from judgment entered 16 October 1989 by *Judge Thomas S. Watts* in BEAUFORT County Superior Court. Heard in the Court of Appeals 29 August 1990.

This appeal arises from plaintiff's claim filed 25 February 1988, seeking an order requiring defendant to relocate and construct a new railroad crossing on plaintiff's land. Trial began during the 9 October 1989 civil session in Beaufort County Superior Court. After arguments of counsel, a view of the premises as requested by the parties and consideration of other evidence, the trial court made findings of fact, conclusions of law and entered its order that defendant construct a new railroad crossing at the location requested by plaintiff. The trial court further ordered that plaintiff's claim for damages be severed and considered at a later term.

From this order, defendant appeals.

Carter, Archie & Hassell, by Sid Hassell, Jr., for plaintiff-appellee.

Ward and Smith, P.A., by John A. J. Ward, Donalt J. Eglinton and Cheryl A. Marteney, for defendant-appellant.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in requiring defendant to construct and maintain a new railroad crossing on plaintiff's land at the location requested by plaintiff. For the following reasons, we hold that the trial court erred.

The following facts are pertinent to this action. In 1983, plaintiff acquired by fee simple a parcel of land containing 116.65 acres, subject to defendant's easement. The property includes two tracts of land: the Wolfenden and Gurganus tracts. Defendant owns a strip of land in fee simple which divides the Gurganus tract. In addition, defendant owns an easement for a right-of-way in the Wolfenden tract. Defendant has been using its property and easement for railroad purposes continuously for over 90 years.

The eastern portion of plaintiff's property borders and fronts U.S. Highway 17. The western portion of plaintiff's property is separated from the eastern portion by defendant's railroad easement. Prior to this action, plaintiff used the western portion for agricultural purposes and the eastern portion for residential development.

The sole access from the eastern portion to the western portion has been by crossing defendant's easement and railroad tracks using an existing railroad crossing, approximately 16 feet wide,

located approximately 549 feet north of Maple Branch. Plaintiff has used this crossing since 1983. There is evidence of another crossing on the Wolfenden tract, but this crossing has not been in use for several decades.

In June 1987, plaintiff requested defendant to upgrade and relocate the crossing. Defendant refused unless plaintiff would abandon the existing crossing, bear the cost of construction, agree to indemnify defendant and provide liability insurance for defendant of $2,000,000.00. Plaintiff agreed to pay reasonable costs of construction and abandon the existing crossing, but refused to indemnify or insure defendant, and brought this action to obtain adequate access to the western portion of his property.

During the pendency of this action, plaintiff began developing the western portion of his property for residential purposes. The only access to the eastern portion of the property from the western portion is the existing crossing.

At trial, the trial court heard the arguments of the parties, reviewed the evidence and conducted a view of the crossing and property involved, and made findings of fact and conclusions of law accordingly. In its judgment, the trial court ordered defendant to construct and maintain a crossing at the location requested by plaintiff. Defendant argues that the evidence does not support the findings of fact and conclusions of law that defendant must construct and maintain a crossing at the location requested by plaintiff.

The question of the sufficiency of the evidence to support the trial court's findings of fact may be raised on appeal, and the appellate courts are bound by such findings so long as there is some evidence to support the findings even when there is evidence to support findings to the contrary. *Lyerly v. Malpass*, 82 N.C. App. 224, 346 S.E.2d 254 (1986), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 748 (1987). However, when the trial court's conclusions of law involve questions of law, the appellate courts may review these on appeal. *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973) (citation omitted); *Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E.2d 793 (1979).

The trial court made the following findings of fact and conclusions of law pertinent to this appeal:

FINDINGS OF FACT

9. At all times pertinent to this action access to that portion of Plaintiff's lands on the western side of Defendant's railway has been by an existing crossing sixteen feet wide over the railway lines 549.1 feet North of Maple Branch.

10. There is no written instrument establishing this crossing or setting forth the rights and duties of the parties with respect to it.

12. Prior to the filing of this lawsuit, the existing crossing was used for access to the westerly portion of Plaintiff's land. Subsequent to the filing of this lawsuit, without the consent of Defendant, vehicles, including automobiles or passenger vehicles of the persons now living on the westerly portion of Plaintiff's lands have used the existing crossing for access to the westerly portion of Plaintiff's lands.

15. On June 2, 1987, . . . , the Plaintiff requested that the crossing be relocated 304 feet to the north of its present location.

16. A map produced by Defendant at trial showed that there had been a crossing near the location of the proposed crossing at some time prior to 1915.

23. The grade crossings to the north and south of the Plaintiff's property are designated only by white "X" shaped wooden signs without lights, reflectors or mechanical arms.

24. The extension of Mary Street over the railroad track into the western parcel of the Plaintiff's property would be safer both to the Defendant and to persons travelling the road if the extension crosses the railroad track at the proposed crossing requested by the Plaintiff instead of turning onto Lynn Avenue then turning across Lot 6 of Block F of the subdivision then crossing at the existing crossing then travelling over the eastern portions of Lots 1, 2 and 3 of Block "J" to Mary Street extended as is presently being done. Use of the proposed crossing would also make Mary Street more likely to be accepted by the State into the public road system if in the future the other improvements required under the N.C. State Subdivision Manual are made.

25. Almost all of the lots in the eastern portion of the Plaintiff's property are occupied and it is not possible for the Plaintiff

to redesign Mary Street in order to safely use the existing crossing.

26. The existing crossing as presently constructed is not adequate for the safe passage of two way automobile traffic without regard to the adequacy of the approaches to it, based upon the "jury view" conducted by the undersigned at the request of both parties.

27. The construction of a crossing suitable for the passage of two way automobile traffic at the location requested by the Plaintiff would be safe for the travelling public and would not interfere with the normal operation of the Defendant's railroad.

CONCLUSIONS OF LAW

6. As the crossing is on the Defendant's right of way, only the Defendant has the right to enter upon track for the purposes of constructing and maintaining the crossing and the Defendant has a duty to construct and maintain a crossing at the location requested by Plaintiff.

We have reviewed the evidence of record and find that it supports the above findings of fact and that the findings, in turn, support the above conclusion of law, which is the subject of this appeal. We now turn to whether this conclusion of law is contrary to existing law in this state. For the following reasons, we hold that it is.

Defendant argues that plaintiff, as contended in the complaint, is not entitled to the new crossing under the cattle guard statute, N.C. Gen. Stat. § 62-226 (1989). Nor, according to the defendant, does the cartway statute apply. N.C. Gen. Stat. § 136-69 (1986). We agree and find these statutes inapplicable to the case before us.

Section 62-226 applies only to completely enclosed land and contemplates that the statute be utilized only for actions involving cattle guards or crossings. *See, e.g., Shepard v. R.R.*, 140 N.C. 391, 53 S.E. 137 (1906); *Hodges v. Railroad*, 105 N.C. 170, 10 S.E. 917 (1890). Section 136-69 applies only when a petitioner is seeking access to a public road, watercourse or railroad over the lands of *other* persons. *See Campbell v. Connor*, 77 N.C. App. 627, 335 S.E.2d 788 (1985), *aff'd*, 316 N.C. 548, 342 S.E.2d 391 (1986).

We have also reviewed N.C. Gen. Stat. § 62-224 (1989), and find that this statute applies exclusively to established roads and ways. The statute directs a railroad to construct its crossings and tracks "not to impede the passage or transportation of persons or property along the same." The statute places enforcement authority of this provision solely with the "governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets, or thoroughfares . . . ." N.C. Gen. Stat. § 62-224 (1989). We find no other statutes which either directly or indirectly grant the trial court authority to direct defendant to build a new crossing at a plaintiff's request.

As a general rule in most jurisdictions, a railroad company cannot be compelled to construct private crossings at its own expense for the benefit of landowners adjacent to the tracks, so long as the railroad held its right-of-way and laid its tracks prior to enactment of a statute (permitting such construction for a private crossing). 65 Am. Jur. 2d Railroads § 273 (1972). The justification for this rule is that such requirement is an unconstitutional taking of private property for a private use, without compensation. *Id.*

Further, we find no authority for this proposition under any common law theory. Plaintiff argues that under common law, he has the right as the "burdened" party to use his land in any manner, including directing defendant where to build its railroad crossing, so long as this use of the land does not interfere with defendant's right-of-way.

Plaintiff is correct that when a person's land is subject to an easement, he may use the land in any manner and for any purpose which does not interfere with the full and free use of the easement, including railroad easements. *See R.R. v. Manufacturing Co.*, 229 N.C. 695, 51 S.E.2d 301 (1948); J. Webster, *Real Estate Law in North Carolina* § 296 (1971). We find no authority, and plaintiff cites no authority, for the proposition that these rights include the right of a private citizen to direct a railroad as to the *location* of its crossings. Therefore, the trial court had no authority under the common law to direct defendant to move its railroad crossing to the location requested by plaintiff.

We note that defendant does have a duty to maintain crossings over *existing* private or public roads. *See Tate v. R.R.*, 168 N.C. 523, 84 S.E. 808 (1915). It is a well-established rule that a railroad has the duty, even in the absence of a statute, to keep its crossings

safe, whether the highway or street was built before or after the railroad. 65 Am. Jur. 2d §§ 270, 504 (1972).

In the case before us, there is evidence that the existing crossing is "not adequate for the safe passage of two way automobile traffic . . . ." If this is, in fact, the case, plaintiff may bring an action against defendant to repair and upgrade the existing crossing.

For the above reasons, we reverse the trial court's judgment of 16 October 1989.

Reversed.

Judges COZORT and DUNCAN concur.

SHERRY DANIELS PHEASANT, PLAINTIFF v. MATTHEW McKIBBEN, DEFENDANT

No. 9030DC1

(Filed 2 October 1990)

1. **Divorce and Alimony § 23 (NCI3d) — child custody — information as to child's address and residence — not provided — subject matter jurisdiction**

The trial court's failure to require full compliance with N.C.G.S. § 50A-9, which requires parties in a custody proceeding to file information including the child's past and present addresses and residences, did not defeat the court's subject matter jurisdiction. The purpose of requiring this information is to assist the court in deciding if it can assume jurisdiction; while the better practice is to require conformity with the provisions of the statute by the party seeking custody before undertaking a custody determination, the trial court here correctly exercised jurisdiction.

Am Jur 2d, Divorce and Separation §§ 963, 964.

2. **Divorce and Alimony § 26 (NCI3d) — child custody — Georgia decree — jurisdiction in North Carolina**

The trial court in a child custody action correctly determined that North Carolina was the home state, thereby meeting

one of the bases of jurisdiction under N.C.G.S. § 50A-3, where the children had resided in North Carolina for all but ten months of the two-year period prior to this action; the ten-month period when the children resided with defendant in Georgia was a temporary absence under the statutes; plaintiff states in her complaint that she resided in North Carolina for the entire period; there was sufficient evidence to enable the trial court to conclude that the children and one of the parents have a significant connection with the state; and there is "substantial evidence relevant to the children's present or future care, protection, training, and personal relationships" in North Carolina.

Am Jur 2d, Divorce and Separation § 1145.

Validity, construction, and application of Uniform Child Custody Jurisdiction Act. 96 ALR3d 968.

3. Divorce and Alimony § 26 (NCI3d)— child custody—Georgia decree—North Carolina jurisdiction

The North Carolina court did not err by assuming jurisdiction in a child custody action and modifying a Georgia decree even though there was no evidence that Georgia had declined to exercise jurisdiction where Georgia's version of the UCCJA conforms to North Carolina's version, the trial court correctly determined that North Carolina is the home state, the children and plaintiff had a significant connection to North Carolina, and there is substantial relevant evidence in North Carolina.

Am Jur 2d, Divorce and Separation § 1145.

Validity, construction, and application of Uniform Child Custody Jurisdiction Act. 96 ALR3d 968.

4. Rules of Civil Procedure § 60.1 (NCI3d)— child custody—motion alleging lack of subject matter jurisdiction—Rule 60 motion considered while appeal pending

The trial court did not err by denying plaintiff's motion under N.C.G.S. § 1A-1, Rule 60(b) alleging lack of subject matter jurisdiction where the trial court correctly exercised jurisdiction. A trial court may correctly consider a Rule 60(b) motion which is filed while an appeal is pending in order to indicate how it would rule were the appeal not pending.

Am Jur 2d, Appeal and Error § 352; Divorce and Separation § 968.

APPEAL by plaintiff from order entered 2 August 1989 by *Judge John J. Snow, Jr.*, in SWAIN County District Court. Heard in the Court of Appeals 24 August 1990.

Pursuant to an agreement incorporated into a divorce decree entered in Superior Court of Gwinnett County, Georgia, on 12 February 1987, plaintiff was granted permanent custody of the two minor children, and her husband was granted visitation. At the time of the decree, both plaintiff and defendant were residing in Georgia. In March 1987, plaintiff moved with the children to Cherokee, North Carolina, where she remarried.

In April 1988, defendant, while in North Carolina to pick up the children for a scheduled visitation, became aware of incidents of domestic violence between plaintiff and her husband. Defendant sought and was granted temporary custody by the Juvenile Court of Gwinnett County, Georgia, and the children moved to Georgia with the defendant. The order granting temporary custody was rescinded on 25 January 1989, and the children were returned to plaintiff in North Carolina.

Plaintiff filed this civil action on 16 March 1989 seeking modification of the order of the Georgia court to terminate or limit defendant's visitation privileges. Defendant counterclaimed seeking custody of the children. The case was heard on 27 July 1989 with the court granting the change of custody and directing modification of the 1987 Georgia decree by returning the children to Georgia.

From this order, plaintiff appeals.

A. Marshall Basinger, II, for plaintiff-appellant.

Matthew McKibben, defendant-appellee, pro se.

ORR, Judge.

The issue on appeal is whether the trial court erred in exercising subject matter jurisdiction to modify the Georgia custody decree granting custody to plaintiff pursuant to North Carolina's version of the Uniform Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. §§ 50A-1 to -25 (1989). For the reasons set forth below, we affirm the order of the trial court modifying the Georgia decree.

[1] In her first assignment of error, plaintiff argues that the defendant did not comply with the requirements of N.C. Gen. Stat. § 50A-9 and that plaintiff only partially complied, such that the

trial court erred in exercising jurisdiction. N.C. Gen. Stat. § 50A-9 provides in relevant part:

> (a) Every party in a custody proceeding in such party's first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:
>
> (1) Such party has participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the same child in this or any other state;
>
> (2) Such party has information of any custody proceeding concerning the child pending in a court of this or any other state; and
>
> (3) Such party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

The purpose of requiring that this information be filed under oath is to assist the court in deciding if it can assume jurisdiction. *Brewington v. Serrato*, 77 N.C. App. 726, 730, 336 S.E.2d 444, 447 (1985). In *Watson v. Watson*, 93 N.C. App. 315, 319, 377 S.E.2d 809, 811 (1989), the Court noted that "we recommend that it would be better practice for District Court judges to require conformity with the provisions of G.S. § 50A-9 by the parties seeking custody before undertaking a custody determination . . . ." However, the Court nevertheless affirmed the trial court's exercise of jurisdiction without first meeting the requirement of filing certain information under oath since "the question of subject matter jurisdiction ha[d] been tried and correctly determined below . . . ." *Id.* Similarly, here the trial court, as we determine below, correctly exercised jurisdiction; thus, we decline to accept plaintiff's argument that the failure to comply fully with the § 50A-9 requirements defeats the court's subject matter jurisdiction.

[2] In her second and third assignments of error, plaintiff argues that the jurisdictional requirements of N.C. Gen. Stat. § 50A-3 were not met, and thus the trial court erred in exercising jurisdiction. The relevant sections of § 50A-3 provide:

(a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State (i) is the home state of the child at the time of commencement of the proceeding . . .; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; . . . .

"Home state" is defined as:

the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months . . . . Periods of temporary absence of any of the named persons are counted as part of the six-month or other period; . . . .

N.C. Gen. Stat. § 50A-2(5) (1989).

The trial court states as a finding of fact and concludes as a matter of law that North Carolina is the "home state" of the children and plaintiff. Plaintiff in her verified complaint alleges that "the said minor children have lived with the Plaintiff in the state of North Carolina for a period of more than six (6) consecutive months immediately preceding the commencement of this action and the state of North Carolina is the home state of said minor children at the time of the commencement of this action." Now plaintiff contends that her allegation that North Carolina is the "home state," which defendant admitted in his answer, and that the children lived here for six consecutive months, which the defendant denied, was erroneous. She notes that defendant alleged and the trial court found that the children resided with defendant in Georgia from April 1988 until 25 January 1989 pursuant to the Georgia temporary custody decree.

Plaintiff now argues that North Carolina is therefore not the "home state" of the children. However, the trial court found that plaintiff's allegations were supported by evidence at trial. Generally, on appeal a trial court's findings of fact are binding as long

as the findings are supported by competent evidence. *Matthews v. Prince*, 90 N.C. App. 541, 369 S.E.2d 116 (1988); *Hart v. Hart*, 74 N.C. App. 1, 327 S.E.2d 631 (1985). The children had lived in North Carolina continuously from March 1987 until March 1989 when this action was filed except for the ten-month period during which the children resided with defendant in Georgia pursuant to the Georgia temporary custody decree. Under N.C. Gen. Stat. § 50A-2(5), "periods of temporary absence of any of the named persons are counted as part of the six-month . . . period." The period during which the children resided in Georgia pursuant to the temporary custody decree was a period of "temporary absence," and thus the six-month requirement was met.

Further, the plaintiff in her complaint states that she resided in North Carolina for the entire period. Therefore, the trial court correctly determined that North Carolina was the home state, thereby meeting one of the bases of jurisdiction over this child custody action under § 50A-3.

Alternatively, the trial court concluded as a matter of law that there were "substantial and significant connections between the children and North Carolina." There was sufficient evidence to enable the trial court to conclude that the children and one of the parents have a "significant connection with this State" and that there is "substantial evidence relevant to the child[ren]'s present or future care, protection, training, and personal relationships" under N.C. Gen. Stat. § 50A-3(a)(2)(i)-(ii). The trial court found that the children had resided in North Carolina for all but ten months of the two-year period prior to this action and that plaintiff resided in North Carolina for the entire period. Thus, the children and plaintiff had a "significant connection" with North Carolina, and there was substantial evidence regarding the children's "present or future care, protection, training, and personal relationships" in North Carolina.

[3] In her fourth assignment of error, plaintiff contends that Georgia had continuing jurisdiction, and thus the trial court erred in exercising jurisdiction. The requirements for the modification of a custody decree issued by another state are:

> (a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under

jurisdictional prerequisites substantially in accordance with this Chapter or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

N.C. Gen. Stat. § 50A-14 (1989).

The threshold issue under N.C. Gen. Stat. § 50A-14 is whether Georgia declined to exercise jurisdiction or "does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Chapter." *See Brewington*, 77 N.C. App. at 729, 336 S.E.2d at 446. There is no evidence in the record indicating that Georgia has declined to exercise jurisdiction. As to whether Georgia has jurisdiction "under jurisdictional prerequisites substantially in accordance with" North Carolina's version of the UCCJA, we note that Georgia's version of the UCCJA conforms to North Carolina's version. *See* Ga. Code Ann. § 19-9-43 (1982). We conclude above that the trial court correctly determined that North Carolina and not Georgia is the "home state." Alternatively, we conclude that the trial court correctly determined that the children and plaintiff have a "significant connection" to North Carolina and there is "substantial evidence relevant . . ." in North Carolina. Thus, the trial court did not err in assuming jurisdiction and modifying the Georgia decree.

[4] In her final assignments of error, plaintiff contends that the trial court erred in its ruling on plaintiff's motion filed 6 October 1989 pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (1983), alleging the trial court's lack of subject matter jurisdiction. A trial court may consider a Rule 60(b) motion which is filed though an appeal is pending in order to indicate how it would rule on the motion were the appeal not pending. *Bell v. Martin*, 43 N.C. App. 134, 258 S.E.2d 403 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980). We have previously concluded that the trial court correctly exercised subject matter jurisdiction; thus, there was no error regarding the Rule 60(b) determination.

In summary, we conclude that the trial court correctly exercised subject matter jurisdiction in modifying the child custody decree. Therefore, the order of the trial court is affirmed.

Affirmed.

Judges COZORT and DUNCAN concur.

HELEN K. HAZELWOOD v. LANDMARK BUILDERS, INC.

No. 9018SC330

(Filed 2 October 1990)

Master and Servant § 19 (NCI3d) — subcontractor's employee — fall from ladder — creation of dangerous condition by general contractor's employees

Plaintiff's evidence was sufficient to support an inference that defendant general contractor's employees negligently created a dangerous condition which caused plaintiff, a subcontractor's employee, to fall from a ladder at a construction site where it would permit the jury to find that plaintiff had been working on the roof of a building at the site; plaintiff used an aluminum ladder to get to the roof; the top of the ladder had been placed between ribs of the roof; while defendant was away from the building to obtain construction materials, defendant's employees installed guttering between the roof's edge and the top of the ladder; this guttering prevented the ladder from fitting securely between the ribs of the roof; plaintiff was unaware that the ladder had been moved during her absence and was not warned of its new position; plaintiff could not see where the top of the ladder was positioned before she began climbing toward the roof; and when plaintiff began to step from the ladder onto the roof, the ladder slid, causing plaintiff to lose her balance and fall to the ground.

Am Jur 2d, Master and Servant § 397; Premises Liability §§ 141, 457.

APPEAL by plaintiff from *Albright (W. Douglas), Judge*. Judgment entered 2 November 1989 in Superior Court, GUILFORD County. Heard in the Court of Appeals 19 September 1990.

This is a civil action wherein plaintiff seeks to recover damages for personal injury sustained as a result of a fall from a ladder on a construction site on 18 July 1985. On the date of the injury, plaintiff was employed by Quality Plastening, Inc., a subcontractor of Shields, Inc., who in turn was a subcontractor of defendant, Landmark Builders, Inc. At the close of plaintiff's evidence, an order allowing defendant's motion for directed verdict was entered. From the order and judgment granting defendant's motion for directed verdict, plaintiff appealed.

The evidence presented at trial tends to show the following: On the day of the accident, plaintiff and a co-worker, her sister, were replacing styrofoam on a wall near the roof line of one building on the construction site. They were using an aluminum ladder fifteen or sixteen feet long and about seventeen inches wide. They seated the ladder on red clay ground and rested the top against the edge of the brown, slanted roof. The roof had "ribs" about two inches tall spaced about twenty inches apart. The top of the ladder was placed between two of these ribs.

Plaintiff and her co-worker climbed the ladder to the roof and worked on the wall from the roof for an hour or two before descending to take a break. After the break, they both climbed back up to the roof. At that time, the ladder was still securely placed between two ribs. A few minutes later, plaintiff climbed down the ladder to get more adhesive from a building three or four hundred yards away.

Plaintiff and another employee of Quality Plastening, Inc., Tommy Hazelwood, returned twenty or thirty minutes later with a full bucket of adhesive. While Mr. Hazelwood removed the bucket of adhesive from his truck, plaintiff climbed the ladder. She testified that the ladder did not look or feel any different to her than the first two times she had ascended. However, when she reached the top of the ladder and began to step onto the roof, the ladder slid to her right causing her to lose her balance. Plaintiff fell twelve to fifteen feet, hitting her foot on the way down and landing on her lower back. She testified that she could not see where the top of the ladder was positioned before she began climbing and, at the time of the fall, could not tell why it slid. The roof, guttering, and flashing were brown.

Tommy Hazelwood testified that he had seen the ladder positioned between the ribs on the roof earlier that morning. As he was walking toward the building with the bucket of adhesive, he saw plaintiff start up the ladder. Plaintiff was stepping onto the roof, with one foot on the ladder and one foot off, when the ladder slid to the right and fell to the ground. Plaintiff fell to the left. Mr. Hazelwood stated that he noticed after the fall that guttering had been installed underneath the top of the ladder since earlier that morning. He also stated that defendant's employees had been installing guttering and flashing along the edge of the roof earlier that morning, working from left to right. Mr. Hazelwood, plaintiff,

and her co-worker all testified that defendant's employees had been working on the left side of the ladder prior to the accident, and after the fall, defendant's employees and equipment were on the right side of the ladder. Mr. Hazelwood also testified that the top of the ladder could not be seated between the roof's ribs after the gutter was installed.

Plaintiff's co-worker, who stayed on the roof while plaintiff went for adhesive, did not hear or see anyone move the ladder.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for plaintiff, appellant.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Clayton M. Custer, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff contends that the trial court erred in granting a directed verdict for defendant. She argues that a reasonable inference from the uncontradicted evidence is that defendant's employees negligently created a dangerous condition which caused injury to plaintiff. We agree.

In determining a motion for directed verdict under G.S. 1A-1, Rule 50(a), the evidence must be reviewed in the light most favorable to the non-moving party. The non-moving party, in this case, plaintiff, should be given the benefit of every reasonable inference that may be drawn. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). Additionally, the burden on the moving party is especially significant in cases involving issues of negligence and contributory negligence.

> Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case (citations omitted). Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury (citations omitted).

Taylor v. Walker, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987).

Defendant argues first that there was insufficient circumstantial evidence that its employees moved the ladder to submit the case to the jury. Defendant maintains that the allegation that its

employees moved the ladder is "mere conjecture" and, in any case, there is "no evidence that the ladder resting against a gutter (rather than against a metal roof) proximately caused plaintiff to fall." However, at least three witnesses testified that Landmark employees were installing gutters and flashing along the roof's edge earlier that morning and that these employees and their equipment had been on the left side of the ladder before the accident and on the right side afterward. Additionally, one witness stated that he saw the ladder slide along the gutter and that the gutter would have prevented the ladder from fitting securely between the two-inch ribs on the roof. A reasonable inference to be drawn from this testimony is that the gutter had been interposed between the roof's edge and the top of the ladder sometime before the accident. The evidence presented by plaintiff indicated that Landmark employees, in the course of installing the gutters and flashing, must have lifted the top of the ladder from its secure resting place between the roof's ribs and set it precariously against the newly installed gutter. Plaintiff was unaware that the ladder had been moved during her twenty to thirty minute absence and was not warned of its new position.

A motion for directed verdict questions the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Manganello*, 291 N.C. 666, 231 S.E.2d 678; *See also U.S. Helicopters, Inc. v. Black*, 318 N.C. 268, 347 S.E.2d 431 (1986). In the case *sub judice*, the witnesses' testimony, along with the undisputed fact that Landmark Builders, Inc. was responsible for installation of guttering and flashing, when given the benefit of every favorable inference, is sufficient to take the case to the jury and support a verdict for plaintiff.

Defendant also maintains "[e]ven if plaintiff is permitted the inference that Landmark moved her ladder and left it against the gutter, there was no negligence because Landmark owed no general duty to the plaintiff to provide a safe place to work and the ladder was an open and obvious condition." While it is true, as defendant contends, that as a general contractor it did not have a duty to provide the employees of a subcontractor with a safe place to work, defendant did owe plaintiff and all others working on the premises the duty of exercising ordinary care.

Finally, defendant argues in his brief that even if the evidence was sufficient to take the case to the jury as to defendant's

negligence, the evidence discloses plaintiff's contributory negligence as a matter of law. The question of plaintiff's contributory negligence, like that of defendant's negligence, is clearly for the jury to determine.

The judgment directing a verdict for defendant is reversed, and the cause is remanded to Superior Court, Guilford County for a new trial.

New trial.

Judges ARNOLD and PHILLIPS concur.

KAY CHANDLER NAPIER AND BENNETT EDWARD NAPIER, II v. HIGH POINT BANK & TRUST COMPANY, INDIVIDUALLY AND AS ADMINISTRATOR CTA OF THE ESTATE OF MARY BLANKENSHIP CLODFELTER, DECEASED; AND HENRY HAZEL CLODFELTER

No. 9018SC47

(Filed 2 October 1990)

1. Banks and Other Financial Institutions § 55 (NCI4th)— certificate of deposit—joint tenants—no right of survivorship

Funds represented by a certificate of deposit were not held as joint tenants with right of survivorship where defendant did not contend that he signed anything when the certificate of deposit was purchased, but relied on the fact that the money used to purchase the certificate had been withdrawn from a survivorship account with another bank, Wachovia Bank and Trust Company. That signature card refers to the Wachovia account and was not a sufficient separate instrument as contemplated by the statute to govern those funds after they were withdrawn and used to purchase the High Point Bank certificate. It was noted that the General Assembly has provided for alternative methods of creating rights of survivorship in joint accounts effective 1 July 1989. N.C.G.S. § 53-146.1. N.C.G.S. § 41-2.1(a).

Am Jur 2d, Banks §§ 369, 372, 385.

Creation of joint savings account or savings certificate as gift to survivor. 43 ALR3d 971.

2. Banks and Other Financial Institutions § 55 (NCI4th)— certificate of deposit—joint account—prior ownership

Funds held jointly in a certificate of deposit did not belong wholly to defendant, the survivor, where defendant claimed that the funds were his because they were his before they were deposited. Nothing else appearing, money deposited in the bank to the joint credit of two people is presumed to belong one-half to each.

Am Jur 2d, Banks § 377.

Creation of joint savings account or savings certificate as gift to survivor. 43 ALR3d 971.

APPEAL by defendant Clodfelter from judgment entered 9 November 1989 in GUILFORD County Superior Court by *Judge Lester P. Martin.* Heard in the Court of Appeals 28 August 1990.

Defendant Clodfelter's wife died, devising the bulk of her estate to plaintiffs. Defendant filed a dissent from this will, and applied for a widower's year's allowance. An agreement was signed between defendant Clodfelter, plaintiffs, and defendant Bank as Administrator purporting to settle all claims of the parties.

Plaintiffs filed a declaratory judgment action against defendant Bank seeking the return of certain moneys claimed to have been wrongfully distributed from the estate to defendant Clodfelter. Defendant Bank answered, denying that it had distributed the money claimed, and praying that defendant Clodfelter be joined as a party defendant, and that defendant and plaintiffs be ordered to interplead their claims to the sum in dispute.

The money in question consisted of one-half of the funds in two joint accounts held in the name of defendant Clodfelter and the decedent. Defendant Clodfelter claimed that both accounts were survivorship accounts, and that even if they were not, he was entitled to the funds based on his ownership of them before they were deposited in the accounts. Plaintiffs denied that the accounts were joint with right of survivorship, and claimed that the settlement agreement barred defendant Clodfelter from asserting any other claim to the funds.

Summary judgment was entered 9 November 1989 in defendant Clodfelter's favor as to one of the accounts, the trial court declaring that the funds in that account had been held by defendant

and decedent as joint tenants with right of survivorship. Neither side appealed this part of the order.

Summary judgment was entered in plaintiffs' favor as to the other account (a certificate of deposit issued by defendant Bank). The court declared that the funds represented by this certificate of deposit had not been held as joint tenants with right of survivorship, and that the estate was entitled to half. Defendant Clodfelter appeals. Defendant Bank has filed an appeal in order to protect its position as the stakeholder, but has assigned no error and advanced no position other than its desire to distribute the funds in compliance with the law.

McNairy, Clifford, Clendenin & Parks, by R. Walton McNairy, and James Dale Shepherd for plaintiff-appellees.

Wyatt, Early, Harris, Wheeler & Hauser, by William E. Wheeler, for defendant-appellant Henry Hazel Clodfelter.

Hugh C. Bennett, Jr. for defendant-appellant High Point Bank & Trust Co., Administrator, CTA, of the estate of Mary Blankenship Clodfelter, Deceased.

Keziah, Gates & Samet, by Jan H. Samet, for defendant-appellant High Point Bank & Trust Company, Individually.

WELLS, Judge.

When a motion for summary judgment is granted, "the critical questions for determination upon appeal are whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E.2d 399 (1980), *cert. denied*, 276 S.E.2d 283 (1981). Defendant Clodfelter assigns error to the court's entry of summary judgment in favor of plaintiffs instead of him regarding the ownership of the funds represented by the High Point Bank certificate of deposit. Alternatively, defendant Clodfelter assigns error to the entry of summary judgment on the grounds that genuine issues of material fact exist regarding the settlement agreement. We affirm.

[1] In granting summary judgment in favor of plaintiffs, the court found:

> The funds represented by High Point Bank & Trust Company certificate of deposit number 016997 were not held by Henry

> Hazel Clodfelter and Mary B. Clodfelter as joint tenants with right of survivorship. As a result, at the death of Mary B. Clodfelter, one-half of those funds became the property of Henry Hazel Clodfelter and the remaining one-half became the property of the Estate of Mary B. Clodfelter. Plaintiffs' [sic] are entitled to judgment as a matter of law to that effect, and plaintiffs' [sic] are entitled to summary judgment to that extent.

Defendant Clodfelter's first claim is that the court erred in ruling that the funds represented by the High Point Bank certificate were not held by him and his wife as joint tenants with the right of survivorship. We disagree.

Parties who wish to create a right of survivorship in a joint bank account must comply with the requirements of N.C. Gen. Stat. § 41-2.1(a):

> A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors. . . when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

This statute applies to the purchase of certificates of deposit, and has been strictly construed. *See In re Estate of Heffner*, 99 N.C. App. 327, 392 S.E.2d 770 (1990).[1]

Defendant does not contend that he signed anything when the certificate of deposit was purchased. He relies on the fact that the money used to purchase the certificate had been withdrawn from a survivorship account with Wachovia Bank and Trust Company, and claims that the signature card from *that* account, which both he and his wife signed, constitutes a sufficient separate instrument to fall within the statute. Assuming *arguendo* that survivorship accounts may be established by methods other than the contemporaneous execution of a signature card, there must be some evidence, however, either on the face of the claimed agreement or the documents setting up the account that what is being put

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1. Effective 1 July 1989, the General Assembly has provided for alternative methods of creating rights of survivorship in joint accounts. *See* N.C.G.S. § 53-146.1 (Banks). G.S. § 54B-129 and G.S. § 54-109.58, dealing with survivorship rights in savings and loans and credit union accounts, have also been substantially revised.

forward as the survivorship agreement was intended to govern the particular account in question.

In *Threatte v. Threatte*, 59 N.C. App. 292, 296 S.E.2d 521 (1982), *disc. rev. withdrawn as improvidently granted*, 308 N.C. 384, 302 S.E.2d 226 (1983), plaintiff and intestate had purchased a money market savings certificate with intestate's funds. The signature card signed by both provided for survivorship rights. The certificate matured, and was renewed in a larger amount by purchase of a new certificate in intestate's name alone. This Court held that the funds were still held in a survivorship account at intestate's death, and belonged to plaintiff. The new certificate number had been placed in the upper right corner of the original signature card. This evidence, coupled with deposition testimony regarding intestate's intentions, supported the conclusion that the original signature card controlled the proceeds represented by the second certificate.

In this case, there is nothing on the face of the certificate or the signature card of the previous account to indicate that its provisions were intended to control the funds represented by the certificate. That signature card refers specifically to the Wachovia account. It is not a sufficient separate instrument as contemplated by the statute to govern those funds after they were withdrawn and used to purchase the High Point Bank certificate. The funds represented by this certificate were not held as joint tenants with right of survivorship.

[2] Defendant Clodfelter's next contention is that even if the funds were not held in a survivorship account, they belong to him since they were his before they were deposited. We see no merit to this contention. The certificate lists "H. H. Clodfelter or Mary B. Clodfelter" as depositors. Nothing else appearing, money deposited in the bank to the joint credit of two people is presumed to belong one-half to each. *McAulliffe v. Wilson*, 41 N.C. App. 117, 254 S.E.2d 547 (1979). Defendant Clodfelter seeks to rebut the presumption by claiming ownership of the funds. This theory of ownership is directly contrary to our holding in *Heffner, supra*, and we summarily reject it.

We hold that the forecast of evidence in this case established that Mary Clodfelter's estate was entitled to one-half of the proceeds of the High Point Bank certificate and that the estate was entitled to summary judgment on that issue.

The family settlement agreement is irrelevant to the disposition of this case. Defendant Clodfelter's second assignment of error is accordingly overruled.

Affirmed.

Judges EAGLES and LEWIS concur.

HUSSAIN MUDUSAR, AN INFANT WHO SUES BY AND THROUGH HIS GUARDIAN AD LITEM, QAMAR H. BALOCH, APPELLANT v. V. G. MURRAY & COMPANY, INC., APPELLEE v. NORTH CAROLINA STATE UNIVERSITY, THIRD-PARTY DEFENDANT

No. 9010SC175

(Filed 2 October 1990)

1. **Negligence § 50.1 (NCI3d)— injury to child—failure to install protective window screens—summary judgment for defendant**

Summary judgment was properly entered for defendant in an action to recover damages for injuries sustained by a child after falling from a second-story window in an apartment building where plaintiff alleged negligence in failing to install and maintain protective window screens. While a landlord may be held liable for breach of an express agreement to install or repair protective window screens, he or she has no common law duty to provide or maintain them.

Am Jur 2d, Landlord and Tenant §§ 915, 916, 919, 963.

2. **Landlord and Tenant § 8 (NCI3d)— failure to install protective window screens—no breach of implied warranty of habitability**

Summary judgment was properly granted for defendant in an action to recover damages for injuries sustained by a child after falling from a second-story window where plaintiff alleged breach of the implied warranty of habitability in that defendant failed to install protective window screens. The Raleigh City Housing Code outlines minimum requirements for making a dwelling fit and habitable and requires only that window screens be sufficient to protect against intrusion by insects. Both parties here acknowledge that screens were sufficient to keep insects from entering the dwelling and there

was therefore nothing about the window screens which made the premises unfit for habitation in violation of the statute. N.C.G.S. § 42-38.

Am Jur 2d, Landlord and Tenant §§ 768, 769, 771, 772; Premises Liability § 635.

APPEAL by plaintiff from *Bailey (James H. Pou), Judge.* Judgment entered 15 November 1989 in Superior Court, WAKE County. Heard in the Court of Appeals 19 September 1990.

This is a civil action wherein plaintiff, by and through his Guardian ad Litem, seeks to recover damages for injuries he sustained after falling from a second-story window in an apartment building managed by defendant and owned by third-party defendant. The record tends to show that on 20 September 1988, plaintiff, a young child, was playing in the bedroom of his parents' apartment. After climbing onto a table located directly beneath one of the bedroom windows, plaintiff, despite the presence of a window screen, fell through the window approximately twenty-five feet to the concrete below. Plaintiff subsequently filed a complaint alleging that his injuries were a direct and proximate result of defendant's negligence. Alternatively, the complaint alleged that defendant had breached its implied warranty of habitability and had created and maintained a private nuisance by failing to maintain protective window screens.

On 15 November 1989, the trial court entered an order allowing defendant's motion for summary judgment. Plaintiff appealed.

LeBoeuf, Lamb, Leiby & MacRae, by Jane Flowers Finch and Douglas J. Tate, for plaintiff, appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Donna Renfrow Rutala, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff's sole argument on appeal is that the trial court erred by allowing defendant's motion for summary judgment. He claims there was a genuine issue "as to whether V. G. Murray breached the standard of care to keep the premises fit and habitable."

It is well settled that summary judgment is appropriate only where there exists no genuine issue of material fact so that the

moving party is entitled to judgment as a matter of law. *Frye v. Arrington*, 58 N.C. App. 180, 292 S.E.2d 772 (1982). However, where the pleadings or proof disclose that no cause of action exists, there can be no genuine issue of material fact, and therefore summary judgment may be granted. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

[1] Whether a landlord can be held liable, under a theory of negligence or private nuisance, for failing to install and maintain protective window screens appears to be a question of first impression before this Court. We therefore look for guidance to other jurisdictions which have already addressed this issue. At least one jurisdiction has determined that a landlord may be held liable when a person is injured by falling through a window with an improperly installed or missing screen. *See Lamkin v. Towner*, 190 Ill. App. 3d 631, 546 N.E.2d 1020 (1989). Nevertheless, a number of other jurisdictions dealing with this question have refused to require a landlord, absent some specific agreement or covenant to repair, to install and maintain protective window screens:

> In cases involving injuries, usually to children of tender years, arising from falling through [windows with] defectively installed or absent screens, it has been generally held that no tort liability attaches to the landlord. In the majority of these cases, the rationale of the decisions denying liability proceeded on a determination of the absence of any duty of the landlord to the tenant either to install or repair screens in a fashion to prevent individuals or children from falling through.

Riley v. Cincinnati Metropolitan Housing Authority, 36 Ohio App. 2d 44, 47, 301 N.E.2d 884, 887 (1973). We believe the rule stated in *Riley* should apply in the present case. While a landlord may be held liable for breach of an express agreement to install or repair protective window screens, he or she has no common law duty to provide or maintain them. In the absence of such an express agreement owed to plaintiff, the pleadings and proof do not state a cause of action for negligence or private nuisance.

[2] Plaintiff's complaint also alleges that the condition of the screens in the apartment amounted to a breach by defendant of its implied warranty of habitability in violation of the North Carolina Residential Rental Agreement Act. G.S. § 42-38 *et seq.* Plaintiff contends that defendant's failure to install protective screens created a genuine issue as to whether, under the statute, the apartment was

fit for habitation. However, the Raleigh City Housing Code, pursuant to authority granted in the Residential Rental Agreement Act, outlines the minimum requirements for making a dwelling fit and habitable. With respect to window screens, Section 10-6122(3)(a) of the Code requires only that they be sufficient to protect against intrusion by insects. Since both parties acknowledge that the screens were sufficient to keep insects from entering the dwelling, we conclude there was nothing about the window screens which made the premises unfit for habitation in violation of the statute.

For the reasons stated herein, we hold the trial judge properly allowed defendant's motion for summary judgment. The judgment of the trial court is affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

SYLVIA BENFIELD STEGALL v. ERNEST WILLIAM STEGALL

No. 8922DC1090

(Filed 16 October 1990)

1. Husband and Wife § 12 (NCI3d)— separation agreement— duress and coercion

Summary judgment for defendant refusing to set aside a 1988 separation agreement due to duress and coercion was improper where both parties submitted affidavits, plaintiff stating that she was forced to sign the agreement under duress and coercion, and defendant denying that allegation. Taking plaintiff's affidavit as true, there is a genuine issue of material fact; furthermore, trial courts should use considerable care when examining whether both parties freely entered into a separation agreement because contracts between husbands and wives are special agreements.

Am Jur 2d, Divorce and Separation § 836.

2. Husband and Wife § 12 (NCI3d)— separation agreement— modification by subsequent agreement

A 1983 separation agreement was modified by a 1988 separation agreement (if the 1988 agreement was not invalid due to duress and coercion) where the language of the 1988 agreement clearly and unambiguously established that the parties' intention was to fully dispose of their respective property rights.

Am Jur 2d, Divorce and Separation § 842.

3. Husband and Wife § 10.1 (NCI3d)— separation agreement— reconciliation— enforceability of property settlement provisions

Summary judgment for defendant was reversed where plaintiff and defendant had separated and entered into a separation agreement in 1983; reconciled and resumed marital relations; separated again in 1987; entered into a second separation agreement in 1988; plaintiff alleged that the 1988 separation agreement was invalid due to duress and coercion; and defendant's answer claimed that the 1983 agreement barred plaintiff's action and determined the rights of the parties. Although defendant contended that the property provisions of the 1983 agreement were still in effect even if the reconciliation voided the marital/support provisions of the agreement, the 1983 agreement was clearly a separation agreement and any executory provisions of the 1983 agreement were terminated upon the parties' reconciliation. It is for the trier of fact to determine if the conduct of the parties substantially defeated the purpose of the 1983 agreement; if so, then even the executed provisions of that agreement are void. *Buffington v. Buffington*, 69 N.C. App. 483, and *In re Estate of Tucci*, 94 N.C. App. 428, were criticized and distinguished.

Am Jur 2d, Divorce and Separation §§ 852-855.

APPEAL by plaintiff from judgment entered 21 June 1989 by *Judge James J. Booker* in IREDELL County Superior Court. Heard in the Court of Appeals 1 May 1990.

According to plaintiff's affidavit, she and defendant were married on 17 November 1979. On 18 April 1983, they separated. On 18 May 1983, they entered into a separation agreement. In June 1983, plaintiff and defendant resumed their marital relationship.

Plaintiff moved back into the marital home. They resumed their sexual relationship, had joint bank accounts, took vacations together, shared all of their property and income, and filed joint tax returns. In September 1987, plaintiff and defendant separated again. On 23 February 1988, they entered into a second separation agreement.

On 9 January 1989, plaintiff filed a complaint (1) alleging that the February 1988 separation agreement was invalid due to duress and coercion and (2) requesting that the agreement be set aside. Defendant filed a motion to dismiss and answer claiming that the May 1983 separation agreement (1) barred plaintiff's action and (2) that it determined the rights of the parties. Defendant filed a motion for summary judgment. Each party filed affidavits. The trial court granted summary judgment in favor of defendant. From this judgment, plaintiff appeals.

Harris, Pressly & Thomas, by Gary W. Thomas, for plaintiff appellant.

Tucker, Hicks, Hodge & Cranford, by John E. Hodge, Jr. and Fred A. Hicks, for defendant appellee.

ARNOLD, Judge.

This case concerns (1) the consequences of entering into a separation agreement under duress and coercion, (2) the legal ramifications of multiple separation agreements, and (3) the effect of reconciliation upon a separation agreement.

[1] The first question presented on appeal is whether the district court judge properly granted summary judgment barring plaintiff's action to have the 1988 separation agreement set aside due to duress and coercion. To answer this question we must first determine if there is a material issue of fact surrounding the circumstances under which plaintiff entered into the 1988 separation agreement. Defendant contends summary judgment was properly granted because the evidence raised no material issue of fact, but only a question of law: did plaintiff sign the separation agreement under duress and coercion.

Summary judgment is proper when there is no genuine issue as to any material fact. N.C.R. Civ. P., Rule 56(c). "It is a drastic remedy, not to be granted 'unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law.' " *Carlton v. Carlton*, 74 N.C.

App. 690, 691, 329 S.E.2d 682, 683 (1985) (citations omitted). The moving party has the burden to establish the lack of any triable issue of fact. *Id.*

In this case, each party submitted affidavits. Plaintiff's affidavit states that she was forced to sign the agreement under duress and coercion. Defendant denies this allegation. Taking plaintiff's affidavit as true, we find there is a genuine issue of material fact on the question of duress and coercion concerning the 1988 separation agreement.

Furthermore, when examining whether both parties freely entered into a separation agreement, trial courts should use considerable care because contracts between husbands and wives are special agreements.

> Courts have thrown a cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably. To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching.

Johnson v. Johnson, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984). "The relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable. . . . [A] separation agreement . . . must have been entered into without coercion. . . ." *Eubanks v. Eubanks*, 273 N.C. 189, 195-96, 159 S.E.2d 562, 567 (1968). "[A] court of equity will refuse to enforce a separation agreement, like any other contract, which is unconscionable or procured by duress, coercion or fraud." *Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985).

"Duress is the result of coercion." *Link v. Link*, 278 N.C. 181, 191, 179 S.E.2d 697, 703 (1971). "Duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Id.* at 194, 179 S.E.2d at 705 (citations omitted). "It may exist even though the victim is fully aware of all facts material to his or her decision." *Id.* at 191, 179 S.E.2d at 703.

Factors relevant in determining whether a victim's will was actually overcome include "the age, physical and mental condition of the victim, whether the victim had independent advice, whether

the transaction was fair, whether there was independent consideration for the transaction, the relationship of the victim and alleged perpetrator, the value of the item transferred compared with the total wealth of the victim, whether the perpetrator actively sought the transfer and whether the victim was in distress or an emergency situation." *Curl v. Key*, 64 N.C. App. 139, 142, 306 S.E.2d 818, 820 (1983), *reversed on other grounds*, 311 N.C. 259, 316 S.E.2d 272 (1984).

[2] The effect of the 1988 separation agreement upon the 1983 agreement is the second question presented. Any analysis of the construction and effect of a separation agreement will at least begin by applying the same rules used to interpret contracts generally. *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). When a separation agreement is in writing and free from ambiguity, its meaning and effect is a question of law for the court. *Id.* at 410, 200 S.E.2d at 624.

The 1988 separation agreement provides for the distribution of the parties' property. Neither party contends that the agreement is ambiguous or unclear. Specifically, the 1988 agreement contains an "Entire Agreement" provision which states: "[t]his agreement contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein." Also, the agreement states that its purpose is to provide "for a final settlement of all marital and property rights." In addition, the 1988 agreement makes no reference to the 1983 separation agreement. "It is a well-settled principle of legal construction that '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.' " *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (citation omitted). The language of the 1988 separation agreement clearly and unambiguously establishes that the parties' intention was to fully dispose of their respective property rights. Accordingly, we hold that the 1983 separation agreement has been modified by the subsequent 1988 separation agreement if the 1988 agreement is not declared invalid due to duress and coercion.

[3] Finally, the third question we must decide is whether the 1983 separation agreement is itself an enforceable contract in the event that the 1988 agreement is declared void. On this point defendant first argues that in determining the intended effects of

the 1983 separation agreement it is necessary to separate the property settlement provisions from the marital/support components of the separation agreement. It is his contention that even if the four-year reconciliation voided the marital/support provisions of the agreement, the property provisions of the document are still in effect. We disagree.

Defendant cites *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984), in support of his argument that the four-year reconciliation had no effect on the property provisions of the 1983 agreement. *Buffington*, however, does not apply here. Since *Buffington* was handed down in 1984, a fire storm of criticism has been leveled at this Court's improper interchange of the terms "separation agreement" and "property settlement" in that opinion. Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. Rev., Issue 2 (forthcoming publication, January 1991); Note, *Property Settlement or Separation Agreement: Perpetuating the Confusion—Buffington v. Buffington*, 63 N.C. L. Rev. 1166, 1173 (1985); Note, *Contractual Agreements as a Means of Avoiding Equitable Distribution—Buffington v. Buffington*, 21 Wake Forest L. Rev. 213, 233 (1985).

North Carolina courts have long recognized a distinction between separation agreements and property settlements. A "pure" separation agreement is a contract in which the husband and wife agree to live apart. Most separation agreements provide for support for the wife and custody and support for minor children. 2 R. Lee, *N.C. Family Law* § 187 (4th ed. 1980). The traditional view, and the one followed in North Carolina, is that separation agreements are void as against public policy unless the parties are living apart at the time the document is executed or they plan to separate shortly thereafter. Furthermore, reconciliation of the parties voids the executory provisions of a separation agreement. *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976). A "true" property settlement, on the other hand, involves the release and division of property and property interests between the parties. Lee, *supra*, at § 187; *see generally* Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. Rev. 819 (1981). Parties may enter into property settlements at any time, before, during or after marriage. N.C. Gen. Stat. § 50-20(d) (1987). Of course, in most separations the parties choose to resolve both their marital and property con-

siderations in one document, which leads to the situation we are faced with here, whether reconciliation has the same effect on the marital/support provisions of the agreement that it has on the property provisions in the same document. Specifically, while reconciliation may nullify the marital/support provisions of an agreement, does it also invalidate the property provisions of a separation agreement? Much of the confusion surrounding this issue can be traced to *Buffington*.

In 1981, the General Assembly enacted N.C. Gen. Stat. § 50-20(d), which provided that before, during, or after marriage the parties may provide by agreement for the distribution of their "marital property." In *Buffington*, a couple executed a separation agreement but then lived together for eighteen days. *Id.* at 484, 317 S.E.2d at 97. The wife later sought equitable distribution on the grounds that the cohabitation after execution rendered the agreement void. This Court held "the public policy of our state, as expressed by G.S. § 50-20(d), permits spouses to execute a *property settlement* at any time, regardless of whether they separate immediately thereafter or not." *Id.* at 488, 317 S.E.2d at 100 (emphasis added). This was a proper application of the law regarding property settlements before the enactment of G.S. § 50-20(d) and, we believe, a correct interpretation of the statute in light of its specific reference to "marital property." However, the *Buffington* Court also, and we think incorrectly, stated that "defendant cannot avoid her *separation agreement* solely on the grounds that she continued to live with the plaintiff for 18 days after the agreement was signed." *Id.* at 488, 317 S.E.2d at 100 (emphasis added). Perhaps, by this statement, the Court meant that despite the eighteen-day cohabitation period, separation of the parties was still imminent and thus the agreement still valid. Other language in the opinion, however, indicates that in *Buffington* the Court mistakenly interchanged the terms separation agreement and property settlement. *Id.* at 486-88, 317 S.E.2d at 98-100; *see* Sharp, *supra*, 69 N.C. L. Rev., Issue 2 (forthcoming); Note, *supra*, 63 N.C. L. Rev. at 1173; Note, *supra*, 21 Wake Forest L. Rev. at 233.

The misuse of these two terms threw into doubt the long-standing North Carolina rule that separation agreements are valid only if executed after the parties are separated or when separation is imminent. We do not believe that *Buffington* should be read to mean, or that the Legislature intended, that G.S. § 50-20(d) authorizes couples to execute separation agreements during mar-

riage. In our view, *Buffington* only stands for the proposition that G.S. § 50-20(d) allows parties to execute property settlements before, during or after marriage. If *Buffington* must be read in a broader context, it is only that separation agreements entered into while the parties are still living together but planning to separate may still be valid. *See Carlton*, 74 N.C. App. at 694, 329 S.E.2d at 685. *Buffington*, however, does not govern the effect *reconciliation* has on a separation agreement entered into while the parties are *separated*. In the case *sub judice*, the parties were separated when both separation agreements were executed, rendering defendant's reliance on *Buffington* inappropriate.

Because in the end *Buffington* is easily distinguishable from the case *sub judice* our view on that opinion's continued validity is not critical to a resolution of the matter before us. Nevertheless, our analysis is important because *Buffington* partially set the stage for the emergence of a rule that we believe conflicts with established principles of North Carolina law. In two opinions last year, this Court, in effect, held that the marital/support provisions of a separation agreement should be bifurcated from the property provisions of the same agreement for the purposes of determining the effects of reconciliation. *See Small v. Small*, 93 N.C. App. 614, 621, 379 S.E.2d 273, 277, *rev. denied*, 325 N.C. 273, 384 S.E.2d 579 (1989); *In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990).

In *Small*, the parties signed a post-nuptial agreement in which they waived alimony and released all rights in the real and personal property then owned and afterwards acquired by the other party. *Small*, 93 N.C. App. at 616, 379 S.E.2d at 274. The couple began experiencing marital difficulties so they executed a separation/property settlement agreement, which expressed their desire to live apart but also to continue to abide by the terms of the post-nuptial contract. *Id.* The parties had isolated sexual contacts shortly thereafter, but then executed a second separation agreement. Again, subsequent to the second separation agreement, the parties had isolated sexual contacts. Later the husband filed for divorce and the wife sought equitable distribution and alimony. *Id.* The husband argued that the wife's claims were barred by the post-nuptial contract and the second separation agreement. The trial court granted summary judgment for the husband and this Court affirmed. *Id.* at 627, 379 S.E.2d at 281.

In upholding the lower court, the Court in *Small* declared that the property settlement provisions should be severed from the remainder of the agreement and "analyzed with reference to those rules which pertain to property settlements rather than separation agreements." *Id.* at 622, 379 S.E.2d at 278. The Court stated that living separate and apart is an essential part of the consideration supporting a separation contract, and if that consideration fails, the contract is void and unenforceable. It is for this reason, the Court noted, that a property settlement is not normally affected by a resumption of marital relations because it deals with property and not support rights, so that living apart furnishes no part of the consideration for the agreement. *Id.* at 625-26, 379 S.E.2d at 280.

While this rationale obviously applies when the agreement involved is a *pure* property settlement, when the agreement is a separation contract where the property provisions and the marital/support provisions are negotiated as "reciprocal consideration" for each other, such logic not only creates inequitable results but also runs contrary to precedent. In our view, *Small* and the later opinion, *Tucci*, advocate a position which fails to recognize that provisions of a separation agreement labeled support may, and often do, constitute reciprocal consideration for property provisions in the same agreement. In such an agreement, the provisions are so interdependent that the execution of one portion of the agreement requires the execution of the other part. Conversely, if one section of the agreement fails or is declared invalid—for example, if the support provisions of an agreement are terminated because the parties reconcile—other provisions of the agreement negotiated with that support provision in mind, in fairness must also fail.

Professor Sally Sharp, perhaps the leading commentator on domestic law in North Carolina, recently wrote, "[t]he assumption that the 'separation agreement' portions and 'property division' portions of a single agreement can be severed from one another is contradicted by common sense, common experience, and—most critically—by the still viable concept of reciprocal consideration." Sharp, *supra*, 69 N.C. L. Rev., Issue 2 (forthcoming). In a recent article discussing this topic, Professor Sharp quotes Professor Homer Clark, "the leading commentator on domestic law in the nation," who has written:

> A property settlement is just that portion of the separation agreement dealing with the property of the spouses. The divi-

> sion of property bears a close relation to the agreement concerning alimony, so that . . . [i]t is therefore both misleading and unhelpful to talk as if there were two different kinds of agreement and as if the impact of reconciliation upon one should be different from the impact on the other. Specious distinction of this kind ought to be abandoned . . . .

Id. (quoting 2 Clark, *The Law of Domestic Relations in the United States, Practitioner's Edition* § 19.7 (2d ed. 1987)).

Two months after *Small, In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 was issued. In *Tucci*, the parties executed a separation/property settlement agreement in November 1983, reconciled the next month and lived together until September 1985. *Id.* at 429-30, 380 S.E.2d at 783. Mrs. Tucci died in March 1986, and Mr. Tucci filed a notice of dissent from his wife's will. A clerk of superior court concluded that the separation agreement had been rescinded by the reconciliation and the superior court affirmed this decision. *Id.* at 432, 380 S.E.2d at 784. First, this Court somewhat rashly concluded that the statutory right to dissent was a property right separate and apart from any support duty. Then, in reversing the trial court, it held, "[t]he mere fact the Tuccis reconciled is not inconsistent with the property settlement provisions of this Agreement under these circumstances and therefore did not impliedly rescind Mr. Tucci's release of his right to dissent." *Tucci*, 94 N.C. App. at 438, 380 S.E.2d at 788. The opinion emphasizes that trial courts must recognize the differing effect of reconciliation on the individual provisions of a single agreement which combines a separation agreement with a property settlement. *Id.*

In attempting to establish this "severance" rule, *Tucci* relies heavily on *Small*, and both opinions rely on two earlier cases, *Jones v. Lewis*, 243 N.C. 259, 90 S.E.2d 547 (1955), and *Love v. Mewborn*, 79 N.C. App. 465, 339 S.E.2d 487 (1986), and on the claim that a prior opinion by this Court, *Carlton v. Carlton*, 74 N.C. App. 690, 329 S.E.2d 682, which conflicts with the results reached in *Tucci* and *Small*, has been "superseded" by a subsequent North Carolina Supreme Court opinion. *Tucci*, 94 N.C. App. at 439, 380 S.E.2d at 788.

In *Jones*, the parties executed a separation agreement in which the wife conveyed an interest in realty to the husband. The conveyance was executed and the parties subsequently reconciled for

one night. *Jones*, 243 N.C. at 260, 90 S.E.2d at 549. The wife later claimed an interest in the realty, arguing that their reconciliation invalidated the agreement, but the Court refused this argument. *Id.* at 262, 90 S.E.2d at 550. The Court in *Small*, however, virtually ignores the holding in *Jones* and focuses instead on dicta in the opinion that lends support to its severance rule. *Small* states, "[t]hus, under *Jones* the resumption of relations does not necessarily rescind a property settlement 'which might with equal propriety have been made had no separation been contemplated . . . .'" *Small*, 93 N.C. App. at 625, 379 S.E.2d at 280 (quoting *Jones*, 243 N.C. at 261, 90 S.E.2d at 549). Despite this language, it is clear that the holding in *Jones* rests on the principle that reconciliation invalidates the executory provisions of a separation agreement, and that invalidation will occur *regardless* of whether the provisions in dispute are support or property provisions. Specifically, *Jones* held:

> It is well settled in this State that a conveyance from one spouse to the other of an interest in an estate held by the entireties is valid as an estoppel. . . . We concur in the ruling of the court below to the effect that the conveyance from the petitioner . . . was in all respects regular, having been executed in conformity with the laws of this State at the time of the execution thereof, and that she is estopped to deny the title of the respondent. . . .

Jones, 243 N.C. at 262, 90 S.E.2d at 550. The holding is based on the fact that prior to the reconciliation the conveyance of land had been executed, not on whether the provision of the separation agreement in dispute was a property provision as opposed to a support provision.

The second opinion, *Tucci*, pushed the severance rule one step further. It held that in determining what effect reconciliation has on a property provision of a separation agreement, "[i]t is immaterial whether Mr. Tucci's release was executory at the time the Tuccis reconciled." *Tucci*, 94 N.C. App. at 437, 380 S.E.2d at 787. In effect, *Tucci* holds that executory provisions, like executed provisions of a separation agreement, are unaffected by the reconciliation of the parties. As we noted above, *Tucci* relies heavily on *Small*, which cited *Jones* as support. But *Jones* is unequivocal, providing, "[i]t is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is ter-

minated for every purpose insofar as it remains executory." *Jones*, 243 N.C. at 261, 90 S.E.2d at 549. *Tucci* avoids this language in *Jones* by relying on the premise from *Small* that the property provisions of a separation agreement should be severed from the remainder of the agreement and analyzed as if they were part of a pure property settlement. But it is simply incorrect for *Tucci* to rely on *Jones* for its proposition that executory provisions are not rescinded by a reconciliation because the dispute in *Jones* involved an *executed* realty provision.

Tucci also relies on *Love v. Mewborn*, 79 N.C. App. 465, 339 S.E.2d 487, to advance the position that reconciliation does not affect executory provisions of a separation agreement. In *Love*, the parties executed a separation agreement that required the husband to pay the wife $800.00 per month in "alimony" for ten years. *Id.* at 465-66, 339 S.E.2d at 488. The parties briefly reconciled and the husband stopped making the payments. When the wife brought an action against him, the husband argued, in effect, that his executory duty to make the alimony payments had been terminated by the reconciliation. *Id.* at 466, 339 S.E.2d at 488. The trial court, however, correctly ordered the husband to pay the money, and this Court affirmed. *Id.* at 468, 339 S.E.2d at 489.

Although, technically the payments were executory, it was clear in *Love* that the husband's agreement to make the payments was reciprocal consideration for the wife giving up her right to certain marital property. The wife had performed, that is she had executed her half of the bargain by giving up the property, but the husband's performance had remained unfulfilled. Thus, the Court required him to execute his half of the agreement—a technically executory provision. *Tucci* mistakenly characterizes the husband's payments in *Love* as "executory," and then cites the opinion as support for its position that reconciliation does not affect executory provisions of a separation agreement. *Tucci*, 94 N.C. App. at 438, 380 S.E.2d at 788. However, a spouse cannot change an executed provision into an executory provision simply by avoiding compliance with the executed agreement. *Whitt v. Whitt*, 32 N.C. App. 125, 130, 230 S.E.2d 793, 796 (1977). "In the context of an integrated [separation] agreement, part of which has been executed, the label 'executory' simply has no meaning to which any substantive consequence should attach." Sharp, *supra*, 69 N.C. L. Rev., Issue 2 (forthcoming). *Love* simply cannot stand for the premise, as *Tucci* suggests, that reconciliation has no effect on the executory provision

of a separation agreement. *See Tucci*, 94 N.C. App. at 438, 380 S.E.2d at 788.

While it is our impression that *Tucci* misinterpreted prior case law, in the case *sub judice*, defendant's reliance on that opinion is misplaced for another reason. In *Tucci*, the separation agreement in question contained the following paragraph: "[s]hould at any time in the future the parties resume marital cohabitation in any respect . . . the provisions of this Separation Agreement and Property Settlement are and shall remain valid and fully enforceable, and of full legal force and effect." *Tucci*, 94 N.C. App. at 430, 380 S.E.2d at 783. The Stegalls' document, in contrast, contains no such clause and states that as consideration for the separation agreement the parties "propose to continue to live so separate and apart from one another."

Finally, we take issue with the claim in *Tucci* that the case *Carlton v. Carlton*, 74 N.C. App. 690, 329 S.E.2d 682, "has apparently been superseded" by *Higgins v. Higgins*, 321 N.C. 482, 364 S.E.2d 426 (1988). *Tucci*, 94 N.C. App. at 439, 380 S.E.2d at 788. *Carlton* stands for the traditional principle that if the provisions of a separation agreement are *executory* they are invalidated by the resumption of the marital relationship, and in such a case, a suit for equitable distribution would be proper. *Carlton*, 74 N.C. App. at 693, 329 S.E.2d at 684. Conversely, if the provisions were *executed* prior to resuming the marital relationship, an action for equitable distribution would be barred, *unless* the evidence shows an intent to cancel those provisions of the separation agreement. *Id. Tucci* interprets *Buffington* and *Love* as conflicting with these principles recited in *Carlton*. *Tucci*, 94 N.C. App. at 439, 380 S.E.2d at 788. *Tucci* cites *Higgins* for a statement approving the result in both *Buffington* and *Love*, and concludes from this that *Carlton* has been superseded. *Id.* Based upon our analysis of *Buffington* and *Love*, however, we fail to see the conflict between those two cases and *Carlton*. Furthermore, we read *Higgins* as affirming the rule that parties may enter into property settlements at any time, and that executory provisions of the agreements may be affected by the behavior of the parties. Neither of these positions are at odds with *Carlton*. Moreover, we fail to see how *Higgins* can be read to support the *Small* and *Tucci* positions advocating severance of support/marital provisions from property provisions in separation agreements or the position taken in *Tucci* that executory provisions are not invalidated by reconciliation of the parties.

In the case before us, the Stegalls' 1983 agreement is clearly a separation agreement. From the terms of the agreement and the circumstances of its execution, it is obvious that the parties intended to create a separation agreement. The agreement itself states: "[t]he parties shall henceforth live separate and apart . . . free from all interference, authority and control, direct or indirect, by the other, as fully as if each party were unmarried . . . ." In his motion for summary judgment, defendant submitted an affidavit which refers to the 1983 agreement as a "separation agreement" and never mentions "property settlement." After their 1983 reconciliation, the Stegalls kept joint bank accounts, took vacations together, shared all their property and income and filed joint tax returns for more than four years after the first separation agreement. Accordingly, we hold that any executory provisions of the 1983 separation agreement were terminated upon the parties' reconciliation.

Furthermore, even if the trier of fact determines that the provisions of the 1983 agreement were executed prior to the parties' reconciliation, equitable distribution may still be allowed if "the evidence shows an intent to cancel those provisions of the separation agreement." *Carlton*, 74 N.C. App. at 693, 329 S.E.2d at 684. "A contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties." 17 Am. Jur. 2d, *Contracts* § 494 (2d ed. 1964).

> "[T]he effect of reconciliation should be governed by the circumstances in which it is asserted. If, as an aspect of reconciliation, the parties by their words or their conduct express the intention of rescinding the separation agreement in whole or in part, effect should be given to their action. This is just an ordinary application of contract principles.

Clark, *supra*, § 19.7.

"[R]escission of a separation agreement requires proof of a material breach—a substantial failure to perform." *Cator v. Cator*, 70 N.C. App. 719, 722, 321 S.E.2d 36, 38 (1984). For example, changing the title of marital property (*e.g.*, a car, realty, or bank account) from one party's name to both parties' names in contravention of a provision of the separation agreement would effectively nullify that provision. It is for the trier of fact to determine if the conduct

of the Stegalls substantially defeated the purpose of the 1983 agreement. If so, then even the executed provisions of that agreement are void.

We therefore reverse the order of the trial court granting summary judgment for defendant and remand this cause to the district court for such further proceedings as are consistent with this opinion.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

ROY TIMOTHY HOOTS, AS FATHER AND GUARDIAN AD LITEM OF JOSHUA TIMOTHY HOOTS, A MINOR, AND ROBERT WHITAKER, PERSONALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF ROBERT TIMOTHY WHITAKER, AND FREDERICK L. McINTYRE, JR. AS THE ADMINISTRATOR OF THE ESTATE OF JULIA ANN WHITAKER, DECEASED, PLAINTIFFS v. TOMS AND BAZZLE, P.A., A CORPORATION, AND JAMES TOMS, DEFENDANTS

ROY TIMOTHY HOOTS, AS FATHER AND GUARDIAN AD LITEM OF JOSHUA TIMOTHY HOOTS, A MINOR, AND ROBERT WHITAKER, PERSONALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF ROBERT TIMOTHY WHITAKER, AND FREDERICK L. McINTYRE, JR. AS THE ADMINISTRATOR OF THE ESTATE OF JULIA ANN WHITAKER, DECEASED, PLAINTIFFS v. JAMES WILKINS, JAMES TOMS, EDWIN HICKS, ROGER WARD, AND MOUNTAIN SCENIC AERO, INC., A CORPORATION, DEFENDANTS

No. 8829SC1370

(Filed 16 October 1990)

1. **Rules of Civil Procedure § 42 (NCI3d)— severance of claims for trial**

The trial court did not err in severing plaintiffs' claim against defendant pilot for negligence in piloting an airplane that crashed from claims concerning another defendant's negligent maintenance of the plane, an earlier induction system fire allegedly caused by the plane's last prior user, and the personal liability of three individual defendants because of

their involvement with the nonprofit corporation that owned the plane. N.C.G.S. § 1A-1, Rule 42(b).

Am Jur 2d, Parties § 205.

2. **Aviation and Airports § 23 (NCI4th)— airplane crash—negligence in piloting—absence of stall warning horn—irrelevancy**

Evidence that an airplane's stall warning horn was not working at the time the plane crashed was irrelevant to plaintiffs' claim against the pilot based on alleged negligence in handling the plane after the engine suddenly failed where plaintiffs did not allege that the pilot was negligent in either inspecting or maintaining the plane.

Am Jur 2d, Aviation §§ 88, 90.

3. **Aviation and Airports § 21 (NCI4th)— airplane crash—instruction on sudden emergency**

The trial court properly instructed on sudden emergency in an action against the pilot of an airplane that crashed where the evidence tended to show that the pilot was confronted with a sudden emergency when the airplane's only engine failed without warning while the plane was taking off.

Am Jur 2d, Aviation § 108.

4. **Aviation and Airports § 22 (NCI4th)— airplane crash—negligence in causing induction system fire—negligent maintenance—summary judgment**

Summary judgment was properly entered for two defendants on plaintiffs' claim for negligence in causing a prior induction system fire that allegedly led to a fatal airplane crash where the forecast of evidence established that plaintiffs cannot show that either defendant caused or knew about the induction system fire. However, summary judgment was improperly entered in favor of a third defendant where plaintiffs' forecast of evidence tended to show that such defendant was the last user of the plane before the fatal flight, that the induction system fire occurred at that time, and that this defendant could have known about the fire.

Am Jur 2d, Aviation §§ 92, 134.

5. **Aviation and Airports § 22 (NCI4th)— negligent maintenance of airplane—sufficient forecast of evidence**

The trial court erred in dismissing a claim against one defendant for negligently maintaining an airplane that crashed where plaintiffs' forecast of evidence tended to show that the crash was caused by damaged carburetor floats which blocked the flow of gasoline while the plane was ascending; this defendant was responsible for maintaining the plane; and defendant knew that the plane's stall warning horn did not work but failed to repair the horn, warn the pilot, or redline the plane.

Am Jur 2d, Aviation §§ 92, 134.

6. **Corporations § 1.1 (NCI3d)— noncompliance with corporate formalities—corporate entity not disregarded**

Evidence of noncompliance with corporate formalities is insufficient to require the trial court to disregard the corporate entity and treat the corporation as the alter ego of its officers or stockholders.

Am Jur 2d, Corporations §§ 45, 50, 238, 249.

APPEAL by plaintiffs from orders entered 11 July 1988, *nunc pro tunc* 30 June 1988, and judgment entered 20 July 1988 by *Judge Robert D. Lewis* in HENDERSON County Superior Court. Heard in the Court of Appeals 22 August 1989.

These actions for personal injury and wrongful death are based upon the crash of a single engine aircraft shortly after takeoff from the Hendersonville, North Carolina airport. Defendant Roger Ward, the pilot, and plaintiff Joshua Timothy Hoots, a passenger, survived the accident; passengers Julia Ann Whitaker and her son, Robert Timothy Whitaker, were killed.

Plaintiffs alleged, in substance, that defendant Mountain Scenic Aero, Inc. (MSA, Inc.), a nonprofit corporation, owned the plane; that defendants Ward, Toms, Wilkins and Hicks were partners or joint venturers in the corporate ownership and operation of the plane; that the engine failed because the last user of the plane, either Wilkins, Hicks or Toms, undertook to start the engine with the fuel selector valve in the "off position," thereby causing an induction system fire which deformed the carburetor floats and caused them to block the flow of gasoline when the plane was ascending; that after the engine failed defendant Ward negligently

attempted to turn the aircraft back on the runway, rather than glide to and land on one of the open fields near the airport; that defendant Wilkins had negligently maintained the aircraft and had negligently instructed Ward, the pilot, in flight and crash procedures; that defendant Toms, attorney for and joint owner of MSA, Inc., had negligently failed to obtain liability insurance on the aircraft; and that the corporate defendant is liable for the negligence of the individual defendants in maintaining, servicing, and operating the aircraft. In a separate action against Toms & Bazzle, P.A., a professional corporation, and Toms individually as president and sole stockholder of Toms & Bazzle, P.A., plaintiffs alleged that: Toms, acting as president of Toms & Bazzle, P.A., intentionally appropriated the aircraft for his own and the law association's use; an employee of Toms & Bazzle, P.A., or some third party to whom the aircraft had been entrusted, negligently caused the induction system fire; Toms and Toms & Bazzle, P.A. breached their duty to maintain liability insurance on the aircraft; and Wilkins was their agent in negligently maintaining the plane.

After all these allegations were denied by the respective defendants, defendants MSA, Inc., Wilkins, Hicks and Ward cross-claimed against defendant Toms for his failure to maintain liability insurance on the aircraft, and defendant Ward cross-claimed against defendant Wilkins for failing to inform him that the aircraft stall warning horn was not working. After discovery, plaintiffs' allegation that the individual defendants were partners in the ownership and operation of the plane was abandoned.

During the pre-trial period various motions were made by the parties and following hearings thereon the court made the following adjudications: By an order of partial summary judgment it *dismissed* plaintiffs' claim against Wilkins, Toms and Hicks for causing the induction system fire by negligently undertaking to start the aircraft with the fuel selector valve in the off position and failing to warn Ward about it, and the claims against Wilkins for negligently maintaining the aircraft and for failing to teach defendant Ward to maintain flying speed in the event of engine failure; it *denied* plaintiffs' motion to set aside the corporate entity of MSA, Inc. and rule that defendants Hicks, Wilkins and Toms were individually responsible for the negligence of defendant Ward; it *severed* the claims against defendants Wilkins, Hicks and Toms from the case against defendant Ward and *directed* that the claim against defendant Ward for negligently operating the plane be

tried first; it *provided* that if Ward's negligence was established it would determine whether the other individual defendants were liable therefor because of their participation in the nonprofit corporation; it *severed* the claim against Toms for failing to maintain liability insurance on the aircraft and provided that his liability would be subsequently determined if Ward's negligence was established; and it *granted* summary judgment for defendants Toms & Bazzle, P.A. and Toms individually in the separate action. After making these adjudications the court declined to rule on plaintiffs' motion to sanction defendant Wilkins for allegedly altering some of the physical evidence.

In the trial of the claim against defendant Ward the court, over plaintiffs' objection, refused to receive evidence that the stall warning horn was not working and charged the jury on the sudden emergency doctrine. The trial ended with the jury answering the issue as to Ward's negligence "No," and the court entering judgment dismissing Ward from the case.

Smiley & Mineo, by Robert R. Smiley III, Charleston, S. C., and Robert A. Mineo, Raleigh, N. C., for plaintiff appellants.

Stepp, Groce, Cosgrove & Miller, by W. Harley Stepp, Jr. and Edwin R. Groce, for defendant appellees James H. Toms and Toms & Bazzle, P.A.

Prince, Youngblood, Massagee & Jackson, by Boyd B. Massagee, Jr. and Sharon B. Ellis, for defendant appellees James Wilkins and Edwin Hicks.

James, McElroy & Diehl, P.A., by Gary S. Hemric and Mark T. Calloway, for defendant appellee Roger Ward.

PHILLIPS, Judge.

Plaintiffs argue that seven of the foregoing actions by the trial court were erroneous. Though not argued in that order, we consider first the actions complained of that relate to the trial as it was conducted—severing and trying first the claim against defendant Ward for negligence in piloting the airplane; refusing to receive evidence that the plane's stall warning horn was not functioning; and instructing the jury on the sudden emergency doctrine. Neither of these actions was reversible error in our opinion and plaintiffs' arguments in regard to them are overruled for the reasons hereafter stated.

I.

[1] Since Rule 42(b), N.C. Rules of Civil Procedure, authorizes a trial judge to order a separate trial of any claim or issue "in furtherance of convenience or to avoid prejudice," the severance of the claim against Ward was within the court's discretion, *Aetna Insurance Company v. Carroll's Transfer, Inc.*, 14 N.C. App. 481, 188 S.E.2d 612 (1972), and was not error since sound grounds therefor existed. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). The claim against Ward arose from circumstances totally different from those that gave rise to the other claims involved and trying the pilot error issue separately was a comparatively simple process that had the advantage of possibly making it unnecessary to try the other issues. *In re Will of Hester*, 320 N.C. 738, 360 S.E.2d 801, *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987). On the other hand trying the issue of Ward's negligence in piloting the airplane with issues concerning Wilkins' maintenance of the plane, an earlier induction system fire allegedly caused by the plane's last user, and the personal liability of defendants Wilkins, Hicks and Toms because of their involvement with the nonprofit corporation that owned the plane would have been a cumbersome, complicated, and possibly confusing process that could have easily prejudiced one or more of the parties.

[2] The evidence concerning the stall warning horn not working and Wilkins' failure to warn Ward about it was properly rejected because it was irrelevant to the only issue being tried—defendant Ward's negligence in handling the airplane after the engine suddenly failed. Plaintiffs' argument that the evidence should have been received since defendant Ward had alleged in his cross-claim against defendant Wilkins that Wilkins knew the stall warning horn did not work and did not inform him about it cannot be accepted. Plaintiffs had not charged defendant Ward with any duty or fault in maintaining or inspecting the airplane; they alleged only that he did not pilot the airplane properly after the engine failed; and they stipulated in the pre-trial order that "his routine preflight inspection of the aircraft . . . gave no indication of any problem with the airplane or engine." Thus, when proffered the evidence was clearly irrelevant to the claim against Ward, and plaintiffs made no effort to make it relevant by moving for permission to allege that Ward was negligent either in inspecting or maintaining the airplane.

[3] And since the evidence tended to show that a sudden emergency arose when the aircraft's only engine failed without warning while taking off, the instruction on that doctrine was not error. *Schloss v. Hallman*, 255 N.C. 686, 122 S.E.2d 513 (1961).

II.

The other four court rulings that plaintiffs challenge are the dismissal of their claim against defendants Wilkins, Hicks, Toms, and Toms & Bazzle, P.A. for negligently causing the induction system fire; the dismissal of their claim against Wilkins for negligently maintaining the plane; the denial of their motion to set aside the corporate status of Mountain Scenic Aero, Inc.; and refusing to sanction defendant Wilkins for altering the physical evidence upon which plaintiffs' case depended. Plaintiffs also assigned as error the dismissal of the claim against defendants Toms and Toms & Bazzle, P.A. in the separate action for failing to maintain liability insurance on the plane but since that point is not argued in their brief it is deemed to have been abandoned. Rule 28(b)(5), N.C. Rules of Appellate Procedure.

First, as to the dismissal by summary judgment of plaintiffs' claim against defendants Wilkins, Hicks and Toms, individually and collectively, for negligently causing the induction system fire that allegedly led to the fatal crash: In supporting their motions for summary judgment these defendants did not contest the soundness of plaintiffs' theory on this claim—that the last user of the plane by trying to start the engine with the fuel selector valve in the off position caused an induction system fire that damaged the carburetor floats and caused them to block the flow of gasoline when the aircraft was heading upward. All that they sought to establish, by affidavits submitted by each defendant, was that plaintiffs cannot prove that either of them knew about or was responsible for the induction system fire. Each affidavit was to the effect that the affiant had no knowledge of any fire having occurred in any part of the plane before the accident occurred. Plaintiffs opposed this showing with affidavits by Tedd L. Bishop, a retired military pilot who served as plaintiffs' accident investigator, and Hugh A. Clark, II, who had flown in the aircraft less than two weeks prior to the crash. Based upon his inspection of the wreckage and photographs of the engine, Bishop opined that the engine failure came about as a "result of damage to the carburetor floats most probably caused, in turn, by an induction system fire which oc-

curred during a prior unsuccessful starting attempt by another pilot." Clark stated that he flew with defendant Wilkins and Irvin Bazzle, the other attorney in Toms & Bazzle, P.A., on 4 June 1985 and that the aircraft was taxied directly back to the hangar rather than to the fuel pumps, as was usually done prior to hangaring. Other materials of record indicate that Wilkins refueled the airplane at the fuel pumps later that day and that the plane was not used again before the fatal flight.

[4, 5] Since the sworn statements of defendants Hicks and Toms that they did not know anything about any fire in the plane's induction system before the accident are not contradicted by plaintiffs' materials, they establish for the purposes of this litigation that plaintiffs cannot show that either of them caused or knew about the induction system fire, and summary judgment in their favor on this claim was proper. But plaintiffs' materials do contradict defendant Wilkins' affidavit by indicating that he was the last user of the airplane before Ward's flight, the induction system fire occurred at that time, and he could know about it. Thus, he has not established, as a matter of law, that he was not the last user of the airplane and does not know anything about the induction system fire; an issue of fact exists as to that and summary judgment in his favor on this claim was error. The court also erred in dismissing the claim against Wilkins for negligently maintaining the airplane, for the materials before the court indicate that he knew the stall warning horn did not work and as the one responsible for maintaining the plane neither repaired the horn, warned Ward about it nor redlined the plane. Both dismissals are reversed.

[6] Plaintiffs' motion for partial summary judgment to set aside the corporate entity of defendant Mountain Scenic Aero, Inc. was denied primarily upon the ground that the issue of piercing the corporate veil of MSA, Inc. was not raised by the complaint. Though the soundness of that ground is questioned by plaintiffs, we need not determine it because the materials of record do not establish that plaintiffs, as movants, are entitled to summary judgment on that issue as a matter of law. For of the several factors stated in *Glenn v. Wagner*, 313 N.C. 450, 329 S.E.2d 326 (1985), that can justify a court piercing the corporate veil and treating a corporation as the alter ego of its officers or stockholders only one—not complying with corporate formalities—is established without contradiction by the materials recorded, and that is not enough to warrant the relief sought. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415

(1985). *See also Park Terrace, Inc. v. Phoenix Indemnity Co.*, 243 N.C. 595, 91 S.E.2d 584 (1956).

As to the court's failure to sanction defendant Wilkins for altering physical evidence the record indicates that the court did not rule on plaintiffs' motion because it was thought that the dismissal of the claims against him involving the airplane made the motion moot. If the motion was ever moot it is no longer and upon the return of the claims against defendant Wilkins to the trial court the motion should be ruled upon.

Affirmed in part; reversed in part.

Judges WELLS and PARKER concur.

EDWARD F. WILKINSON, ADMINISTRATOR OF THE ESTATE OF PEGGY W. PITTMAN, DECEASED, PLAINTIFF v. DR. CORAZON CRUZ, DEFENDANT

No. 9027SC68

(Filed 16 October 1990)

1. Trial § 52.1 (NCI3d) — medical malpractice — damages — new trial denied

The trial court in a medical malpractice action did not abuse its discretion by denying plaintiff's motion for a new trial on the grounds of grossly inadequate damages where plaintiff's funeral expenses were $3,253.59; plaintiff did not seek recovery of the hospital or other medical bills; plaintiff had no minor dependents; plaintiff's income was approximately $390 per week at the time of her death; plaintiff resided with her daughter, son-in-law, and their children; plaintiff's life expectancy at the time of her death was 26.56 years; plaintiff enjoyed a close relationship with her children, grandchildren and father; the trial court gave instructions to the jury to consider all of the above evidence as well as evidence of plaintiff's pain and suffering prior to her death; there were no stipulations between the parties concerning damages; and the jury awarded $4,000.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 370.

2. Trial § 39 (NCI3d)— medical malpractice—request for additional instructions—no error

The trial court did not err in a medical malpractice action by refusing to reinstruct the jury on the issue of damages where the jury, prior to returning a verdict, requested information concerning the amount of funeral expenses; the court instructed the jury that funeral expenses amounted to $3,253.59 and that plaintiff was not seeking recovery of hospital and doctor bills; and plaintiff's request that the entire instruction on damages be repeated was denied. The trial court's answer to the jury question must be read contextually with the other instructions, and it is not clear from the evidence that the jury was confused by this additional information.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 363; Damages § 988.

Judge COZORT dissenting.

APPEAL by plaintiff from judgment entered 31 July 1989 by *Judge J. Marlene Hyatt* in GASTON County Superior Court. Heard in the Court of Appeals 29 August 1990.

This appeal arises from a medical malpractice action against defendant alleging, *inter alia*, that defendant failed to diagnose and treat a condition known as sepsis which caused the death of Peggy Pittman (hereinafter plaintiff) in March 1986.

The case was tried before a jury. On 19 July 1989, the jury found defendant to be negligent in plaintiff's death and awarded plaintiff $4,000.00. Plaintiff moved for a new trial on the issue of damages, and the trial court denied the motion. The trial court entered judgment on 31 July 1989. From this judgment, plaintiff appeals.

Karro, Sellers & Langson, by Seth H. Langson; and Blanchard, Twiggs, Abrams & Strickland, by Douglas B. Abrams, for plaintiff-appellant.

Roberts Stevens & Cogburn, P.A., by Isaac N. Northup, Jr., for defendant-appellee.

ORR, Judge.

Plaintiff argues two assignments of error on appeal. For the reasons below, we affirm the trial court's decision.

[1] Plaintiff first argues that the trial court erred in denying plaintiff's motion for a new trial on the issue of damages under Rule 59 of the N.C. Rules of Civil Procedure. Plaintiff contends that the jury award of $4,000.00 was grossly inadequate and reflected a manifest disregard by the jury of the instructions of the court. We disagree.

A motion for a new trial on the grounds of grossly inadequate or excessive damages under Rule 59 is within the sound discretion of the trial court and may be reversed on appeal only when an abuse of discretion is clearly established. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982) (citations omitted); *Moon v. Bostian Heights Volunteer Fire Dept.*, 97 N.C. App. 110, 387 S.E.2d 225 (1990). Our courts have not formulated a precise test to determine what constitutes an abuse of discretion. 305 N.C. at 484, 290 S.E.2d at 604. "For well over one hundred years, it has been a sufficiently workable standard of review to say merely that 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." *Id.* at 484-85, 290 S.E.2d at 604.

A review of the evidence in the case *sub judice* reveals the following on the issue of damages: Plaintiff's funeral expenses were $3,253.59; plaintiff did not seek recovery of the hospital or other medical bills; plaintiff had no minor dependents; plaintiff's income was approximately $390.00 per week at the time of her death; plaintiff resided with her daughter and son-in-law and their children; plaintiff's life expectancy at the time of her death was 26.56 years; and plaintiff enjoyed a close relationship with her children, grandchildren and father.

The trial court gave instructions to the jury to consider all of the above evidence as well as evidence concerning plaintiff's pain and suffering prior to her death. We note that there were no stipulations between the parties concerning damages. Therefore, the jury must weigh the credibility of the witnesses and may believe any part of the testimony or none of it. *Blow v. Shaughnessy*, 88 N.C. App. 484, 494, 364 S.E.2d 444, 449 (1988) (citation omitted).

In denying plaintiff's motion for a new trial, the trial court agreed with defense counsel that the verdict covered the amount of funeral expenses. In this regard, defendant's attorney stated, "[t]he only thing, I guess, pain and suffering, loss of consortium, on the evidence the jury could go either way on that. And they made a decision that they thought was adequate." The trial court apparently agreed with this and denied plaintiff's motion. We agree with the trial court and find that the foregoing evidence shows that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

[2] Plaintiff next argues that the trial court erred when it refused to reinstruct the jury on the issue of damages. We find this argument to be without merit.

Prior to returning a verdict, the jury requested information concerning the amount of funeral expenses. The trial court instructed: "the funeral expenses amounted to $3,253.59. The plaintiff is not seeking recovery of the hospital and doctor bills. The Court pursuant to law will direct payment of court costs." Plaintiff requested the court to give the entire instruction on damages (which had been given during its initial instructions), and the court denied this request.

> THE COURT: Well, I think it answers specifically what they have asked me about.
>
> [Plaintiff's Attorney]: It does, just whether isolating it is appropriate. I would rather see it as part of the whole picture, but those are accurate responses to the questions that they asked.

Plaintiff maintains that because the trial court answered only the question concerning the amount of funeral expenses and added other information concerning medical expenses, and then refused to give the full instruction concerning damages, the jury was confused and misled. As a result of this confusion, the jury allegedly returned an inadequate award.

We note that plaintiff failed to object to the trial court's additional instruction above pursuant to Rule 21 of the General Rules of Practice for the Superior and District Courts. Assuming *arguendo* that the trial court would have overruled such objection, we have reviewed the evidence of record and find that the trial court did not err.

First, the trial court gave lengthy and clear instructions to the jury concerning what information they should consider in determining the amount of damages. The trial court did not limit these initial instructions to include only funeral expenses, medical bills or court costs. The trial court's answer to the jury question must be read contextually with the other instructions. *See State v. Howard*, 305 N.C. 651, 290 S.E.2d 591 (1982).

Second, it is not clear from the evidence that the jury was confused by this additional information. The only evidence plaintiff presented with a specific monetary value was that of funeral expenses. Plaintiff provided this Court with no evidence of any other specific damages. Plaintiff's evidence contained *references* to loss of consortium, pain and suffering, expected earnings and related damages, but there is no evidence of the amount of damages that could have been awarded for such. Under these circumstances, we cannot find that the trial court confused the jury in providing the additional information.

For these reasons, we affirm the trial court's decision.

Affirmed.

Judge DUNCAN concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

My review of the record and the transcript in this case leads me to the conclusion that the damages awarded were grossly inadequate and reflected a manifest disregard by the jury of the instructions of the trial court. I also find that the trial court erred in failing to grant plaintiff's request to reinstruct the jury on the issue of damages. I therefore vote for a new trial and must dissent from the majority opinion.

In reaching this conclusion, I am mindful of the rule that the trial court has enormous discretion in ruling on motions for a new trial based on inadequate damages. *Robertson v. Stanley*, 285 N.C. 561, 563, 206 S.E.2d 190, 192 (1974). Nonetheless, I find the evidence below compels a conclusion that the jury either disregarded the trial court's instructions on damages or misunderstood the trial court's answer to a question regarding damages posed by the jury.

By statute, the damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

N.C. Gen. Stat. § 28A-18-2(b) (1989). "The General Assembly intended the wrongful death statute to as fully as possible compensate persons for the loss of their decedent." *Beck v. Carolina Power and Light Co.*, 57 N.C. App. 373, 381, 291 S.E.2d 897, 902, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982). "The purpose of damages is to restore these beneficiaries to the position they would have occupied had there been no death." *Scallon v. Hooper*, 58 N.C. App. 551, 555, 293 S.E.2d 843, 845 (1982).

In the case below, plaintiff alleged that decedent Peggy Pittman's death was caused by the negligence of the defendant Cruz. In its instructions to the jury, the trial court instructed on all items enumerated in N.C. Gen. Stat. § 28A-18-2(b), with the exception of punitive damages. The court later informed the

jury that plaintiff was not seeking recovery of the hospital and doctor bills.

The jury returned a verdict finding that defendant Cruz was negligent. The jury awarded plaintiff $4,000 in damages. Given the uncontradicted evidence presented below, that amount was either grossly inadequate or was an apparent compromise verdict.

Peggy Pittman died of sepsis, more commonly known as blood poisoning. She was hospitalized in Lincoln County Hospital on Sunday, 2 March 1986 with an arm injury. She was treated by Dr. Cruz there. She was transferred to Charlotte Memorial Hospital at approximately 5:00 a.m. on Monday, 3 March 1986. She died on Wednesday, 5 March 1986. Though defendant contends that there was no evidence of pain and suffering, the transcript contains much uncontradicted testimony of pain and suffering. One of the attending physicians testified that on 3 March, Mrs. Pittman "was able to converse even though she was in pain from her arm and had to be given some sedation at Lincoln County." He further testified that as Mrs. Pittman became worse over the next two and a half or three days, she became swollen and her skin blistered. She remained conscious or semi-conscious until the evening of 4 March.

Mrs. Pittman's daughter, Mrs. Pamela Wright, testified that her mother complained of the pain in her arm on Monday. On Tuesday, Mrs. Pittman could not speak because of a tube down her throat. She was swollen, having gained 60 to 70 pounds, and she had dark blotches all over her body. She was able to squeeze her hand and blink her eyes. On Tuesday night tears were coming from her eyes. Mrs. Wright testified that by Wednesday, her mother's skin "had busted open all over." When Mrs. Wright went in to see her mother, she had to turn around and leave "[b]ecause it didn't look nothing like my mom. . . . She was just all back [*sic*] and blue. And looked like some kind of monster something. [*sic*]"

Mrs. Pittman's daughter-in-law, Mrs. Lily Lucille Hayes, testified that by Tuesday, Mrs. Pittman's skin was starting to break with fluid running out. By Wednesday her eyes had swollen shut.

There was also evidence that decedent, who was 48 at the time of her death, had a life expectancy of 26.56 years. Family members testified that Mrs. Pittman spent much time with the family, going on vacations with them, babysitting her grandchildren,

going to movies, going out to dinner, and so forth. There was uncontradicted evidence that the funeral expenses were $3,253.59. Thus, the jury's award of $4,000.00 total in damages means that the jury awarded only some $750 for decedent's pain and suffering *and* for the value of the decedent to her children in terms of society, companionship, comfort, guidance, etc. By its first answer the jury found defendant's negligence caused decedent's death. By its second answer the jury said plaintiff was entitled to recover virtually nothing as a result. Such a finding would appear to be obvious error, explainable in either of two ways.

First, the jury may not have understood or remembered all the elements to be considered in the damages issue. After receiving the trial court's instructions, the jury began deliberations at 9:52 a.m. It deliberated an entire day, returning to the courtroom once for additional instructions on negligence before being dismissed for the night at 4:45 p.m. The jury resumed deliberations at 9:30 a.m. the next day. In response to an inquiry from the trial court, the foreman informed the court that the jury was divided ten to two, and asked for more instructions on negligence. Later that morning, the jury sent a written question relating to the damages issue, apparently concerning funeral expenses. (The question does not appear in the record.) The court denied plaintiff's request to repeat the entire instruction on damages, and sent a written response to the jury which stated: "Members of the Jury, the funeral expenses amounted to $3,253.59. The plaintiff is not seeking recovery of the hospital and doctor bills. The Court pursuant to law will direct payment of court costs."

I believe this brief instruction, given some day and a half after the original full instructions on damages were given, could have caused the jury to consider the funeral expenses only, without considering the other pertinent evidence of damages. It was thus error for the trial court to deny plaintiff's request to repeat the full instructions on damages. The majority's reference to or reliance on Rule 21 of the General Rules of Practice of the Superior and District Courts is misplaced. The plaintiff was not objecting to the *content* of the trial court's new instruction; the plaintiff objected to the trial court's refusal to repeat *all* the instructions on damages.

The second way to explain the jury's award of only $4,000.00 in damages is compromise verdict. The jury deliberated on the

first issue of negligence for over a day and reported to the court on the second day that the vote stood ten to two. Later that day the jury received information from the court that the funeral expenses were $3,253.59, and came back with a verdict against defendant for $4,000.00. Given that scenario, there is ground for strong suspicion that the amount awarded was the result of a compromise. *See Robertson*, 285 N.C. at 569, 206 S.E.2d at 196. In my opinion, the trial court should have ordered a new trial on all issues, and I dissent from the majority's opinion affirming the trial court's rulings.

SHARRARD, McGEE & CO., P.A., PLAINTIFF v. SUZ'S SOFTWARE, INC., DEFENDANT

No. 9018SC34

(Filed 16 October 1990)

1. **Assignments § 2 (NCI4th)— assignment of contract rights— assignor not buyer—UCC—common law**

Even if plaintiff's assignor was not technically a "buyer" in a transaction with defendant so as to permit it to assign its contractual rights against defendant pursuant to N.C.G.S. § 25-2-103(1), the assignor's contractual rights were assignable under the common law.

Am Jur 2d, Assignments §§ 7, 27.

2. **Uniform Commercial Code § 11 (NCI3d)— express warranty— action for breach—privity not required**

Privity is not required to assert a claim for breach of express warranty.

Am Jur 2d, Sales §§ 718, 720.

3. **Uniform Commercial Code § 11 (NCI3d)— letter to accounting firm—express warranty to firm's client**

A letter from defendant's president to an accounting firm purchasing a computer accounting system for a plumbing distributor which referenced the accounting firm's "plumbing distributor client" and guaranteed defendant's "programming with full return and refund privileges for the software and

printer should our programming not perform as warranted" constituted an express warranty to both the accounting firm and its client in order to induce both to complete the purchase of a software system from defendant. Therefore, the plumbing distributor could validly assign its claim against defendant for breach of the express warranty.

Am Jur 2d, Sales §§ 377, 379.

4. **Uniform Commercial Code § 26 (NCI3d); Rules of Civil Procedure § 15.2 (NCI3d)— breach of express warranty—special damages—litigation by consent**

Plaintiff was entitled to recover for breach of express warranty of a computer system both its general damages and its special damages for additional sums expended for attempts by defendant to make the system work. Although plaintiff failed to plead damages involving special circumstances, the pleadings were deemed amended to include this issue where plaintiff introduced evidence of these damages without objection at trial and the parties thus tried this issue by implied consent. N.C.G.S. § 1A-1, Rule 15(b); N.C.G.S. § 25-2-714(2).

Am Jur 2d, Sales §§ 1280, 1297, 1351, 1374.

APPEAL by defendant from a judgment entered 21 August 1989 by *Judge Howard R. Greeson, Jr.* in Superior Court, GUILFORD County. Plaintiff cross-appeals. Heard in the Court of Appeals 28 August 1990.

Fisher, Fisher, Gayle, Clinard & Craig, P.A., by John O. Craig, III and Robert G. Griffin, for plaintiff-appellee/cross-appellant.

Brinson and Gullick, by Lynn G. Gullick, for defendant-appellant/cross-appellee.

LEWIS, Judge.

This case involves the following issues: (1) whether plaintiff was assigned its right to sue defendant pursuant to G.S. § 25-2-210; (2) whether any express warranties existed between plaintiff's assignor and defendant; (3) whether any implied warranties under G.S. § 25-2-314 and § 25-2-315 were breached; and (4) whether plaintiff, as assignee, justifiably revoked acceptance of the goods involved pursuant to G.S. § 25-2-608 and whether the revocation

occurred within a reasonable time after the assignor discovered nonconformities in the goods delivered. At a trial by the court, all of these issues were resolved in favor of the plaintiff and defendant appeals. The court made the following findings of fact:

In October 1985, plaintiff Sharrard, McGee and Co., P.A. ("Sharrard"), an accountant firm, was in the business of assisting in the computerization of their clients' accounting systems. One of these clients was Guilford Plumbing Supply, Inc. ("GPS"), a plumbing wholesale distributor.

On 7 and 9 October 1985, plaintiff's employees met and negotiated with an employee of defendant, Suz's Software, Inc. Defendant demonstrated and recommended a general business computer system for the use of plaintiff's client.

On 7 November 1985, Joseph Craycroft, president of defendant corporation, wrote a letter guaranteeing their programming. On 18 November 1985, a computer purchased by the plaintiff was installed at GPS by Mike Joubert, an employee of defendant.

On 22 November 1985, Joubert told GPS employees that the computer program, as customized by defendant, would accomplish the goals GPS had set for a computer accounting system. He also informed the plaintiff that this customized program would be included in the guarantee contained in the 7 November 1985 letter from Craycroft to plaintiff.

On 9 January 1986, Joubert completed the programming and on 17 January provided GPS employees an instruction manual.

On 26 March 1986, the plaintiff paid $8,320.77 to the defendant for the software system and the printer, the money having been provided by GPS.

Shortly thereafter, the system proved to have a number of defects; it failed to consistently and accurately reflect the exact amount of tax; it placed the "description" in the item number column on invoices; it erroneously portrayed unit prices, and erroneously computed state and local taxes. GPS assigned all rights which GPS had against the defendant to the plaintiff for consideration.

By letter dated 9 December 1987, Sharrard revoked acceptance and demanded a refund of the purchase price from the defendant. Defendant refused to comply with the demand and plaintiff filed suit.

I. *Did GPS validly assign all of its rights to the plaintiff?*

[1] The trial court found as a matter of law that GPS validly assigned its rights against the defendant to plaintiff pursuant to G.S. § 25-2-210. G.S. § 25-2-210 provides:

> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned . . . a right to damages for breach of the whole contract, or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

Defendant does not dispute the validity of this statute, instead it argues that G.S. § 25-2-210(2) is inapplicable because it is not a "seller" and GPS is not a "buyer" in this transaction.

"Buyer" and "seller" are defined in G.S. § 25-2-103(1).

> (a) "Buyer" means a person who buys or contracts to buy goods.
>
> (d) "Seller" means a person who sells or contracts to sell goods. . . .

Defendant concedes that it was a "seller" as between it and Sharrard and Sharrard was a "buyer" as to Suz's Software, but defendant argues that it is not a "seller" as to GPS and GPS is not a "buyer" as to defendant. Essentially defendant is arguing that privity is required between the parties before either party can be labelled a "buyer" or a "seller" and have a right to assign its contractual rights as provided in G.S. § 25-2-103(1). We note, however, that GPS's right to assign legal rights is not exclusively governed by the UCC. Even if GPS technically is not a "buyer" under the UCC, as long as it has a valid claim for breach of contract against defendant, our common law will permit its assignment. *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921). The real issue is not whether privity is required in order for GPS to assign its right to sue defendant to plaintiff pursuant to G.S. § 25-2-210, but whether GPS has any legally cognizable claim to assign at all.

The gravamen of plaintiff's action against defendant is for breach of express and implied warranties given by defendant to GPS. Defendant argues that it made no warranties at all, or in the alternative, that it only made limited warranties directly to Sharrard. Again, defendant contends that privity must have existed between it and GPS before GPS would have any right to sue defendant for breach of express and implied warranties.

North Carolina's Uniform Commercial Code does not define "privity" and there are no governing Code provisions dispositive of this issue. G.S. § 25-2-318 eliminates the need for privity when a natural person is suing to recover for personal injuries, but is silent as to whether privity is required in other contexts. We must therefore turn to case law to determine whether privity is required as between GPS and defendant and, if so, whether privity exists between these two parties. *See Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982) (whether there exists a requirement of privity or contractual relationship is not governed by the UCC, but by developing case law).

[2] Plaintiff has asserted, as GPS's assignee, a claim against defendant for breach of both express and implied warranties pursuant to G.S. § 25-2-314 and G.S. § 25-2-315. Privity is not required when the theory is breach of an express warranty. *Kinlaw v. Long Mfg. N.C., Inc.*, 298 N.C. 494, 259 S.E.2d 552 (1979). "[T]he absence of contractual privity no longer bars a direct claim by an ultimate purchaser against the manufacturer for breach of the manufacturer's express warranty which is directed to the purchaser." *Id.* G.S. Chapter 99B (products liability) expressly abrogates the privity requirement in certain claims based upon implied warranty. G.S. Chapter 99B-2(b). However, outside the exceptions created by G.S. Chapter 99B, the general rule is that privity is required to assert a claim for breach of an implied warranty involving only economic loss. *See Holland v. Edgerton*, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Since privity is not required to assert a claim for breach of an express warranty, we will first examine whether an express warranty existed between GPS and defendant.

II. *Was there an Express Warranty between GPS and Defendant?*

[3] G.S. § 25-2-313(1)(a) provides:

> Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

The plaintiff argues that defendant gave GPS an express, unlimited warranty that became the basis of the bargain between GPS and defendant in a letter dated 7 November 1985. In that letter, Joe

Craycroft, president of defendant corporation, stated, "We guarantee our programming with full return and refund privileges for the software and printer should our programming not perform as warranted." This letter was written to Hal Heavner, a CPA in plaintiff accounting firm. The letter specifically referenced plaintiff's "plumbing distributor client."

The trial court found as a matter of law that this letter constituted an express warranty to GPS that the equipment would perform correctly. Defendant argues that it dealt only with plaintiff in the sale of the equipment, and that if there was any warranty it ran only to plaintiff and not GPS and did not encompass later modifications and additions made to the software system. We disagree.

Plaintiff does not have to show privity between GPS and defendant. Instead, plaintiff must show that the warranty was "addressed to the ultimate consumer or user." *Wyatt v. Equipment Co.*, 253 N.C. 355, 359, 117 S.E.2d 21, 24 (1960). In the present case, defendant obviously knew that Sharrard was seeking to obtain computer software on behalf of GPS. The letter expressly references GPS. The equipment was neither purchased nor installed until after this letter was written. We agree with the trial judge that defendant made its express warranty to both plaintiff and GPS in order to induce both parties to go through with the purchase of its software system. Additionally, defendant provided GPS an instruction manual on 16 January 1986, which also expressly warranted that the programs written by the defendant were to supplement the general business system and that the integrated system would "provide a hard copy of invoices, sales and salesmen's reports, and sales and use tax reports." Installation of the integrated system was not complete until after this manual was given to GPS. Defendant concedes that the time of sale was not until the system was paid for in March, 1986. All of this evidence indicates that defendant's letter was intended to warrant its products to GPS and it was reasonable for GPS to rely upon defendant's representations. We affirm the trial court's conclusion that an express warranty existed between GPS and defendant.

Because GPS had a valid claim that it could assert by itself, plaintiff, as assignee, was entitled to assert its claim against defendant.

Because we affirm the trial court's conclusion that GPS had and validly assigned its right to recover for breach of the express warranty to plaintiff, we need not address the issues relating to plaintiff's claim for breach of implied warranties.

III. *Plaintiff's Cross-Appeal*

[4] Plaintiff cross-appeals the amount of the award of damages. The trial court awarded plaintiff $7,538.06, the value of the worthless computer system (less $782.71 for the printer). Plaintiff argues that it is entitled to recover an additional $1,129.05 for amounts paid to the defendant for services rendered to make the system workable. G.S. § 25-2-714 governs the amount of damages a buyer may recover for breach of a warranty:

> (1) Where the buyer has accepted goods and given notification . . . he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section [G.S. § 25-2-715] may also be recovered.

G.S. § 25-2-714(2). The value differential formula set out in subsection two applies absent a showing of "special circumstances." *Id.* In the present case, plaintiff expended an additional $1,129.05 for attempts by the defendant to make the system work. The defendant argues that these damages represent special damages and must therefore be specifically pled or lost. However, plaintiff introduced evidence of these damages without objection at trial.

N.C. Rule of Civil Procedure 15(b) provides:

> (b) *Amendments to conform to the evidence*—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon

> motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues.

G.S. 1A-1, Rule 15(b). Although the plaintiff failed to formally move to amend its complaint to allow recovery for damages involving special circumstances as under G.S. § 25-2-714(2), under the rule of "litigation by consent," failure by defendant to object to the offered evidence permitted the trial judge to admit and consider the additional damages. *See McRae v. Moore*, 33 N.C. App. 116, 123, 234 S.E.2d 419, 422-23, *disc. rev. denied*, 293 N.C. 160, 236 S.E.2d 703 (1977). "If the defendant does not object, he is (except in certain unusual situations) viewed as having consented to admission of the evidence, and the pleadings are deemed amended to include the new issue." *Hardison v. Williams*, 21 N.C. App. 670, 673, 205 S.E.2d 551, 553 (1974).

Defendant waived any objections based upon the propriety of considering this evidence for the purpose of awarding greater damages than those usually allowed under N.C.G.S. § 25-2-714. We reverse and remand this issue to the trial court with directions to award plaintiff an additional $1,129.05 for expenses incurred for unsuccessful repairs to the faulty computer system.

IV. *Conclusion*

The defendant made an express warranty of its goods to GPS. GPS validly assigned its right to recover for breach of this warranty to plaintiff. Plaintiff was entitled to recover its general damages and an additional $1,129.05 for additional sums expended for attempts to make the software system work as warranted.

Affirmed in part, reversed in part and remanded.

Judges WELLS and EAGLES concur.

FLETCHER, BARNHARDT & WHITE, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. JEFFREY STEPHEN MATTHEWS, DEFENDANT

No. 8926SC1390

(Filed 16 October 1990)

1. **Master and Servant § 9 (NCI3d)— salesman—termination of employment—action to recover deficit in draw account**

In an action by an employer to recover a deficit in a commission draw account from a salesman who had left the company, the Court of Appeals adopted the majority view that a salesman is not required to repay any excess advances over commissions unless the parties either expressly or impliedly agree to do so.

Am Jur 2d, Master and Servant § 94.

Personal liability of servant or agent for advances or withdrawals in excess of commissions earned, bonus, or share of profits. 32 ALR3d 802.

2. **Master and Servant § 9 (NCI3d)— termination of salesman's employment—deficit in draw account—no contract to repay**

The trial court, sitting without a jury, erred by concluding that plaintiff employer was entitled to recover from defendant salesman the deficit in defendant's draw account after defendant left plaintiff's company where the parties failed to enter into an express agreement about what was to happen if a salesman terminated his employment with a deficit owed in his draw account, there is no evidence that the parties acted or agreed at any point that defendant was to be personally liable for the excess so that the parties did not impliedly agree that defendant was to be personally liable, and defendant did not breach his fiduciary duty to his employer by making plans to compete with his employer before he left the company because there was no showing that defendant misappropriated trade secrets or that he was bound by any covenants not to compete, and defendant earned greater commissions during that time than he had during the same period in the previous year.

Am Jur 2d, Master and Servant § 94.

Personal liability of servant or agent for advances or withdrawals in excess of commissions earned, bonus, or share of profits. 32 ALR3d 802.

APPEAL by defendant from a judgment entered 1 August 1989 by *Judge Claude L. Sitton* without a jury in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 August 1990.

Plaintiff, Fletcher, Barnhardt & White, Inc. sells individualized promotional materials to businesses throughout the Southeast. In October 1984 plaintiff hired defendant to be a sales representative. Defendant was paid a base salary during his first year of employment plus any commissions that he earned.

After his first year of employment, defendant was compensated solely on the basis of the commissions that he earned. After being on a straight commission salary for approximately six months, defendant approached the plaintiff and requested that he be allowed to draw against his commissions. A "draw" is an arrangement whereby a sales representative is paid a predetermined amount of money each pay period. The purpose of a draw is to stabilize a salesman's monthly income so that in a month where defendant earned few commissions, he would receive the set amount of pay, and in a month where commissions exceeded the draw, the excess would be retained by plaintiff to repay any deficit incurred during months where draws exceeded commissions. The draw was initially set at $1,750.00 per two week pay period. This amount was increased in May 1986 to $1,950.00 per pay period. Along with his paycheck, defendant received a monthly statement which advised him of his commissions for that month versus the draw he was receiving. In months where his commissions exceeded his draw, the excess was applied to any deficits which had accrued.

In October 1987, defendant began the initial steps to form a business to compete with plaintiff. On 7 February 1988, defendant went to the home of Mr. Fletcher, president of the plaintiff corporation, and informed him of his intention to leave his employ and begin operation of his own company. Defendant, after that exchange, indicated that he would pay back the money the plaintiff demanded.

On 18 May 1989, plaintiff sued the defendant to recover the deficit in defendant's draw account. The matter was tried on 17 July 1989 before Judge Sitton without a jury. The court concluded that the defendant owed plaintiff the money because of the existence of express and implied contracts and on the grounds that defendant breached his fiduciary duties of good faith, loyalty and honesty in his dealings with plaintiff. From this judgment, defendant appeals.

Petree Stockton & Robinson, by David B. Hamilton and B. David Carson, for plaintiff-appellee.

Catharine B. Arrowood and Blair S. Levin for defendant-appellant.

LEWIS, Judge.

The issue before this Court is whether the trial court erred when it concluded that appellant was personally liable for the deficit in his draw account. Defendant argues that the trial court erred in concluding that he owed the plaintiff the deficit reflected in his draw when he resigned from plaintiff because of (1) the existence of an express contract; (2) the existence of an implied-in-fact contract; and (3) defendant's breach of a fiduciary duty owed to plaintiff. We address each of these assignments in turn.

[1] We first note that the question of whether an employee is liable to his employer for excess advances over the amount of commissions earned is a matter of first impression in North Carolina. Some jurisdictions hold that the excess of draws over commissions should be treated as a loan, thereby making the agent personally liable to the principal. *Liberty Nat. Life Ins. Co. v. Longshore*, 222 Ala. 408, 132 So. 614 (1931); *Producers' Lumber Co. v. Guiniven*, 260 Pa. 423, 103 A. 916 (1918). However, the majority view is that when advances are made to a salesman and charged against his commissions earned, he is not required to repay any excess advances over commissions unless the parties either expressly or impliedly agree to do so. *Selig v. Bergman*, 43 Wash. 2d 205, 260 P.2d 883 (1953). The presumption that no liability was intended obtains in all jurisdictions which have adopted a position on the subject except in Pennsylvania and Alabama. *See* Personal Liability of Servant or Agent For Advances or Withdrawals in Excess of Commissions Earned, Bonus or Share of Profits. 32 A.L.R. 3d 802, 809-811 (1970). The rationale for this rule is that advances are generally in the nature of salary, and not a loan to the employee,

unless it is explicit by agreement or otherwise that the advances are intended to be a loan. Furthermore, "the advance is given to the agent to promote the principal's business; and therefore a mutual benefit is conferred . . . a fund will be created from which both parties will be compensated—the agent for his time and labor and the principal for his advanced money." *Hubley v. Cram*, 404 N.W.2d 389, 390-91 (Minn. App. 1987); *Tannen v. Equitable Life Ins. Co. of Washington, D.C.*, 303 So.2d 352, 354-55 (Fla. Dist. Ct. App. 1974). Finally, this rule is premised on the fact that the employer has superior bargaining power and this disparity warrants imposing on the employer the duty of making explicit his rights under the employment agreement, especially where he demands the return of previously transferred funds.

We adopt the majority view and look to the court's findings of fact and conclusions of law to determine whether the parties entered into a binding contract to repay the excess draw. If there is any competent evidence to support the Findings of Fact, those findings are conclusive on appeal. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975).

I. Express Contract

[2] Plaintiff argues that there is substantial evidence to support the trial court's findings and to uphold its conclusion that an express contract exists. The trial court found as fact that defendant initially approached the plaintiff and requested that he be placed on a draw account. The parties negotiated the amount of the draw. Matthews further negotiated an increase in the amount of his draw in November of 1986. The court also found that defendant received monthly statements showing the amount of the commissions earned, the amount of his draw, and the balance remaining in the draw account. In the months where his commission exceeded his draw and there was a deficit in his draw account, the excess of commissions over draw was applied to reduce the deficit which had accrued. The defendant never objected to this procedure. Plaintiff also points out the findings of the trial court that defendant was approached by the president of plaintiff corporation about the large amount of the deficit in his draw. Defendant indicated that he was aware of the deficit and that he hoped to have the deficit paid off by the end of the year. After he told Mr. Fletcher he resigned, the defendant stated to Fletcher that he intended to pay the money back to the company. The day after his resignation,

plaintiff again stated that he intended to pay back the money owed in his draw account.

Applying basic principles of contract law to the present case, we find that the parties failed to enter into an express agreement about what was to happen if a salesman terminated his employment with a deficit owed in his draw account. First, none of the events described above indicate that plaintiff and defendant ever discussed what would happen if defendant terminated or resigned from his employment with a deficit owed in his account. Where a material term to a contract is missing, the agreement is not legally binding upon the parties. Second, the statements made by defendant indicating that he intended to repay the money to the plaintiff are not enforceable because they were made *after* he terminated his employment and thus were not supported by consideration. *See Roberts & Johnson Lumber Co. v. Horton*, 232 N.C. 419, 61 S.E.2d 100 (1950) (mere promise unsupported by consideration is unenforceable); *Lester v. Kahn-McKnight Co.*, 521 So.2d 312 (Fla. Dist. Ct. App. 1988) (post-employment promise not supported by consideration and therefore unenforceable as a matter of law).

Other evidence also indicates the parties did not intend to impose personal liability. For instance, other similarly employed salespersons left the company with deficits in their draw accounts and were not required to repay the deficit to plaintiff. Defendant also had a separate loan account which was designated in plaintiff's books as a "loan" and upon which defendant made payments, including interest. Finding no competent evidence of an express contract, we hold that the trial court erred in concluding that the parties expressly agreed that upon resignation or termination of employment the defendant would repay any deficit in his draw account. We note that plaintiff could easily have protected its interests by executing a contract, limiting the amount of the draw, requiring a promissory note from defendant, or firing him altogether. However, Fletcher, Barnhardt failed to take any of these precautions.

II. Implied Contract

The trial court also found an implied-in-fact contract based upon the parties' above-described conduct.

> A 'contract implied in fact'. . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts. . . .

Snyder v. Freeman, 300 N.C. 204, 217-218, 266 S.E.2d 593, 602 (1980) (citations omitted). Plaintiff argues that the actions of plaintiff and defendant support the conclusion of the trial court that a contract implied in fact existed creating personal liability for the defendant. We disagree. The evidence shows that the parties' agreement for advances was that any advances paid to the defendant were to be offset by any commissions earned. There is no evidence that the parties acted or agreed at any point that defendant was to be personally liable for the excess. Finding no agreement to the contrary, the plaintiff has failed to rebut the presumption that plaintiff's sole source of reimbursement was intended to be the fund contemplated, that is, the anticipated commissions, bonus, or profits. *Miller v. Levy*, 60 Ohio App.2d 78, 395 N.E.2d 509 (1978). The trial court erred in concluding that the parties either expressly or impliedly agreed that defendant was to be personally liable for the excess advances.

III. Breach of fiduciary duty

Finally, defendant argues that the trial court erred in concluding that by forming a competing business while employed by plaintiff, he breached his fiduciary duty as an employee. A salesman may be found liable to repay advances from a draw account against commissions, if he has breached his contract or his fiduciary duty to his employer. *St. Cloud Aviation, Inc. v. Hubbell*, 356 N.W. 2d 749 (Minn. App. 1984). The trial court concluded as a matter of law that:

> [t]he acts and conduct of Matthews in forming a competing business while still employed by Fletcher Barnhardt breached the fiduciary duty he owed to them and established that he did not endeavor in good faith to earn commissions during his employment at Fletcher Barnhardt. For this reason, Fletcher Barnhardt is entitled to a judgment equal to the deficit.

We find that the trial court erred in finding that defendant breached his fiduciary duty to his employer by making plans to compete with his employer before he left the company. There is no showing that defendant misappropriated trade secrets from plaintiff, nor any showing that he was bound by any covenants not to compete. Furthermore, during this time period, defendant earned greater commissions than he had during the same time period in the previous year. We hold that under these circumstances, his actions in preparing to leave the company and in forming his own business were

not a breach of duty owed to plaintiff and do not impose personal liability as a matter of law. *See Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).

Employers can easily make their rights to repayment clear by setting out the terms of these draw accounts with their employee-salespersons at the time the draw accounts are created. Because we find no personal liability on the part of the defendant, we reverse and remand this case for entry of judgment in favor of the defendant.

Reversed and remanded.

Judges WELLS and EAGLES concur.

JOHNNY N. IDOL AND JIMMY W. IDOL, SR. v. CECIL STANLEY LITTLE AND WIFE, PATRICIA J. LITTLE

No. 9018SC223

(Filed 16 October 1990)

1. **Landlord and Tenant § 13.2 (NCI3d)— option to renew lease— failure to state rent amount**

An option to renew provision in a lease which is silent on the amount of rent due upon renewal and which does not provide that the renewal rent will be set by the parties' future agreement is valid and enforceable, and the amount of rent due upon renewal is impliedly the amount of rent due under the original lease.

Am Jur 2d, Landlord and Tenant §§ 1158, 1159.

2. **Landlord and Tenant § 13.2 (NCI3d)— option to renew lease— failure to state rent amount—holding over—exercise of option**

A renewal provision of a lease providing that the lessees "shall have three (3) options to renew this lease for a period of five (5) years each option" was valid and enforceable, and upon renewal the lessees were required to pay the lessors the amount of rent due under the original lease as modified by agreement.

Am Jur 2d, Landlord and Tenant §§ 1159, 1168, 1170.

3. Landlord and Tenant § 13.3 (NCI3d) — option to renew lease — exercise by holding over

Where a provision for renewal of a lease did not require notice to be given as a prerequisite for renewal, defendants exercised their option to renew by holding over and continuing to pay the amount of rent due under the original lease as modified by agreement.

Am Jur 2d, Landlord and Tenant § 1191.

APPEAL by defendants from judgment filed 14 November 1989 by *Judge Lester P. Martin, Jr.*, in GUILFORD County Superior Court. Heard in the Court of Appeals 21 September 1990.

Fish & Hall, by Konrad K. Fish and W. B. Trevorrow, for plaintiff-appellees.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for defendant-appellants.

GREENE, Judge.

Defendants appeal from a judgment filed 14 November 1989 wherein the trial court concluded that an option provision in a lease entered into by the defendants was void for uncertainty.

On 27 April 1976, Mrs. Clarence D. Idol leased a four-acre tract of land in Greensboro, North Carolina to the defendants. The tract contained a convenience store. The ten-year lease term began on 1 May 1976 and was to terminate on 30 April 1986. The lease provided that rent would be paid monthly in advance, $225.00 per month for the first five years, and $250.00 per month for the second five years. The lease also contained the following renewal provision:

> OPTIONS—Lessees shall have three (3) options to renew this lease for a period of five (5) years each option.

In March of 1977, Mrs. Idol died, and the plaintiffs, by the terms of Mrs. Idol's will, became the owners of the leased property. During the first five years of the lease term, the defendants paid the agreed-upon rent of $225.00 to Mrs. Idol and later to the plaintiffs. At some time after the first five years, the defendants agreed to pay the plaintiffs increased rental payments of $500.00 per month. The defendants paid and the plaintiffs accepted $500.00 per month

through July, 1988, over two years after the termination date of the original lease period.

On 20 July 1988, the plaintiffs informed the defendants that rent under the renewal would be $1,500.00 per month, retroactive to 1 May 1986. Although the defendants have refused to pay the increased rent and have refused to leave the property, since July of 1988 they have tendered $500.00 per month which the plaintiffs have refused to accept.

On 28 December 1988, the plaintiffs filed suit against the defendants under North Carolina's Declaratory Judgment Act. The plaintiffs asked the trial court to declare the renewal provision in the lease void and grant to the plaintiffs immediate possession of the property. After a hearing, the trial court adjudged the renewal provision to be void for uncertainty, that the lease therefore terminated on 30 April 1986, that since 30 April 1986 the defendants have been in possession as tenants from year-to-year, that this tenancy would terminate on 30 April 1990, and that the plaintiffs would have possession of the property on 1 May 1990.

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[1] The issue is whether an optional renewal provision in a lease is void for uncertainty if the provision fails to provide the amount of rent to be paid by the lessee upon exercise of the renewal option.

Generally, a covenant of renewal in a lease which fails to provide the terms of renewal implies that renewal will be "upon the same terms as provided in the original lease," such covenant being "sufficiently definite and certain to be enforceable." 50 Am. Jur. 2d *Landlord and Tenant* § 1159 (1970). Therefore, in the absence of terms establishing the renewal rent, the amount of rent due under the renewal clause is the amount of rent required under the original lease. 2 M. Friedman, Friedman on Leases § 14.1 (2d ed. 1983 & Supp. 1989); Annotation, *Validity and Enforceability of Provision for Renewal of Lease at Rental Not Determined*, 30 A.L.R. 572, 577 (1924) (simple covenant to renew lease making no provision as to amount of rent during renewal period implies renewal for same rental in original lease, the covenant to renew thus being "sufficiently definite and certain to be valid and enforceable"), supplemented by 68 A.L.R. 157, 158 (1930) and 166 A.L.R. 1237, 1243 (1947). *See also* 50 Am. Jur. 2d *Landlord and Tenant* § 1165. We find North Carolina law on this issue to be generally consistent with these rules.

In *McAdoo v. Callum*, 86 N.C. 419 (1882), the plaintiff leased a storeroom to the defendants for a one-year period. The parties included a covenant in the lease which provided " 'that at the expiration of this lease they [the defendants] shall have the refusal of the above-mentioned premises for another year.' " *Id.* Subsequently, a dispute arose over the meaning of the above provision. Our Supreme Court, analogizing the provision for refusal with a covenant of renewal, held that " '[a] covenant that the lessee shall have the refusal of the premises at the expiration of the lease for a specified time, is a covenant to renew the lease at the same rent for such term.' " *Id.* at 422 (italics omitted). *See also First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946) (renewal provision failing to provide amount of rent due upon renewal held valid); *Annot.*, 30 A.L.R. 572, 577. *Cf. Young v. Sweet*, 266 N.C. 623, 624-25, 146 S.E.2d 669, 670-71 (1966) (where renewal provision stated that amount of renewal rent would be " 'subject to adjustment at the beginning of the option period,' " Court held that " '[a] covenant to let the premises to the lessee at the expiration of the term without mentioning any price for which they are to be let, or to renew the lease upon such terms as may be agreed on, in neither case amounts to a covenant for renewal, but is altogether void for uncertainty' "); *Annot.*, 30 A.L.R. 572, 573. In *Young*, the Court was presented with a lease which provided that the rent due on renewal would be in an amount as subsequently agreed upon by the parties. In *McAdoo*, the lease was absolutely silent on both the method of determining the rent due on renewal and its amount. Accordingly, consistent with *McAdoo* and *Young*, an optional renewal provision in a lease which is silent on the amount of rent due upon renewal of the lease and which does not provide that the renewal rent will be set by the parties' future agreement is valid and enforceable, and the amount of rent due upon renewal is impliedly the amount of rent due under the original lease.

[2, 3] Applying the above law to this case, we conclude that the optional renewal provision in the parties' lease is valid and enforceable. By failing to provide the amount of rent due upon renewal and with no mention that the amount of renewal rent would be subject to the future agreement of the parties, the plaintiffs are entitled to receive and the defendants are required to pay rent in the amount of $500.00 per month, i.e., the amount of rent due under the original lease as modified by agreement. Because the

renewal provision did not require notice to be given as a prerequisite for renewal, and because the defendants held-over at the end of the original lease period continuing to pay the $500.00 per month rent which the plaintiffs accepted for over two years, the defendants have exercised their option to renew the original ten-year lease for a five-year period. *Kearney v. Hare*, 265 N.C. 570, 144 S.E.2d 636 (1965); *Frazelle*, 226 N.C. at 727, 40 S.E.2d at 370; Annotation, *Execution of New Lease as Within Contemplation of Option for Extension or Renewal of Lease*, 172 A.L.R. 1205, 1230-40 (1948) (North Carolina recognizes no distinction between "renewal" and "extension" provisions; thus, tenant exercises option to renew by holding over unless notice expressly required by lease; when tenant exercises option by holding over, tenant liable for full additional time and has right of possession for that period); 50 Am. Jur. 2d *Landlord and Tenant* § 1192. By exercising their option to renew, the defendants are entitled to the premises until the end of the first five-year renewal period. We do not address the issue of whether the defendants have exercised their option to renew for any period of time beyond the first five-year period as this issue is not presented to this Court. Accordingly, judgment of the trial court is reversed.

Reversed.

Judges ORR and DUNCAN concur.

BENNETT REALTY, INC., A NORTH CAROLINA CORPORATION, AND JIM BENNETT, INDIVIDUALLY, PLAINTIFFS-APPELLANTS v. KARL A. MULLER AND PATRICIA W. MULLER, DEFENDANTS-APPELLEES

No. 9023DC266

(Filed 16 October 1990)

Brokers and Factors § 49 (NCI4th)— realtor's commission—action to recover—directed verdict

The trial court should not have granted directed verdict for defendants in an action to recover a real estate commission where plaintiffs and defendants entered into a written contract whereby plaintiffs were authorized to procure a purchaser for thirty-five acres of land owned by defendants in return

for a commission of 10% of the purchase price; defendant Karl Muller subsequently telephoned plaintiff Bennett and told him that defendants were willing to sell the property in two separate tracts; defendant Muller later telephoned Bennett again and instructed him to change the advertisement of one of the properties; Bennett and his salespeople showed the property and procured purchasers who signed a purchase agreement and deposited $2,000 with Bennett; Bennett contacted defendants about the purchasers and defendants indicated that they were agreeable to the sale; a survey was performed, Bennett prepared a settlement form, and Bennett went over the form with Muller on the property; Muller had no objections at that time; Bennett drove back to his office where he and the purchasers waited for defendants to arrive at the closing; defendant Patricia Muller called Bennett and told him that defendants were not going to give him a 10% commission; Bennett offered to accept a 6% commission; and defendant Patricia Muller told him that defendants had decided not to sell the property. Although defendants' evidence may cast some doubt on the issue of whether there was an agreement between the parties as to the sale of the ten acres in question, this discrepancy must be resolved in favor of plaintiffs in ruling upon a motion for a directed verdict.

Am Jur 2d, Brokers §§ 182, 185-187.

Broker's right to commission for selling part of property. 47 ALR2d 680.

APPEAL by plaintiffs from *Osborne (Samuel), Judge.* Judgment entered 11 January 1990 in District Court, ASHE County. Heard in the Court of Appeals 26 September 1990.

This is a civil action wherein plaintiffs seek to recover from defendants a commission allegedly arising out of an exclusive listing contract entered into by the parties. Plaintiffs' evidence reveals the following: Plaintiff Jim Bennett (hereinafter Bennett), a real estate broker, was approached by defendants who wanted Bennett to list their property in Ashe County for sale. On 29 October 1988, plaintiffs and defendants entered into a written contract whereby plaintiffs were authorized to procure a purchaser for thirty-five acres of land owned by defendants in return for which defendants were to pay plaintiffs a commission of 10% of the purchase price.

On 12 December 1988, defendant Karl Muller (hereinafter Muller) telephoned Bennett and told him that defendants were willing to sell the property in two separate tracts. Muller told Bennett that he wanted to sell ten acres with a house on the property for $63,900.00 and twenty-five acres with a log home on it for $49,900.00 with owner financing not to exceed ten years at 10.5%. Plaintiffs began marketing the two tracts separately. On 6 March 1989, Muller telephoned Bennett and instructed him to change the advertisement of the property and to offer the log home and ten acres of land for $29,900.00 with more or less land available. During the time that the property was listed, Bennett and his salespeople showed the property to at least twelve prospective buyers. In April 1989, Bennett showed the property to Randy and Alice Foster. The Fosters offered to purchase the ten acres with the log home for the terms at which the property had been advertised. Bennett prepared and had the Fosters sign a purchase agreement, and the Fosters deposited $2,000.00 with Bennett Realty, Inc. Bennett contacted defendants about the purchasers, and defendants indicated that they were agreeable to the sale. A survey of the ten acres was performed. On 5 May 1989, the day set for the closing, Bennett prepared a settlement form showing all the credits and charges concerning the transaction and went over the form with Muller on defendants' property. The commission charged by Bennett was $2,990.00, which was 10% of the purchase price. Muller had no objections at that time. Bennett drove back to his office where he and the Fosters waited for defendants to arrive for the closing. Patricia Muller called Bennett and told him that defendants were not going to give him a 10% commission. Bennett told her that he was willing to accept a 6% commission if that would keep the deal from falling through. Patricia Muller told him that defendants had decided not to sell the property. Bennett contacted Muller later in the evening but defendants refused to sell.

From a judgment directing a verdict for defendants, plaintiffs appealed.

Kilby & Hodges, by Sherrie R. Hodges, for plaintiffs, appellants.

Vannoy & Reeves, by Jimmy D. Reeves, for defendants, appellees.

HEDRICK, Chief Judge.

The only question raised on appeal is whether the trial court erred in granting defendants' motion for a directed verdict. Plain-

tiffs argue the evidence offered at trial was sufficient to take the case to the jury on the issue of whether plaintiffs and defendants entered into a contract whereby plaintiffs would procure a buyer for the ten acres of property in return for which defendants would pay plaintiffs a 10% commission. Defendants, on the other hand, argue that there is no evidence that there was a meeting of the minds of the parties as to the subsequent changes in the original listing contract.

In ruling upon a defendant's motion for directed verdict, the evidence is to be considered in the light most favorable to plaintiff, and the plaintiff is entitled to all reasonable inferences that can be drawn from that evidence. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E.2d 816 (1981). The question presented by a defendant's motion for a directed verdict is whether plaintiff's evidence was sufficient for submission to the jury. *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971).

It is well settled that a mere contract between a broker and the owner of land to negotiate a sale of the latter's land is not required to be in writing. *Carver v. Britt*, 241 N.C. 538, 85 S.E.2d 888 (1955). It is also well settled that, as a general rule, where a real estate broker finds a customer that is ready, able and willing to enter into a transaction on the terms proposed by the principal, the broker cannot, unless there is a special contract to the contrary, be deprived of his right to his commissions by reason of the transaction failing on account of some fault of the principal. *Id.*

We believe that plaintiffs' evidence in the present case, considered in the light most favorable to plaintiffs, was sufficient for submission to the jury. Defendants' argument that the evidence failed to show a "meeting of the minds" is without merit. Although defendants' evidence may cast some doubt on the issue of whether there was an agreement between the parties as to the sale of the ten acres in question, this discrepancy must be resolved in the favor of plaintiffs in ruling upon a motion for a directed verdict. Any question of fact raised by the evidence is properly one for the jury. Thus, we hold the trial court erred in directing a verdict for defendants.

The judgment of the trial court must be reversed and the cause remanded to the District Court of Ashe County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. LUTHER BYRD HARRELL, DEFENDANT-APPELLANT

No. 903SC26

(Filed 16 October 1990)

Criminal Law § 1114 (NCI4th)— sentencing—consideration of defendant's denial of guilt

The trial court erred in basing its sentencing decision in part upon defendant's denial of all guilt with respect to the charges against him.

Am Jur 2d, Criminal Law § 599.

APPEAL by defendant from judgment entered 5 May 1989 by *Judge Samuel T. Currin* in PITT County Superior Court. Heard in the Court of Appeals 26 September 1990.

On 5 May 1989 defendant was found guilty of two counts of conspiracy to possess cocaine, one count of conspiracy to possess with intent to sell cocaine, three counts each of conspiracy to sell cocaine and to deliver cocaine, two counts of possession of cocaine, one count of possession with intent to sell cocaine, three counts of sale of cocaine and three counts of delivery of cocaine. Defendant was sentenced to a total of fifty years imprisonment.

The trial court arrested judgment on ten of the counts and gave the presumptive sentences for six of the counts. It also found factors to aggravate the sentences in two counts beyond the presumptive term, while suspending one of these aggravated sentences. From these judgments, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General R. Dawn Gibbs, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant appellant.

ARNOLD, Judge.

Defendant contends the trial court erred in basing its sentencing decision in part upon the fact defendant denied all guilt with respect to the charges. We agree with defendant's contention and remand for resentencing.

The trial court found one statutory aggravating factor for two of the charges, a prior conviction for a criminal offense punishable by more than sixty days confinement. In addition, the trial court found as a nonstatutory aggravating factor for these two charges that "[t]he defendant gave no substantial assistance to law enforcement." Later in corrected findings the trial court eliminated this nonstatutory factor for one of the offenses. The trial court found no mitigating factors.

Of more concern to this Court are the trial court's comments prior to sentencing:

> Mr. Harrell, I always explain to the defendant why I impose the sentence that I do. In your case several factors entered into my decision. . . . My second consideration is the fact that you have denied all guilt with regard to these charges. . . . It's one thing when a defendant is caught and comes in and admits his wrong. That enables the court to take some consideration. But in your case, of course, you continue to deny your involvement, even in the face of what I think is very strong evidence against you. So I would take a different view of you if I thought you were being truthful with the court, that's what I'm saying to you. I just don't think you're being truthful with the court. . . . But in any event those are the factors that go into my thinking.

As Judge Duncan emphasized in *State v. Williams*, 98 N.C. App. 68, 74, 389 S.E.2d 830, 833 (1990), "exercising the right against self-incrimination, cannot be an aggravating factor in the defendant's sentence." Factors which would mitigate a sentence if present, cannot be used in aggravation if absent. *Id.* The record indicates the trial judge improperly considered defendant's denial of all guilt in regard to the charges. *State v. Brown*, 64 N.C. App. 578, 307 S.E.2d 831 (1983). Although the trial court corrected its findings of factors in aggravation for one of the two sentences which exceeded the presumptive term, both sentences are error warranting a new sentencing hearing. *Williams*, 98 N.C. App. 68, 389 S.E.2d

830. Since defendant is entitled to a new sentencing hearing based on the first assignment of error, his other assignment of error concerning sentencing will not be addressed.

After reviewing the record, briefs, and counsel's oral arguments, we examined defendant's remaining assignments of error and found them to be without merit. We find no error in the trial below. But due to the trial court's consideration of an impermissible factor in sentencing, this case is

Remanded for resentencing.

Chief Judge HEDRICK and Judge PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 OCTOBER 1990

BELL v. HIATT No. 894SC1210	Onslow (89CVS1438)	Affirmed
BROTHERS v. BRAINOS No. 8910DC1366	Wake (88CVD9436)	Affirmed
CARTER v. HIATT No. 8910SC891	Wake (89CVS01462)	Affirmed
CROMPTON v. CROMPTON No. 9021DC452	Forsyth (89CVD1050)	Dismissed in part; affirmed in part
DAWSON v. ALLSTATE INS. CO. No. 9010SC571	Wake (89CVS10820)	Appeal Dismissed
EARNHARDT v. EARNHARDT No. 9020DC378	Stanly (89CVD032)	Affirmed
HOYLE v. DILLINGHAM No. 9025DC457	Burke (88CVD995)	Affirmed in part & remanded
IN RE SOUTHERN No. 8917SC1270	Stokes (89CVS46)	Affirmed
IN RE WALL No. 8917SC1271	Stokes (89CVS13)	Affirmed
NICHOLS v. HIATT No. 9021SC392	Forsyth (89CVS5105)	Affirmed
ROGERS v. HIATT No. 9021SC391	Forsyth (89CVS4106)	Affirmed
SAYLOR v. FORREST No. 9021SC511	Forsyth (89CVS6153)	Reversed & Remanded
STATE v. ABSHER No. 9023SC115	Ashe (87CRS718) transferred to Wilkes (89CRS6325)	Vacated
STATE v. BARRON No. 9020SC610	Moore (88CRS9105) (88CRS9106) (88CRS9107) (88CRS9108)	No Error
STATE v. CHERRY No. 907SC491	Nash (89CRS10600)	No Error

STATE v. JONES No. 8916SC823	Scotland (88CRS3158)	No Error
STATE v. MARTIN No. 9011SC465	Lee (89CRS10489)	No Error
STEWART v. STEWART No. 9030DC520	Haywood (89CVD565)	Dismissed
STUBBS v. WAGONER No. 8922DC1333	Alexander (88CVD367)	Reversed, Vacated & Remanded
THOMPSON v. HIATT No. 8910SC827	Wake (89CVS03675)	Affirmed
TOWN OF KNIGHTDALE v. VAUGHN No. 9010SC48	Wake (88CVS3888)	Reversed
WHITLEY v. HIATT No. 907SC461	Nash (89CVS1372)	Affirmed

FILED 16 OCTOBER 1990

HAMMOND v. IMPERIAL FIRE HOSE CO. No. 8910IC1368	Ind. Comm. (558613)	Affirmed
JOHNSON v. NEW HANOVER CO. BD. OF EDUCATION No. 9010IC227	Ind. Comm. (700640)	Affirmed
PAGE v. PAGE No. 8926DC1350	Mecklenburg (79CVD11959)	Affirmed
STATE v. DRIVER No. 8911SC1365	Johnston (88CRS9706) (89CRS862) (89CRS863) (89CRS864) (89CRS874) (89CRS875)	No Error

STATE OF NORTH CAROLINA v. MURRAY ALAN COATS

No. 8910SC1077

(Filed 30 October 1990)

1. Indictment and Warrant § 8.4 (NCI3d)— kidnapping and sexual offense—kidnapping conviction arrested—State not required to elect between charges

In a prosecution for first degree kidnapping and first degree sexual offense where the trial court's arrest of judgment on the conviction for first degree kidnapping prevented double punishment for the same conduct, the Court of Appeals declined to adopt defendant's contention that an election between charges to preclude double punishment should be mandatory when defendant so moves at the charge conference.

Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 20, 21, 520-524.

2. Kidnapping § 2 (NCI3d)— first degree kidnapping—judgment arrested—sentencing for second degree kidnapping

It was proper to sentence defendant for second degree kidnapping in a prosecution for first degree kidnapping and first degree sexual offense where judgment was arrested on the conviction for first degree kidnapping to prevent double punishment. The trial court correctly charged the jury on the elements of first and second degree kidnapping, the jury asked during deliberations to be instructed on the difference between first and second degree kidnapping, the trial court once again instructed the jury on the elements of those offenses, and, when the jury found that the State had proven all of the elements of first degree kidnapping, the jury necessarily had to find that the State had proven all the elements of second degree kidnapping.

Am Jur 2d, Abduction and Kidnapping §§ 4, 34; Trial §§ 712 et seq.

3. Criminal Law § 503 (NCI4th)— court's remarks to jury—jury not coerced

The trial court's unrecorded remarks did not amount to a coercion of the jury to reach a verdict where the inference

that the court's remarks rushed the jury to a verdict is not warranted.

Am Jur 2d, Trial § 1055.

4. **Criminal Law § 959 (NCI4th)— State's failure to disclose evidence—motion for appropriate relief denied**

Defendant's motion for appropriate relief in a prosecution for first degree kidnapping and first degree sexual offense was properly denied where the motion was based on the State's failure to disclose a witness's statement to an officer but the statement, assuming admissibility, was not internally consistent, was not material, and did not meet the requirements of N.C.G.S. § 15A-1415(b)(6).

Am Jur 2d, Depositions and Discovery §§ 428, 437, 455-461.

APPEAL by defendant from judgment entered 14 April 1989 by *Judge Orlando Hudson* in WAKE County Superior Court. Heard in the Court of Appeals 29 May 1990.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane R. Garvey, for the State.

Richard W. Rutherford for defendant appellant.

COZORT, Judge.

On 14 April 1989, the defendant was convicted of first-degree kidnapping and two counts of first-degree sexual offense. He received the mandatory sentence of life imprisonment for each count of first-degree sexual offense. Judgment was arrested on the conviction of first-degree kidnapping, and the defendant was sentenced to a term of thirty years' imprisonment for second-degree kidnapping. We find no error.

At trial the State offered evidence tending to show the following: At approximately 7:15 on the morning of 5 November 1988, Kimberly Lynn Hilton arrived for work at the Star Flite Gas Station on North Boulevard in Raleigh. Early that morning the defendant Murray Alan Coats, who patronized this gas station and convenience store, came inside to buy a soft drink or a pack of cigarettes. At approximately 9:00 the same morning, the defendant returned and found Ms. Hilton alone in the store.

According to Ms. Hilton's testimony, when the defendant returned, he walked behind the counter, put a gun to her face, grabbed her by the hair, and pulled her out of the store. After placing her in the passenger side of a pickup truck, he locked the door and held a gun against her left leg. The defendant drove to a wooded area, stopped near a barn, forced Ms. Hilton inside, and ordered her to undress. The defendant then ordered Ms. Hilton to perform fellatio, which continued for an hour or more. While pressing a gun against her temple, the defendant said: "[Y]ou can do better than that."

Ms. Hilton testified further that the defendant ordered her to change positions several times and to get on a platform on her hands and knees. Then, she testified,

> he put his fingers inside of my vagina.
>
> Q. Okay. What happened after that?
>
> A. And I said, ouch, because it hurt. And he took his fingers out of me and then he told me to stand up.

At this point the attack ceased, and the defendant began a rambling monologue about his use of cocaine the previous night, his knowledge of Ms. Hilton's family and their residence, and his difficulties with his girlfriend. Finally, after Ms. Hilton promised to tell no one about the attack, the defendant left the barn. After five or ten minutes, Ms. Hilton looked out of the barn and saw "that the truck was still there and that . . . another car . . . had pulled in . . . facing in the opposite direction." Ms. Hilton left the barn and found her way to a house, whose owner called the police.

Ronald Gay testified that he bought gas at the Star Flite station where Ms. Hilton worked. He stopped there on the morning of 5 November 1988, but found no one except another patron who was looking for the clerk. Gay stated: "I didn't see her [Ms. Hilton] anywhere . . . . I went behind the counter; cash register door was closed. . . . So, I called the Raleigh Police Department and told them who I was and what I had found there."

Officer M. F. Frazier, who responded to Mr. Gay's call, testified that he investigated the scene and found, among other items, Ms. Hilton's pocketbook and car keys. With Kim Marshall, manager of the Star Flite station, Officer Frazier found "money in the cash register; so, it didn't appear to be a robbery."

William Rhodes, Ms. Hilton's boyfriend, testified that he telephoned her between 7:30 and 7:45 on the morning of 5 November 1988. He testified further that he usually brought Ms. Hilton lunch "[o]n the weekends when she worked" and that he planned to bring her lunch "[a]round 11:00" that day. When he arrived at the Star Flite station, he saw a "whole swarm of CCBI. The place was surrounded by police."

Billy Ray Prince testified that, while driving home on 5 November 1988, he saw the defendant standing beside a truck. Prince stopped, asked whether he could help and volunteered "to go get some jumper cables." When the jumper cables failed to start the defendant's truck, Prince used his car to push the defendant's truck until it jump started.

Mr. Coats testified in his own defense and gave the following account: He stopped at the Star Flite station "about every Saturday" on his way to or from work and struck up "casual conversation" with Ms. Hilton. They "tended to flirt a little bit with each other." On the night of 4 November 1988, "seven people" came to Mr. Coats' residence for a party. Mr. Coats drank some alcohol and used some drugs until approximately 1:00 the next morning. On his way to work, he stopped at the Star Flite station and struck up a conversation with Ms. Hilton. They agreed that they did not want to work that morning. Mr. Coats left the station, had difficulties with his car, exchanged it for his girlfriend's pickup truck, and decided to return to Star Flite to see whether Ms. Hilton wanted to take the day off. She willingly left with him, telling him not to worry about leaving the store unlocked because she had a plan. Mr. Coats' gun was on the seat of the truck, but its clip was inside the glove compartment, and at no time did he threaten her with the gun. She agreed to enter a barn and voluntarily performed fellatio on him. After their sexual encounter ended, they talked for about an hour. Ms. Hilton "said that she was going to tell her mother that she had been abducted from the store" so that she would no longer have to work there, but she assured Mr. Coats that she would not implicate him in the story she would fabricate. Then, according to Mr. Coats, Ms. Hilton left the barn, and he returned to the pickup truck and with the help of a passerby got it started.

The defendant also presented several character witnesses who testified in his behalf.

[1] On appeal the defendant contends that the trial court erred in failing to require the State to submit only the first-degree kidnapping charge or only the first-degree sex offense charges to the jury. Although the trial court's arrest of judgment on the conviction of first-degree kidnapping prevented double punishment for the same conduct, the defendant argues that, where, as here, the defendant moves at the charge conference to require an election between charges to preclude the possibility of double punishment, such an election should be mandatory for the State. The defendant cites no authority to support that proposition, and we decline to adopt it.

Among its other aspects, the Fifth Amendment guarantee against double jeopardy "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 665 (1969). In North Carolina the crime of kidnapping has two degrees. "If the person kidnapped 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." N.C. Gen. Stat. § 14-39(b) (1989). A defendant may not be punished for both first-degree kidnapping and sexual assault, where the sexual assault is used to elevate kidnapping to the first degree. *State v. Freeland*, 316 N.C. 13, 23, 340 S.E.2d 35, 40-41 (1986), *resentencing affirmed on appeal*, 321 N.C. 115, 361 S.E.2d 560 (1987); *accord State v. Mason*, 317 N.C. 283, 292, 345 S.E.2d 195, 200 (1986); and *State v. Walker*, 84 N.C. App. 540, 544, 353 S.E.2d 245, 247-48 (1987). In both *Freeland* and *Mason* the defendant was convicted and sentenced for a sexual assault and first-degree kidnapping predicated on the sexual assault, and in both cases our Supreme Court required the trial court to arrest judgment either on the conviction of sexual assault or on the conviction of first-degree kidnapping. In both cases the Court held that the defendant could be resentenced for second-degree kidnapping, if judgment on first-degree kidnapping was arrested. *Freeland*, 316 N.C. at 324, 340 S.E.2d at 41; *Mason*, 317 N.C. at 292-93, 345 S.E.2d at 200.

[2] In a related argument the defendant asserts that, following the arrest of judgment on his conviction for first-degree kidnapping, he should not have been sentenced for second-degree kidnapping without a specific adjudication of guilt as to that crime. We note initially that under our case law a defendant may be convicted of kidnapping and of a sexual assault where the restraint or asporta-

tion of the victim "is a separate, complete act, independent of and apart from" the sexual assault. *State v. Silhan*, 297 N.C. 660, 673, 256 S.E.2d 702, 710 (1979); *accord State v. Wilson*, 296 N.C. 298, 310, 250 S.E.2d 621, 628 (1979). Thus, the defendant in the case below could properly be sentenced for second-degree kidnapping if the State proved beyond a reasonable doubt each of the elements of that crime. Regarding kidnapping, the trial court instructed the jury as follows:

> The defendant has been accused of first degree kidnapping. Now, I charge that for you to find the defendant guilty of first degree kidnapping the State must prove five things beyond a reasonable doubt:
>
> First, that the defendant unlawfully removed a person from one place to another.
>
> Second, that the person did not consent to this removal.
>
> Third, that the defendant removed that person for the purpose of facilitating his commission of the felony of first degree sexual offense.
>
> Fourth, that this removal was a separate, complete act independent of and apart from the felony of first degree sexual offense.
>
> And, fifth, that the person had been sexually assaulted.
>
> * * * *
>
> If you do not find the defendant guilty of first degree kidnapping, you must determine whether he is guilty of second degree kidnapping. Second degree kidnapping differs from first degree kidnapping only in that it is unnecessary for the State to prove that the person had been sexually assaulted.

The trial court correctly charged the jury on the elements of first- and second-degree kidnapping. *See* N.C. Gen. Stat. § 14-39; North Carolina Pattern Jury Instructions, Crim. 210.25; North Carolina Crimes, A Guidebook on the Elements of Crime 101-03 (3d ed. 1985). During its deliberations the jury asked to be instructed on the difference between first- and second-degree kidnapping, and the trial court once again instructed them on the elements of those offenses. When it found that the State proved all the elements of first-degree kidnapping, the jury necessarily had to find that

the State proved all the elements of second-degree kidnapping. Thus, it was proper to sentence the defendant for second-degree kidnapping.

[3] The defendant also contends that the trial court erred in making certain remarks which, the defendant asserts, could be construed as coercing the jury to reach a verdict by 1:00 p.m. of the following day. We disagree.

After closing arguments on 13 April 1989, the following exchange occurred:

> THE COURT: All right. Members of the jury, we will ask that you assemble in the jury room at 9:00 o'clock tomorrow morning and I will give you instructions at that time. Please remember the instructions that I have given you throughout the trial about keeping an open mind and not deliberating about this matter and not having any contact with any other parties.
>
> All right. At this time the jury is excused until 9:00 o'clock tomorrow.
>
> (Jury absent.)
>
> MR. ANDERSON: If Your Honor please, we feel like it should be a part of the Court—of the record as to your instructions to the jury while the court reporter was not here in connection with their deliberations and as to the time constraints that you have suggested and things of that nature. We feel like it's—
>
> THE COURT: The time constraints of the Court are the same ones the Court told defense counsel. I said exactly to the jury what I told y'all I would tell them beforehand. If you want to put something in the record about what your recollection is, that's fine. I'll give any party any opportunity to put whatever they want in the record.
>
> MR. ANDERSON: Well, my understanding was you suggested to the—to the jury that by 1:00 o'clock that—that you would not be in the courtroom or that the verdict—you had hoped they would reach a verdict by 1:00 o'clock.

THE COURT: No, sir, I certainly did not. I certainly did not tell the jury anytime about which I would hope they would reach a verdict.

* * * *

MR. ANDERSON: I'm trying to get my objection in, Judge.

THE COURT: Yes, sir.

MR. ANDERSON: We object to it being done out of the presence of the court reporter.

On 14 April the following was entered in the record:

THE COURT: All right. Miss Court Reporter, if you will record the following, the Court at the request of the defense counsel has been asked to reconstruct a conversation that the Court had at the end of all the jury arguments in the late afternoon, Thursday, April 13th, 1989. This occurred in the presence of all counsel but inadvertently outside the presence of the court reporter.

The Court notes that at an earlier point in the trial of this matter outside the presence of the jury that the Court discussed with all counsel the substance of what the Court would tell the jury but not the exact words. The Court does not recall there being objection at that time.

The Court summary is as follows: Members of the jury, I have known for some time that if we—I'm sorry—that if you were to deliberate on Friday that you would not have a full day to do so. The longest that you would be allowed to deliberate would be 1:00, but this is not the fault of any of the parties in this case.

The Court does not care how long you deliberate but if you desire to deliberate beyond 1:00 o'clock p.m. Friday we will need to discuss whether or not you wish to return Saturday or next Monday. I am not concerned with deciding now whether you will return Saturday or Monday because that is premature. All of us have decided, however, that since you will not have the regular full day to deliberate that the jury should decide what time it desires to start court on Friday.

At this point there was some discussion among the jurors and they decided to begin court at 9:00 o'clock a.m. on Friday morning.

I'll hear from counsel for the State, counsel for the defendant and opportunity to place in the record whatever they desire.

MR. ANDERSON: I think we have an objection in the record, Judge, already.

THE COURT: Yes, sir.

At trial the defendant, through his counsel, was repeatedly afforded opportunities to place in the record any correction or variation in the trial judge's remarks, according to counsel's recollection of those remarks. He did not avail himself of any of those opportunities. On appeal he would have us infer that "the jurors construed the Court's unrecorded remarks the night before as requiring some verdict . . . by 1:00 P.M. [on 14 April 1989], thereby rushing them to a verdict." Based on the record, we do not think that inference is warranted.

The defendant analogizes the trial judge's remarks in the case below to remarks made by the trial judge in *State v. Goodwin*, 95 N.C. App. 565, 569, 383 S.E.2d 234, 236 (1989). The analogy is inapt. In *Goodwin* the trial judge held a private discussion with the jury; neither the defendant nor his counsel was present, and neither the judge's remarks nor a summary of them appeared in the record. In the case below the trial judge's remarks to the jury were made in open court and in the presence of the defendant and his counsel; the substance of those remarks appears of record. In the circumstances disclosed by the case below, the trial judge's unrecorded remarks do not amount to coercion of the jury. *See State v. Holcomb*, 295 N.C. 608, 613-14, 247 S.E.2d 888, 892 (1978).

Having reviewed the record and the briefs, we find defendant's remaining assignments of error to be without merit. They are overruled.

[4] On 17 May 1990, the defendant moved for appropriate relief in the appellate division pursuant to N.C. Gen. Stat. §§ 15A-1418 and 15A-1415(b)(3) and (6). N.C. Gen. Stat. § 1415(b)(3) provides for relief when the defendant's "conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." The defendant contends that, contrary to the re-

quirements of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and its progeny, the State failed to disclose exculpatory evidence, specifically the transcript of a statement made by Sharon Simmons (now Sharon Brown) to Detective Glover of the Raleigh Police Department. Ms. Brown stated, in part, that Ms. Hilton "is not very responsible." The defendant contends that this evidence was material and "would have enabled the Defendant to prove that the prosecuting witness was irresponsible and voluntarily left the Starflite [*sic*] premises."

Assuming that Ms. Brown's opinion of Ms. Hilton's responsibility is admissible for purposes of impeachment, which is doubtful, Ms. Brown's statement is not internally consistent. While she opined that Ms. Hilton "is not a real responsible person," she also conceded that Ms. Hilton "cared about working," stated that she knew of no problems that Ms. Hilton had had at work, and told Detective Glover that "it isn't like Kim to just leave the store right open and everything." For *Brady* purposes, nondisclosed information "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." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494, 105 S. Ct. 3375, 3383 (1985). By that standard Ms. Brown's opinion is not material.

Section 15A-1415(b)(6) provides for appropriate relief when

> [e]vidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

As a basis for the relief sought by the defendant, it is sufficient to note that Ms. Brown's statement does not meet the requirements of that section. *See State v. Sprinkle*, 46 N.C. App. 802, 805, 266 S.E.2d 375, 377, *disc. review denied*, 300 N.C. 561, 270 S.E.2d 115 (1980). Accordingly, the defendant's motion is denied.

For the reasons stated above, we find that the defendant's trial was free of prejudicial error.

No error in trial.

Motion for appropriate relief denied.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. MARTIN BERNARD PETTY

No. 9018SC168

(Filed 30 October 1990)

1. **Criminal Law §§ 1282, 152 (NCI4th)— habitual felon—1973 plea of nolo contendere—improperly used**

The trial court improperly used a *nolo contendere* plea as one of three prior felony convictions required by N.C.G.S. § 14-7.1 to support a charge of being an habitual felon where judgment was entered against defendant for felony escape based on a *nolo contendere* plea on 2 April 1973, before the effective date of N.C.G.S. Chapter 15A. The rule at that time was that a conviction resulting from a *nolo contendere* plea could not be used against the defendant in any case other than the one in which it was entered.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 6-10, 14.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 ALR2d 1080.

2. **Criminal Law § 1286 (NCI4th)— habitual offender—supporting convictions—variance in name**

A conviction as an habitual offender was not improper because the judgment for the second of the three supporting felonies was under the name Martin Petty whereas defendant was convicted here under the name Martin Bernard Petty. The names are the same for the purposes of N.C.G.S. § 14-7.4; absolute identity of name is not required under the statute. Any discrepancy between the actual age of the defendant at the time of conviction and his age as reflected on the record of conviction goes to the weight of the evidence and not its admissibility.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 15, 27.

3. Criminal Law § 73.1 (NCI3d)— hearsay—inadmissible—no plain error

There was no plain error in a prosecution for breaking and entering, larceny, and felonious possession of stolen property from the admission of statements by a witness who did not testify where the statements were inadmissible hearsay but there was sufficient other competent evidence by which the jury could have reached its verdict.

Am Jur 2d, Evidence §§ 493-496.

APPEAL by defendant from judgments entered 19 October 1989 by *Judge Thomas W. Ross* in GUILFORD County Superior Court. Heard in the Court of Appeals 27 September 1990.

Defendant was charged by proper bills of indictment with breaking and entering with intent to commit larceny, felonious larceny of a motor vehicle and felonious possession of stolen property. Defendant was charged in a separate bill of indictment with being a habitual felon under G.S. § 14-7.1. Defendant was convicted on all charges following a bifurcated jury trial. Judge Ross arrested judgment on the conviction for possessing stolen property, consolidated for judgment the remaining offenses of breaking and entering and larceny while being a habitual felon and imposed a life sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant- appellant.

JOHNSON, Judge.

We note initially that defendant did not properly preserve for appeal either issue on which he now relies. N.C. Rules of Appellate Procedure 10(b)(1), 10(b)(3). However, the Court may hear appeals in its discretion under Rule 2 of the N.C. Rules of Appellate Procedure and we do so now.

I.

Defendant first contends that his conviction and sentence as a habitual felon violated due process because the State's evidence to support the charge was insufficient as a matter of law where (a) the State failed to prove that defendant had been convicted of or pled guilty to three felony offenses as required by G.S. § 14-7.7; and (b) the State failed to prove that the defendant to which the earlier court records referred was the defendant before the court in this case.

I(a).

[1] In support of the habitual felon charge the State offered certified copies of judgments of three prior felony convictions which corresponded to the felonies charged in the indictment. The second felony conviction was for escape and was based on a plea of *nolo contendere* (no contest). It was proved by a certified copy of the judgment of conviction dated 2 April 1973. Defendant contends that this felony conviction cannot stand as a basis for the habitual felon charge because it was based on a plea of *nolo contendere* which was taken prior to the enactment of G.S. § 15A. We agree.

The definition of a habitual felon is set out in G.S. § 14-7.1: "Any person who has been *convicted* of or pled guilty to three felony offenses . . . is a habitual felon." (emphasis added). The issue here is whether a sentence entered in 1973 pursuant to a plea of *nolo contendere* is a conviction for purposes of G.S. § 14-7.1.

A no contest plea is not an admission of guilt. It is a statement by the defendant that he will not resist the imposition of a sentence in the case in which the plea is entered. *See State v. Holden*, 321 N.C. 125, 161, 362 S.E.2d 513, 535 (1987). The plea authorizes judgment as if on conviction by verdict or guilty plea in that particular case but it leaves the defendant free to assert his innocence in any other case and cannot be considered an admission of guilt. *State Bar v. Hall*, 293 N.C. 539, 238 S.E.2d 521 (1977). *Accord, Fox v. Scheidt, Comr. of Motor Vehicles*, 241 N.C. 31, 84 S.E.2d 259 (1954) (A *nolo contendere* plea is equivalent to a guilty plea for the purpose of the case in which it is entered but does not establish guilt for any other purpose).

The adoption of Chapter 15A of the General Statutes has changed the rule as it is stated above:

> The General Assembly has enacted Chapter 15A of the General Statutes with an effective date of 1 July 1975 [sic], which would make it inapplicable to [earlier cases prohibiting use of a no contest plea against the defendant in other cases]. N.C.G.S. § 15A-1022(c) provides that before a court may accept a no contest plea it must determine that there is a factual basis for the plea. *This changes the rule that a court must impose a sentence based on the no contest plea and may not adjudicate the guilt of a defendant upon such a plea. When a plea of no contest is now entered there must be a finding by a court that there is a factual basis for the plea. This finding and the entry of a judgment thereon constitute an adjudication of guilt.*

State v. Outlaw, 326 N.C. 467, 469, 390 S.E.2d 336, 337 (1990) (emphasis added). A no contest plea may now be used to aggravate a crime so as to sustain a death sentence under G.S. § 15A-2000(e). *State v. Holden*, 321 N.C. 125, 161, 362 S.E.2d 513, 535. It can properly be admitted under Rule 609(a) for purposes of impeachment. *State v. Outlaw, supra. See also Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990) (G.S. § 15A-1022(c) has changed the rule that a court may not adjudicate defendant's guilt on plea of no contest; thus, no contest plea to DWI charge qualifies as a prior conviction for purposes of revoking driver's license since court must now make finding of factual basis for plea and this amounts to an adjudication of guilt).

In the case *sub judice*, defendant was convicted on a plea of no contest to the charge of felony escape. The judgment was entered on 2 April 1973, before the effective date of Chapter 15A. The rule at that time was that a conviction resulting from a *nolo contendere* plea could not be used against the defendant in any case other than the one in which it was entered because it was neither an admission nor adjudication of guilt. The use of this conviction as one of the three prior felony convictions required by G.S. § 14-7.1 to support a charge of being a habitual felon was therefore improper.

I(b).

[2] Defendant next argues that his conviction as a habitual felon was improper because the State failed to prove that the defendant to which the earlier court records referred was the defendant before the court in this case. The defendant specifically points to the

fact that the judgment of conviction for the second of the three supporting felonies was in the name of Martin Petty whereas this defendant was indicted and convicted in the case *sub judice* under the name Martin Bernard Petty. He further points to age discrepancies on two of the judgments, given defendant's stipulated date of birth. Defendant did not object to the introduction of the documentary evidence at trial nor did he present any evidence to contradict their contents.

The use of documentary evidence in habitual felon proceedings is set out in G.S. § 14-7.4:

> In all cases where a person is *charged under the provisions of this Article with being an habitual felon,* the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or a certified copy of the court record, bearing the *same name as that by which the defendant is charged,* shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein (emphasis added).

G.S. § 14-7.4. The issue is whether the requirement in the statute that the document bear the "same name as that by which the defendant is charged" means that the names must be identical in order for that document to be *prima facie* evidence that the defendant named in the document is the same as the defendant before the court.

In the case *sub judice*, three certified judgments were entered into evidence to support the habitual felon charge. The first judgment, dated 3 September 1969, identified the "name, age, sex and race of defendant" as being "Martin Bernard Petty CM-19." The second certified judgment dated 2 April 1973, identified the "name, age, sex and race of defendant" as being "Martin Petty 22/M/N." The third certified judgment, dated 30 August 1982, identified the "defendant, race, sex, age" as "Martin Bernard Petty, B, M, 30." The age of the defendant on the first two judgments does not agree with this defendant's stipulated birthdate.

We hold that the names "Martin Bernard Petty" and "Martin Petty" are the "same name" for purposes of G.S. § 14-7.4 and that absolute identity of name is not required under this statute. We note that absolute identity or a specific degree of identity between names can be required by the legislature. An example is G.S. § 15A-924(d) which states in pertinent part:

> If the surname of a defendant charged is identical to the surname of a defendant previously convicted and there is identity with respect to one given name, or two initials, or two initials corresponding with the first letters of given names, between two defendants, and there is no evidence that would indicate the two defendants are not one and the same, the identity of name is prima facie evidence that the two defendants are the same person.

G.S. § 15A-924(d). G.S. § 14-7.4 by its own terms specifically applies to a conviction of habitual felon under G.S. § 14-7.3. The plain meaning of the statute would require only that the *same* name be on the judgment and the present indictment. In view of the fact that the legislature could be and, in fact, has been more specific in this regard, we decline to expand the plain meaning of the statute to encompass a greater degree of specificity than the plain meaning would require.

We further find that any discrepancy between the actual age of the defendant at the time of conviction and his age as reflected on the record of conviction, goes to the weight of the evidence and not its admissibility.

II.

[3] Defendant lastly contends that the trial court committed plain error by admitting improper and prejudicial hearsay during the trial for the substantive offenses of breaking and entering and larceny.

At trial, the State's evidence tended to show, *inter alia*, the following pertinent facts. Mr. Bhagat worked the night shift at the Days Inn in Greensboro. At about 2:30 a.m. on 24 May 1989 he observed a black male approach the front lobby door, peer through the glass, turn and walk away. The man walked to a parked vehicle that appeared to be a white Cadillac hearse, got in and drove away. Mr. Bhagat observed the vehicle until it disappeared after turning toward the nearby Red Carpet Inn. At about

3:00 a.m. Officers Miller and Nabors responded separately to a call concerning a suspicious black male at the Days Inn. They spoke with Mr. Bhagat, obtained a description of the man Bhagat had seen and then proceeded to the Red Carpet Inn in search of the vehicle. Officer Nabors entered the parking lot of the Red Carpet Inn and noticed a 1968 Cadillac hearse parked there. Officer Miller, entering another part of the lot, noticed a vehicle with a black female driver. A black male who fit the description given by Mr. Bhagat was leaning into the window. Miller continued around the motel and saw a hearse with a Smith-Hinnant funeral home logo. Officer Nabors contacted the funeral home by radio and was informed that the hearse should be at the funeral home and apparently had been stolen. Meanwhile, Officer Miller stopped and detained the other car as it came around the motel. The man he had observed standing by the car was now a passenger in the car.

During its direct examination of Officer Nabors, the State elicited the following testimony:

> Q. All right. Now during your investigation [at the Red Carpet Inn parking lot], did [the defendant] make any statements to you regarding the hearse or his whereabouts that evening?
>
> A. He stated that he knowed [sic] nothing of the hearse and that he had been with the lady who was driving the car that Officer Miller had stopped when it come around the back of the building.
>
> Q. Did he say how long he had been with that woman?
>
> A. He stated that he had been with her all night.

On direct examination of Officer Miller, the State elicited the following testimony:

> Q. Okay, now, did you have any conversation with the female driver of this second car?
>
> A. Yes, I did.
>
> Q. And what did she indicate to you?
>
> A. She indicated she had been on a dinner date with a resident of that particular motel, the Red Carpet Inn. As she was leaving the driveway, the suspect approached her vehicle and leaned in the driver's window asking for a ride. The suspect happened to be going in the same direction, a similar area of town that

she lived in, so she offered to give him a ride. She stated she did not know him and had never seen him before.

Q. Okay. Now subsequent to that, did you then release her and let her on on [sic] her way?

A. Yes, sir.

The officers did not ascertain the woman's identity and she did not testify at trial. The State's evidence consisted primarily of Mr. Bhagat's testimony that the defendant in court was the same man he saw peer into the lobby of the Days Inn and then drive away in a white Cadillac hearse; the man he saw was wearing a dark sports jacket and a white golf hat, as was the defendant when he was brought to Mr. Bhagat shortly thereafter for identification; the seizing of Newport cigarettes from defendant's person which matched Newport butts found in the hearse, together with testimony that none of the regular drivers of the hearse smoked Newports.

Defendant contends that Officer Miller's testimony as to the woman driver's statements is inadmissible hearsay which was extremely prejudicial to him in light of the fact the other evidence against him was not very strong and it directly contradicted his claim to the arresting officers that he had been with the woman in the car the entire night.

Out of court statements offered for the truth of the matter asserted are hearsay and are inadmissible unless they fall within an exception to the hearsay rule. G.S. § 8C-1, Rules 801(c), 802. A trial error, not otherwise preserved for appeal by rule or law, is not preserved on appeal unless a timely objection is made. N.C. R. App. P. 10(b)(1). However, under the "plain error" rule an appellate court may review a trial error which seriously affects the fairness and integrity of the judicial proceeding despite the failure of the trial counsel to object. *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983). N.C. R. App. P. 10(c)(4) (1990) (effective for all judgments of the trial division entered on or after 1 July 1989).

The issue on appeal is whether the statement now objected to for the first time is inadmissible hearsay and if so whether its admission was "plain error" which "would have had a probable impact on the jury's [verdict]." *State v. Black, supra* at 741, 303 S.E.2d at 807.

From a review of the transcript we conclude that the woman's statements are inadmissible hearsay as they were offered for the truth of the matter asserted, namely, that she did not know the defendant and had not been with him all night, and further, they do not fall within a recognized exception to the hearsay rule. Even though the admission of the statements constitutes trial error, this error will not mandate a new trial unless the error constitutes "plain error."

The "plain error" rule is "always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said that the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), *quoting United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L.Ed.2d 513 (1982) (original emphasis).

After reviewing the transcript, we find that although the statement of the woman driver was inadmissible hearsay and therefore erroneously admitted, this does not constitute plain error such as would warrant granting defendant a new trial. There was sufficient other competent evidence by which the jury could have reached its verdict and we are not convinced that absent the error, the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986).

Conviction as habitual felon reversed and vacated.

Remand to Superior Court for resentencing on the underlying convictions, which are affirmed.

Judges EAGLES and PARKER concur.

JACK HAYES, PLAINTIFF-APPELLEE v. EVERGO TELEPHONE COMPANY, LTD., AND EVERGO TRADING COMPANY, LTD., DEFENDANTS-APPELLANTS

No. 9021SC67

(Filed 30 October 1990

1. **Process § 9 (NCI3d)— Hong Kong company—service of process by international mail**

Service of process by international registered mail on defendants in Hong Kong was sufficient under Articles 10(a) and 19 of The Hague Convention since service through a Central Authority is not the exclusive method of serving defendants in other nations; Hong Kong has not objected to any portion of Article 10; and the internal law of Hong Kong permits service of process through the mail.

Am Jur 2d, Process § 383.

2. **Process § 9.1 (NCI3d)— jurisdiction over Hong Kong company—long-arm statutes—due process**

North Carolina's long-arm statutes permitted the exercise of jurisdiction over defendant Hong Kong limited company in an action to recover for injuries allegedly caused by a telephone where the evidence showed that defendant sells ceiling fans to various retailers operating stores in North Carolina; defendant has sales of $35 million in the United States; defendant has made no attempt to limit the geographic distribution of its products to any certain states; and the phone which caused plaintiff's injuries was purchased in a North Carolina store. Furthermore, the exercise of in personam jurisdiction over defendant did not violate due process where the injury to plaintiff occurred in North Carolina; the majority of the witnesses are in North Carolina and the substantive law of this state controls; and North Carolina's interest in adjudicating this matter was much greater than the minimal burden on defendant to defend this action.

Am Jur 2d, Courts § 146; Process § 301.

Construction and application, as to isolated acts or transactions, of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act, or upon doing or transacting business or "any" business, within the state. 27 ALR3d 397.

3. Rules of Civil Procedure § 60.2 (NCI3d)— default judgment— insurer's refusal to defend—absence of excusable neglect

The trial court properly refused to set aside a default judgment on the ground of excusable neglect and a meritorious defense where defendants had two weeks to retain North Carolina counsel and file an answer after they learned that their insurance carrier denied coverage and refused to defend the action; plaintiff's counsel waited some three months before moving for default and sent defendants a letter stating his intention to seek default if defendants failed to respond; and defendants still failed to take any action to defend plaintiff's suit. N.C.G.S. § 1A-1, Rule 60(b)(1).

Am Jur 2d, Judgments §§ 1166, 1174, 1178.

APPEAL by defendants from a judgment entered 18 August 1989 by *Judge W. Steven Allen, Sr.* in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 August 1990.

On 11 March 1988, plaintiff commenced this action against Evergo Manufacturing of America, Inc. ("EMA"). EMA filed an answer on 14 April 1988. Plaintiff then amended his complaint to include Evergo Telephone Company, Ltd. ("Evergo Telephone") and Evergo Trading Company, Ltd. ("Evergo Trading") as defendants. Both defendants are Hong Kong limited companies. On 12 October 1988, plaintiff served Evergo Telephone and Evergo Trading by sending the summons and complaint via international registered mail, return receipt requested, to their business addresses.

Default was entered against Evergo Trading and Evergo Telephone on 23 January 1989. On 21 February 1989, plaintiff filed a motion for partial summary judgment against Evergo Telephone and Evergo Trading. This motion was granted on 27 March 1989.

Plaintiff settled with EMA for $8,000.00 and on 21 April 1989 dismissed his complaint as to that defendant.

On 16 June 1989, defendants retained local counsel who entered an appearance for defendants and filed Motions to Dismiss, Motions to Quash, Motions to Set Aside Entry of Default and Partial Summary Judgment and Motions for Extension of Discovery Period. All of these motions were denied on 14 August 1989.

The matter came on for trial before a jury at the 1 August 1989 Civil Jury Session in Forsyth County. The jury returned a

verdict in favor of the plaintiff in the amount of $78,000.00, against which Judge Allen credited the $8,000.00 settlement plaintiff received from EMA, leaving a judgment against defendants in the amount of $70,000.00. Judge Allen denied defendants' motions for a judgment notwithstanding the verdict and for a new trial. Defendants appeal.

House and Blanco, P.A., by Peter J. Juran, for plaintiff-appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts, by David A. Senter, for defendants-appellants.

LEWIS, Judge.

I. Sufficiency of Service of Process Via International Mail

[1] Defendants first assert that the plaintiff's service of process via international mail was insufficient as a matter of law and justifies setting aside partial summary judgment and dismissing plaintiff's claims. Plaintiff effected service of process upon defendants by sending the summons, together with the complaint, via registered mail, return receipt requested.

In 1969, the United States signed the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 U.S.T. 361-367, T.I.A.S. 6638) ("The Hague Convention"). This international treaty was also ratified by Hong Kong. The Convention "was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S.Ct. 2104, 2107, 100 L.Ed.2d 722 (1988).

The Hague Convention provides a number of acceptable methods for service of foreign process, including the creation or designation by each adherent of a Central Authority to receive requests for service of documents from other countries and to serve those documents in accordance with the internal law of the recipient nation. 20 U.S.T. 362, T.I.A.S. 6638, Art. 5. Appellee concedes that he never sent either a request or the relevant documents to the designated Central Authority in Hong Kong. Service through a Central Authority, however, is not necessarily the exclusive method of serving defendants resident in party-nations. This appeal concerns the interpretation of Article 10(a) and Article 19 of the Con-

vention, and whether these Articles provide an alternative method for service of process via international mail.

Article 10(a) provides:

> Provided the State of destination does not object, the present Convention shall not interfere with—
>
> (a) the freedom *to send* judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin *to effect service* of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination[,]
>
> (c) the freedom of any person interested in a judicial proceeding *to effect service* of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Id. (Emphasis added). Hong Kong has not objected to any portion of Article 10.

Article 19 provides: "To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions."

These Articles pose two different questions: first, whether the authority in Art. 10(a) "to send judicial documents, by postal channels, directly to persons abroad" includes the authority to serve process by those channels; and, second, whether internal Hong Kong law permits service of process in that manner. *Nicholson v. Yamaha Motor Co., Ltd., et al.*, 80 Md. App. 695, 702, 566 A.2d 135, 139 (1989).

The applicable rules of procedure in Hong Kong apparently allow service of process by registered mail in domestic civil cases.

A split currently exists among United States jurisdictions as to whether the words "to send" found in Article 10(a) are equivalent to the words "to serve" found elsewhere in the Convention, thereby allowing Article 10(a) to support service of process via international mail. *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988), is representative of the view of those

jurisdictions that conclude that Article 10(a) of the Hague Convention does not encompass documents that require formal service. *Suzuki* involved service of process upon a Japanese defendant. Japan has objected to Article 10(b) and 10(c) of the Convention. The California Court of Appeals reasoned:

> Given the fact that Japan itself does not recognize a form of service sufficiently equivalent to America's registered mail system, it is extremely unlikely that Japan's failure to object to Article 10, subdivision (a) was intended to authorize the use of registered mail as an effective mode of service of process, particularly in light of the fact that Japan specifically objected to the much more formal modes of service by *Japanese officials* which were available in Article 10. . . . [T]he fact that the Convention's drafters used both the phrase 'to send' and the phrase 'service of process' indicates they intended each phrase to have a different meaning and function.

Id. at 1481, 249 Cal. Rptr. 379.

Interestingly, the opposing view was first articulated in a California court. In *Shoei Kako Co., Ltd. v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973), the court held that the Convention did permit service of process by mail on a Japanese defendant, concluding,

> Although there is some merit to the proposed distinction it is outweighed by consideration of the entire scope of the convention. . . . The reference to 'the freedom to send judicial documents by postal channels, directly to persons abroad' would be superfluous unless it was related to the sending of such documents for the purpose of service. The mails are open to all.

Id. at 821, 109 Cal. Rptr. 411. *Shoei* was not overruled by *Suzuki*, instead the California Court of Appeals held that it was not bound by *Shoei* because of factual differences in the two cases. *Suzuki*, *supra* at 1479, 249 Cal. Rptr. 376, 377. The *Shoei* court observed that ratification of the Hague Convention by the United States Senate came only four years after promulgation of Rule 4(i)(1)(D) of the Federal Rules of Civil Procedure, allowing service in a foreign country by any form of mail requiring a signed receipt, addressed to the person to be served. It concluded that by ratifying Article 10(a) of the Convention the Senate could not have intended to abrogate Rule 4, but instead "intended to retain service by mail

. . . as an effective method of service of process in a foreign country unless that country objected to those provisions." *Id.* at 822, 109 Cal. Rptr. 412. *See also Ackermann v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986). More recently, in *Nicholson v. Yamaha Motor Co., Ltd.*, 80 Md. App. 695, 566 A.2d 135 (1989), *cert. denied*, 318 Md. 683, 569 A.2d 1242 (1990), the Maryland Court of Appeals concluded that service of process by mail upon a Japanese defendant was permissible because

> (1) when adopting the Convention, the Japanese were presumably aware of U.S.Fed.R.Civ.P. 4(i) . . . (2) since then, they have been aware of the decisions in many Federal cases that art. 10(a) does not prohibit service in Japan by that method, (3) under that line of decisions, U.S. based assets of Japanese nationals would be subject to seizure to satisfy judgments founded upon such service, and (4) in their only Declaration on the matter, they did not expressly negate the validity of such service. . . . Principally on that basis—because otherwise there are compelling arguments on both sides of the issue—we conclude that service may be effected on a Japanese defendant. . . .

Id. at 709-710, 566 A.2d 135, 142-43. *See also Meyers v. ASICS Corp.*, 711 F. Supp. 1001 (C.D. Cal. 1989); *Newport Components v. NEC Home Electronics*, 671 F.Supp. 1525 (C.D. Cal. 1987), *Tamari v. Bache and Co.*, 431 F.Supp. 1226, 1228-9 (N.D. Ill. 1977), *aff'd*, 566 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905, 55 L.Ed.2d 495 (1978).

We conclude that service of process via international mail in this case was in conformity with the provisions of the Hague Convention. We find particularly compelling the fact that, unlike Japan, Hong Kong has not objected to any portion of Article 10 and apparently the internal law of Hong Kong permits service of process through the mail. Defendants do not argue that they did not receive process and indeed plaintiff sent a letter notifying the defendants of his intention to obtain a default judgment if an answer was not filed in the case. Defendants do not argue that they did not receive any of these documents. The trial court did not err in refusing to dismiss plaintiff's claims and set aside entry of partial summary judgment and default based upon insufficient service of process.

II. Existence of In Personam Jurisdiction

[2] Defendant Evergo Trading next argues that North Carolina lacks in personam jurisdiction. Defendant Evergo Telephone concedes that North Carolina validly exercised jurisdiction over it. A judgment entered against a defendant over which the Court does not have in personam jurisdiction is void and subject to being set aside pursuant to G.S. 1A-1, Rule 60(b)(4). *Allred v. Tucci*, 85 N.C. App. 138, 354 S.E.2d 291, *disc. rev. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987). Challenges to in personam jurisdiction present a two-part inquiry; first, whether the statutes of North Carolina permit the exercise of jurisdiction, and second, whether exercising in personam jurisdiction over the defendant violates due process of law. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674-75, 231 S.E.2d 629, 630 (1977). Evergo Trading apparently had nothing to do with the manufacture of the telephone which caused plaintiff's injuries. In fact, defendant argues that if allowed to present evidence as to its liability, it could show that Evergo Trading was not even incorporated at the time plaintiff received and used the telephone. However, plaintiff contends that these arguments are irrelevant since it can show that North Carolina's long-arm statutes permit the exercise of jurisdiction over Evergo Trading and that exercising jurisdiction over the defendant did not violate due process. We agree with the plaintiff.

At the time of hearing on defendants' motions to dismiss, plaintiff was able to show that Evergo Trading sells ceiling fans to distributors, including Lowe's, K-Mart, and Montgomery Ward, all of which operate stores in North Carolina. Evergo Trading has sales of approximately $35 million dollars in the United States. It has made no attempt to limit the geographic distribution of its products to any certain state or states. Both defendants carry insurance for their sales and products throughout the United States. The phone which caused plaintiff's injuries was purchased in a North Carolina Lowe's store. Although Evergo Trading did not have contacts with North Carolina as to the telephone, because of its substantial business in the United States and the unlimited geographic distribution of its products, we conclude that Evergo Trading could reasonably have expected to be haled into our courts. G.S. 1-74.4(1)(d), *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 306 S.E.2d 562 (1983); *ETR Corp. v. Wilson Welding Service, Inc.*, 96 N.C. App. 666, 386 S.E.2d 766 (1990). The assertion that Evergo Trading was not in any way involved in the manufacture

of the telephone may have provided an excellent defense to this action. However, defendants failed to file an answer in this case after actual service and therefore waived all defenses relating to its liability in this matter.

Our conclusion that the exercise of jurisdiction over the defendant is in accordance with our long-arm statutes is also in conformity with our fundamental notions of "fair play and substantial justice." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 564, 62 L.Ed.2d 490, 498 (1980). The injury to the plaintiff occurred in North Carolina; the product was purchased in North Carolina; the majority of the witnesses are in North Carolina and North Carolina substantive law controls. North Carolina's interest in adjudicating this matter was much greater than the minimal burden on defendant to defend this action. *See E.T.R. Corp. v. Wilson Welding Service, Inc., supra.*

III. Existence of Excusable Neglect

[3] Finally, defendants urge this Court to reverse the trial court's denial of their Rule 60 motion based upon their alleged showing of "excusable neglect" and the existence of a meritorious defense. G.S. 1A-1, Rule 60(b)(1). We find that the trial judge did not abuse his discretion in refusing to set aside the judgment on these grounds.

Upon commencement of this action, defendants contacted their insurance carrier and their California attorney about the case. Some dispute arose amongst these parties as to whether the insurance company would defend the appellants in this action. On 18 November 1988, defendants' carrier denied coverage and refused to defend this action. Defendants still had two weeks to retain North Carolina counsel and file an answer. This they did not do. A defendant may not simply turn a case over to its insurer and then do nothing. *Milks v. Clark's Greensboro, Inc.*, 260 N.C. 676, 677, 133 S.E.2d 517, 518 (1963). A defendant must give its litigation matters that level of attention one gives important business matters; the primary duty of attending to litigation remains with the defendant. *Howard v. Williams*, 40 N.C. App. 575, 578, 253 S.E.2d 571, 573 (1979). In the present case, defendants were well aware of the fact that their insurance carrier refused to represent them in this matter. Counsel for plaintiff waited some three months before moving for default and he also sent them a letter stating his intention to seek default if the defendants continued to fail to respond. There was sufficient time to protect their interests and defendants did

nothing. Accordingly, the trial court refused to grant them relief from the judgment. We hold that under the circumstances, this was not an abuse of discretion.

IV. Conclusion

We have considered defendants' remaining assignments of error and find them to be without merit. For the reasons stated above, we affirm the trial court.

Affirmed.

Judges WELLS and EAGLES concur.

BARRY B. KEMPSON, ATTORNEY-IN-FACT FOR MARY A. BLOOMER, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-APPELLANT

No. 9028SC176

(Filed 30 October 1990)

1. **Social Security and Public Welfare § 1 (NCI3d)— Medicaid benefits—resource spend down**

The DHR is required to use resource spend down to determine eligibility for Medicaid benefits so that applicants may qualify for Medicaid without actually using their excess reserve if their current medical expenses would reduce their total asset reserve below the imposed limit since (1) under 42 U.S.C.A. § 1396a(a)(17) resource spend down is an allowable, reasonable method of evaluating resources, and (2) the N. C. Medical Assistance Program requires the DHR to utilize resource spend down.

Am Jur 2d, Welfare Laws §§ 38-41.

2. **Social Security and Public Welfare § 1 (NCI3d)— Medicaid benefits—retroactivity**

A 22 December application for Medicaid benefits would provide retroactive coverage for three full months before the

month of the application so that the applicant was entitled to benefits beginning on 1 September.

Am Jur 2d, Welfare Laws § 38.

APPEAL by respondent from an order filed 9 November 1989 by *Judge Robert Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals on 19 September 1990.

Petitioner Barry B. Kempson applied for Medicaid benefits on behalf of Mary A. Bloomer on 22 December 1988 at the Buncombe County Department of Social Services ("DSS"). On 3 February 1989, DSS granted Ms. Bloomer coverage effective 2 February 1989, but denied her retroactive and prospective coverage for the period from 1 September 1988 to 1 February 1989 due to "excess reserve." Petitioner appealed the decision by DSS pursuant to N.C. Gen. Stat. § 108A-79 (1988). At a state-level appeal hearing and review, the hearing officer entered a Notice of Decision dated 24 May 1989 affirming the decision below. On 18 July 1989, after reviewing the record and additional written arguments, North Carolina Department of Human Resources' ("DHR") chief hearing officer entered a Notice of Final Decision upholding the 24 May 1989 decision. Petitioner filed his Petition for Judicial Review pursuant to N.C. Gen. Stat. § 108A-79(c) in Buncombe County Superior Court on 21 August 1989.

The case was argued before Judge Lewis who entered a written order on 9 November 1989, which reversed DHR's final agency decision, declared Ms. Bloomer eligible for Medicaid retroactive to 1 September 1988 and ordered DHR to pay her Medicaid benefits for the period between 1 September 1988 and 2 February 1989. From this Order, DHR appealed.

Van Winkle, Buck, Wall, Starnes and Davis, by R. Walton Davis, III, for petitioner appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane T. Friedensen, for the respondent appellant.

ARNOLD, Judge.

This case was heard below on the following stipulated facts:

Petitioner has been the attorney-in-fact of Mary A. Bloomer since March 1985, and Ms. Bloomer has lived at Pisgah Manor

Health Care Center ("Pisgah Manor") since August of that year. On 1 August 1988, Ms. Bloomer owned assets worth $3,983.72 in bank accounts and a personal account at Pisgah Manor. At this time Pisgah Manor was billing her about $1,750.00 a month for nursing home expenses. By 1 September 1988, Ms. Bloomer's assets were worth only $2,071.17, but her unpaid bill to Pisgah Manor totaled $1,749.95. Between 1 September 1988 and 2 February 1989 petitioner made no payments on the Pisgah Manor account. Ms. Bloomer's financial situation during that time is summarized as follows:

Date	Assets	Pisgah Manor Liability	Net Difference
09/1/88	$2,071.17	$1,749.95	321.22
10/1/88	2,326.30	3,562.80	(1,236.50)
11/1/88	2,151.27	5,289.60	(3,138.33)
12/1/88	2,422.47	7,155.79	(4,733.32)
01/1/89	2,681.34	9,160.38	(6,479.04)
02/1/89	2,758.32	10,995.99	(8,237.67)
02/2/89	284.00	8,521.67	(8,237.67)

On 22 December 1988, Mr. Kempson applied to Buncombe County DSS for Medicaid coverage of Ms. Bloomer's Pisgah Manor bills prospectively from 1 December 1988 and retroactively from 1 September 1988 to 30 November 1988. Medically needy persons may receive assistance for as much as three months prior to the month of application. N.C. Admin. Code tit. 10, r. 50B.0204(a)(1) (October 1987). On 2 February 1989, Mr. Kempson was notified that DSS could not grant Ms. Bloomer Medicaid coverage until funds from her bank account were transferred to Pisgah Manor in an amount sufficient to reduce her assets to the applicable $1,500 one-person reserve limit. *See* N.C. Admin. Code tit. 10, r. 50B.0311(c) (November 1989). Mr. Kempson immediately paid Pisgah Manor $2,474.32, reducing Ms. Bloomer's assets to $284. On 3 February 1989, the County DSS granted Ms. Bloomer prospective coverage effective 2 February 1989, but denied her retroactive coverage for the period from 1 September 1988 to 1 February 1989 because her assets during that period had exceeded the $1,500 reserve limit.

[1] The issue on appeal is whether federal and state laws governing the eligibility requirements for certain Medicaid applicants require the DHR to use a procedure known as "resource spend-down."

Resource spend-down permits an individual to qualify for Medicaid benefits, even though he or she possesses resources or reserves that are greater than the limit imposed by law, by offsetting incurred medical expenses against the excess reserve. North Carolina currently requires that such persons *actually* spend excess reserve to pay their medical bills before they can qualify for Medicaid. Under a resources spend-down policy such persons would qualify for Medicaid without actually using their excess reserve if their current medical expenses would reduce their total asset reserve to below the imposed limit.

For a single person such as Ms. Bloomer, the applicable asset limit to receive medically needed assistance through DHR is $1,500. N.C. Admin. Code title 10, r. 50B.0311(c). On 1 September 1988, Ms. Bloomer had assets totalling $2,071.17, but her liability to Pisgah Manor was $1,749.95, leaving her a net difference of only $321.22. Under current state eligibility guidelines, however, she did not qualify for Medicaid coverage until Mr. Kempson reduced her assets below $1,500 on 2 February 1989.

Petitioner argued below that North Carolina's prohibition of resource spend-down conflicts with the purposes of the federal Medicaid statute and our state law. We agree.

Congress created the Medicaid program by enacting Title XIX of the Social Security Act, 42 U.S.C.A. § 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301, 65 L.Ed.2d 784, 794 (1980). As part of the program, Congress granted states the option of providing Medicaid to the "medically needy," those persons who met the nonfinancial eligibility requirements for one of the other Medicaid categorical cash assistance programs, but whose incomes were too high for them to qualify for categorical aid and who lacked the means to pay their medical expenses. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37, 69 L.Ed.2d 460, 465-66 (1981). Medical coverage for medically needy persons remains optional for states. 42 U.S.C.A. §§ 1396a(a)(10)(A)(ii), (a)(10)(C).

Respondent here contends that federal Medicaid law and regulations do not require resource spend down. The basis of this argument rests on the absence of a reference to the term "resources" in the federal law which requires that a state plan for medical assistance include reasonable standards for determining eligibility

for medical assistance "and provide for flexibility in the application of such standards with respect to *income* . . . ." 42 U.S.C.A. § 1396a(a)(17)(D). This explicit reference to *income* has been interpreted by the courts to mean that "income spend-down" is allowed by the statute. *Atkins v. Rivera*, 477 U.S. 154, 91 L.Ed.2d 131 (1986). Thus, the medically needy may qualify for Medicaid if they incur medical expenses sufficient to reduce their *incomes* to the eligibility level. Respondent contends, however, that the absence of a reference to *resources* in the § 1396a(a)(17)(D) clause does not allow for the use of resource spend-down. While respondent is correct in that § 1396a(a)(17)(D) only mentions income in instructing states to provide flexibility in their program application standards, we note that § 1396a(a)(17)(C) instructs that a state's plan must "provide for reasonable evaluation of any such income or resources."

The Supreme Court of Massachusetts examined this same issue in 1985. In its interpretation of 42 U.S.C. § 1396a(a)(17) and its implementing regulations 42 C.F.R. §§ 435.840-435.852 (1989), the court concluded:

> We do not agree that this absence clearly precludes a resource spend down. This section requires that eligibility determinations "provide for reasonable evaluation of any such income or resources." 42 U.S.C. § 1396a(a)(17)(C). The agency administering the MA [medical assistance] benefits program must determine eligibility in a manner "consistent with objectives of this subchapter [Title XIX]." 42 U.S.C. § 1396a(a)(17)(A). If application of an income spend down is a reasonable and consistent method of evaluating income, so a resource spend down is a reasonable and consistent method of evaluating resources.

Haley v. Com'r of Public Welfare, 394 Mass. 466, 474-75, 476 N.E.2d 572, 578 (1985).

At least three other jurisdictions have examined this issue and all have reached the same conclusion that prohibiting the consideration of resource spend-down in determining the eligibility of the medically needy "ignores reality." *Walter O. Boswell v. Yavapai County*, 148 Ariz. App. 385, 389, 714 P.2d 878, 882 (1986); *Hession v. Illinois Dept. of Public Aid*, 129 Ill. 2d 535, 544 N.E.2d 751 (1989); Westmiller by *Hubbard v. Sullivan*, 729 F.Supp. 260 (W.D.N.Y. 1990); *contra Gandenberg v. Barry*, 687 F.Supp. 346 (S.D.Ohio 1988) (Unlike North Carolina, however, Ohio does *not*

provide benefits to the medically needy through Medicaid. *Id.* at 350.). We choose to follow the reasoning of these cases which hold that under 42 U.S.C.A. § 1396a(a)(17) resource spend-down is an allowable, reasonable method of evaluating resources.

The *Haley* court provided the following example of the effect of eligibility determinations without a resource spend-down:

> Without a resource spend down, an individual with excess resources who is aware of the department's policy is in a better position than the average individual who is unaware of the policy. The aware individual can actually spend down his excess resources as soon as he incurs medical expenses which, absent excess resources, would be eligible for payment. Once the resources are actually absorbed, the individual is eligible for payment of medical expenses.
>
> The paradox occurs with a less sophisticated individual or an individual who is not in a condition actually to spend down resources. Upon application to the department, this individual would be informed that, because of excess resources, medical expenses incurred in the last three months would not be eligible for payment. This result would occur regardless of how miniscule the excess resources were in comparison to the medical expenses incurred in that three-month period.

Haley, 394 Mass. at 476, n. 8, 476 N.E.2d at 578-79.

Respondent attempts to shift the blame for Ms. Bloomer's problem on Mr. Kempson. Had Mr. Kempson paid at least part of Ms. Bloomer's Pisgah Manor bill in September and immediately applied for Medicaid coverage on her behalf, the problem here would not have arisen. While in this particular situation Mr. Kempson must share some blame, we are convinced that the policy itself is flawed and when applied in many circumstances it is patently unfair. As one court examining this issue noted:

> The typical emergency patient does not arrive at a hospital with a summary of his financial condition to compare with the statutory guideline. The patient is often unconscious or otherwise physically or emotionally unable to provide the hospital with sufficient financial information to make that immediate determination. Moreover, depending on the patient's condition during the hospitalization, he may not be in a position

> at the precise moment that the charges equal the spend down amount to pay those medical bills in order to establish eligibility.

Walter O. Boswell, 148 Ariz. App. at 389, 714 P.2d at 882.

Our review of the case law reveals a pattern where Medicaid applicants are blindsided by this eligibility requirement simply because it is so illogical. Applicants who otherwise qualify are denied coverage because they have several hundred dollars above the reserve asset limit while at the same time they are liable for tens of thousands of dollars worth of medical bills. In *Haley*, an 85-year-old woman had $497.12 in excess resources when admitted to a hospital. Her hospital expenses totaled $17,517.31 for a four and one-half month period. *Haley*, 394 Mass. at 476, n. 8, 476 N.E.2d at 579. As the court stated:

> Common sense and simple mathematics require the conclusion that the $497.12 excess would have been absorbed in the first few days of hospitalization. However, [the woman] was incapable of actually spending down her resources. Therefore, the department, applying the present criteria, denied her retroactive eligibility until she actually paid out the $497.12 on June 28, 1981, thereby precluding any retroactive benefits. The unreasonableness of this result is self-evident.

Id.

In addition, we find that the North Carolina Medical Assistance Program requires DHR to utilize resource spend-down with regard to Mr. Kempson's request for medical assistance. The purpose of North Carolina's Medical Assistance Program is to assist in "the cost of medical and other remedial care for any eligible person when it is essential to the health and welfare of such person that such care be provided, and when the *total resources* of such person are not sufficient to provide the necessary care." N.C. Gen. Stat. § 108A-55 (1988) (emphasis added). Moreover, the legislature intended that individuals be eligible for benefits while retaining some level of personal property. A person's primary place of residence valued at less than $12,000 is excluded from consideration and $1,500 is also excluded. G.S. § 108A-55 and N.C. Admin. Code tit. 10, r. 50B.0311(2)(c). Under DHR's current policy, however, an applicant possessing resources in excess of the asset disregard is ineligible despite having incurred medical expenses that exceed his or her resources. This forces the applicant to deplete those resources

that the legislature intended to be disregarded. "By failing to consider an individual's incurred medical expenses as well as his or her assets, the Department defeats the legislature's intent." *Hession*, 544 N.E.2d at 758. In contrast, use of resource spend-down entitles an applicant to Medicaid benefits once their medical expenses exceed the excess they hold in assets. Because such a policy advances the legislative intent that the medically needy be allowed to retain some assets, we conclude that DHR must employ the resource spend-down methodology when determining Medicaid eligibility for these individuals.

[2] In its second assignment of error, respondent asserts that the period of retroactive eligibility for Ms. Bloomer began on 23 September 1988. DHR justifies this assertion by measuring the three-month retroactive period from the date of Ms. Bloomer's application on 22 December 1988. Petitioner argues that the retroactive period consists of three full months prior to the month of application, which would include all of September 1988. 42 U.S.C.A. § 1396a(a)(34) provides that medical assistance "will be made available . . . in or after the third month before the month in which he made application." State guidelines provide "Medicaid coverage is effective . . . [a]s much as three months prior to the month of application when medical services covered by the program were received and the client was eligible during the month(s) of medical need . . . ." N.C. Admin. Code tit. 10, r. 50B.0204(a)(1).

In lieu of our holding that DHR must employ resource spend-down, as of 1 September 1988 Ms. Bloomer's total assets equaled only $321.22, well below the asset limit of $1,500, entitling her to receive assistance as of that date. Our reading of the regulations above indicate that her 22 December application would provide retroactive coverage back three full months before the month of her application. Thus, we uphold the Order declaring Ms. Bloomer retroactively eligible beginning 1 September 1988.

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STEVE W. ALLEN, PLAINTIFF v. STAMY LINCOLN RUPARD, DEFENDANT

No. 9021SC146

(Filed 30 October 1990)

1. **Master and Servant § 89.4 (NCI3d)— workers' compensation— settlement with tortfeasor—distribution to employee and compensation insurer—discretion of court**

The superior court was not required to follow the priority schedule for the Industrial Commission set forth in N.C.G.S. § 97-10.2(f) when disbursing the proceeds of a settlement with a tortfeasor to an injured employee and the employer's compensation insurer pursuant to subsection (j). Rather, subsection (j) gave the court discretion to determine how the settlement proceeds should be distributed and did not require that the entire proceeds of a $25,000 settlement be distributed to an insurance carrier which had paid over $40,000 in compensation benefits and medical expenses to and for the injured employee.

Am Jur 2d, Workmen's Compensation §§ 627, 651, 681, 682.

2. **Master and Servant § 89.4 (NCI3d)— workers' compensation— settlement with tortfeasor—discretion of court—due process— necessity for findings**

N.C.G.S. § 97-10.2(j) does not give the trial court unbridled or unlimited discretion to decide how to distribute settlement proceeds between an injured employee and the employer's compensation insurer so as to violate due process. Rather, the trial court, in exercising such discretion, must enter an order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review. Fifth Amendment to the U. S. Constitution; Art. I, § 19 of the N. C. Constitution.

Am Jur 2d, Workmen's Compensation §§ 553-560.

3. **Master and Servant § 89.4 (NCI3d)— workers' compensation— settlement with tortfeasor—equal division between employee and compensation insurer**

The trial court did not abuse its discretion in dividing a $25,000 settlement with a tortfeasor equally between the injured employee and the employer's compensation insurer where the amount of the settlement was insufficient to reimburse plaintiff for his pain, suffering and other losses and

to reimburse the insurer for its payment of over $40,000 in compensation and medical expenses.

Am Jur 2d, Workmen's Compensation §§ 681, 682.

APPEAL by Pilot Freight Carriers and Protective Insurance Company from order entered on 29 November 1989 by *Judge W. Steven Allen, Sr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 18 September 1990.

Michael Lewis for plaintiff appellee.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers, for appellant.

COZORT, Judge.

On 26 June 1987, plaintiff Steve Allen was injured when the truck he was driving collided with a truck operated by Stamy Rupard. The negligence of Mr. Rupard is not at issue in this appeal; he tendered the policy limits of his liability insurance coverage to the plaintiff. Plaintiff applied to the trial court for a determination of the distribution of the $25,000 settlement proceeds from the defendant's liability insurance carrier. The trial court awarded $12,500 to the plaintiff and $12,500 to Pilot Freight Carriers [hereinafter Pilot], plaintiff's employer, and Protective Insurance Company [hereinafter Protective], Pilot's workers' compensation insurer. Protective and Pilot appealed to this Court.

The two issues presented on appeal are (1) whether the trial court was required to distribute all the settlement proceeds to the insurer; and (2) whether it is unconstitutional to give the trial court discretion as to the distribution of settlement proceeds. We hold (1) that the trial court was not required to distribute all the settlement proceeds to the insurance carrier and (2) that the trial court's decision to equally divide the settlement proceeds was an appropriate exercise of the trial court's discretion. Pertinent facts and procedural history follow.

Plaintiff was injured on 26 June 1987 while he was operating a truck within the scope of his employment. Plaintiff's injuries include a crushed vertebrae. He has had three operations requiring insertion and removal of hooks and rods in his back. Protective has paid over $40,000 in workers' compensation payments.

On 24 June 1988, plaintiff filed suit against defendant Rupard. Rupard's insurer tendered $25,000, his policy limit, to plaintiff. Both plaintiff and Protective agreed to this lump sum settlement and release of defendant Rupard. The parties agree that Rupard was essentially judgment proof, with no additional available funds. Plaintiff also had underinsured motorist coverage. His insurer paid him $15,000, again with Protective's consent. On appeal, Pilot and Protective do not contest plaintiff's right to receive this $15,000.

Plaintiff applied to the trial judge scheduled to hear the case between plaintiff and defendant Rupard for a determination of the distribution of the $25,000 settlement proceeds from Rupard's insurer. This application was made pursuant to N.C. Gen. Stat. § 97-10.2(j) which provides:

> [I]n the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge . . . for determination as to the amount to be paid to each [the employee and the workers' compensation insurance carrier] by such third party tort-feasor.

The court heard arguments from plaintiff's attorney and from Protective's attorney. The trial court concluded that the General Assembly granted to the superior court the discretion to determine the amount to be paid to each when there are insufficient funds to compensate both. The court ordered that $12,500 of the $25,000 tendered by the tortfeasor be paid to Protective and that the remaining $12,500 be paid to plaintiff for the "injuries suffered at the hands of the third party tort-feasor."

[1] On appeal, Protective first contends that the trial court erred in not awarding all of the settlement proceeds to the carrier because Protective's subrogation lien (over $40,000) exceeded the amount of the settlement ($25,000). Protective argues that N.C. Gen. Stat. § 97-10.2(j) should be construed in conjunction with subsection (f) to require the trial court to follow the order of priority for distribution established in subsection (f). Under subsection (f), any amount obtained by the plaintiff by settlement with the tortfeasor must be disbursed by the Industrial Commission as follows:

a. First to the payment of actual court costs taxed by judgment.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of § 90 of this Chapter [G.S. 97-90] but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

Protective argues that judges of the superior court should adhere to the same priority schedule which binds the Industrial Commission. Under subsection (f), Protective would have received the entire $25,000 as compensation for the medical expenses it paid on behalf of plaintiff.

In *Pollard v. Smith*, 90 N.C. App. 585, 369 S.E.2d 84 (1988), *rev'd on other grounds*, 324 N.C. 424, 378 S.E.2d 771 (1989), this Court addressed the issue of whether the trial court has the discretion to distribute all the settlement or judgment proceeds to the injured party giving the carrier nothing on its subrogation lien. In *Pollard*, we specifically held:

> Subsection (j) is clear and unambiguous, and must be given effect. Judicial interpretation of a statute is inappropriate when the Legislature has made clear its intent. *Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 226, 166 S.E.2d 671, 679 (1969). The section clearly provides for a different standard for disbursement when the case is before the Superior Court than that for cases before the Industrial Commission. When the General Assembly added subsection (j), it made no reference to subsection (f).
>
> When the General Assembly amends an existing statute, as opposed to merely clarifying existing law, a presumption arises that the Legislature intended to change existing law by creating or taking away rights or duties. *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968).

> We realize that subsection (j) allows plaintiff a double recovery at the expense of the employer or carrier, in the discretion of the Superior Court judge. Nonetheless, since the language is clear and unambiguous, we must hold that the Legislature intended this possible result.

Id. at 588, 369 S.E.2d at 85-86. When *Pollard* reached the Supreme Court, that court decided the case on the issue of whether it was error for the superior court to order disbursement of the proceeds from a settlement made without the written consent of the employer. *Pollard*, 324 N.C. at 426, 378 S.E.2d at 772. The issue to be decided in this case, the interpretation of subsection (j), was not reached by the Supreme Court. Thus, we are bound by the prior *Pollard* ruling by a panel of this Court. *In re Harris*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We hold that the trial court did not have to follow the distribution priority set forth in N.C. Gen. Stat. § 97-10.2(f).

[2] Protective's second argument here raises an issue not decided by either court in *Pollard*, *i.e.*, whether the discretion given the trial court by § 97-10.2(j) violates the United States and North Carolina Constitutions. Protective argues that the statute violates the due process clause of the Fifth Amendment of the United States Constitution, violates the "Law of the Land" clause of Article 1, Section 19 of the North Carolina Constitution, and is unconstitutionally vague.

In *State v. Fulcher*, our Supreme Court stated:

> It is well settled that if a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question.

294 N.C. 503, 520, 243 S.E.2d 338, 349 (1978) (citations omitted). Thus, if N.C. Gen. Stat. § 97-10.2(j) is susceptible of a constitutional construction, we shall adopt that construction.

Protective contends that the statute in question is flawed because it gives the trial court "unlimited" discretion, "unbridled" discretion, the ability to make the distribution without standards, guidelines, and definitions. We do not read N.C. Gen. Stat. § 97-10.2(j) in the manner suggested by Protective.

In *Pollard*, we held that subsection (j) did give the trial court "discretion" in deciding how to distribute the settlement proceeds. *Pollard*, 90 N.C. App. at 588, 369 S.E.2d at 85. We do not, however, equate "discretionary" with arbitrary or capricious. "[J]udicial discretion is not the indulgence of a judicial whim, but is the exercise of judicial judgment *based on facts and guided by law.*" *Smith v. Hill*, 5 F.2d 188 (3d Cir. 1925) (emphasis supplied). This Court, through Chief Judge Mallard, has defined the exercise of discretion:

> The exercise of judicial discretion by a judge is not an arbitrary power, and is not one to be used to gratify the passion, partiality, whim, vindictiveness, or idiosyncracies of the individual judge. In the case of *Hensley v. Furniture Co.*, 164 N.C. 148, 80 S.E. 154 (1913), in discussing the nature of judicial discretion Justice Walker said:
>
> > "Judicial discretion, said Coke, is never exercised to give effect to the mere will of the judge, but to the will of the law. The judge's proper function, when using it, is to discern according to law what is just in the premises. *'Discernere per legem quid sit justum.' Osborn v. Bank*, 9 Wheat., 738. When applied to a court of justice, said *Lord Mansfield*, discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. 4 Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. We do not interfere unless the discretion is abused."

Musgrave v. Savings and Loan, 5 N.C. App. 439, 443, 168 S.E.2d 497, 499 (1969). Therefore, the power given the trial court in N.C. Gen. Stat. § 97-10.2(j) is not unbridled or unlimited. Rather, the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported. We hold that the trial court, in considering a request for disbursement under subsection (j), must enter an order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review. *See Worthington v.*

Bynum, 305 N.C. 478, 290 S.E.2d 599 (1982); *Veazey v. Durham*, 231 N.C. 354, 57 S.E.2d 377 (1950), and *Martin v. Martin*, 263 N.C. 86, 138 S.E.2d 801 (1964).

[3] In its order distributing the funds equally between plaintiff and Protective, the trial court below made these pertinent findings of fact:

> 3. Mr. Allen sustained a crushed vertebrae in the wreck, necessitating three (3) surgical procedures to his back. His treating physician, Dr. Joseph Nicastro of Bowman Gray School of Medicine is of the opinion that a fourth surgical procedure will be necessary, and that a permanent partial impairment rating will likely result.
>
> 4. The Employer and Protective Insurance Company have a subrogation lien against any third party recovery in the sum of at least $40,000.00 through the date of this hearing. The parties anticipate, in light of the necessity for a fourth surgical procedure and the anticipated permanent partial impairment rating, that the subrogation lien will be substantially in excess of $40,000.00.
>
> 5. Prior to the institution of this law suit, the Third Party Tort Feasor and Defendant herein, Stamy Lincoln Rupard, had tendered the policy limits of his liability insurance coverage in the amount of $25,000.00. Both the Employee and Employer are satisfied that the Defendant Rupard does not have sufficient personal assets from which to recover in the event of a Judgment in excess of the liability insurance limits.
>
> * * * *
>
> 7. The law firm of Michael Lewis, Attorneys at Law, has rendered valuable services on behalf of Mr. Allen in the prosecution of this action, but is seeking no recovery for attorney fees out of the proceeds of the $25,000.00 liability insurance coverage tendered by the insurance carrier for the Defendant Stamy Lincoln Rupard.
>
> * * * *
>
> 12. That considering the nature and circumstances of the incident, the nature and extent of the Plaintiff's injury, the fact that Plaintiff is seeking no attorney fee to be paid out of the $25,000.00 proceeds to be paid by Stamy Lincoln Rupard,

> and other circumstances in the case, the Court finds that it has authority, pursuant to G.S. 97-10.2(j) to determine the amount of recovery to be paid to both the Employee and Employer, and the Court finds that it is fair, equitable, and just that one-half (1/2) of said sum, or $12,500.00 be paid to Steve W. Allen, the Plaintiff-Employee, and that the remaining one-half (1/2) of said sum or $12,500.00 be paid to Pilot Freight Carriers, the Employer and its insurance carrier, Protective Insurance Company.

The trial court then concluded:

> [T]hat it has authority, pursuant to the provisions of G.S. 97-10.2(j), when read in conjunction with the other provisions of said statute, to determine the amount to be paid to the Employee and Employer by a Third Party Tort Feasor; that it is fair and equitable and just that the Employee and Employer divided equally the $25,000.00 proceeds to be paid herein by the third party tort feasor . . . .

We find the trial court's decision to be a reasoned choice which is factually supported. Furthermore, we cannot say that the trial court abused its discretion in determining that it is fair, equitable, and just for the plaintiff and Protective to share equally the proceeds which fall far short of being sufficient to reimburse plaintiff for his pain, suffering, and other losses; or to reimburse Protective for its payment of plaintiff's extensive medical bills.

We hold, therefore, that the trial court's order was a proper, constitutional exercise of its discretionary authority under N.C. Gen. Stat. § 97-10.2(j). The order is

Affirmed.

Judges WELLS and LEWIS concur.

THOMAS WALKER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; BETTY S. CAMP v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

Nos. 8910SC1322
9010SC36

(Filed 30 October 1990)

1. **Administrative Law § 67 (NCI4th)— review of State Personnel Commission—whole record test**

In two actions arising from the dismissal of State employees, the appeal record did not affirmatively show that the superior court failed to apply the whole record test where the order in each case states that the court reviewed "the briefs of the parties, the order of the State Personnel Commission, the recommended decision of the Administrative Judge," and heard arguments of counsel. Since neither party objected to the findings adopted by the Commission, the superior court could reasonably assume that the Commission had properly resolved these conflicts and that the findings in each case accurately and properly reflected the whole record.

Am Jur 2d, Administrative Law §§ 689, 730 et seq.

2. **State § 12 (NCI3d)— dismissal of State employees—just cause—not shown**

The trial court correctly concluded that the State Personnel Commission's findings did not support its conclusion that just cause was established for termination of two rehabilitation counselors where there were not substantial findings of fact to support the conclusions and, in fact, many of the findings were directly contradictory to the conclusions.

Am Jur 2d, Master and Servant §§ 45, 46, 54, 55.

3. **State § 12 (NCI3d)— termination of State employees—finding of just cause—grounds**

When an agency seeks to establish before the State Personnel Commission that an employee subject to the State Personnel Act was terminated for just cause, it cannot rest solely on the grounds that a supervisor's directions were not carried out to the fullest extent. An agency must make a showing that the employee has not performed with reasonable care, diligence, and attention. Failure to fulfill quotas and complete

tasks to the complete satisfaction of a supervisor is not enough; the agency must show that these quotas and job requirements were reasonable and that the employee made no reasonable effort to meet them.

Am Jur 2d, Master and Servant §§ 45, 46, 54, 55.

APPEAL by respondent from orders entered 19 September 1989 in WAKE County Superior Court by *Judge James H. Pou Bailey.* Heard in the Court of Appeals 28 August 1990.

Each petitioner was dismissed from its position as a rehabilitation counselor with respondent's Division of Vocational Rehabilitation on 28 February 1986. Respondent has appealed the trial court's decision in each case reversing the State Personnel Commission and ordering that each petitioner be reinstated. Since these cases present similar facts and questions of law, they have been consolidated for appeal. We affirm.

Thomas Walker

Petitioner in this case began working as a counselor for the Division of Vocational Rehabilitation in 1972. His main responsibility as a counselor was to counsel handicapped adolescents and successfully place them in jobs. Counselors were required to evaluate the eligibility of potential clients for services and develop individualized rehabilitation plans. They were also expected to provide transportation when necessary, train the client to use public or other transportation on their own, teach job-seeking and job-keeping skills, and help the client overcome other barriers to acquiring employment. Counselors were also expected to actively seek out employment for the clients. All of these services were to be documented. A primary measure of performance of the counselors was the number of case activations and successful case closures each year. A successful case closure is defined as a client working in a particular job for 60 days.

On 26 October 1984, petitioner was orally warned by his unit manager, E. Frank Rouse, for inadequate performance. After a December case review was completed, Rouse was still dissatisfied with petitioner's performance and warned him in writing. Rouse then devised a performance contract under which petitioner was to work. By the end of June, 1985, petitioner had satisfactorily performed 13 out of the 15 designated activities. He was considered

to be deficient in implementing a case diary system which Rouse was to assist him with, but had not. He had also failed to meet his quota of successful job placements, but had met his quota of case activations.

A special case review in July 1985 revealed what were considered to be inadequacies in paper work and documentation. Closures or activations in which documentation was considered to be inadequate had earlier been approved by Rouse or another supervisor, however. On 30 August 1985, a final written warning was issued. A second performance contract was devised in September.

Petitioner was evaluated four times during the period of the second contract. By the final follow-up, petitioner had performed satisfactorily in seven out of nine areas. Petitioner had again been unable to meet his quota for job or job training placements, and five cases revealed a failure to either provide adequate client services or to document them if they were being provided. Rouse had never received any complaints from the general public, school personnel, or other counselors regarding petitioner's work or provision of services. Area school personnel who worked in special education considered petitioner to go above and beyond the call of duty for his clients. Petitioner was terminated 13 February 1986, effective 28 February 1986.

Betty S. Camp

Petitioner in this case began work as a counselor in 1967. On 10 September 1984, petitioner was commended for her performance by Rouse. On 25 October 1984, petitioner was orally warned by Rouse that her performance was inadequate. A performance contract was then drawn up in January 1985 under which she was expected to work. Prior to this contract, in December 1984, it was recommended to Rouse that petitioner receive help in closing out old cases and have part of her caseload reassigned. Her caseload was far in excess of the other school counselors. Rouse did not implement any of these recommendations. By the end of June 1985, petitioner had adequately performed 14 of the 18 designated assignments under the contract. She was still considered deficient in carrying through a case diarying system, completing annual review forms, and successfully placing clients in jobs. She had, however, met her quota of case activations.

In a special July follow-up review, several cases were considered to be marked by either inadequate performance of services or inadequate documentation if these services had in fact been provided. Closures or activations in which documentation was considered to be inadequate had earlier been approved by Rouse or another supervisor, however. Petitioner exceeded her quota of job placements in August, 1985. On 29 August 1985, she was issued a final written warning.

A second performance contract was implemented in September, 1985. Petitioner was reviewed four times during the course of this contract. By February 1986, she had performed adequately in seven out of the eleven areas designated in the contract. She had a few cases which needed closing and rehabilitation plans, and a few that needed corrected documentation. She had also not been able to meet her job and job training quotas. Rouse had never received any complaints from the general public, school personnel, or other counselors or staff about petitioner's work. Area school personnel who worked in special education considered petitioner to go above and beyond the call of duty for her clients. Petitioner was terminated 13 February 1986, effective 28 February 1986.

Both petitioners appealed their terminations. The administrative law judge assigned to each case submitted recommended decisions containing extensive findings of fact and concluded that respondent had not carried its burden of establishing just cause for dismissal in either case, and recommended that each petitioner be reinstated. The State Personnel Commission adopted the administrative law judge's findings of fact in each case, but concluded that respondent had carried its burden of establishing just cause and upheld each termination. The trial court reversed the Commission, ruling that the Commission's conclusions were not supported by the findings of fact it had adopted, that respondent had not carried its burden of showing just cause, and ordering that each petitioner be reinstated. Respondent appeals.

Edelstein, Payne & Nelson, by M. Travis Payne, for petitioners-appellees.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John R. Corne, for respondent-appellant.

WELLS, Judge.

This court's review of a trial court's consideration of a final agency decision is to determine whether the trial court failed to properly apply the review standard articulated in N.C. Gen. Stat. § 150B-51. *In re Kozy*, 91 N.C. App. 342, 371 S.E.2d 778 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). Our review is further limited to the exceptions and assignments of error set forth to the order of the superior court. *Watson v. N.C. Real Estate Commission*, 87 N.C. App. 637, 362 S.E.2d 294 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988).

An agency decision may be reversed or modified by the reviewing court if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1985). The proper standard to be applied depends on the issues presented on appeal. If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required. *Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E.2d 342 (1988). A review of whether the agency decision is supported by the evidence, or is arbitrary or capricious, requires the court to employ the whole record test. *Id.*

Having set out the proper standard of review, we now determine whether the trial court correctly applied it. In each case, respondent has set out a long list of somewhat redundant assignments of error. We note initially that respondent did not object in either case to the adopted findings of fact at the superior court level. The findings of fact were binding, therefore, at that appellate level, and are binding for purposes of our review. *See Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 361 S.E.2d 575 (1987).

[1] Respondent's primary contention on appeal is that the superior court erred by not applying the "whole record test" in reviewing the decision of the Commission. As we have noted, the whole record test was the proper scope of review for determining the merits of petitioners' contentions that the Commission's conclusions were

not supported by its findings of fact. The order in each case states that the court reviewed "the briefs of the parties, the Order of the State Personnel Commission, the Recommended Decision of the Administrative Judge," and heard the arguments of counsel. We do not agree that this appeal record affirmatively shows that the superior court failed to apply the whole record test.

The whole record test generally requires examination of the entire record, including the evidence which detracts from the agency's decision. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). Neither party here, however, called the court's attention to any dispute in the evidence by excepting to or assigning error to any of the findings of fact adopted by the Commission. When an agency finds facts, it is required to resolve conflicting evidence. *See Dunlap v. Clarke Checks, Inc.*, 92 N.C. App. 581, 375 S.E.2d 171 (1989). Since neither party objected to the findings adopted by the Commission, the superior court could reasonably assume that the Commission had properly resolved these conflicts, and that the findings in each case accurately and properly reflected the whole record.

[2] The superior court was compelled then, to examine the conclusions of the Commission and determine whether they were supported by substantial evidence in the record, as reflected by the findings of fact. If an agency decision is not supported by substantial evidence in the record, it may be reversed. *Joyce v. Winston-Salem State University*, 91 N.C. App. 153, 370 S.E.2d 866, *cert. denied*, 323 N.C. 476, 373 S.E.2d 862 (1988). Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion. *Id.* The court held that the conclusions of the Commission were not supported by the findings of fact. We agree.

The Commission concluded from the findings of fact that each petitioner's performance continued to be deficient during the probationary periods in that each petitioner failed to meet the reasonable expectations of respondent. The Commission further concluded that the findings of fact indicated that each petitioner was compelled to catch up on paper work and documentation while keeping up a full workload because of "inadequate performance." Finally, the Commission concluded that each petitioner had improved during the probationary periods, but not to such an extent to merit continued employment. We do not find substantial evidence in the

findings of fact which would support these conclusions, and view many of these findings to be directly contradictory to them. In each case, the findings support a conclusion that respondent's expectations for these petitioners were not reasonable, particularly regarding the mandatory placement of a set number of clients in jobs each month. In each case, the findings support a conclusion that each petitioner was behind in paper work at least in part because of extraneous forces, such as understaffing and an office fire.

[3] The superior court concluded that respondent had not met its burden of showing just cause to uphold the terminations. N.C. Gen. Stat. § 126-35 provides that no permanent employee subject to the State Personnel Act shall be discharged except for just cause. Just cause is not defined. The words are to be given their ordinary meaning. *Reed v. Byrd*, 41 N.C. App. 625, 255 S.E.2d 606 (1979). There is no question that a state employee may be discharged for inadequate performance of duties. *See Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). We agree with the State Personnel Commission that the adequacy of an employee's work must be, to some extent, a subjective determination made by agency personnel. When an agency seeks to establish before the Commission that an employee was terminated for just cause, however, it cannot rest solely on the grounds that a supervisor's directives were not carried out to their fullest extent.

The standard of employee conduct implied in every contract of employment is one of reasonable care, diligence and attention. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 358 S.E.2d 107 (1987). We cannot say that a state employee undertakes any greater duty. In attempting to establish that it had just cause to terminate an employee, then, an agency is bound to make a showing that the employee has not performed with reasonable care, diligence and attention. Failure to fulfill certain quotas and complete certain tasks to the complete satisfaction of a supervisor is not enough. The agency must show that these quotas and job requirements were *reasonable*, and if so, that the employee made no reasonable effort to meet them. The facts which the Commission adopted do not support such a conclusion, and several directly contradict it. The facts show that each petitioner was putting in extra effort to attempt to meet Rouse's requirements, and show that these requirements failed to take into account many of the

realities of the school caseload. There is also nothing in the findings which would indicate that the inability of petitioners to meet Rouse's goals adversely affected the agency in any way. To the contrary, these findings indicate that respondent's clients were well served by each petitioner.

The trial court having correctly concluded that the Commission's own findings did not support its conclusion that just cause was established in these cases, the order of the trial court in each case must be and is

Affirmed.

Judges EAGLES and LEWIS concur.

MUTHER-BALLENGER, A NORTH CAROLINA GENERAL PARTNERSHIP v. GRIFFIN ELECTRONIC CONSULTANTS, INC.

No. 903SC83

(Filed 30 October 1990)

1. Sales § 17.1 (NCI3d)— spinal scanner—breach of express warranty—disclaimer

The trial court improperly granted summary judgment for defendant on a claim for breach of an express warranty that a scanner would completely perform quality diagnostic scanning of the human spine. Although defendant contended that it effectively disclaimed any express warranties by a disclaimer located in a service agreement, whether defendant made or breached any such express warranty is a question of fact to be decided by the trier of fact. N.C.G.S. § 25-2-313.

Am Jur 2d, Sales §§ 723 et seq., 826.

2. Sales § 17.2 (NCI3d)— spinal scanner—implied warranties of merchantability and fitness for a particular purpose—disclaimer

The trial court erred by granting summary judgment for defendant on a claim for breach of the implied warranties of merchantability and fitness for a particular purpose arising from the sale of a spinal scanner where defendant's disclaimer language appeared only in a service agreement; defendant con-

tends that the service agreement and contract were merged into a single contract; the quotation and service agreement were on separate pieces of paper; each document contains a separate executory section; each document could be read as an entire agreement in itself; and there was a material question of fact as to whether the quotation and the service contract constituted one contract.

Am Jur 2d, Sales §§ 747 et seq., 826.

3. **Evidence § 32.3 (NCI3d)— spinal scanner—modification of warranties—parol evidence rule not applicable**

Summary judgment was improperly granted for defendant on the issue of subsequent modification of warranties arising from the sale of a spinal scanner. The parol evidence rule would not bar evidence of oral modifications made subsequently to the written contract and there was a material issue of fact as to whether there was a subsequent modification. N.C.G.S. § 25-2-202.

Am Jur 2d, Sales §§ 826-832.

APPEAL by plaintiff from order entered 8 December 1989 by *Judge Herbert O. Phillips, III,* in CRAVEN County Superior Court. Heard in the Court of Appeals 18 September 1990.

Stubbs, Perdue, Chesnutt, Wheeler & Clemmons, P.A., by Gary H. Clemmons, for plaintiff appellant.

Hollowell, Eldridge & Ingersoll, P.A., by James E. Eldridge, for defendant appellee.

COZORT, Judge.

Plaintiff filed suit seeking damages and recision of a maintenance agreement, alleging that a spinal scanner sold to plaintiff by defendant failed to produce acceptable spinal diagnostic scans. Plaintiff asserted four claims: (1) breach of express warranty; (2) breach of implied warranty of merchantability; (3) breach of implied warranty of fitness for a particular purpose; and (4) breach of contract. The trial court granted summary judgment for defendant on the first three claims. We find material issues of fact are present, and we reverse.

Plaintiff forecast evidence tending to show: After a period of negotiations during the fall of 1987, plaintiff signed a written agreement to purchase a used Pfizer CT Scanner, used to scan the spinal region of the human body. Prior to the signing of the agreements between the parties, Dr. Ellis Muther, a general partner in plaintiff Muther-Ballenger, negotiated with Mr. Jonathan Griffin, president of defendant Griffin Electronic. Dr. Muther informed Mr. Griffin that his partnership needed a scanner which would produce acceptable scans for neurological and psychiatric purposes. Mr. Griffin assured Dr. Muther that the unit would produce acceptable spinal scans for diagnostic purposes. Dr. Muther and B. Rabon Maready, a financial account management consultant associated with plaintiff, traveled to defendant's place of business in Fuquay-Varina to personally inspect a Pfizer Scanner and to inspect a spinal scan that had been produced by the scanner. They were shown a scan on the machine, and it was represented to them that the particular scan was produced from the machine. In fact, the scan had been produced by another Pfizer Scanner located in Elizabeth City. Mr. Griffin made representations to Dr. Muther and Mr. Maready that the Pfizer Scanner plaintiff would purchase would perform at the same quality level and maintain the same operational capacity as a Technicare 2060 Quantum, G.E. 8800, or any machine of comparable style. Based on these representations, plaintiff purchased the Pfizer Scanner from the defendant.

On 17 November 1987, Dr. Muther, acting in his representative capacity for the plaintiff, signed a contract for the purchase of one Pfizer Scanner. This document, entitled "Quotation," was dated 16 November 1987. Dr. Muther also signed a service agreement, dated 17 November 1987. There was also a third document entitled "Addendum to G.E.C. Service Agreement"; this document was dated 16 November 1987, and signed 17 November 1987.

The quotation is typed on defendant's letterhead and describes the specifications for the scanner. The quotation also contains provisions setting forth the selling price and shipping terms. The second, and only other page of the quotation, contains the terms of the maintenance agreement. Underneath the terms of the maintenance agreement is typed "Copy of Griffin Electronic Consultants, Inc. Service Agreement and Terms and Conditions included for your inspection." The signatures of Dr. Muther and Mr. Griffin appear on the second page.

The service agreement is also typed on defendant's letterhead. On the second page appears the following language:

> ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT INCLUDING THOSE SET OUT IN THE ATTACHED ADDENDUM AND THOSE SPECIFICALLY INCORPORATED HEREIN BY REFERENCE CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES. THERE ARE NO WARRENTIES, [*SIC*] EXPRESSED OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE, EXCEPT AS SET FORTH IN THIS AGREEMENT.

The addendum to the service agreement contains provisions setting forth the services the defendant agrees to provide, the parts not covered by the agreement and the maintenance for which the plaintiff would be responsible.

In an affidavit, Dr. Muther testified that upon installation, the scanner failed to perform diagnostically acceptable spinal scans. The plaintiff was totally unable to utilize the equipment for routine spinal diagnostic purposes. Plaintiff requested that defendant service the scanner as provided in the service agreement. According to the plaintiff, the defendant failed to service the scanner in the manner provided in the service agreement. On several occasions after the quotation and service agreement were signed, Mr. Griffin told Dr. Muther that the scanner would produce spinal scans for diagnostic purposes and that problems with the scanner could be resolved. The scanner, which went on line on 8 February 1988, was removed from the plaintiff's facility in May of 1988 after the plaintiff gave notice of its rejection of the scanner.

In its complaint, plaintiff alleged, among other things, that the defendant breached its express warranty that the scanner would conform to the plaintiff's desired use of the equipment and that the defendant implied warranties of merchantability and fitness for a particular purpose. Defendant answered that it effectively disclaimed all warranties, express and implied, by the disclaimer language (quoted above) located in the service agreement. Defendant moved for summary judgment on plaintiff's claims regarding breach of warranty. Both parties filed affidavits in support of their positions. The trial court found that there were no genuine issues of material fact concerning the liability of the defendant under plaintiff's breach of warranty claims and granted summary judgment in defendant's favor on those claims.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." We find questions of material fact present in this case, and we reverse summary judgment.

[1] The sale of the scanner is a sale of goods and, thus, the sales transaction is governed by the Uniform Commercial Code, N.C. Gen. Stat. §§ 25-2-101 *et seq.* Plaintiff's first claim is that defendant made and breached an express warranty that the scanner would completely perform quality diagnostic scanning of the human spine. The pertinent part of the code is:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> * * * *
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

N.C. Gen. Stat. § 25-2-313(1)(a) and (c) (1986).

Defendant contends that it effectively disclaimed any express warranties by the disclaimer located in the service agreement. The comment to § 25-2-313 suggests that the basic obligation created by a description of the goods cannot be retracted. "A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description . . . ." Comment, N.C. Gen. Stat. § 25-2-313 (1986). Thus, the true issue is whether the defendant made or breached any express warranties. Under the present circumstances whether defendant made or breached any express warranties that the scanner would completely perform quality scanning of the human spine is a question of fact to be decided by the trier of fact. *Davis Realty, Inc. v. Wakelon Agri-Products, Inc.*, 84 N.C. App. 97, 351 S.E.2d 816 (1987); *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E.2d 588 (1982). Thus, the trial court improperly concluded that there were no issues of material fact as to plaintiff's first claim for relief.

[2] Plaintiff's second and third claims are that the defendant breached the implied warranties of merchantability and fitness for a particular purpose. The Uniform Commercial Code provides that "[u]nless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." N.C. Gen. Stat. § 25-2-314(1) (1986). Further, the code provides that the implied warranty of fitness for a particular purpose arises

> [w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods . . . .

N.C. Gen. Stat. § 25-2-315 (1986). Defendant contends that its disclaimer in the service agreement effectively disclaimed both implied warranties.

To exclude the implied warranty of fitness for a particular purpose, the writing must be conspicuous. To exclude the warranty of merchantability, the language must mention merchantability and be conspicuous. N.C. Gen. Stat. § 25-2-316(2) (1986). Defendant's language of disclaimer in the service agreement meets the code's requirement of conspicuousness. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976). However, there is no language of disclaimer in the quotation; the only disclaimer appears on the service agreement. Defendant contends that the service agreement and the quotation were merged into a single contract and that the disclaimer in the service agreement is effective to disclaim the warranties implied in the sale of the scanner. The quotation and the service agreement are on separate pieces of paper; each document contains a separate executory section, and each document could be read as an entire agreement in itself. Thus, there is a material question of fact as to whether the quotation and the service contract constitute either one contract for the sale of goods or two contracts, one for the sale of goods and one for the sale of services. Consequently, the trial court's grant of summary judgment for the defendant was improper.

[3] The plaintiff contends that even if the documents are found to constitute one contract that it is entitled to maintain this breach of warranty action because the defendant's subsequent verbal warranties modified the prior written contract and written disclaimer.

Plaintiff contends that after the sales contract had been signed and after the scanner had been installed, the defendant's agents told plaintiff's agents that the scanner would produce acceptable spinal scans and that any problems with the scanner could be resolved. Thus, plaintiff argues that defendant's statements created additional warranties which were not disclaimed by the statement in the original contract.

In response, defendant argues that the written contract is the complete agreement between the parties and that parol evidence of additional terms may not be introduced. Defendant misapprehends the purpose of the parol evidence rule. The parol evidence rule bars admission of evidence of any *contemporaneous* oral agreements or any *prior* agreements which contradict the terms of the parties' final written agreement. N.C. Gen. Stat. § 25-2-202 (1986). In the present case, the parol evidence rule would not bar plaintiff's evidence of oral modifications made *subsequent* to the written contract.

In *Bone International, Inc. v. Johnson*, 74 N.C. App. 703, 329 S.E.2d 714 (1981), a truck dealer sued defendant for the cost of repairs it made on defendant's trucks. Defendant claimed that after he had purchased the trucks and signed the bills of sale, which contained the words "No Warranty," the plaintiff orally promised to repair the trucks for free. *Id.* at 706, 329 S.E.2d at 716. This Court held that the post sale agreement was an oral modification of the original contract and that the subsequent agreement was not subject to the parol evidence rule. *Id.* This Court held that the "defendant's testimony as to the oral modification thus raises a statutory defense to plaintiff's suit and so creates a genuine issue of material fact, precluding summary judgment." *Id.* at 707, 329 S.E.2d at 717. We find *Bone International* controlling here. There is a genuine issue of material fact as to whether there was a subsequent agreement modifying the original contract. For this reason summary judgment was improper.

In conclusion, we find that summary judgment for the defendant was improperly granted for three reasons. First, there are issues of material fact as to whether the defendant's description of the scanner's capabilities and the defendant's display of a scan taken by another scanner created any express warranties. Second, there is a question of material fact as to whether the quotation and the service agreement are merged into a single contract. Last, there is a factual issue as to whether the defendant's agent's

statements to the plaintiff's agent constitute a subsequent oral agreement. Because these questions must be answered by the fact finder, we reverse the entry of summary judgment and remand the case for further proceedings.

Reversed and remanded.

Judges WELLS and LEWIS concur.

GAYE H. LEONARD, PLAINTIFF-APPELLANT v. PHYLLIS B. WILLIAMS, DEFENDANT, THIRD-PARTY PLAINTIFF-APPELLEE v. ROY EDWARD LEONARD, THIRD-PARTY DEFENDANT-APPELLEE

No. 8921SC1383

(Filed 30 October 1990)

1. **Constitutional Law § 74 (NCI3d)— self-incrimination—possible prosecution—expiration of statute of limitations**

A witness could not invoke the privilege against self-incrimination in an action for criminal conversation on the ground that his testimony might subject him to a prosecution for adultery where the two-year statute of limitations for adultery had expired.

Am Jur 2d, Witnesses §§ 38, 39.

2. **Constitutional Law § 74 (NCI3d)— self-incrimination—possible punitive damages—necessity for threat of execution against person**

A witness could not invoke the privilege against self-incrimination on the ground that his testimony might subject him to punitive damages in a civil action where there was no showing of a threat of an execution against the person pursuant to N.C.G.S. § 1-311.

Am Jur 2d, Witnesses § 41.

3. **Evidence § 24 (NCI3d)— objections to deposition—reservation for trial by stipulation**

Where the parties stipulated that all objections during a deposition except as to the form of the question would be

reserved for trial, the third-party defendant reserved his right to object at trial to the admission of his deposition testimony on the ground of self-incrimination.

Am Jur 2d, Depositions and Discovery §§ 174 et seq.

APPEAL by plaintiff from order entered 1 November 1989 by *Judge Joseph John* in FORSYTH County Superior Court. Heard in the Court of Appeals 22 August 1990.

Charles L. Cromer, Attorney at Law, by Charles L. Cromer, for plaintiff-appellant.

No brief filed for third-party plaintiff-appellee.

No brief filed for third-party defendant-appellee.

GREENE, Judge.

The plaintiff, Gaye H. Leonard, in this action for criminal conversation alleges that the defendant, Phyllis B. Williams, had sexual relations with the plaintiff's husband, Roy Edward Leonard (third-party defendant). From a summary judgment for the defendant, the plaintiff appeals.

This action is the second of two suits filed by the plaintiff in this matter. The plaintiff originally brought suit against the defendant in 1985, alleging criminal conversation and alienation of affections.

On November 22, 1985, the third-party defendant gave a deposition during which he described in detail his alleged sexual relations with the defendant. All parties were present and represented by counsel during the deposition. Counsel for the parties stipulated that all objections and motions to strike would be reserved until the deposition testimony was offered into evidence at trial, with the exception of objections to the form of the question.

Subsequently, the plaintiff voluntarily dismissed the first suit, and she and the third-party defendant divorced on January 2, 1987.

On November 16, 1987, the plaintiff brought the present action against the defendant for criminal conversation, again alleging that the defendant had sexual relations with the third-party defendant while the plaintiff was married to him. In her answer, the defendant denied the allegations, counterclaimed against the plaintiff and

brought a third-party claim against Roy Leonard, alleging libel and slander.

On September 6, 1989, the plaintiff notified the other parties of her intent to use the third-party defendant's deposition as substantive evidence in the event he invoked his privilege against self-incrimination. On October 31, 1989, the third-party defendant moved in limine to exclude from trial the deposition testimony, and gave notice of his "intention to exercise his right to refuse to testify about any matter tending to incriminate him or expose him to punitive damages. . . ."

The trial court concluded that the third-party defendant had not waived his right to invoke his privilege against self-incrimination by giving his deposition testimony, and that he was entitled to invoke his privilege both as to his live testimony at trial and as to the deposition testimony. The plaintiff conceded that she had no evidence other than the deposition to support her claim, and the court granted summary judgment for the defendant.

The issues raised are: Whether the trial court erred by holding that the third-party defendant could invoke the privilege against self-incrimination in regard to (I) his live testimony, and (II) his deposition testimony.

I

[1] The record does not indicate the specific offense for which the third-party defendant contends he may be subjected to prosecution. We assume he refers to the offense of adultery under N.C.G.S. § 14-184 (1986). However, adultery is a misdemeanor under our statutes, and is therefore subject to a two-year statute of limitations. N.C.G.S. § 15-1 (1983). It is generally held that a witness cannot invoke the privilege against self-incrimination where he is either immune from prosecution, or where prosecution is barred by a statute of limitations. *See* 98 C.J.S. *Witnesses* § 437 (1957); 23 Am. Jur. 2d *Depositions and Discovery* § 38 (1985). "A legal limitation of the time of prosecution is in practical effect an expurgation of the crime; so after the lapse of the time fixed by law the privilege ceases." 8 Wigmore on Evidence § 2279 (McNaughton rev. 1961). The constitution protects against only real danger of prosecution, not mere speculative possibilities. *Shaw v.*

Williamson, 75 N.C. App. 604, 331 S.E.2d 203, *disc. rev. denied*, 314 N.C. 669, 335 S.E.2d 496 (1985).

In his deposition testimony, the third-party defendant indicates that his last sexual involvement with the defendant was on January 8, 1984. The present action was brought on November 16, 1987, and the third-party defendant invoked his privilege against self-incrimination on October 31, 1989. Clearly, at the time the privilege was invoked, as well as at the time suit was filed, the two-year statute of limitations had already run as to the offense of adultery. Since any potential prosecution for that offense is barred, it cannot be the basis for invoking the privilege against self-incrimination.

[2] From the trial court's order, it also appears that the court was persuaded by the third-party defendant's contention that he could invoke the privilege against self-incrimination on the basis his testimony would subject him to liability for punitive damages in a civil suit. The defendant, in fact, seeks punitive damages in her claim against the third-party defendant.

The third-party defendant's contention regarding punitive damages apparently stems from *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964). *Allred* holds that a person is entitled to invoke the privilege against self-incrimination where he is subject to a verdict for punitive damages on the grounds that an award of punitive damages gives rise to execution against the person. However, the basis for *Allred* was N.C.G.S. § 1-311 (1953).

> In this State a person may be arrested and held to bail "in an action for the recovery of damages on a cause of action not arising out of a contract where the action is for wilful, wanton, or malicious injury to person or character or for wilfully, wantonly, or maliciously injuring . . . real or personal property." G.S. 1-410 (1); . . . For such acts, when a cause of action is properly alleged and proved and at least nominal damages are recovered by the plaintiff, a jury in its discretion can award punitive damages. . . . In such cases, if a judgment is rendered against a defendant for a cause of action specified in G.S. 1-410 (1), G.S. 1-311 authorizes an execution against the person of the judgment debtor, after the return of an execution against his property wholly or partly unsatisfied.

Allred at 37, 134 S.E.2d at 191 (citations omitted).

In 1977, the legislature amended N.C.G.S. § 1-311 limiting execution against the person to cases where either the jury's verdict or the trial court's findings of fact include a finding that the defendant is about to either (1) flee the jurisdiction to avoid paying his creditors, or (2) has concealed or diverted assets in fraud of his creditors, or (3) will do so unless immediately detained. Accordingly, under the present language of N.C.G.S. § 1-311, an award of punitive damages in a cause of action specified under N.C.G.S. § 1-410, alone, does not give rise to execution against the person. *See Shaw* (analyzing the basis for the holding in *Allred* and distinguishing the amended N.C.G.S. § 1-311); *see also* 1 H. Brandis, *Brandis on North Carolina Evidence* § 57 (3d ed. 1988). Therefore, the privilege against self-incrimination cannot now be supported by the mere threat of a punitive damages award. Before one is entitled to invoke the privilege there must be a threat of execution against the person, and here there is nothing in the record to suggest that possibility.

We hold that, upon the record before us, the trial court erred in allowing the third-party defendant to invoke the privilege against self-incrimination as to his live testimony in that he was not faced with any real threat of criminal prosecution or of execution against the person. Our review is limited to the record, and we assume that the third-party defendant's assertion that he may be subject to criminal prosecution is based on the offense of adultery. Upon remand, if the third-party defendant invokes the privilege based on some other offense, the trial court will need to determine whether a real threat of prosecution exists, considered in light of any applicable statute of limitations. *See Trust Co. v. Grainger*, 42 N.C. App. 337, 256 S.E.2d 500, *disc. rev. denied*, 298 N.C. 304, 259 S.E.2d 300 (1979). The same holds true in the event circumstances become such that the third-party defendant may be subject to execution against the person. Unless a real threat exists, the privilege is not available.

We realize that in some instances, the existence of a real threat of prosecution is not easily determined just from the nature of the question asked the witness. In such cases "the judge may, in the absence of the jury, inquire into the matter to the minimum extent necessary to determine that a truthful answer *might* tend to incriminate, and should deny the claim only if there is no such possibility." 1 H. Brandis, *Brandis on Evidence* § 57 (3d ed. 1988). Our cases have also noted that this necessary inquiry partially invades the very privilege the witness seeks to invoke. In *Grainger*,

42 N.C. App. at 340, 256 S.E.2d at 503, this Court noted Judge Learned Hand's evaluation of this problem.

> Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

United States v. Weisman, 111 F.2d 260 (2d Cir. 1940).

II

If the trial court finds that there is a basis to support the third-party defendant's privilege against self-incrimination as to his live testimony, the question remains as to whether the privilege also precludes the use of his deposition testimony.

We note first that under federal practice the usual procedure is for the objecting party to note the objection during the course of the deposition, but to then answer the question. *Perrignon v. Bergen Brunswig Co.*, 77 F.R.D. 455 (N.D. Cal. 1978). However, where the objection is based on privilege, the usual procedure is for the objecting party to halt the deposition and apply to the court for a protective order. *Id.*

[3] Without addressing the applicability of these federal procedures to North Carolina, we find here that the parties expressly stipulated that all objections except as to the form of the question would be reserved for trial. Accordingly, we find that the third-party defendant reserved his right to object at trial to the admission of the deposition testimony on the basis of self-incrimination. Therefore, if the trial court determines during the course of the trial that the defendant may be subject to criminal prosecution or execution against the person, such that he may properly invoke the privilege as to his live testimony, the privilege, once properly invoked, will also serve to exclude the deposition testimony.

Reversed and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

DELORES MAE HILL, PLAINTIFF v. WINN-DIXIE CHARLOTTE, INC. AND BABBI MOORE, AND MARCUS MARSHALL, DEFENDANTS

No. 8917SC1380

(Filed 30 October 1990)

Malicious Prosecution § 11.2 (NCI3d)— shoplifting—conviction in district court and acquittal in superior court—underlying probable cause for malicious prosecution

The trial court did not err by granting a directed verdict for defendants in a malicious prosecution action arising from plaintiff's alleged shoplifting where plaintiff was convicted in district court and acquitted in superior court. Evidence that plaintiff was convicted of the charges forming the basis for the malicious prosecution action conclusively establishes the existence of probable cause even where plaintiff is later acquitted of the charge. Although plaintiff contended that her district court conviction was procured by fraud or other unfair means, her acquittal in superior court standing alone does not make a prima facie case for malicious prosecution and inaccurate or conflicting testimony does not alone constitute perjury.

Am Jur 2d, Malicious Prosecution §§ 71, 75, 130, 132, 134, 167, 179.

Conclusiveness, as evidence of probable cause in malicious prosecution action, of conviction as affected by the fact that it was reversed or set aside. 86 ALR2d 1090.

APPEAL by plaintiff from judgment entered 21 September 1989 by *Judge Melzer A. Morgan Jr.*, in ROCKINGHAM County Superior Court. Heard in the Court of Appeals 22 August 1990.

Plaintiff Delores Hill was served with a civil summons on 10 March 1987 alleging the offense of shoplifting. Plaintiff pled not guilty in district court, but was convicted and appealed. She was found not guilty by a jury in superior court on 18 May 1988.

Plaintiff filed this suit on 6 June 1988 against defendants asserting claims of false imprisonment, malicious prosecution, abuse of process, slander and libel. At the trial on 5 September 1989, the judge dismissed all the claims except the action for malicious prosecution pursuant to N.C.R. Civ. P. 12(b)(6). At the close of plaintiff's evidence, the trial court granted defendants' motion dismissing plaintiff's remaining claim pursuant to N.C.R. Civ. P. 50. From that judgment, plaintiff appeals.

The record and briefs reveal the following facts:

On the evening of 10 March 1987, plaintiff was shopping in the Winn-Dixie Store in Reidsville, North Carolina, with her nine-year-old son. Both individual defendants, Babbi Moore and Marcus Marshall, were Winn-Dixie employees working in the store on the night of plaintiff's arrest.

Defendant Moore testified at both shoplifting trials and in the trial of this matter that she observed plaintiff place eight bottles of Primatene tablets in her jacket pockets as she shopped. Ms. Moore notified Marcus Marshall of her suspicions and contacted the police. Mr. Marshall testified that he saw plaintiff take a white spool of thread out of her pocket and place it back on a display rack. After plaintiff passed through the check-out lane, Mr. Marshall asked plaintiff to step aside and return any merchandise that she had not paid for. Plaintiff denied taking any item, but she was charged with unlawfully concealing eight bottles of Primatene tablets.

Plaintiff testified that on the night of the incident she placed eight packages of Primatene tablets in her shopping cart along with other items. As she proceeded through the store, she conversed with a friend, who advised Ms. Hill that she could purchase the Primatene tablets cheaper at a drug store. Prior to going through the check-out line, plaintiff placed four Primatene tablet boxes back on a shelf at one point inside the store and the remaining four back on a shelf at a separate location.

During the trial of this matter, Ms. Moore testified that in her earlier testimony she had made "an incorrect statement" concerning where Mr. Marshall was standing when she approached him on the night in question. She had testified during the shoplifting trial that Mr. Marshall had been standing in the back of the Winn-Dixie store when she first approached him. In his testimony

Mr. Marshall stated that he never left the front of the store prior to stopping Ms. Hill.

Both individual defendants and the corporate defendant admitted that the two individual defendants violated the shoplifting policy of the store in that they did not individually keep plaintiff under constant observation after she allegedly took the merchandise. Furthermore, Mr. Marshall did not personally see Ms. Hill conceal the merchandise. Also in violation of the policy, Mr. Marshall stopped plaintiff before she had left the store premises.

An attorney testified that he saw Ms. Moore laugh during plaintiff's testimony in the district court trial.

Daniel K. Bailey for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Kari L. Russwurm and Robert W. Kaylor, for defendant appellees.

ARNOLD, Judge.

In her first assignment of error, plaintiff argues that the superior court committed reversible error in granting defendants' motion for dismissal pursuant to Rule 50. A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E.2d 193 (1982). A court reviewing such a motion must consider the evidence in the light most favorable to the nonmoving party. The motion is granted only if the evidence is insufficient, as a matter of law, to support a verdict for the nonmoving party. *Eatman v. Bunn*, 72 N.C. App. 504, 325 S.E.2d 50 (1985).

To prevail on a claim of malicious prosecution, plaintiff has the burden of establishing the following four elements: "(1) that defendant initiated the earlier proceeding; (2) that he did so maliciously; and (3) without probable cause; and (4) that the earlier proceeding terminated in plaintiff's favor." *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984) (quoting *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979)).

The focus in this case is on the third element, whether or not the suit against Ms. Hill was initiated with probable cause. "Probable cause depends upon whether there was a reasonable ground for suspicion, supported by circumstances sufficiently strong

to warrant a cautious man's belief in the guilt of the accused." *Gray v. Gray*, 30 N.C. App. 205, 208, 226 S.E.2d 417, 419 (1976). The critical time for determining whether or not probable cause existed is when the prosecution begins. *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 318, 317 S.E.2d 17, 19 (1984), *aff'd*, 313 N.C. 321, 327 S.E.2d 870 (1985).

Evidence showing that a plaintiff was convicted of charges forming the basis for the malicious prosecution action conclusively establishes the existence of probable cause, even where the plaintiff is later acquitted of the charges, unless the plaintiff can establish that the conviction was procured by fraud or other unfair means. *Myrick v. Cooley*, 91 N.C. App. 209, 213, 371 S.E.2d 492, 495 (1988). Thus, in the instant case, plaintiff's conviction in district court constitutes conclusive evidence of probable cause and can only be rebutted by evidence that the conviction was procured by fraud or other unfair means.

Plaintiff erroneously contends that her acquittal in superior court is sufficient to demonstrate that her district court conviction was procured by fraud or other unfair means. This is simply an attempt to use the first and fourth elements of a claim for malicious prosecution—that defendant initiated the earlier proceeding and that it terminated in plaintiff's favor—to prove the third element, that no probable cause existed when the suit was initiated. Standing alone, a plaintiff's acquittal does not make out a *prima facie* case for malicious prosecution. *Fowle v. Fowle*, 263 N.C. 724, 729, 140 S.E.2d 398, 402 (1965).

Plaintiff also asserts that her conviction in district court was fraudulently or unfairly procured because it was based on perjured testimony. To support her contention, plaintiff relies on *Moore v. Winfield*, 207 N.C. 767, 178 S.E. 605 (1935), the only North Carolina case we are aware of where a plaintiff in a malicious prosecution action overcame the conclusive effect of a prior conviction. *Moore*, however, is distinguishable because the evidence in that case established that at the earlier trial the plaintiff had been convicted by perjured testimony that was procured by threats, intimidation and promises of reward. *Id.* at 770, 178 S.E. at 607.

Moreover, plaintiff has failed even to show that perjured testimony was given in this case. Plaintiff points to several statements made by defendants as examples of perjury. She argues that because a jury found her not guilty, defendants' testimony

that she concealed the tablets must be false. She then concludes that defendants must have made the false statements knowing that they were false. Plaintiff also relies upon several inaccurate statements made by Ms. Moore regarding the location of Mr. Marshall in the store prior to plaintiff's arrest. Finally, she relies upon conflicts in the testimony regarding when plaintiff concealed the Primatene tablets as evidence of perjury.

Despite plaintiff's contentions, none of these statements constitute perjury. Perjury is "a false statement under oath, knowingly, willfully and designedly made, . . . as to some matter material to the issue or point in question." *State v. Arthur*, 244 N.C. 582, 584, 94 S.E.2d 646, 647 (1956) (citations omitted). False statements made unintentionally or with an honest belief that one is telling the truth are not perjurious. *State v. Phillips*, 297 N.C. 600, 256 S.E.2d 212 (1979). Plaintiff has failed to demonstrate that defendants' statements concerning her actions in the store were made with the knowledge that they were false. Quite the contrary, the record reveals that Ms. Moore and Mr. Marshall have consistently testified that they believed plaintiff concealed property of Winn-Dixie on her person on 10 March 1987. Furthermore, the testimony concerning Mr. Marshall's location in the store, while inaccurate, does not constitute perjury and was not a material issue in the shoplifting trials. Finally, the conflicts in the testimony regarding when plaintiff concealed the tablets do not alone constitute perjury.

Plaintiff has failed to produce any evidence that her district court conviction was procured by fraud or unfair means. Accordingly, that conviction stands as conclusive evidence that probable cause existed when the shoplifting action was instituted, and therefore she cannot prevail here as a matter of law. The trial court acted properly in granting a directed verdict in defendants' favor.

Our holding here makes it unnecessary to examine plaintiff's other assignment of error.

Affirmed.

Judges COZORT and GREENE concur.

COULTER v. CITY OF NEWTON

[100 N.C. App. 523 (1990)]

LEONARD COULTER, BOB SEAGLE, AND ODESSA COULTER, PLAINTIFFS v. THE CITY OF NEWTON, A MUNICIPAL CORPORATION; MARY BESS LAWING, ALDERWOMAN; ROBERT D. SAUNDERS, ALDERMAN; THURMOND A. HARVELL, ALDERMAN; H. TOM ROWE, ALDERMAN; JAMES I. STOCKNER, ALDERMAN; AND GEORGE REID, JR., ALDERMAN, BEING ALL OF THE ALDERMEN OF THE BOARD OF ALDERMEN OF THE CITY OF NEWTON; HUGH R. GAITHER, MAYOR OF NEWTON, AND GARY WORKMAN, ACTING CITY MANAGER OF NEWTON, DEFENDANTS

No. 8925SC1342

(Filed 30 October 1990)

1. **State § 1.1 (NCI3d)— conditional use permit—open meetings law—statute of limitations**

Plaintiffs' suit challenging a board of aldermen's approval of a conditional use permit on the basis of the open meetings law, N.C.G.S. § 143-318.11, was barred by the forty-five day statute of limitations of N.C.G.S. § 143-318.16A(b) where disclosure to plaintiffs of the action that the suit seeks to have declared null and void occurred more than sixty days prior to the date plaintiffs filed their complaint.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 569-574.

2. **Municipal Corporations § 30.6 (NCI3d)— special use permit—water and sewer services**

Even if a city's original commitment to provide a waterline to a mobile home park proposed by an applicant for a special use permit violated the open meetings law, its proposal to furnish the waterline was thereafter implicitly approved in a proper manner by the board of aldermen's decision at a public meeting to grant the conditional use permit upon the condition that the city would furnish the waterline and the applicant would extend a sewer line, and the board thus had before it sufficient evidence of adequate water and sewer services to support its approval of the permit.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 569-574.

APPEAL by plaintiffs from judgment entered 5 September 1989 by *Judge Forrest A. Ferrell* in CATAWBA County Superior Court. Heard in the Court of Appeals 20 August 1990.

Defendant Board of Aldermen of the City of Newton adopted a resolution on 22 August 1988 approving the application of Percy Dale Little and Dixie H. Little for a conditional use permit allowing the Littles to construct and maintain a mobile home park on property they owned located within the City's planning and zoning jurisdiction. On 1 September 1988, plaintiffs, who own property adjoining the site of the proposed park, filed a complaint seeking to have a contract between the City and the Littles declared void because it was allegedly agreed to illegally during an executive session of the Board of Aldermen. In addition, plaintiffs filed a Petition for Writ of Certiorari seeking to reverse the action of the Board in approving the permit. Plaintiffs filed a Motion for Summary Judgment pursuant to N.C.R. Civ. P. 56(c) on 30 December 1988, and after a hearing, Judge Ferrell granted summary judgment in favor of defendants. Plaintiffs filed a Motion for Rehearing and for Relief from Order pursuant to N.C.R. Civ. P. 52 and 59. The motion was denied, and plaintiffs appealed.

According to the record and briefs, the facts pertinent to this case are as follows:

Defendant Newton City Board of Aldermen retired into executive session at the close of its regular meeting on 3 February 1987 for the stated purpose of discussing "property acquisition and personnel matters." The mayor of defendant City announced that no action would be taken after the executive session and no action was taken. Neither the Agenda nor the Minutes of the 3 February meeting contain any reference to the Littles, the proposed mobile home park or the extension of water or sewer service to the subject property.

Pursuant to the Littles' application for the conditional use permit, a lengthy public hearing was held on 18 March 1987. Action on the application was tabled until the Board's 7 April 1987 meeting, at which time the Littles' request was denied on the basis that the mobile home park would be detrimental to the safety of other residents because of the poor condition of a public road and the small size of a bridge servicing the area.

Despite the 7 April vote denying the conditional use permit, in the spring of 1987 the City and the Littles apparently reached an agreement on one precondition for complying with the permit requirements. A letter signed by the then city manager of Newton was sent to Mr. Little on 24 April 1987 advising him that at its

3 February 1987 meeting the Board of Aldermen "agreed to install a waterline in McKay Road and under said road to your property located on McKay Road . . . . This agreement was contingent on your agreement to extend a sewer line along McKay Road to serve your property, at your expense. Further, it was contingent on your agreement to petition the City for satellite annexation of the property."

Also, subsequent to the Board's denial of the conditional use permit at the April 7 meeting, the Littles filed a petition for a Writ of Certiorari to the superior court for a review of the proceedings. The court remanded the matter to the City for a de novo hearing to be conducted in a quasi-judicial manner. During the course of the resulting 22 June 1988 public hearing, the 24 April 1987 letter was submitted as evidence of an agreement between the Littles and the City whereby the City would provide a waterline to the property in exchange for Mr. Little installing a sewer line and agreeing to petition the City for annexation.

No action on the matter was taken until the Board's 2 August 1988 meeting at which time the conditional use permit was approved. On 1 September 1988, plaintiffs filed this suit.

Long & Cloer, by Samuel H. Long, III, for plaintiff appellants.

Sigmon, Sigmon & Isenhower, by Jesse C. Sigmon, Jr., for defendant appellees.

ARNOLD, Judge.

In their first assignment of error, plaintiffs contend the trial court erred in granting summary judgment to defendants and in dismissing plaintiffs' claim based on an alleged violation of N.C. Gen. Stat. § 143-318.11 (1987), otherwise known as the "open meetings law." Although plaintiffs filed the motion for summary judgment, the trial court after reviewing the pleadings, exhibits, affidavits of plaintiffs and the record of the Board's proceedings entered summary judgment for defendants. "When appropriate, summary judgment may be rendered against the party moving for such judgment." *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 43 (1972).

A careful reading of plaintiffs' pleadings and brief indicates that the only purpose of this action is to test the legality of the Board's 2 August 1988 action granting the conditional use permit.

Plaintiffs' case rests entirely on their argument that the City "illegally contracted" to furnish water service to the Little property.

[1] Defendants, by their motion to dismiss filed on 25 October 1988, raised a statute of limitations defense pursuant to N.C. Gen. Stat. § 143-318.16A(b) (1987) against the suit challenging the action taken in executive session. That statute provides in part: "A suit seeking declaratory relief under this section must be commenced within 45 days following the *initial disclosure* of the action that the suit seeks to have declared null and void . . . ." *Id.* (emphasis added).

It is clear at the 22 June 1988 public hearing plaintiffs gained knowledge of the 24 April letter, which referred to the "action" taken by the Board of Aldermen in its executive session on 3 February 1987. The letter was introduced into evidence and read at the June public hearing. Plaintiffs were present at the hearing and represented by counsel. Disclosure to plaintiffs of the action complained of therefore occurred on 22 June 1988, more than sixty days prior to 1 September 1988, the date plaintiffs filed their complaint. Thus, plaintiffs' suit is barred by G.S. § 143-318.16A(b), and the trial court properly granted defendants' motion dismissing plaintiffs' first cause of action. *See Northampton County Drainage District Number One v. Bailey*, 92 N.C. App. 68, 72, 373 S.E.2d 560, 563 (1988).

[2] Next plaintiffs contend that the trial court erred by upholding the Board's action in granting the Littles a conditional use permit. "In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court's order but whether the evidence before the town board was supportive of its action." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). Plaintiffs argue that in approving the permit defendant City erred in finding that the permit application met the requirements of the Newton City Code. *See* Newton, N.C. City Code, § 26-54 (1976). According to the Code, a permit applicant must show as a precondition for approval of a permit application that plans for water and sewer systems have been approved by state, county and city authorities. Newton City Code, § 26-54(c)(5). Plaintiffs contend that given the alleged illegality of the agreement between the City and Mr. Little reached during the executive session the Littles have not met the Code requirements.

Nevertheless, even if plaintiffs are correct that the waterline commitment made at the 3 February 1987 executive session violated the open meetings law, a contention we have not addressed here, it does not prevent defendant City from later committing itself to furnish water to the Littles' property. After a lengthy public hearing in 1987, a lawsuit and another public hearing on 22 June 1988, all the facts pertinent to this case were publicly presented, including the City's proposal to furnish a waterline to the Littles' property. That proposal was approved and ratified by the Board of Aldermen through its adoption at the 2 August 1988 public meeting of the resolution granting the conditional use permit to the Littles under certain terms and conditions specified. Among those terms and conditions was the commitment by the City to furnish water to the property. Approval and adoption of the waterline commitment was implicit in the decision of the Board to grant the conditional use permit. Therefore, evidence concerning the City Code requirement for providing adequate water and sewer services to the mobile home park was before the Board when it granted the permit.

The judgment below is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge GREENE concur.

JOHNNY SUGGS, EMPLOYEE, PLAINTIFF v. SNOW HILL MILLING COMPANY, SELF-INSURED EMPLOYER, (KEY RISK MANAGEMENT SERVICES, INC., SERVICING AGENT), DEFENDANT

No. 8910IC1273

(Filed 30 October 1990)

Master and Servant § 58 (NCI3d)— workers' compensation— intoxication not proximate cause of accident—application of correct legal standard

The Industrial Commission correctly applied the legal standard of causation required under N.C.G.S. § 97-12(1) when it determined that, although plaintiff was under the influence of alcohol at the time a bail of straw rolled from the forklift

of a tractor plaintiff was operating and crushed him against the tractor seat, plaintiff's mental retardation and the condition of the tractor were more probably than not proximate causes of the accident, and intoxication was not a proximate cause of the accident.

Am Jur 2d, Workmen's Compensation §§ 230, 234.

APPEAL by defendant from the Opinion and Award of the Industrial Commission entered 21 June 1989. Heard in the Court of Appeals 29 May 1990.

Gene Collinson Smith for plaintiff appellee.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Jack S. Holmes, for defendant appellant.

COZORT, Judge.

Defendant appeals from the Industrial Commission's award of total disability compensation benefits to plaintiff. The award was based on the conclusion that "intoxication was not a proximate cause of the accident [which disabled the plaintiff]." We affirm.

Plaintiff Johnny Suggs, now approximately twenty-nine years old, worked at odd jobs as needed for defendant Snow Hill Milling Company (Snow Hill). Plaintiff has a history of "mental and visual motor impairment" dating from 1968; his I.Q. was evaluated as 64 in 1987. On 17 March 1986, William Taylor, who supervised laborers for defendant, saw Suggs at a local store and asked him to work for Snow Hill. After stopping at the defendant's mill, Taylor instructed Suggs to drive a tractor to the defendant's "hay farm." Suggs drove "for approximately thirty minutes" along North Carolina Highways 58 and 903 to reach the farm. At the farm Suggs and Taylor placed a forklift attachment on the tractor. Taylor explained to Suggs that he was to move bales of wheat straw from a field to a brush pile. After watching Suggs move one bale, Taylor left. When Taylor returned, he discovered that a bale of straw had rolled backward off the fork lift, crushing Suggs against the tractor seat. Suggs was taken to Lenoir Memorial Hospital, where a blood alcohol test performed at 5:20 p.m. indicated that Suggs' blood alcohol content was 93 milligrams per deciliter (equivalent to a breathalyzer reading of .09). The bale that fell

on Suggs (variously estimated to weigh between 500 and 800 pounds) broke his neck and paralyzed him below the upper body.

On 20 March 1986, Suggs filed a claim with the Industrial Commission (the Commission). On 25 April 1988, Deputy Commissioner Richard Harper entered an Opinion and Award denying the claim based on the conclusion that N.C. Gen. Stat. § 97-12(1) barred plaintiff's recovery of compensation benefits. Plaintiff appealed, and on 21 June 1989, the Full Commission entered an Opinion and Award directing the defendant to pay plaintiff permanent total disability compensation benefits. The defendant appealed.

"Appellate review of opinions and awards of the Industrial Commission is strictly limited to the discovery and correction of *legal* errors." *Godley v. County of Pitt*, 306 N.C. 357, 359-60, 293 S.E.2d 167, 169 (1982) (emphasis in original). If supported by competent facts, the Commission's findings of fact are conclusive on appeal. "This is so even though there is evidence which would support a finding to the contrary." *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). With this standard of review in mind, we turn to defendant's appeal.

By its first assignment of error defendant contends that the Commission applied an erroneous legal standard concerning the causal link, if any, between plaintiff's consumption of alcohol and the accident which disabled him. N.C. Gen. Stat. § 97-12 provides in pertinent part that "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by: (1) His intoxication, provided the intoxicant was not supplied by the employer . . . ." Under § 97-12(1) the employer "is required to prove only that the employee's intoxication was more probably than not a proximate cause of the accident and resulting injury." *Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 574, 340 S.E.2d 111, 113 (1986).

Plaintiff admitted that on the day of the accident he drank two beers at "eight o'clock" in the morning and "another beer about one o'clock" with his lunch. The Commission heard expert opinion evidence, based on the plaintiff's blood alcohol content when tested at the hospital, that the plaintiff had an estimated blood alcohol content of 110 to 129 milligrams per deciliter (.11 to .13 in terms of a breathalyzer reading) at the time of the accident. However, the Commission also heard William Taylor testify that he did not smell alcohol on the plaintiff's breath and that he (Taylor)

"felt perfectly safe in having [the plaintiff] operate that tractor." The Commission also heard evidence to the effect that the tractor's seat was blocked on one side, that the tractor was difficult to brake, and that the "home made" forklift attachment had a history of malfunctions, including hydraulic problems and a tendency to "jerk back." We note, finally, that the Commission heard the following expert opinion evidence from Dr. John Butts:

> Q And your problem is trying to separate the two? That is, the effect of alcohol versus the effect of this man's mental condition?
>
> A Yes, sir. If this man had been a man of normal intelligence who had performed this task on a regular basis and was aware of how it was to be done and had experience with doing it, then I wouldn't credit much weight upon alcohol, but this was not something he was used to, had not done it before, and apparently had considerable mental handicap, I feel that I could not say in this case that alcohol was the cause.
>
> Q All right. Would it be your opinion then that both factors, that is this man's alcohol ingestion and resulting impairment and his prior mental retardation, were in your opinion causative factors in the resulting accident?
>
> A It would be my opinion that they could both be. I would be inclined to think that either one of them in and of themselves could conceivably have been the cause. It could have happened to him in the absence of alcohol and conceivably could have happened to him in the absence of mental retardation.

It is not the function of courts of the appellate division

> to *weigh* the evidence before the Industrial Commission in a workmen's compensation case. By authority of G.S. 97-86 the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it. Its findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them.

Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). In the case below the Commission made the following findings of fact:

> 20. Plaintiff's pre-existing mental handicap was more probably than not a cause in fact of the accident resulting in his

injuries. Therefore, plaintiff's mental deficiency was a proximate cause of the accident and the plaintiff's resulting injuries.

21. The condition of defendant's tractor was more probably than not a cause in fact of the accident resulting in plaintiff's injuries, and was therefore a proximate cause of the accident.

22. Plaintiff's consumption of alcohol was not a cause in fact of the accident resulting in his injuries, and was therefore not a proximate cause of the accident resulting in his injuries.

Competent evidence supports those findings, and those findings, in turn, support the conclusion that, "[a]lthough plaintiff was under the influence of alcohol at the time of the accident, other factors caused the accident; therefore, *intoxication was not a proximate cause* of the accident" (emphasis added). Thus, the Commission correctly applied the legal standard of causation required under N.C. Gen. Stat. § 97-12(1). *See Torain*, 79 N.C. App. at 574, 340 S.E.2d at 113.

Having reviewed the record and the briefs, we find the defendant's two remaining assignments of error to be without merit.

For the reasons stated above the Commission's Opinion and Award of 21 June 1989 is

Affirmed.

Judges ARNOLD and PHILLIPS concur.

WRIGHTSVILLE WINDS TOWNHOUSES HOMEOWNERS' ASSOCIATION, APPELLEE/PLAINTIFF v. DOUGLAS E. MILLER AND WIFE, ROXANNA B. MILLER, APPELLANT/DEFENDANT

No. 905DC183

(Filed 30 October 1990)

1. Deeds § 19.5 (NCI3d)— condominium—common areas—action to require removal of structures—evidence sufficient

The evidence presented in an action for an injunction requiring defendants to remove certain structures on condominium grounds supported the court's finding that the

disputed structures were built on common elements of the condominium property where plaintiff presented testimony from a layman and homeowner in the association and defendant presented a surveyor who testified that the structures were built on limited common areas. Defendant did not object to the testimony of plaintiff's witness and was afforded full and free cross-examination; moreover, a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting.

Am Jur 2d, Condominiums and Co-operative Apartments §§ 33, 38, 39; Injunctions § 353.

2. **Injunctions § 2.1 (NCI3d)— condominium—removal of structures from common areas—irreparable harm**

Plaintiffs in an action for an injunction requiring removal of certain structures from common areas of a condominium property presented evidence of irreparable harm in that the injury does not have to be beyond repair, but one to which the complainants should not be required to submit or the other party permitted to inflict. Plaintiff has the right to expect all its tenants to abide by the association's bylaws and declaration.

Am Jur 2d, Injunctions §§ 29-31.

3. **Injunctions § 3 (NCI3d)— condominium common areas—removal of structures—mandatory preliminary injunction**

A "Mandatory Preliminary Injunction" requiring removal of certain structures from condominium common areas was affirmed where the order was based on an adversarial hearing, granted all the relief prayed for in the complaint, and thus constituted a final determination.

Am Jur 2d, Injunctions §§ 21, 29-31.

4. **Attorneys at Law § 60 (NCI4th)— condominium—removal of structures from common areas—attorney fees**

The trial court did not err in an action to require that certain structures be removed from condominium common areas by ordering defendant to pay plaintiff homeowners' association's attorney fees where the bylaws provide that an owner must pay the association's attorney fees if an action is brought

against the owner and the result is a judgment for the association. The action by the trial court here constituted a final judgment.

Am Jur 2d, Injunctions § 309.

APPEAL by defendant from judgment entered 16 August 1989 by *Judge C. Rice* in NEW HANOVER County District Court. Heard in the Court of Appeals 19 September 1990.

Plaintiff Wrightsville Winds Townhouses Homeowners' Association ("Association") filed this Complaint on 30 January 1989 against defendants seeking a preliminary and permanent injunction requiring defendants to remove certain structures built on the plaintiff's premises on the grounds that the structures were erected on common property areas in violation of the Association's rules and bylaws. Following a hearing on the claim, Judge Rice entered a "Mandatory Preliminary Injunction" on 16 August 1989, ordering Mr. Miller to remove a shower roof and stall, a partition at the end of the parking area and a partition between his parking area and the unit next door. Mr. Miller was ordered to pay plaintiff's attorney's fees in the sum of $1,900. On the same date, plaintiff dismissed its action without prejudice as to Mrs. Miller. Mr. Miller appealed.

The record and briefs relate the following facts:

Mr. and Mrs. Miller became record owners of Unit 8B by warranty deed filed in September 1987. The deed was subject to the "Declaration of Condominium" ("Declaration"), which also was properly recorded. The Declaration provides in part:

A. [t]he common elements shall include . . .

(1) All of the real property . . . .

(2) All . . . exterior walls . . . .

(4) All yard areas, parking and drive areas, and sidewalks.

. . .

(6) All other portions of the real property and the improvements thereon which are not specifically part of the units themselves . . . .

In addition, paragraph 16B of the Declaration states: "The owner shall be entitled to use the common elements in accordance with

the purpose for which they are intended, but no such use shall hinder or encroach upon the lawful rights of the owner of the other units."

During the spring of 1988, the Millers constructed a fence along the rear property line of the building and up to Unit 8B, an enclosure and roof onto the outdoor shower attached to Unit 8B, a partition in the parking area of Unit 8B and an enclosure across the rear of Unit 8B's parking area.

At the 4 August 1989 hearing concerning the injunction, Thomas Evans, a homeowner in the Association, testified to the specific provisions of the Declaration that the Millers had violated. Mr. Evans stated that the items built on common elements violated the Declaration. Mr. Evans also testified to provisions of the Declaration that describe the process for amending the Declaration. The Declaration was never amended to allow the building of personal structures on the common elements.

Defendant called Jack Stocks, the original land surveyor who had prepared the plans of the town houses, to testify on their behalf. Mr. Stocks had checked the site in question on the day prior to the hearing and had taken measurements to confirm his testimony. Mr. Stocks testified that the structures were built on "*limited* common elements" and did not encroach on any common elements.

Smith and Smith, by W. G. Smith and Barbara Smith, for plaintiff appellee.

Ryals, Jackson and Mills, by Anthony A. Saffo, for defendant appellant.

ARNOLD, Judge.

[1] Although defendant brings forth a number of assignments of error, the essence of his appeal is that the evidence presented did not support the trial court's finding that the disputed structures were built on common elements of the condominium property. Specifically, defendant attacks the testimony of Mr. Evans, a layman and homeowner in the Association. Mr. Evans' testimony conflicted with statements of defendant's witness, a land surveyor, who testified that the structures were built on limited common areas. Defendant argues that in light of the testimony of his "expert," the testimony

of the layman cannot constitute competent, credible testimony. We disagree.

First, we find no indication in the record that Mr. Miller objected to Mr. Evans' testimony or to Mr. Evans' credibility as a witness concerning the location of the common elements. Further, defendant was afforded full and free cross-examination of Mr. Evans, an examination which filled one-third of the transcript of the proceeding.

Lay opinion is admissible when it is rationally based on the perception of the witness and is helpful for a clear understanding of the determination of a fact in issue. N.C.R. Evid. 701. Furthermore, the testimony of a lay witness is admissible concerning the location of a boundary in a boundary dispute case. *Welborn v. Roberts*, 83 N.C. App. 340, 349 S.E.2d 886 (1986).

In reviewing the grant of a preliminary injunction, an appellate court may weigh the evidence and find facts for itself. *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984). Nevertheless, a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings. *Id.* We view Mr. Evans' testimony as competent and hold the trial court's finding that the structures were built on the common elements supported by the evidence.

[2] Defendant also argues that even if the evidence shows the structures were built on the common elements, plaintiff has failed to demonstrate how the tenants were harmed by the structures. To receive a preliminary injunction, plaintiff must show a likelihood of success on the merits and some type of irreparable harm. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983). This standard, however, does not require a showing that the injury is beyond repair, "but that the injury is one *to which the complainant should not be required to submit or the other party permitted to inflict . . . .*" *Id.* at 407, 302 S.E.2d at 763 (emphasis in the original) (quoting *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949)). Plaintiff clearly has the right to expect all its tenants to abide by the Association's bylaws and Declaration.

[3] Although there is some confusion in the briefs, plaintiff also sought a permanent mandatory injunction in this action. While a preliminary injunction is designed to preserve the status quo until a hearing on the merits is conducted, a mandatory injunction is used to carry into effect the final judgment. *See First Nat. Bank v. The Peoples Bank*, 194 N.C. 720, 140 S.E. 705 (1927). As defendant admits, the Order here was based on an adversarial hearing, it granted all the relief prayed for in the Complaint, awarded attorney's fees and thus constituted a final determination. A mandatory injunction is the proper remedy to enforce a restrictive covenant, *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E.2d 388 (1954), and to restore the status quo. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953).

[4] Finally, defendant argues the trial judge erred in ordering him to pay plaintiff's attorney's fees. However, Article VIII, Section 5 of the Association's bylaws provides that an owner must pay the Association's attorney's fees if an action is brought against an owner and the result is a judgment for the Association. As noted above, the action by the trial court constituted a final judgment. Thus, the order to pay plaintiff's attorney's fees was properly entered.

We have examined defendant's other assignments of error and, after a thorough review of the briefs and record, found them to be without merit.

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

LOUISE WHITE ELLIOTT, DAVID JOSEPH WATTS AND GWENDOLYN K. BELL v. JEANETTE B. COX AND HUSBAND, GARY F. COX

No. 9013SC92

(Filed 30 October 1990)

1. Deeds § 12.3 (NCI3d)— construction of deed—conflicting clauses—life estate

In an action to remove a cloud upon title in which defendants claimed title through a deed from Edna Buffkin, the trial

court did not err by granting summary judgment for plaintiffs where only the language in the deed to Archie and Edna Buffkin was in issue and the granting, habendum and warranty clauses of the deed are all in accord and clearly express the grantor's intent to limit Edna Buffkin to a life estate. The introductory recital that defendants' claim creates a tenancy by the entirety is repugnant to the granting clause and must be disregarded. *Bowden v. Bowden*, 264 N.C. 296, does not stand for the proposition that an introductory title, by virtue of being first in the deed, will be given effect over granting, habendum and warranty clauses which are in accord with each other but inconsistent with the introductory recital.

Am Jur 2d, Deeds §§ 234, 273, 277.

2. Deeds § 12.2 (NCI3d)— limitation over—death without heirs—surviving issue

A grantee took a fee simple defeasible upon his death without surviving issue and his estate ended and the limitation over operated where he died survived by his wife but without surviving issue, despite language in the deed referring to surviving heirs.

Am Jur 2d, Deeds §§ 328 et seq.

APPEAL by defendants from order granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment entered 16 December 1989 in COLUMBUS County Superior Court by *Judge Dexter Brooks*. Heard in the Court of Appeals 29 August 1990.

In 1937 P. V. Buffkin and wife, Lucy E. Buffkin, divided their land into three parcels and conveyed a parcel to each of their three children, Louise White [Elliott], Forest B. Culbreth and Archie Buffkin. This action to remove cloud of title involves the construction of the deed to Archie Buffkin.

In their 1937 deed conveying land to Archie Buffkin and his wife, Edna, P. V. and Lucy Buffkin included the following clauses. The introductory recital reads, "to Archie Buffkin and Edna Buffkin, his wife. . . ." The granting clause reads, ". . . and convey to said Archie Buffkin and Edna Buffkin and to Archie Buffkin['s] heirs and assigns. . . ." The habendum clause reads, "TO HAVE AND TO HOLD, . . . belonging to the said Archie Buffkin and Edna

Buffkin and to Archie Buffkin['s] heirs and assigns. . . ." The warranty reads, ". . . covenant with said Archie Buffkin, Edna Buffkin and his heirs. . . ." Following the warranty, the deed contains the following words, ". . . [I]t is understood that if the said Archie Buffkin, has no heirs at his death then this land goes to Forest B. Culbreth and Louise White or their heirs excepting however the life time right of the said P. V. Buffkin and Lucy Buffkin. . . ."

P. V. Buffkin died in 1952, Lucy Buffkin died in 1954, and Archie Buffkin died intestate in 1968 survived by his wife, Edna, but no lineal descendants. In a deed dated 9 June 1988, Edna Buffkin conveyed title to defendants before her death in March 1989. It is this deed that plaintiffs seek to have removed as a cloud on their title. The plaintiffs are Louise White Elliott and the heirs of Forest B. Culbreth. Both parties moved for summary judgment at trial. The trial court granted plaintiffs' motion and denied defendants' motion. Defendants appeal.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for plaintiffs-appellees.

McGougan, Wright & Worley, by Dennis T. Worley, for defendants-appellants.

WELLS, Judge.

[1] Plaintiffs contend that the court should construe the 1937 deed to pass title to them subject to a life estate interest in Edna if she survived Archie and to declare void the 1988 deed from Edna Buffkin to defendants. Defendants contend that the court should construe the 1937 deed to create a tenancy by the entirety in Archie and Edna Buffkin and give full force and effect to the 1988 deed to defendants.

The materials presented to the court show that the facts in this case are not in dispute, and that only the language in the deed is at issue. "A deed is to be construed by the court, and the meaning of its terms is a question of law, not of fact." *Mason v. Andersen*, 33 N.C. App. 568, 235 S.E.2d 880 (1977). *See also Anderson v. Jackson Co. Bd. of Education*, 76 N.C. App. 440, 333 S.E.2d 533, *cert. denied*, 315 N.C. 586, 341 S.E.2d 22 (1985). A deed is to be construed to ascertain the intention of the grantor as expressed in the language used, construed from the four corners of the instrument. *Reynolds v. Sand Co.*, 263 N.C. 609, 139 S.E.2d 888 (1965).

Defendants contend that the introductory recital creates a tenancy by the entirety fee simple and that the following clauses although inconsistent do not affect the tenancy by the entirety. Defendants cite *Byrd v. Patterson*, 229 N.C. 156, 48 S.E.2d 45 (1948), for the proposition that ". . . slight inconsistencies in the designation of the grantees in the several provisions of the deed do not affect the nature of the estate conveyed. . . ." Defendants rely on the mistaken premise that the introductory recital in this deed is the granting clause. From this premise, defendants contend that inconsistencies exist in the deed and repugnant clauses should be discarded. We disagree.

The granting, habendum and warranty clauses of the deed are all in accord and clearly express the grantors' intent to limit Edna Buffkin to a life estate should she survive her husband. The estate created in the granting clause is not a tenancy by the entirety fee simple as defendants assert. As stated in *Byrd* ". . . in the event of any repugnancy between the granting clause and preceding or succeeding recitals, the granting clause will prevail." *Id. See also Johnson v. Burrow*, 42 N.C. App. 273, 256 S.E.2d 811 (1979). The introductory recital that defendants claim creates a tenancy by the entirety is repugnant to the granting clause and must be disregarded.

Defendants also contend that because the introductory recital is first on the deed that it takes priority. Defendants cite *Bowden v. Bowden*, 264 N.C. 296, 141 S.E.2d 621 (1965), for the proposition that where two clauses in the deed are repugnant, the first in order will be given effect and the latter rejected. *Bowden* involved a granting clause followed by an inconsistent habendum and warranty clause. We do not agree that *Bowden* stands for the proposition that an introductory recital, by virtue of being first in the deed, will be given effect over the granting, habendum and warranty clauses all of which are in accord with each other but inconsistent with the introductory recital.

Having found the language in the deed to be clear and the clauses free from inconsistency, we hold that the deed did not convey an estate in fee simple to Edna Buffkin.

[2] Finally, defendants contend in the alternative, that if the deed did not create a tenancy by the entirety then the limitation over still should not be given effect because Edna Buffkin was Archie

Buffkin's heir at law in 1968 pursuant to N.C. Gen. Stat. § 29-2(3), the Intestate Succession Act.

Assuming *arguendo* that Edna Buffkin was Archie Buffkin's sole heir when he died, this circumstance is of no avail to defendants. Our Supreme Court has stated and applied the following rule, which is applicable to the facts now before us:

> Applying the principle, it has been held in several of our decisions construing deeds of similar import that, in case of a limitation over on the death of a grantee or first taker without heir or heirs, and the second or ultimate taker is presumptively or potentially one of the heirs general of the first, the term 'dying without heir or heirs' on the part of the grantee will be construed to mean, not his heirs general, but his issue in the sense of children and grandchildren, etc., living at his death.

Hampton v. Griggs, 184 N.C. 13, 18-19, 113 S.E. 501, 503 (1922), *citing Pugh v. Allen*, 179 N.C. 309, 102 S.E. 394 (1920). Under the deed from P. V. and Lucy Buffkin, Archie Buffkin took a fee simple defeasible upon his death without surviving issue. *Jernigan v. Lee*, 279 N.C. 341, 182 S.E.2d 351 (1971). Archie's estate ended when he died without surviving issue, and the limitation over in his deed operated at his death to convey fee simple title to Forest B. Culbreth and Louise White or their heirs. *See also Webster, Real Estate Law in North Carolina*, § 39 (1988 Ed.).

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges EAGLES and LEWIS concur.

JOHN LEON RUSSELL v. GUILFORD COUNTY AND THE GUILFORD COUNTY BOARD OF COMMISSIONERS

No. 9018SC91

(Filed 30 October 1990)

Municipal Corporations § 30.16 (NCI3d)— rezoning—prior use—no vested right

The trial court did not err by finding and concluding that plaintiff in an action to set aside a rezoning had not made substantial expenditures in reasonable reliance on the previous zoning where plaintiff thought that the seven-acre tract was all zoned residential when he bought it; he had a plan drawn up dividing the property into a seven-lot residential subdivision; he changed his plans after learning that part of the tract was zoned for commercial uses; plaintiff borrowed $100,000 using the tract in question as part of the collateral and then sought alteration of his plan and began to pursue the rezoning of the four residential acres to commercial use; a group of adjoining landowners filed an application to have the three acres of commercial property rezoned residential; and the Board of Commissioners voted to rezone the three commercially zoned acres to residential. The money that plaintiff spent towards his first set of plans cannot be said to be substantial expenditures made in reliance on a governmental act because plaintiff did not know that three of the seven acres were zoned commercial; a large portion of the $100,000 plaintiff borrowed using the tract in question was expended on general overhead and an entirely different project; engineering costs related to the development of the residential portion of the property should not enter into the calculation since that zoning had not changed; the trial court correctly did not include $29,000 used to pay off an old deed of trust on the entire tract because plaintiff initially bought the property for residential development; and there was no evidence of ground breaking, tree clearing or anything done to prepare the site for development.

Am Jur 2d, Zoning and Planning §§ 18-23, 322 et seq.

APPEAL by plaintiff from judgment entered 18 September 1989 by *Judge Julius A. Rousseau, Jr.*, in GUILFORD County Superior Court. Heard in the Court of Appeals 29 August 1990.

Michael B. Brough & Associates, by Michael B. Brough and Robert E. Hagemann, for plaintiff appellant.

Samuel M. Moore for defendant appellee.

COZORT, Judge.

In this case, the owner of seven acres of land in Guilford County sued Guilford County and the Guilford County Board of Commissioners. Plaintiff requested the court to set aside the rezoning of his land and issue an order permitting plaintiff to proceed with development of the property. The trial court concluded that the plaintiff had not incurred substantial expenditures pertaining to the property in question prior to rezoning so as to create in plaintiff a vested right. The court decreed that the rezoning of the tract was valid. The principal issue presented on appeal is whether the trial court's findings of fact regarding the substantiality of plaintiff's expenditures support the conclusion that plaintiff did not obtain a vested right to develop the property in question as commercial property. We affirm.

Plaintiff purchased the seven-acre tract on 3 July 1985. At that time, three acres were zoned for commercial retail uses and four acres were zoned for residential use only. Plaintiff was under the impression that all of the tract was zoned residential, however, and thus the first subdivision plan he submitted to the Guilford County Planning Board called for development of the property into seven one-acre residential lots. After plaintiff was informed that part of his property was zoned commercial, he hired the same engineer who developed the first plan to draw up a second plan to develop that portion commercially. Because the plan called for off-site sewage disposal, plaintiff was required to submit his new plan to the Guilford County Technical Review Committee [hereinafter TRC]. On 30 October 1986, the TRC sent a memo to plaintiff's engineer stating that the committee had "conditionally" approved the plan. The TRC stamped the actual plan drawing: "APPROVED for B-1 compliance DATE: 10-29-86 GUILFORD COUNTY PLANNING DEPT."

Plaintiff did not take any other action on the development until 16 July 1987 when he obtained a $100,000 loan, using as security the entire seven-acre tract and some other property he owned. Plaintiff testified that the $100,000 was disbursed as follows: $29,000 was used to pay off the principal on the entire seven-acre

tract, $2,500 was used to pay the engineering costs related to the entire seven-acre tract, $200 was spent on the application fee to rezone the residential tract to commercial, $500 was paid to appraise all the property used as collateral, $1,000 was paid for a loan origination fee, and $30,000 was used towards the development of unrelated property. Plaintiff testified that he had also paid taxes on the property.

After obtaining the loan, plaintiff sought alteration of his plan and began to pursue the rezoning of the four residential acres to commercial use. While plaintiff sought this rezoning, a group of adjoining landowners filed an application with the Guilford County Board of Commissioners to have the three acres of commercial property rezoned to residential. On 21 December 1987, after a public hearing, the Board of Commissioners voted to rezone the three commercially zoned acres to residential. Subsequently, plaintiff brought this action claiming, among other things, that he has a vested right to commercially develop the property regardless of the rezoning to residential.

In order to proceed with commercial development in the residential zone, plaintiff must show that he has acquired a vested right in the property as zoned before the rezoning. *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969). The obtaining of a building permit is not the crucial factual issue to be resolved when determining whether a party has acquired a vested right to continue development of land as a nonconforming use after rezoning. *In re Campsites Unlimited*, 287 N.C. 493, 501, 215 S.E.2d 73, 78 (1975). To acquire a vested right under North Carolina law, "it is sufficient that, prior to . . . enactment of the zoning ordinance and with requisite good faith, he make a substantial beginning of construction and incur therein substantial expense." *Hillsborough*, 276 N.C. at 54, 170 S.E.2d at 909. At issue in this case is whether plaintiff made "substantial expenditures" in reasonable reliance on the current zoning of the property before the County Commission rezoned three acres of his property. For the following reasons, we find the trial court did not err in finding and concluding that plaintiff did not.

When plaintiff bought the tract, he thought it was all zoned residential. He had a plan drawn up dividing the property into a seven-lot residential subdivision. After learning that part of his tract was zoned for commercial uses, plaintiff changed his plans.

The money that plaintiff spent towards his first set of plans cannot be said to be substantial expenditures made in reliance on a governmental act of keeping three acres of his property zoned commercial, when plaintiff did not know the acres were zoned commercial. Of the $100,000 that plaintiff borrowed using the tract in question as part of the collateral, a large portion was expended on general overhead and an entirely different project. Further, some of the engineering costs were related to the development of the residential portion of the property; the trial court correctly determined that these expenditures should not enter into the calculation since the zoning for this property had not changed. Further, the trial court correctly did not include the $29,000 used to pay off the old deed of trust on the entire seven-acre tract because plaintiff initially bought the property for residential development.

As recognized in *Randolph v. Coen*, 99 N.C. App. 746, 394 S.E.2d 256 (1990), monetary expenditures are not the only expenditures which may constitute "substantial expenditures." In *Randolph*, the defendants had, prior to the effective date of the ordinance, "finished preparing the site for operations, met the requirements for and obtained the requisite licenses to operate [their used equipment business] and had vehicles available for sale." *Id.* at 749, 394 S.E.2d at 258. However, in this case, plaintiff did not devote substantial time or labor in developing the tract in issue.

Plaintiff purchased the property in July 1985, submitted his plan to the TRC for approval of the off-site sewer facilities in October 1986, and obtained financing in July 1987. Plaintiff admits that the lengthy delay in developing the property was "simply because I was concentrating on other projects and this one was sort of put on the back burner." Thus, plaintiff cannot argue that length of time between plaintiff's purchase of the property and the County's rezoning should be classified as an expense of time or labor made in reliance on the current zoning of the tract.

In *Sunderhaus v. Bd. of Adjustment*, 94 N.C. App. 324, 327, 380 S.E.2d 132, 134 (1989), this Court held that when courts are called on to consider the substantiality of a beginning of construction, the court may consider the size of the projected development. In *Sunderhaus*, the plaintiffs were planning to erect a satellite dish in their yard. The court found that a substantial beginning had been made where the plaintiffs had dug a trench and placed PVC pipe in the trench before the zoning ordinance disallowing

such structures was enacted. In the present case, nothing in the record indicates that plaintiff did anything other than hire an engineer to draw up plans for a part commercial, part residential development and submit such plans for TRC approval; the defendant did not expend a significant amount of labor relative to the amount of work necessary to develop the property as he desired. *Randolph*, 99 N.C. App. at 749, 394 S.E.2d at 257. Here there is no evidence of ground breaking, tree clearing or anything else done to prepare the site for development as was the case in *Randolph*.

We hold that the trial court's findings of fact support its conclusion that the plaintiff had not incurred substantial expenditures for the commercial development of this property. Since we find that the plaintiff did not make substantial expenditures, we need not address whether plaintiff's reliance on the TRC's conditional approval of the plan was reasonable. Thus, we affirm the trial court's conclusion that plaintiff did not acquire a vested right to develop his property contrary to the zoning ordinance.

Affirmed.

Judges ORR and DUNCAN concur.

BOBBY LEE ELLER, EMPLOYEE, PLAINTIFF v. J & S TRUCK SERVICES, INC., EMPLOYER; NORTHWESTERN INSURANCE CO., INSURER; GAB BUSINESS SERVICES, SERVICING AGENT, DEFENDANTS

No. 9010IC208

(Filed 30 October 1990)

Master and Servant § 99 (NCI3d) — workers' compensation — division of attorneys' fee — no jurisdiction in Industrial Commission

The Industrial Commission did not have jurisdiction to determine a controversy between plaintiff's attorneys concerning division of a fee awarded to plaintiff's attorneys in a workers' compensation case.

Am Jur 2d, Workmen's Compensation § 644.

APPEAL from order of the North Carolina Industrial Commission filed 15 September 1989. Heard in the Court of Appeals 20 September 1990.

Ottway Burton, P.A. for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by John A. Tomei, for defendants-appellees.

David B. Crosland, III, Attorney at Law, pro se.

No brief filed by Robert L. Saunders.

JOHNSON, Judge.

This case involves a dispute over the splitting of a fee awarded to plaintiff's attorneys in a Workers' Compensation case. Bobby Lee Eller was injured in the course of his employment with J & S Truck Services. He signed a contract for legal services with Attorney Ottway Burton, P.A., on 17 July 1985. Attorney Burton alleges that he represented plaintiff Eller in negotiations with the insurance carrier which resulted in tentative agreement for a 15% permanent partial disability and a proposed recovery of $9,432.00. Attorney Burton further alleges that Bobby Lee Eller, for no valid reason, terminated the legal relationship between them and hired the partnership of Saunders and Crosland, III. Attorney Burton turned over his entire file to Eller on 9 December 1985. On 27 March 1986 Eller and Attorney Saunders executed Industrial Commission Form No. 26 which evidenced an agreement for 15% permanent partial disability and compensation at the rate of $262.00 for 36 weeks, the same settlement that Attorney Burton alleges that he had tentatively negotiated for Eller. Subsequently, the Commission authorized attorney fees of $2,358.00 and notified Attorney Burton and Attorneys Saunders and Crosland of the fee award "to be divided by both attorneys as they deem appropriate." A check for $2,358.00 was issued in the names of Saunders and Crosland, III. Attorney Burton alleges that he received no part of the fee award. Attorney Burton moved the Commission for a hearing which was held on 30 January 1989 before Deputy Commissioner Ford. Commissioner Ford found, *inter alia*: that the Commission had duly approved a settlement between Eller and his employer by Form 21 and Form 26 settlement agreements dated 15 May 1985 and 27 March 1986, respectively; that an attorney fee of $2,358.00 was approved 22 July 1986, to be divided by plaintiff's counsel

as deemed appropriate; that that sum was forwarded to Saunders and Crosland by GAB Business Services, the servicing agent for the insurance carrier; that the controversy between the parties is between Attorney Burton and Attorneys Saunders and Crosland with respect to the division of the fee; that the Commission is without jurisdiction to determine the controversy between counsel. The Deputy Commissioner's dismissal of the motion for lack of jurisdiction was affirmed by the Full Commission and Attorney Burton appeals.

The issue on appeal is whether the Commission properly dismissed the motion for lack of jurisdiction. Attorney Burton argues that the Commission has full authority over any disputes relating to legal fees for employees who are injured while subject to the Workers' Compensation Act and that the Commission should be responsible for dividing the fee between the competing lawyers. We disagree.

It is well settled in North Carolina that the Industrial Commission is a court of limited jurisdiction whose jurisdiction is "created by statute and confined to its terms." *Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962). Attorney fees in compensation cases are made subject to approval of the Commission by G.S. § 97-90(a). Any person who receives a fee on account of services rendered in a Workers' Compensation case, unless such fee is approved by the Commission, is guilty of a misdemeanor. G.S. § 97-90(b). If an attorney has an agreement for a fee, he must file a copy of it with the hearing officer or Commission prior to the hearing and if it is deemed reasonable it will be approved. G.S. § 97-90(c). If the hearing officer or Commission deems the fee to be unreasonable an appeal can be had as set out in G.S. § 97-90(c).

In this case, Attorney Burton is not claiming that the Industrial Commission failed to compensate him for his efforts on behalf of employee Eller or that they found a reasonable fee to be unreasonable, but that they refused to divide the fee award between competing claims to it. Attorney Burton cites *Wake County Hospital System, Inc. v. North Carolina Industrial Commission*, 8 N.C. App. 259, 174 S.E.2d 292, *cert. denied*, 277 N.C. 117 (1970), and G.S. § 97-91 to support his claim. General Statutes § 97-91 provides: "All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commis-

sion, shall be determined by the Commission, except as otherwise herein provided." In *Wake County Hospital* the plaintiffs operated hospitals in North Carolina. They claimed that the hospital charges approved by the Commission in compensation cases were below those normally charged by the hospitals and were below prevailing charges in like communities. They sought to have the superior court enjoin the Commission from enforcing such of its rules and regulations as limited the payments in these cases. On appeal, plaintiffs argued that G.S. § 97-91 limited the Commission solely to consideration of questions arising out of an employer-employee relationship or to the determination of rights asserted by or on behalf of an injured employee. The Court held that the application of G.S. § 97-91 is not limited solely to these questions but also covers remedies and charges expressly made subject to the approval of the Commission by the Workers' Compensation Act. *Wake County Hospital* and the cases cited therein do not support Attorney Burton's case but, to the contrary, emphasize that the jurisdiction of the Industrial Commission is limited by statute to those areas expressly made subject to the Workers' Compensation Act. Attorney Burton has not cited and we cannot find any statutory authority that would extend the Commission's jurisdiction to cover a dispute between plaintiff's attorneys over the division of attorney's fees.

Affirmed.

Judges EAGLES and PARKER concur.

DAVID A. BARBEE v. THE HARFORD MUTUAL INSURANCE COMPANY

No. 9026DC272

(Filed 30 October 1990)

Insurance § 92.1 (NCI3d)— garage liability insurance—permitting foreign object to fall in cylinder—work product as jury question

In an action to recover under a garage keepers insurance policy for damage caused to two automobiles when plaintiff's employee dropped a foreign object into a cylinder of each automobile while changing the spark plugs, a jury question

was presented as to whether the damages were restricted to the work product so as to come within the policy provision excluding coverage for faulty work or whether they involved other parts of the automobiles.

Am Jur 2d, Garages, and Filling and Parking Stations §§ 54, 55; Insurance § 726.

APPEAL by plaintiff from judgment entered 18 January 1990 by *Judge Robert Johnston* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 26 September 1990.

Plaintiff brought this action against his insurance carrier, The Harford Mutual Insurance Company, after it declined to pay claims for damage to two cars worked on by plaintiff's employees. Defendant denied liability alleging plaintiff's claims were excluded under the policy language. Plaintiff filed a Motion for Partial Summary Judgment on the issue of liability and defendant filed a Motion for Summary Judgment. The court denied plaintiff's Motion for Partial Summary Judgment and granted defendant's Motion for Summary Judgment.

Wishart, Norris, Henninger & Pittman, by Kenneth R. Raynor, for plaintiff appellant.

Petree Stockton & Robinson, by Richard E. Fay, for defendant appellee.

ARNOLD, Judge.

This is an action to recover under a "garage keepers" insurance policy. Under the comprehensive coverage of such a policy, the insurer is obligated to pay the insured garage for losses to a customer's car "from any cause . . . while the insured is attending, servicing, [or] repairing . . . it."

The claimed damages in this case occurred in two separate instances. In the first a customer asked plaintiff to tune-up his car and work on the fuel injection system. While replacing the spark plugs, plaintiff's employee dropped a foreign object into one of the engine cylinders. When the engine was later engaged, a valve in the cylinder was damaged due to the presence of the foreign material. Plaintiff's employees did not work on the cylinder valves.

In the second case a customer requested that plaintiff tune-up his car and perform some carburetor work. Other than replacing the spark plugs, plaintiff's employees did not work on the engine cylinders. Again, while replacing the spark plugs a mechanic dropped a foreign object into a cylinder. When the car was started, the cylinder walls were damaged.

Defendant has refused to provide coverage claiming the damages fall within the "work product" exclusion of the insurance policy. This clause reads as follows: "This insurance does not apply to . . . faulty work you performed."

Garage keeper policies containing work product exclusions do not insure defective work the insured is under contract to perform, but they do cover damages to other property resulting from defective work. *Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501 (Tex. Ct. App. 1979) (The exclusion refers to damages to the work performed, but it "does not refer to damages *due* to work performed." *Id.* at 503.); *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (1982) (The exclusion "carves out of the policy damage to the particular work performed by the insured, but not the overall damage that the incorporation of the defective work product causes the entire entity." *Id.* at 421.); *see* 12 G. Couch, *Couch on Insurance 2d* § 45:111 (1981).

No North Carolina case has directly addressed this issue. In *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 369 S.E.2d 128 (1988), this Court examined a similar work product exclusion involving a different type of claimed damage. We held in *Western World* that the cost of removing and replacing a faulty waterproofing system in a parking deck installed by the insured's subcontractor was not covered by a policy because of a work product exclusion. *Id.* at 524, 369 S.E.2d at 130. The Court distinguished the facts before it from the cases involving damages to other property caused by the insured's defective work. *Id. Western World* recognizes that while work product exclusions preclude recovery for faulty work, damages to other property caused by that faulty work are not excluded from coverage by these provisions.

The question before us then becomes: what was the insured's work product? It is difficult here to determine whether the damage was restricted to the work product or whether it involved other parts of the automobile. Plaintiff argues he was only under contract to perform tune-ups and other unrelated work. In neither case

was he authorized nor did his employees perform work on the parts of the automobiles that were eventually damaged by the faulty work. Defendant, however, contends that the spark plugs are "part and parcel of the engine['s] cylinders," and that the damage was not damage to other property but to items directly connected with the plaintiff's work under the contracts.

Every shade tree mechanic knows that a critical aspect of changing spark plugs is to prevent foreign material from falling into the cylinders. In this sense, the damage that occurred can be viewed as part of the overall job of changing the spark plugs. On the other hand, the subsequent repairs on the two damaged automobiles did not involve any work on the spark plugs, but required repair of a cylinder wall and a valve. Viewed this way, the damages were to property other than the contract work.

When the limits of the work product are vague, a question of fact for the jury arises. Summary judgment, of course, is proper only when there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. *Frye v. Arrington*, 58 N.C. App. 180, 292 S.E.2d 772 (1982). Such is not the case here; therefore, we reverse the judgment of the trial court.

Reversed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. CHARLES JUNIOR DAVY

No. 894SC1349

(Filed 6 November 1990)

1. Rape and Allied Offenses § 5 (NCI3d) — rape — identity of defendant as perpetrator — sufficient evidence

The State's evidence of defendant's identity as the perpetrator of a rape was sufficient for the jury where it tended to show that the victim glimpsed her assailant as he pulled an afghan over her head and was able to tell that he was a large, dark-complexioned black man; within seconds after the incident, the victim observed a pickup truck back

out of her driveway, and defendant's pickup matched the description of this truck; tire impressions identical to the tread on defendant's truck were found on the ground outside the victim's home; defendant knew that the victim's husband was away on military duty; hairs found on defendant's pants were microscopically consistent with hairs taken from the victim; and fibers found on defendant's pants were consistent with fibers in a blanket on the victim's bed and in the victim's bedclothes.

Am Jur 2d, Rape § 88.

2. Searches and Seizures § 14 (NCI3d)— request to speak to lawyer—subsequent consent to search—voluntariness

Defendant's consent to a search of his pants for hair and fibers was not involuntary because he had previously requested to speak to a lawyer where defendant admitted that he had been told that he was free to leave the sheriff's office before detectives asked his permission to roll his pants with a lint brush.

Am Jur 2d, Searches and Seizures §§ 46, 48.

Validity of consent to search given by one in custody of officers. 9 ALR3d 858.

3. Jury § 6.3 (NCI3d)— question to prospective jurors—disallowance not prejudicial

No prejudice was shown by the trial court's disallowance of defense counsel's question to prospective jurors as to whether those who concluded that the prosecution had not proven defendant's guilt beyond a reasonable doubt would change their minds or verdicts if they found that a majority of the jurors believed defendant was guilty where the entire jury *voir dire* was not transcribed and made a part of the record. Furthermore, such matter was within the sound discretion of the trial court.

Am Jur 2d, Jury §§ 197, 200, 202.

4. Criminal Law § 68 (NCI3d); Rape and Allied Offenses § 4 (NCI3d)— admissibility of hair and fiber evidence

The trial court in a rape case did not err in admitting hair and fiber evidence removed from defendant's pants on the ground that defendant could have picked up the hair and

fibers by riding in the same police car in which the victim had ridden earlier in the day since this argument goes to the weight and not the admissibility of the evidence.

Am Jur 2d, Rape § 88.

5. Criminal Law § 1127 (NCI4th)— rape—aggravating factor—victim asleep

The trial court did not err in finding as an aggravating factor for rape that the victim was especially vulnerable because she was asleep and was therefore impeded from fleeing or fending off the attack.

Am Jur 2d, Criminal Law §§ 598, 599; Rape § 115.

6. Criminal Law § 1127 (NCI4th)— rape—aggravating factor—young children present

The trial court properly found as an aggravating factor for rape that the victim's two young children were present at the time of the attack since the victim was rendered more vulnerable to an attack because of her fear for the safety of her children.

Am Jur 2d, Criminal Law §§ 598, 599; Rape § 115.

7. Criminal Law § 1127 (NCI4th)— rape—aggravating factor—victim on menstrual cycle

The trial court erred in finding as an aggravating factor for rape that the victim was on her menstrual cycle at the time of the attack where there was no evidence that this fact rendered her physically infirm or more vulnerable and less able to protect herself from her assailant or that defendant targeted her or took advantage of her because of this fact.

Am Jur 2d, Criminal Law §§ 598, 599; Rape § 115.

8. Criminal Law § 1127 (NCI4th)— rape—aggravating factor—knowledge that victim's husband was away

The trial court properly found as an aggravating factor for rape that defendant knew that the victim's husband was away on military duty and targeted her because of this knowledge.

Am Jur 2d, Criminal Law §§ 598, 599; Rape § 115.

APPEAL by defendant from a judgment entered 4 August 1989 and an order entered 15 September 1989 by *Judge James R. Strickland* in Superior Court, ONSLOW County, denying the return of defendant's seized vehicle. Heard in the Court of Appeals 21 August 1990.

In January 1989, the victim, her husband and their two children were living in a mobile home in Jacksonville, North Carolina. On the evening of 28 January 1989, the victim's husband, who was serving in the Marine Corps, was deployed to California on military maneuvers and the victim and the two children were at home in Jacksonville. In the early morning hours on 29 January 1989, the victim was awakened by the sound of footsteps in the hall. She saw a tall black man standing over her; he threw a crocheted afghan over her head. Through the loosely knit fabric of the afghan, the victim was able to see that her attacker was a dark-complected black man. He smelled of alcohol. She touched his head and testified that he had a short, military style haircut. The victim was on her menstrual cycle and was wearing a tampon. She testified that he penetrated her. However, she also testified that his penis was not fully erect and that he did not ejaculate. When one of the victim's children began to cry, the assailant fled. The victim ran to the window and saw a "pukey" brown pickup truck with a red, black and gold license plate on the front back out of her driveway and drive down Maplehurst Road toward Highway 53. The victim immediately contacted the police.

Upon arrival, the police took the victim's statement. Deputy Allen Pate testified that the victim related to him essentially the same events described above. Deputy Pate and Sergeant Bryan's investigation revealed that a kitchen window had been forcibly entered. The officers also observed tire tracks near the window and noted two or three different types of treads.

Deputy Pate canvassed the area looking for the attacker's truck. At 10:24 a.m. he noticed a small pickup truck in the defendant's driveway that fit the description the victim gave to the officer. There was no dew on the vehicle and the hood was warm. Deputy Pate radioed for Deputy Dickerson and the two officers knocked on the front door. Defendant came to the door wearing a tee shirt and a robe. He smelled of alcohol and incense but did not appear intoxicated. The defendant agreed to go to the police station and he followed the two officers in the pickup truck. The officers con-

firmed that the tread on the truck was consistent with some of the tracks found at the victim's home.

At the station, the defendant volunteered that he had been at the victim's residence on two prior occasions; the first time he drove in and drove out of the victim's residence, on the second visit, he drove in and backed out. Defendant allowed Detective Brown to examine his underwear. There were neither menstrual nor seminal stains. Defendant stated that he had worn other underwear the night before and allowed his house to be searched for the underwear. Before leaving the station, the defendant allowed Detective Brown to roll his pants with a lint roller for evidence.

While the defendant was still at the sheriff's office, the victim arrived and became hysterical upon seeing the defendant's truck in the parking lot. The victim also spoke with Hattie Kent who told her that Kelly Wright, Hattie and the defendant had left a birthday party on Saturday night and driven to the victim's house. They knocked on the door and when no one answered, they went to a phone booth and tried calling. When there was no answer, they decided to go home. Hattie said that the defendant had asked if she had girlfriends she could introduce him to, and when she told him they were all married, the defendant replied, "Well, them's [sic] the best kind of women."

A SBI examination of the hairs on defendant's pants found them to be microscopically consistent with hairs known to have come from the victim. No pubic hair similar to the victim's was found in the defendant's underwear and there were no hairs of Negroid origin in the victim's pubic hair combings.

A forensic fiber examiner found two types of polyester in the sample from the defendant's pants which were consistent with two types of polyester from a brown blanket on the victim's bed. White fibers found on the defendant's pants were consistent with the white blanket from the victim's bed. Gold and blue fibers were recovered from the victim's bedclothes and identical fibers were found in the sample taken from the defendant's pants.

From his conviction of second degree rape and misdemeanor breaking and entering and from the denial of his motion for the return of the vehicle seized at the time of his arrest, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the State.

Gaylor, Edwards, Vatcher & Bell, by Walter W. Vatcher, for the defendant-appellant.

LEWIS, Judge.

Defendant argues that the trial court's refusal to grant his motion to dismiss at the end of the presentation of all the evidence constituted reversible error. In order to overcome a motion to dismiss, the State must introduce more than a scintilla of evidence of each essential element of the offense and that the defendant was the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). The evidence must be considered in the light most favorable to the State in determining its sufficiency, and the State is entitled to each and every reasonable inference to be drawn therefrom. *Id. State v. Jackson*, 309 N.C. 26, 40, 305 S.E.2d 703, 714 (1983). The weight and credibility of the evidence presented are matters for the jury to determine and are not considered on a motion to dismiss or for nonsuit. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971).

[1] Defendant argues that there is insufficient evidence of the defendant's identity as being the perpetrator of the crime to allow the jury to deliberate. We disagree. The victim testified that she glimpsed her attacker as he pulled the afghan over her head and she was able to tell that he was a large, strong, dark-complected black man. Within seconds after the incident, she observed a truck which she later positively identified as the vehicle that drove away from her home down Maplehurst Road. Tire impressions identical to the tread on defendant's truck were found on the ground outside the trailer window. The State also produced evidence that tended to show that the defendant knew that the victim was married and that her husband was away on military duty. Hairs and fibers consistent to those found on the victim were found on the defendant. These facts present sufficient evidence to go to the jury as to the defendant's identity as the perpetrator. The defendant has pointed out in his brief a number of inconsistencies in the State's evidence; however, these discrepancies were for the jury to weigh and consider. This assignment of error is overruled.

[2] Defendant next argues that the trial court committed reversible error when it denied his motion to suppress the hair and fiber

evidence recovered from his pants. Defendant argues that this evidence should have been suppressed because he did not voluntarily give his consent to the search and seizure of the hairs and fibers on his pants. The test for determining the validity of a consent search is whether, under the totality of the circumstances, the consent was induced by duress or coercion or was voluntary. *State v. Powell*, 297 N.C. 419, 426, 255 S.E.2d 154, 158 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed. 2d 854, 862-63 (1973). When a defendant seeks to suppress evidence on grounds his consent to search was involuntary, the trial court must conduct a voir dire to determine whether consent was, in fact, given without compulsion. *State v. Washington*, 86 N.C. App. 235, 238-39, 357 S.E.2d 419, 422, *disc. rev. denied*, 322 N.C. 485, 370 S.E.2d 235 (1988). These findings are conclusive on appeal if supported by competent evidence. *Id.*

In the present case, defendant argues that because he previously had requested to speak to a lawyer, his consent to the rolling of his trousers with a lint brush was coerced and his consent was not freely and voluntarily given. We disagree. Defendant admits that he had been told that he was free to leave the sheriff's office before he was asked by the detectives about rolling his pants. He agreed to allow the detectives to roll his pants, stepping over to the detective's desk to allow the officer to perform the task. We find that the trial court's findings are supported by competent evidence and must be upheld. This assignment of error is overruled.

[3] Defendant next argues that the court erred in sustaining the State's objection to the following question asked by defense counsel during the voir dire:

> If you come to the conclusion that the prosecution had not proven that the accused was guilty beyond a reasonable doubt and you found a majority of the jurors believed the Defendant was guilty, would you change your mind or your verdict only because you were in the minority?

After the jury was impanelled, defense counsel asked that the above question and the court's ruling sustaining the State's objection to the ruling be noted on the record. However, the entire jury voir dire was not transcribed or made a part of the record. On this record it is impossible to tell whether the trial court erred in sustaining this objection. *See State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). (When determining propriety of

jury voir dire questions, courts must review entire record of jury voir dire, rather than isolated questions.) Furthermore, such matters are within the sound discretion of the trial judge. *State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978). Based on the record before us, we find neither abuse nor prejudice in the court's ruling. This assignment is overruled.

[4] Defendant also argues that the trial court committed reversible error when it allowed the introduction of hair and fiber evidence removed from the defendant's pants with a lint brush. Specifically, he maintains that he could have picked up the incriminating hair and fibers by riding in the same police car in which the victim had ridden earlier in the day. Defendant argues, "although a break in the chain of custody does not exist after the fibers were taken from the Defendant's trousers, the break exists in that the trousers were contaminated *prior* to the taking of the fiber and hair specimens." We hold that the trial court did not commit reversible error in admitting this testimony. There was no break in the chain of custody after the sample was taken from the defendant's pants. The argument that he may have picked up the fibers somewhere else goes to the weight of such evidence, not to its admissibility. *See DeVooght v. State*, 722 P.2d 705 (Okla. 1986) (admitting fiber evidence while acknowledging the possibility that it could have been conveyed by a secondary source upheld).

Finally, defendant argues that the trial court erred in aggravating his sentence based upon a finding that "the victim was particularly and especially vulnerable in that she was asleep; that two small children were present; that she was having her period and that her husband was away on military duties and that the defendant was specifically aware of this vulnerability and made a calculative decision to proceed with the commission of this offense." These findings are analogous to Aggravating Factor 10(d), G.S. § 15A-1340.4(a)(1)(j), allowing a court to aggravate the defendant's sentence because "[t]he victim was very young, or very old, or mentally or physically infirm." G.S. § 15A-1340.4(a)(1)(j). Vulnerability is the concern addressed by this aggravating factor. *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E.2d 689, 701 (1983). The State has the burden of showing (1) that the victim was in fact vulnerable because of conditions at the time of the offense and (2) that she was targeted because of these conditions or that the defendant took advantage of them while committing the offense. *State v.*

Drayton, 321 N.C. 512, 514, 364 S.E.2d 121, 122 (1988). We will address each of these factors in turn.

[5] 1. "*The victim was particularly and especially vulnerable in that she was asleep.*"

In *State v. Drayton, supra*, our Supreme Court upheld a finding that the victim had a blood alcohol content of .29% at the time of his attack as a nonstatutory basis for aggravating the defendant's sentence. Holding that vulnerability was the gravamen of G.S. § 15A-1340.4(a)(1)(j), the court stated that the victim's high blood-alcohol level "supports a finding that a person's ability to flee, fend off an attack, or otherwise avoid being victimized is impaired." In *Drayton*, the victim was conscious and walking. *Id.* In the present case the victim was asleep. Reason and logic compel us to conclude that if being heavily intoxicated makes one vulnerable to physical attack, then being asleep would surely render a rape victim as vulnerable to attack as someone who was heavily intoxicated. We conclude that the trial court properly aggravated the defendant's sentence because the victim was asleep and was therefore "impeded from fleeing or fending off the attack." *Drayton, supra, but see State v. Underwood*, 84 N.C. App. 408, 352 S.E.2d 898 (1987).

[6] 2. "*Two small children were present.*"

We find that the trial court properly found as an aggravating factor the fact that the victim's two young children were present in the house at the time of the attack. Particularly compelling is the fact that the victim's fifteen-month-old baby was in the room with the defendant and the victim during the attack. The baby awakened and started to cry as the defendant began to rape her mother. Because the victim feared for the safety of her baby, she clearly was inhibited in her ability to resist attack and protect herself. Under these circumstances, she was rendered more vulnerable to an attack and the court properly aggravated the defendant's sentence. *See State v. Eason*, 67 N.C. App. 460, 313 S.E.2d 221, *aff'd*, 312 N.C. 320, 321 S.E.2d 881 (1984).

[7] 3. "*That the victim was on her period.*"

The State relies on *State v. Eason, supra*, where this Court upheld aggravation of the defendant's sentence because the defendant proceeded with a burglary despite the victim's pleas that she was pregnant. The court observed that the victim's pregnancy rendered her less able to resist and that her concern for her unborn

child enhanced the trauma she experienced because of the burglary. *Id.* at 464, 313 S.E.2d at 224. However, in *Eason* the prosecutrix was more than eight months pregnant at the time of the attack. Therefore, she clearly was more vulnerable because of her condition.

In the present case, the court aggravated the defendant's sentence because she was on her period. There is no evidence in the record that the fact that the victim was on her menstrual cycle at the time of her attack renders her "physically infirm" or more vulnerable and less able to protect herself from her attacker. Furthermore, there is no evidence that the defendant targeted her or took advantage of her because she was on her period. This finding was in error.

[8] 4. "*Her husband was away on military duties and that the defendant was specifically aware of this vulnerability and made a calculative decision to proceed with the commission of this offense.*"

We find that the trial court properly aggravated the defendant's sentence based upon a finding that the defendant knew that the victim's husband was away on military duty and proceeded to target her because of this knowledge. *See State v. Drayton, supra.* Hattie Kent testified that she told the defendant that the victim's husband was away on military duty on the evening of the rape. The trial court properly concluded that the victim was more vulnerable because her husband was away on deployment and that the defendant targeted her because of his actual knowledge of this fact.

CONCLUSION

The trial court properly aggravated the defendant's sentence based upon his findings that the victim was asleep; that there were two young children present; and that she was specifically targeted because her husband was away at the time of the attack. The trial court erred in concluding that the victim was more vulnerable because she was on her menstrual cycle at the time of the attack and therefore more vulnerable to her attacker. "When an aggravating factor is incorrect, the trial judge cannot properly balance the aggravating and mitigating factors, and therefore the case must be remanded for resentencing." *State v. Taylor*, 74 N.C. App. 326, 328, 328 S.E.2d 27, 29, *disc. rev. denied*, 314 N.C. 547, 335 S.E.2d 319 (1985).

The defendant has also appealed the denial of his motion for the return of his truck, exclusive of any storage lien. At the time of his arrest, the defendant's 1977 Ford truck was seized and stored at a privately-owned local storage facility in Jacksonville, North Carolina. There is a local county storage facility, but the defendant's truck was not stored there. The storage fees now amount to more than the value of the truck. Defendant acknowledges that the truck was subject to impoundment as an item of evidence under G.S. § 15-11.1, and under the circumstances of this case, a lien for storage fees attached to the car by virtue of G.S. § 44A-2. However, defendant asks us

> to create a judicial exception to N.C.G.S. sec. 44A-1 *et seq.* and hold that when property is seized by a law enforcement agency who thereafter directs the local storage facility to store and retain said property at their direction . . . the lawful owner is entitled to immediate possession of said property and the law enforcement agency is thereafter held accountable for all storage liens.

We decline.

The judgment of conviction in the trial court is affirmed. We remand the cause for resentencing due to the fact that the trial judge erroneously found the aggravating factor that the victim was particularly and especially vulnerable because she was on her menstrual cycle.

No error in the trial.

Remanded for sentencing.

Judges WELLS and EAGLES concur.

JOHN W. BROOKS, PLAINTIFF v. HAROLD D. HACKNEY AND MARGARET B. HACKNEY, DEFENDANTS

No. 8915SC1199

(Filed 6 November 1990)

Frauds, Statute of § 2.2 (NCI3d)— contract to convey—patently ambiguous description

The description in a contract to convey twenty-five acres of a one hundred fifteen acre tract was patently ambiguous where the northern boundary was described as "with the Whitehead line. Thence straight to road that goes by Plainfield Church" since this line could be drawn in an infinite number of ways. Therefore, the contract is void and unenforceable under the statute of frauds, N.C.G.S. § 22-2.

Am Jur 2d, Statute of Frauds §§ 322, 323.

Sufficiency of description or designation of land in contract or memorandum of sale, under statute of grounds. 23 ALR2d 6.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from judgment entered 31 July 1989 by *Judge Gordon Battle* in CHATHAM County Superior Court. Heard in the Court of Appeals 8 May 1990.

The following facts are undisputed:

On 17 February 1979, defendants owned a tract of land comprising approximately one hundred fifteen acres on the Plainfield Church Road in Chatham County ("Plainfield Tract"). On that date, they agreed to sell to plaintiff and his late wife, Marilyn B. Brooks, twenty-five acres from the Plainfield Tract. There was a written memorandum of agreement between plaintiff and defendants. The writing specified a purchase price of $43,750.00 to be paid in a $6,000.00 down payment and monthly payments of $400.00 each. Plaintiff made the down payment and timely monthly payments called for in the writing from 17 February 1979 to 1 June 1987, a period of eight years and four months, thereby paying to defendants a total of $50,700.00. The interest rate agreed upon was 12% per annum until paid in full, beginning 1 March 1979, and subse-

quently, the annual interest rate decreased to 11% with the first payment at said rate beginning 1 March 1979. Plaintiff received no deed for property from defendants. The agreement between plaintiff and defendants did not specify the date on which defendants would make a deed to plaintiff. Plaintiff, by letter dated 1 July 1987, demanded the sum of $50,700 from defendants and stated that defendants would have possession and ownership of their land free and clear of all claims by plaintiff. Defendants kept all money paid and refused to return any of it.

Plaintiff filed a complaint claiming (1) the statute of frauds voided the contract, entitling plaintiff to recover the money paid to defendants, (2) unjust enrichment, and (3) breach of contract. Defendants filed an answer claiming defenses of (1) failure to state a claim, (2) bar by the three-year statute of limitations, (3) estoppel, and (4) laches. In addition, defendants asserted a counterclaim, arguing that plaintiff failed to comply with the terms of the "contract" resulting in forfeiture of his rights under said contract. Plaintiff filed a reply, asserting defenses of statute of frauds and breach of contract.

Plaintiff filed a motion for summary judgment based upon the claims of a void contract and unjust enrichment. Defendants filed a motion for summary judgment as well. The trial court denied plaintiff's motion for summary judgment and granted summary judgment for the defendants. From this judgment, plaintiff appeals.

Law Firm of Wade Barber, by Wade Barber, for plaintiff appellant.

Edwards & Atwater, by Phil S. Edwards, and Love & Wicker, by Dennis A. Wicker, for defendant appellees.

ARNOLD, Judge.

The question presented on appeal is whether the trial court properly denied plaintiff's motion for summary judgment. We must determine (1) whether there is a genuine issue as to any material fact, and (2) whether the movant is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c).

Plaintiff argues that the trial court should have granted his motion for summary judgment because the evidence raised no material issue of fact, but only a question of law: is the property description contained in the writings sufficiently definite to meet

the requirements of the statute of frauds. *See Searcy v. Logan*, 226 N.C. 562, 565, 39 S.E.2d 593, 595 (1946). If not, the contract is void. Whether a description in a contract to convey land is ambiguous so as to render the contract void under the statute of frauds is a question of law for the court. *Bradshaw v. McElroy*, 62 N.C. App. 515, 517, 302 S.E.2d 908, 911 (1983). The only facts material to the determination of that question are the existence and contents of the written agreement. N.C. Gen. Stat. § 22-2 (1986); *Lane v. Coe*, 262 N.C. 8, 12, 136 S.E.2d 269, 273 (1964). In this case, the existence and contents of the written agreement have been established. Therefore, the question is, as a matter of law, whether the written description of the property contained in the writings was sufficiently definite to satisfy the requirements of the statute of frauds.

The statute of frauds states that: "[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged . . . ." G.S. § 22-2. A deed or a contract to sell land must contain, among other things, a sufficient description of the land to be sold or conveyed, to satisfy the statute of frauds. *Searcy*, at 565, 39 S.E.2d at 595. To be sufficient, the description must be certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Id.* In addition, property descriptions that purport to carve small tracts of land out of larger tracts must specifically identify the part to be conveyed in order to comply with the statute of frauds. *Sheppard v. Andrews*, 7 N.C. App. 517, 521-22, 173 S.E.2d 67, 70 (1970).

"[A] patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed." *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942). Plaintiff contends that the writing does not describe a particular twenty-five acre portion of the Plainfield Tract because the northern boundary described as "with the Whitehead line. Thence straight to road that goes by Plainfield Church . . ." could be drawn in an infinite number of ways. We agree. Because there is uncertainty as to the land intended to be conveyed, and the writings refer to nothing extrinsic by which such uncertainty can be resolved, the description is patently

ambiguous. *Overton v. Boyce*, 289 N.C. 291, 294, 221 S.E.2d 347, 349 (1976).

Where ambiguity exists in a property description contained in a writing, it is a question of law to be decided by the court as to whether the ambiguity is patent or latent. *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976); *Bradshaw*, 62 N.C. App. 515, 516, 302 S.E.2d 908, 911.

Parol evidence is not admitted to explain patent ambiguities. *Lane*, at 13, 136 S.E.2d at 273.

> The purpose of parol evidence . . . is to fit the description to the property—not to create a description. There must be language in the [instrument] sufficient to serve as a pointer or a guide to the ascertainment of the location of the land. The expression of the intention of the parties to the [instrument] must appear thereon. Parol evidence is resorted to merely to bring to light this intention—but never to create it.

Thompson, 221 N.C. at 180, 19 S.E.2d at 485.

If the description is so vague and indefinite that effect cannot be given the instrument without writing new, material language into it, then it is void and ineffectual. *Id.*

We have examined the record on appeal, and the evidentiary materials filed by the parties indicate there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law. Accordingly, we hold, as a matter of law, that the contract is void under the statute of frauds and not enforceable. It follows then that there is no genuine issue to be litigated. Furthermore, plaintiff's payment of $50,700 to defendants pursuant to a contract which is void under the statute of frauds unjustly enriched defendants. Plaintiff received nothing in return. Therefore, plaintiff must be restored to the position he held before entering into the agreement with defendants, which requires defendants to return the money paid to them with interest.

Having established that the contract is void, we do not reach plaintiff's additional argument that the trial court erred in dismissing his claim for breach of contract.

We reverse the order of the trial court granting summary judgment for defendants and remand this cause for entry of judg-

ment for plaintiff. In addition, the trial court is directed to determine the amount of interest to which plaintiff is entitled.

Reversed and remanded.

Judge COZORT concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

The record shows without contradiction that: In the fall of 1978, at the suggestion of some friends who had bought some land from defendants, plaintiff asked defendants to let him visit their property for the purpose of offering to buy some of it. After walking over all of defendants' property with them and visiting them seven or eight more times, plaintiff got defendants to agree to sell him twenty-five acres for $1,750 an acre, payable in monthly installments with interest. Both parties understood that plaintiff was buying the "southernmost twenty-five acres" of defendants' larger tract. The agreement stating the terms of the purchase and describing the land bought was composed by plaintiff and written in his hand. After making the payments required by the agreement and using the described land in various ways as he saw fit for more than eight years, plaintiff notified defendants he was of the opinion the contract was void and demanded the return of his money, and when defendants refused to comply filed this action for the return of the money. Defendants have stood ready at all times to deed the land purchased to plaintiff upon receiving the balance of the purchase price, which has not been tendered. In regard to the northern boundary of the purchased tract, the only uncertainty of which plaintiff complains, the record does not indicate that there has been a dispute between the parties with respect to it, and defendants have stipulated that plaintiff can establish that line as he sees fit consistent with the other terms of the agreement.

In my opinion these circumstances required the court to dismiss plaintiff's action for several reasons. First, plaintiff, having created any uncertainty that exists and having adhered to the contract for eight years, is in no position either legally or equitably to call on the law to extricate him from his obligation and require defendants to return what he has paid on it. Second, the statute of frauds is a defensive, rather than an offensive, vehicle. Third,

the trial judge ruled correctly, I believe, that the phrase, "Thence straight to road that goes by Plainfield Church" was intended and understood by the parties to mean taking the shortest distance to get to the road in arriving at the southern twenty-five acres of defendants' property. Fourth, even if the phrase is regarded as ambiguous, it is a latent ambiguity which requires no clarification by evidence in view of defendants' stipulation that it can mean any twenty-five acres plaintiff wants consistent with the other contract terms.

STATE OF NORTH CAROLINA v. NATHAN EXAVIA WILLIAMS

No. 9025SC88

(Filed 6 November 1990)

1. **Indictment and Warrant § 8.4 (NCI3d)— murder—motion for bill of particulars—State not required to elect theory**

The trial court did not err in a murder prosecution by overruling defendant's objection to arraignment and deferring his motion for a bill of particulars to the judge who was scheduled to preside at defendant's trial. The State is not generally required to elect its theory of prosecution in a murder case before trial, and a motion for a bill of particulars is directed to the discretion of the trial judge.

Am Jur 2d, Homicide § 211.

2. **Criminal Law § 258 (NCI4th)— murder—continuance—denied**

The trial court did not err by denying defendant's motion to continue a murder trial for eight days where both defense attorneys withdrew from the case. Defendant's substitute lead counsel at trial was appointed twelve weeks before trial began, substitute co-counsel was appointed over three weeks prior to trial, defendant's lead counsel proceeded with discovery on 30 May 1989, and defendant's trial was on 21 August 1989.

Am Jur 2d, Continuance §§ 83-88.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 ALR3d 725.

3. Criminal Law § 273 (NCI4th)— murder—absent witnesses—continuance denied

The defendant in a murder trial could not argue that the trial court erred by proceeding to trial without testimony from certain witnesses where defendant neither moved for a recess nor objected to the trial court's decision to proceed when his witnesses had not appeared after fifty minutes. N. C. Rules of Appellate Procedure, Rule 10(b)(1).

Am Jur 2d, Continuance §§ 62, 63.

4. Homicide § 28 (NCI3d)— murder—self-defense—not available

The trial court did not err in a murder prosecution by instructing the jury that self-defense would not be available if defendant were the aggressor where the record indicates that defendant had to walk all the way across a room to get a gun from under a pillow on a couch; the victim was unarmed when he was shot; and there was testimony that defendant shot the victim a second time even after he pleaded with defendant not to shoot him again.

Am Jur 2d, Homicide §§ 140, 145, 146, 152, 519.

5. Homicide § 28.4 (NCI3d)— murder—duty to retreat—instruction not given

The trial court did not err by refusing to give an instruction on the duty to retreat in defendant's own home where there was no evidence that defendant was assaulted or attacked by the victim at the time of the shooting.

Am Jur 2d, Homicide §§ 162, 167, 520.

6. Criminal Law § 1200 (NCI4th)— second degree murder—sentencing—mitigating factor—self-defense

The trial court did not err when sentencing defendant for second degree murder by rejecting self-defense as a mitigating factor. Although the court stated that "you used that as a defense [and] the jury rejected it, I do likewise," the record clearly indicates that the trial court did not believe that defendant was acting in self-defense prior to the jury verdict.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 139.

7. Criminal Law § 1233 (NCI4th)— second degree murder—sentencing—mitigating factor—limited mental capacity

The trial court acted within its discretion in refusing to find limited mental capacity as a mitigating factor where defendant failed to meet his burden of showing that his limited mental capacity significantly reduced his culpability. Evidence of limited mental capacity by itself does not require the trial court to find the mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

8. Criminal Law § 909 (NCI4th)— murder—sufficiency of evidence of first degree—any error in submitting cured by verdict

The trial court did not err by submitting first degree murder to the jury in a prosecution in which defendant was convicted of second degree murder where the evidence tended to show that defendant had become romantically involved with the victim's girlfriend and that he shot the victim despite the absence of any immediate threat to his person. Assuming *arguendo* that it was error to submit this issue to the jury, it is well established in North Carolina that a conviction on a lesser offense renders any error in submission of a greater offense harmless.

Am Jur 2d, Homicide §§ 525, 529; Trial § 923.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

APPEAL by defendant from *Downs (James U.), Judge*. Judgment entered 24 August 1989 in Superior Court, CATAWBA County. Heard in the Court of Appeals 22 October 1990.

Defendant was charged in a proper bill of indictment with murder in violation of G.S. 14-17. The record on appeal tends to show that on 6 April 1989, while at his own residence, defendant shot and killed Clarence Whitener after Whitener physically assaulted Linda Walton and ignored defendant's repeated requests to leave the premises. A jury found defendant guilty of second degree murder. From a judgment imposing a prison sentence of twenty-five years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Grayson G. Kelley, for the State.

Michael Doran for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns as error the trial court's overruling of his objection to arraignment and deferral of his motion for a bill of particulars to the judge who was scheduled to preside at defendant's trial. He complains that he was "prejudiced in preparation of his defense and preparation for trial" because the indictment did not properly inform him as to whether he was being prosecuted for first or second degree murder.

It is well settled in North Carolina that the State is not generally required to elect its theory of prosecution in a murder case before trial. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981). "Where the factual basis for the prosecution is sufficiently pleaded, defendant must be prepared to defend against any and all theories which these facts may support." *Id.* at 235, 275 S.E.2d at 462. Furthermore, a motion for a bill of particulars is directed to the sound discretion of the trial judge and is not subject to review absent a "gross abuse of discretion." *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984). The denial of such a motion "will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case." *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980). We have examined the record and find no such impairment of defendant's case. Defendant's argument has no merit.

[2] Defendant next contends the trial court abused its discretion by denying his motion to continue the trial for eight days. He argues that the denial of his motion deprived him of his constitutional right to effective assistance of counsel. We disagree.

Defendant points out that the original lead counsel and co-counsel both withdrew from the case, requiring the appointment of substitute counsel to represent him at trial. However, Mr. Doran, defendant's lead counsel at trial, was appointed as substitute counsel on 26 May 1989, fully twelve weeks before defendant's trial on 21 August 1989. Defendant's co-counsel was appointed on 26 July 1989, over three weeks prior to trial. Furthermore, the record

indicates that defendant's lead counsel began proceeding with discovery on 30 May 1989, when he served the State with a voluntary request for discovery. We are aware of the fact that an accused and his counsel are constitutionally entitled to a reasonable period of time in which to prepare for trial. Nevertheless, the circumstances offered by defendant fail to convince us that the trial judge infringed this right by denying defendant's motion to continue. This assignment of error is therefore overruled.

[3] In his fifth assignment of error, defendant asserts that the trial court "abused its discretion by failing to recess the trial until the arrival of defendant's witnesses." On the final day of trial, defendant's counsel informed the court that defendant's mother, grandmother and sister planned to appear and testify on his behalf. The court recessed for fifty minutes to wait for the appearance of these witnesses before asking defense counsel if they had concluded their case. Although defense counsel agreed to rest and proceed to the jury at this point, defendant now complains that the court should have recessed until the witnesses arrived.

To preserve a question for appellate review, Appellate Rule 10(b)(1) requires a party to present to the trial court "a timely request, objection or motion . . . [and] obtain a ruling [thereon]." N.C.R. App. P. 10(b)(1). In the present case, defendant neither moved for a recess nor objected to the trial court's decision to proceed when his witnesses had not appeared after fifty minutes. Thus, he cannot now argue for the first time that the trial court erred by proceeding to the jury without testimony by such witnesses.

[4] Defendant makes two separate arguments regarding the jury instructions given by the trial court. First, he contends the court should not have instructed the jury that self-defense would not be available to defendant if he were found to be the aggressor. Then, he argues the court erred by refusing to give a jury instruction concerning the right of a person who is without fault in a situation "to stand his ground, with no duty to retreat, when in his own home."

In support of his challenge to the instruction regarding the availability of self-defense to an aggressor, defendant refers us to *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982). In *Tann*, this Court held to be error a jury instruction which declared that self-defense was not available to a defendant if he was the aggressor. *Id.* at 531, 291 S.E.2d at 827. However, defendant overlooks

the fact that in *Tann*, there was absolutely no evidence that defendant was the aggressor. *Id.* at 530, 291 S.E.2d at 827. In fact, the absence of evidence pointing to defendant as the aggressor is what made the instruction prejudicial under the circumstances. *See State v. Ward*, 26 N.C. App. 159, 215 S.E.2d 394 (1975).

In the present case, the record indicates that defendant had to walk all the way across the room to get the gun from underneath a pillow on the couch. It further reveals that the victim was unarmed when he was shot. Finally, there is testimony by Ms. Walton stating that defendant shot Whitener a second time even after he pleaded with defendant not to shoot him again. Such evidence clearly tends to show that defendant was the aggressor. Thus, we find no error in the trial court's instruction as to the availability of self-defense where defendant was the aggressor.

[5] With respect to the instruction regarding a person's duty to retreat when in his or her own home, defendant relies on a decision in which this Court ordered a new trial after the trial court refused to give the requested instruction. *State v. Hearn*, 89 N.C. App. 103, 365 S.E.2d 206 (1988). Once again, however, the circumstances in *Hearn* are clearly distinguishable from those in the case now before us. In *Hearn*, there was testimony indicating that the victim was the aggressor. As a result, this Court determined that the instruction regarding the duty to retreat should have been given. By contrast, the record in the present case contains no evidence suggesting that defendant was assaulted or attacked by the victim at the time of the shooting. In view of this lack of evidence, the instruction requested by defendant was clearly unnecessary. We therefore hold that the trial court was not required to give the instruction regarding the duty to retreat.

[6] Defendant next contends that the trial court "erred in sentencing the defendant to a term of imprisonment exceeding the presumptive sentence." He claims the court abused its discretion by failing to find two statutory factors in mitigation and by concluding that the factors in aggravation outweighed the factors in mitigation, thereby justifying a prison sentence in excess of the presumptive term.

First, defendant argues that his self-defense plea, although rejected by the jury, was "sufficient to support the statutory mitigating factor that the Defendant committed the offense under threat which was insufficient to constitute a defense but significant-

ly reduced his culpability." He submits that the trial court improperly based its decision regarding this factor on the jury verdict and points to the statement made by the trial judge that, "You used that as a defense [and] the jury rejected it, I do likewise." We do not believe this statement requires the conclusion that the trial judge relied on the jury verdict in making its decision on the aggravating factor in question. In fact, the record clearly shows that prior to the jury verdict, the trial court did not believe defendant was acting in self-defense. We therefore conclude that the trial court did not err in its rejection of self-defense as a factor in mitigation.

[7] Defendant also argues that the court erred by rejecting his request that his limited mental capacity be considered a factor in mitigation. However, evidence of limited mental capacity, by itself, does not require a trial court to find mitigating circumstances. *State v. Smith*, 321 N.C. 290, 362 S.E.2d 159 (1987). Defendant bears the burden of showing beyond a reasonable doubt that this lack of capacity significantly reduced defendant's culpability for the offense charged. *State v. Lloyd*, 89 N.C. App. 630, 366 S.E.2d 912 (1988). An examination of the evidence presented in this case does not convince us that defendant's limited mental capacity significantly reduced his culpability. As defendant has failed to meet his burden on this issue, we hold that the trial court acted within its discretion in refusing to find limited mental capacity as a mitigating factor.

[8] Finally, defendant complains that he was prejudiced by the trial court's submission of the issue of first degree murder to the jury. He argues that the evidence was insufficient to support a charge of first degree murder, and, as a result, submission of that issue served only to confuse the jury. We disagree.

Evidence presented at trial tends to show that defendant had become romantically involved with the victim's girlfriend and that he shot the victim despite the absence of any immediate threat to his person. We believe that this evidence justified the submission of first degree murder to the jury. Assuming, *arguendo*, that it was error to submit this issue to the jury, it is well established in North Carolina that a conviction on a lesser offense renders any error in submission of a greater offense harmless. *See, e.g., State v. Casper*, 256 N.C. 99, 122 S.E.2d 805 (1961).

Defendant had a fair trial free from prejudicial error.

No error.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ALFRED DIXON McCOY

No. 9021SC93

(Filed 6 November 1990)

Searches and Seizures § 24 (NCI3d)— search warrant—motel room—probable cause—cocaine buys in other motel rooms

An affidavit was sufficient to establish probable cause for issuance of a warrant to search defendant's motel room for narcotics under the totality of the circumstances test where it alleged that an informant had made two controlled buys of cocaine from defendant at two other motel rooms within ten days of the application for the search warrant since the circumstances of the two prior sales of cocaine in other motel rooms reasonably leads to the inference that cocaine could be found in the third room.

Am Jur 2d, Searches and Seizures §§ 42, 43.

APPEAL by the State from an order entered 25 September 1989 by *Judge W. Steven Allen* in FORSYTH County Superior Court. Heard in the Court of Appeals 22 October 1990.

On 31 October 1988 defendant Alfred Dixon McCoy was indicted by a grand jury for trafficking in cocaine by possession. A hearing was held upon defendant's motion to suppress evidence obtained as a result of an allegedly invalid search warrant. From the order granting defendant's motion to suppress evidence, the State appealed.

On 25 August 1988 two detectives with the Forsyth County Sheriff's Department Narcotics Division secured a warrant to search room 406 of the Innkeeper Motel on Peters Creek Parkway in Winston-Salem, North Carolina. Room 406 was registered to defendant. As a result of the search, the officers found nine glassine envelopes of cocaine, a brown glass bottle containing 29.64 grams of cocaine and a white plastic bottle containing 17.38 grams of cocaine. The total amount of cocaine seized from defendant was

in excess of 57 grams. Finding that the affidavit in support of the application for search warrant "failed to implicate the premises to be searched," the trial judge ruled this evidence not admissible.

The application for the search warrants contained the following pertinent information:

The applicants for the search warrant received information from an informant that the informant had purchased cocaine from defendant. To confirm the reliability of the informant, the applicants supervised two controlled purchases of cocaine by the informant from defendant. The first controlled buy occurred on or after 15 August 1988. The purchase occurred at room 203 of the Econo Lodge located on Germantown Road in Winston-Salem. As a result of this controlled purchase, a search warrant was issued on 18 August 1988 for a search of room 203. Defendant had vacated the premises, however, before officers could serve the warrant.

Similarly, on or after 21 August 1988, the applicants used the informant to purchase cocaine from defendant at room 209 of the same Econo Lodge in Winston-Salem. A search warrant for room 209 was obtained and executed on 23 August, but again defendant had vacated the premises. The applicants were informed that room 209 was registered to defendant from 21 August through 23 August until approximately 11:00 a.m. The receipt for room 209 showed that two persons had occupied the room. Receipt from the room registration of room 203 show it had been registered to Vickie Thompson from 15 August through 18 August. Both Vickie Thompson and defendant had given Winston-Salem addresses as their home addresses on the motel registrations.

On 25 August 1988 applicants were informed that defendant was occupying room 406 at the Innkeeper Motel on Peters Creek Parkway in Winston-Salem. Officers confirmed this information through the desk clerk and established surveillance of room 406. Officers also determined that Vickie Thompson's automobile was parked in the Innkeeper parking lot, and in the early afternoon of 25 August defendant was seen operating Ms. Thompson's automobile.

A local criminal history check showed that defendant previously had been convicted of selling drugs.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State, appellant.

No brief filed for appellee.

ARNOLD, Judge.

The standard for a court reviewing the issuance of a search warrant is "whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L.Ed.2d 721, 724 (1984); *see Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983). North Carolina adopted the "totality of the circumstances" approach for determining the existence of probable cause in *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 261 (1984). Thus, the task of the issuing judicial officer is to make a common-sense decision based on all the circumstances that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, at 238, 76 L.Ed.2d at 548. The State contends that the trial judge applied a standard more stringent than "fair probability" in reviewing the application and erred by suppressing the evidence for lack of probable cause to search.

Application for a search warrant must be supported by statements "particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched . . . ." N.C. Gen. Stat. § 15A-244(3) (1988). Conclusory statements concerning the location of the items sought are not sufficient to establish probable cause. *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972). The affidavits must establish a nexus between the objects sought and the place to be searched. *State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983); *Campbell*, 282 N.C. 125, 191 S.E.2d 752; LaFave, *Search and Seizure*, § 3.1(b) n.26 (2d ed. 1987). Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place. "Difficult problems can arise, however, where such direct information concerning the location of the objects is not available and it must be determined what reasonable inferences may be entertained concerning the likely location of those items." LaFave, *supra* § 3.7(d) at 103.

There is no firsthand evidence in the affidavits supporting this search warrant application that cocaine had been observed

in room 406 of the Innkeeper Motel on 25 August. No controlled buys occurred at the location nor was any criminal activity observed by the surveillance team stationed outside the room that day. We are left here with deciding whether the circumstances of the two prior sales of cocaine in other motel rooms within a ten-day period reasonably leads to the inference that cocaine could be found in the third room. North Carolina case law supports the premise that firsthand information of contraband seen in one location will sustain a finding to search a second location. Probable cause was found for the search of a party's residence and automobile where drugs had previously been seen only in the party's residence. *State v. Mavrogianis*, 57 N.C. App. 178, 291 S.E.2d 163 (1982), *disc. rev. denied*, 306 N.C. 562, 294 S.E.2d 227 (1982).

When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale. In *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260 (1932), the Supreme Court held that a second search warrant cannot be issued on the same showing of probable cause that supported the issuance of an earlier warrant after the first search warrant becomes void. The first warrant had been issued three weeks prior to the second one. The Court said there must be additional proof of probable cause sufficient at the time of issuing the second warrant. *Id.* at 211, 77 L.Ed. at 263. Whether the proof meets that test is determined by circumstances of each case. *Id.*

Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support a search warrant: (1) the amount of criminal activity and (2) the time period over which the activity occurred. "Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best." LaFave, *supra* § 3.7(a) at 78. "However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *U.S. v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale. In this case, two controlled buys of cocaine between an informant and defendant occurred within ten days of the application for the search warrant. The most recent purchase occurred not more than four days earlier.

In the end we must return to the question of whether it was reasonably probable, judging from the totality of the circumstances, that the contraband sought could be found in the location to be searched. The facts here show that a suspect, previously convicted of selling drugs, had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and that at two of those locations he had sold cocaine. Based on these facts, it was reasonable to infer that when the suspect occupied the third room, he still possessed the cocaine.

The order of the trial court is reversed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. JOHN C. WHITAKER, JR.

No. 9015SC295

(Filed 6 November 1990)

1. **Criminal Law § 1169 (NCI4th)— sentencing—aggravating factor—offense committed while on pretrial release**

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury by finding as an aggravating factor that defendant committed the offense while on two separate release orders for misdemeanor assault on his wife, the victim here. It is uncontested that there was a factual basis for this factor; that defendant committed the offense while on pretrial release for other charges is clearly related to the purposes of sentencing; the fact that defendant committed the offense while on release for misdemeanors rather than felonies simply means that the court is not required to find it as an aggravating factor, but does not preclude the court from doing so; and the finding of this factor was not contrary to the intent of the legislature as expressed by N.C.G.S. § 15A-1340.4(a)(1)o because the aggravating factor found here was not based on the misdemeanor charges themselves.

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law § 1123 (NCI4th)— assault—sentencing—aggravating factor—premeditation and deliberation

The aggravating factor of premeditation and deliberation for an assault with a deadly weapon inflicting serious injury was supported by the evidence where it was clear that the court found defendant's version of events incredible and based this factor on evidence that there was considerable ill will between the parties in the weeks preceding the felonious assault; that the ill will culminated in violence on at least two prior occasions; that defendant showed his wife a butterfly knife, the type used in the assault, about one week before the assault; and that defendant approached his wife hours before the assault at a concert and told her she was dead, was going to die, or words of similar import.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1079 (NCI4th)— sentencing—weighing aggravating and mitigating factors—no abuse of discretion

The trial court did not abuse its discretion when sentencing defendant for assault with a deadly weapon inflicting serious injury by finding that the two aggravating factors outweighed the two mitigating factors.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Criminal Law § 1239 (NCI4th)— strong provocation

The trial court did not err when sentencing defendant for assault by failing to find as a mitigating factor that defendant acted under strong provocation where defendant's evidence was contradicted and not manifestly credible.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from judgment entered 29 September 1989 by *Judge J. Milton Read, Jr.* in ALAMANCE County Superior Court. Heard in the Court of Appeals 19 October 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Martha K. Walston, for the State.

Abernathy, Roberson & Huffman, by David R. Huffman, for defendant-appellant.

GREENE, Judge.

Defendant appeals from judgment entered 29 September 1989 wherein the trial court sentenced the defendant to a prison term of nine years after the defendant pled guilty to the offense of assault with a deadly weapon inflicting serious injury.

A true bill of indictment was returned against the defendant charging him with assault with a deadly weapon with intent to kill inflicting serious injury. Upon his guilty plea to the lesser offense, the trial court sentenced the defendant to a term of imprisonment in excess of the presumptive term. In sentencing defendant, the court found the following two nonstatutory aggravating factors to exist: (1) that the offense was committed while defendant was on two separate release orders for misdemeanor assault on this same victim, his wife Lori Whitaker; and (2) that the defendant's acts were done with premeditation and deliberation. The court found two statutory mitigating factors to exist, but found that the aggravating factors outweighed the mitigating factors.

The issues are: (I) whether the trial court erred in finding as an aggravating factor that the defendant committed the offense while he was on two separate release orders for misdemeanor assault on the same victim; (II) whether the trial court erred in finding as an aggravating factor that the defendant committed the offense with premeditation and deliberation; (III) whether the trial court abused its discretion in finding that the two aggravating factors outweighed the two mitigating factors; and (IV) whether the trial court erred in failing to find as a mitigating factor that the defendant acted under strong provocation.

I

[1] Defendant first argues that the trial court erred in finding as an aggravating factor that he committed the offense while on two separate release orders for misdemeanor assault on his wife. He contends the finding of this factor was error because: (1) such factor is not reasonably related to the purposes of sentencing; (2) consideration of such factor is contrary to the intent of our legislature because it is only when a defendant commits an offense while on pretrial release for a felony, rather than a misdemeanor, that it is to be considered in aggravation of the offense under N.C.G.S. § 15A-1340.4(a)(1)(k) (1988); (3) consideration of such factor

was tantamount to treating the pending misdemeanor charges as if they were convictions, thus circumventing the intent of the legislature as expressed through N.C.G.S. § 15A-1340.4(a)(1)(o) (1988); and (4) consideration of such factor was improper because the misdemeanor charges were allegedly joinable with the felony charge for which defendant was being sentenced.

N.C.G.S. § 15A-1340.4(a) authorizes the sentencing judge to "consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein." It is uncontested that there was a factual basis for this factor. The only question remaining then is whether this factor is reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340.3 (1988) provides that the primary purposes of sentencing

> are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

That the defendant committed the offense while on pretrial release for another charge, whether that charge be for a misdemeanor or a felony, is clearly related to the purposes of sentencing. *See State v. Webb*, 309 N.C. 549, 308 S.E.2d 252 (1983). That this is so is demonstrated by the legislature's requiring that it be found in aggravation of an offense that the defendant committed the offense while on pretrial release on another felony charge. *See* N.C.G.S. § 15A-1340.4(a)(1)(k). The fact the defendant committed the offense while on release for a misdemeanor, rather than a felony, does not *preclude* the court from finding it as an aggravating factor. It simply means the court is not *required* to find it as an aggravating factor. As our Supreme Court has stated: "One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance." *Webb* at 559, 308 S.E.2d at 258.

Lastly, we do not agree that the finding of this aggravating factor is contrary to the intent of our legislature as expressed by N.C.G.S. § 15A-1340.4(a)(1)(o). N.C.G.S. § 15A-1340.4(a)(1)(o) re-

quires that the sentencing court consider as an aggravating factor that the defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement, when such factor is proven by the evidence. The statute further specifies that such prior convictions may not include any offense that is joinable with the offense for which the defendant is being sentenced. N.C.G.S. § 15A-1340.4(a)(1)(o). Defendant's arguments pertaining to N.C.G.S. § 15A-1340.4(a)(1)(o) are misplaced, however, because the aggravating factor found here was not based on the misdemeanor charges themselves. The misdemeanor charges were not, of course, convictions and were not treated or considered as such by the court. In sum, we conclude the court's finding of this factor was proper.

II

[2] Defendant next argues the court erred in finding as an aggravating factor that he committed the offense with premeditation and deliberation. He contends this factor is not supported by the evidence. We disagree.

It is well established that premeditation and deliberation may properly be found as a factor in aggravation of a violent offense. *See State v. Carter*, 318 N.C. 487, 349 S.E.2d 580 (1986); *State v. Smith*, 92 N.C. App. 500, 374 S.E.2d 617 (1988), *disc. rev. denied*, 324 N.C. 340, 378 S.E.2d 805 (1989). Premeditation means the defendant formed the intent to commit the offense during some period of time before actually committing it. *Smith* at 504, 374 S.E.2d at 619-20. "[D]eliberation means that the defendant was in a cool state of blood when he formed the intent to" commit the crime. *Id.* at 504, 374 S.E.2d at 620.

> Proof of premeditation and deliberation generally consists of circumstantial rather than direct evidence. Threats against the victim by the defendant, previous ill will between the victim and the defendant, the nature and number of the victim's wounds, and the brutality of the . . . [offense] are some of the circumstances supporting an inference of premeditation and deliberation.

Carter at 491, 349 S.E.2d at 582.

Defendant's argument that this factor is not supported by the evidence is based on his version of what occurred on the night of the felonious assault as well as what transpired previously be-

tween him and his wife, who was the victim of the assault. Defendant's version of the events differs greatly from the version told by his wife. It is clear the court found defendant's version incredible and based this aggravating factor on the evidence supporting the wife's version of the events in question. That evidence showed, among other things, that there was considerable ill will between the parties in the weeks preceding the felonious assault, which ill will culminated in violence on at least two occasions prior to the felonious assault; that one week before the felonious assault, defendant showed his wife a butterfly knife, which was the type of knife used in the assault, and told her drug dealers were after him and were going to get her to get at him; and that, hours before the assault, defendant approached his wife at a concert and told her she was dead, or was going to die, or words of similar import. We conclude that the State has met its burden of proving this factor by a preponderance of the evidence. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988).

III

[3] Defendant next argues it was an abuse of the discretion vested in the court to find that the two aggravating factors found outweighed the two mitigating factors.

> The balance struck in weighing aggravating and mitigating factors pursuant to the Fair Sentencing Act is a matter within the sound discretion of the trial judge. . . . This balance will not be disturbed on appeal unless the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

State v. Parks, 324 N.C. 94, 98, 376 S.E.2d 4, 7 (1989) (citation omitted). We discern no abuse of the court's discretion in weighing the factors here and reject defendant's argument.

IV

[4] Lastly, defendant argues the court erred in failing to find as a mitigating factor that he acted under strong provocation. *See* N.C.G.S. § 15A-1340.4(a)(2)(i) (1988). The sentencing court is required to find a statutory factor only when the evidence supporting the factor is uncontradicted, substantial, and manifestly credible. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). The evidence cited by the defendant here as supporting this statutory factor was con-

tradicted and was not manifestly credible. Accordingly, we find no error in the court's failure to find this factor.

The judgment entered is affirmed.

Affirmed.

Judges PARKER and ORR concur.

CLARENCE WESLEY COX, JR. AND LINDA TUCKER COX, PLAINTIFFS v. ROBERT C. RHEIN INTEREST, INC.; KINGSTREE PARTNERSHIP LTD., A NORTH CAROLINA LIMITED PARTNERSHIP; AND THE KING CORPORATION OF CHARLOTTE, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. 8921SC1392

(Filed 6 November 1990)

1. Damages § 10 (NCI3d)— flood damages—verdict against one defendant—credit for settlement with other defendants

A judgment awarding plaintiffs $6,000 for flood damage was remanded for amendment of judgment to give defendant Rhein benefit of a $5,000 settlement with former codefendants where plaintiffs owned property downstream from defendants; defendant Rhein began construction of Phase I of a residential subdivision on one side of the branch; defendants King and Kingstree began construction Phase II; plaintiffs suffered flood damage; defendants King and Kingstree negotiated a settlement for $5,000; the jury awarded plaintiffs $6,000 in a trial against defendant Rhein only; and defendant Rhein's motion for a reduction in verdict equal to the settlement was denied. Plaintiffs treated defendants as joint tortfeasors in their complaint and sought damages for flood damage from all defendants' properties; the evidence reveals only a single indivisible injury; and, although plaintiffs contended that Rhein was responsible for flood damages incurred and that they settled with King and Kingstree for future flooding, plaintiffs were not entitled to recover in this action for future flooding. N.C.G.S. § 1B-4(1).

Am Jur 2d, Damages §§ 559, 564.

2. Appeal and Error § 342 (NCI4th) — cross-assignment of error — failure to state alternative basis for verdict

Plaintiffs' cross-assignment of error to the denial of their motion for judgment n.o.v. or a new trial on damages in an action to recover flood damages did not present an alternative basis in law for supporting the judgment and was not properly before the Court of Appeals.

Am Jur 2d, Appeal and Error §§ 653, 727.

APPEAL by defendant Robert C. Rhein Interest, Inc. from judgment entered 22 June 1989 in FORSYTH County Superior Court by *Judge Lester P. Martin, Jr.* Heard in the Court of Appeals 23 August 1990.

Plaintiffs Clarence Wesley Cox, Jr. and Linda Tucker Cox brought this action against Robert C. Rhein Interest, Inc. [Rhein], Kingstree Partnership Ltd. [Kingstree], and The King Corporation of Charlotte, Inc. [King] alleging property flood damage caused by defendants' unreasonable use of land, negligent development of upstream land and failure to comply with certain erosion control laws.

Plaintiffs and defendants owned property adjacent to a stream known as Perryman Branch. Plaintiffs' property was located just south and downstream from defendants' properties. In 1986 defendants began constructing a residential subdivision known as "Kingstree." Rhein began Phase I of "Kingstree" on his property located west of Perryman Branch. King and Kingstree began Phase II of "Kingstree" on their properties located east of Perryman Branch.

In April 1987, on two separate occasions, plaintiffs experienced severe flooding during heavy rainfalls. Evidence tended to show that the mud and silt from defendants' properties caused damage to plaintiffs' shed located near Perryman Branch. Plaintiffs used this shed to store vehicles, farm equipment and plaintiffs' tile business supplies. Although Rhein had begun development of Phase I on his property several months before King and Kingstree began development of Phase II on their property, all defendants had begun at least initial development of their land at the time of the April 1987 flooding.

Prior to trial, King and Kingstree negotiated a settlement with plaintiffs for $5,000.00 in exchange for a complete release

as to claims against them. The trial proceeded against Rhein only. At the close of trial, the jury determined that Rhein created a nuisance by altering the flow of surface water and awarded plaintiffs $6,000.00 in damages. Rhein moved for a verdict reduction of $5,000.00—the amount of the pretrial settlement between plaintiffs and defendants King and Kingstree. The trial court denied Rhein's motion. Plaintiffs moved for judgment notwithstanding the verdict and/or a new trial as to damages. The trial court denied plaintiffs' motion. Defendant Rhein appeals. Plaintiffs cross-assign as error the trial court's denial of their motion for a new trial as to damages.

T. Dan Womble for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr., Clayton M. Custer and Beth Ann Spencer, for defendant-appellant.

WELLS, Judge.

[1] Defendant Rhein contends the trial court erred in entering judgment and denying defendant's motion to modify or amend judgment pursuant to N. C. Gen. Stat. § 1B-4(1). Defendant contends G.S. § 1B-4(1) entitles it to a reduction in the verdict award entered against it in the amount equal to the $5,000.00 settlement between plaintiffs and original co-defendants, King and Kingstree. G.S. § 1B-4(1) states:

> When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> > (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater. . . .

"Where one [joint] tort-feasor has settled with the injured party, the other tort-feasor, who has gone to trial, is entitled to have the judgment reduced by the amount of the settlement." *Ryder v. Benfield*, 43 N.C. App. 278, 258 S.E.2d 849 (1979) (*quoting Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1979)). As part of the Uniform Contribution Among Tort-feasors Act, G.S. § 1B-1(1) provides rights of contribution among *joint tort-feasors*:

(a) Except as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them.

See Insurance Co. v. Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973).

For Rhein to be entitled to a verdict reduction in the amount of the settlement between plaintiffs and defendants King and Kingstree, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. "If the independent wrongful acts of two or more persons unite in producing a *single indivisible injury*, the parties are joint tort-feasors within the meaning of the law. . . ." *Phillips v. Mining Co.*, 244 N.C. 17, 92 S.E.2d 429 (1956).

In their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties. Our review of the evidence at trial reveals only a single indivisible injury—the flooding of plaintiffs' property. Rhein points out that until this appeal, plaintiffs did not attempt to allocate their injury among defendants. It appears that all defendants had begun work on their properties at the time of the April 1987 flood damage.

In plaintiffs-appellees' brief on appeal, they contend for the first time that they suffered two separate injuries. Plaintiffs contend that Rhein is responsible for the flood damage incurred and that plaintiffs settled with King and Kingstree for potential future flood damage that is likely to occur. Plaintiffs' argument is without merit. Plaintiffs were not entitled to recover in this action for future flooding. "Plaintiff's remedy in a proceeding of this sort, between private parties, is by successive suits brought from time to time against the author of the nuisance as long as the noxious condition is maintained in which he may recover past damages down to the time of the trial." *Phillips v. Chesson*, 231 N.C. 566, 58 S.E.2d 343 (1950).

We find no error in the trial, but for the reasons stated we remand to the superior court for amendment of the judgment to give defendant Rhein the benefit of the $5,000.00 settlement.

[2] Plaintiffs cross-assign as error the trial court's denial of plaintiffs' motion for judgment notwithstanding the verdict or in the

alternative a new trial as to the amount of damages awarded by the jury. Plaintiffs contend the verdict award was too low and ignored the damage evidence and the trial court abused discretion in refusing to set aside the jury verdict.

Rule 10(d) of the North Carolina Rules of Appellate Procedure states in part:

> Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for *supporting* the judgment, order, or other determination from which appeal has been taken. (Emphasis added).

In their cross-assignment of error, plaintiffs do not present an alternative basis in law for supporting the judgment. Instead, plaintiffs contend that the trial court erred in refusing to set aside the jury verdict as too small. Therefore, the plaintiffs' contention is not properly before this Court. The proper method to have preserved this issue for review would have been a cross-appeal. *See Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E.2d 775 (1984). Plaintiffs' cross-assignment of error is overruled.

No error in part; remanded in part.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. HOMER TILLEY, III

No. 9025SC535

(Filed 6 November 1990)

Criminal Law § 474 (NCI4th) — indictments summarized to jury — no error

The trial court did not err in a prosecution for burglary, robbery, and assault by summarizing the indictments in order to explain the charges to the jury. N.C.G.S. § 15A-1213.

Am Jur 2d, Trial §§ 700, 715.

APPEAL by defendant from *Kirby (Robert W.), Judge*. Judgment entered 15 December 1989 in Superior Court, CALDWELL County. Heard in the Court of Appeals 15 October 1990.

Defendant was charged in proper bills of indictment with first degree burglary in violation of G.S. § 14-51, robbery with a dangerous weapon in violation of G.S. § 14-87, and assault with a deadly weapon with intent to kill inflicting serious injury in violation of G.S. § 14-32(a). He was found guilty of first degree burglary, robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. The offenses were consolidated for judgment, and defendant was sentenced to fifty years in prison. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. David Steinbock, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant, appellant.

HEDRICK, Chief Judge.

The record in this case was mailed by the Clerk of this Court to counsel for defendant on 25 May 1990. On 25 June 1990, counsel for defendant filed a motion for an extension of time to file defendant's brief, and this Court entered an order allowing defendant's brief to be filed on or before 15 July 1990. On 16 July 1990, counsel for defendant filed another motion for an extension of time to file defendant's brief, and this Court entered an order allowing defendant's brief to be filed on or before 2 August 1990. On 2 August 1990, counsel for defendant filed yet another motion for an extension of time to file defendant's brief. On 3 August 1990, this Court denied that motion. On 20 August 1990, the State moved to dismiss defendant's appeal on the grounds that defendant had not filed a brief. On 21 August 1990, counsel for defendant filed a motion to have defendant's brief deemed timely filed and contemporaneously filed the brief. On 23 August 1990, out of an abundance of caution to see that defendant had appellate review, this Court entered an order which referred the motion to dismiss to the panel to which the case was assigned and allowed the motion to deem the brief timely filed. It is noted that eighty-eight days elapsed between the time the record was mailed to counsel and the time defendant's brief was filed.

In the record defendant's counsel has set out four assignments of error as follows:

> 1. The trial court erred in reading aloud to the jury the details of each offense as set out in the bills of indictment prior to trial; on the grounds that defendant was prejudiced by this statutorily prohibited procedure and his rights to due process under the state and federal constitutions were violated.
>
> 2. The trial court erred in denying the defendant's motions to suppress certain statements made to Sergeant Brown on October 13, 1988 and to Detective Mike Miller on January 26, 1989; on the grounds that these statements were obtained in violation of the defendant's state and federal constitutional rights.
>
> 3. The trial court erred in denying the defendant's motions to dismiss the charges at the close of the State's case and of all the evidence; on the grounds that there was insufficient lawful evidence as a matter of law that defendant was the perpetrator of these offenses and he was thereby deprived of his rights to due process under the state and federal constitutions.
>
> 4. The trial court committed plain error in failing to instruct the jury on the lesser included offense of common law robbery; on the grounds that there was evidence warranting the instruction and defendant was prejudiced by its omission and thereby deprived of his due process rights under the state and federal constitutions.

In the brief, all the assignments of error have been abandoned except the one in which defendant argues that the trial court erred by reading to the jury, prior to trial, the details of each offense as set out in the bills of indictment. G.S. § 15A-1213 prohibits the reading of the pleadings by the trial judge to the jury. In this case, the trial judge did not read from the indictment, but instead summarized the indictments in order to explain the charges to the jury. Such a summarization is permissible and is in fact necessary to inform the jurors of the circumstances surrounding the case against defendant as required by G.S. § 15A-1213. *State v. Leggett*, 305 N.C. 213, 287 S.E.2d 832 (1982). Defendant's assignment of error is meritless.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. MELVIN BRYANT ELLIS

No. 9025SC207

(Filed 6 November 1990)

Burglary and Unlawful Breakings § 126 (NCI4th)— breaking or entering motor vehicle—insufficient evidence

The evidence was insufficient to support defendant's conviction for breaking or entering a motor vehicle in violation of N.C.G.S. § 14-56 where it tended to show that defendant grabbed the victim in a hospital parking lot and forced her back into her automobile at gunpoint, and that defendant bound the victim, kidnapped her, committed an armed robbery at a convenience store, and then returned her to the hospital parking lot.

Am Jur 2d, Burglary § 7.

Burglary, breaking, or entering of motor vehicle. 72 ALR4th 710.

APPEAL by defendant from *Downs (James U.), Judge.* Judgments entered 26 October 1989 in Superior Court, CATAWBA County. Heard in the Court of Appeals 15 October 1990.

Defendant was charged in proper bills of indictment with breaking or entering a motor vehicle in violation of G.S. § 14-56, second degree kidnapping in violation of G.S. § 14-39, and robbery with a dangerous weapon in violation of G.S. § 14-87. Evidence presented at trial tends to show the following:

On 15 February 1989 at about 6:45 a.m., Margaret Rhodes entered the parking lot at Catawba Memorial Hospital in her 1986 black Monte Carlo. She got out of the car and was about to reach into the back seat to get her nurse's uniform when she saw defend-

ant approaching her. Defendant grabbed her arm, showed her a gun, and forced her into the car. He took the car keys, started the car, and drove out of the parking lot. After driving about one-half mile, defendant stopped the car and forced Rhodes into the back seat where he tied her up and put her sweater over her head.

Defendant started the car again and drove around for awhile. He then stopped the car and told Rhodes he was "going in and get some money." Rhodes remained in the car and defendant returned in a few minutes. Defendant drove Rhodes back to the hospital and got out of the car.

At about 7:00 a.m. on 15 February 1989, Karen Phillips was working at the Fast Track convenience store when defendant came in and went to get an "icy cup." When Phillips turned around, she saw defendant standing at the counter with a gun. Defendant told her he wanted the money, and after she gave him $83.00 in cash, defendant made her lie on the floor.

Defendant testified that he and another person, Susan Michaux, had stolen a large sum of money on 14 February 1989 and that he did not need any money on 15 February 1989. He testified that he slept late on 15 February 1989 and that he did not see Margaret Rhodes, did not rob the Fast Track convenience store, and did not go near Catawba Memorial Hospital.

The jury found defendant guilty as charged. He was sentenced to prison terms of five years for breaking or entering a motor vehicle, thirty years for second degree kidnapping, and forty years for robbery with a dangerous weapon. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant, appellant.

HEDRICK, Chief Judge.

At the outset, we note that the printed record on appeal in this case was mailed from this Court on 23 February 1990. Defendant's brief was therefore due on 26 March 1990. N.C. App. R. 13(a). On 26 March 1990, defendant's counsel filed a motion for an extension of time to file defendant's brief, and this Court on 27 March 1990 allowed the motion extending the time to 26 April

1990. On 24 April 1990, defendant's counsel again filed a motion for an extension of time to file defendant's brief. On 25 April 1990, this Court allowed the motion extending the time to 31 May 1990. Defendant's brief was thereafter filed on 4 June 1990. Even though assignments of error were noted in the record on appeal as to each judgment in this case and there were extensions of time for filing defendant's brief totalling sixty-five days, only one assignment of error as to one judgment has been brought forward and argued on appeal.

In the one assignment of error argued on appeal, defendant contends the trial court erred "in refusing to dismiss the charge or to set aside the verdict and in entering judgment on the conviction for breaking and entering a motor vehicle." G.S. § 14-56 provides:

> If any person, with intent to commit any felony or larceny therein, breaks or enters any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind, containing any goods, wares, freight, or other thing of value, or, after having committed any felony or larceny therein, breaks out of any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind containing any goods, wares, freight, or other thing of value, that person is guilty of a Class I felony. It is prima facie evidence that a person entered in violation of this section if he is found unlawfully in such a railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft.

The evidence in this case is not sufficient to support a verdict of guilty to defendant's having violated G.S. § 14-56. There is no evidence that defendant "broke or entered" the automobile of Margaret Rhodes with intent to commit a felony therein. All the evidence tends to show that defendant grabbed the victim and at gunpoint forced her back into her automobile, and that defendant bound her, kidnapped her, committed an armed robbery and returned the victim to the hospital parking lot. The evidence supports the convictions for second degree kidnapping and robbery with a dangerous weapon and might have supported verdicts for other offenses had they been charged, but does not support the conviction for breaking or entering a motor vehicle.

The result is that defendant had a fair trial, free from prejudicial error with respect to the convictions for second degree kidnapping and robbery with a dangerous weapon and the judgments imposing prison sentences in those cases will be affirmed; the judg-

ment imposing a prison sentence for breaking or entering a motor vehicle will be reversed.

No error in part; reversed in part.

Judges ARNOLD and COZORT concur.

KATHY WALLESHAUSER (EVANS), PLAINTIFF-APPELLEE v. JACK G. WALLESHAUSER, JR., DEFENDANT-APPELLANT

No. 9015DC321

(Filed 6 November 1990)

1. **Appeal and Error § 107 (NCI4th)— child custody—order retaining jurisdiction—appeal interlocutory**

The portion of a child custody order in which the North Carolina court retained jurisdiction was interlocutory in nature in that no substantial right of defendant was affected which could not be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits.

Am Jur 2d, Divorce and Separation §§ 1003, 1004.

2. **Divorce and Alimony § 25.12 (NCI3d)— failure to abide by visitation order—contempt**

The portion of a child custody order finding defendant to be in contempt for failure to comply with a previous visitation order was affirmed where competent evidence supported the trial court's findings of defendant's failure to comply with the previous order and of his present ability to comply. Those findings are conclusive on appeal and support the conclusion that defendant was in contempt.

Am Jur 2d, Divorce and Separation §§ 997, 998.

APPEAL by defendant from order entered 22 December 1989 by *Judge Spencer B. Ennis* in ALAMANCE County District Court. Heard in the Court of Appeals 22 October 1990.

Defendant and plaintiff have three minor children who are the subjects of a custody modification action. On 25 June 1984

plaintiff was awarded custody of the children by Alamance County District Court. On 24 September 1985 the parties entered into a temporary custody consent order which gave defendant, who now lived in New York, temporary custody of the children.

Plaintiff filed a motion 24 October 1989 alleging defendant was in contempt of the visitation portion of the 24 September consent order and seeking custody of the minor children. Defendant filed a motion to transfer jurisdiction to New York on 30 November 1989.

The trial court's order of 22 December 1989 held defendant in contempt for his failure to comply with the previous trial court's order regarding visitation. In this same order the trial court retained jurisdiction over the minor children for the purpose of determining custody matters. From this order defendant appeals.

Moseley & Whited, P.A., by G. Keith Whited, for plaintiff-appellee.

Hatfield & Hatfield, by Kathryn K. Hatfield, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first argues the trial court erred in its order retaining jurisdiction to hear the child custody issue. The order from which defendant appeals is interlocutory and is not properly before us.

> An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree. *Smart v. Smart*, 59 N.C. App. 533, 297 S.E.2d 135 (1982). No appeal lies from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose if the order is not reviewed before the final judgment.

Dunlap v. Dunlap, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986).

The trial court's order retaining jurisdiction to determine custody is not a final determination of the issue involved; rather it determines where the children's custody issue will be heard, which is preliminary to a final decree. We hold the portion of the order retaining jurisdiction to be interlocutory in nature. No

substantial right of defendant is affected which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits. *Id.*

[2] Defendant next contends the trial court erred in holding him in contempt for failure to comply with a previous visitation order. "Review in contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986).

Defendant testified he did not allow plaintiff to visit the children during holidays. He further testified to his belief that his presence during her visits was necessary. Competent evidence supports the trial court's findings of defendant's failure to comply with the previous visitation order and of his present ability to comply with this order. These findings are therefore conclusive on appeal, *Weaver v. Weaver*, 88 N.C. App. 634, 364 S.E.2d 706, *review denied*, 322 N.C. 330, 368 S.E.2d 875 (1988), and they also support the conclusion of law that defendant was in contempt of the visitation order.

The portion of the order finding defendant to be in contempt is upheld. Defendant's appeal from the remainder of the trial court's order retaining jurisdiction is premature and must be dismissed. The trial court's order of 22 December 1989 is

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

DAN C. WORLEY v. CITY OF ASHEVILLE

No. 9028SC320

(Filed 6 November 1990)

Municipal Corporations § 9 (NCI3d)— city employee—performance evaluation—amount of pay raise—no genuine issue for trial court

Where petitioner's job performance as a city building inspector was rated "above standard" and he received the 6% pay increase commensurate with that rating, and there was

no evidence in the record that respondent city violated any procedural rules in evaluating petitioner, he was not denied a pay increase to which he was entitled, and no genuine issue of material fact was presented in his appeal to the superior court as to whether he should have received a pay raise of 7.5% which is given to those evaluated as "outstanding." Ch. 757, 1953 Session Laws, as amended by Ch. 415, 1977 Session Laws.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 262.

APPEAL by petitioner from *Lewis (Robert D.), Judge.* Judgment entered 25 January 1990 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 22 October 1990.

This is a civil action wherein petitioner, pursuant to Chapter 757 of the 1953 Session Laws [as amended in Chapter 415 of the 1977 Session Laws], seeks to challenge a pay increase he received as a building inspector for the City of Asheville. The record on appeal discloses that on 18 May 1989, petitioner's job performance was rated "above standard" in an evaluation by Harold Garland, his immediate supervisor. As a result of this evaluation, petitioner became entitled to a six percent (6%) increase in salary. Mr. Garland's decision was upheld by the head of petitioner's department and later by the Asheville city manager. Petitioner then appealed to the Asheville Civil Service Board. The Board affirmed the decision theretofore made by Mr. Garland and approved by the head of petitioner's department and the Asheville city manager, and determined that respondent had not violated any procedural rules in evaluating petitioner's entitlement to a raise in pay. Petitioner gave timely notice of appeal from the Board's decision and petitioned the Superior Court of Buncombe County for a trial *de novo* on the issue of whether the pay increase he received was justified. On 25 January 1990, the trial court entered an order allowing respondent's motion for summary judgment. Petitioner appealed.

Patla, Straus, Robinson & Moore, P.A., by Harold K. Bennett, for petitioner, appellant.

Nesbitt & Slawter, by William F. Slawter, for respondent, appellee.

Associate City Attorney for the City of Asheville, Martha McGlohon, for respondent, appellee.

HEDRICK, Chief Judge.

Petitioner's sole argument on appeal is that the trial court erred by granting respondent's motion for summary judgment. He claims the evidence before the trial court in the hearing on respondent's summary judgment motion raises a genuine issue as to whether he was entitled to a salary increase of 7.5%. We disagree.

Chapter 757 of the 1953 Session Laws, as amended in Chapter 415 of the 1977 Session Laws, provides as follows:

> Whenever any member of the classified service of the City of Asheville is discharged, suspended, reduced in rank, transferred against his or her will, *or is denied any promotion or raise in pay which he or she should be entitled to,* that member shall be entitled to a hearing before the Civil Service Board of the City of Asheville to determine whether or not the action complained of is justified . . . . Within 10 days of the receipt of notice of the decision of the board, either party may appeal to the Superior Court division of the General Court of Justice for Buncombe County for a trial *de novo* (emphasis added).

The petitioner has not been discharged, suspended, reduced in rank or transferred against his will. Neither has he been denied any promotion or raise in pay to which he should be entitled. If the petitioner had received an evaluation of "outstanding," he would have been entitled to a 7.5% pay increase, and under these circumstances, if the Civil Service Board had denied him that 7.5% pay increase, he would have been able to appeal that decision to the Superior Court in a trial *de novo.*

Petitioner contends that he has been denied a pay increase to which he is entitled, and that whether he is in fact entitled to this increase is a genuine issue of material fact which makes summary judgment improper. However, the petitioner was evaluated as an "above-standard" employee and received the 6% pay increase commensurate with that rating. Since petitioner received the pay increase to which he was entitled under the City of Asheville's Management Objectives Appraisal System, and there is no evidence in the record that respondent violated any procedural rules in evaluating the appellant, no genuine issue of material fact is present. Therefore, summary judgment for respondent will be affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 30 OCTOBER 1990

BURRIS v. FISHER No. 903SC157	Craven (88CVS1366)	Affirmed
DIAGNOSTIC IMAGING v. GRIFFIN ELECTRONIC CONSULTANTS, INC. No. 903SC84	Craven (88CVS548)	Reversed & Remanded
STATE v. MILLER No. 9026SC121	Mecklenburg (89CRS33029)	No Error
STATE EX REL. HUNTER v. SOMERVILLE No. 909DC190	Warren (83CVD179)	Reversed
WATTS v. BRYANT No. 8925SC1202	Caldwell (88CVS422)	No Error

FILED 6 NOVEMBER 1990

ASHEVILLE LAND CORP. v. REGISTER No. 9028SC674	Buncombe (89CVS2513)	Appeal Dismissed
BOYLES v. SAFRIT No. 9021DC709	Forsyth (87CVD570)	Reversed & Remanded
CALDWELL v. HICKS No. 9014SC101	Durham (89CVS1687)	Affirmed
CALL v. CALL No. 9023DC383	Wilkes (88CVD561)	Affirmed
COHEN v. COHEN No. 8925DC1098	Catawba (86CVD1107)	Vacated & Remanded
HALL v. HALL No. 8910IC1345	Ind. Comm. (517225)	Affirmed
HILLIS v. PECHELES IMPORTS, INC. No. 907DC100	Wilson (88CVD1075)	Remanded
ISLAND BEACH AND RACQUET CLUB CONDOMINIUM OWNERS' ASSN. v. SUMMEY BLDG. SYSTEMS, INC. No. 903SC248	Carteret (89CVS754)	Affirmed

KINCHELOE v. HIATT No. 8910SC1259	Wake (89CVS01539)	Affirmed
PINO v. INTEGON INS. CO. No. 905SC569	New Hanover (87CVS3637)	Dismissed
QUEEN v. HIATT No. 8910SC1258	Wake (89CVS01805)	Affirmed
SMITH v. LUMBERTON CLINIC OF SURGERY No. 8816SC1332	Robeson (87CVS689)	Affirmed
STAFFORD v. STAFFORD No. 9028DC619	Buncombe (78CVD1010)	Affirmed
STATE v. BARBER No. 9025SC451	Catawba (89CRS7358)	No Error
STATE v. BARBOUR No. 9026SC532	Mecklenburg (89CRS59626) (89CRS59628)	No Error
STATE v. DAVIS No. 9014SC658	Durham (89CRS6080)	No Error
STATE v. DORSETT No. 9015SC265	Chatham (89CRS825) (89CRS826)	No Error
STATE v. ELLIS No. 9025SC534	Catawba (89CRS6177)	No Error
STATE v. FREEMAN No. 9014SC567	Durham (88CRS29864)	No Error
STATE v. HACKNEY No. 905SC505	New Hanover (89CRS9685)	No Error
STATE v. HENAGAN No. 9012SC483	Cumberland (89CRS26933)	No Error
STATE v. HOLMES No. 9018SC472	Guilford (89CRS17276) (89CRS17332) (89CRS18404) (89CRS17245) (89CRS17246)	Affirmed
STATE v. JACKMAN No. 9025SC46	Catawba (88CRS13868) (88CRS13869) (88CRS13870)	No Error
STATE v. LATTA No. 9026SC458	Mecklenburg (89CRS41624) (89CRS71455)	No Error

STATE v. LECRAFT No. 903SC487	Craven (86CRS6537) (86CRS6538) (88CRS10678) (88CRS10679)	No error in part; vacated in part
STATE v. LINGLE No. 9025SC454	Caldwell (89CRS1908) (89CRS1909) (89CRS1910) (89CRS1911) (89CRS1912) (89CRS1913) (89CRS1914) (89CRS1915) (89CRS1916)	Dismissed
STATE v. MOORE No. 9017SC421	Surry (89CRS4687) (89CRS4688) (89CRS4689) (89CRS4690)	Sentence Vacated & Remanded
STATE v. ROBINSON No. 9018SC418	Guilford (88CRS63252)	No Error
STATE v. SPELLER No. 902SC592	Martin (89CRS2056)	No Error
STATE v. STANFIELD No. 9017SC482	Rockingham (88CRS8249) (88CRS8250) (88CRS8251) (88CRS8252) (88CRS8253) (89CRS385) (89CRS386)	Dismissed
STATE v. SURRATT No. 9025SC510	Catawba (89CRS4198)	No Error
STATE v. TRAMMELL No. 9030SC400	Haywood (89CRS2276) (89CRS2277)	No Error
STATE v. WILLIAMS No. 903SC470	Pitt (88CRS23221)	No Error
STATE v. WILLIAMS No. 9016SC654	Robeson (89CRS017088) (89CRS017089)	No Error

RANKIN WHITTINGTON, DANIEL C. HUDGINS, DR. TAKEY CRIST, DR. GWENDOLYN BOYD AND PLANNED PARENTHOOD OF GREATER CHARLOTTE, INC., PLAINTIFFS v. THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DAVID FLAHERTY, IN HIS CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, THE NORTH CAROLINA SOCIAL SERVICES COMMISSION, AND C. BARRY McCARTY, IN HIS CAPACITY AS CHAIRPERSON OF THE NORTH CAROLINA SOCIAL SERVICES COMMISSION, DEFENDANTS

No. 8910SC405

(Filed 20 November 1990)

Administrative Law and Procedure § 10 (NCI4th)— State Abortion Fund—Social Services Commission—rule-making authority

The trial court did not err by granting summary judgment for plaintiffs in an action seeking a declaratory judgment and an injunction against defendants enjoining enforcement of rules adopted by the Social Services Commission requiring directors of county social service departments to report any allegations of rape or incest and to offer each woman who applies for funds for an abortion the opportunity to personally view models showing birth and development of the human embryo and fetus. Defendants as a matter of law do not have specific or implied authority to promulgate rules such as these. Since the rules in question were adopted by the Commission subsequent to the enactment of N.C.G.S. § 150B-9, they are subject to the specific requirements of that statute that rules be adopted in accordance with procedures specified in the article and that agencies are prohibited from adopting any rule implementing or interpreting any statute or other legislative enactment unless specifically authorized to do so in the enactment. There is no grant of authority from which the court could infer any rule-making authority pursuant to the legislation authorizing the State Abortion Fund.

Am Jur 2d, Administrative Law §§ 92, 95, 96; Welfare Laws § 72.6.

APPEAL by defendants from judgment entered 8 December 1988 by *Judge Craig B. Ellis* in WAKE County Superior Court. Heard in the Court of Appeals 14 November 1989.

On 1 June 1987, plaintiffs filed this action seeking a declaratory judgment and an injunction against defendants alleging, *inter alia*,

in its first and fourth claims, that on 31 October 1986, the Social Services Commission adopted two rules pursuant to the legislation authorizing the State Abortion Fund (1985 N.C. Sess. Laws c. 479 s. 93) (hereinafter the Fund), which exceed the administrative authority of the Social Services Commission, and therefore, are *ultra vires*. According to plaintiffs, these rules require them and all other directors of county social services departments to: (a) offer each woman who applies for funds for an abortion under the Fund an opportunity to personally view fetal models showing growth and development of the human embryo and fetus, and (b) report any allegations of rape or incest when a woman who applies for assistance from the Fund alleges rape or incest in her application.

Plaintiffs moved for a preliminary injunction on 11 June 1987 to enjoin enforcement of the rules. The trial court granted the preliminary injunction on 1 July 1987 and denied defendants' motion to dismiss.

On 24 October 1988, plaintiffs filed a motion for partial summary judgment on their first and fourth claims for relief. The trial court heard this motion on 9 November 1988 and considered the evidence of record, the briefs and arguments. The trial court then concluded that there were no material facts in dispute and that the two rules in question were "*ultra vires* and beyond the scope of the administrative authority of the Social Services Commission as a matter of law."

Further, the trial court found that based upon its findings, there was no need to consider plaintiffs' other claims for relief. It enjoined defendants' enforcement of the rules and awarded plaintiffs costs in the action. The trial court entered judgment accordingly on 8 December 1988. Defendants appeal from the order of 8 December 1988 granting summary judgment in favor of plaintiffs.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by Leslie J. Winner and Thomas M. Stern, for plaintiff-appellees.

Maupin Taylor Ellis & Adams, P.A., by Charles B. Neely, Jr. and Robert A. Cohen, for defendant-appellants.

ORR, Judge.

We begin by noting that although this case arises in the context of controversial regulations pertaining to state funded abortions, this case is not about abortions. Rather, it is a case solely

about administrative rule-making authority and whether the trial court erred in granting summary judgment in favor of plaintiffs in regard to that question. For the reasons below, we find that the trial court did not err.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983), summary judgment is appropriate only 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 material fact and that any party is entitled to a judgment as a matter of law." Under the rule, a party is entitled to summary judgment if it can establish through the pleadings and affidavits, that there is no genuine issue as to any material fact, that only issues of law remain and that it is entitled to judgment as a matter of law. *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987); *Johnson v. Holbrook*, 77 N.C. App. 485, 335 S.E.2d 53 (1985).

In its judgment after the hearing on the summary judgment motion, the trial court concluded that "there are no material facts in dispute that are necessary to determine these claims and [these rules] . . . are each *ultra vires* and beyond the scope of the administrative authority of the Social Services Commission as a matter of law."

The following are the rules in issue:

> Counseling required by Chapter 479, Section 93(5) of the 1985 Session Laws shall include the opportunity, but not the requirement, for all persons determined eligible for service to personally view fetal models showing the growth and development of the human embryo and fetus, said models to be obtained from regular medical supply houses or medical schools.
>
> The director of any county department of social services receiving information from an applicant for State Abortion Funds alleging rape or incest as a basis for eligibility for assistance from the fund shall report such incident of rape or incest to the district attorney having jurisdiction in the area in which the incident occurred.

Rule 10 N.C.A.C. 42W .0003(c) and .0005 (hereinafter referred to as "the fetal model rule" and "the reporting rule"). The reporting rule has been interpreted by the Social Services Division to require the director of each county department of social services to report

only the fact that the rape or incest incident occurred and may exclude details of the incident and the victim's name.

Before addressing the specific statutory provisions upon which the parties rely to support their opposing positions, we must first set out the following general rules regarding statutory construction. As early as 1915, our Supreme Court stated that when construing a statutory provision, the words in the statute are to be given their natural or ordinary meaning, unless the context of the provision indicates that they should be interpreted differently. *Abernathy v. Commissioners*, 169 N.C. 631, 86 S.E. 577 (1915). Moreover, when one statute speaks directly and in detail to a particular situation, that direct, detailed statute will be construed as controlling other general statutes regarding that particular situation, absent clear legislative intent to the contrary. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966).

It is only when the language of a statute is unclear or ambiguous that a court should attempt to interpret the language of a statute in accordance with what the court presumed the Legislature intended. *State v. White*, 58 N.C. App. 558, 294 S.E.2d 1 (1982). In enacting a law, we must presume that the Legislature acted with full knowledge of prior and existing law. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970). Finally, statutes relating to the same subject should be construed *in para materia*, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved. *See State ex rel. Utilities Comm. v. Thornburg*, 84 N.C. App. 482, 353 S.E.2d 413, *disc. review denied*, 320 N.C. 517, 358 S.E.2d 533 (1987).

We first note that the broad general rule-making authority in the executive branch of government for matters relating to human resources is found in Article 3 of Chapter 143B of the General Statutes known as the Executive Organization Act of 1973. Within this article, there is a specific legislative grant of rule-making authority to the Social Services Commission in N.C. Gen. Stat. § 143B-153 which states in pertinent part:

> There is hereby created the Social Services Commission of the Department of Human Resources with the power and duty to adopt rules and regulations to be followed in the conduct of the State's social service programs with the power and duty to adopt, amend, and rescind rules and regulations under and not inconsistent with the laws of the State necessary

to carry out the provisions and purposes of this Article. Provided, however, the Department of Human Resources shall have the power and duty to adopt rules and regulations to be followed in the conduct of the State's medical assistance program.

(1) The Social Services Commission is authorized and empowered to adopt such rules and regulations that may be necessary and desirable for the programs administered by the Department of Human Resources as provided in Chapter 108A of the General Statutes of North Carolina.

N.C. Gen. Stat. § 143B-153 (1987). Pursuant to that authority, over the course of years, the Social Services Commission has made numerous rules and regulations covering the gamut of programs within its scope of services.

Beginning in 1978, the General Assembly began providing limited appropriations for state funded abortions. 1977 N.C. Sess. Laws 2d Sess. c. 1136. No specific legislation pertaining to this program was enacted other than the line item budget provisions enacted in the spending legislation passed by the General Assembly. In the 1985 Session Laws, Chapter 479, Section 93, the General Assembly for the first time enacted specific legislation dealing with the operation of the State Abortion Fund and the legislative policies applying to it.

Section 93 states in pertinent part:

LIMITATIONS ON STATE ABORTION FUND

Sec. 93.

(1) It shall be the policy of the State of North Carolina that the State Abortion Fund shall not be available for abortion on demand but shall be limited in accordance with this section.

. . .

No rules adopted pursuant to this section may require a woman to report rape or incest within any specified time.

(4) Responsibilities of the County Department of Social Services. Services provided under this section shall be administered uniformly in every political subdivision of the State.

Applications for service shall be made to county departments of social services.

Eligibility for the services under this section shall be determined by the county department of social services under the provisions of subdivision (3) of this section. The county department of social services shall arrange for the delivery of these services with appropriate medical providers.

(5) Counseling and Referral Services. The county department of social services shall provide counseling to all persons determined eligible for service under this section. Counseling shall include discussion of pregnancy options, including adopting, and family planning information.

. . .

The county department of social services shall provide to all persons determined eligible under this provision family planning counseling, and referral for family planning consultation and supplies, or voluntary sterilization.

In cases where the applicant chooses to carry the pregnancy to term, the county department of social services shall refer the individual for all appropriate services, including licensed adoption services, maternal health care services and financial assistance.

(6) Reimbursement to Providers. Services shall be reimbursed at no less than one hundred fifty dollars ($150.00) for outpatient services and not more than five hundred dollars ($500.00) for inpatient services.

No services may be reimbursed where federal funds are available.

Providers receiving funds under this section may not collect additional funds from individuals receiving services.

Notwithstanding any provision of law, the setting of rates or fees for such services; the setting of eligibility standards or application requirements; the determination of the components of income that are considered in computing family monthly gross income; designation of services to be provided or the designation of providers shall be done only by enactment of law by the General Assembly. For purposes of administering

this section, the following regulations which are codified in the North Carolina Administrative Code, to the extent that they are consistent with this section, are specifically authorized by the General Assembly: 10 NCAC 42W .0001—.0003, which were filed and effective as of January 1, 1983; 10 NCAC 35E .0103, Income Eligible Status, which was filed and effective as of July 1, 1983; and 10 NCAC 35 .0003, including the referenced Family Services Manual.

1985 N.C. Sess. Laws c. 479 s. 93.

Finally, in 1985, the General Assembly passed a new Administrative Procedures Act codified in N.C. Gen. Stat. § 150B. This provision states in pertinent part:

§ 150B-1. Policy and scope.

(a) The policy of the State is that the three powers of government, legislative, executive, and judicial, are, and should remain, separate. The intent of this Chapter is to prevent the commingling of those powers in any administrative agency and to ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) The purpose of this Chapter is to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies.

(c) This Chapter shall apply to every agency, as defined in G.S. 150B-2(1), except to the extent and in the particulars that any statute, including subsection (d) of this section, makes specific provisions to the contrary.

N.C. Gen. Stat. § 150B-1 (1987). The Social Services Commission was not excluded from coverage under subsection (d).

While the specific issue before this Court is the appropriateness of the trial court's grant of summary judgment for the defendants, the underlying basic issue is the applicability of these various legislative enactments to the rules in question. We turn now to the specific contentions of the parties.

Defendants' Contentions

Defendants primarily contend that the rules adopted by the Social Services Commission are authorized specifically under N.C.

Gen. Stat. § 143B *et seq.*, and that these provisions create express general authority in the Social Services Commission of the Department of Human Resources to adopt rules and regulations pertaining to the Fund. Defendants further argue that *Stam v. State*, 47 N.C. App. 209, 267 S.E.2d 335 (1980), *aff'd in part and rev'd in part*, 302 N.C. 357, 275 S.E.2d 439 (1981), supports their authority to regulate the Fund through the adoption of rules. In addition, defendants contend that they have the implied authority to make such rules because administrative authority should be broadly construed.

Defendants rely on the broad grant of authority of N.C. Gen. Stat. § 143B-137 and the specific grant of § 143B-153 wherein the Social Services Commission is created "with the power and duty to adopt rules and regulations to be followed in the conduct of the State's social service programs with the power and duty to adopt, amend, and rescind rules and regulations under and not inconsistent with the laws of the State . . . ."

Defendants further rely on *Stam* for the proposition that pursuant to Chapter 143B, the Commission has rule-making authority as it pertains to the State Abortion Fund. To this point at least, defendants' contentions are correct and the Social Services Commission is authorized by virtue of Chapter 143B, standing alone, and specifically authorized as to the State Abortion Fund by *Stam* to promulgate rules that are "necessary and desirable."

Plaintiffs' Contentions

The primary contention advocated by the plaintiffs is that the enactment of N.C. Gen. Stat. § 150B-9 limited the rule-making authority of North Carolina administrative agencies such as the Social Services Commission. This statute, as noted previously, was part of the revised Administrative Procedure Act of 1985. Section 150B-9 (effective 12 July 1985) states:

> (a) It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. . . . [T]he provisions of this Article are applicable to the exercise of any rule-making authority conferred by any statute, but nothing in this Article repeals or diminishes additional requirements imposed by law or any summary power granted by law to the State or any State

agency. *No rule hereafter adopted is valid unless adopted in substantial compliance with this Article.*

(b) Each agency shall adopt, amend, suspend or repeal its rules in accordance with the procedures specified in this Article and pursuant to authority delegated by law and in full compliance with its duties and obligations. *No agency may adopt any rule that implements or interprets any statute or other legislative enactment unless the power, duty, or authority to carry out the provisions of the statute or enactment is specifically conferred on the agency in the enactment,* . . . .

N.C. Gen. Stat. § 150B-9 (1987) (emphasis added).

Plaintiffs argue that general provisions of §§ 143B-153 and 108A-71 must yield to the specific provisions of § 150B-9 and Section 93. Furthermore, plaintiffs argue that *Stam* is inapplicable to the case at bar because it does not support the proposition that the Social Services Commission *currently* has authority to enact rules concerning the State Abortion Fund.

We must now decide whether any of the above statutes or provisions grant to the Social Services Commission the specific or implied authority to adopt the fetal model and reporting rule pursuant to the Fund. We hold that they do not.

a. *Specific Authority*

Since the rules in question were adopted by the Commission subsequent to the enactment of N.C. Gen. Stat. § 150B-9, they are subject to the specific requirements. The first such requirement under § 150B-9(b) is that they be adopted in accordance with procedures specified in the article. On this count, the Commission failed to comply.

Secondly, the Commission is prohibited from adopting any rule implementing or interpreting *any* statute or *other* legislative enactment unless specifically authorized to do so in the enactment.

We now turn to Section 93 wherein the Legislature specifically enacted certain limitations on the State Abortion Fund. There is nothing in Section 93 which specifically confers upon the Social Services Commission or any other designated entity rule-making authority; however, the Legislature did specifically authorize for purposes of administering the section certain regulations previously codified. The language tracks the requirements of Chapter 150B.

Although there are references to certain limitations on "Rules adopted pursuant to this section . . .," we cannot conclude that Section 93 references a specific grant of rule-making authority to any particular entity.

In fact, Section 93 specifically reserves the right to make such rules to the General Assembly.

> Notwithstanding any provision of law, . . . *designation of services to be provided or the designation of providers shall be done only by enactment of law by the General Assembly.* For purposes of administering this section, the following regulations which are codified in the North Carolina Administrative Code, to the extent that they are consistent with this section, are specifically authorized by the General Assembly: 10 NCAC 42W .0001-.0003, . . . 10 NCAE 35 .0103, . . ., and 10 NCAC 35 .0003, which were filed and effective as of January 1, 1983; . . . .

1985 N.C. Sess. Laws c. 479, s. 93 (emphasis added).

In summary, we conclude that the Commission has and continues to have general rule-making authority under its grant in N.C. Gen. Stat. § 143B-153 and by the provision of N.C. Gen. Stat. § 108A-71 which authorizes the Department of Human Resources to accept all "State appropriations" for programs of social services. That grant became limited, however, by Chapter 150B upon its enactment, thereby requiring the Commission to comply with certain procedural requirements in adopting rules if specifically authorized by legislative enactment to adopt rules. We also note that any rules made pursuant to Chapter 143B must be "[consistent] with the laws of the state." N.C. Gen. Stat. § 143B-153.

Since the State Abortion Fund prior to the enactment of Section 93 was merely a "state appropriation," the Department of Human Resources, through its Social Services Commission, could and did enact rules and regulations pertaining to the program. However, by the passage of Section 93, which specifically limits by legislative enactment, how the Fund is to be administered, the Department of Human Resources and the Commission's rule-making authority must comply with the requirements of Chapter 150B.

We make no ruling on whether the rules in question are, in fact, "necessary and desirable" under § 143B-153. Furthermore,

for the purposes of this opinion, we do not need to make a determination of whether the Fund is a grant-in-aid under Chapter 108A.

We also note that defendants are correct in their analysis of the *Stam* case to the extent that *Stam* interpreted § 143B-153(7) to grant rule-making authority to the Commission to adopt "rules and regulations consistent with the provisions of this Chapter," as well as the specific grants of power in subsections (1) through (6). 47 N.C. App. at 220, 267 S.E.2d at 343. However, *Stam* does not authorize the Social Services Commission to make such rules if they are inconsistent with other more specific statutes such as § 150B-9.

Defendants argue in their reply brief that § 150B-9 should not apply to the rules in question because this statute became effective 12 days after Section 93. Therefore, the General Assembly had no reason to specifically confer the authority in the enactment of Section 93 to carry out the provisions of that section since § 150B-9 was not yet law. This argument is without merit for at least two reasons.

First, Section 93 specifically reserves the right of designation of services under the Fund to the General Assembly. Had the Legislature desired to carve an exception under any of the subsections to permit the Social Services Commission to promulgate rules, it could have done so. The Legislature did this for certain other rules in its last sentence of Section 93 by allowing some that already had been promulgated and codified in the North Carolina Administrative Code. Had the Legislature intended to leave room for additional future rules, such as the rules in the present case, it could have done so.

Second, although § 150B-9 was enacted after Section 93, the General Assembly has had additional opportunities to confer specific rule-making authority on the Social Services Commission in Section 93, and has failed to do so. The Legislature failed to grant such authority to the Social Services Commission in 1987, and twice in 1989.

Moreover, the Social Services Commission promulgated the rules in question *after* § 150B-9 became effective. Therefore, § 150B-9 does not operate retroactively in the case *sub judice.*

b. *Implied Authority*

Defendants argue that the administrative authority of an agency is to be broadly construed, consistent with the modern trend to permit administrative agencies reasonable discretion to carry out their charter purposes. *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). We find this proposition to be inapplicable to the case at bar.

First, the General Statutes of the state must justify any authority which administrative agencies purport to exercise. *Insurance Co. v. Lanier, Comr. of Insurance*, 16 N.C. App. 381, 384, 192 S.E.2d 57, 59 (1972). There is no such justification from the General Statutes in the case at bar.

Second, in *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985), this Court stated that administrative agencies have those powers expressly vested by statute, and "those [implied] powers reasonably necessary for the agency to function properly. . . ." *Id.* at 530, 338 S.E.2d at 121. In our case, there is no such grant of authority from which we may infer any rule-making authority pursuant to the legislation authorizing the Fund.

Finally, because Section 93 and N.C. Gen. Stat. § 150B-9 prohibit the Social Services Commission from promulgating rules such as the fetal model and reporting rule, there is no implicit authority for the Commission to make and enforce such rules in these or other statutes.

We find that § 150B-9 and Section 93 speak directly to the rule-making authority of the Social Services Commission in the case *sub judice*, and we must, under the laws of this State, construe those provisions as controlling. We find no clear legislative intent to the contrary. *See Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966). Furthermore, we note that it is the Legislature's obligation to clarify its intent should it deem such clarification to be necessary.

In summary, we hold that the trial court did not err in granting summary judgment under Rule 56 of the N.C. Rules of Civil Procedure for plaintiffs because, as a matter of law, defendants are not authorized by the laws of this State to promulgate rules such as the fetal model and reporting rules pursuant to the State Abortion Fund.

Affirmed.

Judges EAGLES and COZORT concur.

HARVEY M. ALLEN, PETITIONER v. CITY OF BURLINGTON BOARD OF ADJUSTMENT, RESPONDENT; AND ALLIED CHURCHES OF ALAMANCE COUNTY, INC., INTERVENOR/RESPONDENT

No. 9015SC258

(Filed 20 November 1990)

1. **Municipal Corporations § 31.1 (NCI3d)— zoning—building inspector's decision—standing of property owner to appeal**

Petitioner was a "person aggrieved" by a building inspector's decision that proposed uses of zoned property were appropriate and could appeal that decision to the Board of Adjustment where his own testimony shows that he is a nearby property owner who will suffer special damages in that the value of his property will be reduced by the proposed uses.

Am Jur 2d, Zoning and Planning § 343.

2. **Municipal Corporations § 31 (NCI3d)— zoning—decision permitting uses of property—notice—reasonable time for appeal**

Petitioner appealed from a building inspector's 1986 decision permitting the use of zoned property for a community kitchen, adult day care, and offices within a "reasonable time" as permitted by city ordinance where he had no actual notice of the decision until a 10 August 1989 letter to his attorney, and he appealed the decision on 8 September 1989. However, petitioner had constructive notice of the portion of the decision allowing the property to be used for a homeless shelter where the shelter had been in operation since 1986, and his challenge on appeal of an expansion of the shelter on the ground of the use of the property was thus barred by the "reasonable time" requirement of the ordinance.

Am Jur 2d, Zoning and Planning §§ 300-303.

3. Municipal Corporations § 30.11 (NCI3d)— zoning—community kitchen not boarding house—adult day care as rooming house—offices as accessory use

A community kitchen does not constitute a "boarding house" which is permitted by petitioner's zoning classification where the zoning ordinance defines boarding house as "a dwelling where meals or lodging and meals are provided for compensation." However, an adult day care center does constitute a rooming house permitted under the zoning classification, and offices constitute a permissible accessory use to the principal use of the property.

Am Jur 2d, Zoning and Planning §§ 113, 114.

What is a lodginghouse or boardinghouse within provisions of zoning ordinance or regulation. 64 ALR2d 1167.

APPEAL by petitioner from order entered 22 December 1989 in ALAMANCE County Superior Court by *Judge J. Milton Read, Jr.* Heard in the Court of Appeals 25 September 1990.

Intervenor-respondent Allied Churches of Alamance County, Inc. [Allied Churches] has operated a homeless shelter in Burlington since November 1986. In early 1989, intervenor filed a rezoning request with the city. Intervenor planned to build a new facility on the site, and desired to have its setback requirements reduced. It wished to construct the new building to house the shelter as well as an adult day-care center, the Allied Churches offices, and the Good Shepherd Community Kitchen. At the time, the property was zoned "R-9" and "O-I." A sign was posted on the property announcing the filing of the petition in April 1989.

A public meeting was held 19 April 1989 at which several area residents objected to the construction of a new facility. The residents asked the town officials in attendance whether the new facility required any special use permits and whether the community kitchen in particular could be located in the building. Burlington's Chief Building Inspector Jack Childers, who is charged with making such interpretations by the zoning ordinance, was on medical leave and unavailable. Robert Harkrader, Burlington's Planning Director, indicated by letter to the residents that the assistant building inspector had determined that the community kitchen was not permissible on the site, and the other proposed uses were allowable only with a special use permit.

In August 1989, Childers wrote to intervenor's attorney informing him that he had in fact made a determination in 1986 that each of the proposed uses was appropriate, and that this interpretation still stood. He had not previously been made aware of the intervening interpretation, or that one had been requested. A copy of this letter was sent to petitioner Harvey Allen's attorney and petitioner appealed this ruling to the Burlington Board of Adjustment. The Board affirmed the building inspector's interpretation, holding that petitioner was not an aggrieved party, his appeal was not timely filed, and the building inspector's interpretation was correct.

Petitioner then appealed to the Alamance County Superior Court. On 9 November 1989, respondent Allied Churches was granted leave to intervene in the appeal. The court affirmed the Board's ruling by order entered 22 December 1989. Petitioner appeals.

Michael B. Brough & Associates, by Frayda S. Bluestein and Michael B. Brough, for petitioner-appellant.

Robert M. Ward for respondent-appellee.

Wishart, Norris, Henninger & Pittman, P.A., by Margaret C. Ciardella, Robert B. Norris, and June K. Allison, for intervenor-respondent-appellee.

WELLS, Judge.

Petitioner initially assigns error to the court's ruling that he was required to prevail on the preliminary issues of standing and timeliness by a vote of four-fifths of the members of the Board. Due to our disposition of this appeal, we need not reach or decide this issue.

Petitioner next assigns error to the trial court's decision upholding the Board of Adjustment's holdings that he is not an aggrieved party, that his appeal is time-barred, and affirming the building inspector's interpretation. We affirm in part and reverse in part.

The scope of review for decisions made by a Board of Adjustment sitting as a quasi-judicial body involves:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Town and Country Civic Organization v. Winston-Salem Zoning Bd. of Adjustment, 83 N.C. App. 516, 350 S.E.2d 893 (1986), *disc. review denied*, 319 N.C. 410, 354 S.E.2d 729 (1987). Petitioner claims that the decision of the town board is legally erroneous and not supported by competent evidence in the whole record and should not have been affirmed.

[1] We first address the issue of standing. Appeals may be taken to the Board of Adjustment from a building inspector's decision only by a "person aggrieved" by that decision. N.C. Gen. Stat. § 160A-388(b) (1987); Burlington Zoning Ordinance § 32.15(H). The Board in this case found that petitioner was not an aggrieved party, and the trial court affirmed this determination. This conclusion is not supported by the evidence in the record. An aggrieved party is one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property. *Concerned Citizens of Downtown Asheville v. Board of Adjustment of the City of Asheville*, 94 N.C. App. 364, 380 S.E.2d 130 (1989). The record reveals competent evidence of such special damages through petitioner's own testimony. Respondents' expert testified in general terms about the neighborhood and his opinion as to the appropriateness of the proposed uses in the area. We find nothing in his testimony which could reasonably be concluded to negate petitioner's testimony about his property. Petitioner is a person aggrieved for purposes of this action.

[2] We turn next to the issue of timeliness. The trial court affirmed the Board's determination that petitioner was time-barred from bringing this appeal, relying on the local ordinance and laches. Burlington Zoning Ordinance § 32.15(H) provides that appeals are to be taken within a "reasonable time." Reasonable is not defined. In making a determination of what is reasonable, the time begins

to run when a party has actual or constructive notice of the zoning decision. *See Town & Country Civic Organization, supra.* There is no evidence that petitioner had actual notice of the building inspector's decision until the 10 August 1989 letter. Petitioner appealed this decision on 8 September 1989, a reasonable period.

Respondents' claim focuses on assertions of constructive notice, particularly from a series of newspaper articles dealing with the shelter. The articles mention the possibility of an expanded use of the property, but we cannot say that they are so definite that petitioner should be charged with notice of any zoning interpretation regarding the proposed uses before the appearance of the sign on the property in April 1989.

Petitioner concedes that he had constructive notice of the interpretation allowing the homeless shelter, since it has been in operation since 1986, and is barred from challenging the operation of the shelter as it currently stands. He claims that this time bar does not apply, however, to the planned expansion of the shelter. We disagree. This appeal is from the 1986 interpretation of permissible uses of the property. Petitioner lost his right to challenge that portion of the interpretation dealing with the shelter. His appeal rights do not resurface simply because a use which has been found to be permissible on the property is being expanded. Any challenge to this expansion would have to be based on factors other than use, and any such factors are not before us.

Petitioner is not barred by the ordinance time requirements from challenging the interpretation relating to the Good Shepherd Community Kitchen, adult day-care, and offices. He is also not barred by laches. Laches will only work as a bar when the claimant knew of the existence of the grounds for the claim. *See Cieszko v. Clark*, 92 N.C. App. 290, 374 S.E.2d 456 (1988). There has been no showing that petitioner knew of the grounds for this appeal before the 10 August 1989 letter, and we cannot agree that the newspaper stories charged him with this knowledge.

The interpretation which forms the crux of this appeal compared the kitchen with a boarding house, the adult day-care center with a rooming house, and construed the offices as an accessory use. Under the table of permitted uses in the city code, each use was then permissible as of right on the property. Burlington Zoning Ordinance § 32.9. We shall address each use *seriatim.*

Good Shepherd Community Kitchen

[3] The city code defines a boarding house as "[a] dwelling where meals or lodging and meals are provided for compensation." Burlington Zoning Ordinance § 32.22 (9). "Dwelling" is defined as "[a] building designed for or used by one (1) or more families for residential purposes but not including a hotel, motel or mobile home." Burlington Zoning Ordinance § 32.22 (17). The usual conception of a boarding house involves a family taking paying guests into its home, with the guests having some degree of permanency, or contracting for fixed periods. 82 Am. Jur. 2d, *Zoning and Planning*, § 114, p. 578 (1976); Annotation, *Zoning—Lodging House or Boardinghouse*, 64 A.L.R.2d 1167 (1959). Each case, however, must be determined by its own facts and the language of the ordinance. *Id.*

A primary factor taken into consideration in determining what is a boarding house is the transiency of the clientele. *Id.* This is consistent with the language of the ordinance, which excludes hotels and motels from the definition of dwelling. Though there is testimony in the record which indicates that the Good Shepherd Community Kitchen serves some people regularly, it is in the nature of such operations to primarily serve transients. In finding a residential purpose in the facility, the trial court also relied on the operation of the shelter. While we recognize that the building inspector is simply required to find a use to which the proposed use is "most similar," *see* Burlington Zoning Ordinance § 32.9, the inspector's interpretation regarding the community kitchen stretches the ordinance too far. The decision to affirm it was erroneous.

Adult Day-Care Center

The city code defines a rooming house as "[a] dwelling where lodging without meals is provided for compensation." Burlington Zoning Ordinance § 32.22 (44). There is little in the record to indicate exactly what this day care would entail. Giving the words their ordinary meaning, we hold that it is reasonable to assume that a good number of those who partake of this service will do so for an extended period. We have many of the same difficulties with this interpretation that applied to the community kitchen, but the difference in purpose, and the lessened likelihood of transient clients makes this interpretation more reasonable. We cannot agree that the Board's decision to affirm it was erroneous. It is therefore affirmed.

Allied Churches Offices

We also do not perceive any grounds for reversing the decision to affirm the inspector's interpretation regarding the offices. An accessory use is one customarily incidental and subordinate to the principal use or structure. Burlington Zoning Ordinance § 32.22(3). It was reasonable to assume that the organization would need offices to coordinate the activities it carries on in the building, and that such a use is customarily incidental and subordinate to the principal uses of the land. Allied Churches may rely on this interpretation to operate offices in the R-9 zone which are in fact related to the permissible uses. Petitioner has conceded that *any* office use is permissible in the O-I zone.

To summarize, we hold that the Board properly held that petitioner may not challenge the expansion of the homeless shelter on the grounds of the use of the property. The trial court's affirmation of the Board's upholding of the inspector's interpretation is affirmed regarding the operation of an adult day-care center, and reversed regarding the operation of the Good Shepherd Community Kitchen. The kitchen is not permissible as of right under the provisions applicable to boarding houses. The Board's upholding of the interpretation is also affirmed pertaining to the operation of Allied Churches' offices in the R-9 zone which are in fact related to the permissible uses. Operation of offices in the O-I zone are permissible according to the letter of the code.

Affirmed in part; reversed in part.

Judges COZORT and LEWIS concur.

CHEROKEE HOME DEMONSTRATION CLUB, PLAINTIFF v. MABLE OXENDINE, ORIGINAL DEFENDANT, AND RUTH OXENDINE, VILER J. CHAVIS, FANCY J. LOCKLEAR, PARREE C. JACOBS, GEORGIA LOCKLEAR, CATHERINE CHAVIS, LILLIE MAE WOODS, BERNICE LOCKLEAR, JESSIE B. CHAVIS, PATTIE CHAVIS, AND MYRTLE LOCKLEAR, ADDITIONAL PARTIES DEFENDANT, AND RUTH OXENDINE, MABLE OXENDINE, VILER J. CHAVIS, FANCY J. LOCKLEAR, PARREE C. JACOBS, GEORGIA LOCKLEAR, CATHERINE CHAVIS, LILLIE MAE WOODS, BERNICE LOCKLEAR, JESSIE B. CHAVIS, PATTIE CHAVIS, AND MYRTLE LOCKLEAR, THIRD PARTIES PLAINTIFF v. MAUDE LOCKLEAR, LOU ELLEN LOWERY, DOVIE SCOTT, ROY EVERETT, LEONARD LOCKLEAR, LULA BRYANT, MAE BRYANT, AND SHEILA LOWERY, ASSOCIATED UNDER THE NAME OF CHEROKEE HOME DEMONSTRATION CLUB, THIRD PARTIES DEFENDANT

No. 9016DC145

(Filed 20 November 1990)

1. **Associations and Clubs §§ 24, 27 (NCI4th)— unincorporated civic organization—title to real property—right to sue in own name—registration**

While N.C.G.S. § 39-24 permits an unincorporated civic association to hold real property in its common name, the association must be registered in accordance with N.C.G.S. § 66-68 and must allege such registration in order to bring a suit concerning such property in its own name. N.C.G.S. § 1-69.1.

Am Jur 2d, Associations and Clubs §§ 11, 13.

Power and capacity of members of unincorporated association, lodge, society, or club to convey, transfer, or encumber association property. 15 ALR2d 1451.

2. **Associations and Clubs § 16 (NCI4th)— home demonstration club—unincorporated association—readmittance to membership—failure to state claim**

The counterclaim and complaint of defendants and third party plaintiffs were insufficient to show that they are entitled to readmittance to membership in plaintiff home demonstration club under a provision of the handbook of the North Carolina Extension Homemaker Association, Inc. stating that membership in that organization will not be denied on the basis of "color, race, or creed" where the club has no constitution, bylaws, rules or other provisions controlling its membership; the fact that club members in the past loosely adhered

to guidelines of the State organization was insufficient to show that the club was under the auspices of that organization; and defendants and third party plaintiffs do not contend that they were denied membership based upon any ethnic, religious or racial practices of the club.

Am Jur 2d, Associations and Clubs §§ 19, 41.

APPEAL by defendant Mable Oxendine, additional parties defendant and third parties plaintiff (hereinafter referred to as "Group I") from an order dismissing their claims on 2 October 1989 by *Judge R. Frank Floyd, Jr.* in District Court, ROBESON County. Plaintiff and third party defendants (hereinafter referred to as "Group II") cross-appeal dismissal of their complaint. Heard in the Court of Appeals 18 September 1990.

Plaintiff, Cherokee Home Demonstration Club ("the Club") was at all relevant times in this action an unincorporated civic organization located in Robeson County, North Carolina. In 1962, the plaintiff club was allegedly deeded .12 acres of land by Deed of Gift from Ruth Oxendine, Conrad Oxendine and Redell Oxendine. The original members of the Club erected a clubhouse on the property. The clubhouse was used for approximately fifteen years for Club activities and fellowship dinners.

The organization was never incorporated, and its name, officers, and process agent were never registered in the Office of the Clerk of Superior Court of Robeson County. Insofar as the record shows, the Club had no rules, regulations, bylaws, or membership cards. Instead, the members apparently followed the guidelines of the North Carolina Extension Homemakers Association, Inc., a state organization administered through the offices of North Carolina County Agents.

At some point, Group I alleges that "because of the dictatorial, high-handed and imperious manner with which Maude Locklear and others [Group II] controlled the meetings, [Group I] attended the meetings with less frequency, but always continued their interest as homemakers."

As fewer of the members attended meetings, Group II decided to rotate meetings in their homes. They decided to lease the clubhouse for seven years to the Lumbee Regional Development Association as a day-care center.

In 1986-1987, Group I renewed membership in the North Carolina Extension Homemakers Association, Inc., and they all applied for readmission to the Club; however, their applications were denied by Group II.

In September 1987, the Lumbee Regional Development Association terminated its lease.

In October 1987, Mable Oxendine [Group I] obtained food for distribution to needy families in Robeson County. She stored the food at the clubhouse and also changed the locks on the doors, forwarding a key to Maude Locklear [Group II].

On 13 January 1988 the Cherokee Home Demonstration Club [Group II] filed suit against Mable Oxendine and Group I alleging, *inter alia*, that "Mable Oxendine did go on, without legal authority or justification, the premises belonging to Cherokee Home Demonstration Club." The plaintiff further alleged that Mable Oxendine had no legal authority to change the locks on the clubhouse and that she "interfered with the business contract of [the Club] by forcing the renter of the building to vacate the premises." Group II sued Mable Oxendine for trespass, unlawful interference with business contract, unlawful conversion of real property, and it further requested an order commanding the return of the premises and enjoining the defendant from "interfer[ing] with the Plaintiff or any of its civic functions."

The January 1988 action was joined with another action by Group I against Maude Locklear and Lou Ellen Lowery filed in September 1987 in Superior Court. The 1987 action was transferred to District Court on 18 April 1988.

On 8 November 1988, Mable Oxendine filed an amended answer, joining necessary additional parties defendants and asserted a counterclaim along with third party plaintiffs' complaint. The counterclaim and third party complaint alleged *inter alia* that the monies collected by Group II from the Lumbee River Development Association, amounting to approximately $30,600, was

> used as the membership desired, partially defraying the expenses of one member on a trip to the Holy Land, gifts to various fire departments, various funerals and charitable purposes, paying off the indebtedness of the building which those who borrowed were never required personally to pay, and continuing to rent the building to LRDA until the lease for

> the same expired in October 1987. . . . That Maude Locklear and Lou Ellen Lowery hold more than $12,100.00 . . . of funds belonging to the [Club] . . . That Maude Locklear and Lou Ellen Lowery and other third parties defendants used more than $12,500.00 of the members of the [Club] named as third parties plaintiffs and third parties defendants [Group II], paying all of the expenses of their suppers, personal meetings, and any other purpose which they individually desired. . . .

Group I seeks damages for failure to admit them as members to the Club, a declaratory judgment that all of Group I are entitled to be declared members of the Club, a preliminary injunction to restrain each of the third party defendants from further interfering with the Group I memberships in the Club, a "declaration" by the court that all of Group I are entitled to free use and enjoyment of the clubhouse building, and a "decree" by the court that third party plaintiffs are entitled to hold free elections as provided for by the North Carolina Extension Homemakers Association, Inc.

Group I and Group II both made motions to dismiss. On 18 October 1989, Judge Floyd dismissed both complaints. Plaintiff Club and third parties defendants [Group II], and Mable Oxendine, all additional parties defendants and all third parties plaintiffs [Group I] appeal.

Donald W. Bullard for plaintiff, third party defendants. (Group II).

Britt and Britt, by Evander M. Britt, Sr. and William S. Britt, for Mable Oxendine and additional parties defendant/third party plaintiffs. (Group I).

LEWIS, Judge.

I. Dismissal of Plaintiff Club's Complaint

[1] Group II contends that their complaint was improperly dismissed by the trial judge. Their complaint was dismissed because plaintiff Home Demonstration Club allegedly does not have capacity to sue in its own name. An unincorporated association may sue in its own name, without naming any of the individual members composing it, but only if the association alleges in its complaint the "specific location of the recordation required by G.S. 66-68." G.S. § 1-69.1. G.S. § 66-68 requires an association to file a certificate in the office of the register of deeds in the county where the association does

business, showing the name of the association, the name of the owner or agent, and the addresses of each. Group II acknowledges this requirement, but distinguishes this situation on the grounds that it can sue and be sued in its own name regarding real property held by the Club pursuant to G.S. § 39-24.

G.S. § 39-24 provides:

> [v]oluntary organizations and associations of individuals organized for charitable, fraternal, religious, social or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names and may sue and be sued in their common or corporate names concerning real estate so held. . . .

Group I challenges the Club's capacity to sue and cites us to the case of *Highlands Township Taxpayers Assoc. v. Highlands Township Taxpayers Assoc., Inc.*, 62 N.C. App. 537, 303 S.E.2d 234 (1983), as controlling. In *Highlands Township*, this Court found that the failure of plaintiff unincorporated association to comply with the directives of G.S. § 1-69.1 was fatal to its complaint. "[B]efore an unincorporated association may gain the privilege of instituting a lawsuit in its common name, first there must be recordation of the necessary information required by G.S. 66-68 and the allegation of its specific location." *Id.* at 539, 303 S.E.2d at 236. The court upheld dismissal. The *Highlands* court was faced with a conflict between the recordation requirements of G.S. § 1-69.1 and G.S. § 66-71, which stated that failure to record as required by G.S. § 1-69.1 was a misdemeanor, but that "this Article does not prevent a recovery by such person in any civil action brought in any of the courts of this State." The court found that G.S. § 1-69.1 controlled the action, applying rules of statutory construction which are dispositive of the present issue.

G.S. § 39-24 was enacted in 1939. The amendment to G.S. § 1-69.1, which added the requirement of an allegation of G.S. § 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective 1 October 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, G.S. § 1-69.1, being the later enactment, will control or be regarded as a qualification of the earlier statute. *Id.; see also State v. Hutson*, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971). The requirements of G.S. § 1-69.1

are mandatory and failure to satisfy them is not exonerated by G.S. § 39-24. *Highlands, supra,* at 540, 303 S.E.2d 234, 236. The trial court was correct in dismissing plaintiff's complaint.

II. Dismissal of Group I's Counterclaim/Third-Party Complaint

Group I appeals the dismissal of their counterclaim/third-party complaint. Group II's motion to dismiss was granted based upon G.S. § 1A-1, Rule 12(b)(6), failure to state a claim upon which relief can be granted.

[2] Group I first seems to argue that the trial court erred in dismissing their complaint because they were denied readmittance to the Club based upon some language in the North Carolina Extension Homemaker Association, Inc.'s handbook which states that membership in that organization will not be denied based upon "color, race, or creed." Group I argues that this creed entitles *any* person who applies for membership to be admitted in plaintiff club. We disagree. The plaintiff has no constitution, by-laws, rules or other governing provisions which control their membership. They have not adopted any other creed or constitution as their own. The fact that its members in the past have loosely adhered to the guidelines of the North Carolina Extension Homemaker Association Inc. is insufficient to show that this local group is in any way under the auspices of that State organization. Group I is not arguing that they were denied membership based upon any ethnic, religious or racial practices of the Club. There are no State or Federal statutes referred to in the complaint, and we can think of none applicable to this situation. Under these circumstances, their complaint must fail.

Group I also argues that the trial court erred in dismissing their complaint because each of the individuals who were members in the Club in 1962 took joint title to the property upon which the clubhouse is situated. They rely upon *Venus Lodge No. 62 F. & A.M. v. Acne Benevolent Ass'n., Inc.*, 231 N.C. 522, 58 S.E.2d 109 (1950), which held that a conveyance to an unincorporated association is not void at common law, but instead vests title to the property in the individual members of the Association. Group II argues that G.S. § 39-25 controls and therefore the conveyance is properly held in the name of the Cherokee Home Demonstration Club.

We agree with Group II and affirm. While it is true that G.S. § 1-69.1 requires an unincorporated association to allege its registration for purposes of bringing suit in its collective name, there is no concomitant requirement attached to its right to hold property under G.S. § 39-25. While this produces a somewhat awkward result, it is the responsibility of the legislature to clarify the rights and obligations of these associations to sue and hold real property. We find that under the wording of G.S. § 39-25, an unincorporated, unregistered association may hold real property in its common name; however, if the association wishes to bring suit concerning this property, it must be registered in accordance with G.S. § 66-68.

III. Conclusion

For the reasons stated above, we affirm the trial court's dismissal of plaintiff's complaint, and dismissal of defendant/third-party plaintiffs' counterclaim/third-party complaint.

Affirmed.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. REAL AUBIN

No. 9012SC8

(Filed 20 November 1990)

1. Searches and Seizures § 12 (NCI3d)— investigative stop— reasonable suspicion of impaired driving

An officer had a reasonable suspicion that defendant was operating his vehicle while impaired so that an investigative stop of defendant's vehicle was lawful where the officer observed defendant through his rear view mirror slowing his speed on I-95 to approximately 45 miles per hour and weaving within his lane.

Am Jur 2d, Searches and Seizures §§ 42, 43, 45, 99.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 89 L.Ed.2d 939.

2. Searches and Seizures § 12 (NCI3d)— investigative stop— questions not impermissible

An officer did not exceed the permissible scope of his initial stop of defendant's vehicle to investigate whether defendant was driving while impaired when he asked defendant about his plans for returning the rental car he was driving to Newark, New Jersey, whether he still lived in Quebec, Canada, what he did for a living, and how the weather was in Florida.

Am Jur 2d, Searches and Seizures §§ 42, 43, 45, 99.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 89 L.Ed.2d 939.

3. Searches and Seizures § 14 (NCI3d)— consent to search— voluntariness

The trial court did not err in concluding that defendant voluntarily consented to a search of his car for contraband after an investigatory stop based on a suspicion that defendant was driving while impaired where the evidence supported findings by the court that defendant on three occasions orally gave the officer permission to search his car with no apparent reservations, that defendant was not held in the car for any improper length of time and was not subjected to any pressure by the officer, that defendant displayed an educated and understanding use of the English language during the stop, that the officer did not restrain defendant's movements during the search, and that defendant was in sole possession of his keys, license and identification papers throughout the search. The fact that defendant may have had some difficulty understanding the consent form, which he did not sign, did not require the conclusion that he did not intelligently and voluntarily consent to the search.

Am Jur 2d, Searches and Seizures §§ 46, 47, 100.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 89 L.Ed.2d 939.

4. Searches and Seizures § 38 (NCI3d)— consent to search car— lifting of back seat

An officer did not exceed the scope of defendant's oral consent to a search of his car for contraband when he lifted

the corner of the back seat out of position and discovered cocaine under the seat.

Am Jur 2d, Searches and Seizures §§ 46, 47, 100.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 89 L.Ed.2d 939.

APPEAL by defendant from judgment entered 5 September 1989 in CUMBERLAND County Superior Court by *Judge Gregory A. Weeks*. Heard in the Court of Appeals 25 September 1990.

Defendant was arrested and charged with trafficking in cocaine by possession of 400 or more grams, trafficking in cocaine by transportation of 400 or more grams, and intentionally keeping or maintaining a motor vehicle for keeping or selling controlled substances. He pled guilty to trafficking by possession and trafficking by transportation, reserving his right to appeal the denial of his pretrial motion to suppress evidence and statements.

At the suppression hearing (Judge Giles R. Clark presiding), State's evidence tended to show that defendant was stopped while driving north on I-95 in Cumberland County by Trooper L. E. Lowry. Lowry was in pursuit of another vehicle when he observed in his rear view mirror that defendant's car was slowing markedly and weaving within its lane. Lowry then slowed his vehicle, eventually pulling off to an emergency lane to allow defendant to pass. He then pulled back onto the highway behind defendant, drove up on the left side to observe the driver, fell back behind defendant's car, and activated his blue light. Defendant pulled off to the side of the road.

Lowry then approached the driver's window and asked for his license and registration. Defendant produced a Canadian driver's license written in French and a rental car agreement. The weather was windy, so Lowry asked defendant to move to his patrol vehicle so he could determine in a closed space whether defendant had any odor of alcohol about him. When they were in the car, Lowry told defendant he had been stopped because of his erratic driving, and defendant responded that he was okay. Lowry spoke to defendant about his travels, and was told that he had flown to Florida from Montreal, and was returning the rental vehicle to Newark, New Jersey. Lowry told defendant of a "program" where cars heading north were being searched for weapons and contraband,

and asked for his consent to search his car. Defendant said okay.

Lowry then filled out a consent to search form and pointed to the place for defendant to sign. Defendant did not sign the form, but stated "You're all right to look in the car," and "You can go and check my car. No problem. I don't understand you no way." The two then exited the car. Defendant's driver's license and the rental agreement were returned some time before they got out of the car.

Defendant unlocked the trunk and front passenger door for Lowry. Lowry searched the car. Defendant stood behind him, periodically making statements and asking questions unrelated to the search. Lowry opened the back passenger door and searched the back seat area, including lifting the bottom portion of the seat up and out of position. He noticed what appeared to be cocaine under the seat and arrested defendant.

Defendant's evidence focused on his claims that he had driven properly at all times and was stopped because he matched a drug courier profile, that he spoke little English and had difficulty understanding Lowry, and that he never consented to the scope of the search which was carried out.

The trial court denied defendant's motion on 10 March 1989. An order was filed on 19 June 1989, *nunc pro tunc*. Defendant then pled guilty pursuant to a plea arrangement, and was sentenced to 24 years' imprisonment and fined $100,000.00.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

Tharrington, Smith & Hargrove, by Wade M. Smith, Roger W. Smith, and C. Mark Holt, for defendant-appellant.

WELLS, Judge.

Defendant brings forward 19 assignments of error from the trial court's order challenging the court's findings and conclusions regarding the initial stop of defendant and resulting questioning, the purported consent, and the scope of the search. We find no error.

[1] We first address the initial stop. An officer's stop of a car to investigate a potential traffic offense does not require probable cause, but it is governed by the reasonableness standards of the

Fourth Amendment. *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989). This Court set out the guidelines for such stops in *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990):

> A police officer may conduct a brief investigative stop of a vehicle where justified by specific, articulable facts which give rise to a reasonable suspicion of illegal conduct. However, police may not make *Terry*-stops based on the pretext of a minor traffic violation.
>
> In determining the traffic stop was pretextual, the trial court should look at what a reasonable officer *would* do rather than what an officer *could* do. (Citations omitted).

The trial court made extensive findings of fact in concluding that Trooper Lowry did have a reasonable suspicion that defendant was operating his vehicle while under the influence and that a reasonable officer would have stopped him. The court found that Trooper Lowry observed defendant through his rear view mirror slowing his speed to approximately 45 miles per hour and weaving within his lane. Our review of the record reveals competent evidence to support the trial court's findings, and we are accordingly bound by them. *Morocco, supra.*

We also hold that these findings support the trial court's conclusions. In *Jones, supra*, we held that observations of a car going 20 miles an hour below the posted speed and weaving within its lane are sufficient to raise a reasonable suspicion that the driver is operating the vehicle while impaired. Given the public interest in removing impaired drivers from the highways, these observations are also sufficient to support a conclusion that a reasonable officer would have stopped defendant to investigate the cause of this erratic driving. *See Morocco, supra.*

[2] We next address defendant's contention that Trooper Lowry improperly detained and questioned him for purposes other than an investigation of impaired driving. The trial court found that Trooper Lowry asked for defendant's license and registration and was given a Canadian driver's license and a rental car agreement. Defendant was asked to move to Lowry's patrol vehicle so that Lowry could detect the presence of any alcohol on his person and to observe him walking to the car. The court also found that Lowry asked defendant about his residence and travel plans and was told that although defendant lived in Quebec, he was returning the

car to Newark. Lowry then handed defendant back his license and the agreement and asked for and received consent to search his car. The court then found that Lowry attempted to get defendant to sign a consent form, which defendant declined to do, but repeated his consent orally. Our review of the record again reveals competent evidence to support these findings.

We recognize that an investigative stop and inquiry must be reasonably related in scope to the initial justification for it. *State v. Jones, supra.* In *Jones*, this Court refused to adopt a rule which would limit an officer's ability to investigate suspicious matters uncovered during an investigatory stop. In *Morocco*, Trooper Lowry asked about the driver's vehicle and registration in the patrol car while filling out a warning ticket. We held that such "polite conversation" was not improper. In this case, Trooper Lowry asked defendant about his plans for returning the car, whether he still lived in Quebec, what he did for a living and how the weather was in Florida. As in *Morocco*, this conversation did not exceed permissible police behavior. Lowry's investigation was reasonable in subject matter and scope.

[3] Defendant also contends that he did not freely and voluntarily consent to the search of his car, and that if he did, the search exceeded the scope of the consent given. We disagree.

When the State relies on a purported consent to justify a warrantless search, it has the burden of proving that the consent was voluntary and not the result of express or implied coercion. *State v. Glaze*, 24 N.C. App. 60, 210 S.E.2d 124 (1974). Voluntariness is a question of fact to be determined from all the surrounding circumstances. *Id.* At a hearing to determine the voluntariness of a defendant's consent to a search of his property, the weight to be given the evidence is peculiarly a determination for the trial court, and its findings are conclusive when supported by competent evidence. *State v. Long*, 293 N.C. 286, 237 S.E.2d 728 (1977). *See also State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983).

In this case, the trial court's findings of fact, supported by competent evidence, support the conclusion that defendant freely, intelligently, and voluntarily consented to the search of his car. The court's findings indicate that defendant responded three separate times with no apparent reservations that Trooper Lowry could search, look in, and check the car. They do not indicate that defendant was held in the car for any improper length of time, or was

subjected to any pressure from Trooper Lowry. While findings do indicate that defendant may have had some difficulty understanding the consent form, or the purpose for it, this does not require the conclusion that he did not intelligently and voluntarily consent to the search. The trial court specifically found that defendant displayed an educated and understanding use of the English language during the stop. Finally, the court found that Lowry did not threaten or harass defendant, did not restrain his movements during the search, and that defendant was in sole possession of his keys, license and identification papers throughout the search.

[4] These findings of fact also support the conclusion that Trooper Lowry's search of defendant's car did not exceed the scope of defendant's consent. In *Morocco, supra*, Lowry searched the trunk and back seat of defendant's vehicle, where he found a tote bag. This Court upheld the scope of the search, holding:

> The defendant's consent to search the automobile for contraband entitled Lowry to conduct a reasonable search anywhere inside the automobile which reasonably might contain contraband. . . .

Similarly, in *State v. Belk*, 268 N.C. 320, 150 S.E.2d 481 (1966), the Court held that defendant's consent to the officer's search of his trunk implied consent to search any part of his car. It found support for this holding in the fact that none of the defendants objected to the search once it was begun. In this case, defendant gave oral consent to a search of his car for contraband. He did not object in any way to what Trooper Lowry was doing. It was reasonable for Lowry to lift up the corner of the back seat in the progress of his search.

Defendant has also assigned error to the court's failure to make a long list of alternate and additional findings of fact. As stated above, we are bound by the trial court's findings of fact if they are supported by competent evidence. We have reviewed a videotape exhibit submitted at trial and do not find it so conclusively inconsistent with the trial court's findings that it would lead us to overrule any of them. Conflicts in the evidence at a suppression hearing are to be resolved by the trial court. *See State v. Johnson*, 322 N.C. 288, 367 S.E.2d 660 (1988). The court must make findings resolving conflicts in the evidence which are *material* to its decision. *See State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823 (1986). In *State v. Ghaffar*, 93 N.C. App. 281, 377

S.E.2d 88 (1989), we vacated an order of the trial court because of insufficient findings on the questions of the officer's reasonable suspicion, the appropriateness of the investigatory detention, and the voluntariness of the consent. In this case, however, there are sufficient findings to support the conclusions deciding each issue. These assignments of error are overruled.

There is competent evidence in this record to support the trial court's findings, and these findings in turn support the court's conclusions.

No error.

Judges COZORT and LEWIS concur.

LARRY GORDON BRAXTON, PLAINTIFF v. ANCO ELECTRIC, INC., DEFENDANT

No. 9010SC139

(Filed 20 November 1990)

Master and Servant §§ 86, 87 (NCI3d)— injury in Virginia—North Carolina workers' compensation collected—North Carolina statute applied—negligence action barred

The trial court erred by granting defendant's motion to dismiss a negligence action where plaintiff was the employee of a plumbing subcontractor and defendant was the electrical subcontractor on a job in Virginia; plaintiff was injured in a fall from a ladder allegedly caused by an electrical explosion; plaintiff collected workers' compensation under the North Carolina statute; and North Carolina was the place of plaintiff's residence, the location of defendant's business, and the place of the initial hiring. Although defendant contended that the Virginia Workers' Compensation Act would have barred plaintiff's claim, the *lex loci* principle does not apply in dealing with conflicting workers' compensation laws where the interest and public policy of North Carolina override. Plaintiff sought and received workers' compensation benefits pursuant to the North Carolina Workers' Compensation Act, and it is clear that all parties are North Carolina citizens, North Carolina is the state with the greatest interest in the matter, and North

Carolina has a significant interest in applying its own law based on the employment relationship and its connection with North Carolina. N.C.G.S. § 97-10.2.

Am Jur 2d, Workmen's Compensation §§ 55, 56, 63, 86, 88.

Modern status of rule that substantive rights of party to a tort action are governed by the law of the place of the wrong. 29 ALR3d 603.

APPEAL by plaintiff from order entered 5 February 1990 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 30 August 1990.

Plaintiff, a resident of Raleigh, North Carolina, was employed as a plumber's helper for Dubberly and Son Plumbing and Electrical (Dubberly), a North Carolina corporation. Plaintiff began working on the construction of a shopping center in Franklin, Virginia, a project for which Dubberly was plumbing subcontractor. The general contractor for the project was Bailey and Associates, a North Carolina corporation. Defendant Anco Electric, Inc., also a North Carolina corporation, was electrical subcontractor for the construction project.

On 11 March 1987, plaintiff was injured in a fall from a ladder which plaintiff alleges was the result of an electrical explosion. Dubberly began paying plaintiff workers' compensation benefits beginning 28 March 1987 pursuant to the North Carolina Workers' Compensation Act.

Plaintiff brought this civil action against defendant Anco alleging the negligence of Anco's employees in proximately causing plaintiff's injuries and sought punitive and compensatory damages. Defendant moved to dismiss on the grounds that plaintiff's action was barred by the Virginia Workers' Compensation Act. The trial court granted the motion to dismiss.

From this order, plaintiff appeals.

Edelstein, Payne & Nelson, by Steven R. Edelstein, for plaintiff-appellant.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Donnell Van Noppen, III, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten and Loann S. Meekins, for defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting defendant's motion to dismiss. For the reasons set forth below, we reverse the trial court's order.

Under North Carolina law, the right of an employee to maintain a negligence action against persons other than the employer and those carrying out the employer's business is governed by N.C. Gen. Stat. § 97-10.2 (1985) of the N.C. Workers' Compensation Act. *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E.2d 548 (1966). The Act provides for a right of action on behalf of an injured employee against a third party even though the injured party applied for and received workers' compensation benefits. *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953).

In contrast, Virginia law prohibits a similar right of action. Under the Virginia Workers' Compensation Act, "[a]n employee who has accepted the provisions of the Act is therefore limited to the exclusive rights and remedies under the Act (Section 65.1-40) as against his employer." *Snowden v. Virginia Elec. & Power Co.*, 432 F. Supp. 266, 268 (E.D.Va. 1976). Any "owner, contractor, or subcontractor who subcontracts work which is part of his trade to another person or a subcontractor who in turn subcontracts with another person" is liable for paying compensation to any worker "employed in the work that each undertakes." *Smith v. Weber*, 3 Va. App. 379, 382-83, 350 S.E.2d 213, 215 (1986); *see* Va. Code Ann. §§ 65.1-29 to -31 (1987). Further, recovery under the Act is the exclusive remedy where an employee is injured by a fellow employee or statutory employee. *See Evans v. Hook*, 239 Va. 127, 387 S.E.2d 777 (1990); *Smith v. Horn*, 232 Va. 302, 351 S.E.2d 14 (1986). However, under Va. Code Ann. § 41 (1987), an employee may bring a tort action against an "other party" who is a "stranger to the trade, occupation, or business of his employer." *Conlin v. Turner's Express, Inc.*, 229 Va. 557, 559, 331 S.E.2d 453, 455 (1985).

Thus, Virginia prohibits an injured employee of a subcontractor from bringing a tort action against a general contractor (his statutory employer), *Slusher v. Paramount Warrior, Inc.*, 336 F. Supp. 1381 (W.D.Va. 1971); prohibits an employee from bringing an action against the subcontractor of his employer where the subcontractor is not a stranger to the employer's work, *Kast v. PPG Industries, Inc.*, 664 F.Supp. 237 (W.D.Va. 1987); *Whalen v. Dean Steel Erection Co.*, 229 Va. 164, 327 S.E.2d 102, *appeal dis-*

missed, 474 U.S. 802, 106 S.Ct. 33, 88 L.Ed.2d 26 (1985); and prohibits an injured employee of a subcontractor from bringing an action against another subcontractor on the job of the same general contractor. *Utica Mut. Ins. Co. v. Potomac Iron Works, Inc.*, 300 F.2d 733 (D.C. Cir. 1962) (applying Virginia law).

Defendant contends that Virginia's exclusive remedy provision governs and that plaintiff's claim should be disallowed. While we acknowledge that normally the law of the *lex loci* governs, we conclude that under the facts of this case it should not. Accordingly, for the reasons set forth below, we disagree and reverse the trial court's order dismissing plaintiff's action.

Traditionally, North Carolina has adhered to the conflict of laws rule that the *lex loci* determines matters affecting substantial rights. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988); *Charnock v. Taylor*, 223 N.C. 360, 26 S.E.2d 911 (1943). In North Carolina, where a plaintiff is injured in another state, the law of that state will determine substantive issues in a negligence action. *Boudreau*, 322 N.C. at 335, 368 S.E.2d at 854. However, in dealing with conflicting workers' compensation laws, in *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 96, 305 S.E.2d 528, 532 n.1 (1983), our Supreme Court noted that the *lex loci* principle did not apply where the interests and public policy of North Carolina override.

In *Leonard*, plaintiff was injured in Virginia and filed for, and his widow later received, his workers' compensation benefits under the Virginia Workers' Compensation Act. Following his death, the administratrix brought a third-party tort action in North Carolina against certain manufacturers and distributors of asbestos. In North Carolina, in a negligence action by an injured employee who had received workers' compensation benefits from the employer, the third-party tortfeasor can allege as a *pro tanto* defense the concurring negligence of the employer. *See* N.C. Gen. Stat. § 97-10.2. Unlike North Carolina, however, Virginia had no law either permitting or denying a third-party sued in a negligence action to raise as a defense the employer's negligence. The employer argued that since the injury occurred in Virginia, Virginia law should apply and the defense should not be allowed.

The N.C. Supreme Court determined that North Carolina law applied even though plaintiff received workers' compensation benefits pursuant to the Virginia Workers' Compensation Act stating that

"[i]n the absence of any Virginia law one way or the other on this issue, the rule of *lex loci delicti commissi* does not apply." *Id.* at 96, 305 S.E.2d at 532. The Court further noted that "even if Virginia law clearly prohibited an employer's negligence to be litigated for the limited purposes allowed under North Carolina law, under the facts of this case, the governmental interests and public policy of our state would require us to abjure the *lex loci delicti commissi* rule." *Id.* at 96, 305 S.E.2d at 532 n.1.

Defendant cites *McCann v. Newport News Shipbuilding & Dry Dock Co.*, 177 F. Supp. 909 (E.D.Va. 1959), where the plaintiff, a New Jersey resident employed by a New Jersey company, was injured at defendant's shipyard in Virginia. He made no claim for benefits under the Virginia Workers' Compensation Act, though he had a right to benefits as a statutory employee of the shipyard. However, he did receive benefits under the New Jersey Workers' Compensation Act. The court held that the action was barred under the Virginia law, noting that

> [w]hile the precise question has apparently never been decided in Virginia, as the compensation statutes make no reference to the status of non-residents working in Virginia at the time of the accident, it is believed that Virginia intended to grant such remedies to, and impose such restrictions and limitations upon, such non-residents to the same extent as though they were residents and employed by a Virginia employer.

Id. at 913.

Defendant also cites *Home Indemnity Co. of New York v. Poladian*, 270 F.2d 156 (4th Cir. 1959), in which plaintiff, a resident of the District of Columbia, was employed by a District of Columbia subcontractor and injured in Virginia. The general contractor was a Virginia resident doing business in Virginia. The applicable law in the District of Columbia did not bar a negligence action against the general contractor. The court held that the Virginia Workers' Compensation Act applied since Virginia was the place of injury.

However, the *Home Indemnity* Court noted that "when all the parties reside and make their employment and insurance arrangements in a certain place, they have it in contemplation that the law of that place shall govern their relationships, rather than the purely adventitious circumstance that an injury may occur in another place." *Id.* at 159. Such a proposition did not apply in

Home Indemnity where the general contractor was a Virginia resident and should not be bound by "private arrangements made elsewhere between others." *Id.* Both *McCann* and *Home Indemnity* are thus distinguishable from the present case in which all the parties involved are North Carolina residents and their employment relationship was created in North Carolina.

In the present case, plaintiff sought and received workers' compensation benefits pursuant to the North Carolina Workers' Compensation Act. In contrast, in *Leonard*, the plaintiff received workers' compensation benefits pursuant to the Virginia act, and the court nevertheless applied North Carolina law since Virginia had no law governing the issue. Further, the court noted that the *lex loci* principle did not apply where interests and public policy of North Carolina override. *Leonard*, 309 N.C. at 96, 305 S.E.2d at 532 n.1. It is clear that all parties are North Carolina citizens and North Carolina is the state with the greatest interest in the matter. Thus, the choice of law should not be based on the fortuitous circumstance that an injury occurred elsewhere. North Carolina is the place of plaintiff's residence, the location of defendant's business, and the place of the initial hiring. Thus, North Carolina has significant interests in applying its own law based on the employment relationship and its connection with North Carolina. Pursuant to N.C. Gen. Stat. § 97-10.2, it is the sound public policy of the State of North Carolina to provide for a right of action on behalf of an injured employee against a third party tortfeasor (even if a fellow subcontractor) and even though the injured employee applied for and received workers' compensation benefits.

Therefore, we reverse the trial court's order dismissing plaintiff's claim on the grounds that plaintiff's action was barred by the Virginia Workers' Compensation Act and hold that plaintiff's action is controlled by the North Carolina Workers' Compensation Act.

Reversed.

Judges COZORT and DUNCAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. SHANNON CRONAN, DEFENDANT

No. 9029SC27

(Filed 20 November 1990)

1. **Constitutional Law § 34 (NCI3d)— rape and contributing to the delinquency of a minor—no double jeopardy**

Defendant's prosecution for second degree rape following a guilty plea to contributing to the delinquency of a minor did not constitute double jeopardy because defendant was offered the opportunity to prove that the sexual act and not alcohol-related instances was the basis of the earlier plea but failed to do so. The crimes of second-degree rape and contributing to the delinquency of a minor are legally distinct and defendant's assertion that the factual basis for the acceptance of the guilty plea was solely based upon the sexual act is too speculative.

Am Jur 2d, Rape § 32.

2. **Rape and Allied Offenses § 4.3 (NCI3d)— rape—character of victim—drunkenness—not admissible**

The trial court did not err in a prosecution for second-degree rape by refusing to admit evidence of prior acts and habits of the victim. The proffered testimony as to the victim's alcohol consumption with other people in party settings has no tendency to prove that the victim consented to sexual activity with defendant on the day in question. N.C.G.S. § 8C-1, Rule 402.

Am Jur 2d, Rape §§ 82, 86.

3. **Rape and Allied Offenses § 6.1 (NCI3d)— contributing to the delinquency of a minor—not lesser-included offense of rape**

The trial court did not err in a prosecution for second-degree rape by refusing to instruct the jury on the lesser-included offense of contributing to the delinquency of a minor because the two offenses are legally distinct and contributing to the delinquency of a minor is not a lesser-included offense of second-degree rape pursuant to N.C.G.S. § 14-27.3.

Am Jur 2d, Rape § 110.

APPEAL by defendant from judgment entered 27 September 1989 by *Judge Marvin K. Gray* in HENDERSON County Superior Court. Heard in the Court of Appeals 25 September 1990.

Defendant was charged and convicted of second-degree rape in violation of G.S. § 14-27.3. Following a trial by jury, defendant was sentenced to ten years imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Rebecca B. Barbee, for the State.

Prince, Youngblood, Massagee & Jackson, by Sharon B. Ellis, for defendant-appellant.

JOHNSON, Judge.

On the afternoon of 17 February 1989, the victim, a minor, was attending East Henderson High School. She planned, with her parents' permission, to spend the night with her friend. When the weather turned bad and school ended early, the two girls were picked up by the defendant. Defendant and the victim's friend were residing together at the time and it was at their trailer that the victim planned to spend the night.

After leaving school, the defendant and the two girls made several stops and eventually arrived at the trailer. One of the stops was at the local ABC store. Upon their arrival at the trailer, the three made pizza and an alcoholic fruit punch called "PJ." The three subsequently drank a quantity of "PJ."

The victim testified to the following events on the night of 17 February 1989: (1) that she went to bed around 7:00 p.m. at the trailer; (2) that she awoke and the defendant was on top of her; (3) that the defendant held her down by the arm and shoulder and had sexual intercourse with her; (4) that she kept telling him "no" while fighting him off whereupon he finally stopped; (5) that the defendant and her friend began to argue and fight and that each of them cut their hand with a knife; and (6) that she was afraid to call anyone because she thought that the defendant would shoot her.

At trial, the defendant testified that intercourse did not occur, but that as a result of the victim's drunken state and following her "crazy behavior," he and the victim engaged in some "heavy petting."

On appeal, defendant brings forth three questions for this Court's review. First, defendant contends that his prosecution and sentencing for second-degree rape amounts to double jeopardy. Specifically, he argues that his arrest on a warrant charging him with second-degree rape of the minor victim and his subsequent guilty plea to contributing to the delinquency of the minor victim were founded upon the same facts and therefore violates his constitutional right to be free from double jeopardy. We disagree.

[1] The fundamental and sacred principle of constitutional law provides that:

> a person may not be unfairly subjected to multiple trials for the same offense. Nor may a defendant be punished twice for the same statutory offense. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982), *reh'g denied*, [459] U.S. [1056], 103 S.Ct. 839, 74 L.Ed.2d 1031 (1983). A person's right to be free from double jeopardy is violated not only when he is tried and convicted twice for the same offense but also when one is charged and convicted for two offenses, one of which is a lesser included offense of the other. *See State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

State v. Murray, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984), *overruled* by *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988) (Insofar as *State v. Murray* indicated that larceny is not a lesser included offense of armed robbery.). The burden is on the defendant to plead and to offer evidence to sustain his plea of former jeopardy. *State v. Christy*, 26 N.C. App. 57, 215 S.E.2d 154 (1975).

Defendant voluntarily pled guilty to contributing to the delinquency of a minor based upon the facts alleged in the warrant. Specifically, the warrant provided that the defendant

> knowingly while at least 16 years of age, cause[d], encourage[d] and aid[ed] . . . a juvenile, to drink alcohol, took money from the juvenile to buy alcohol, and . . . committed a sexual act upon the body of [the juvenile] whereby that juvenile could be adjudicated undisciplined. . . .

At trial, the defendant was furnished with an opportunity to plead and offer evidence to sustain his plea of former jeopardy by proving that the sexual act, not the alcohol-related instances were the basis of his earlier plea. This, however, defendant failed

to do. Thus, defendant's assertion that the factual basis for the acceptance of his guilty plea was solely based upon the sexual act is too speculative and wholly insufficient to establish his burden of proof. Further, even though the crimes of second-degree rape and contributing to the delinquency of a minor are related in character and grow out of the same transaction, they are legally distinct and separate crimes. The prosecution for one is not a bar to a prosecution for the other. *Compare, State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987) (defendant's convictions of indecent liberties with a child and incest—all arising from same transaction—no double jeopardy). *See* the third issue for a detailed discussion of the essential elements of each crime. This assignment is overruled.

[2] Second, defendant contends that the trial court erred in refusing to admit evidence of prior acts and habits of the victim. Specifically, defendant argues that the victim's character for drunkenness was pertinent to his defense. We disagree.

G.S. § 8C-1, Rule 404(a)(2) authorizes the admission of defense evidence whenever a character trait of the victim is pertinent in a criminal case. "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." G.S. § 8C-1, Rule 401. Evidence that is not relevant is inadmissible. G.S. § 8C-1, Rule 402. "If proffered evidence has no tendency to prove a fact in issue in the case, the evidence is irrelevant and must be excluded." *State v. Coen*, 78 N.C. App. 778, 780-81, 338 S.E.2d 784, 786, *disc. rev. denied, dismissal allowed*, 317 N.C. 709, 347 S.E.2d 444 (1986), *citing State v. Perry*, 298 N.C. 502, 259 S.E.2d 496 (1979). The proffered testimony as to the victim's alcohol consumption with other people in party settings has no tendency to prove that the victim consented to sexual activity with the defendant on the day in question. This assignment is overruled.

[3] Third, defendant contends that the trial court erred by refusing to instruct the jury with regard to the lesser included offense of contributing to the delinquency of a minor. We disagree.

The well-settled rule in this jurisdiction provides that:

> When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indict-

> ment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding a defendant guilty of a higher degree of the same crime.

State v. Weaver, 306 N.C. 629, 633, 295 S.E.2d 375, 377 (1982), *quoting State v. Banks*, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978) (*quoting State v. Bell*, 284 N.C. 416, 419, 200 S.E.2d 601, 603 (1973)).

Defendant was indicted, tried and convicted of second-degree rape in violation of G.S. § 14-27.3. The applicable sections of this statute provide that:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

G.S. § 14-27.3. "Any person who is at least 16 years old who knowingly or willfully causes, encourages or aids any juvenile . . . to commit an act whereby the juvenile could be adjudicated delinquent" is guilty of the crime of contributing to the delinquency of a minor as prescribed by G.S. § 14-316.1.

It is clear from the statutory definition of these two crimes that all of the essential elements of the offense of second-degree rape are not essential to the offense of contributing to the delinquency of a minor. Evidence of a defendant's aid and encouragement of a juvenile to drink alcohol or a defendant's aid and encouragement of a juvenile to commit the crime of breaking and entering is sufficient for a conviction of contributing to the delinquency of a minor. *See In re Wallace*, 57 N.C. App. 593, 291 S.E.2d 796 (1982), and *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970). It is, however, insufficient to support a conviction for second-degree rape. Such offenses are legally distinct and separate. Recogniz-

ing that the act of sexual intercourse is not inherent to the crime of contributing to the delinquency of a minor under G.S. § 14-316.7, we hold, therefore, that this offense is not a lesser included offense of second-degree rape pursuant to G.S. § 14-27.3. This assignment is overruled.

In light of our holdings above, we find that the defendant had a fair trial, free from prejudicial error.

No error.

Judges EAGLES and PARKER concur.

MONY CREDIT CORPORATION v. ULTRA-FUNDING CORPORATION

No. 9026SC203

(Filed 20 November 1990)

1. **Process § 14 (NCI3d)— New York corporation—long-arm jurisdiction**

North Carolina's long-arm statute conferred jurisdiction over defendant New York corporation in that the lease assignment in question required defendant to perform some of its obligations in North Carolina. N.C.G.S. § 55-145(a)(1) (1982).

Am Jur 2d, Process §§ 175, 178.

2. **Process § 14.2 (NCI3d)— New York corporation—minimum contacts—sufficient**

Due process requirements for minimum contacts were satisfied where defendant New York corporation purposely directed its contacts with North Carolina by entering into a contract with a North Carolina resident and availing itself of the privilege of doing business here. When the cause of action arises directly from the foreign defendant's contacts with the state, the threshold for sufficiency of defendant's contacts with North Carolina is lowered.

Am Jur 2d, Process §§ 185, 186, 190.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents

or foreign corporations on making or performing contract within the state. 23 ALR3d 551.

APPEAL by defendant from order denying motion to dismiss entered 3 December 1989 in MECKLENBURG County Superior Court by *Judge Chase B. Saunders*. Heard in the Court of Appeals 20 September 1990.

Plaintiff, a New York corporation, having its principal office and place of business in Teaneck, New Jersey, filed this action in Mecklenburg County, North Carolina, against defendant, a New York corporation, having its principal office and place of business in Hicksville, New York. In its complaint, plaintiff alleges that defendant breached an assignment of lease and seeks repurchase of the lease under the terms of the assignment.

From the evidence presented, it appears that on 4 December 1986 defendant leased certain chiropractic equipment to Cobb Chiropractic Clinic of Greensboro, North Carolina. On the same day, defendant executed an assignment under which defendant assigned all right, title and interest in the lease to plaintiff and granted plaintiff a first priority security interest in the equipment. Defendant signed and recorded a UCC financing statement in North Carolina referring to the lease and showing plaintiff as assignee of defendant (lessor). The equipment served as collateral both for the assignment and for the lease. Cobb defaulted on his payments under the lease and filed for bankruptcy.

Plaintiff alleges in its complaint that defendant misrepresented in the assignment that the equipment was new and in good condition and that Cobb had held no interest in the equipment prior to the lease. Plaintiff however alleges that when Cobb and defendant entered into this lease, the equipment was in poor condition; that Cobb had previously owned the equipment; and that the lease and assignment were a sham to induce plaintiff to assume the lease at an inflated price. Plaintiff contends that under the terms of the assignment defendant is obligated to repurchase the lease from plaintiff for the outstanding balance owed under the lease due to these misrepresentations.

Defendant filed a motion to dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure for lack of jurisdiction over the defendant. The trial court denied defendant's motion. Defendant appeals.

Moore & Van Allen, by David L. Eades, for plaintiff-appellee.

Subsequent to the filing of defendant-appellant's brief in this Court, defendant-appellant's counsel of record, Hugh G. Casey, Jr., was allowed to withdraw as counsel.

WELLS, Judge.

North Carolina has adopted a two-part test to determine whether a court may exercise *in personam* jurisdiction over a nonresident defendant. First, the court must determine whether the North Carolina "long arm" statute, N.C. Gen. Stat. § 1-75.1 *et seq.*, confers jurisdiction over defendant. Second, the court must determine whether the exercise of personal jurisdiction violates defendant's right to due process. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986).

In its two assignments of error, defendant contends the trial court erred in denying defendant's motion to dismiss because North Carolina's "long arm" statute does not confer jurisdiction and the court's exercise of jurisdiction in this case violates defendant's due process.

[1] Regarding defendant's first assignment of error that North Carolina's "long arm" statute does not confer jurisdiction over defendant, plaintiff contends that North Carolina's "long arm" statute confers personal jurisdiction over defendant in various provisions. We need to examine only one provision. The statute confers personal jurisdiction whenever any special jurisdiction statute applies:

> (2) Special Jurisdiction Statutes—In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

N.C. Gen. Stat. § 1-75.4(2). A special jurisdiction statute is applicable to this case and confers jurisdiction over a foreign corporation for any claim arising out of a contract to be performed in North Carolina. N.C. Gen. Stat. § 55-145 (1982) states in part:

> (a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

> (1) Out of any contract made in this State or to be performed in this State. . . .

N.C. Gen. Stat. § 55-145(a)(1) (1982). The lease assignment required defendant to perform at least some of its obligations in North Carolina. The assignment required defendant to deliver the chiropractic equipment in good condition to lessee Cobb in Greensboro, North Carolina. The assignment also required defendant to deliver a security interest in the equipment to plaintiff. To do this defendant needed to file a financing statement in North Carolina reflecting the assignment to plaintiff. These facts plus the legislative intent to liberally construe the North Carolina "long arm" statute to the limits of due process convince us that the "long arm" statute confers personal jurisdiction in this case. *See Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977).

[2] Defendant also contends that the court's exercise of jurisdiction in this case would violate defendant's due process rights. The North Carolina Supreme Court in *Tom Togs* has summarized the due process requirements as stated by the United States Supreme Court:

> To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (*quoting* from *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283 (1940)). In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws; . . . *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298 (1958). This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L.Ed. 2d 490, 501 (1980).

Tom Togs, Inc., supra. The court in *Tom Togs* went on to state that the United States Supreme Court has distinguished, for due process purposes, those causes of action arising out of defendant's contact with the forum state:

> Where the controversy arises out of the defendant's contacts with the forum state, the state is said to be exercising "specific" jurisdiction. In this situation, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction. . . . *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414, 80 L.Ed. 2d 404, 411 (1984). The Supreme Court has also said that for purposes of asserting "specific" jurisdiction, a defendant has "fair warning" that he may be sued in a state for injuries arising from activities that he "purposefully directed" toward that state's residents. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 85 L.Ed. 2d 528, 540-41 (1985).

When the cause of action arises directly from the foreign defendant's contacts with the state, the threshold for sufficiency of defendant's contacts with North Carolina is lowered. *See Ash v. Burnham Corp.*, 80 N.C. App. 459, 343 S.E.2d 2 (1986). Defendant's contacts with the State of North Carolina include the contract entered into with Cobb. Plaintiff's claim is directly related to defendant's contacts with the State. Plaintiff alleges that the contract entered into between defendant and Cobb was a sham and that the assignment was part of defendant's attempt to defraud plaintiff. Plaintiff alleges that the equipment was not delivered to Cobb in good condition and Cobb had previously owned the equipment and that the lease and assignment together were a scheme to induce plaintiff to assume the lease at an inflated price. The contract and the assignment are both part of the same transaction. Under the assignment, defendant transferred all right, title and interest in the lease to plaintiff, including the right to receive rental payments from Cobb in North Carolina. Defendant also granted plaintiff a first priority security interest in the equipment. The lease required that the equipment remain in North Carolina and that Cobb pay all local taxes on the leased equipment.

Defendant purposely directed its contacts with North Carolina by entering into the contract with Cobb and availing itself of the privilege of doing business there. Because plaintiff's claim arises directly from defendant's contacts with North Carolina, it does not offend traditional notions of fair play and substantial justice to have defendant haled into court here.

No error.

Judges COZORT and LEWIS concur.

ALDON MASON-REEL, ALICE B. REEL, AND FLORA MASON REEL, PLAINTIFFS v. JIMMY C. SIMPSON, KENNETH DALE SIMPSON, AND JAMES H. SIMPSON, DEFENDANTS

No. 903SC285

(Filed 20 November 1990)

1. **Deeds § 11 (NCI3d) — intent of parties — determination by judge**

The requirement of N.C.G.S. § 39-1.1(a) that "the courts" interpret a deed containing inconsistent clauses did not change the traditional rule that it is the judge's role to determine the intent of the parties according to rules of construction.

Am Jur 2d, Deeds § 234.

2. **Deeds § 11 (NCI3d) — intent of parties — ruling by court without jury**

The trial judge did not err in ruling pursuant to N.C.G.S. § 39-1.1, without a jury and without hearing evidence, that it was the intent of the parties to a 1986 deed which contained inconsistent clauses that only timber would be conveyed by the deed.

Am Jur 2d, Deeds § 221.

APPEAL by defendants from a judgment entered 27 November 1989 by *Judge Napoleon B. Barefoot* in Superior Court, PAMLICO County. Heard in the Court of Appeals 27 September 1990.

Beaman, Kellum, Hollows & Jones, P.A., by William H. Hollows, for plaintiff-appellees.

Barker & Dunn, by Donald J. Dunn, for defendant-appellants.

LEWIS, Judge.

The issue in this case is whether the trial judge, upon a motion made after the denial of a summary judgment, correctly used N.C.G.S.

§ 39-1.1 when he interpreted, as a matter of law, the intent of the parties in a deed which contained inconsistent clauses.

The plaintiffs filed a complaint alleging in their first claim for relief that the defendants had fraudulently schemed to acquire title to the plaintiffs' property. The plaintiffs also alleged that due to the defendants' fraud, there exists a cloud on plaintiffs' title to their property. In the plaintiffs' second claim for relief, the plaintiffs asked the court to "declare the effect of the [deed] . . . to be a timber deed . . ." pursuant to N.C.G.S. § 39-1.1.

The deed in controversy was typed, i.e., not on a form, and was executed on 24 March 1986. It was prepared by the defendants' attorney and was signed by the plaintiff-grantors. The granting clause states in part:

> [t]hat said parties of the first part, for and in consideration of the sum of TEN DOLLARS, and other good and valuable considerations to them in hand paid, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do bargain, sell, and convey unto the said party of the second part and his heirs and assigns *all merchantable timber and a certain tract or parcel of land as hereinafter defined, lying or standing upon a certain tract of land* in Pamlico County, North Carolina, and more fully described as follows: . . . .

(emphasis added). The deed then describes the tract of land in detail. The habendum clause provides the following:

> [t]o have and to hold, *said timber*, together with the rights and privileges hereinabove set out, to him, the said party of the second part and his heirs and assigns in fee simple forever.

(emphasis added). The warranty clause states as follows:

> [a]nd said parties of the first part do covenant that they are seized of said *timber and the lands upon which it is situated in fee simple*, and have the right to convey the same, that the same are free and clear of all encumbrances and that they will warrant and defend the title herein conveyed against the lawful claims of all persons whomsoever.

(emphasis added).

The defendants made a motion for summary judgment, arguing that there was no genuine issue of material fact as to the plaintiffs' claims of fraud. Judge Reid denied the summary judgment motion. At a separate hearing later, before Judge Barefoot, the plaintiffs moved that the judge interpret the meaning of the words of the deed and find, as a matter of law, pursuant to N.C.G.S. § 39-1.1, that the parties intended to convey only timber rights and not the fee simple. The defendants asked for a jury trial.

After reading the pleadings which included a copy of the deed in controversy the trial judge, without a jury and without hearing any evidence, ruled that there was an error in the granting clause and that the parties intended the word "and" to be "on" so that the clause would read: "merchantable timber *on* a certain tract or parcel of land. . . ." Thus, the trial judge ruled that it was the intent of the parties to convey only timber.

"The intention of the parties as apparent in a deed should generally control in determining the property conveyed thereby; but, if the intent is not apparent from the deed, resort may be had to the general rules of construction." *Sugg v. Greenville*, 169 N.C. 606, 614, 86 S.E. 695, 699 (1915). When the legislature passed N.C.G.S. § 39-1.1, it was their primary intention to abolish past rules of construction which required courts to disregard certain clauses if they contradicted the granting clause of a deed. *Whetsell v. Jernigan*, 291 N.C. 128, 133, 229 S.E.2d 183, 187 (1976). Instead, for conveyances executed after 1 January 1968, the courts would, under N.C.G.S. § 39-1.1, consider equally all clauses in a deed when ascertaining the intent of the parties. *Id.* Therefore, N.C.G.S. § 39-1.1(a) provides:

> [i]n construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.

N.C.G.S. § 39-1.1(a).

[1] Generally, where there is "no waiver of jury trial or agreement as to facts nor evidence offered, the court [is] without power to decide a controverted issue of fact raised by the pleadings." *Sullivan v. Johnson*, 3 N.C. App. 581, 583, 165 S.E.2d 507, 508 (1969). However, "[a]mbiguous deeds traditionally have been construed by the courts

according to rules of construction, rather than by having juries determine factual questions of intent." *Robinson v. King*, 68 N.C. App. 86, 89, 314 S.E.2d 768, 771, *disc. rev. denied*, 311 N.C. 762, 321 S.E.2d 144 (1984). The meaning of the terms of the deed is a question of law, not of fact. *Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E.2d 603, 606 (1950), *reh'g denied*, 233 N.C. 617, 65 S.E.2d 144 (1951). In light of the purpose of N.C.G.S. § 39-1.1(a), the statute's requirement that "the courts" interpret the deed did not change the traditional rule that it is the judge's role to determine the intent of the parties. It was not the legislature's intent to change *who* interprets the intent of the parties in a deed; rather, the statute was an effort by the legislature to state *how* "the courts" should interpret the deed. Therefore, under the statute it is the judge's role to determine the intent of the parties.

[2] The plaintiffs' basis for their action to quiet title was the alleged fraud of the defendants. Generally, in actions to quiet title where the plaintiffs rely on fraud to overcome the effect of a deed, they must prove fraud. *Ramsey v. Ramsey*, 224 N.C. 110, 114, 29 S.E.2d 340, 342 (1944) (citation omitted). Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, Judge Barefoot in this case considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined, "fraud" no longer mattered and no jury trial was necessary. The judge was able to dispose of the case on what appears to be a judgment on the pleadings.

In *Robinson v. King*, 68 N.C. App. 86, 314 S.E.2d 768, *disc. rev. denied*, 311 N.C. 762, 321 S.E.2d 144 (1984), this Court held that in some situations it is necessary to look beyond the four corners of the deed to ascertain the intent of the parties. "[I]ntention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time—the tendency of the modern decisions being to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining in the manner indicated the intention of the parties." *Robinson v. King*, *id.* at 95, 314 S.E.2d at 774, *disc. rev. denied*, 311 N.C. 762, 321 S.E.2d 144 (1984) (quoting *Seawell v. Hall*, 185 N.C. 80, 82, 116 S.E. 189, 190 (1923)). In the present case, the trial judge chose not to hear evidence of "circumstances attending the execution of the instru-

ment and the situation of the parties at that time." *Id.* Instead, the trial judge reasoned that he was able to determine the intent of the parties by considering the entire deed. From the peculiar wording of the deed and the pleadings, the judge concluded that the parties intended only to convey timber rights. We find no error in the trial judge's ruling.

Affirmed.

Judges WELLS and COZORT concur.

ADZORADZE WILLIAMS AND WIFE, ODESSA B. WILLIAMS, PLAINTIFFS-APPELLANTS v. LEIGHTON KENDALL HALL AND QUINN WHOLESALE COMPANY, INC., DEFENDANTS-APPELLEES

No. 9012SC206

(Filed 20 November 1990)

Automobiles and Other Vehicles §§ 518, 577 (NCI4th)— tractor-trailer blocking lane—plaintiff partially blinded by lights—negligence and contributory negligence

Plaintiffs' evidence was sufficient for the jury on the issue of defendant driver's negligence in this action to recover for injuries received in a collision between plaintiff's pickup and defendants' tractor-trailer where it tended to show that the tractor was stopped in the westbound lane of a two-lane highway at 6:00 A.M. while it was still dark; the trailer extended at a 45 degree angle across the eastbound lane as defendant driver backed it into a parking lot; the headlights of the tractor faced westward on the highway; plaintiff was traveling in the eastbound lane; plaintiff was partially blinded by the headlights of the tractor and did not see any signals to indicate that the tractor-trailer was backing across his lane; when plaintiff reached the side of the tractor, he suddenly realized that he had been blinded by the headlights as to what was behind the tractor; and although plaintiff immediately hit his brakes, his pickup hit the side of the trailer. Furthermore, the evidence did not establish contributory negligence by plaintiff as a matter of law in knowingly driving into a blinded area since plaintiff may have been keeping a proper lookout without realiz-

ing that he was partially blinded only as to the area beyond the tractor-trailer's headlights.

Am Jur 2d, Automobiles and Highway Traffic §§ 804, 806, 807.

Liability or recovery in automobile negligence action as affected by driver's being blinded by lights of motor vehicle. 64 ALR3d 551.

APPEAL by plaintiffs from a judgment entered by *Judge Gregory A. Weeks* on 12 October 1989 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 20 September 1990.

A. Maxwell Ruppe for plaintiffs-appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Patricia L. Holland and Susan K. Burkhart, for defendants-appellees.

LEWIS, Judge.

The issue in this negligence action involving an automobile-tractor-trailer collision is whether the trial court erred in granting the defendants-appellees' motion for a directed verdict at the close of all the evidence.

Reviewing the evidence in the light most favorable to the plaintiffs, as we are bound to do, it is as follows:

On August 31, 1987, one of the defendants, Leighton Hall, an employee of Quinn Wholesale Company, Inc., also a defendant, drove an eighteen-wheeler tractor-trailer westbound on a two-lane highway near Stedman. At approximately 6:00 A.M., while still dark and drizzling rain, Hall reached his destination, a grocery store on the highway adjacent to the eastbound lane. Hall began backing the tractor-trailer into the parking lot of the grocery store. The headlights of Hall's truck faced westward on the highway. The truck's trailer was extended at a 45 degree angle across the eastbound traffic lane as Hall backed into the parking lot. The tractor-trailer had the statutorily required reflectors, lights on the upper and lower portions of the sides of the trailer, and other lights as well. Adzoradze Williams, "plaintiff," contends that he saw no signal lights to indicate the tractor-trailer was turning. Nor did he see "flashers" or "caution lights."

Meanwhile, the plaintiff traveled eastbound on the highway in his pickup truck. As the plaintiff approached the tractor-trailer, he rounded two curves. Going at a speed of approximately thirty to forty-five miles per hour, the plaintiff first saw the tractor-trailer in the left-hand lane after he rounded the first curve, approximately 2,112 feet away. The tractor-trailer appeared to be only in the left-hand lane.

Plaintiff's headlights on his pickup truck were operating properly and usually allowed him to see 200 feet into the distance. Although the lights from the defendant's truck were bright, plaintiff was able to see the buildings on the right and left as he approached the tractor-trailer. He also saw that there were no cars, road signs or bushes between him and the lights of the defendant's truck. Although he was not completely blinded by the headlights of the tractor-trailer, when the plaintiff reached the side of the cab, he suddenly realized that he had been blinded by the headlights as to what was behind the tractor's cab. The plaintiff immediately hit his brakes. His pickup truck hit the side of the tractor-trailer which was extended into the left-hand lane.

The plaintiff has brought this action for damages for injuries sustained in the collision. His wife brought a claim for loss of consortium. The trial judge granted a motion for directed verdict for the defendants at the close of all the evidence.

Allegations of Defendants' Negligence

First, the basic issue before us is whether there was any evidence of negligence on the part of the defendants to allow the case to go to the jury. Plaintiff has alleged negligence of the defendants in several areas:

1) Lighting

a) by failing to dim the headlights of the tractor-trailer in violation of N.C.G.S. § 20-131(a);

b) by driving without due caution or circumspection by backing the tractor-trailer across the center line in the dark into the eastbound traffic lane as the front of the cab faced the plaintiff without any notice by signaling or by dimming his lights in violation of N.C.G.S. § 20-140(b); and

c) by backing into the eastbound lane without giving a signal to indicate the defendant's intention to make such movement in violation of N.C.G.S. § 20-154(a).

2) Movement

a) by failing to give the driver in the opposite direction at least one half the main travel portion of the roadway as nearly as possible in violation of N.C.G.S. § 20-148; and

b) by turning from a direct line without first seeing that such movement could be made in safety in violation of N.C.G.S. § 20-154(a).

3) Common Law

a) by failing to keep a proper lookout for other vehicles; and

b) by failing to keep his vehicle under proper control.

Plaintiff supported these allegations by testifying that he was partially blinded by the headlights of the tractor-trailer and that he did not see any signals to indicate the tractor-trailer was backing across his lane. Although defendant Hall claims his signal lights were on, the plaintiff's testimony is to the contrary. Also, whether defendant Hall was correct in believing such movement could be made in safety under the circumstances is a factual question. Whether or not Hall knew or should have known that the position of his cab and lights could blind oncoming drivers is, here, a question for the jury. We are mindful of *Cooley v. Baker*, 231 N.C. 533, 58 S.E.2d 115 (1950) (holding that under certain circumstances, defendant had every reason to believe he could complete a left turn safely when the oncoming car was 900 feet away), but find it distinguishable. Therefore, the evidence is sufficient to create an issue of fact for the jury on the issue of the defendants' negligence.

Allegations of Plaintiff's Contributory Negligence

The second basic issue before us is whether the plaintiff was contributorily negligent. The defendants contend that the plaintiff failed to keep a proper lookout and that the fact that he was "blinded" does not allow him to overcome his contributory negligence.

"It is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook*, in the direction of travel; and he is held to the duty of seeing what he ought to have seen."

Wall v. Bain, 222 N.C. 375, 379, 23 S.E.2d 330, 333 (1942). When a motorist travels into a completely blinded area for two or three seconds, with the knowledge that his vision has failed him, such behavior will be contributory negligence as a matter of law. *McKinnon v. Howard Motor Lines*, 228 N.C. 132, 136, 44 S.E.2d 735, 737 (1947).

This case is unique in that the plaintiff testified that he was not completely blinded by the oncoming headlights as he approached the tractor-trailer. It appears from his testimony at trial that the plaintiff could see much more than the edge of the road. The plaintiff may have been keeping a proper lookout without realizing that he was partially blinded only as to the area beyond the tractor-trailer's headlights. In such a deceptive visual situation, the plaintiff may not be knowingly driving into a blinded area, for it would appear as though he could see into the distant darkness.

"A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence." *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E.2d 788, 789 (1978). From the evidence presented in this case, there is insufficient evidence to establish that Williams was contributorily negligent as a matter of law.

The trial court erred in directing the verdict against the plaintiff at the close of all the evidence. Plaintiff was entitled to have the evidence considered by the jury.

Reversed—new trial.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. HOSEA BARNARD NORMAN

No. 9026SC316

(Filed 20 November 1990)

1. **Searches and Seizures § 8 (NCI3d)— strip search and pubic combing—not unconstitutional**

Defendant in a prosecution for crime against nature, first degree sexual offense, and kidnapping was not subjected to an unconstitutional search where two young boys informed a patrol officer that defendant had forced them at gunpoint to walk into a wooded area and to commit certain sexual acts; officers were informed by a doctor that the boys had injuries consistent with their statements; defendant agreed to come to the Law Enforcement Center where officers advised him of his *Miranda* rights; after officers arrested defendant without a warrant, a crime scene technician strip searched defendant without a warrant and obtained pubic hair combings; a pubic hair was tested and found consistent with the pubic hair of one of the victims; and the trial court allowed the State to present the evidence at trial. Defendant concedes that the search was made after he had been arrested upon probable cause, both the North Carolina and U. S. Constitutions allow a search incident to lawful arrest, and the strip search and combing of pubic hair were reasonable because the evidence could easily be concealed or destroyed.

Am Jur 2d, Searches and Seizures §§ 43, 93, 99, 105.

Fourth Amendment as prohibiting strip searches of arrestees or pretrial detainees. 78 ALR Fed 201.

2. **Searches and Seizures § 44 (NCI3d)— motion to suppress evidence—no findings—no error**

The trial court did not err by failing to make findings of fact when denying defendant's motion to suppress a pubic hair in a prosecution for crime against nature, first degree sexual offense, and first degree kidnapping because there was no conflict in the evidence presented to the judge at the hearing on the motion to suppress. Although findings of fact are preferred, the trial judge may admit the challenged evidence

without specific findings when there is no material conflict of the evidence presented.

Am Jur 2d, Evidence § 412.

3. **Rape and Allied Offenses § 7 (NCI3d)— first degree sexual offense—mandatory life sentence—not cruel and unusual**

The Supreme Court of North Carolina has repeatedly rejected the argument that a life sentence for first degree sexual offense is cruel and unusual punishment and such an assignment of error in this case was without merit.

Am Jur 2d, Criminal Law § 629; Sodomy §§ 97, 98.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 ALR4th 1213.

APPEAL by defendant from a judgment entered 7 August 1989 in Superior Court, MECKLENBURG County by *Judge Kenneth A. Griffin.* Heard in the Court of Appeals 24 October 1990.

Defendant was charged with two counts of crime against nature, two counts of first degree sexual offense, and two counts of first degree kidnapping. Defendant was found guilty of one count of crime against nature, two counts of first degree sexual offense, and two counts of first degree kidnapping. The court arrested judgment on the kidnapping convictions, and sentenced the defendant to life imprisonment for the two convictions of first degree sexual offense, and sentenced the defendant to a consecutive term of three years for crime against nature. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General R. Dawn Gibbs, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

LEWIS, Judge.

The three issues presented on appeal relate to 1) whether the defendant was subjected to an unreasonable search and seizure when, after his arrest, the police strip searched him and combed through his pubic hair, 2) whether the evidence of a pubic hair should be suppressed due to the trial judge's failure to make find-

ings of fact at the suppression hearing, and 3) whether the defendant's life sentences for two convictions of first degree sexual offense constitutes cruel and unusual punishment within the meaning of the North Carolina Constitution and the United States Constitution.

[1] At a hearing to suppress evidence of a hair found in the defendant's pubic area, the State offered evidence that two young boys informed a patrol officer that the defendant had forced them at gunpoint to walk into a wooded area and to commit certain sexual acts. The boys identified the defendant by name as the perpetrator, and stated that they knew him from their neighborhood. In their statement to a patrol officer, the boys alleged that the defendant repeatedly sodomized them and forced one of them to engage in an act of oral sex with the defendant. Before interviewing the defendant, officers were informed by a doctor that the boys had injuries consistent with their statements about having been sodomized.

The State also put on evidence that the defendant agreed to come to the Law Enforcement Center where officers advised him of his Miranda rights. After the officers arrested the defendant, without an arrest warrant, the crime scene technician strip searched him without a search warrant. During the strip search, the technician obtained pubic hair combings. A pubic hair was tested and was found consistent with the pubic hair of one of the victims. Finding that the taking of the hair samples was not in violation of the defendant's constitutional rights, the trial judge allowed the State to present the evidence of the hair at trial.

The first issue before this Court concerns the constitutionality of the strip search of the defendant. The defendant contends that the State was required to have a warrant before searching the defendant's pubic region, unless the search was conducted under exigent circumstances and with probable cause. The defendant denies that there was either probable cause to search or exigent circumstances.

An arrest without an arrest warrant is valid under the United States Constitution and the North Carolina Constitution when the officers have probable cause to make the arrest. *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973). Here the defendant concedes the search was made after he had been arrested upon probable cause. We hold the search was not tainted by an unlawful arrest.

Both the North Carolina Constitution and the United States Constitution allow a search incident to a lawful arrest. *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984); *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685, *reh'g denied*, 396 U.S. 869, 24 L.Ed.2d 124 (1969). "[T]he Fourth Amendment precludes only those intrusions into privacy of the body which are unreasonable under the circumstances." *State v. Cobb*, 295 N.C. 1, 20, 243 S.E.2d 759, 770 (1978) (citations omitted). In *Cobb*, the defendant was arrested for rape and strip searched. Shortly after his arrest, a hair sample was taken from the defendant's pubic hair region without a search warrant. The North Carolina Supreme Court held that under the circumstances, the nature and extent of the search was reasonable, and therefore, did not violate any of the defendant's constitutional rights. *Id.* We find *Cobb* controlling as to the search in this case. Here, as in *Cobb*, the evidence could be easily concealed or destroyed. Thus, it was reasonable under the circumstances to strip search the defendant and comb through his pubic hair.

[2] The defendant's second assignment of error addressed in defendant's brief is that the trial court failed to make findings and conclusions regarding the denial of the motion to suppress. N.C.G.S. § 15A-977(d) requires findings of fact if the motion to suppress is not determined summarily.

There was no conflict in the evidence presented to the trial judge at the hearing on the motion to suppress the hair. The trial judge's entire ruling was "that the taking of the hair samples was not a violation of the defendant's constitutional rights and did not interfere in his person for any extended period or subject him to any hardship, and that Motion to suppress is DENIED, on behalf of the defendant."

When there is no material conflict in the evidence presented at a motion to suppress evidence, the trial judge may admit the challenged evidence without specific findings of fact, although findings of fact are preferred. *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (citations omitted). "In that event, the necessary findings are implied from the admission of the challenged evidence." *Id.* (Citing *State v. Whitley*, 288 N.C. 106, 215 S.E.2d 568 (1975)). The trial judge did not err by failing to make findings of fact when he denied the defendant's motion to suppress.

[3] The defendant's third assignment of error addressed in his brief is that the mandatory life sentence for first degree sexual

offense constitutes cruel and unusual punishment under the State and Federal Constitutions. The Supreme Court of North Carolina has repeatedly rejected the argument that a life sentence for first degree sexual offense is cruel and unusual punishment. *State v. Higginbottom*, 312 N.C. 760, 763, 324 S.E.2d 834, 837 (1985). This assignment of error is without merit.

No error.

Judges WELLS and COZORT concur.

FRANCES MOSLEY KERNS AND LAWRENCE KERNS, PLAINTIFFS v. JANET SOUTHERN (FORMERLY JANET SOUTHERN WILLIAMS AND JANET SOUTHERN KERNS), DEFENDANT

No. 9021DC65

(Filed 20 November 1990)

1. **Divorce and Alimony § 23 (NCI3d)— child visitation—subsequent custody claim not frivolous**

The claim of plaintiff grandparents for custody of their grandchildren was not frivolous in violation of N.C.G.S. § 1A-1, Rule 11 because they first sought only child visitation and a custody issue was then necessary to a child visitation claim where there was no indication at trial that plaintiffs in fact did not wish to obtain custody of the grandchildren or that their claim was made in bad faith. Therefore, the trial court properly considered plaintiffs' claim for custody. N.C.G.S. §§ 50-13.2, 50-13.5.

Am Jur 2d, Divorce and Separation §§ 1002, 1003.

Award of custody of child where contest is between child's mother and grandparent. 29 ALR3d 366.

2. **Divorce and Alimony § 25.12 (NCI3d)— child visitation—best interest of children—burden of proof**

The trial court erred in placing on defendant mother the burden of proving that visitation of her children by plaintiff grandparents was not in the best interest of the children. Rather, the grandparents who sought visitation had the burden

of proving that visitation was in the best interest of the children.

Am Jur 2d, Divorce and Separation §§ 974, 982, 999, 1000, 1003.

Grandparents' visitation rights. 90 ALR3d 222.

3. **Divorce and Alimony § 25.12 (NCI3d)— child visitation— insufficient findings**

The trial court's conclusory findings were insufficient to support the court's award of child visitation rights to plaintiff grandparents.

Am Jur 2d, Divorce and Separation §§ 974, 982, 999, 1000, 1003.

Grandparents' visitation rights. 90 ALR3d 222.

APPEAL by defendant from a judgment entered 23 October 1989 by *Judge James A. Harrill, Jr.* in District Court, FORSYTH County. Heard in the Court of Appeals 18 September 1990.

Wolfe and Collins, P.A., by John G. Wolfe, III and Michael R. Bennett, for plaintiff-appellees.

Glover & Petersen, P.A., by James R. Glover and Paul C. Shepard, for defendant-appellant.

LEWIS, Judge.

The issues before the Court in this case are these: 1) whether the trial court had jurisdiction to consider the custody of the defendant's children, 2) whether the trial judge erred when he placed the burden of proof on the custodial parent to show that the grandparents' visitation would be against the better interest of the children, and 3) whether the trial court judge made adequate findings of fact in his judgment which granted visitation rights to the grandparents.

The plaintiffs are the paternal grandparents of the defendant's children. After the defendant's husband died, the grandparents filed a petition for visitation rights with the trial court. In response, the defendant-mother moved for dismissal under Rule 12(b)(6) on the grounds that any rights in the grandparents' favor, arising out of North Carolina General Statutes sections 50-13.2 and 50-13.5,

are only where custody is already at issue. The 1989 changes to section 50-13.1, which allow an independent action for visitation, were not in effect at the time of the original petition. The trial court granted the plaintiffs' motion to amend their petition and complaint to raise the question of custody of the children. After concluding that the defendant would have custody of the children, the court then granted the plaintiffs' visitation rights. The defendant now appeals the trial court's ruling.

First

[1] Defendant contends that the trial court lacked jurisdiction to consider the issue of custody of the children because the plaintiffs' claim to custody was a "sham" and made in bad faith. The appellant's "jurisdictional" argument in brief appears to be more correctly stated as a claim that the plaintiffs violated N.C.G.S. § 1A-1, Rule 11 by bringing a frivolous suit. There is no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith. The fact that the grandparents had originally asked for visitation does not make their later claim for custody violative of Rule 11. North Carolina General Statute § 50-13.1, before modified in 1989, states that: "[a]ny parent, relative, or other person, . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of a minor child. . . ." N.C.G.S. § 50-13.1. The grandparents merely exercised their right to institute an action for custody as allowed by the statute. We find the trial court was correct in allowing the plaintiffs' claim for custody.

Second

[2] Defendant's second contention is that the trial court incorrectly placed the burden of proof on the defendant-mother to show that visitation of the grandparents would be bad for the children. The standard by which the court is guided in visitation matters is the child's best interest. *In re Jones*, 62 N.C. App. 103, 105, 302 S.E.2d 259, 260 (1983). The North Carolina General Statutes provide that "[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." N.C.G.S. § 50-13.2(b1). Although the trial judge determined that the appellant-defendant would continue to have primary custody of the children, it was entirely within the trial judge's discretion to allow the grandparents visitation rights based on the best interest of the children.

When considering the issue of visitation, the grandparents, who were seeking the visitation rights, had the burden of proving that the award of visitation was in the best interest of the children. However, here the trial judge reversed the burden, so that the mother had to prove that the visitation was bad for the children. We find that the trial judge erred in placing this burden of proof on the mother.

Third

[3] The defendant's last contention is that the trial judge's order, which granted the plaintiffs visitation rights to the defendant's children, was not supported by adequate findings of fact. The judgment of the trial court provides:

> [t]hat the Plaintiffs and the Defendant are all fit and proper persons to have the care, custody and control of the minor children; . . . that the Plaintiffs . . . have a fine home with living conditions that are appropriate for children to be in and around; that the Plaintiffs have 12 grandchildren (having raised 7 children) and their home is frequented by young people; that Plaintiffs [sic] home is a proper place for young people to be in; that the male Plaintiff is a diabetic, disabled veteran who has not consumed alcohol since January of 1986; that the female Plaintiff is available at all times to care for the minor children and would keep them under her watchful eye or that of a suitable adult; that it is appropriate and in the best interest of the minor children for their custody to remain with their mother, the Defendant, subject to grandparental visitation by the Plaintiffs.

"To support an award of visitation rights[,] the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child." *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E.2d 26, 29 (1977). (Citations omitted). The above stated findings are conclusory. We find that the conclusory statements are inadequate findings to support the award of visitation rights to the grandparents.

Reversed and remanded.

Judges WELLS and COZORT concur.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, PLAINTIFF v. RICHARD WEST, DEFENDANT

No. 9030SC61

(Filed 20 November 1990)

Waters and Watercourses § 3.1 (NCI3d)— erosion of creek bank— placement of telephone poles—evidence of causation—insufficient

The trial judge properly allowed plaintiff's motion for a directed verdict as to defendant's counterclaim where plaintiff telephone company sought an injunction to prevent defendant's interference with its maintenance and repair of telephone equipment on defendant's land; defendant counterclaimed for negligence alleging that plaintiff's placement of telephone poles caused erosion of a creek bank; the court found in a separate order that plaintiff had an easement over defendant's property and a legal right to maintain telephone poles on defendant's property; and the trial court granted a directed verdict for plaintiff at the conclusion of all evidence. The testimony of defendant's own expert witness clearly established that a variety of factors, both natural and unnatural, could have caused the erosion of the creek bank and the witness did not offer any testimony that one cause was more likely than others.

Am Jur 2d, Easements and Licenses §§ 72, 89, 93; Waters §§ 391, 393, 406.

Judge PHILLIPS dissenting.

APPEAL by defendant from order entered 26 October 1989 by *Judge Robert D. Lewis* in HAYWOOD County Superior Court. Heard in the Court of Appeals 28 August 1990.

This is a civil action in which plaintiff seeks injunctive relief to prevent defendant from continuing to interfere with its employees in their activities in maintaining and repairing telephone equipment on defendant's land. Defendant thereafter filed an answer and a counterclaim alleging negligence. When the matter came on for trial, the court found by way of a separate order that plaintiff had acquired an easement over defendant's property and a legal right to maintain telephone poles on defendant's property. This matter proceeded on the issue of defendant's counterclaim. At the

conclusion of defendant's evidence, plaintiff moved for, but was denied, a motion for directed verdict. At the conclusion of all evidence, plaintiff renewed its motion for directed verdict. Upon hearing arguments from counsel, the court entered a directed verdict in favor of plaintiff. Defendant appeals.

Roberts Stevens & Cogburn, P.A., by Gwynn G. Radeker and Elizabeth M. Warren, for plaintiff-appellee.

Patla, Straus, Robinson & Moore, P.A., by Harold K. Bennett, for defendant-appellant.

JOHNSON, Judge.

Considered in the light most favorable to the defendant, the evidence tends to show the following: Defendant owns a tract of land on Ratcliff Road in Haywood County on which a one-story building and a concrete parking slab sit. Prior to 1974, plaintiff placed two telephone poles on defendant's property between the building and a creek located to the east of defendant's property.

In 1974, the two telephone poles on defendant's property were relocated by plaintiff. The southern pole was relocated and placed approximately 18 inches from the prior existing bank of the creek. The northern pole was placed on the edge of the creek. By 1989, the creek had substantially washed away the prior existing bank leaving the southern pole in the center of the creek. The northern pole still remained on the edge of the creek.

In support of his contention that the erosion of the west bank of the creek was caused by plaintiff's placement of: (1) the southern pole 18 inches from the creek bank, (2) the northern pole on the creek bank, and (3) the riprap, defendant presented five witnesses. Two witnesses, including defendant, testified as to the extent of the erosion and the causation. Three witnesses testified as to damages.

At the close of all evidence, the court found that the defendant had failed to prove that he had suffered any damage to his creek bank, building or parking slab as a proximate result of the placement of the poles or riprap. Plaintiff's motion for directed verdict was therefore granted.

Defendant's sole contention on appeal is that the trial court erred in granting plaintiff's motion for directed verdict at the close of all the evidence. We disagree.

Where a party moves for a directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury. G.S. § 1A-1, Rule 50(a); *see also Mosley & Mosley Blders., Inc. v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E.2d 608 (1987), *disc. rev. denied*, 326 N.C. 801, 393 S.E.2d 898 (1990). Upon appeal, the scope of review is limited to those grounds asserted by the moving party before the trial court. *Warren v. Canal Indus., Inc.*, 61 N.C. App. 211, 300 S.E.2d 557 (1983).

In North Carolina, a landowner may recover for any damages proximately resulting from the intrusion of water on his land due to a third party's construction of an impediment on such land which obstructs natural drainage water. *Galloway v. Pace Oil Co., Inc.*, 62 N.C. App. 213, 302 S.E.2d 472 (1983). Plaintiff must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion. *Powell v. Cross*, 263 N.C. 764, 140 S.E.2d 393 (1965).

> The sufficiency of the evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one in his own affairs may base his judgment on mere probability as to a proposition of fact and as a basis for the judgment of the court, he must adduce evidence of other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for mere guess and must be such as tends to actual proof.

Id. at 768, 140 S.E.2d at 397, *quoting State v. Prince*, 182 N.C. 788, 108 S.E.2d 330 (1921). Undeniably, the question of whether defendant presented *some* evidence that erosion took place on the creek bank must be answered in the affirmative. The essential question, however, is whether defendant produced *any* evidence supporting his contention that the placement of the poles on his property near the creek caused the erosion of the creek bank.

The testimony of defendant's own expert witness, Gary McKay, a civil engineer, clearly established that a variety of factors, both natural and unnatural, could have caused the erosion of the creek

bank. Specifically, McKay testified that the erosion could have been caused by the placement of the telephone poles, as alleged by defendant, the softness of the soil on the east side of the creek or the creek's gentle curve. McKay did not, however, offer any testimony suggesting that one cause was more likely than the others. Such testimony as to causation, being speculative in nature, would have resulted in a verdict founded upon a series of mere possibilities; and reliance upon a choice of possibilities amounts to nothing more than guesswork. Thus, we conclude that defendant has failed to establish that the erosion of the creek bank was caused by the placement of the poles or the riprap.

For all the foregoing reasons, the order of the trial court granting plaintiff's motion for directed verdict is

Affirmed.

Judge PARKER concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though plaintiff's evidence is not as clear as it might be, it is sufficient in my opinion to support the inference that the erosion of the creek bank and the water damage to defendant's property proximately resulted from the improper placement of plaintiff's poles and the riprap.

STATE OF NORTH CAROLINA v. TIMOTHY JOE BURGE

No. 908SC11

(Filed 20 November 1990)

1. Criminal Law § 169.3 (NCI3d)— exclusion of testimony— admission of similar testimony—absence of prejudice

Defendant was not prejudiced by the court's refusal to permit a witness to testify that, based upon his personal knowledge of the State's eyewitness, he would not believe him under oath where the witness had previously testified

that in his opinion the eyewitness was a liar and had told him that he would take a bribe to change his testimony.

Am Jur 2d, Evidence § 256; Witnesses §§ 563, 566.

2. Jury § 7.14 (NCI3d)— State's exclusion of black jurors—no racial motivation

The State's exclusion of six black panelists from the jury that tried defendant for a murder arising out of a purported cocaine transaction was not racially motivated and did not violate defendant's constitutional rights where two of the panelists had brothers who had been charged with cocaine offenses; two others knew defendant's parents and one of his attorneys; one knew two of defendant's witnesses; and the remaining panelist knew defendant's family and both of his attorneys.

Am Jur 2d, Jury §§ 235, 284.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

3. Criminal Law § 86 (NCI3d)— police use of defendant as informant—exclusion of cross-examination of detective

The trial court did not err in refusing to permit defendant to cross-examine a detective about the police department's use of defendant as an informant to show that defendant had credibility with the police department where defendant's credibility had not been attacked, since defendant was not entitled to bolster his credibility in advance.

Am Jur 2d, Witnesses §§ 523, 646.

4. Homicide § 21.7 (NCI3d)— second degree murder—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of second degree murder where an eyewitness testified that, after the victim begged defendant not to kill him, defendant said, "I'm going to kill you anyway" and pro-

ceeded to do so by deliberately firing a bullet through the victim's skull.

Am Jur 2d, Homicide §§ 425, 437-439.

APPEAL by defendant from judgment entered 27 October 1989 by *Judge James D. Llewellyn* in LENOIR County Superior Court. Heard in the Court of Appeals 24 September 1990.

Defendant was convicted of the second-degree murder of Joseph Wayne Coston and sentenced to forty years imprisonment. The State's evidence indicated that on the night of 2 January 1989 a crowd of about 30-40 people was gathered at the corner of Thompson and Quinerly Streets in Kinston. Joseph Wayne Coston drove his van into the neighborhood in order to buy crack cocaine and gave defendant $10 for a bag of what he thought was cocaine but was in reality ground brazil nuts. As Coston started to leave he snatched the $10 from defendant and began to drive away. Defendant grabbed the steering wheel of the van and hung on until he turned the wheel to make the van wreck. He and two others beat and threatened Coston and defendant shot him in the head with a pistol. Before the fatal shot, defendant pulled the trigger once and it did not fire; the second time the pistol fired into Coston's left temple and he died a half an hour later.

Defendant denied firing the gun at all. He admitted pointing the loaded pistol at Coston's chest earlier, but claimed he ran away when someone said the police were coming. He heard three shots and believed that Coston had the gun and was trying to shoot someone.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the State.

William D. Spence for defendant appellant.

PHILLIPS, Judge.

[1] The first error defendant cites is the court's refusal to permit Marcus Jerome Edwards to testify that based upon his personal knowledge of Roy Lee Clark, the State's only eyewitness, he would not believe him under oath. Immediately before that evidence was offered, Edwards testified without objection that in his opinion Roy Lee Clark was a liar and that Clark had told him he would take a bribe to change his testimony. Thus, even if admissible,

and we do not hold that it was, the refused evidence was cumulative and its rejection was not prejudicial.

[2] Defendant's next contention—that the State's exclusion of six black panelists from the jury that tried the case was racially motivated and a violation of various constitutional provisions—has no support in the record. To prevail on such a contention it must be shown, among other things, that the circumstances of the exclusions raise an "inference of racist motivation," *State v. Sanders*, 95 N.C. App. 494, 498, 383 S.E.2d 409, 412, *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 470 (1989), and this showing was not made. Instead, the record indicates that the State had sound grounds for excusing all six panelists: Two had had brothers who had been charged with cocaine offenses; one knew two of defendant's witnesses; two others knew defendant's parents and one of his attorneys; and the last one knew defendant's family and both of his attorneys.

[3] The next error defendant cites is the court's refusal to permit him to cross-examine Detective Flowers about the Kinston Police Department having used defendant as an informant. His purpose was to show by the evidence that defendant had credibility with the police department. But at that time only the State had presented evidence, defendant's credibility had not been attacked, and he was not entitled to bolster it in advance.

[4] Defendant's contention that the evidence does not support his conviction of second-degree murder is refuted by the testimony of the eyewitness that after Coston begged him not to kill him, defendant said, "I'm going to kill you anyway" and proceeded to do so by deliberately firing a bullet through Coston's skull.

Nor was it error to refuse to charge the jury on the lesser included offenses of voluntary and involuntary manslaughter, as there is no evidence that defendant was guilty of manslaughter. The State's evidence indicates only a deliberate, intentional homicide, while defendant's evidence was that he fled the scene before Coston was shot and killed by somebody else.

Defendant's other contentions—that the court erred in refusing to permit him to cross-examine the State's witnesses as to their knowledge that another person had been indicted for the murder; in refusing to permit both of his lawyers to cross-examine the same witnesses; and in charging the jury on the alleged un-

truthfulness of the State's eyewitness—likewise devoid of legal basis are also overruled.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

JULIE ANN DRAKE CHURCH v. WANDA BURNEY GREENE

No. 8926SC1405

(Filed 20 November 1990)

Automobiles and Other Vehicles § 596 (NCI4th)— automobile accident—left turn—contributory negligence

There was no reversible error in an action arising from an automobile accident tried before a judge where plaintiff was struck in the left side as she made a left turn; plaintiff testified that she last looked into her side mirror 115 feet before her turn; the trial court erroneously directed a verdict against plaintiff on the ground that she was contributorily negligent as a matter of law for turning left without ascertaining that she could do so in safety in violation of N.C.G.S. § 20-154; and the court also made a factual finding from the evidence that plaintiff was contributorily negligent. Although a new trial would be ordered if the case had been tried before a jury, ordering a new trial before a fact-finder who has permissibly found plaintiff contributorily negligent would avail her nothing.

Am Jur 2d, Automobiles and Highway Traffic §§ 238, 882-884.

APPEAL by plaintiff from judgment entered 18 July 1989 by *Judge Claude S. Sitton* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 23 August 1990.

Joel L. Kirkley, Jr. for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick, for defendant appellee.

PHILLIPS, Judge.

While undertaking to turn left on a two lane road, plaintiff's automobile was struck in the left side by defendant's following vehicle. Plaintiff's action for the damages allegedly sustained was tried to the judge under an agreement that if it was disposed of by a directed verdict under Rule 41(b) of the N.C. Rules of Civil Procedure findings of fact would not be necessary. After the close of plaintiff's evidence a verdict was directed against plaintiff on the ground that she was contributorily negligent as a matter of law for turning left on the highway without first ascertaining that she could do so in safety as G.S. 20-154 requires. No facts were found.

Plaintiff's evidence, when taken in the light most favorable to her, shows the following: While driving her car on Plaza Road Extension in Cabarrus County plaintiff turned onto Starwood Road, a two lane road that led to her mother's house about 115 feet from the intersection. Knowing that she would soon make a left turn, she looked into her side mirror, noticed that no one was behind her, signaled for a left turn, and proceeded at a speed of 10 to 15 miles per hour. When opposite the driveway to her mother's house she swung her car slightly to the right before undertaking to turn left, and as she started into the turn she again looked in her side mirror and saw defendant's car immediately before it struck hers.

Under G.S. 20-154(a), a motor vehicle driver before "turning from a direct line" is required to "first see that such movement can be made in safety." Plaintiff's failure to again look for following or passing vehicles before beginning the left turn is evidence that she violated this statute and was contributorily negligent. Since the evidence does not indicate how far following vehicles could be seen, ascertaining when 115 feet away that no vehicle was behind her and signaling for a left turn did not necessarily meet the statute's requirements. But even if plaintiff violated the statute it was not negligence *per se*, G.S. 20-154(d), and the court's ruling that plaintiff was contributorily negligent as a matter of law is not legally correct.

In *Spruill v. Summerlin*, 51 N.C.App. 452, 276 S.E.2d 736 (1981), factually similar to this case, the Court quoted with approval the following from *Mintz v. Foster*, 35 N.C.App. 638, 641-42, 242 S.E.2d 181, 184 (1978):

Since a violation of G.S. 20-154 is no longer to be considered negligence per se, the jury, if they find as a fact the statute was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his common law duty of exercising ordinary care.

But unlike that case, this one was not tried by a jury, and though the judge's determination that plaintiff was contributorily negligent as a matter of law was error, it was not reversible error, as that determination is surplusage. For the transcript indicates that the judge made a factual finding from the evidence that plaintiff was contributorily negligent, a finding clearly supported by competent evidence. If the case had been tried to a jury and dismissed before they considered it a new trial would have to be ordered. But ordering a new trial before a fact-finder who has permissibly found that plaintiff was contributorily negligent and cannot prevail in her action would avail her nothing.

Affirmed.

Judges JOHNSON and PARKER concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. STEPHEN L. BEAMAN, ATTORNEY, DEFENDANT

No. 8910NCSB1017

(Filed 4 December 1990)

Attorneys at Law § 80 (NCI4th)— attorney's letter to former clients' bankruptcy attorney—conduct prejudicial to administration of justice—insufficient findings

Findings by a Hearing Committee of the Disciplinary Hearing Commission of the State Bar were insufficient to support its conclusion that defendant attorney was guilty of "conduct prejudicial to the administration of justice" in violation of Rule 1.2(D) of the Rules of Professional Conduct by writing a letter to the attorney representing defendant's former clients in a bankruptcy proceeding in which he stated that he had filed a proof of claim for fees due from the bankrupts, that attorney-

client confidences do not apply when collection of a fee is involved, that the bankruptcy petition failed to mention a promissory note owed the bankrupts and their conveyance of two parcels of real estate to their daughter, and that "if we can reach some satisfactory agreement with respect to the handling of the balance due to us, then this matter may . . . be put to rest," where the Committee failed to determine whether defendant's letter constituted a threat, the nature of the threat, if any, and how defendant's conduct, by intent or effect, was prejudicial to the administration of justice.

Am Jur 2d, Attorneys at Law § 60.

Attorneys at Law; fee collection practices as ground for disciplinary action. 91 ALR3d 583.

APPEAL by defendant from Order of the Disciplinary Hearing Commission of the North Carolina State Bar entered 30 January 1989. Heard in the Court of Appeals 6 June 1990.

Carolin D. Bakewell for plaintiff appellee.

Beaman and King, P.A., by Charlene Boykin King; Thomas and Farris, P.A., by Allen G. Thomas; and Burns, Day and Presnell, by Lacy M. Presnell, III, for defendant appellant.

COZORT, Judge.

The North Carolina State Bar filed a complaint alleging that the defendant violated Rule 4 of the Rules of Professional Conduct of the North Carolina State Bar. The State Bar subsequently moved to amend its complaint to allege that the defendant also violated Rule 1.2(D) of the Rules of Professional Conduct. A Hearing Committee of the Disciplinary Hearing Commission (the Committee) found in substance that the defendant had committed the acts alleged in the complaint and concluded that the defendant violated Rule 1.2(D). The Hearing Committee's Order of Discipline publicly censured the defendant. The defendant appealed. Having reviewed the record and the briefs, we remand the case for further consideration by the Disciplinary Hearing Commission. The factual and procedural history pertinent to our disposition of the case follows.

In April 1985, defendant Beaman was consulted by Mr. and Mrs. Thomas L. Green regarding their financial difficulties. By the summer of 1986, Beaman concluded that it would be in the

best interest of the Greens to file a petition in bankruptcy. Apart from billing the Greens on a monthly basis for $2,125.59 in attorney's fees, Beaman had no contact with the Greens after approximately July 1986. In April 1987, Beaman learned that the Greens had initiated bankruptcy proceedings, through another attorney, in the United States Bankruptcy Court for the Eastern District of North Carolina. The Greens' bankruptcy petition listed Beaman as an unsecured creditor and the $2,125.59 in attorney's fees as a debt. Beaman filed a proof of claim. On 5 August 1987, Beaman sent a letter to Joseph T. Howell, the attorney representing the Greens in bankruptcy proceedings. That letter was worded as follows:

> As you know I have previously represented Mr. and Mrs. Green and have filed a Proof of Claim in their case for fees due us in the amount of $2,125.59.
>
> As you know, client confidences do not apply as between an attorney and a client when the collection of the fee is involved.
>
> In reviewing the petition of the Greens I fail to note any mention of a Promissory Note from Barbara Holt in the approximate amount of $22,000.00 payable at the rate of $522.50 per month, nor is there any reference to the transfer of a store building, warehouse, and cucumber station to Patty Green sometime in 1984, along with the tranfer [*sic*] of a lake lot on Lake Gaston to Patty Green. Patty Green is the daughter of Mr. and Mrs. Green.
>
> I have not publicly raised any of these questions at this point. If we can reach some satisfactory agreement with respect to the handling of the balance due to us, then this matter may, in fact, be put to rest.
>
> I look forward to hearing from you in the next several days.

On 29 August 1988, the State Bar filed a complaint against Beaman alleging, among other items, the following:

> 4. In 1986, Beaman undertook to represent Thomas and Ellen Green.
>
> 5. While representing the Greens, Beaman discussed the Greens' property and debts and advised them of the requirements for filing for bankruptcy.

6. Thereafter, the Greens discharged Beaman as their attorney, and Beaman billed the Greens approximately $2,125.99 as his attorney fee.

7. In April 1987, the Greens, then represented by the law firm of Kirk, Gay & Kroeschell, filed for bankruptcy.

8. The Greens listed Beaman as a creditor in their bankruptcy petition.

9. Beaman was notified that he had been listed as a creditor in the Greens' bankruptcy petition.

10. Thereafter, on August 5, 1987, Beaman sent a letter to the Greens' attorney, requesting payment of his $2,125.59 attorney fee. A copy of the August 5, 1987 letter is attached hereto as exhibit A.

11. In the August 5, 1987 letter, Beaman stated that the Greens might have improperly omitted two financial transactions from their bankruptcy petition. Beaman then indicated "[i]f we can reach some satisfactory agreement with respect to the handling of the balance due to us, then this matter may . . . be put to rest."

12. Beaman did not adequately pursue other means of collecting his fee before writing the August 5, 1987 letter.

THEREFORE, Plaintiff alleges that Beaman's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. Section 84-28(b)(2) in that:

(a) By threatening to reveal client confidences unless his attorney fee was paid, and by failing to adequately explore other means of collecting his fee, Beaman violated Rule 4.

Rule 4 provides:

(A) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.

(B) Except when permitted under Rule 4(C), a lawyer shall not knowingly:

(1) Reveal confidential information of his client.

(2) Use confidential information of his client to the disadvantage of the client.

(3) Use confidential information of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation.

(2) Confidential information with the consent of the client or clients affected, but only after full disclosure to them.

(3) Confidential information when permitted under the Rules of Professional Conduct or required by law or court order.

(4) Confidential information concerning the intention of his client to commit a crime, and the information necessary to prevent the crime.

(5) Confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Beaman answered, denying "that the letter of August 5, 1987 . . . requested payment of Beaman's attorney fee." He answered further that he

> reviewed the notes that had been taken during [his] last meeting with Mrs. Green concerning assets and liabilities, and compared said notes to the assets and liabilities listed in the [Greens' bankruptcy] petition.

6. In comparing said notes and petition, Beaman noted that there was a promissory note of the Greens from Barbara Holt . . . . He further noted that the Greens had transferred two parcels of real estate to their daughter . . . .

* * * *

. . . He believed that further investigation into the affairs of the debtors was necessary and prudent in the role of an unsecured creditor. Such an investigation might well lead to the recovery of additional assets, which would in turn increase the size of the estate that the trustee had available for distribution to all creditors including him, so that the payment to him would be enhanced. Such action would be prudent and proper if viewed solely as a creditor. However, he had also previously acted as debtors' counsel and had received confidential information from the debtors, including the information described above.

* * * *

11. Beaman believed that the prudent course of action, considering all of the circumstances, would be to simply write the debtors' attorney, inform him that certain issues were unresolved in Beaman's mind, and to suggest that if these questions were not resolved to Beaman's satisfaction, that further legal proceedings might follow.

After the defendant answered the complaint, the plaintiff filed a motion to amend the complaint, stating: "That the proposed amendment does not attempt to charge Beaman with additional acts of alleged misconduct, but simply cites an additional provision of the Rules of Professional Conduct which Plaintiff alleges Beaman's conduct may have violated." The proposed amendment alleged that defendant's conduct also violated Rule 1.2(D), which provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that is prejudicial to the administration of justice."

After a hearing on 30 December 1988, the Committee found that the defendant violated Rule 1.2(D). In announcing the decision of the Committee, the Chairman stated that the allegations that defendant violated Rule 4 had "not been proven by clear and cogent evidence"; the order made no reference to Rule 4. In an Order of Discipline dated 30 January 1989, the Committee made the following pertinent findings of fact and conclusion of law:

3. Between the spring of 1985 and approximately August 1986, the Defendant represented Thomas and Ellen Green.

4. During his representation of the Greens, the Defendant discussed the Greens' financial problems, including their assets and liabilities.

5. During his representation of the Greens, the Defendant learned that the Greens were the holders of a promissory note executed by one Barbara Holt and that the Greens had conveyed certain property, including a cucumber station and a lake lot, to their daughter, Patty Green, in 1984.

6. After a final conference with the Defendant in approximately July 1986, the Greens failed to return for any further appointments, and the Defendant concluded that they no longer wished him to represent them by August, 1986.

7. As of their last conference in July, 1986, the Defendant believed that the Greens owed him $2,125.59 in attorneys' fees.

8. Between August, 1986 and April, 1987, the Defendant took no action to attempt to collect the attorneys' fees owed to him, other than sending monthly bills to the Greens.

9. On April 5, 1987, the Greens, then represented by Joseph T. Howell, filed a petition in bankruptcy.

10. The Greens' petition in bankruptcy listed the Defendant as a creditor and listed the $2,125.59 in attorneys' fees as a disputed debt.

11. The Defendant was aware that he had been listed as a creditor in the Greens' bankruptcy petition and filed a proof of claim after April 5, 1987.

12. On August 5, 1987, the Defendant sent a letter to the Greens' attorney . . . .

[The text of the letter is quoted above.]

13. The Defendant did not investigate the Greens' transactions regarding the Holt note or the Patty Green matters other than writing the August 5, 1987 letter.

14. The Defendant has an excellent personal and professional reputation in his community and has not been the subject of prior discipline by the N.C. State Bar.

Based upon the foregoing Findings of Fact, the Committee makes the following Conclusion of Law:

(a) By sending the above threatening letter to the Greens' attorney, the Defendant engaged in conduct prejudicial to the administration of justice, and thereby violated Rule 1.2(D) of the Rules of Professional Conduct.

On approximately 21 February 1989, the defendant filed a "motion for reconsideration" of the conclusion of law and Order of Discipline. After a hearing on 14 April 1989, the Committee deemed the defendant's motion to be one made pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, and the Committee denied that motion. The defendant appealed, assigning error both to the Order of Discipline and the Order denying his Rule 60(b)(6) motion.

Turning to the issues on appeal, we note initially that no objection to the State Bar's motion to amend its complaint to include Beaman's alleged violation of Rule 1.2(D) was made and that his alleged violation of this rule was argued before the Committee. Accordingly, consent to the amendment is presumed and the issue will be treated as being properly pled. *Harris v. Bridges*, 59 N.C. App. 195, 197-98, 296 S.E.2d 299, 300-01 (1982). We note further that in his brief the defendant does not discuss the denial of his Rule 60(b)(6) motion. Hence, the assignment of error to the Committee's denial of that motion is abandoned. N.C.R. App. P. 28. We note further that the standard of proof in attorney discipline proceedings is "clear, cogent, and convincing" evidence. Rules of the North Carolina State Bar, Art. IX, § 14(18) (1990); *N.C. State Bar v. Whitted*, 82 N.C. App. 531, 536, 347 S.E.2d 60, 63 (1986), *aff'd*, 319 N.C. 398, 354 S.E.2d 501 (1987). We note, finally, that the "[p]leadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder." Rules of the North Carolina State Bar, Art. IX, § 14(12) (1990).

The defendant contends that the Committee's findings do not support its conclusion that by sending his letter of 5 August 1987 the defendant "engaged in conduct prejudicial to the administration of justice, and thereby violated Rule 1.2 of the Rules of Professional Conduct."

We agree that the findings recited by the Committee in its Order dated 30 January 1989 are inadequate to support its conclusion. The Committee's conclusion characterizes defendant's letter to the Greens' attorney as "threatening." However, the Committee made no findings as to the exact nature of that threat nor as to the specific relationship between the defendant's "threatening letter" and the administration of justice. Thus, the Committee's findings failed to conform to North Carolina Rules of Civil Procedure, Rule 52(a)(1), which provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Under Rule 52(a)(1), the

> facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. . . . In other words, a proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.

Quick v. Quick, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

In her opening statement before the Disciplinary Hearing Committee, counsel for the plaintiff stated:

> This case is about a letter written by the defendant Mr. Stephen Beaman. There are two issues before you today, and that is, first of all, what does the letter mean, and second of all, was there a violation of the Rules depending on what the letter meant?
>
> * * * *
>
> The only real issues, or the only real dispute we have, is, "Is this letter a threat to reveal client confidences?" If it is, is that a violation of Rule 4, or Rule 1.2(D).

The Committee's Order simply fails to resolve the issues posed by the plaintiff's complaint and the evidence presented. The Committee failed to determine the nature of the threat, if any, posed by the defendant's letter of 5 August 1987, and to determine how

by intent or effect the defendant's conduct was prejudicial to the administration of justice. The cause must be remanded for specific findings on these issues. The Order is reversed and the cause remanded.

Reversed and remanded.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

MICHELE LYNN KELLY HARROFF v. JOHN COLE HARROFF

No. 8919DC1364

(Filed 4 December 1990)

1. **Husband and Wife § 12.1 (NCI3d)— separation agreement— rescission—fiduciary duty—procurement of signature**

Summary judgment should not have been granted for defendant husband in an action to rescind a separation agreement where plaintiff wife alleged that defendant breached his fiduciary duty in procuring her signature and defendant contended that he owed no fiduciary duty to plaintiff, based primarily on the parties' separation and their employment of an attorney. The involvement of an attorney does not automatically end the confidential relationship of husband and wife; where, as here, one spouse alleges and offers evidence that the confidential relationship still existed and that the attorney's role was merely to record the agreement the spouses negotiated, it is a question of fact as to whether the confidential relationship has been terminated.

Am Jur 2d, Divorce and Separation § 836.

2. **Husband and Wife § 12.1 (NCI3d)— separation agreement— rescission—duty of disclosure**

Summary judgment was not appropriate in an action to rescind a separation agreement where there were issues of material fact in that defendant contended that he had complied

with his duty of disclosure because plaintiff had had full access to their tax returns and had asked questions about the returns, but plaintiff asserted that the returns did not accurately reflect the couple's financial position.

Am Jur 2d, Divorce and Separation § 836.

3. Divorce and Alimony § 21.9 (NCI3d)— separation agreement— rescission—equitable distribution

Summary judgment for defendant was not proper in a claim for equitable distribution and rescission of a separation agreement where plaintiff wife alleged that defendant had breached his fiduciary duty in procuring her signature on the separation agreement and defendant alleged that plaintiff had failed to assert a claim for equitable distribution prior to the judgment of absolute divorce. The trial court is not barred from making an equitable distribution if it is factually determined on remand that plaintiff did not file a claim for equitable distribution before entry of the divorce judgment and that the claim for equitable distribution was not made because of misrepresentations by defendant. N.C.G.S. § 50-11(e).

Am Jur 2d, Divorce and Separation § 836.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

APPEAL by plaintiff from Order of *Judge Clarence E. Horton, Jr.*, entered 22 August 1989 in CABARRUS County District Court. Heard in the Court of Appeals 22 August 1990.

Womble Carlyle Sandridge & Rice, by Carole S. Gailor, for plaintiff appellant.

Tucker, Hicks, Hodge and Cranford, P.A., by John E. Hodge, Jr., Fred A. Hicks and Terri L. Young, for defendant appellee.

COZORT, Judge.

Plaintiff-wife brought an action to rescind a separation agreement, alleging a breach of fiduciary duty by the husband in procuring her signature to the separation agreement. The trial court granted summary judgment for the defendant-husband. We reverse, finding there are genuine issues of material fact concerning (1) whether the husband had a fiduciary duty to the wife at the time

the agreement was signed; and (2) whether the husband failed to disclose some assets and the true value of other assets.

Plaintiff's evidence tends to show that plaintiff and defendant were married on 12 July 1972. The marriage produced no children. The plaintiff worked in the parties' home and the defendant operated a veterinary practice in Salisbury. During the marriage, the parties acquired a significant amount of real property and other assets. Defendant moved out of the marital home on 1 March 1986. During the period of separation, an attorney, Mr. Tom Grady, was retained. After meeting with the parties, Mr. Grady drafted a separation agreement which had been negotiated by the parties. Mr. Grady drafted the parties' first agreement and the parties signed the agreement, but this agreement was not acknowledged. Plaintiff renegotiated the property settlement to include an amount for interest.

Under the terms of the agreement executed 15 January 1987, the parties agreed that they were "owners in a partnership known as H & S Properties" and that it was "understood that some of the properties owned by H & S Properties may be titled individually in the name of the parties and that some of the properties may be titled in the name of H & S Properties." Further, the agreement provided that the plaintiff would convey all of her right, title and interest in and to the partnership known as H & S Properties together with any interest in any lands owned by H & S Properties unto defendant. The lands owned by H & S were to be listed in an exhibit attached to the separation agreement. However, no such exhibit was ever filed. Finally, the agreement contained the following provision:

> It is the intent of the parties that this Agreement constitutes the final settlement of all rights and interest [*sic*] arising from the marriage of the parties, including a final settlement of marital property, and each party acknowledges that the settlement herein provided for is deemed to be an equitable settlement and distribution in lieu of the provisions of G.S. 50-20 and each party expressly releases and waives any claims arising thereunder.

The parties properly executed the agreement on 15 January 1987. The parties gave Mr. Grady a week at their beach house as payment for his services. The parties were divorced on 16 July 1987.

On 14 February 1989, some 18 months after the divorce, plaintiff filed an action to have the agreement rescinded on the grounds that it was invalid because the defendant did not disclose all material facts pertaining to the various provisions of the separation agreement. Plaintiff also asked for an equitable distribution of the marital assets. Plaintiff claimed that a fiduciary relationship existed between the defendant and her and that the defendant breached his fiduciary duty by failing to disclose the existence of and value of certain marital assets. Defendant moved for summary judgment on 22 June 1989. The trial court granted summary judgment on 22 August 1989. Plaintiff appeals.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1989). On appeal, the questions for determination are "whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980). Thus, in this case, the defendant must show that there is no dispute as to any material fact and that he is entitled to judgment as a matter of law.

To be valid "a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." *Eubanks v. Eubanks*, 273 N.C. 189, 196, 159 S.E.2d 562, 567 (1968), citing *Taylor v. Taylor*, 197 N.C. 197, 201, 148 S.E. 171, 173 (1929). Summary judgment is improper where there is a genuine issue of material fact as to whether defendant disclosed all material facts pertaining to the agreement. *Ledford v. Ledford*, 49 N.C. App. 226, 228, 271 S.E.2d 393, 396 (1980).

Plaintiff contends that the separation agreement is invalid because defendant breached his fiduciary duty to her by failing to disclose the true value of several assets and by concealing the existence of some marital assets. Defendant maintains that he owed no fiduciary duty to the plaintiff and that even if he did, he satisfied his duty of full disclosure.

[1] Defendant's first argument is based primarily on the separation of plaintiff and defendant and the employment of an attorney. We do not find that those facts settle the issue.

In *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971), our Supreme Court held that a confidential relationship between husband and wife can exist even after one spouse has left the home. In that case, Mr. Link asked his wife, sometime after they had separated, to sign over to him her interest in the house and her interest in some stock. *Id.* at 187, 179 S.E.2d at 700. Mrs. Link offered evidence tending to show that she had relied upon the defendant to handle the family business affairs, habitually signing without question documents such as tax returns. Her evidence also tended to show that, when the defendant requested her to sign the transfer forms, she knew nothing about the value of the stock. The Court held:

> [T]he fact that the transactions here in question occurred after the defendant's departure from the home . . . did not show the previously established confidential relationship between them had terminated so as to free the defendant to deal with the plaintiff as if they were strangers.

Id. at 193, 179 S.E.2d at 704. The Court also held that, where such a relationship exists, there is a duty to disclose all material facts, and failure to do so constitutes fraud. *Id.* at 192, 179 S.E.2d at 704.

We find the reasoning in *Link* controlling on the issue as to whether the confidential relationship between plaintiff and defendant still existed even after the parties separated.

We further find that the mere involvement of an attorney did not automatically end the confidential relationship and create an adversarial posture between the parties. Defendant urges to the contrary, relying mostly on *Avriett v. Avriett*, 88 N.C. App. 506, 363 S.E.2d 875 (1988), *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988). We find *Avriett* distinguishable.

In *Avriett*, the wife sued to set aside a separation agreement entered into with her husband. The facts showed that, during the settlement negotiations, the husband had sought legal advice, but the wife chose not to. *Id.* at 507, 363 S.E.2d at 877. After the husband had obtained legal advice, the parties continued their negotiations. *Id.* Plaintiff's complaint acknowledged that her husband had retained a lawyer to advise *him* with respect to the

settlement terms. *Id.* at 508, 363 S.E.2d at 877. We held that the parties had become adversaries and that the confidential relationship that formerly existed between them was terminated. *Id.*

The factual situation presented in this case is distinguishable from *Avriett.* In the present case, the plaintiff's evidence is that an attorney was retained by both parties to act as a scrivener to draft the parties' agreement. Mr. and Mrs. Harroff negotiated the terms of the agreement themselves and gave the information to the attorney. The Harroffs' working out the terms of their separation agreement themselves is evidence of the lack of the adversarial posture indicative of the termination of a confidential relationship. Furthermore, defendant admits that the retention of the attorney even helped to preserve the relationship between the parties: "[Mr. Grady] had helped us through a difficult time without getting into major conflicts."

Thus, we conclude that the involvement of an attorney does not automatically end the confidential relationship of husband and wife. Where, as here, one spouse alleges and offers evidence that the confidential relationship still existed and that the attorney's role was merely to record the agreement the spouses negotiated, it is a question of fact as to whether the confidential relationship has been terminated. Defendant's evidence below which contradicted plaintiff's evidence is not to be considered for purposes of summary judgment. Defendant's contrary evidence would be considered by the finder of facts.

[2] Defendant further contends that, even if a fiduciary relationship still existed, he complied with his duty of disclosure. Plaintiff disputes this contention arguing the defendant did not reveal the existence of all the marital assets. The affidavits submitted by the parties conflict on many of the factual assertions pertaining to the specific acts which constitute the defendant's alleged failure to satisfy his duty of disclosure.

Defendant's affidavit states that plaintiff had full access to the couple's income tax returns and asked questions about the returns. Plaintiff asserts that while she had access to the returns, the defendant represented to her that the returns did not accurately reflect the couple's financial position. Defendant claims that the partnerships were all reported on the couple's tax returns. Plaintiff alleges that defendant did not disclose the couple's interest in three limited partnerships owned by H & S. The plaintiff also avers

that the tax return in question was filed after the separation agreement was executed. It is clear that summary judgment was inappropriate where these issues of material facts existed. *Ledford*, 49 N.C. App. at 228, 271 S.E.2d at 396. Thus, this case must be remanded to determine whether the confidential relationship between the parties still existed and, if so, whether the defendant concealed assets or their true values such that the separation agreement should be set aside.

[3] Defendant further contends on appeal that summary judgment was proper as to plaintiff's claim for equitable distribution because plaintiff failed to assert a claim for equitable distribution prior to the judgment of absolute divorce entered 16 July 1987. Defendant relies on N.C. Gen. Stat. § 50-11(e), which provides that an absolute divorce "shall destroy the right of a spouse to an equitable distribution . . . unless the right is asserted prior to judgment of absolute divorce." We do not find, under the facts alleged by plaintiff, that the trial court is barred from making an equitable distribution of the marital property if the fact finder finds in plaintiff's favor on the issues of breach of fiduciary duty and concealment of assets.

We note initially that the record does not include the pleadings from the divorce action and thus the record is silent on whether plaintiff made a claim for equitable distribution prior to entry of absolute divorce. If it is factually determined upon remand that plaintiff did not file a claim for equitable distribution before the entry of the divorce judgment and that the claim for equitable distribution was not made because of misrepresentations made by defendant, the trial court is not barred from making an equitable distribution. If the finder of fact finds that defendant's misrepresentation caused the plaintiff to forego pleading for equitable distribution prior to divorce, the defendant shall be equitably estopped from pleading N.C. Gen. Stat. § 50-11(e) as a bar to plaintiff's claim for an equitable distribution of the marital property.

> "Equitable estoppel is defined as 'the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right . . . .'"

Webber v. Webber, 32 N.C. App. 572, 576, 232 S.E.2d 865, 867 (1977) (quoting *American Exchange Nat'l Bank v. Winder*, 198 N.C. 18, 20, 150 S.E. 489, 491 (1929)). *See also Parker v. Thompson-Arthur Paving Company and Cigna*, 100 N.C. App. 367, 396 S.E.2d 626 (1990). Here, defendant would be estopped from asserting the defense that plaintiff did not preserve her equitable distribution claim because plaintiff, if the trial court so finds, in good faith, relied on the representations of the defendant in waiving her right to equitable distribution.

In summary, defendant's motion for summary judgment should not have been granted where there existed questions of fact as to whether a fiduciary relationship still existed between the parties and whether defendant breached it. The trial court's order of summary judgment is reversed and the cause remanded for further proceedings.

Reversed and remanded.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY, PLAINTIFF v. WAKE COUNTY, DEFENDANT

No. 9010SC262

(Filed 4 December 1990)

Statutes § 1 (NCI3d) — taxation — assessment of public service company system property — act not revenue act — manner of enactment

Chapter 1052, 1987 Session Laws (Reg. Sess. 1988), entitled "AN ACT TO CORRECT THE DATES FOR PHASE-IN OF THE MODIFIED SYSTEM FOR ADJUSTING THE ASSESSMENT LEVEL OF PUBLIC SERVICE COMPANY SYSTEM PROPERTY," does not impose or authorize a tax and therefore is not within the

purview of N. C. Const. art. II, § 23, which requires revenue acts to be read and passed on three separate days.

Am Jur 2d, State and Local Taxation §§ 8, 9.

APPEAL by plaintiff from order entered 20 December 1989 by *Judge J. B. Allen, Jr.*, in WAKE County Superior Court. Heard in the Court of Appeals 26 September 1990.

On 4 May 1989, plaintiff filed an action against defendant seeking a refund of $1,214,211.00 in 1988 ad valorem taxes, plus $33,390.80 in interest. The complaint also challenged the constitutionality of 1987 N.C. Sess. Laws (Reg. Sess. 1988) c. 1052 (H.B. 2651), which allowed Division Five counties (including defendant) to reassess plaintiff's system property subject to ad valorem taxes in Wake County for 1988.

Plaintiff filed a motion for summary judgment on 31 July 1989. Defendant subsequently filed a motion to dismiss under Rule 12(b)(6) of the N.C. Rules of Civil Procedure and a motion for summary judgment. On 20 December 1989, the trial court entered its order *nunc pro tunc* 18 December 1989, granting defendant's motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Plaintiff appeals from this judgment.

Poyner & Spruill, by David Dreifus and Mary Beth Johnston, for plaintiff-appellant.

Wake County Attorney Michael R. Ferrell and Assistant Wake County Attorney Shelley T. Eason for defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting defendant's motion to dismiss under Rule 12(b)(6) of the N.C. Rules of Civil Procedure for failure to state a claim upon which relief can be granted. For the reasons below, we hold that the trial court did not err and affirm its judgment of 20 December 1989.

Under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1983), the question is whether the complaint, liberally construed, states a claim upon which relief may be granted under any legal theory. *Jones v. City of Greensboro*, 51 N.C. App. 571, 593, 277 S.E.2d 562, 576 (1981)

(citations omitted). In deciding a motion under this rule, the trial court must treat the allegations of the complaint as true. *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984), *aff'd in part and rev'd in part*, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 107 S.Ct. 131, 93 L.Ed.2d 75 (1986). Conclusions of law and unnecessary deductions of fact are not admitted for purposes of this rule. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

A claim may be dismissed under Rule 12(b)(6) if there is no law to support the claim, if there is an absence of fact to make a good claim or if there is a disclosure of fact which will defeat the claim. *Robertson v. Boyd*, 88 N.C. App. 437, 441, 363 S.E.2d 672, 675 (1988) (citation omitted). To test the legal sufficiency of a complaint asserting constitutional issues, a party may move to dismiss under this rule. *See Town of Beech Mountain v. County of Watauga*, 91 N.C. App. 87, 370 S.E.2d 453 (1980), *aff'd*, 324 N.C. 409, 378 S.E.2d 780, *cert. denied*, 110 S.Ct. 365, 107 L.Ed.2d 351 (1989) (U.S.N.C., 6 Nov. 1989 No. 89-179) (affirming dismissal of a complaint asserting constitutional equal protection and privileges and immunities issues).

I.

With these general principles in mind, we now turn to the facts and issues in the case before us. Before we discuss the constitutionality of the challenged statute, we must address the background of this litigation.

Plaintiff is a "public service company" organized under N.C. Gen. Stat. § 159B *et seq.*, and is subject to taxation on its system property under N.C. Gen. Stat. § 105-333 (1985). The Legislature authorized defendant and other counties to levy property taxes, including taxes on plaintiff's system property, according to the procedures in the Machinery Act (Chapter 105, Subchapter II). N.C. Gen. Stat. § 153A-149 (1987).

Counties reappraise real property every eight years. N.C. Gen. Stat. § 105-286 (1985). For these purposes, counties in North Carolina are divided into eight divisions, with each division having a different base year when its octennial revaluation of real property occurs. N.C. Gen. Stat. § 105-286(a) (1985). Defendant is in Division Five. Its last revaluation occurred in 1984; the next occurs in 1992. Although the issues in this litigation affect other divisions, our

discussion of the issues will be limited generally to Division Five counties and specifically, to defendant.

Under N.C. Gen. Stat. § 159B-27(a) (1987), municipally owned public utilities such as plaintiff make payments for system property to counties and cities "in lieu of property taxes." Under the statute, these payments are treated as property taxes.

The North Carolina Department of Revenue (hereinafter Revenue) appraises the true value of system property each year and then apportions the system property valuation among the local taxing units where the property is located. N.C. Gen. Stat. §§ 105-335(b), 338 and 339. The local taxing unit assesses the public utility system property at the certified valuation rate, applies the tax rate and collects that amount as it does property tax. N.C. Gen. Stat. § 105-341 (1985).

Generally, property in this state is assessed at 100% of its appraised (true) value. N.C. Gen. Stat. § 105-284(a). Some statutes, however, provide for assessment at different rates for special classes of property. These classes of property are not in issue.

Until 1 January 1987, N.C. Gen. Stat. § 105-342(c) allowed public utilities, such as plaintiff, to request county boards of commissioners to reduce assessed valuations for system property in the first year (base year) of the eight-year revaluation cycle, and in the third and seventh years following an eight-year revaluation. To receive a lower assessment, public utilities must show that locally appraised property was valued at 85% or less of its true value. Under those circumstances, the county commissioners could approve an assessment at less than 100% of Revenue's appraised value, thus eliminating any inequality in valuation for tax purposes between other real property and system property. When the county commissioners approved such reductions, they reported the reductions to Revenue, who would then apply the percentage reduction to its certified value for system property in that county in all following years until the public utility requested another reduction or the county conducted another eight-year revaluation. N.C. Gen. Stat. § 105-342(c)(1) (1985).

In 1985, the Legislature changed the above procedure for revaluing system property by rewriting N.C. Gen. Stat. § 105-284, effective 1 January 1987. This statute directed Revenue to determine if system property was appraised inequitably in any county by

conducting periodic assessment ratio studies of real property tax values. If Revenue found inequitable differences in valuations, it would automatically reduce system property tax values to compensate for these differences. Under the rewritten statute, the automatic revaluation for system property occurs in the first, fourth and seventh years of the county's eight-year revaluation cycle. The new statute also contained a rolling repeal date for the county Board of Commissioners reduction procedure, repealing it in each county on 1 January of the year in which Revenue was due to perform the sales assessment ratio studies. N.C. Gen. Stat. § 105-342(c).

By 1987, the Legislature realized that the phased repeal of the statute would produce a disproportionate effect on Division Five counties with revaluation cycles beginning in 1984. Under the old statute, defendant was eligible for third-year Board of Commissioner reductions during the 1987 tax year. They were again eligible for fourth-year reductions under the rewritten statute for the 1988 tax year. Therefore, in Division Five counties, utility companies could receive four reductions during the eight-year revaluation cycle instead of three reductions.

To prevent back-to-back reductions in Division Five counties, the Legislature enacted H.B. 2651 as 1987 N.C. Sess. Law (Reg. Sess. 1988) c. 1052 (hereinafter Chapter 1052), effective 1 January 1988. Chapter 1052 permitted a Division Five county, for the 1988 tax year (fourth year), to offset any amount of 1987 (third year) reduction received by a public utility under the old county board procedure. For example, if a public utility received a third-year reduction under the old procedure and a fourth-year reduction under the new procedure, the county could add the amount of the third-year reduction to the appraised value of the property for the fourth year.

The practical application of this produced the following result in the case *sub judice*. The value of plaintiff's property in Wake County in 1987 was $796,977,354.00. Plaintiff received a 21.16% reduction in the appraised value which resulted in a $168,640,408.00 reduction in the value of the property subject to taxes. Therefore, plaintiff paid 1987 taxes on the value of $628,336,946.00.

In 1988, Revenue appraised plaintiff's property at $841,979,244.00. Plaintiff received a reduction in the appraised value of 23.39%, or $196,938,945.00. Plaintiff paid 1988 taxes on the value of $645,040,299.00.

Pursuant to Chapter 1052, defendant assessed an additional amount of $1,214,211.00 in ad valorem taxes on plaintiff for the 1988 tax year. This was calculated by adding the amount of plaintiff's 1987 reduction (third year) of $168,640,408.00, to the 1988 value (after the fourth-year reduction) of $645,040,299.00. Plaintiff paid the additional tax plus $33,390.80 in interest, and subsequently requested a refund from defendant. Defendant denied this request on 21 April 1989. Plaintiff then filed this action challenging the constitutionality of Chapter 1052.

II.

Plaintiff alleges that Chapter 1052 violates two provisions of the North Carolina Constitution: Article II § 23 and Article I § 16.

a. *Article II § 23*

Under Article II § 23 of the North Carolina Constitution,

> No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

Both plaintiff and defendant agree that Article II § 23 applies, *inter alia*, to laws enacted for the purpose of imposing a tax. Defendant maintains that Chapter 1052 neither imposes a tax nor authorizes its imposition, and therefore, Article II § 23 does not apply. We agree and hold that Chapter 1052 does not impose or authorize a tax, and therefore, Article II § 23 does not apply.

We have reviewed the briefs of record, the cases cited therein and the arguments of the parties before this Court concerning this issue. There is no doubt that the effect of Chapter 1052 imposed a greater tax burden on plaintiff for 1988. However, Article II § 23 focuses on the *purpose* of the statute (to impose a tax) and not the *result* of the statute (an increased tax burden).

It is well-established law in this state that when determining the constitutional validity of a statute, "if the meaning is clear from reading the words of the Constitution, we should not search for a meaning elsewhere." *State ex rel. Martin v. Melott*, 320 N.C. 518, 520, 359 S.E.2d 783, 785 (1987) (citations omitted). We find that the language of Article II § 23 is clear in that it applies to statutes enacted to impose a tax.

More importantly, we find that the language of Chapter 1052 is clear. It is entitled, "AN ACT TO CORRECT THE DATES FOR PHASE-IN OF THE MODIFIED SYSTEM FOR ADJUSTING THE ASSESSMENT LEVEL OF PUBLIC SERVICE COMPANY SYSTEM PROPERTY." 1987 N.C. Sess. Laws (Reg. Sess. 1988) c. 1052. Sections 1 and 2 describe the manner in which the reappraisal or revaluation of system property will occur in the applicable divisions, as well as the effective dates for such revaluation. There is nothing in Chapter 1052 which indicates that its purpose is to raise revenue or to impose taxes. The fact that the effect of this chapter increased defendant's tax burden in 1988 is of no import to the stated purpose of the statute.

Moreover, we find that *Hart v. Commissioners*, 192 N.C. 161, 134 S.E. 403 (1926), supports our holding that Chapter 1052 does not impose a tax and therefore is not within the purview of Article II § 23 of the North Carolina Constitution. In *Hart*, a case upholding an act authorizing the revaluation of property, our Supreme Court stated: " 'Revenue bills, as defined by law, are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue.' " *Id.* at 164, 134 S.E. at 404, *citing*, 1 Story Constitution, § 880; *Twin City National Bank v. Nebeker*, 167 U.S. 196; 42 L.Ed., 134; *Millard v. Roberts*, 202 U.S. 429; 50 L.Ed., 1090; *Anderson v. Ritterbusch*, 98 Pac., 1002; 26 R. C. L., § 55; *Northern Counties Investment Trust v. Sears*, 35 L. R. A. (O. S.). The *Hart* Court found that the act in question was a machinery act and not a revenue act, and as such, need not comply with Article II § 14 of the 1868 Constitution (which is substantially the same as Article II § 23).

Plaintiff argues that *Hart* is inapplicable to the present case because *Hart* did not involve a retroactive revocation of a tax reduction authorized and taken in the previous year. We disagree. If the act is not a revenue or tax act from the outset, it does not matter if the act is retroactive or prospective in its application.

Further, we are not convinced that Chapter 1052 in the present case is, in fact, a retroactive act.

b. *Article I § 16*

Because we hold that Chapter 1052 is not a revenue or taxing act under Article II § 23, we do not need to address the issue of whether it violates Article I § 16. Article I § 16 of the North Carolina Constitution applies only to tax statutes "taxing retrospectively sales, purchases, or other acts previously done . . . ." N.C. Const. art. I § 16.

In summary, we hold that Chapter 1052 is not a tax or revenue statute within the meaning of Article II § 23 of the North Carolina Constitution. Therefore, the trial court did not err in dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted.

Affirmed.

Judge GREENE concurs.

Judge DUNCAN concurred prior to 29 November 1990.

STEPHANIE G. SUAREZ v. FOOD LION, INC.

No. 9019SC166

(Filed 4 December 1990)

1. **Master and Servant § 9 (NCI3d)— group life insurance plan—beneficiary**

Summary judgment was properly granted for defendant in an ERISA action in which plaintiff alleged that defendant had breached its fiduciary duty when its employee erroneously assured plaintiff that she was the properly designated beneficiary under her husband's group life insurance plan. Under 29 U.S.C.A. 1132(a)(2) (1985), the fiduciary is liable only to the plan and not to an individual.

Am Jur 2d, Insurance §§ 1848, 1849.

2. Reformation of Instruments § 3 (NCI3d) — group life insurance plan — beneficiary form — plaintiff not party to document

Summary judgment was properly granted in part for defendant in an action in which plaintiff alleged that defendant had erroneously informed her that she was the beneficiary of her husband's group life policy and that she could have changed the beneficiary form through the doctrine of reformation had she been aware of the error. In order to ask for reformation of a document, the party requesting such reformation must be a party to the document.

Am Jur 2d, Insurance §§ 1848, 1849.

Judge DUNCAN concurred prior to 29 November 1990.

APPEAL by plaintiff from judgment entered 1 November 1989 by *Judge Russell G. Walker* in RANDOLPH County Superior Court. Heard in the Court of Appeals 19 September 1990.

On 18 May 1988, plaintiff filed this action alleging negligence and breach of contract. Defendant answered and moved to dismiss the state law claims on the ground that they are preempted by the Employee Retirement Income Security Act (ERISA). Defendant stipulated that it would not raise as a defense the issue of standing under ERISA, if plaintiff filed its claim exclusively under ERISA. On 18 January 1989, the trial court granted defendant's motion.

On 16 February 1989, plaintiff filed an amended complaint alleging that defendant violated its fiduciary duty to plaintiff under ERISA and 29 U.S.C. § 1104 and that this breach was the proximate cause of plaintiff's injuries.

On 13 October 1989, defendant moved for summary judgment under Rule 56 of the N.C. Rules of Civil Procedure. The trial court granted the motion on 1 November 1989 after considering the pleadings, affidavits, evidence of record, briefs and arguments of counsel.

Plaintiff appeals from this judgment.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Jonathan R. Harkavy, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Timothy G. Barber and Steven O. Todd, for defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment to defendant. For the reasons below, we hold that the trial court did not err.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983), a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." This remedy permits the trial court to decide whether a genuine issue of material fact exists; it does not allow the court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C. App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In a summary judgment proceeding, the trial court must view all evidence presented in the light most favorable to the nonmoving party and determine if there is a triable material issue of fact. *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), *disc. review denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). A defendant is entitled to summary judgment if he establishes that no claim for relief exists or that the plaintiff cannot overcome an affirmative defense. *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

With these general principles in mind, we turn to the facts in the case before us. The evidence, in the light most favorable to plaintiff, establishes the following.

Plaintiff's deceased husband, Fernando Suarez, was in defendant's employ from 1982 until the time of his death on 17 June 1986. As defendant's employee, Suarez received group life insurance. On 8 March 1982, Suarez submitted his life insurance application to defendant's insurance carrier and designated his mother as beneficiary of the policy.

In August 1985, Suarez and plaintiff married. Suarez wanted to change the beneficiary of his life insurance from his mother to plaintiff and obtained a change of beneficiary form from defendant in August 1985. The instructions for making such change were included in an employee benefit booklet. Plaintiff acknowledged

that she and Suarez kept the booklet with their valuable papers but had never read it. The bottom of the change of beneficiary form contained a line for the signature of the *insured* to effect a change of beneficiary. Plaintiff signed the form instead of Suarez.

In March 1986, Suarez was admitted to a hospital and diagnosed as having a brain tumor. Two days later, he lapsed into a coma and died on 17 June 1986. Plaintiff contacted defendant after her husband lapsed into the coma and was assured by one of defendant's employees that she was the properly designated beneficiary of her husband's life insurance benefits.

Immediately following Suarez's death, both plaintiff and Suarez's mother filed claims for the insurance proceeds. The insurance carrier, Provident Life and Accident Insurance Company (hereinafter Provident), deposited the proceeds with the United States District Court for the Middle District of North Carolina and filed an action as an interpleader under Rule 22 of the Federal Rules of Civil Procedure. The U.S. District Court found the change of beneficiary form to be ineffective because Suarez did not sign it, and held that Suarez's mother was entitled to receive the proceeds. Plaintiff appealed, and the Fourth Circuit affirmed the lower court's decision.

Plaintiff then filed this action in state court seeking damages from defendant for negligence. The trial court dismissed the original complaint on the grounds that it was preempted by ERISA, and granted plaintiff leave to amend. Plaintiff filed an amended complaint against defendant under ERISA for breach of fiduciary duty.

Plaintiff claims that defendant breached its fiduciary duty when its employee assured her (erroneously) that she was the properly designated beneficiary under Suarez's group life insurance plan. Plaintiff further argues that had she been properly advised by defendant, she could have reformed the beneficiary designation. We find no merit to plaintiff's arguments and therefore affirm summary judgment.

ERISA Claim

[1] Under 29 U.S.C.A. § 1132(a)(2) (1985), a participant or beneficiary may bring a civil claim against an employer for breach of fiduciary duty under § 1109. Section 1109 states:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties

> imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, ...

29 U.S.C.A. § 1109 (1985).

The United States Supreme Court construed the above statute to apply when a fiduciary breaches its duties imposed by ERISA. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 87 L.Ed.2d 96, 105 S.Ct. 3085 (1985). Under the statute, the fiduciary is liable only to the plan and not to an individual. *Id.* The Supreme Court held that a plan participant or beneficiary does not have a claim against a fiduciary for extracontractual compensatory or punitive damages resulting from improper or untimely processing of ERISA benefit claims, because recovery applies to the benefit of the plan as a whole and not to an individual beneficiary. *Id.* The Court reasoned:

> But when the entire section [1109] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is 'to make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan* . . . .' [Footnote omitted.]

Id. at 140, 87 L.Ed.2d at 102, 105 S.Ct. at 3089 (emphases added).

The Supreme Court further explained that while the "fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries . . .[,] the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, . . . and [other duties to the fund]." *Id.* at 142-43, 87 L.Ed.2d at 104, 105 S.Ct. at 3090.

Plaintiff argues that *Massachusetts Mut. Life Ins. Co.* does not apply because defendant stipulated that plaintiff had standing to bring the action before us. We have reviewed the record before us and find that defendant stipulated only that it would "not raise as a defense the issue of standing . . . [in an ERISA claim]." Defend-

ant did not stipulate that any such claim filed by plaintiff would be recognized legally under ERISA.

Moreover, we have reviewed the cases plaintiff cited and find them inapplicable to the case at bar. The present case is one for breach of fiduciary duty under ERISA. Plaintiff relies heavily on *O'Grady v. Firestone Tire & Rubber Co.*, 635 F.Supp. 81 (S.D. Ohio 1986). *O'Grady* discusses the preemption of an equitable estoppel claim by ERISA and held that under ERISA a plaintiff may bring an action for arbitrary and capricious administration of a plan under the same facts which would support a common claim of equitable estoppel. There is nothing in *O'Grady* which speaks to breach of fiduciary duty under ERISA.

For the above reasons, we hold that the United States Supreme Court's decision in *Massachusetts Mut. Life Ins. Co.* precludes plaintiff from bringing an action against defendant for breach of fiduciary duty under ERISA and the facts of the case before us.

Reformation of the Beneficiary Form

[2] Plaintiff further argues that had she been aware of the error on the change of beneficiary form, she could have changed the form through the doctrine of reformation. We disagree.

Under the doctrine of reformation, such equitable remedy is available:

> [W]hen, because of the mutual mistake of the parties, the agreement expressed in a written instrument differs from the actual agreement made by the parties. [Citation] The mistake of only one party to the instrument, if such mistake was not induced by the fraud of the other party, affords no ground for relief by reformation. [Citation] The party asking for relief, by reformation of a written instrument, must prove, first, that a material stipulation was agreed upon by the parties to be incorporated in the instrument as written; and, second, that such stipulation was omitted from the instrument by mistake, either of both parties, or of one party, induced by the fraud of the other, or by mistake of the draftsman. [Citation] Equity will give relief by reformation only when a mistake has been made, and the written instrument, because of the mistake, does not express the true intent of both parties. [Citation] '[R]eformation on grounds of mutual mistake is available only where the evidence is clear, cogent and convincing.' [Citation]

Light v. Equitable Life Assurance Society, 56 N.C. App. 26, 32-33, 286 S.E.2d 868, 872 (1982).

In the case *sub judice*, any change in the beneficiary was the sole responsibility of the insured, Suarez. Plaintiff acknowledged that Suarez could have taken no action to change the beneficiary form himself after he lapsed into a coma.

We fail to see how plaintiff could have reformed the document in question under the above principles of law. In order to ask for reformation of a document, the party requesting such reformation must be a party to the written document. *Id.* The only parties contemplated to effect a change in beneficiary are the group policyholder (defendant) and the insured. Under the group life insurance policy provided by defendant, in order to change a beneficiary, the *insured* must file a written request for such change and the *insured* must sign the written request. Under the circumstances in the present case, the intended beneficiary was not authorized to effect such change under the provisions of the policy or under the doctrine of reformation.

For the above reasons, we hold that plaintiff could not have reformed the beneficiary form on her own initiative prior to her husband's death. Therefore, we hold that the trial court did not err in granting summary judgment in defendant's favor.

Affirmed.

Judge GREENE concurs.

Judge DUNCAN concurred prior to 29 November 1990.

STATE OF NORTH CAROLINA v. CLARK EDWARD CHANDLER

No. 909SC385

(Filed 4 December 1990)

1. Criminal Law § 35 (NCI3d)— trafficking in cocaine—criminal record of vehicle owner—no proof of guilt of another

In a prosecution for trafficking in cocaine found under the seat of a truck defendant was driving, the criminal rec-

ord of the owner of the truck was not admissible to show that he acted in conformity with his prior conviction by placing the cocaine under the truck seat since such a conclusion would be based on pure conjecture, and the evidence does not point directly to the guilt of another for the crime for which defendant was on trial.

Am Jur 2d, Drugs, Narcotics, and Poisons § 46.

2. Criminal Law § 381 (NCI4th) — court's examination of witness — no prejudice to defendant

The trial court's questioning of a witness did not elicit hearsay testimony and did not prejudice defendant. N.C.G.S. § 8C-1, Rules 614(b), 801(c).

Am Jur 2d, Trial § 88.

3. Criminal Law § 86.2 (NCI3d) — conviction more than ten years old — use to impeach defendant

The trial court did not violate N.C.G.S. § 8C-1, Rule 609(b) by permitting the State to use a prior conviction more than ten years old to impeach defendant's testimony that his convictions during the last ten years were his only convictions.

Am Jur 2d, Witnesses § 577.

Right to impeach credibility of accused by showing prior conviction as affected by remoteness in time of prior offense. 67 ALR3d 824.

4. Criminal Law § 1061 (NCI4th) — sentencing hearing — failure to transcribe — absence of prejudice

The trial court's failure to order that the sentencing hearing be transcribed did not constitute prejudicial error.

Am Jur 2d, Criminal Law § 527.

5. Narcotics § 4 (NCI3d) — trafficking in cocaine — sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of trafficking in cocaine by possession where it tended to show that a plastic bag containing 44.2 grams of powder of which approximately thirty percent was cocaine hydrochloride

was found underneath the seat of the truck defendant was driving.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

APPEAL by defendant from judgment entered 8 September 1989 by *Judge Howard E. Manning, Jr.* in GRANVILLE County Superior Court. Heard in the Court of Appeals 14 November 1990.

Defendant was charged with trafficking in cocaine by possession in violation of G.S. § 90-95(h)(3) and trafficking in cocaine by transportation in violation of G.S. § 90-95(h)(3)a. After a jury trial, defendant was found guilty as charged. The trial court arrested judgment on the charge of trafficking in cocaine by transporting and sentenced the defendant on the charge of trafficking in cocaine by possession to an active term of twelve years imprisonment and imposed a fine of $50,000. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General E. Burke Haywood, for the State.

Currin & Currin, by Hugh M. Currin, Jr., for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show the following: While on patrol on 10 February 1989, Butner Public Safety Officer William J. Pendleton received a dispatch to be on the lookout for a brown pickup truck with a camper shell. Shortly thereafter, a pickup truck matching the dispatched description was observed traveling east on C Street. After following the truck for approximately five blocks, the officer pulled the truck over for speeding. After he approached the truck, the officer explained that he had received information that that vehicle was supplying drugs to Piedmont Village. Defendant subsequently gave Officer Pendleton permission to search the truck.

While searching the truck, Officer Pendleton found a plastic bag containing a white powdery substance located behind and partially underneath the seat of the truck. Defendant was thereafter arrested.

During trial, Irvin Allcox, a forensic chemist, testified that the bag in question contained 44.2 grams of white powder, approximately thirty percent of which was cocaine hydrochloride.

[1] On appeal, defendant brings forth five questions for this Court's review. First, defendant contends that the trial court improperly excluded the criminal record of Ernest Kemp, the owner of the truck. We disagree.

G.S. § 8C-1, Rule 404(b) provides that "[e]vidence 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." *See also State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). "Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard." *Id.* at 667, 351 S.E.2d at 279. "The admissibility of evidence of the guilt of one other than the defendant is governed . . . by the general principle of relevancy." *Id.* at 667, 351 S.E.2d at 280. Such evidence, however, must tend to directly implicate another *and* be inconsistent with the guilt of the accused. *Id.*

In holding that the trial court properly excluded Mr. Kemp's criminal record, we are not inadvertent to *State v. Cotton, supra.* Instead, we simply find the present case to be distinguishable. In *Cotton*, the defendant was convicted of first-degree burglary, first-degree rape and first-degree sexual offense. On appeal, the Supreme Court concluded that the trial court erred by excluding evidence tending to show that the crimes charged and another similar offense were committed by the same person—not the defendant. The defendant was therefore entitled to a new trial. Unquestionably, the evidence excluded in *Cotton* tended to point directly to the guilt of another person.

Here, the excluded evidence and the defendant's contention that Kemp acted in conformity with his prior conviction by placing the cocaine under the seat is based on pure conjecture and does not point directly to the fact that another, namely Ernest Kemp, committed the crime for which the defendant was convicted. Extending the holding in *Cotton* to the instant case would result in the admissibility of evidence based upon an inference. Given the facts at hand and the purpose for which the defendant sought to have Kemp's criminal record admitted, the trial court's decision to exclude the record was proper. This assignment is overruled.

[2] Second, defendant contends that the trial court's questioning of a witness constituted error and the questioning elicited inadmissible prejudicial testimony. Specifically, defendant contends that as a result of the trial court's question, hearsay testimony was improperly admitted.

"The court may interrogate witnesses, whether called by itself or by a party." G.S. § 8C-1, Rule 614(b). The court may also question a witness for the purpose of clarifying a witness' testimony and for promoting a better understanding of it. *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986). Such examination must be conducted with care and in a manner which avoids prejudice to either party. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968). Having reviewed the complained of testimony, we find that the witness' testimony was neither hearsay nor prejudicial to the defendant. *See also* G.S. § 8C-1, Rule 801(c). This assignment is also overruled.

[3] Third, defendant contends that the trial court disregarded G.S. § 8C-1, Rule 609 by admitting into evidence his prior conviction of misdemeanor possession of marijuana which occurred more than ten years prior to the date of trial. We disagree.

G.S. § 8C-1, Rule 609(b) provides that:

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

"Rule 609 allows the defendant's prior conviction to be offered into evidence when the defendant takes the stand and thereby places his credibility at issue." *State v. Blankenship*, 89 N.C. App. 465, 467, 366 S.E.2d 509, 511 (1988).

Here, the State gave defense counsel written notice of his intent to use the defendant's 1972 conviction pursuant to G.S. § 8C-1, Rule 609(b) and a hearing was thereafter conducted to

provide the defendant with an opportunity to contest the use of such evidence. After hearing arguments of counsel, the trial court ruled that

> the evidence does not have the probative value sufficient to outweigh any possible prejudicial effect under Rule 609B [sic], and I am not going to allow its admission . . . if the door, now—if the door is opened, then we have got a whole new ball game.

From the trial court's ruling, defense counsel was given sufficient notice of the court's intent.

When the defendant took the stand, defense counsel posed questions about his convictions within the last ten years. Defense counsel also asked the defendant whether those convictions (the ones within the last ten years) were the only convictions he had. Defendant replied in the affirmative. Later, the court ruled that such a statement opened the door and allowed the State to go into the 1972 conviction. We find that defendant's testimony creates favorable inferences as to his entire criminal record. Therefore, on cross-examination, the State "may inquire into defendant's record and rebut his statement that [he] had not been convicted of anything other than the crimes mentioned in [his] testimony." *State v. Blankenship*, *supra* at 470, 366 S.E.2d at 512.

[4] Fourth, defendant contends that the trial court's failure to order a transcript of the sentencing hearing constituted prejudicial error. We have considered the defendant's argument, but find no error. Suffice it to say that in the absence of an abuse of discretion, a judgment will not be disturbed because of either the sentencing procedure or procedural conduct. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

[5] Last, defendant contends that the trial court improperly denied his motion to dismiss at the end of all the evidence. We disagree.

In ruling on a motion to dismiss, the trial court must view and consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). The State has the burden of establishing, beyond a reasonable doubt, every essential element of the charge of trafficking in cocaine by possession. *Id.* A person is guilty of this offense if (1) he knowingly possesses cocaine or any mixture containing cocaine

(either actual or constructive) and (2) the quantity of cocaine or mixture containing cocaine is 28 grams or more. *State v. Keys*, 87 N.C. App. 349, 361 S.E.2d 286 (1987). *See also* G.S. § 90-95(h)(3).

In the instant case, the State offered uncontroverted evidence that a plastic bag containing 44.2 grams of powder of which approximately thirty percent was cocaine hydrochloride was found underneath the seat of the truck defendant was driving. As previously held by our Supreme Court, possession of narcotics by an accused may be a result of "circumstantial evidence from which an inference of knowledge might reasonably be drawn." *State v. Boone*, 310 N.C. 284, 295, 311 S.E.2d 552, 559 (1984). Based upon the circumstances of defendant's arrest, this contention lacks merit.

Having carefully reviewed the record and the briefs, we conclude defendant received a fair trial, in which there was

No error.

Judges WELLS and COZORT concur.

ZELMA R. OXENDINE, PLAINTIFF v. SARAH BOWERS, AKA SARAH BRAYBOY AND JANE MARIE MORGAN, DEFENDANTS

No. 8916SC1348

(Filed 4 December 1990)

1. Evidence § 34.1 (NCI3d)— claim against two or more defendants—plaintiff not bound by pleadings

The trial court erred by granting summary judgment for defendant Bowers in an action arising from an automobile accident where plaintiff was a passenger in a car driven by defendant Morgan and owned by plaintiff; defendant Bowers was the driver of the other car; and defendant Bowers moved for summary judgment based on plaintiff's allegation of negligence by Morgan and by her adoption in deposition testimony of a statement by her counsel that the facts would support Morgan's negligence. Plaintiff's complaint does not explicitly state that her claims against the named defendants are alternative allegations, but that does not preclude the

application of *Woods v. Smith*, 297 N.C. 363, which declined to apply the rule that a party is bound by his pleadings to cases where a plaintiff brings a claim in the alternative against two or more defendants.

Am Jur 2d, Evidence § 696.

2. Evidence § 34.1 (NCI3d)— adverse deposition testimony— nonconclusive

The trial court erred by granting summary judgment for defendant Bowers in an automobile accident case where plaintiff adopted a statement of her attorney during her deposition that the facts supported the allegation that plaintiff's driver was negligent. Plaintiff also testified in the same deposition that her driver was not negligent and her statement was not such deliberate, unequivocal, and repeated testimony as would defeat plaintiff's claim as a matter of law. Plaintiff's deposition contained a forecast of evidence from which it could reasonably be inferred that plaintiff's driver was not negligent and the resolution of this issue should have been left to a jury.

Am Jur 2d, Depositions and Discovery § 178.

Judge LEWIS concurring in the result.

APPEAL by plaintiff from order entered 21 September 1989 in SCOTLAND County Superior Court by *Judge Howard E. Manning, Jr.* Heard in the Court of Appeals 21 August 1990.

Plaintiff filed this negligence action on 12 December 1988 claiming injuries arising out of a collision between a vehicle driven by defendant Morgan in which plaintiff was a passenger and a vehicle driven by defendant Bowers. Defendant Bowers answered, denying her own negligence, admitting defendant Morgan's negligence, and affirmatively alleging that plaintiff was the owner of the vehicle driven by Morgan and that Morgan's negligence operated as a matter of law to bar plaintiff's claim. Defendant Bowers moved for summary judgment on 21 August 1989 based on plaintiff's allegation of negligence on the part of her own driver, and her adoption in deposition testimony of a statement of her counsel that the facts of the case would support Morgan's negligence. On 11 September 1989, plaintiff voluntarily dismissed her claim against defendant Morgan.

An order granting defendant Bowers' motion for summary judgment was entered 21 September 1989. Plaintiff appeals.

Bruce Allen for plaintiff-appellant.

Etheridge, Moser, Garner and Bruner, P.A., by Terry R. Garner, for defendant-appellee Sarah Bowers.

WELLS, Judge.

[1] When a motion for summary judgment is granted, "the critical questions for determination upon appeal are whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E.2d 399 (1980), *cert. denied*, 276 S.E.2d 283 (1981). By her first assignment of error, plaintiff claims the existence of genuine issues of material fact which would preclude summary judgment. We agree and therefore reverse.

In its order granting summary judgment, the court below found:

> On the morning the motion of the defendant Bowers was set for hearing, the plaintiff filed a voluntary dismissal as to Jane Marie Morgan. However, the plaintiff has not amended her pleadings, and the voluntary dismissal of this action as to the defendant Morgan does not in any way alter the sworn testimony of the plaintiff as set forth in her deposition, nor does it operate to withdraw her sworn statements. Under the law in North Carolina, and in particular, the case of *Herne v. Smith*, 23 N.C. App. 111, 208 S.E.2d 268 (1974), and *Rhodes [sic] v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637 (1982), the plaintiff, an owner/passenger is not, under the doctrine of imputed negligence, entitled to recover against the defendant Bowers for injuries sustained in the collision, where she has stated in her sworn deposition that the facts at a trial would support her allegations of negligence on the part of the driver of her own vehicle.

We do not quarrel with the court's statement of the law of imputed negligence. We fail to see any admission by the plaintiff, in the pleadings or deposition testimony, however, which mandated the application of the doctrine at the summary judgment stage.

In *Woods v. Smith*, 297 N.C. 363, 255 S.E.2d 174 (1979), plaintiff was a passenger in her own automobile, driven by defendant Smith. Her complaint alleged that a car driven by defendant Stallings crossed the center line and struck her car, and that she suffered injuries in the collision. She brought a negligence claim against Stallings and Smith, asserting that her injuries were caused "by the reason of the negligence of either or both."

Each defendant answered, denying their own negligence and admitting the negligence of the other. Defendant Stallings moved for summary judgment, relying on the doctrine of imputed contributory negligence. The trial court accepted her contention that her admission of defendant Smith's negligence established these allegations as conclusive judicial admissions and granted the motion. Defendant Smith then moved for summary judgment, relying on plaintiff's deposition testimony to the effect that he was not negligent. The trial court granted this motion as well.

The Supreme Court reversed on each motion. The Court acknowledged the general rule of *Davis v. Rigsby*, 261 N.C. 684, 136 S.E.2d 33 (1964), which holds that a party is bound by his pleadings unless withdrawn, amended, or otherwise altered, but declined to apply it to cases where a plaintiff brings a claim in the alternative against two or more defendants:

> Inconsistent, alternative, and hypothetical forms of statements of claims, "are directed primarily to giving notice and lack the essential nature of an admission. To allow them to operate as admissions would render their use ineffective and frustrate their underlying purpose. . . ." (Citation omitted).

The Court also set forth the effect of a party's deposition testimony which is adverse to her case:

> [W]hen a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict. Two exceptions to this general rule should be noted, however. First, when a party gives unequivocal, adverse testimony under factual circumstances such as were present in *Cogdill*, his statements should be treated as binding judicial admissions rather than as evidential admissions. Second, when a party gives adverse testimony, and there is insufficient evidence

> to the contrary presented . . . summary judgment or a directed verdict would in most instances be properly granted against him.

Plaintiff's testimony was held not to fit into either exception.

We first apply *Woods* to the pleadings. Plaintiff's complaint does not explicitly state that her claims against the named defendants are alternative allegations, but that does not preclude application of *Woods*. "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." N.C. Gen. Stat. § 1A-1, Rule 20(a). "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses." N.C. Gen. Stat. § 1A-1, Rule 8(e)(2). Neither rule provides for any particular form of phrasing alternative claims.

The complaint sets forth separate counts against each defendant. Each count contains a paragraph where it avers that plaintiff was damaged by "*the* Defendant" (emphasis added) and lists the same damages claims in nearly identical language. The prayer for relief lists a damage claim against each, and a separate prayer for judgment of joint and several liability. Plaintiff's attorney also made it clear during plaintiff's deposition and at the summary judgment hearing that he was attempting to plead the claims in the alternative. While the better practice would be to use specific language to the effect that such claims are brought in the alternative, we hold that on these facts, plaintiff's complaint is not so inartfully drafted as to preclude application of the *Woods* rule.

[2] We next apply *Woods* to plaintiff's deposition testimony in this case. Neither exception to the general rule of nonconclusiveness of adverse deposition testimony applies here. In *Cogdill v. Scates*, 290 N.C. 31, 224 S.E.2d 604 (1976), relied on in *Woods*, the party "testified to concrete facts, not matters of opinion, estimate, appearance, inference, or uncertain memory. Her testimony was deliberate, unequivocal and repeated." Plaintiff in this case adopted a statement of her attorney that the "facts do support what has been pled," *i.e.*, that her driver was negligent, but she also testified in the same deposition that her driver was not negligent, and stated "I really am not a lawyer, and I don't understand when

you come talking about who's at fault and who's to blame. I can't say because I don't know, other than Jane moved over." Such a statement is not such deliberate, unequivocal, and repeated testimony as would defeat plaintiff's claim as a matter of law. Plaintiff's deposition, which defendant Bowers submitted with her motion for summary judgment, also contained a forecast of evidence sufficient from which it could reasonably be inferred that plaintiff's driver was not negligent. The resolution of this issue should have been left to a jury.

Defendant Bowers failed to show that there were no genuine issues of material fact in this case, and that she was entitled to judgment as a matter of law. Summary judgment, therefore, was inappropriate. Having found for plaintiff on her first assignment of error, we do not consider her second or third assignments.

Reversed.

Judge EAGLES concurs and joins in the concurring in the result opinion of Judge LEWIS.

Judge LEWIS concurs in the result.

Judge LEWIS concurring in the result.

I concur in the result: Where a plaintiff sues two or more defendants, the plaintiff should clearly state that the actions are in the alternative, if they are. In the event that the plaintiff takes a voluntary dismissal as to one or more defendants, the plaintiff should move to strike those sections of the complaint no longer applicable. Otherwise, do the allegations remain viable, lurking in various counts, waiting to spring upon unsuspecting parties, lawyers or judges? Or alternatively, are these lines redacted by some unnamed, unseen entity and if so, just which lines?

However, the present state of the law does not seem to require either.

J. ADAM ABRAM, WILLIAM L. CASSELL AND JOHN ENGLERT, D/B/A ACE CHEMICAL DEPENDENCY SERVICES, PLAINTIFFS v. CHARTER MEDICAL CORPORATION OF RALEIGH, INC., DEFENDANT

No. 9010SC140

(Filed 4 December 1990)

1. **Limitation of Actions § 4.6 (NCI3d)— certificate of need— agreement not to contest—breach—statute of limitations**

Plaintiff was barred by the statute of limitations from bringing an action alleging breach of an agreement to refrain from further challenges to ACE's certificate of need where the agreement was breached, if at all, on 18 April 1985 and plaintiff did not bring its breach of contract action until 1 August 1988. The statute of limitations for contract actions is three years. N.C.G.S. § 1-52(1) (1983).

Am Jur 2d, Limitation of Actions § 92.

2. **Malicious Prosecution § 12 (NCI3d)— contested certificate of need—malicious prosecution—summary judgment for defendant**

The trial court did not err by granting summary judgment for defendant on a malicious prosecution claim arising from a contested certificate of need where plaintiff did not allege special damages, one of the elements of malicious prosecution. Liquidated damages for breach of a contract are not special damages resulting from the alleged malicious prosecution; furthermore, the record reveals no factual dispute as to whether special damages existed.

Am Jur 2d, Malicious Prosecution §§ 10, 11.

3. **Unfair Competition § 1 (NCI3d)— contested certificate of need—not unfair competition**

The trial court properly granted defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of defendant's unfair and deceptive trade practices claim arising from a contested certificate of need. The General Assembly intended to exclude from the application of N.C.G.S. § 75-1.1 professional services rendered by a member of a learned profession such as a professional health care provider.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

APPEAL by plaintiffs from judgment entered 4 August 1989 by *Judge Henry W. Hight, Jr.*, in WAKE County Superior Court. Heard in the Court of Appeals 30 August 1990.

Tharrington, Smith & Hargrove, by Richard A. Schwartz and Douglas A. Ruley, for plaintiff appellants.

Parker, Poe, Adams & Bernstein, by Robert W. Spearman, Renee J. Montgomery and John J. Butler, for defendant appellee.

COZORT, Judge.

The owners of ACE Chemical Dependency Services (hereinafter ACE or plaintiff) initiated this action against Charter Medical Corporation of Raleigh (hereinafter Charter or defendant) on 1 August 1988. ACE asserted claims for breach of contract, fraud, attempted monopolization, abuse of civil process, malicious prosecution and unfair and deceptive trade practices. The trial court granted defendant's Rule 12(b)(6) motion to dismiss plaintiff's unfair and deceptive trade practices claim and dismissed on summary judgment the rest of plaintiff's claims. Plaintiff appeals. We affirm the dismissal of all claims.

In North Carolina no person may develop a new institutional health service without first obtaining a certificate of need (hereinafter CON) from the Department of Human Resources (hereinafter Department). N.C. Gen. Stat. § 131E-178(a) (1988). In 1982, ACE and Charter, along with several other organizations, submitted applications for a CON to provide chemical dependency treatment facilities in the Wake County area. In the fall of 1982, the Department approved Charter's application. ACE contested this approval and pursued its administrative remedies.

In 1983 the Department determined that additional chemical dependency facilities were needed. ACE submitted an application for the CON. ACE planned to lease the facility to another organization, CHAPS Health Services, Inc. (hereinafter CHAPS). Charter then opposed ACE's new application and pursued its administrative remedies. Thus, while ACE was opposing Charter's application in a contested case hearing, Charter was opposing ACE's through an identical procedure. However, on 15 April 1985, the parties

entered into a Settlement Agreement which was to settle the parties' "interests and claims with regard to the projects." ACE agreed to cease its opposition to Charter's project. In return, Charter agreed to cease its opposition to ACE's and CHAPS' pending application and not to contest the CON if it was awarded to ACE.

Over the next two years, Charter developed its project while ACE suffered a number of pre-construction delays. ACE attempted to enter into a financing relationship with American Treatment Centers, Inc. (hereinafter ATC). Pursuant to the Settlement Agreement, ACE dismissed its contested case hearing regarding Charter's development. On 18 April 1985, Charter wrote to the CON section of the Department requesting that the project proposed by ACE, CHAPS and ATC be subjected to a full certificate of need review.

The Department viewed ACE's new financing relationship as a CON transfer, a decision which would have necessitated the withdrawal of the first CON and a full, lengthy CON review. ACE proposed a new financing relationship, which the Department eventually found acceptable and extended the timetable on ACE's CON. Charter continued to raise questions about ACE's CON by writing to the Department on 31 July 1985 and 3 September 1985. On 1 May 1986, Charter filed with the Department a formal petition alleging ACE had unlawfully transferred its certificate. When that petition was denied, Charter filed in superior court on 11 July 1986 a Petition for a Contested Case Hearing. Charter also filed in superior court a Petition for Judicial Review and Complaint. The superior court filings were ultimately resolved in ACE's favor, and the ACE project was completed and began operation in 1986.

On 1 August 1988, plaintiff filed this action, basing its claims upon Charter's efforts to secure full CON review of the proposed project after ACE changed its financing arrangement.

On appeal, plaintiff contests the trial court's dismissal of the unfair and deceptive trade practices claim and the granting of summary judgment for defendant on the breach of contract claim and the malicious prosecution claim. We shall address the breach of contract claim first.

[1] Plaintiff contends that the letter and the spirit of the settlement agreement required Charter to refrain from any further challenges to ACE's certificate of need and that Charter's letters, administrative petitions and judicial petitions violated the agree-

ment. Defendant argues that the statute of limitations bars ACE's contract claim. We agree with defendant.

The statute of limitations for contract actions is three years. N.C. Gen. Stat. § 1-52(1) (1983). The statute begins to run when the claim accrues; with a breach of contract action, the claim accrues upon breach. *Pearce v. N.C. Hwy. Patrol Vol. Pledge Comm.*, 310 N.C. 445, 448, 312 S.E.2d 421, 424 (1984).

The controlling case is *Parsons v. Gunter*, 266 N.C. 731, 147 S.E.2d 162 (1966). In that case plaintiff Parsons and defendant Gunter agreed in April 1959 that "they would work jointly to develop a machine known as a 'cotton card drive'." *Id.* at 731, 147 S.E.2d at 163. The parties agreed that they would each "receive one-half of the profits from sales of the machines." *Id.* Thereafter, defendant sold some of the machines. In May 1960, plaintiff demanded an accounting of the proceeds defendant received; defendant told plaintiff that there was " 'no room for [plaintiff] in the sale of [the] card drives.' " *Id.* at 733, 147 S.E.2d at 164. Our Supreme Court held that in May 1960 Gunter had disclaimed his obligation to pay part of the proceeds to plaintiff and that "[t]his disavowal started the statute of limitations to run." *Id.* Therefore, Parsons' right to maintain the action was barred since more than three years elapsed since the date plaintiff was put on notice of Gunter's breach and the institution of the cause of action. *Id.*

In the present case, the agreement, if breached at all, was breached initially on 18 April 1985. On that date, Charter's attorney wrote the chief of the CON section and requested a full review of the new arrangement proposed by CHAPS, ACE, and ATC. In a letter to Charter's attorney, ACE itself declared the 18 April letter to be a breach of the settlement agreement. Thus, according to *Parsons*, if a claim for breach of contract arose, it did so on 18 April 1985. ACE did not bring its breach of contract action until 1 August 1988 and is thus barred by the statute of limitations.

[2] Plaintiff's next argument is that, since Charter's administrative and judicial petitions were filed in the absence of or contrary to the governing statutes and regulations and jeopardized a CON, the trial court should have denied defendant's motion for summary judgment as to plaintiff's malicious prosecution claim. We do not agree.

In North Carolina, a claim of malicious prosecution requires proof of four elements: (1) that the defendant initiated the proceedings, (2) that the defendant did so maliciously and without probable cause, (3) that the proceeding terminated in plaintiff's favor, and (4) that there are special damages beyond the ordinary expense and inconvenience of litigation. *Stanback v. Stanback*, 297 N.C. 181, 203, 254 S.E.2d 611, 625 (1979). In the present case, one of the elements plaintiff must prove is special damages. Plaintiff has forecast no evidence demonstrating special damages as required by *Stanback*; plaintiff has merely referred to the liquidated damages set forth in the agreement. Liquidated damages for breach of a contract are not special damages resulting from the alleged malicious prosecution. Furthermore, the record reveals no factual dispute as to whether special damages existed. Thus, summary judgment for the defendant on this issue was appropriate.

[3] Finally, plaintiff maintains that the trial court's dismissal of the unfair and deceptive trade practices claim was erroneous. In the complaint, plaintiff alleges that the actions of defendant in seeking review of plaintiff's application for the CON constituted an unfair and deceptive trade practice in violation of N.C. Gen. Stat. § 75-1.1. In response, defendant argues that § 75-1.1(b) exempts professional services rendered by a member of a learned profession and that it is exempted as a professional health care provider. We find merit to defendant's argument.

In an action which stemmed from a hospital's denial of hospital staff privileges to two doctors, a panel of this Court concluded that the "consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of 'professional services' which is now excluded from the aegis of G.S. 75-1.1." *Cameron v. New Hanover Memorial Hosp.*, 58 N.C. App. 414, 447, 293 S.E.2d 901, 921, *disc. review denied, appeal dismissed*, 307 N.C. 127, 297 S.E.2d 399 (1982). We find that the rationale of *Cameron* applies here; the General Assembly intended to exclude such professional services from the application of § 75-1.1. Under North Carolina's CON law, an applicant seeking to develop a health service facility must meet certain criteria. *See* N.C. Gen. Stat. § 131E-183 (1988). Defendant, a member of the health care community, was requesting that ACE's application be subjected to scrutiny before ATC, the organization which would run the chemical dependency treatment facility, was admitted to

the community. These actions do not give rise to a claim under § 75-1.1. Thus, the trial court properly dismissed plaintiff's claim.

In conclusion, we find that the trial court's orders dismissing this action were proper.

Affirmed.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

NANCY P. SEARLES v. HAROLD N. SEARLES

No. 9029DC25

(Filed 4 December 1990)

Appeal and Error § 40 (NCI4th); Rules of Civil Procedure § 58 (NCI3d)— decision announced in open court—no entry of judgment—no jurisdiction in appellate court—judgment not enforceable

An appeal in an equitable distribution action was dismissed because the Court of Appeals lacked jurisdiction over the case where the trial court announced in general terms its decision as to how the property was to be divided; the trial court directed the defendant's attorney to draft a judgment; the plaintiff gave oral notice of appeal in open court and subsequently served written notice of appeal; and defendant's attorney never drafted the judgment. Entry of judgment did not occur in compliance with any of the provisions of N.C.G.S. § 1A-1, Rule 58 and notice of appeal given after the general terms of the judgment were announced in open court was not alone sufficient to vest jurisdiction in the Court of Appeals. An announcement of judgment in open court constitutes the rendition of judgment, not its entry, and entry of judgment by the trial court is the event which vests jurisdiction in the Court of Appeals. Not only is there no effective judgment for the purposes of appeal, the judgment is not enforceable as between the parties.

Am Jur 2d, Appeal and Error § 301.

Chief Judge HEDRICK concurs in the result.

APPEAL by plaintiff from judgment rendered 22 August 1989 by *Judge Loto J. Greenlee* in TRANSYLVANIA County District Court. Heard in the Court of Appeals 27 August 1990.

George T. Perkins, III, for plaintiff-appellant.

Ladson F. Hart for defendant-appellee.

GREENE, Judge.

The plaintiff appeals from an equitable distribution proceeding completed on 22 August 1989.

The parties were married on 2 September 1982. On 12 May 1988, the plaintiff filed a divorce complaint and a request for equitable distribution. The divorce was granted on 30 August 1988.

The equitable distribution proceeding began on 21 August 1989. The transcript indicates that on 22 August 1989, the trial court announced in general terms its decision as to how the property was to be divided. At the end of the proceeding, the trial court directed the defendant's attorney to draft a judgment, to allow the plaintiff's attorney to examine it, and to then send it to the court. The record indicates that the defendant's attorney never drafted the judgment.

At the end of the proceedings on 22 August 1989, the plaintiff gave oral notice of appeal in open court. The plaintiff also subsequently served written notice of appeal, filed 15 September 1989.

On appeal, the defendant moves to dismiss under Rules 25(b) and 9(a)(1) of the North Carolina Rules of Appellate Procedure upon the grounds that the plaintiff failed to include in the record a copy of the judgment the defendant's attorney was directed to draft.

The dispositive issue is whether this Court has jurisdiction over the case. We conclude that it does not.

We first note that the record on appeal does not include a judgment, and failure to include such in the record on appeal subjects the appeal to dismissal. N.C.R. App. P. 9(a)(1). *See also Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984).

However, we do not dismiss this appeal for failure to comply with Rule 9, but because the record reveals that no judgment was entered by the trial court. Since entry of judgment is jurisdictional this Court is without authority to entertain an appeal where there has been no entry of judgment. *Logan v. Harris*, 90 N.C. 7 (1884).

Entry of judgment is governed by Rule 58 of our Rules of Civil Procedure which provides:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

N.C.R. Civ. P. 58 (1983).

Since this action is for equitable distribution, it does not involve recovery of a "sum certain or costs" as required by paragraph one. Furthermore, the record does not indicate that the clerk made any notation in the minutes as required by paragraph one. The second paragraph of Rule 58 is inapplicable because the transcript does not indicate that the court directed the clerk to make a notation of judgment, and because the record does not contain such a notation.

Under paragraph three of Rule 58, three separate events must occur before entry of judgment will be deemed complete. First, the clerk must receive an order from the trial judge for the entry of judgment. Second, the judgment must be filed. Third, the clerk must mail notice of filing to all parties. Since no judgment was prepared and filed in this case, entry of judgment did not occur under paragraph three of Rule 58. Consequently, entry of judgment did not occur in compliance with any of the provisions of Rule 58 and this appeal must be dismissed.

We reject any argument that notice of appeal given after the general terms of the judgment are announced in open court is, alone, sufficient to vest jurisdiction in this Court. An announcement of judgment in open court constitutes the rendition of judgment, not its entry. *See Kirby Building Systems v. McNiel*, 327 N.C. 234, 240, 393 S.E.2d 827, 830 (1990) (contrasting rendition of judgment and entry of judgment). Rendition of judgment merely marks the beginning of the time during which a party may give timely notice of appeal. *See* N.C.R. App. P. 3 (appeal *may* be taken from a judgment which has been rendered, but appeal *must* be taken within thirty days after entry of judgment). While timely notice of appeal generally divests the trial court of jurisdiction, *see Kirby*, notice of appeal does not remove the authority of the trial court to enter its written judgment where it conforms substantially with the court's oral announcement. *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 126 (1987); *see also Truesdale v. Truesdale*, 89 N.C. App. 445, 447, 366 S.E.2d 512, 514 (1988) (notice of appeal does not prevent the court from approving the form of its judgment and making findings and conclusions necessary to prepare and file judgment). We hold that, not only does the court have the authority to subsequently enter a judgment which conforms to its rendered judgment, entry of judgment by the trial court is the event which vests jurisdiction in this Court, and the judgment is not complete for the purpose of appeal until its entry. 2 McIntosh, *North Carolina Practice and Procedure* § 1621 (2d ed. 1956). *See also Logan.*

The circumstances which cause us to dismiss this appeal are particularly troublesome because the defendant now benefits from a dismissal of plaintiff's appeal brought about by the defense counsel's failure to draft the judgment as directed by the court. However, not only is there no effective judgment for the purposes of appeal, the judgment is not enforceable as between the parties to this

action as it has not been entered. *See McIntosh* (judgment not complete for purpose of enforcement until its entry).

We acknowledge the present North Carolina practice in which the trial court usually delegates the drafting of judgments and orders to counsel. However, the delegation of this responsibility does not relieve the trial court of its ultimate responsibility.

> A judgment is an act of the court, not counsel. [The trial judge] may not escape responsibility for any judgments signed by him by delegating their preparation to counsel or anyone else. "The trial judge cannot be too careful to make certain that his judgments and orders are accurate and complete, regardless of who takes the primary responsibility of preparing them." The National Conference of State Trial Judges, The State Trial Judges Book 197 (2d ed. 1969).

In re Crutchfield, 289 N.C. 597, 603, 223 S.E.2d 822, 825 (1975).

We note in passing that a 1963 amendment to Federal Rule 58 specifically discourages such delegation of order preparation to trial counsel. The rule provides that "[a]ttorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." Fed. R. Civ. P. 58.

Accordingly, as the judgment from which the plaintiff attempts to appeal has not been entered by the trial court, this appeal is dismissed.

Dismissed.

Judge ARNOLD concurs.

Chief Judge HEDRICK concurs in the result.

CLINTON DEVANE BASS, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. 907SC130

(Filed 4 December 1990)

Insurance § 69 (NCI3d) — underinsured motorist coverage — stacking not allowed

Summary judgment was correctly granted for defendant insurance company in an action in which plaintiff had two vehicles insured by defendant N. C. Farm Bureau; plaintiff owned a motorcycle insured by a different insurance company; plaintiff was injured while operating the motorcycle; plaintiff obtained a jury verdict for damages against the driver of the other vehicle; and plaintiff alleged that he was entitled to recover from defendant based on the underinsured motorist coverage provided in defendant's policy covering the other two vehicles. The N. C. Farm Bureau policy specifically excluded other vehicles owned by plaintiff and not insured under the policy issued by defendant and the policies were not stackable.

Am Jur 2d, Automobile Insurance § 329.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

APPEAL by plaintiff from judgment entered 15 December 1989 by *Judge G. K. Butterfield* in WILSON County Superior Court. Heard in the Court of Appeals 30 August 1990.

Thomas and Farris, P.A., by Allen G. Thomas and Julie A. Turner, for plaintiff appellant.

Poyner & Spruill, by George L. Simpson, III, for defendant appellee.

COZORT, Judge.

This case involves the stacking of underinsured motorist coverages provided in automobile insurance policies. In this case

plaintiff asked the trial court to find the defendant insurance company liable to plaintiff for underinsured motorist coverage. Defendant issued a policy insuring two vehicles owned by plaintiff. The accident causing plaintiff's injuries occurred while plaintiff was operating a third vehicle he owned which was insured not by the defendant, but by a different insurance company. Defendant's policy contained the standard exclusion which excluded liability insurance coverage for any insured using any vehicle, other than a vehicle insured by the policy, owned by the named insured. The trial court granted summary judgment for defendant. We affirm. The facts follow.

Plaintiff was permanently injured on 27 July 1987 when a 1986 Honda motorcycle he was operating was involved in a collision with an automobile driven by Manuel Tyson. On that date, plaintiff had a policy of insurance with the defendant, North Carolina Farm Bureau Mutual Insurance Company, which insured a 1979 Dodge truck and a 1981 Ford automobile. Each vehicle was insured as follows: Bodily injury limits of $100,000 per person and $300,000 per accident; uninsured/underinsured bodily injury limits of $100,000 per person and $300,000 per accident. Plaintiff paid a separate premium to insure each vehicle for the uninsured/underinsured coverage.

On the date of the accident, plaintiff had a policy with State Farm Mutual Automobile Insurance Company which insured the Honda motorcycle for bodily injury limits of $25,000 per person and $50,000 per accident.

Plaintiff filed a civil action against Manuel Tyson and received a jury verdict for damages in the amount of $900,000. Tyson had minimum liability coverage on his automobile in the amount of $25,000. His insurance carrier paid $25,000 to the Clerk of Superior Court of Wilson County for the benefit of plaintiff pursuant to N.C. Gen. Stat. § 20-279.21(b)(4).

Plaintiff filed this action on 24 October 1989, alleging that he is entitled to recover from defendant based on the uninsured motorist (hereinafter UIM) coverage provided in the policy covering the Dodge truck and the Ford automobile. After defendant filed an answer, both parties moved for summary judgment. On 15 December 1989, the trial court granted defendant's motion for summary judgment. Plaintiff filed timely notice of appeal.

For the purposes of this appeal, the facts are not disputed. Coverage under the insurance policy is thus a question of law and an appropriate matter for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56.

Plaintiff contends on appeal that he is entitled to stack the coverages provided in his policy with the defendant and receive $175,000, computed as follows: $100,000 from the underinsured coverage on the Dodge plus $100,000 on the underinsured motorist coverage on the Ford, less the $25,000 paid to the plaintiff by Tyson's insurance company. We disagree.

Plaintiff relies principally on *Sutton v. Aetna Casualty and Surety Company*, 325 N.C. 259, 382 S.E.2d 759 (1989). In *Sutton*, plaintiff insured had two policies with the defendant insurance company. Policy A provided $50,000 per person UIM bodily injury coverage on two vehicles. Plaintiff paid a premium for the UIM coverage for each vehicle. *Id.* at 261, 382 S.E.2d at 761. Policy B provided $100,000 per person UIM bodily injury coverage on each of two additional vehicles. Plaintiff also paid a separate premium for the UIM coverage for each vehicle under Policy B. *Id.* Plaintiff was allowed to stack, or aggregate, UIM coverages for each vehicle in both policies. The Supreme Court held that plaintiff was entitled to a total UIM coverage of $300,000 under her policy with Aetna. *Id.* at 269, 382 S.E.2d at 765.

We do not find *Sutton* controlling in this case. Rather, the situation in this case is most analogous to *Smith v. Nationwide Mut. Ins. Co.*, 97 N.C. App. 363, 388 S.E.2d 624 (1990), a case decided by this Court less than six months after the Supreme Court handed down its decision in *Sutton*. In *Smith*, the plaintiff, Michael A. Smith, purchased two automobile insurance policies from defendant Nationwide. Policy A covered a Toyota automobile owned by Mr. Smith and his daughter, who was killed in an accident. Both Mr. Smith and his daughter were named insureds under Policy A. Policy B covered two other vehicles and listed only Mr. Smith as the named insured. The daughter was killed when the car she was driving—the Toyota covered by Policy A—was struck by another vehicle. Mr. Smith filed suit seeking a declaration that the UIM coverages under Policies A and B from Nationwide could be stacked in the event of a recovery exceeding the amount of insurance carried by the other driver. *Id.* at 365, 388 S.E.2d at 626. The trial court granted Mr. Smith's motion for summary judgment, ruling

that Policy A and Policy B should be stacked. This Court reversed, holding that a household-owned vehicle exclusion in Policy B barred UIM coverage for the daughter's death and therefore prevented stacking of that coverage with the UIM coverage provided by Policy A. *Id.* at 371, 388 S.E.2d at 629.

In distinguishing *Smith* from *Sutton*, this Court stated:

> The question decided in *Sutton* was whether an injured insured could stack UIM coverages for each of four vehicles listed in two separate policies. Analyzing the language of the statute, the legislative intent, and the public policy implications of its decision, the Court held that the coverages for each of the vehicles listed under the two policies was available to compensate the insured.

Smith, 97 N.C. App. at 368, 388 S.E.2d at 628.

The Court then reasoned:

> It is not clear from *Sutton* who owned the vehicle driven by the injured insured. Thus, the *Sutton* opinion cannot be read to explicitly address the question presented here, namely, the effect on stacking of a policy provision excluding coverage for an accident involving an automobile owned by a named insured or a family member which is not insured by that policy. In our view, this court's decision in *Driscoll v. United States Liability Ins. Co.*, 90 N.C. App. 569, 369 S.E.2d 110, *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988) is dispositive.
>
> . . . We reasoned that because UIM coverage is provided only in conjunction with bodily injury liability coverage, a family member for whom *liability* coverage is inapplicable by reason of the household-owned vehicle exclusion is not entitled to UIM coverage. We noted that:
>
> > "it is scarcely the purpose of any insurer to write a single [UIM] coverage upon one of a number of vehicles owned by an insured, or by others in the household, and extend the benefits of such coverage gratis upon all other vehicles—any more than it would write liability, collision or comprehensive coverages upon one such vehicle and indemnify for such losses as to any other vehicle involved."
>
> *Id.* at 572, 369 S.E.2d at 112-13 (quoting 8C Appleman, *Insurance Law and Practice* Sec. 5078.15, at 179).

Id. at 369, 388 S.E.2d at 628 (citation omitted). We find the reasoning by this Court in *Smith*, as it applied *Driscoll* and distinguished *Sutton*, to be applicable to the facts in this case. In this case, plaintiff was injured while driving a vehicle insured by State Farm. The UIM coverage he seeks is that provided under policies issued by defendant North Carolina Farm Bureau Mutual Insurance Company, which issued a policy covering two other vehicles. The policy specifically excluded other vehicles owned by the plaintiff and not insured under the policy issued by defendant. The policies are not stackable, and the trial court correctly entered summary judgment for the defendant.

We note that the opinion issued by this Court in *Smith* was not unanimous and has been appealed to the North Carolina Supreme Court. The Supreme Court heard arguments on the *Smith* case in October of 1990, and no opinion has been issued as of the date of the filing of this opinion.

The Order of the trial court granting summary judgment for the defendant is

Affirmed.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

LILLIAN G. PRICE v. JACK ECKERD CORPORATION

No. 9010SC345

(Filed 4 December 1990)

Negligence § 57.5 (NCI3d)— fall in store—contributory negligence—directed verdict for defendant improper

The trial court should not have granted a directed verdict for defendant in an action arising from plaintiff's fall in a store where plaintiff asked a cashier for help in locating an item; looked in the direction in which the cashier pointed and noticed advertisements hanging from the ceiling; took one step

with her left foot and one step with her right foot; caught her right foot on a small but heavy box; and fell face down upon the floor. Whether a reasonably prudent person using ordinary care under similar circumstances would have looked down at the floor and seen the box before walking is a question the jury must resolve; likewise, given the possibility that plaintiff's attention was diverted by the cashier's directions and by the advertisements, it cannot be said as a matter of law that plaintiff was guilty of contributory negligence in bringing about her injuries.

Am Jur 2d, Premises Liability §§ 782, 783.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on floor. 61 ALR2d 110.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

APPEAL by plaintiff from judgment filed 1 December 1989 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 24 October 1990.

McNamara, Pipkin, Knott & Carruth, by J. T. Knott, III and Ashmead P. Pipkin, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by J. Dennis Bailey and Joseph T. Carruthers, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals the trial court's judgment filed 1 December 1989 granting the defendant's motion for directed verdict made at the close of the plaintiff's evidence.

The evidence, when viewed in the light most favorable to the plaintiff, shows the following: On 6 March 1986, the plaintiff, a seventy-six-year-old woman, entered the Eckerd Drug Store located on Raeford Road in Fayetteville, North Carolina. She went to the store to buy some Tums. She searched for the Tums for some time, and when she was unable to locate them, she decided to ask a cashier for help. She walked up an aisle to the cash register behind which was a cashier, Ms. Toni Gillis. When the plaintiff was just beyond the end of the aisle and thereby three to four

steps away from Ms. Gillis, the plaintiff asked Ms. Gillis where the Tums were located, and Ms. Gillis pointed in the direction of the prescription department, which was to Ms. Gillis' left and to the plaintiff's right. The plaintiff could not see the Tums from her location because a wall of merchandise separated her from the prescription department.

At this point, the plaintiff was standing at an angle to Ms. Gillis. When Ms. Gillis pointed to the prescription department, the plaintiff looked over in that direction, noticing the advertisements hanging from the ceiling. She then turned on her left foot, took one step with her left foot, then took one step with her right foot, catching her right foot on a small but heavy box and falling face down upon the floor. She sustained various injuries from her fall. According to Ms. Gillis, the box had been left on the floor by one of the store managers during the process of stocking the shelves. At the time of the fall, the plaintiff was looking in the direction of the prescription department, not at the floor.

The plaintiff filed suit against the defendant on 18 November 1987. On 8 February 1989, the defendant filed a motion for summary judgment. The trial court denied that motion concluding that there were "genuine issues of material fact that should be considered by the jury." The case came on for trial on 27 November 1989. After the plaintiff had presented her evidence, the defendant told the trial court that it would not be presenting any evidence. Rather, the defendant motioned for a directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50, which the trial court granted "on the grounds that plaintiff was contributorily [sic] negligent as a matter of law."

As we have recently stated,

> [t]he purpose of a motion for directed verdict is to test the legal sufficiency of the evidence for submission to the jury and to support a verdict for the non-moving party. . . . In deciding the motion, the trial court must treat non-movant's evidence as true, considering the evidence in the light most favorable to non-movant, and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence. . . . Non-movant's evidence which raises a mere possibility or conjecture cannot defeat a motion for directed verdict. . . . If, however, non-movant shows more than a scintilla of evidence, the court must deny the motion. . . . Grant

> of motion for directed verdict in negligence cases is rare; the issues 'are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury.' . . . 'A verdict may never be directed when there is conflicting evidence on contested issues of fact.'

McFetters v. McFetters, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990) (citations omitted). When a defendant pleads as a defense the plaintiff's contributory negligence, the defendant has "the burden of proof on the issue," and if the defendant offers no evidence, a directed verdict for the defendant "based on plaintiff's contributory negligence is appropriate only when there are no genuine issues of fact, . . . and [the] 'non-movant's contributory negligence [is so clearly established] that no other reasonable inference or conclusion may be drawn therefrom.' " *Id.* at 193, 390 S.E.2d at 351 (citations omitted).

The issue is whether the evidence viewed in the light most favorable to the plaintiff allows but one reasonable inference, that the plaintiff was contributorially negligent with regard to her injuries.

The defendant argues that the plaintiff was contributorially negligent as a matter of law "because the evidence clearly established that [the] plaintiff fell over the box because she was not looking where she was going."

"Negligence is the failure to exercise a duty of care for the safety of another." *Thomas v. Dixson*, 88 N.C. App. 337, 340, 363 S.E.2d 209, 212 (1988). Because the plaintiff entered the defendant's store to purchase the defendant's goods, the plaintiff is considered an invitee. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981). Because the plaintiff was an invitee, the defendant owed the plaintiff "the duty to exercise ordinary care to keep its store in a reasonably safe condition and to warn her of hidden dangers or unsafe conditions of which it had knowledge, express or implied." *Id.* The defendant also owed the plaintiff the duty "to maintain its aisles and passageways in such condition as a reasonably careful and prudent person would deem sufficient to protect its patrons while exercising ordinary care for their own safety." *Id.*

When a plaintiff does not discover and avoid an obvious defect, that plaintiff will usually be considered to have been contributorially negligent as a matter of law. *Thomas*, 88 N.C. App. at 341, 363 S.E.2d at 212. However, "where there is 'some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition,' " the general rule does not apply. *Id.* (citation omitted). Additionally, our Supreme Court has rejected an unbending application of the general rule stating that the contributory negligence defense does not automatically bar from recovery the " 'plaintiff who trips or falls over an object on the premises of another,' " even when the object was " 'in a position at which the plaintiff would have seen it had he or she looked.' " *Norwood*, 303 N.C. at 468, 279 S.E.2d at 563 (citation omitted).

> The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety. *The question is* not whether a reasonably prudent person would have seen the . . . [object] had he or she looked but *whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.*

Id. (emphases added).

Viewed in the light most favorable to the plaintiff, the evidence supports a reasonable inference or conclusion that she was not contributorially negligent in failing to look down at the floor. When she asked the cashier where the Tums were located, the cashier pointed toward the prescription department. The plaintiff looked toward the prescription department and noticed advertisements hanging from the ceiling. Paying attention to the cashier's directions, the plaintiff turned and began walking. The box over which she fell was so close to her that she had barely taken two steps before tripping over it. Whether a reasonably prudent person using ordinary care for her safety under similar circumstances would have looked down at the floor and seen the box before walking or would have proceeded in the same manner as the plaintiff is a question the jury must resolve. On these facts, a reasonable juror could find either way. Likewise, given the possibility that the plaintiff's attention was diverted by the cashier's directions and by the advertisements, we cannot say as a matter of law that the plaintiff was contributorially negligent in bringing about

her injuries. Whether her attention was in fact diverted and whether the circumstances facing her would have diverted the attention of an ordinarily prudent person from discovering or seeing the box are questions of fact. If the plaintiff's attention was in fact diverted, and if the same would have happened to an ordinarily prudent person, then the general rule would not apply, and the plaintiff cannot be considered to have been contributorially negligent as a matter of law. *Thomas*. Accordingly, the judgment of the trial court directing verdict for the defendant is vacated, and the case is remanded for a new trial.

New trial.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

SHELBY OGLE ALLEN, PLAINTIFF v. ROUSE TOYOTA JEEP, INC., FORMERLY D/B/A CAROLINA TOYOTA, AND CAROLINA TOYOTA, INC., DEFENDANTS

No. 8928SC1178

(Filed 4 December 1990)

1. Automobiles and Other Vehicles § 274 (NCI4th)— purchase of automobile—attempted revocation—substantial impairment of value

In an action for revocation of a sale of an automobile in which the trial court sat without a jury, the court's findings (mislabeled as conclusions of law) regarding whether the automobile had a nonconformity which substantially impaired its value to the buyer were remanded where the evidentiary findings reflect a substantial defect in the car, repeated, unsuccessful repair efforts, and plaintiff's continued use of the car, and the Court of Appeals was unable to determine whether the trial court gave appropriate consideration to plaintiff's subjective reaction to the vehicle's problems in the context of the objective criteria. The proper test to be applied is a "personalized objective test," or how a reasonable person would react in the buyer's position. N.C.G.S. § 25-2-608.

Am Jur 2d, Consumer Product Warranty Acts §§ 66-68; Sales §§ 1238, 1239, 1247-1249.

2. **Automobiles and Other Vehicles § 274 (NCI4th)— sale of automobile—revocation—use of automobile**

The trial court erred in an action for revocation of the sale of an automobile by concluding that there was a substantial change in the condition of the car before the attempted revocation not due to any defect where that conclusion was at odds with the court's conclusion that plaintiff's revocation occurred within a reasonable time. When the defendant has made repeated assurances that the defect can and will be cured, a delay to see if these assurances are met is not *per se* unreasonable and, particularly when dealing with an automobile, the Court of Appeals declined to impose a rule that the goods cannot be used during such a time period. N.C.G.S. § 25-2-608(2).

Am Jur 2d, Consumer Product Warranty Acts §§ 66-68; Sales §§ 1235, 1236.

3. **Appeal and Error § 487 (NCI4th)— action tried without jury—findings made under misapprehension of law—reversed and remanded—no new trial**

It was not necessary to order a new trial in an action for revocation of an auto purchase where the court sitting without a jury made findings under a misapprehension of the law. Findings made under a misapprehension of law are not binding, and the judgment was reversed and remanded.

Am Jur 2d, Appeal and Error §§ 839, 844.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

APPEAL by plaintiff from judgment entered 12 June 1989 in BUNCOMBE County Superior Court by *Judge C. Walter Allen.* Heard in the Court of Appeals 3 May 1990.

Plaintiff purchased a 1986 Toyota Corolla automobile from defendant Rouse Toyota Jeep, Inc. (Rouse) on 29 November 1985. Plaintiff returned the car to Rouse on 5 December 1985 to correct a hesitation problem. The car "bogged down" and "lagged" when the gas pedal was engaged. Rouse's efforts to fix the car on that

occasion were unsuccessful. Plaintiff returned the car for further repair attempts of the same problem 15 or 16 times in the next eleven months, leaving the car overnight on many occasions.

Plaintiff told Rouse in November 1986 that she wanted a replacement automobile or her money back. Rouse did not respond to her demand. Plaintiff had driven the car less than 20,000 miles at the time. Counsel for plaintiff sent Rouse a written letter of revocation on 21 January 1987, again demanding a refund of the purchase price, or a replacement vehicle. Plaintiff filed this action on 7 May 1987, seeking to revoke acceptance of the vehicle and seeking damages. She continued to drive the car through the time of trial.

The case was tried without a jury on 30 March 1989. The trial court found the above-stated facts and concluded as a matter of law:

1. There was a substantial change in the Toyota Corolla not due to any defect before the attempted revocation;

2. That the revocation did occur within a reasonable time after the discovery of the defect;

3. That the value of the Toyota Corolla was not substantially impaired by the defect;

4. That the Toyota Corolla was not substantially impaired for its intended use;

5. That Chapter 20, Article 15A is not applicable to this cause of action.

Based on these findings of fact and conclusions of law, the court denied plaintiff any recovery. Plaintiff appeals.

Moore, Lindsay & True, by Ronald C. True, for plaintiff-appellant.

Mullinax & Alexander, by William M. Alexander, Jr., for defendants-appellees.

WELLS, Judge.

Plaintiff has assigned error to the trial court's conclusions that the value of the automobile was not substantially impaired and that it was not substantially impaired for its intended use.

She also assigns error to the court's conclusion that there was a substantial change in the vehicle not due to any defect before the attempted revocation. We reverse and remand.

North Carolina General Statute § 25-2-608 provides in pertinent part:

> (1) The buyer may revoke his acceptance of a . . . commercial unit whose nonconformity substantially impairs its value to him. . . .
>
> (2) Revocation of acceptance must occur within a reasonable time . . . and before any substantial change in condition of the goods which is not caused by their own defects. . . .

Compliance with each of these statutory prerequisites to revocation involves questions of fact, not matters of law for the trial court. 4 Anderson, *Anderson on the Uniform Commercial Code*, § 2-608.20 (3rd ed. 1982). While a fact-finder's resolution of a factual issue is generally binding for appellate purposes if supported by competent evidence, findings made under a misapprehension of law are not binding. *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E.2d 819 (1978). When faced with such findings, the appellate court should remand the action for consideration of the evidence in its true legal light. *Hanford v. McSwain*, 230 N.C. 229, 53 S.E.2d 84 (1949).

[1] In any case of attempted revocation, the threshold issue is whether the goods have a nonconformity which substantially impairs its value to the buyer. Resolution of this factual issue requires the application of a two-part test which considers both the buyer's subjective reaction to the alleged defect (taking into account the buyer's needs, circumstances, and reaction to the nonconformity) and the objective reasonableness of this reaction (taking into account the goods market value, reliability, safety, and usefulness for purposes for which similar goods are used, including efficiency of operation, cost of repair of nonconformities, and the seller's ability or willingness to seasonably cure the nonconformity). *Wright v. O'Neal Motors, Inc.*, 57 N.C. App. 49, 291 S.E.2d 165, *disc. review denied*, 306 N.C. 293, 294 S.E.2d 221 (1982). It does not appear that the court applied this test in making the ultimate findings (mislabeled as conclusions of law) that the value of the car to plaintiff was not substantially impaired, and that it was not impaired for its intended use. The evidentiary findings reflect a substantial defect in the car, repeated, unsuccessful repair efforts, and plain-

tiff's continued use of the car. We are unable to determine whether the trial court gave appropriate consideration to plaintiff's subjective reaction to the vehicle's problems in the context of the objective criteria. The proper test to be applied is a "personalized objective test," or how a reasonable person would react if in the buyer's position. *See* 4 Anderson, § 2-608.23. Our review of the record reveals factual questions to be resolved under this analysis. We therefore remand for a proper resolution of this issue.

[2] The court also concluded (found) that there was a substantial change in the condition of the car before the attempted revocation not due to any defect. Under N.C. Gen. Stat. § 25-2-608 (2), this would bar any attempt at revocation. This conclusion (finding) is at odds with the court's conclusion (finding) that plaintiff's revocation occurred within a reasonable time. While there is authority from other jurisdictions which equates increased mileage with a substantial change in condition, *see Ford Motor Credit Co. v. Mellor*, 748 S.W.2d 410 (Mo. App. 1988), we decline to adopt such a rule. When the defendant has made repeated assurances that the defect can be and will be cured, a delay in revocation to see if these assurances are met is not *per se* unreasonable. *See City Nat. Bank of Charleston v. Wells*, 384 S.E.2d 374 (W.Va. 1989). Particularly when dealing with an automobile, we decline to impose a rule that the goods cannot be used during such a time period.

[3] Because there are no errors asserted as to the conduct of the trial below, it is unnecessary to order a new trial. *See Chemical Realty Corp. v. Home Federal Savings & Loan Ass'n of Hollywood*, 65 N.C. App. 242, 310 S.E.2d 33 (1983), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L.Ed.2d 69 (1984). Accordingly, we reverse the judgment below and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges PARKER and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

HERMAN A. WILKINS, EMPLOYEE, PLAINTIFF v. J. P. STEVENS & COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER; AND/OR BURLINGTON INDUSTRIES, EMPLOYER; AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 9010IC79

(Filed 4 December 1990)

Master and Servant § 94 (NCI3d)— chronic obstructive lung disease—cotton dust exposure—separate finding on aggravation not required

An opinion and award of the Industrial Commission finding that plaintiff's occupational exposure to cotton dust was not a significant contributing factor in the development of his lung disease was affirmed despite the Commission's failure to make a separate finding regarding aggravation of the plaintiff's disease. When the Industrial Commission determines that plaintiff's exposure to cotton dust did not significantly contribute to his disease, it is tantamount to a finding that his disease was not aggravated by his exposure to cotton dust and it is not necessary for the Commission to make two separate findings.

Am Jur 2d, Workmen's Compensation §§ 303, 333.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 21 September 1989. Heard in the Court of Appeals 29 August 1990.

Taft, Taft & Haigler, by Robin E. Hudson, for plaintiff appellant.

Smith Helms Mulliss & Moore, by Jeri L. Whitfield, for Burlington Industries and American Motorists Insurance Company, defendant appellees.

COZORT, Judge.

Plaintiff filed a claim with the North Carolina Industrial Commission alleging he had an occupational lung disease resulting from cotton dust exposure in the textile industry. After a hearing, the Deputy Commissioner found that plaintiff's "occupational exposure

to cotton dust during his employment with defendants was not a significant contributing factor in the development of his lung disease." On appeal to the Full Commission, the Full Commission adopted the Opinion and Award of the Hearing Commissioner and added the following: "When the record is read as a whole, the conclusion is inescapable that plaintiff's problems were neither caused nor significantly contributed to by his occupation." On appeal to this Court, plaintiff contends the Commission erred by failing to determine whether plaintiff's exposure to cotton dust "aggravated" his lung disease, in addition to finding whether the exposure caused or significantly contributed to plaintiff's disease. We hold that the Commission is not required to make a separate finding regarding "aggravation" of the plaintiff's disease, and we affirm.

Plaintiff worked for Burlington Industries from 28 December 1955 to 22 March 1986 and for J. P. Stevens from 23 March 1986 to 29 May 1986. (In an Order by the Commission not contested by plaintiff, J. P. Stevens and its insurance carrier were dismissed from the case.) Plaintiff did not work after 29 May 1986, because the mill in which he worked closed and his job was phased out. Plaintiff worked in the textile mill at a variety of jobs, some of which exposed him to cotton dust. Plaintiff also smoked about a pack of cigarettes a day for 27 years.

Beginning in 1971, plaintiff was given a yearly respiratory questionnaire. The questionnaire focused on symptoms typical of lung disease: coughing, tightness in the chest, and tobacco smoking. In 1975, plaintiff complained of having a morning cough and coughing up phlegm when he had a cold. In other years, plaintiff answered that he did not experience a morning cough or cough up phlegm. In his answers to the 1972, 1974, and 1975 respiratory questionnaires, plaintiff reported an occasional tightness in his chest. On all the questionnaires, plaintiff revealed that he had smoked about 20 cigarettes a day. At his hearing before the Industrial Commission, plaintiff testified that he had untruthfully answered some of the health questions on the questionnaires.

In her Opinion and Award denying compensation, Deputy Commissioner Morgan Chapman made the following crucial findings of fact:

> 5. Plaintiff alleges that he began having breathing problems in 1965 with chest congestion developing by 1967 and then Monday morning symptoms. Although he has clearly

developed breathing problems, his testimony regarding the onset of his problems was not altogether credible, especially in view of the medical reports stipulated into evidence. He apparently first noted shortness of breath with exertion approximately 11 to 16 years ago. His condition has worsened since then, and, when he was evaluated by Dr. Saltzman in October 1987, he was found to have chronic obstructive pulmonary disease of moderate degree.

6. Besides his obstructive lung disease, plaintiff has also had problems with diabetes and back problems. He has had to take insulin for many years and still has had some difficulty keeping his diabetes under control. He has also experienced some occasional disability due to his back condition.

7. Plaintiff has contracted chronic obstructive pulmonary disease which is a general term for conditions such as emphysema, asthma and chronic bronchitis in which the flow of air into and out of the body is impeded so that the individual must work hard to breathe. He was placed at an increased risk of developing this condition by reason of his occupational exposure to cotton dust as compared to the general public not so employed. However, his occupational exposure to cotton dust during his employment with defendants was not a significant contributing factor in the development of his lung disease.

8. Plaintiff's chronic obstructive pulmonary disease is not an occupational disease which is due to causes and conditions characteristic of and peculiar to his employment in the cotton textile industry and which is not an ordinary disease of life to which the general public is equally exposed.

On appeal to this Court, plaintiff contends that it was error for the Commission to base its decision on findings relating only to whether the exposure to cotton dust was a causative factor in the plaintiff's disease without making a finding of whether plaintiff's exposure to the cotton dust was an aggravating factor in the development of his disease. In making this argument, plaintiff relies principally on *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E.2d 822, *amended*, 305 N.C. 296, 285 S.E.2d 822 (1982). Plaintiff's argument focuses on the following statement made by the Supreme Court:

> Disability caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment.

Id. at 297, 285 S.E.2d at 828.

Plaintiff argues essentially that whether the cotton dust was an "aggravating factor" is an additional inquiry which the Commission should make. We disagree. We do not read *Walston* to stand for the proposition that there is a difference between (1) a plaintiff's exposure to cotton dust "significantly contributing to" his condition; and (2) plaintiff's condition being "aggravated" by his exposure to cotton dust. Rather, we find the terms to be interchangeable. *See Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981); *Walston*, 304 N.C. at 680, 285 S.E.2d at 828; and *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987). Thus, when the Industrial Commission has determined that plaintiff's exposure to cotton dust did not significantly contribute to his disease, it is tantamount to a finding that his disease was not aggravated by his exposure to cotton dust. It is not necessary for the Commission to make two separate findings.

The plaintiff's assignment of error is without merit, and the Opinion and Award of the Industrial Commission is

Affirmed.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

47TH STREET PHOTO, INC. v. HELEN A. POWERS, SECRETARY OF REVENUE FOR THE STATE OF NORTH CAROLINA, AND THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 9010SC2

(Filed 4 December 1990)

Taxation § 38.3 (NCI3d)— sales tax—declaratory judgment seeking injunction enjoining collection—dismissed

The trial court properly dismissed a declaratory judgment action seeking an injunction against the collection of sales and use taxes where plaintiff was challenging the constitutionality of the tax statute rather than the amount of tax or the manner of assessment. Our case law plainly indicates that a constitutional defense to a tax does not exempt a plaintiff from the mandatory procedure for challenging the tax set out in N.C.G.S. § 105-267.

Am Jur 2d, Sales and Use Taxes §§ 167, 242.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

APPEAL by plaintiff from Order entered 1 November 1989 by *Judge Samuel T. Currin* in WAKE County Superior Court. Heard in the Court of Appeals 24 August 1990.

Emanuel and Emanuel, by Robert L. Emanuel, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for defendant appellees.

Womble Carlyle Sandridge & Rice, by Donald L. Smith, amicus curiae.

COZORT, Judge.

Plaintiff is a New York corporation engaged in the sale of electronic products by telephone, facsimile and mail order. Plaintiff filed a declaratory judgment action seeking an injunction enjoining the North Carolina Department of Revenue from requiring the plaintiff to collect and pay Sales and Use Taxes. The trial court dismissed the action, concluding that the trial court did not have

jurisdiction to entertain a suit to prevent collection of the tax. We affirm. A brief procedural history follows.

On approximately 30 May 1989, defendants mailed a "Notice of Delinquent Sales and Use Tax Report" to plaintiff. On 19 September 1989, plaintiff filed a complaint seeking, *inter alia*, a declaratory judgment that subsections (4), (5), and (7) of N.C. Gen. Stat. § 105-164.8(b) violate both the Commerce Clause of Article I, Section 8 and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. In its complaint plaintiff also requested that defendants be enjoined permanently from requiring the plaintiff to collect North Carolina sales tax. On the same day the plaintiff applied for a temporary restraining order and a preliminary injunction. The trial court granted plaintiff a temporary restraining order, which remained effective until the hearing, held 25 September 1989, on plaintiff's request for a preliminary injunction. After the hearing the trial court concluded that N.C. Gen. Stat. § 105-267 bars the relief sought by plaintiff and requires dismissal of its suit.

On appeal the plaintiff contends that the trial court erred in denying plaintiff a preliminary injunction and in dismissing its suit pursuant to § 105-267. Plaintiff asserts that "where the litigant does not challenge the amount of tax due or manner of assessment thereof, but instead, challenges the constitutionality of the tax statute, the court has jurisdiction to grant injunctive or declaratory relief prior to" collection of the tax. We disagree.

N.C. Gen. Stat. § 105-267 provides that:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. *Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax* to the proper officer, *and such payment shall be without prejudice to any defense of rights he may have in the premises.* At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at

> any time within three years after the expiration of the 90-day period allowed for making the refund. *If upon the trial it shall be determined that such a tax* or any part thereof was levied or assessed for an illegal or unauthorized purpose, or *was for any reason invalid* or excessive, *judgment shall be rendered therefor, with interest,* and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2. [Emphasis added.]

In *Kirkpatrick v. Currie, Comr. of Revenue*, 250 N.C. 213, 108 S.E.2d 209 (1959), the plaintiff sought to recover taxes paid under protest approximately two years before suit was brought. The court held that § 105-267,

> permitting payment to be made under protest with a right to bring an action to recover the monies so paid[,] is constitutional and accords the taxpayer due process.
>
> * * * *
>
> The taxpayer . . . was accorded the right provided by G.S. 105-267 to pay under protest and sue to recover if his demand for refund was not complied with.
>
> [In 1957 the Legislature] amended G. S. 105-267. Significantly, it did not change the requirement that demand for refund be made in thirty days if the taxpayer intended forthwith to seek judicial review rather than a hearing by the Commissioner as permitted by G.S. 105-266.1.

Kirkpatrick, 250 N.C. at 215-16, 108 S.E.2d at 210-11 (citations omitted).

In *Oil Corp. v. Clayton, Comr. of Revenue*, 267 N.C. 15, 147 S.E.2d 522 (1966), the plaintiff sought to recover taxes which it contended had been unconstitutionally assessed upon income not attributable to North Carolina. Plaintiff paid the disputed taxes under protest and brought suit under § 105-267 in superior court; defendant appealed. Our Supreme Court held:

> The statute under which [plaintiff] proceeds, G.S. 105-267, requires the taxpayer to pay the amount of the disputed tax and sue the State for its recovery. Such a method, has, in

effect, been available to taxpayers since 1887 (Pub. L. 1887, ch. 137 § 84). It is appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute or its application to him.

Oil Corp., 267 N.C. at 20, 147 S.E.2d at 526.

In *Enterprises, Inc. v. Department of Motor Vehicles*, 290 N.C. 450, 226 S.E.2d 336 (1976), the Supreme Court upheld a motor vehicle tax collection statute (N.C. Gen. Stat. § 20-91.1), the provisions of which parallel § 105-267. The Court noted that, in determining the constitutionality of § 20-91.1, it was "guided by our Court's decisions relating to the similar statute, G.S. 105-267." *Enterprises*, 290 N.C. at 455, 226 S.E.2d at 339. Finally, in *Coca-Cola Co. v. Coble*, 293 N.C. 565, 568, 238 S.E.2d 780, 783 (1977), the court held that, where a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under § 105-267.

Thus, our case law plainly indicates that, contrary to plaintiff's contention, a constitutional defense to a tax does not exempt a plaintiff from the mandatory procedure for challenging the tax set out in § 105-267. Plaintiff's argument that the tax levied on it pursuant to § 105-164.8 is unconstitutional may have merit. Nevertheless, to seek relief plaintiff must proceed according to the requirements of § 105-267. At the same time, plaintiff may raise the issue of whether § 105-267 (a "postdeprivation procedure") provides a sufficiently "clear and certain remedy" to satisfy federal due process principles. *McKesson Corp. v. Dept. of Business Regulation of Florida*, --- U.S. ---, ---, 110 L.Ed.2d 17, 45, 110 S.Ct. 2238, 2258 (1990).

The trial court's Order of 1 November 1989 is

Affirmed.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 29 November 1990.

VICKI JO CRUMP STEVENSON, PLAINTIFF v. MICHAEL LEE STEVENSON, DEFENDANT

No. 8926DC1385

(Filed 4 December 1990)

Judgments § 21 (NCI3d) — divorce — consent judgment — subsequent modification

The trial court erred by granting plaintiff's motion under N.C.G.S. § 1A-1, Rule 60(b) to "correct an error" in a consent judgment in a divorce action where the parties announced to the court that they had reached an agreement; counsel for the plaintiff read certain portions of the agreement into the record, including a formula for assessing the value of the marital home which included a loan to the parties from defendant's employer; counsel for defendant then prepared an initial draft of a consent judgment; the draft was revised several times; a final draft was signed by the parties and their attorneys, submitted to the court, and then filed, but did not mention including the loan from defendant's employer in the formula for computing the value of the house; plaintiff would have been entitled to $8,627.18 under the formula as read into the record but was entitled to nothing under the formula spelled out in the consent judgment; plaintiff filed a Rule 60(b) motion to correct the alleged error in the judgment; and the trial court granted the motion. The evidence was not sufficient to support claims of fraud or lack of consent, and any mistake was not mutual in that both parties altered the agreement during several redrafts. There was also no showing that defendant attempted to conceal the alteration of the formula, or that any pressure was applied to get plaintiff and her attorney to sign the judgment without being able to properly review it.

Am Jur 2d, Divorce and Separation §§ 470, 471; Judgments §§ 688, 765.

APPEAL by defendant from order entered 23 August 1989 in MECKLENBURG County District Court by *Judge Marilyn R. Bissell.* Heard in the Court of Appeals 18 September 1990.

Plaintiff and defendant were married in 1974. Plaintiff filed an action against defendant on 5 April 1988 seeking alimony *pendente*

lite, permanent alimony, equitable distribution, child custody, and attorney's fees. Defendant counterclaimed for custody. The matter was called for hearing on 31 May 1988. The parties announced to the court at that time that they had reached an agreement on the issues which were to be brought before it. Counsel for the plaintiff read certain provisions of the agreement into the record. The court then admonished the attorneys to draft an artful order and made sure the parties understood and agreed to the terms of the agreement as they had been recited.

The agreement was that plaintiff was to have sole possession of the marital home. She also would receive an extra sum if the value of the house, as assessed through a certain formula, was less than the value of defendant's profit sharing plan. The formula read into the record on 31 May 1988 included a deduction in the value based on a loan to the parties from defendant's employer connected with the purchase of their home.

Counsel for the defendant then prepared an initial draft of a consent judgment. It was revised several times. A final draft was submitted to the court and filed 6 July 1988. Both parties and their attorneys signed it. This judgment made no mention of including the loan from defendant's employer in the formula for computing the value of the house. The house was assessed and compared to the value of the pension plan. Under the formula as read into the record, plaintiff would have been entitled to $8,627.18. Under the formula as spelled out in the consent judgment, plaintiff was entitled to nothing.

On 25 April 1989, plaintiff filed a Rule 60(b) motion to "correct an error" in the judgment. The trial court granted the motion pursuant to Rule 60(b)(6) on 23 August 1989. The court made extensive findings of fact regarding the negotiations surrounding the agreement and concluded that "justice and equity" required that certain paragraphs be vacated and paragraphs be inserted to reflect the formula as agreed upon in open court. Defendant appeals.

Casstevens, Hanner, Gunter & Gordon, by Dorian H. Gunter and Elizabeth J. Caldwell, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson, for defendant-appellant.

WELLS, Judge.

The judgment in this case is a consent judgment. A consent judgment incorporates the bargained agreement of the parties. *In re Will of Baity*, 65 N.C. App. 364, 309 S.E.2d 515 (1983), *cert. denied*, 311 N.C. 401, 319 S.E.2d 266 (1984). Such a judgment can only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud. *Blankenship v. Price*, 27 N.C. App. 20, 217 S.E.2d 709 (1975). Plaintiff in this case did not make a sufficient showing under this standard. We therefore vacate the trial court's order.

The trial court made extensive findings of fact regarding the judgment and the circumstances surrounding the entry of it in its order. There are no findings which would support a conclusion of fraud or lack of consent. Our examination of the record also failed to reveal sufficient evidence to support either claim. We focus our analysis, then, on the issue of mistake.

A contract may be avoided based on mutual mistake where the mistake is common to both parties and because of it each has done what neither intended. *Marriot Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975). A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. *Id.* In *Baity, supra*, this Court applied these principles to consent judgments.

The record before the trial court was insufficient to support a conclusion that each party had done what neither intended. Defendant altered the agreement from what was agreed upon at trial, as each side apparently did during several redrafts. There was no finding or evidence which would lead to a conclusion that this was inadvertent. Any mistake, then, was not mutual.

We also do not find a sufficient basis, either in the trial court's findings of fact or our own review of the record to support a claim of unilateral mistake accompanied by fraud, imposition, or similar circumstances. There is no showing that defendant attempted to conceal the alteration of the formula, or that any pressure was applied to get plaintiff and her attorney to sign the judgment without being able to properly review it.

In *Fountain v. Fountain*, 83 N.C. App. 307, 350 S.E.2d 137 (1986), *disc. review denied*, 319 N.C. 224, 353 S.E.2d 407 (1987),

we held that a written instrument could be reformed when there had been a prior oral agreement, and one party knew that the other party was operating under a mistaken belief that the written agreement conformed to it. While in this case, there is clear evidence of a prior contrary oral agreement, there are no findings in the trial court's order which would establish that plaintiff and her attorney were mistaken as to the effect of the language of the agreement and that defendant was aware of this mistake at the time the consent judgment was signed. Our review of the record likewise reveals insufficient evidence to support such a conclusion. The agreement was altered many times by both parties. It should be enforced as written.

Blee v. Blee, 89 N.C. App. 289, 365 S.E.2d 679 (1988), is distinguishable. Judgment in that case was entered orally, and by agreement of the parties was effective that day. Defendant attempted to withdraw his consent before the judgment was memorialized. The trial court allowed defendant's Rule 60(b) motion. This Court reversed, holding: "It would be a travesty to say that a party to a judgment so solemnly promulgated and entered as the one depicted by this record could repudiate that judgment at any time after the judgment was entered." The judgment in this case was not "solemnly rendered" on 31 May 1988. It was altered several times by both parties before it was finalized and signed by the court.

It is the policy of this State to promote certainty and finality in domestic dispute resolutions. *Goff v. Goff*, 90 N.C. App. 388, 368 S.E.2d 419 (1988). Plaintiff in this case has not carried her burden to invalidate this consent judgment. The order of the trial court is therefore vacated.

Vacated.

Judges COZORT and LEWIS concur.

WADE BROOKOVER, EMPLOYEE, PLAINTIFF-APPELLANT v. BORDEN, INC., EMPLOYER, AND ESSIS, CARRIER, DEFENDANTS-APPELLEES

No. 9010IC721

(Filed 4 December 1990)

Master and Servant § 69.3 (NCI3d)— workers' compensation— signed agreements—not set aside

The Industrial Commission properly denied plaintiff's request to set aside a Form 26 Agreement where plaintiff suffered a back injury while working for defendants, was unable to continue at his former position, was rated as having a ten percent permanent partial disability of the back, signed a Form 26 Agreement providing for payment of permanent partial disability benefits for thirty weeks, and the Industrial Commission approved the agreement. Although plaintiff asserted that he was unrepresented by counsel at the time he signed the agreement and that defendants failed to explain to him that he had the right to elect benefits under N.C.G.S. § 97-30 or § 97-31, the evidence reveals that there was no error due to fraud, misrepresentation, undue influence, or mutual mistake and plaintiff is bound by the Commission-approved written agreement.

Am Jur 2d, Workmen's Compensation § 465.

APPEAL by plaintiff from an Opinion and Award of the North Carolina Industrial Commission entered 3 April 1990. Heard in the Court of Appeals 26 November 1990.

On 5 December 1986, plaintiff suffered a back injury while working for Borden, Inc. He attempted to return to work as a milk deliveryman in March of 1987, but was unable to continue at that position because of his back pain. Plaintiff was rated as having a ten percent permanent partial disability of the back. On 18 June 1987, plaintiff signed a Form 26 Agreement which provided for payment of permanent partial disability benefits for a period of 30 weeks based upon the rating of ten percent permanent partial disability to his back. This agreement was approved by the Industrial Commission on 17 July 1987. Thereafter, plaintiff, in a hearing before the Industrial Commission, sought to set aside the Form 26 Agreement and accept benefits under G.S. § 97-30. This request was denied on 18 August 1989 in an Opinion and Award

by Deputy Commissioner Tamara R. Nance. Plaintiff gave notice of appeal to the Full Commission on 25 August 1989. On 3 April 1990, the Full Commission affirmed and adopted the Opinion and Award of the Deputy Commissioner. Plaintiff appealed.

Shelley Blum for plaintiff, appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten, and Kari L. Russwurm, for defendants, appellees.

HEDRICK, Chief Judge.

The sole question presented for review is whether absent a showing of fraud, misrepresentation, undue influence or mutual mistake, an employee may set aside an agreement made pursuant to G.S. § 97-31 and receive benefits for diminution of earning ability under G.S. § 97-30. Plaintiff asserts that he was unrepresented by counsel at the time he signed the agreement and that defendants failed to explain to him that he had a right to elect benefits under G.S. § 97-30 or G.S. § 97-31. Plaintiff argues that by signing the Form 26 Agreement accepting benefits under G.S. § 97-31, he was merely acknowledging payment of benefits and he should not be held to the agreement because he was not making an "informed election of remedies."

G.S. § 97-82 provides that an employer and an injured employee may reach an agreement in regard to compensation under the Worker's Compensation Act, execute a memorandum of the agreement in the form prescribed by the Industrial Commission, and file it with the Commission for approval. The Commission acts in a judicial capacity in approving an agreement and the settlement as approved becomes an award enforceable, if necessary, by a court decree. *Pruitt v. Publishing Co.*, 289 N.C. 254, 221 S.E.2d 355 (1976).

G.S. § 97-17 provides:

> Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission: Provided, however, that no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters

> therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement.

In interpreting and applying the two above-mentioned sections, it has uniformly been held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. *Tabron v. Farms, Inc.*, 269 N.C. 393, 152 S.E.2d 533 (1967). Where an employee accepts benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the Commission, the employee may attack and have such agreement set aside only for fraud, misrepresentation, undue influence, or mutual mistake. *Id.*

In the present case, plaintiff argues that even though the mistake was unilateral, he should not be precluded almost two years after the agreement was signed from electing the most beneficial remedy under the Worker's Compensation Act. This argument is unpersuasive. The evidence reveals that there has been no error due to fraud, misrepresentation, undue influence, or mutual mistake. Thus, we must hold that plaintiff is bound by the Commission-approved written agreement on Form 26 dated 18 June 1987 where defendants agreed to pay and plaintiff agreed to accept compensation based on a ten percent permanent partial disability of the back.

Affirmed.

Judges LEWIS and DUNCAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 DECEMBER 1990

BLAKEMORE, ROSEN, MEEKER & VARIAN CO. v. JACKSON No. 9021SC785	Forsyth (89CVS3020)	Appeal Dismissed
BROWN v. FOX No. 9028SC300	Buncombe (88CVS3751)	No Error
COMER v. CITY OF GREENSBORO No. 9018SC129	Guilford (88CVS6860)	Affirmed
FOY v. FOY No. 894DC1341	Onslow (86CVD1572)	Affirmed in part & remanded
G & G DREDGING, INC. v. PARKER No. 8913DC1135	Brunswick (87CVD774)	Affirmed
JOLES v. JOLES No. 904DC686	Onslow (89CVD1844)	Affirmed
MELVIN v. GLOVER No. 9030SC556	Macon (88CVS182)	Dismissed
MILLER BLDG. CORP. v. BELL No. 895SC1403	New Hanover (87CVS1480)	Affirmed
MOSS v. BRADFORD No. 8926SC1357	Mecklenburg (88CVS1656)	Dismissed
PERKINS v. HIATT No. 9026SC715	Mecklenburg (90CVS4)	Affirmed
STATE v. ALFORD No. 9012SC665	Cumberland (88CRS38722) (88CRS38723)	In defendant Alford's appeal the result is No Error. In defendant McNeil's appeal the result is No Error.
STATE v. ANTHONY No. 9026SC372	Mecklenburg (89CRS34816)	No Error
STATE v. BARNES No. 902SC631	Washington (88CRS1000) (88CRS1002)	No Error

STATE v. BARNHILL No. 905SC772	New Hanover (89CRS28610)	No Error
STATE v. BLANSETT No. 9022SC481	Iredell (89CRS1462)	No Error
STATE v. COVINGTON No. 9020SC948	Richmond (89CRS8278) (89CRS8279)	No Error
STATE v. COX No. 9022SC711	Davidson (89CRS14471)	No Error
STATE v. CURRY No. 9015SC737	Alamance (89CRS20681)	No Error
STATE v. DARITY No. 9029SC561	Henderson (89CRS133) (89CRS134) (89CRS135)	No Error
STATE v. DAVIS No. 905SC764	New Hanover (89CRS14620)	No Error
STATE v. ELEY No. 906SC579	Hertford (88CRS2534)	No Error
STATE v. GRANDY No. 903SC613	Carteret (89CRS2892) (89CRS2893)	No Error
STATE v. JACKSON No. 907SC667	Wilson (86CRS10199) (86CRS10200)	No Error
STATE v. JACKSON No. 9014SC779	Durham (89CRS33158) (89CRS33751)	Remanded for Resentencing
STATE v. LEWIS No. 897SC1321	Wilson (88CRS10117) (89CRS254)	No Error
STATE v. MACKEY No. 9021SC625	Forsyth (89CRS22819)	No Error
STATE v. MASSEY No. 9026SC678	Mecklenburg (88CRS92791) (88CRS92796)	No Error
STATE v. MORTON No. 9018SC693	Guilford (89CRS54702)	No Error
STATE v. PARKER No. 9021SC821	Forsyth (89CRS44462) (89CRS44464)	No Error

STATE v. PETTIFORD No. 9020SC776	Richmond (89CRS6685)	No Error
STATE v. PEYTON No. 908SC873	Lenoir (89CRS6317) (89CRS6358) (89CRS6360)	No Error (Peyton) (Braxton) (Braxton)
STATE v. PITT No. 903SC938	Pitt (89CRS26130) (89CRS26131)	No Error
STATE v. PUGH No. 906SC852	Bertie (90CRS758) (90CRS760) (90CRS761) (90CRS764) (90CRS766) (90CRS767)	No Error
STATE v. SEAMON No. 8926SC973	Mecklenburg (89CRS2909)	New Trial
STATE v. SHAW No. 9012SC531	Cumberland (89CRS21955)	Affirmed
STATE v. STEGALL No. 9026SC500	Mecklenburg (89CRS35633) (89CRS35634)	No Error
STATE v. WILLIAMS No. 9012SC882	Cumberland (88CRS16750)	Remanded for resentencing in part; affirmed in part
STATE v. WORTHY No. 9012SC694	Cumberland (89CRS23549)	No Error

FILED 20 NOVEMBER 1990

BLACK v. HILL FOREST, INC. No. 9015SC4	Chatham (88CVS10)	Affirmed
FLOYD C. PRICE & SON, INC. v. DIXON No. 8911SC1358	Johnston (87CVS1227)	Affirmed
FOSTER v. FOSTER No. 9018SC557	Guilford (89CVD171)	Vacated & Remanded
STANFORD v. STANFORD No. 9028SC109	Buncombe (87CVS3239)	No Error

STATE v. EATON No. 9021SC13	Forsyth (88CRS18955)	No Error
STATE v. GODWIN No. 9014SC135	Durham (81CRS16827)	No Error
STATE v. HAMBRIGHT No. 9027SC5	Gaston (88CRS23694)	Affirmed
STATE v. WEATHERFORD No. 8916SC1081	Scotland (85CRS6155) (85CRS6156) (85CRS6543) (86CRS830) (86CRS831) (86CRS832)	Affirmed
STATE v. WHITE No. 901SC154	Dare (89CRS8230)	No Error

APPENDIXES

ORDER ADOPTING
AMENDMENTS TO INTERNAL OPERATING PROCEDURES
PRINTING DEPARTMENT

ORDER ADOPTING AMENDMENTS TO INTERNAL OPERATING PROCEDURES PRINTING DEPARTMENT

The Internal Operating Procedures of the Supreme Court Printing Department, published as the Internal Operating Procedures Mimeographing Department at 295 N.C. 743, are hereby amended to read as in the following pages. All amendments shall be effective 15 October 1990.

Adopted by the Court in Conference this 11th day of October, 1990. The operating procedures, as amended, shall be published in their entirety in the Advance Sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

PRINTING DEPARTMENT

The following rules are hereby adopted to govern the internal operation of the Supreme Court Printing Department:

Pursuant to G.S. § 7A-11 and the North Carolina Rules of Appellate Procedure, the Clerk of the Supreme Court is authorized and directed to administer the Printing Department as follows:

1. Receipts by the Printing Department shall be deposited daily or as often as practicable in a checking account entitled "Supreme Court of North Carolina Mimeographing Department," which shall be maintained in a bank insured by the Federal Deposit Insurance Corporation and approved by the Supreme Court. All checks drawn against the Printing Department account must be co-signed by the Clerk and another person designated by the Supreme Court. A savings account shall be maintained in the State Employees Credit Union under the same title, to which the Clerk shall transfer excess funds when, in his discretion, such transfer is practicable. Excess funds accumulated by the Printing Department shall be held in the savings account named above, subject to the order of this Court.

2. The Clerk shall employ the necessary personnel to operate the Printing Department. These persons may be employed on a full or part-time basis, or on the basis of piecework services, in the discretion of the Clerk. Employees of the State or of the Printing Department may perform piecework services for additional compensation so long as the work is performed on their own time and not on State-owned premises. State employees whose regular duties require services related to printing operations shall not receive dual compensation for those services. Printing Department employees shall be subject to the provisions of the North Carolina Judicial Branch of Government Personnel Management Manual, except that they shall be paid every two weeks out of the Printing Department receipts, at rates approved by the Supreme Court and filed with the Minutes of the Clerk. Printing Department employees shall be provided fringe benefits equivalent to the benefits provided by the State to other Judicial Department employees.

3. The Clerk shall make the necessary withholding deductions from compensation paid to Printing Department personnel and shall remit the same monthly to the appropriate agencies.

4. The Clerk shall purchase the necessary supplies and materials for the operation of the Printing Department. He shall also purchase and maintain necessary equipment and shall make any other

expenditures reasonably necessary for the operation of the department.

a. Competitive bidding is the foundation of the Printing Department's purchasing program. Open, competitive bidding should provide the lowest available price. In a market where many forces act upon price, the competitive bidding procedure provides an open method of acquiring goods and services. In choosing a bid, price is not the only element considered. Other factors, such as volume, product quality, delivery schedules, lead times, types of services required, value of trade-ins, servicing capabilities, and warranties/guarantees offered, affect the purchase decision. There must be a valid, documented reason when items are purchased by means other than competitive bidding.

b. A term contract is a binding agreement between the Printing Department and the vendor to buy and sell certain items at agreed contract prices, terms and conditions. The award of a term contract shall be based upon sealed competitive bids for which the Printing Department publicly advertises. Once a term contract is awarded, suppliers and prices of commodities shall be established for a certain period of time, usually twelve calendar months. Some term contracts, due to fluctuating markets, may be effective for different periods.

c. Equipment items are tangible goods with a value over $100.00 and a life of one year or longer, and they may have an identifying serial number. Equipment items are distinguished from supplies, which are consumed or expended in the course of use. Computer software and numbering machines are considered to be supplies rather than equipment, notwithstanding the existence of a serial number.

d. Purchasing Authorization. The Printing Department may purchase supplies and equipment items from vendors who are under State contract without engaging in a separate process for competitive quotes. All other purchases must be conducted under the following procedures:

(a) A petty purchase is generally justified when an immediate need arises for a specific item or items not on hand at the office and either not readily available through standard purchasing procedures or where time does not permit the office to follow normal procedures. Before

Printing Department employees make petty purchases, they must first obtain the approval of the Clerk. The established limit for such a purchase is $25.00.

(b) Purchases of equipment or supplies valued from $25.00 to $1,000.00 may be made upon oral quotations from at least three vendors. Forms recording such quotations shall be approved by the Clerk and shall be retained with the financial records of the Printing Department.

(c) Purchases of equipment or supplies valued over $1,000.00 or purchases under a term contract may be made only upon written, sealed quotations from at least three vendors, approved by the Clerk and the Court, and retained with the financial records of the Printing Department.

e. Surplus property is equipment which has been replaced by other equipment, is outdated or is of no further use to the Printing Department or the Court. Property may be declared surplus by the Clerk with the approval of the Court. Surplus property shall be disposed of by public sale or transfer to other state agencies, in accordance with State Surplus Property Agency procedures.

5. Equipment items valued over $500.00 shall be included in a fixed asset inventory system, using serialized identification tags distinct from those used by the Judicial Department. The existence and location of all Printing Department assets shall be verified at least annually. In accordance with the policy of the State Controller, assets valued over $5,000.00 shall be depreciated on a five-year basis; assets valued under $5,000.00 shall be recorded as an expense for the year in which the asset is purchased.

6. The Clerk shall make quarterly financial reports on the operation of the Printing Department to the Chief Justice and Associate Justices of the Supreme Court. In May of each year, the Clerk shall present to the Supreme Court a proposed operating budget for the fiscal year beginning July 1. The budget proposal shall be in line-item format and shall include a detailed description of equipment items proposed for purchase or lease.

7. All books and records of the Printing Department shall be open for inspection and audit by the State Auditor.

8. Until such time as the Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be reproduced, shall be printed at a cost of $5.00 per printed page where the document is retyped and printed and at a cost of $2.00 per printed page where the Clerk determines that the document is in proper format and can be reproduced directly from the original.

ADMINISTRATIVE HISTORY

Adopted: 12 September 1978.

Amended: 7 December 1982—(8)—to become effective 1 January 1983;
11 October 1990—effective 15 October 1990.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 10 (NCI4th). Rules and rule-making generally; agency powers and duties to adopt or promulgate rules and regulations

The trial court did not err by granting summary judgment for plaintiffs in an action seeking a declaratory judgment and an injunction against defendants enjoining enforcement of rules adopted by the Social Services Commission regarding abortion. *Whittington v. N.C. Dept. of Human Resources*, 603.

§ 30 (NCI4th). Adjudication of contested case; preliminary matters; generally

An order of the Superior Court affirming an administrative law judge's dismissal of petitioner's petition for lack of jurisdiction was remanded for further appropriate proceedings where there was clearly a dispute between respondent agency and petitioner concerning the minimum streamflow requirements for petitioner's hydroelectric power project, the dispute involved a determination of petitioner's rights, duties or privileges, there was no resolution of the dispute through informal procedures, and petitioner properly initiated an administrative proceeding. *Metro. Sewerage Dist. of Buncombe County v. N.C. Wildlife Resources Commission*, 171.

§ 52 (NCI4th). Exhaustion of administrative remedies

The trial court was without subject matter jurisdiction over plaintiffs' claim in an action to have a mining permit declared void that Buncombe County had authority to require an environmental impact statement from defendant mining company where plaintiffs failed to exhaust their administrative remedies. *North Buncombe Assn. of Concerned Citizens v. Rhodes*, 24.

§ 67 (NCI4th). Applicability of whole record test

The appeal record did not affirmatively show that the superior court failed to apply the whole record test in an action arising from the dismissal of state employees. *Walker v. N.C. Dept. of Human Resources*, 498.

ADOPTION OR PLACEMENT FOR ADOPTION

§ 3 (NCI4th). Construction of adoption statutes

The trial court did not err in an action for relief from an interlocutory adoption decree by concluding that it was in the best interest of the child to remain in the custody of the adoptive parents without finding that the biological parents were unfit. *In re Adoption of P. E. P.*, 191.

Procedural defects in an adoption proceeding did not require that an interlocutory adoption decree be dismissed because the legislative policy of North Carolina places the interest of the child above procedural defects. *Ibid.*

§ 23 (NCI4th). Necessity of parental consent

There was competent evidence to support each disputed finding and the findings supported the conclusions relating to the absence of fraud, undue influence, or duress arising from an adoption proceeding in which the biological mother, a resident of Michigan, arranged an adoption in North Carolina through The Way International, a religious organization. *In re Adoption of P. E. P.*, 191.

§ 26 (NCI4th). Notified parent's failure to appear

The trial court did not err in an action to set aside an interlocutory adoption decree by finding that the alleged biological father should be estopped from attacking the decree because he had actual notice of the proceedings and failed to take any action prior to entry of the order. *In re Adoption of P. E. P.*, 191.

APPEAL AND ERROR

APPEAL AND ERROR — Continued

§ 409 (NCI4th). Presumptions regarding evidence, findings

Plaintiff failed to show that the full Industrial Commission erred by awarding plaintiff a 15% disability rating based on testimony by her surgeon rather than a 20% to 25% rating recommended by her treating physician where plaintiff did not provide the Court of Appeals with transcripts of the proceedings, depositions, or other necessary documents. *Forrest v. Pitt County Bd. of Education*, 119.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

Defendant abandoned two assignments of error by failing to set forth an argument for one and failing to state the basis on which error was assigned for the other. *Liberty Finance Co. v. North Augusta Computer Store*, 279.

§ 487 (NCI4th). Findings made under misapprehension of law

An action for revocation of an auto purchase was remanded but a new trial was not ordered where the court sitting without a jury made findings under a misapprehension of the law. *Allen v. Rouse Toyota Jeep, Inc.*, 737.

§ 505 (NCI4th). Error cured by verdict

Plaintiff did not demonstrate prejudice in a declaratory judgment action to determine insurance coverage on two issues which the jury did not reach. *Mut. Benefit Life Ins. Co. v. City of Winston-Salem*, 300.

§ 510 (NCI4th). Frivolous appeals in appellate division

An appeal from trial court orders denying claims filed with a receiver and approving fees was frivolous and was remanded for a hearing on sanctions. *Lowder v. All Star Mills, Inc.*, 322.

ARREST AND BAIL

§ 147 (NCI4th). Impaired drivers

The trial court did not err in a prosecution for driving while impaired by denying defendant's pretrial motion to dismiss based upon an unwarranted and illegal incarceration where the magistrate did not inquire into all of the statutory considerations for pretrial release. *S. v. Eliason*, 313.

ASSAULT AND BATTERY

§ 27 (NCI4th). Sufficiency of evidence of felonious assault where weapon is a knife or similar weapon

The evidence was sufficient for the jury in a prosecution for assault with a deadly weapon inflicting serious injury by cutting three victims with a knife. *S. v. Hunt*, 43.

§ 116 (NCI4th). Particular circumstances not requiring submission of lesser degrees of offenses

The trial court in a prosecution for felonious assaults was not required to instruct on simple assault where several witnesses testified that defendant cut his victims with a knife and that their injuries were serious. *S. v. Hunt*, 43.

ASSIGNMENTS

ASSOCIATIONS AND CLUBS

ATTORNEYS AT LAW

AUTOMOBILES AND OTHER VEHICLES

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 596 (NCI4th). Contributory negligence; collisions involving turns to or from driveways

There was no reversible error in an action arising from an automobile accident tried before a judge where plaintiff was struck in the left side as she made a left turn, the trial court erroneously directed a verdict against plaintiff on the ground that she was contributorily negligent as a matter of law, and the court also made a proper factual finding from the evidence that plaintiff was contributorily negligent. *Church v. Greene*, 675.

AVIATION AND AIRPORTS

§ 21 (NCI4th). Jury instructions in actions for injuries from aircraft operation

The trial court properly instructed on sudden emergency in an action against the pilot of an airplane that crashed. *Hoots v. Toms and Bazzle*, 412.

§ 22 (NCI4th). Sufficiency of evidence in actions for injuries from aircraft operation

Summary judgment was properly entered for two defendants on plaintiffs' claim for negligence in causing a prior induction system fire that allegedly led to a fatal airplane crash, but summary judgment was improperly entered in favor of a third defendant on this issue. *Hoots v. Toms and Bazzle*, 412.

The trial court erred in dismissing a claim against one defendant for negligently maintaining an airplane that crashed. *Ibid.*

§ 23 (NCI4th). Other matters in actions for injuries from aircraft operation

Evidence that an airplane's stall warning horn was not working at the time the plane crashed was irrelevant to plaintiffs' claim against the pilot based on alleged negligence in handling the plane after the engine suddenly failed. *Hoots v. Toms and Bazzle*, 412.

BANKS AND OTHER FINANCIAL INSTITUTIONS

§ 55 (NCI4th). Joint accounts

Funds represented by a certificate of deposit were not held as joint tenants with right of survivorship where defendant relied on the fact that the money used to purchase the certificate had been withdrawn from a survivorship account with another bank. *Napier v. High Point Bank & Trust Co.*, 390.

Funds held jointly in a certificate of deposit did not belong wholly to defendant, the survivor, where defendant claimed that the funds were his before they were deposited. *Ibid.*

BROKERS AND FACTORS

§ 49 (NCI4th). Sufficiency to withstand motions for directed verdict, judgment n.o.v., or new trial

The trial court should not have granted directed verdict for defendants in an action to recover a real estate commission. *Bennett Realty, Inc. v. Muller*, 446.

BURGLARY AND UNLAWFUL BREAKINGS

§ 126 (NCI4th). Breaking and entering of motor vehicle

The evidence of breaking or entering a motor vehicle was sufficient to withstand defendant's motion to dismiss. *S. v. Riggs*, 149.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

The evidence was insufficient to support defendant's conviction for breaking or entering a motor vehicle where it showed that defendant forced the victim back into her automobile at gunpoint in a hospital parking lot, bound the victim, kidnapped her, committed an armed robbery at a convenience store, and then returned her to the hospital parking lot. *S. v. Ellis*, 591.

COMPROMISE AND SETTLEMENT

§ 6 (NCI3d). Admissibility of evidence

There was no error in an action for breach of a lease agreement in admitting evidence of defendant's offer of $150,000 to terminate the lease. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 82.

CONSPIRACY

§ 8 (NCI3d). Verdict and judgment

Defendant's right against double jeopardy was not violated by her convictions for both solicitation and conspiracy to commit arson. *S. v. Richardson*, 240.

CONTEMPT OF COURT

§ 8 (NCI3d). Appeal and review

A trial court ruling that it was without authority to hold defendant in contempt because of pending appeals was reversed and remanded because, while the issue of civil contempt based on appeals which have been resolved was moot, the trial court has jurisdiction to consider criminal contempt and would have jurisdiction to consider civil contempt for future filing of appeals in violation of court directives. *Lowder v. All Star Mills, Inc.*, 318.

CONSTITUTIONAL LAW

§ 34 (NCI3d). Double jeopardy

Defendant's prosecution for second-degree rape following a guilty plea to contributing to the delinquency of a minor did not constitute double jeopardy. *S. v. Cronan*, 641.

§ 60 (NCI3d). Racial discrimination in jury selection process

The trial court did not deny defendant a reasonable opportunity to investigate and produce evidence of racial discrimination in the jury selection process by limiting its order compelling disclosure of jury selection records to the previous four years. *S. v. Moore*, 217.

The preliminary conclusion of an expert appointed by the court to assist defendant in investigating racial discrimination in jury selection that the lists used for jury selection might not include "all categories of the population in the proportions in which they exist in the county" did not show a need for additional expert witness assistance to conduct a study comparing the racial composition of the lists and census data about the racial composition of the county. *Ibid.*

§ 66 (NCI3d). Evidence of identity by sight

Defendant's constitutional right to be present at every stage of his trial was violated by the trial court's ex parte meeting and discussion with the jury during a recess before the verdict was rendered. *S. v. Buckom*, 179.

CONSTITUTIONAL LAW — Continued

§ 74 (NCI3d). Self-incrimination generally

A witness could not invoke the privilege against self-incrimination in an action for criminal conversation on the ground that his testimony might subject him to a prosecution for adultery where the statute of limitations for adultery had expired, or on the ground that his testimony might subject him to punitive damages in a civil action where there was no showing of a threat of execution against the person. *Leonard v. Williams*, 512.

CORPORATIONS

§ 1.1 (NCI3d). Disregarding corporate entity

Evidence of noncompliance with corporate formalities is insufficient to require the trial court to disregard the corporate entity. *Hoots v. Toms and Bazzle*, 412.

§ 14 (NCI3d). Liability of officers and agents to corporation for neglect of duties, mismanagement, or wrongful depletion of assets

The trial court did not err by denying the majority shareholders' claim for attorney fees arising from a shareholders' derivative action where they had not at any time been successful in the litigation. *Lowder v. All Star Mills, Inc.*, 322.

§ 28 (NCI3d). Dissolution

The trial court did not err in an action for breach of a lease by granting partial summary judgment against individual defendants regarding liability for damages recovered against the corporate defendant where the corporation had been dissolved without assets or money being set aside for payment of any liability or claims arising from this action. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 82.

Summary judgment was properly granted for defendant director in an action for negligent paving and guttering by a dissolved corporation where the allegations cannot be construed to allege that the company's assets were distributed without providing for known and reasonably ascertainable liabilities. *Heather Hills Home Owners Assn. v. Carolina Custom Development Co.*, 263.

§ 31 (NCI3d). Purchase of assets of one corporation by another corporation

Summary judgment should not have been granted for defendant St. Andrews Properties and its two partners in an action arising from negligent paving and guttering where plaintiff did not show that these defendants were successors to the dissolved corporation which performed the work. *Heather Hills Home Owners Assn. v. Carolina Custom Development Co.*, 263.

COURTS

§ 9 (NCI3d). Jurisdiction to review rulings of another superior court judge, generally

The trial court's ruling allowing a motion to quash subpoenas duces tecum did not result in one superior court judge overruling another because another judge had suggested at a pretrial hearing that defense counsel could subpoena records not in the district attorney's possession. *S. v. Love*, 226.

CRIMINAL LAW

§ 3 (NCI4th). Solicitation

Defendant's right against double jeopardy was not violated by her convictions for both solicitation and conspiracy to commit arson. *S. v. Richardson*, 240.

Indictments charging defendant with solicitation of obstruction of justice in a specific criminal case, attempt to commit obstruction of justice in such case, and solicitation of obstruction of justice in future cases were not duplicitous. *S. v. Clemmons*, 286.

§ 6 (NCI4th). Infamous offenses

Indictments for solicitation to obstruct justice and attempt to obstruct justice charged infamous misdemeanors which became Class H felonies under G.S. 14-3(b) so as to give the superior court jurisdiction over the offenses. *S. v. Clemmons*, 286.

§ 11.14 (NCI4th). Nonstatutory aggravating factors; lack of acknowledgment of wrongdoing; lack of remorse

The trial court erred in basing its sentencing decision in part upon defendant's denial of all guilt with respect to the charges against him. *S. v. Harrell*, 450.

§ 34.7 (NCI3d). Admissibility of evidence of other offenses to show knowledge or intent, animus, motive, malice, premeditation or deliberation

The testimony of a teenage boy about homosexual activities the defendant engaged in with him and the two teenage victims was admissible in a murder prosecution to show motive and a pattern of conduct toward the victims consistent with the State's theory of the case. *S. v. Ross*, 207.

Testimony by an arson victim that she quit being friends with defendant when defendant said she wanted to find someone to kill her husband was admissible to show defendant's motive in soliciting the burning of the victim's mobile home. *S. v. Richardson*, 240.

§ 34.8 (NCI3d). Admissibility of evidence of other offenses to show modus operandi or common plan, scheme or design

Evidence that defendant had previously solicited the same youths who burned the victim's mobile home for her to commit other crimes and had provided transportation for them was admissible to show a common plan or scheme. *S. v. Richardson*, 240.

§ 35 (NCI3d). Evidence that offense was committed by another

The criminal record of the owner of a truck defendant was driving was not admissible to show that the owner acted in conformity with his prior conviction by placing cocaine under the truck seat since the evidence did not point directly to the guilt of another for the crime of trafficking in cocaine for which defendant was on trial. *S. v. Chandler*, 706.

§ 39 (NCI3d). Evidence in rebuttal of facts brought out by adverse party

In a prosecution based on defendant's solicitation of youths to burn the victim's mobile home, testimony concerning defendant's plan to have her own mobile home burned by youths was admissible to explain or rebut evidence previously elicited by defendant. *S. v. Richardson*, 240.

A detective's testimony as to statements by a youth allegedly solicited to burn the victim's mobile home concerning his "stealing" for defendant was properly admitted to rebut defendant's evidence that the youth was making up statements about defendant's role in the burning to extricate himself from his own legal troubles. *Ibid.*

§ 50.1 (NCI3d). Admissibility of opinion testimony; opinion of expert

The trial court properly permitted a hospital counselor and a pediatrician to give expert testimony as to the symptoms and characteristics of sexually abused children and to state their opinions that symptoms exhibited by the victim were consistent with sexual abuse. *S. v. Love*, 226.

§ 50.2 (NCI3d). Opinion of nonexpert

The trial court did not err in allowing a sexual abuse victim's school guidance counselor to state her opinion that the victim's pretrial statements to a social worker and a police officer were consistent with the account the victim had given her. *S. v. Murphy*, 33.

Testimony by the mother of an alleged rape and sexual offense victim that the victim had never lied to her about anything of this magnitude was admissible lay opinion testimony. *S. v. Love*, 226.

§ 66 (NCI3d). Evidence of identity by sight

The trial court properly instructed the jury with respect to a prior inconsistent out-of-court identification and properly refused to give an instruction requested by defendant. *S. v. Hunt*, 43.

§ 68 (NCI3d). Other evidence of identity

The trial court in a rape case did not err in admitting hair and fiber evidence removed from defendant's pants on the ground that defendant could have picked up the hair and fibers by riding in the same police car in which the victim had ridden earlier in the day. *S. v. Davy*, 551.

§ 73.1 (NCI3d). Admission of hearsay statement as prejudicial or harmless error

There was no plain error in the admission of statements by a witness who did not testify where the statements were inadmissible hearsay but there was sufficient other competent evidence for the jury to reach its verdict. *S. v. Petty*, 465.

§ 86 (NCI3d). Credibility of defendant and interested parties

The trial court did not err in refusing to permit defendant to cross-examine a detective about the police department's use of defendant as an informant to show that defendant had credibility with the police department where defendant's credibility had not been attacked. *S. v. Burge*, 671.

§ 86.2 (NCI3d). Impeachment of defendant by prior convictions generally

Even if the trial court erred in ruling that the prosecution could cross-examine defendant about a conviction more than ten years old, defendant waived objection when he testified about the conviction on direct examination. *S. v. Ross*, 207.

The trial court did not violate Rule 609(b) by permitting the State to use a prior conviction more than ten years old to impeach defendant's testimony that his convictions during the last ten years were his only convictions. *S. v. Chandler*, 706.

§ 87.1 (NCI3d). Leading questions

The trial court did not err in allowing the prosecutor to ask leading and repetitive questions of a 10 year old rape and indecent liberties victim. *S. v. Murphy*, 33.

§ 88.4 (NCI3d). Cross-examination of defendant

Where defendant testified that he had had a homosexual relationship with a murder victim, it was permissible for the State to bring out the details of that relationship on cross-examination of defendant. *S. v. Ross*, 207.

§ 89.3 (NCI3d). Corroboration and impeachment; prior statements of witness; generally consistent statements

Statements made to a detective by a youth allegedly solicited by defendant to burn the victim's mobile home that he was ready to "get out of the stealing and burning" were admissible to corroborate testimony by the youth at trial that he had told detectives that defendant had had him steal and set a fire for her, although the statements went beyond the testimony of youth. *S. v. Richardson*, 240.

§ 91 (NCI4th). Preliminary or probable cause hearing generally

There was no error in a prosecution for breaking or entering a motor vehicle and felonious larceny where no probable cause hearing was held during defendant's confinement because there is no necessity for a preliminary hearing after a grand jury returns a bill of indictment. *S. v. Riggs*, 149.

§ 113 (NCI4th). Regulation of discovery; failure to comply

The trial court did not err by denying defendant's motion to dismiss based on the State's failure to provide the complete police investigatory report during discovery. *S. v. Lineberger*, 307.

§ 152 (NCI4th). Plea of nolo contendere; nature and effect of plea

A nolo contendere plea in 1973, before the effective date of G.S. Chapter 15A, could not be used against defendant in any case other than the one in which it was entered. *S. v. Petty*, 465.

§ 162.2 (NCI3d). Time for objection generally

Defendant did not object in apt time and waived his right to argue on appeal that an out-of-court statement was hearsay. *S. v. Hyder*, 270.

§ 169.3 (NCI3d). Error cured by introduction of other evidence

There was no prejudice in a prosecution for delivering a controlled substance from the admission of an out-of-court statement where that fact had already been established without objection. *S. v. Hyder*, 270.

Defendant was not prejudiced by the court's refusal to permit a witness to testify that, based upon his personal knowledge of the State's eyewitness, he would not believe him under oath where the witness had previously testified that the eyewitness was a liar and had told him that he would take a bribe to change his testimony. *S. v. Burge*, 671.

§ 169.5 (NCI3d). Error in admission or exclusion of evidence held not prejudicial

Defendant was not prejudiced by any error in the admission of testimony by a social worker concerning certain pretrial statements made by a sexual abuse victim. *S. v Murphy*, 33.

§ 201 (NCI4th). Speedy trial; commencement of time; successive arrest, indictment, or information after dismissal

The trial court did not err in an assault prosecution by denying defendant's motion to dismiss under the Speedy Trial Act where defendant was tried 87 days after his indictment. *S. v. Lineberger*, 307.

§ 258 (NCI4th). Particular grounds for continuance; absence or change of appointed counsel generally

The trial court did not err by denying defendant's motion to continue a murder trial for eight days where both defense attorneys withdrew from the case because

§ 829 (NCI4th). Instructions on accomplices, accessories, and codefendants generally

Because no evidence of the guilty pleas of defendant's companions to the crimes in question was presented at trial, the trial court correctly concluded that to insert such information in the jury charge would be prejudicial to the State. *S. v. Hunt*, 43.

§ 865 (NCI4th). Instruction on reasoning together

The trial court did not err in instructing the jurors not to stake themselves out on a strong position immediately upon entering the jury room. *S. v. Hunt*, 43.

§ 884 (NCI4th). Appellate review of jury instructions; objections; waiver of appeal rights

Where defense counsel waited to request an instruction and object to its omission until after the jury had retired, he failed to preserve his assignment of error for appeal. *S. v. Hunt*, 43.

§ 904 (NCI4th). Denial of right to unanimous verdict

Defendant's right to a unanimous verdict was not violated by the trial court's disjunctive instruction in an indecent liberties case. *S. v. Love*, 226.

§ 909 (NCI4th). Verdict as cure of prior errors

The trial court did not err in submitting first degree murder to the jury in a prosecution in which defendant was convicted of second degree murder; it is well established that a conviction on a lesser offense renders any error in submission of the greater offense harmless. *S. v. Williams*, 567.

§ 959 (NCI4th). Motion for appropriate relief; newly discovered evidence

Defendant's motion for appropriate relief based on the State's failure to disclose evidence in a prosecution for kidnapping and sexual offense was properly denied. *S. v. Coats*, 455.

§ 1014 (NCI4th). New trial for newly discovered evidence; required showing

Defendant's motion for a new trial was denied because it could not be said that the new evidence was probably true, the new evidence was merely cumulative, and defendant failed to show due diligence. *S. v. Riggs*, 149.

§ 1061 (NCI4th). Record of evidence at sentencing hearing

The trial court's failure to order that the sentencing hearing be transcribed did not constitute prejudicial error. *S. v. Chandler*, 706.

§ 1079 (NCI4th). Consideration of aggravating and mitigating factors generally; discretion of trial court

The trial court did not abuse its discretion when sentencing defendant for assault by finding that the two aggravating factors outweighed the two mitigating factors. *S. v. Whitaker*, 578.

§ 1117 (NCI4th). Nonstatutory aggravating factors; seriousness of crime

There was no error in sentencing defendant to maximum terms for delivery of a controlled substance where the evidence allegedly did not support the judge's statements concerning marijuana use by defendant's sons because defendant was sentenced prior to any comment and the record contains statutory aggravating factors supporting the sentence. *S. v. Hyder*, 270.

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

§ 1196 (NCI4th). Mitigating factors; burden and quantum of proof

The trial court did not abuse its discretion by not considering defendant's physical condition as a mitigating factor where the only mention of defendant's physical condition was in defense counsel's argument. *S. v. Hyder*, 270.

§ 1200 (NCI4th). Judge's inference that jury considered mitigating factors

The trial court did not err when sentencing defendant for second degree murder by rejecting self-defense as a mitigating factor where the record clearly indicates that even before the verdict the court did not believe that defendant was acting in self-defense. *S. v. Williams*, 567.

§ 1233 (NCI4th). Mitigating factors; proof that limited mental capacity reduced culpability

The trial court acted within its discretion in refusing to find limited mental capacity as a mitigating factor where defendant failed to meet his burden of showing that his limited mental capacity significantly reduced his culpability. *S. v. Williams*, 567.

§ 1239 (NCI4th). Mitigating factors; strong provocation

The trial court did not err when sentencing defendant for assault by failing to find as a mitigating factor that defendant acted under strong provocation. *S. v. Whitaker*, 578.

§ 1282 (NCI4th). Definition of habitual felon

The trial court improperly used a 1973 nolo contendere plea as a supporting felony conviction to the charge of being an habitual felon. *S. v. Petty*, 465.

§ 1286 (NCI4th). Evidence of prior convictions of felony offenses

A conviction as an habitual offender was not improper because the judgment for one of the supporting felonies was under the name Martin Petty and another was under the name Martin Bernard Petty. *S. v. Petty*, 465.

DAMAGES

§ 10 (NCI3d). Credit on damages; collateral source rule

Judgment awarding plaintiffs $6,000 for flood damage was remanded for amendment of judgment to give defendant benefit of a $5,000 settlement with former codefendants. *Cox v. Robert C. Rhein Interest, Inc.*, 584.

DEEDS

§ 11 (NCI3d). Rules of construction

The trial judge did not err in ruling pursuant to G.S. 39-1.1, without a jury and without hearing evidence, that it was the intent of the parties of a 1986 deed which contained inconsistent clauses that only timber would be conveyed by the deed. *Mason-Reel v. Simpson*, 651.

§ 12.2 (NCI3d). Defeasible fees

A grantee took a fee simple defeasible upon his death without surviving issue and the limitation over operated where he died survived only by his wife despite language in the deed referring to surviving heirs. *Elliott v. Cox*, 536.

DIVORCE AND ALIMONY — Continued

§ 24 (NCI3d). Child support generally

The trial court did not err by entering a child support order prior to determination of a pending equitable distribution action. *Cohen v. Cohen*, 334.

§ 24.1 (NCI3d). Child support; determining amount

The trial court did not err in a child support action by failing to consider the child support guidelines then in effect where the guidelines were only advisory in nature at that time. *Cohen v. Cohen*, 334.

The trial court did not err in using a cost-sharing formula in determining the final child support payment but did err by reducing the amount to reflect money saved by the custodial parent while the children were visiting the non-custodial parent. *Ibid.*

The trial court did not err in a child support action by awarding retroactive child support based solely on evidence of actual expenditures. *Ibid.*

The trial court did not err in a child support action by assigning to defendant husband the right to claim the minor children as dependents for income tax purposes. *Ibid.*

§ 24.6 (NCI3d). Burden of proof; sufficiency of evidence generally

There was sufficient evidence in a child support action to support the finding that defendant had physical custody of the children ten percent of the time and therefore should pay ninety percent of the support. *Cohen v. Cohen*, 334.

§ 24.9 (NCI3d). Findings

The trial court made sufficient findings of fact to support its child support order. *Cohen v. Cohen*, 334.

§ 25.12 (NCI3d). Child visitation privileges

The portion of a child custody order finding defendant to be in contempt for failure to comply with the previous visitation order was affirmed. *Walleshauser v. Walleshauser*, 594.

The trial court erred in placing on defendant mother the burden of proving that visitation of her children by plaintiff grandparents was not in the best interest of the children. *Kerns v. Southern*, 664.

The trial court's conclusory findings were insufficient to support the court's award of child visitation rights to plaintiff grandparents. *Ibid.*

§ 26 (NCI3d). Modification of foreign child support orders generally

The trial court in a child custody action correctly determined that North Carolina was the home state, thereby providing one of the bases for jurisdiction under G.S. 50A-3. *Pheasant v. McKibben*, 379.

The North Carolina court did not err by assuming jurisdiction in a child custody action and modifying a Georgia decree even though there was no evidence had that Georgia declined to exercise jurisdiction. *Ibid.*

§ 27 (NCI3d). Attorney fees and costs generally

The trial court did not err by failing to award attorney fees where the case involved both child support and child custody initially but the child custody issue was resolved through negotiations arbitrated by the trial judge after trial began. *Cohen v. Cohen*, 334.

DIVORCE AND ALIMONY — Continued

§ 30 (NCI3d). Distribution of marital property in divorce action

The trial court erred in determining that an 8.6 acre tract of land was defendant husband's separate property where a one-half interest in the tract was conveyed by a deed to plaintiff and defendant as tenants by the entirety. *Lawrence v. Lawrence*, 1.

The trial court erred by relying on defendant's use of separate property to purchase a 24 acre tract to rebut the presumption of a gift to the marital estate. *Ibid.*

The trial court erred in using a source of funds approach to determine what portion of a 56.6 acre tract was marital property where defendant used some separate property to acquire the land, it was titled as entireties property, and defendant presented no evidence to rebut the presumption that he intended a gift to the marital estate. *Ibid.*

A deed to property which named as grantees defendant's partner and his wife and defendant and plaintiff as husband and wife created in the couples tenancies by the entirety so that the presumption of gift to the marital estate arose. *Ibid.*

The case is remanded for a reclassification of defendant's share of partnership property since a spouse's interest in a professional partnership may be marital property, defendant's partnership with his uncle existed during the marriage, and the trial court erred in classifying some of the partnership property. *Ibid.*

The trial court erred in awarding the full value of an investment trust to defendant husband where there was some evidence to support the trial court's finding that 61.8% of the trust was separate property and the remaining 38.2% was marital property. *Ibid.*

The trial court was without authority to impose a trust for the benefit of the parties' children on an education fund established by the parties, to appoint the parties as trustees, and to order that the children pay income taxes due on the fund. *Ibid.*

The trial court erred in determining that plaintiff wife had converted certain marital funds to her own use during the marriage and in treating the allegedly converted funds as part of the marital estate in making its equitable distribution order. *Ibid.*

EMINENT DOMAIN

§ 3.1 (NCI3d). What constitutes a public purpose

The trial court did not err in a condemnation action by finding that plaintiff was authorized to acquire land for parks, recreational programs and facilities through exercising eminent domain or by finding that the land was being taken for a public purpose. *Town of Chapel Hill v. Burchette*, 157.

§ 7.1 (NCI3d). Proceedings to take land and assess compensation generally

The contention in a condemnation action that defendants owned the property by entireties and that plaintiff could therefore not acquire the property other than simultaneously was not raised below and could not be raised on appeal; however, N.C.G.S. Chapter 40A contains no requirement that title to condemned property be divested simultaneously. *Town of Chapel Hill v. Burchette*, 157.

§ 7.7 (NCI3d). Answer by landowner

Defendants in a condemnation action did not assert a challenge to the town's power to condemn where the original answer by the defendant husband contested

only the amount of compensation due and the wife never filed an answer to an amended complaint. *Town of Chapel Hill v. Burchette*, 157.

§ 13.4 (NCI3d). Evidence and burden of proof

The trial court did not err in a condemnation action by finding that the value of the property was $14,000 where no exceptions were taken to the admission of testimony concerning the value of the land and the amount was within the range established by the evidence. *Town of Chapel Hill v. Burchette*, 157.

EQUITY

§ 2 (NCI3d). Laches

Plaintiff lessor's action against defendant lessee to recover real estate taxes required by the lease to be paid by the lessees was not barred by laches because subleases required the subtenants to pay taxes due on the leased property and defendants' right of action against their subtenants is barred by the statute of limitations. *Martin v. Ray Lackey Enterprises*, 349.

EVIDENCE

§ 13 (NCI3d). Communications between attorney and client

The court did not err in an action for breach of a lease by admitting into evidence a letter from an attorney to the individual defendants and their accountant. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 82.

§ 24 (NCI3d). Depositions

Where the parties stipulated that objections during a deposition would be reserved for trial, the third-party defendant reserved his right to object at trial to the admission of his deposition testimony on the ground of self-incrimination. *Leonard v. Williams*, 512.

§ 32.3 (NCI3d). Effect of subsequent parol agreements

Summary judgment was improperly granted for defendant on the issue of subsequent modification of warranties arising from the sale of a spinal scanner. *Muther-Ballenger v. Griffin Electronic Consultants, Inc.*, 505.

§ 34.1 (NCI3d). Admissions and declarations; admissions against interest

The trial court erred by granting summary judgment for defendant Bowers in an action arising from an automobile accident where plaintiff alleged negligence by her driver and adopted a statement by her counsel supporting her driver's negligence; the rule that a party is bound by his pleadings does not apply to cases where plaintiff brings a claim in the alternative against two or more defendants. *Oxendine v. Bowers*, 712.

The trial court erred by granting summary judgment for defendant Bowers in an automobile accident case where plaintiff adopted a statement of her attorney during her deposition that the facts supported the allegation that her driver had been negligent; her statement was not such deliberate, unequivocal and repeated testimony as would defeat plaintiff's claim as a matter of law. *Ibid.*

§ 48.1 (NCI3d). Failure to prove qualifications of expert

The trial court did not abuse its discretion in an adoption proceeding by refusing to accept an expert in the area of destructive cults and behavioral modifica-

HOMICIDE — Continued

§ 21.7 (NCI3d). Sufficiency of evidence of second degree murder

The evidence of second degree murder was not sufficient where statements by defendant only a few hours after the incident indicate that the shooting was accidental and the statement was not contradicted or shown to be false by any other facts or circumstances in evidence. *S. v. Turnage*, 234.

The State's evidence was sufficient to support defendant's conviction of second degree murder by deliberately firing a bullet through the victim's skull after the victim begged defendant not to kill him. *S. v. Burge*, 671.

§ 28 (NCI3d). Self-defense; generally

The trial court did not err in a murder prosecution by instructing the jury that self-defense would not be available if defendant was the aggressor. *S. v. Williams*, 567.

§ 28.4 (NCI3d). Duty to retreat; right to stand ground

The trial court did not err by refusing to give an instruction on the duty to retreat in defendant's own home. *S. v. Williams*, 567.

HUSBAND AND WIFE

§ 10.1 (NCI3d). Separation agreements; requisites and validity; void and voidable agreements

Summary judgment for defendant was reversed where the parties had separated and entered into a separation agreement in 1983, reconciled and resumed marital relations, separated again in 1987, and entered into a second separation in 1988. *Stegall v. Stegall*, 398.

§ 12 (NCI3d). Revocation and rescission; resumption of marital relationship; divorce, and remarriage

Summary judgment for defendant refusing to set aside a 1988 separation agreement due to duress and coercion was improper where, taking plaintiff's affidavit as true, there was a genuine issue of material fact. *Stegall v. Stegall*, 398.

A 1983 separation agreement was modified by a 1988 separation agreement where the language of the 1988 agreement clearly and unambiguously established the intention to fully dispose of the parties' property rights. *Ibid.*

§ 12.1 (NCI3d). Revocation and rescission; fraud, want of consideration, and other grounds

Summary judgment should not have been granted for defendant husband in an action to rescind a separation agreement where plaintiff alleged that defendant had breached his fiduciary duty in procuring her signature and plaintiff contended that he owed no fiduciary duty based on the parties' separation and their employment of an attorney, and defendant further contended that he had complied with any duty of disclosure because plaintiff had had full access to their tax returns. *Harroff v. Harroff*, 686.

INDICTMENT AND WARRANT

§ 8.4 (NCI3d). Election between offenses or counts

The Court of Appeals declined to adopt defendant's contention in a kidnapping and sexual offense prosecution that an election between charges to preclude double

tortfeasor's liability insurer rather than allowing only the aggregate amount of the two coverages to be reduced by such payment. *Ibid.*

G.S. 20-279.21(e) does not permit an insurer to reduce the underinsured motorist coverage in a personal automobile insurance policy by amounts paid to the insured as workers' compensation. *Ibid.*

Summary judgment was correctly granted for defendant insurance company in an action in which plaintiff sought to stack underinsured motorist coverage from two policies covering two automobiles and a motorcycle. *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 728.

§ 69.1 (NCI3d). Policy provisions and conflict with uninsured and underinsured motorist statutes

The underinsured motorist coverage of an automobile policy per person and per accident was the same amount as the personal injury liability coverage even though the policy stated lower limits. *Sproles v. Greene*, 96.

An underinsured motorist insurer's policy limit obligation was not reduced by an underinsured motorist payment received by the injured insured from another insurer since a policy provision limiting insured's recovery to the highest applicable limit of liability under any one policy was unenforceable. *Ibid.*

§ 88 (NCI3d). Garage and dealer's liability insurance

Defendant, which provided a garage liability policy for an employer, was the primary carrier for an employee who drove the employer's car with its permission to test-drive it for the weekend and had a collision while doing so, and plaintiff, which provided automobile liability insurance to the employee, was the excess carrier for the employee. *Integon General Ins. Corp. v. Universal Underwriters Ins. Co.*, 64.

§ 92.1 (NCI3d). Garage liability insurance

In an action to recover under a garage liability policy for damage caused to two automobiles when plaintiff's employee dropped a foreign object into a cylinder of each automobile while changing the spark plugs, a jury question was presented as to whether the damages were restricted to the work product so as to come within the policy provision excluding coverage for faulty work or whether they involved other parts of the automobiles. *Barbee v. Harford Mutual Ins. Co.*, 548.

§ 100 (NCI3d). Duty of insurer to defend

Defendant garage liability insurer had a duty to provide a defense for an employee involved in a collision while driving the employer's car with the employer's permission and to pay attorney fees and litigation expenses incurred in that defense. *Integon General Ins. Corp. v. Universal Underwriters Ins. Co.*, 64.

JUDGMENTS

§ 21 (NCI3d). Consent judgments and judgments of retraxit; generally

The trial court erred by granting plaintiff's Rule 60 motion to correct an error in a consent judgment in a divorce action where the evidence was not sufficient to support claims of fraud or lack of consent and any mistake was not mutual. *Stevenson v. Stevenson*, 750.

LANDLORD AND TENANT — Continued

real party in interest entitled to prosecute a claim against the lessees for breach of the lease by failing to pay real estate taxes on the leased property, and the bank was not a necessary party to the lessor's action. *Martin v. Ray Lackey Enterprises*, 349.

A breach of a lease occurred and the statute of limitations began to run when defendant lessees failed to pay real estate taxes on the leased property as they became due on an annual basis, not when plaintiff lessor gave defendant lessees written notice of default and defendants failed to cure within the applicable time specified by the lease. *Ibid.*

LARCENY

§ 6.1 (NCI3d). Competency and relevancy of evidence; identity, ownership, and value of property stolen

There was no error in a prosecution for felonious larceny in the admission of testimony about the value of stolen wine. *S. v. Riggs*, 149.

LIMITATION OF ACTIONS

§ 4.6 (NCI3d). Accrual of cause of action for breach of particular contracts

A breach of a lease occurred and the statute of limitations began to run when defendant lessees failed to pay real estate taxes on the leased property as they became due on an annual basis, not when plaintiff lessor gave defendant lessees written notice of default and defendants failed to cure within the applicable time specified by the lease. *Martin v. Ray Lackey Enterprises*, 349.

Plaintiff was barred by the statute of limitations from bringing an action alleging breach of an agreement to refrain from further challenges to a certificate of need. *Abram v. Charter Medical Corp. of Raleigh*, 718.

MALICIOUS PROSECUTION

§ 11.2 (NCI3d). Effect of acquittal, discharge, or discontinuance; action of examining magistrate

The trial court did not err by granting a directed verdict for defendants in a malicious prosecution action arising from plaintiff's alleged shoplifting where plaintiff was convicted in district court and acquitted in superior court. *Hill v. Winn-Dixie Charlotte, Inc.*, 518.

§ 12 (NCI3d). Proof of damages; competency and relevancy of evidence

The trial court did not err by granting summary judgment for defendant on a malicious prosecution claim arising from a contested certificate of need where plaintiff did not allege special damages. *Abram v. Charter Medical Corp. of Raleigh*, 718.

MASTER AND SERVANT

§ 9 (NCI3d). Actions to recover compensation

The Court of Appeals adopted the majority view that a salesman is not required to repay any excess advances over commissions unless the parties either expressly or impliedly agree to do so. *Fletcher, Barnhardt & White, Inc. v. Matthews*, 436.

MASTER AND SERVANT — Continued

The trial court erred by concluding that plaintiff employer was entitled to recover from defendant salesman the deficit in defendant's draw account after defendant left plaintiff's company where the parties failed to enter into an express agreement concerning deficits in the draw account if a salesman left the company, the parties did not impliedly agree that plaintiff was to be personally liable for the deficit, and defendant did not breach his fiduciary duty to his employer by making plans to compete with his employer before he left the company. *Ibid.*

Summary judgment was properly granted for defendant in an ERISA action in which plaintiff alleged that defendant had breached its fiduciary duty when its employee erroneously assured her that she was the properly designated beneficiary under her husband's group life insurance plan. *Suarez v. Food Lion, Inc.*, 700.

§ 19 (NCI3d). Liability of contractee or main contractor to employees of independent contractor

Plaintiff's evidence was sufficient to support an inference that defendant general contractor's employees negligently created a dangerous condition which caused plaintiff, a subcontractor's employee, to fall from a ladder at a construction site by installing guttering between the top of the ladder and the edge of the roof while plaintiff was away from the building. *Hazelwood v. Landmark Builders, Inc.*, 386.

§ 29 (NCI3d). Liability of employer for negligence or willful act of fellow employee

Plaintiff's forecast of evidence was sufficient to maintain her claim against defendant employer for negligent retention of her supervisor after he intentionally inflicted emotional distress upon her. *Waddle v. Sparks*, 129.

§ 58 (NCI3d). Intoxication of employee

The Industrial Commission correctly applied the legal standard of causation when it determined that, although plaintiff was under the influence of alcohol at the time of the accident, intoxication was not a proximate cause of the accident. *Suggs v. Snow Hill Milling Co.*, 527.

§ 69.3 (NCI3d). Compromise settlements

The Industrial Commission properly denied plaintiff's request to set aside a Form 26 Agreement where plaintiff asserted that he was unrepresented by counsel and was not informed that he had the right to elect benefits but the evidence revealed no error due to fraud, misrepresentation, undue influence, or mutual mistake. *Brookover v. Borden, Inc.*, 754.

The Industrial Commission erred in setting aside a settlement agreement for defendant to compensate plaintiff for disability from asbestosis because of "mutual mistake" based on a report by the Advisory Medical Committee of the Industrial Commission that plaintiff does not have "compensable asbestosis." *Mullinax v. Fieldcrest Cannon, Inc.*, 248.

§ 75 (NCI3d). Medical and hospital expenses

An Industrial Commission opinion and award was remanded for further findings on the issue of whether plaintiff complied with N.C.G.S. § 97-25 in seeking medical treatment where there were no findings indicating whether approval for any of plaintiff's treatment was sought within a reasonable time and whether the services performed affected a cure or rehabilitation. *Forrest v. Pitt County Bd. of Education*, 119.

MASTER AND SERVANT — Continued

§ 86 (NCI3d). Employment in this and other states as affecting jurisdiction

The trial court erred by granting defendant's motion to dismiss a negligence action where plaintiff, an employee of a North Carolina company, was injured in Virginia and collected compensation under the North Carolina Workers' Compensation Act. *Braxton v. Anco Electric, Inc.*, 635.

§ 87 (NCI3d). Claim under Compensation Act as precluding common law action

The trial court erred by granting defendant's motion to dismiss a negligence action where plaintiff was injured in Virginia while working for North Carolina employers and collected benefits under the North Carolina Workers' Compensation Act. *Braxton v. Anco Electric, Inc.*, 635.

§ 89.4 (NCI3d). Distribution of recovery of damages at common law

The superior court was not required to follow the priority schedule for the Industrial Commission set forth in G.S. 97-10.2(f) when disbursing the proceeds of a settlement with a tortfeasor to an injured employee and the employer's compensation insurer pursuant to subsection (j). *Allen v. Rupard*, 490.

G.S. 97-10.2(j) does not give the trial court unbridled discretion to decide how to distribute settlement proceeds between an injured employee and the employer's compensation insurer so as to violate due process. *Ibid.*

The trial court did not abuse its discretion in dividing a $25,000 settlement with a tortfeasor equally between the injured employee and the employer's compensation insurer where the insurer's subrogation lien was over $40,000. *Ibid.*

§ 91 (NCI3d). Filing of workers' compensation claim generally

The Industrial Commission did not err by denying plaintiff's claim arising from a back injury where the claim was denied upon the ground that it was not filed within two years of the accident; paying an employee's medical bills is not enough to establish estoppel against the employer. *Abels v. Renfro Corp.*, 186.

Defendant employer was equitably estopped from asserting the two-year time limitation of G.S. 97-24(a) as a bar to plaintiff's claim for compensation for a shoulder injury. *Parker v. Thompson-Arthur Paving Co.*, 367.

§ 94 (NCI3d). Findings of Commission; necessity for specific findings of fact

An opinion and award of the Industrial Commission finding that plaintiff's occupational exposure to cotton dust was not a significant contributing factor in the development of his lung disease was affirmed despite the Commission's failure to make a separate finding regarding aggravation of plaintiff's disease. *Wilkins v. J. P. Stevens & Co.*, 742.

§ 94.1 (NCI3d). Sufficiency of findings of fact

An Industrial Commission opinion and award was remanded where there were no findings of fact indicating whether approval for any of plaintiff's treatment was sought within a reasonable time and whether the services performed affected a cure or rehabilitation. *Forrest v. Pitt County Bd. of Education*, 119.

§ 94.2 (NCI3d). Award and judgment of Commission

An opinion of the Industrial Commission in a workers' compensation action arising from a slip and fall in a cafeteria freezer was remanded where the Commission did not address an overpayment to plaintiff and her attorney raised by defendant. *Forrest v. Pitt County Bd. of Education*, 119.

MASTER AND SERVANT — Continued

§ 96.1 (NCI3d). Scope of review; review of findings in general

The findings of the Industrial Commission in a workers' compensation claim were not disturbed by the Court of Appeals where the claim was denied upon findings that plaintiff's evidence was not credible. *Abels v. Renfro Corp.*, 186.

§ 99 (NCI3d). Costs and attorneys' fees

Plaintiff was entitled to attorney fees as part of the costs of defendant employer's appeal from the Deputy Commissioner to the Full Commission and appeal to the Court of Appeals where the Court of Appeals decision reinstated a settlement agreement. *Mullinax v. Fieldcrest Cannon, Inc.*, 248.

The Industrial Commission did not have jurisdiction to determine a controversy between plaintiff's attorneys concerning division of a fee awarded to the attorneys in a workers' compensation case. *Eller v. J & S Truck Services*, 545.

MINES AND MINERALS

§ 1.1 (NCI3d). Rights and title to mines and minerals

The trial court was without subject matter jurisdiction over plaintiffs' claim in an action to have a mining permit declared void that Buncombe County had authority to require an environmental impact statement from defendant mining company where plaintiffs failed to exhaust their administrative remedies. *North Buncombe Assn. of Concerned Citizens v. Rhodes*, 24.

Plaintiffs' failure to exhaust their administrative remedies before seeking judicial review precluded declaratory relief on their claim that the Mining Act was unconstitutional both facially and as applied and on their claim that the Department of Natural Resources failed to comply with the Mining Act in issuing a permit to defendant mining company. *Ibid.*

MUNICIPAL CORPORATIONS

§ 9 (NCI3d). Rights, powers, and duties of officers and employees

No genuine issue of material fact was presented in a city building inspector's appeal to the superior court as to whether he should have received a 7.5% pay raise which is given to those evaluated as "outstanding" rather than the 6% pay increase he received upon being rated as "above standard." *Worley v. City of Asheville*, 596.

§ 30.6 (NCI3d). Special permits and variances

A board of aldermen had before it sufficient evidence of adequate water and sewer services to support its approval of a special use permit upon the condition that the city would furnish a waterline to the property and the applicant would extend a sewer line even though the city's original commitment to provide a waterline may have violated the open meetings law. *Coulter v. City of Newton*, 523.

§ 30.11 (NCI3d). Zoning ordinances; specific businesses, structures, or activities

A community kitchen did not constitute a "boarding house" permitted by petitioner's zoning classification, but an adult day care center did constitute a rooming house permitted under the classification, and offices constituted a permissible accessory use. *Allen v. City of Burlington Bd. of Adjustment*, 615.

MUNICIPAL CORPORATIONS — Continued

§ 30.16 (NCI3d). Nonconforming uses; time and existence of use; knowledge of pendency of ordinance

The trial court did not err by finding and concluding that plaintiff in an action to set aside a rezoning had not made substantial expenditures in reasonable reliance on the previous zoning. *Russell v. Guilford County*, 541.

§ 31 (NCI3d). Judicial review of zoning ordinances in general; methods of review

Plaintiff's challenge to a 1985 zoning law based on alleged state and federal constitutional violations was barred by the nine month statute of limitations. *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 77.

Petitioner appealed from a building inspector's 1986 decision permitting the use of zoned property for a community kitchen, adult day care, and offices within a reasonable time as permitted by city ordinance where he had no actual notice of the decision until August 1989 and appealed in September 1989, but he had constructive notice of the portion of the decision allowing the property to be used for a homeless shelter and could not challenge on appeal an expansion of the shelter on the ground of the use of the property. *Allen v. City of Burlington Bd. of Adjustment*, 615.

§ 31.1 (NCI3d). Standing to appeal or sue

Plaintiff's allegations were insufficient as a matter of law to state any claim as to a 1987 rezoning of its property which was less restrictive than the original zoning. *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 77.

A nearby property owner who will suffer special damages was a "person aggrieved" by a building inspector's decision that proposed uses of zoned property were appropriate and could appeal that decision to the Board of Adjustment. *Allen v. City of Burlington Bd. of Adjustment*, 615.

§ 31.2 (NCI3d). Scope and extent of judicial review of zoning ordinances

The issue as to whether a zoning ordinance was in fact enacted based on the purported failure to file and index properly the map which demonstrated the zoning boundaries was not before the Court of Appeals where it was not raised during the trial and no information regarding the issue was included in the record. *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 77.

NARCOTICS

§ 4 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was sufficient

The State's evidence was sufficient to support defendant's conviction of trafficking in cocaine by possession of cocaine found in a plastic bag beneath the seat of a truck defendant was driving. *S. v. Chandler*, 706.

NEGLIGENCE

§ 50.1 (NCI3d). Other conditions or uses of lands and buildings

Summary judgment was properly entered for defendants in an action to recover damages for injuries sustained by a child after falling from a second story window in an apartment building where plaintiff alleged negligent failure to install and maintain window screens. *Mudusar v. V. G. Murray & Co.*, 395.

NEGLIGENCE — Continued

§ 57.5 (NCI3d). Defective or obstructed floors

The trial court should not have granted a directed verdict for defendant in an action arising from plaintiff's fall in a store where plaintiff fell over a box in an aisle while following directions from a cashier and looking at advertisements hanging from the ceiling. *Price v. Jack Eckerd Corporation*, 732.

OBSTRUCTING JUSTICE

§ 1 (NCI3d). Generally

Defendant's conviction of an attempt to obstruct justice was supported by evidence that he delivered six hundred dollars to a K-Mart manager to cause the manager to tell the district attorney that he had made a mistake and to dismiss a larceny case. *S. v. Clemmons*, 286.

The presence of a pending case is not an essential element of solicitation of obstruction of justice. *Ibid.*

The trial court did not commit plain error in instructing the jury on the offense of solicitation to obstruct justice in future cases. *Ibid.*

§ 2 (NCI3d). Sufficiency of indictment

Indictments charging defendant with solicitation of obstruction of justice in a specific criminal case, attempt to commit obstruction of justice in such case, and solicitation of obstruction of justice in future cases were not duplicitous. *S. v. Clemmons*, 286.

An indictment was sufficient to charge defendant with solicitation of obstruction of justice where it alleged that defendant offered to pay money to a K-Mart manager for referring individuals he might charge with shoplifting or larceny to defendant as a bondsman and for declining to prosecute those individuals. *Ibid.*

Indictments for solicitation to obstruct justice and attempt to obstruct justice charged infamous misdemeanors which became Class H felonies under G.S. 14-3(b) so as to give the superior court jurisdiction over the offenses. *Ibid.*

PLEADINGS

§ 33.2 (NCI3d). Particular cases; motion to amend allowed

The trial court did not err in an action for breach of a lease by allowing plaintiff to amend its pleadings to include breach of the covenant of quiet enjoyment and to clarify the claim of conversion of personal property. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 82.

PRINCIPAL AND AGENT

§ 5 (NCI3d). Scope of authority

There was no prejudicial error in a declaratory judgment action to determine coverage under a life insurance policy in the denial of defendant's motion for a directed verdict on the issues of actual and apparent authority. *Mut. Benefit Life Ins. Co. v. City of Winston-Salem*, 300.

PROCESS

§ 6 (NCI3d). Subpoena duces tecum

The trial court did not err in quashing subpoenas duces tecum issued to treatment centers, the DSS, and public schools requesting the production of all files and records relating to a child rape, sexual offense and indecent liberties victim. *S. v. Love*, 226.

There is no requirement that the trial court review the records and files of nonparties sought pursuant to a subpoena duces tecum prior to quashing the subpoena. *Ibid.*

§ 9 (NCI3d). Service on nonresident individuals in another state or country

Service of process by international registered mail on defendant in Hong Kong was sufficient under Articles 10(a) and 19 of The Hague Convention. *Hayes v. Evergo Telephone Co.*, 474.

§ 9.1 (NCI3d). Minimum contacts test

North Carolina's long-arm statutes permitted the exercise of jurisdiction over defendant Hong Kong limited company in an action to recover for injuries allegedly caused by a telephone, and the exercise of in personam jurisdiction over defendant did not violate due process. *Hayes v. Evergo Telephone Co.*, 474.

§ 14 (NCI3d). Service of process on a foreign corporation by service on the Secretary of State

North Carolina's long-arm statute conferred jurisdiction over defendant New York corporation in that the lease assignment in question required defendant to perform obligations in North Carolina. *Mony Credit Corp. v. Ultra-Funding Corp.*, 646.

§ 14.2 (NCI3d). Service of process under the Business Corporation Act; minimum contacts

The exercise of personal jurisdiction over defendant was authorized by statute where defendant was an out-of-state corporation which applied for and received a line of credit from a North Carolina company, purchased computer equipment from that company, and then failed to make payments for the equipment. *Liberty Finance Co. v. North Augusta Computer Store*, 279.

Due process requirements for minimum contacts were satisfied where defendant New York corporation entered into a contract with a North Carolina resident and availed itself of the privilege of doing business here. *Mony Credit Corp. v. Ultra-Funding Corp.*, 646.

§ 14.3 (NCI3d). Service of process on foreign corporation; contacts within the state

Defendant did not meet its burden of showing error in the denial of its motion to dismiss for lack of jurisdiction where defendant merely alleged that the court relied on incompetent evidence and did not direct the court to any particular place in the record which would support its position, and there was evidence which supported the court's findings that defendant applied for credit from a North Carolina company, ordered equipment on the approved line of credit, and the North Carolina corporation accepted the equipment order in North Carolina. *Liberty Finance Co. v. North Augusta Computer Store*, 279.

RAILWAYS

§ 2 (NCI3d). Location, relocation, and maintenance of tracks and overpasses and underpasses

The trial court erred by requiring defendant to construct and maintain a railway crossing on plaintiff's land at a location requested by plaintiff. *Harris v. Southern Railway Co.*, 373.

RAPE AND ALLIED OFFENSES

§ 4 (NCI3d). Relevancy and competency of evidence

The trial court did not err in permitting a clinical psychologist to testify as to the characteristics of sexually abused children and as to which of those characteristics fit the victim in this case. *S. v. Murphy*, 33.

The trial court properly permitted a hospital counselor and a pediatrician to give expert testimony as to the symptoms and characteristics of sexually abused children and to state their opinions that symptoms exhibited by the victim were consistent with sexual abuse. *S. v. Love*, 226.

The trial court in a rape case did not err in admitting hair and fiber evidence removed from defendant's pants on the ground that defendant could have picked up the hair and fibers by riding in the same police car in which the victim had ridden earlier in the day. *S. v. Davy*, 551.

§ 4.3 (NCI3d). Character or reputation of prosecutrix

The trial court did not err in a prosecution for second-degree rape by refusing to admit evidence of prior acts and habits of the victim. *S. v. Cronan*, 641.

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

Evidence that defendant masturbated on his daughter's stomach was insufficient to support a charge of first degree sexual offense. *S. v. Murphy*, 33.

The State's evidence of defendant's identity as the perpetrator of a rape was sufficient for the jury. *S. v. Davy*, 551.

§ 6.1 (NCI3d). Lesser degrees of the crime

The trial court did not err in a prosecution for second-degree rape by refusing to instruct the jury on the lesser-included offense of contributing to the delinquency of a minor. *S. v. Cronan*, 641.

§ 7 (NCI3d). Verdict; sentence and punishment

Mandatory life sentences imposed on defendant for first degree rape and first degree sexual offenses do not constitute cruel and unusual punishment. *S. v. Love*, 226.

The Supreme Court of North Carolina has repeatedly rejected the argument that a life sentence for first-degree sexual offense is cruel and unusual punishment. *S. v. Norman*, 660.

§ 19 (NCI3d). Taking indecent liberties with child

Defendant's right to a unanimous verdict was not violated by the trial court's disjunctive instruction in an indecent liberties case. *S. v. Love*, 226.

RECEIVERS

§ 12.4 (NCI3d). Claims for wages and salaries

The trial court did not err by denying a claim for wages during a receivership where the claimant had been discharged by the receivers and ordered not to interfere in any way with any of the companies in receivership. *Lowder v. All Star Mills, Inc.*, 322.

REFORMATION OF INSTRUMENTS

§ 3 (NCI3d). Parties

Summary judgment was properly granted in part for defendant in an action in which plaintiff alleged that she would have been able to correct an error on a life insurance beneficiary form had she known that she was not the beneficiary. *Suarez v. Food Lion, Inc.*, 700.

RIOT AND INCITING TO RIOT

§ 2.1 (NCI3d). Evidence; instructions

The evidence was sufficient for the jury in a prosecution for felonious rioting. *S. v. Hunt*, 43.

RULES OF CIVIL PROCEDURE

§ 15 (NCI3d). Amended and supplemental pleadings

The trial court did not err in an action for breach of a lease by allowing plaintiff to amend its pleadings to include breach of the covenant of quiet enjoyment and to clarify the claim of conversion of personal property. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 82.

§ 15.2 (NCI3d). Amendments to conform to the evidence or proof

Though not raised in defendant's answer or the motion for summary judgment, the affirmative defense of res judicata was clearly before the trial court in a summary judgment hearing with the consent of both parties, and the pleadings were deemed amended to conform to the evidence on that issue. *County of Rutherford ex rel. Hedrick v. Whitener*, 70.

The pleadings in a breach of warranty action were deemed amended to include the issue of special damages where plaintiff introduced evidence of these damages without objection at trial and the parties thus tried this issue by implied consent. *Sharrard, McGee & Co. v. Suz's Software, Inc.*, 428.

§ 23 (NCI3d). Class actions

The trial court did not err by refusing to certify plaintiff's action as a class action. *Perry v. Union Camp Corp.*, 168.

§ 36 (NCI3d). Admission of facts and of genuineness of documents

The trial court did not err by concluding in its final order in a condemnation action that the property did not have any means of egress or ingress where the lack of access was established by defendant's failure to respond to plaintiff's requests for admissions. *Town of Chapel Hill v. Burchette*, 157.

§ 42 (NCI3d). Consolidation; separate trials

The trial court did not err in severing plaintiff's claim against defendant pilot for negligence in piloting an airplane that crashed from claims concerning another

SEARCHES AND SEIZURES

SOCIAL SECURITY AND PUBLIC WELFARE

SOCIAL SECURITY AND PUBLIC WELFARE — Continued

stamps for failure to cooperate in supplying information as to the number of persons in her household, and the trial court properly awarded attorney fees to petitioner who contested the final agency decision terminating her food stamps. *Tay v. Flaherty*, 51.

The DHR is required to use resource spend down to determine eligibility for Medicaid benefits so that applicants may qualify for Medicaid without actually using their excess reserve if their current medical expenses would reduce their total asset reserve below the imposed limit. *Kempson v. N.C. Dept. of Human Resources*, 482.

A 22 December application for Medicaid benefits would provide retroactive coverage for three full months before the month of the application. *Ibid.*

STATE

§ 1.1 (NCI3d). Open meetings law

Plaintiffs' suit challenging a board of aldermen's approval of a conditional use permit on the basis of the open meetings law was barred by the forty-five day statute of limitations of G.S. 143-318.16A(b). *Coulter v. City of Newton*, 523.

§ 12 (NCI3d). State Personnel Commission authority and actions

The trial court correctly concluded that the State Personnel Commission's findings did not support its conclusion that just cause was established for termination of two rehabilitation counselors. *Walker v. N.C. Dept. of Human Resources*, 498.

When an agency seeks to establish before the State Personnel Commission that an employee subject to the State Personnel Act was terminated for just cause, it cannot rest solely on the grounds that a supervisor's directions were not carried out to the fullest extent. *Ibid.*

A state agency's dismissal procedure violated petitioner's due process rights where the final decision to discharge her was made before she was given an opportunity to respond to the charges and those who did the firing did not confer after hearing petitioner's response, and an award of back pay and attorney fees was authorized. *Bishop v. N.C. Dept. of Human Resources*, 175.

STATUTES

§ 1 (NCI3d). Enactment of statutes

An act correcting the dates for phase-in of the modified system for adjusting the assessment level of public service company system property did not impose or authorize a tax and was therefore not within the purview of the constitutional provision requiring revenue acts to be read and passed on three separate days. *N.C. Eastern Mun. Power Agency v. Wake County*, 693.

TAXATION

§ 38.3 (NCI3d). Payment under protest

The trial court properly dismissed a declaratory judgment action seeking an injunction against the collection of sales and use taxes where plaintiff was challenging the constitutionality of the tax statute. *47th Street Photo, Inc. v. Powers*, 746.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

Plaintiff's forecast of evidence presented issues of fact for the jury in an action against her former supervisor for intentional infliction of emotional distress based on various sexually connotative statements and offensive actions, but a second plaintiff's forecast of evidence was insufficient where it failed to show that the incidents in question took place within the three-year statute of limitations period. *Waddle v. Sparks*, 129.

TRIAL

§ 10.1 (NCI3d). Expression of opinion on evidence by court during trial; particular cases

The trial court did not improperly express an opinion in remarking to the jury about the need to shorten the length of this wrongful death trial. *Ward v. McDonald*, 359.

§ 11 (NCI3d). Argument and conduct of counsel

There was no error in a declaratory judgment action to determine insurance coverage where defendant opened and closed the arguments to the jury despite introducing evidence. *Mut. Benefit Life Ins. Co. v. City of Winston-Salem*, 300.

§ 38.1 (NCI3d). Disposition of requests for instructions

The trial court did not err in its instructions on apparent authority in a declaratory judgment action to determine coverage under an insurance policy where the court did not give the requested instruction but properly instructed the jury on the substance of the requested instruction. *Mut. Benefit Life Ins. Co. v. City of Winston-Salem*, 300.

The trial court did not err by changing the jury instructions without notice to counsel and after jury arguments. *Ibid.*

§ 39 (NCI3d). Additional instructions and redeliberation of jury

The trial court did not err in a medical malpractice action by refusing to completely reinstruct the jury on the issue of damages where the jury, prior to returning verdicts, requested information concerning the amount of funeral expenses. *Wilkinson v. Cruz*, 420.

§ 52.1 (NCI3d). Setting aside verdict for excessive or inadequate award; particular cases

The trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the issue of damages in a wrongful death action where the jury awarded plaintiff the amount stipulated by the parties as the total medical and funeral expenses incurred by plaintiff because of his intestate's death. *Ward v. McDonald*, 359.

The trial court in a medical malpractice action did not abuse its discretion by denying plaintiff's motion for a new trial on the grounds of grossly inadequate damages. *Wilkinson v. Cruz*, 420.

TROVER AND CONVERSION

§ 2 (NCI3d). Nature and essentials of actions for possession of personalty

There was sufficient evidence of conversion of personal property in an action for breach of a real property lease. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 82.

§ 4 (NCI3d). Measure of damages

There was sufficient evidence in an action for breach of a lease for a restaurant to support the jury's award of damages for conversion of plaintiff's personal property. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 82.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

The trial court properly granted a defendant's motion to dismiss defendant's unfair and deceptive trade practices claim arising from a contested certificate of need. *Abram v. Charter Medical Corp. of Raleigh*, 718.

UNIFORM COMMERCIAL CODE

§ 11 (NCI3d). Express warranties

Privity is not required to assert a claim for breach of express warranty. *Sharrard, McGee & Co. v. Suz's Software, Inc.*, 428.

A letter from defendant's president to an accounting firm purchasing a computer accounting system for a plumbing distributor which guaranteed defendant's "programming with full return and refund privileges for the software and printer should our programming not perform as warranted" constituted an express warranty to the plumbing distributor, and the distributor could validly assign its claim against defendant for breach of the express warranty. *Ibid.*

§ 26 (NCI3d). Measure of damages for breach of warranty

Plaintiff was entitled to recover for breach of express warranty of a computer system both its general damages and special damages for additional sums expended for attempts by defendant to make the system work. *Sharrard, McGee & Co. v. Suz's Software, Inc.*, 428.

WATERS AND WATERCOURSES

§ 3.1 (NCI3d). Recovery for interference with stream or flow; obstruction and detention

The trial court properly allowed plaintiff's motion for a directed verdict as to defendant's counterclaim for negligence in the placement of telephone poles on a creek bank, allegedly causing erosion. *Southern Bell Telephone and Telegraph Co. v. West*, 668.

WORD AND PHRASE INDEX

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