NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 101

18 DECEMBER 1990

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19 FEBRUARY 1991

RALEIGH
1991

CITE THIS VOLUME

101 N.C. App.

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R. A. HEDRICK

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1. Appointed to a new position and sworn in 1 March 1991.
2. Deceased 28 April 1991.

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

RARITAN RIVER STEEL CO. v. CHERRY, BEKAERT & HOLLAND, ET AL.

No. 9026SC170

(Filed 18 December 1990)

Contracts § 120 (NCI4th)— audited financial statements—action against accountants—breach of third party beneficiary contract

Summary judgment was improperly allowed for defendants in an action against an accounting firm for breach of a third party beneficiary contract arising from an audited financial statement because issues of whether IMC as promisee intended to benefit creditors like plaintiff and whether defendant promisor reasonably had such intent are genuinely subject to dispute. Reliance on the actual audited financial statements is not an element of this third party beneficiary claim; however, reasonable reliance may give rise to a right against the promisor, and reliance on the contract is also relevant to the issue of damages.

Am Jur 2d, Accountants § 19.

Liability of public accountant to third parties. 46 ALR3d 979.

Judge DUNCAN dissenting prior to 30 November 1990.

APPEAL by plaintiff from order filed 9 November 1989 by *Judge Chase B. Saunders* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 21 September 1990.

Grier and Grier, P.A., by Joseph W. Grier, III and J. Cameron Furr, Jr., for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings, Mark A. Ash and Michael D. Hill, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals the trial court's order filed 9 November 1989 allowing the defendants' motion for summary judgment.

Raritan River Steel Company (plaintiff) is a company engaged in selling raw steel. Cherry, Bekaert & Holland (defendants) is a North Carolina firm of certified public accountants. Before its bankruptcy, Intercontinental Metals Corporation (IMC) purchased the plaintiff's raw steel. In June, 1981, IMC entered into a contract with the defendants under which the defendants agreed to audit IMC's financial statements for the years ending 30 September 1980 and 30 September 1981. Pursuant to the contract, the defendants were to conduct the audit "in accordance with generally accepted auditing standards" and then were to express an "opinion on the fairness of the presentation of these financial statements in conformity with generally accepted accounting principles applied on a consistent basis."

In January, 1982, defendants issued a qualified opinion concerning IMC's financial statements, stating that IMC's net worth as of 30 September 1981 was $6,964,475.00. Plaintiff never examined the actual audited financial statements. However, the plaintiff reviewed a summary of the audited statements which was published in Dun & Bradstreet reports in April and May of 1982. The summary read in part:

> [P]repared from statement(s) by Accountant: Cherry, Bekaert & Holland, CPA. ACCOUNTANTS OPINION: 'Accountants indicate that the figures of Sep 30 1981 present fairly the financial position of the company in conformity with accepted accounting principles subject to the following qualifications or exceptions: the ultimate outcome of a dispute with a foreign supplier is not presently determinable.'

The summary also showed IMC's net worth to be $6,964,475.00. The plaintiff argues that because the defendants did not conduct its audit according to generally accepted auditing or accounting principles, the defendants overstated IMC's actual net worth by twenty million dollars, the actual net worth being negative 14.6 million dollars. The plaintiff contends that based upon the Dun & Bradstreet summary it decided to sell steel to IMC on open credit terms. By December, 1982, with plaintiff's IMC account at an outstanding balance of $2,247,844.61, IMC went involuntarily into bankruptcy. From IMC's bankruptcy estate, the plaintiff received only $511,143.60.

On 13 February 1985, the plaintiff filed suit against the defendants in the Superior Court of Mecklenburg County for the losses it sustained on account of the defendants' alleged erroneously audited financial statements. Plaintiff sued on two theories, one based upon defendants' negligent preparation of the statements, the other based upon principles governing third party beneficiary contracts. On 9 May 1985, the trial court granted the defendants' motion to dismiss both claims for failure to state a claim upon which relief could be granted. This Court reversed the trial court. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 79 N.C. App. 81, 339 S.E.2d 62 (1986). Our Supreme Court affirmed in part and reversed in part this Court's decision, declining to review this Court's decision with regard to the plaintiff's third party beneficiary claim, yet holding that the plaintiff had not stated a claim upon which relief could be granted with regard to defendants' alleged negligence. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988). Thereafter, the plaintiff pursued its breach of contract claim. On 30 December 1988, the defendants moved for summary judgment which the trial court allowed on 8 November 1989, *nunc pro tunc*, 27 October 1989.

The issue is whether there is a genuine issue of material fact that the contract and surrounding circumstances evidence an intent that the plaintiff was an intended beneficiary of the defendants' contract with IMC.

Summary judgment is proper where there is no genuine issue of any material fact and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c). "[A]n issue is genuine if it can be maintained by substantial evidence. . . . A fact is

material if it would establish any material element of a claim or defense." *Martin v. Ray Lackey Enter.*, 100 N.C. App. 349, 353, 396 S.E.2d 327, 330 (1990) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986). The movant "has the burden of showing at least one of the three grounds justifying summary judgment in his favor: [1] 'an essential element of plaintiff's claim is nonexistent . . . [2] plaintiff cannot produce evidence to support an essential element of his claim, or . . . [3] plaintiff cannot surmount an affirmative defense which would bar the claim.' " *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37 (1990) (citations omitted). *See also Edwards v. Akion*, 52 N.C. App. 688, 690, 279 S.E.2d 894, 896, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981) (movant must clearly establish that no triable issue of fact exists and that movant "is entitled to judgment as a matter of law"). "Once the moving party meets this burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. . . . If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper." *White v. Hunsinger*, 88 N.C. App. 382, 383, 363 S.E.2d 203, 204 (1988) (citation omitted).

The plaintiff's claim is based on the theory that it was the third party intended beneficiary of a contract entered into between IMC (promisee) and the defendants (promisor). *See* Restatement (Second) of Contracts § 2(1)-(3) (1979) (defining "promisee" as the person to whom a manifestation of intention to act in a specified way is addressed, and defining "promisor" as the person manifesting such intention).

In North Carolina " '[t]he rule is well established . . . that a third person may sue to enforce a binding contract or promise made for his [direct] benefit even though he is a stranger both to the contract and to the consideration.' " *American Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 379, 88 S.E.2d 233, 239 (1955) (citation omitted). "If a class of persons is clearly designated as beneficiaries, an individual of that class can maintain suit though not specifically named." 4 Corbin, Corbin on Contracts § 781 (1951). *See also* 4 Corbin § 786 (third party need not be

sole party benefited). However, the precise test for determining whether a contract has been made for a person's direct benefit, and therefore whether that person is a third party beneficiary of the contract, is unclear. *Compare Vogel v. Reed Supply Co.*, 277 N.C. 119, 127-28, 177 S.E.2d 273, 278 (1970) *with Snyder v. Freeman*, 300 N.C. 204, 221, 266 S.E.2d 593, 604 (1980).

In *Vogel*, our Supreme Court expressly adopted the Restatement of Contracts § 133(1)(a) (1932) which determines third party donee beneficiary status by focusing on the intent and purpose of the promisee to the contract. *Vogel*, 277 N.C. at 127-28, 177 S.E.2d at 278. At the same time, *Vogel* also stressed the importance of looking at the intent of both the promisor and the promisee. *Id.* at 128, 177 S.E.2d at 279. In *Snyder*, our Supreme Court adopted the tentative draft of the Restatement (Second) of Contracts § 133 (1973), now cited as Restatement (Second) of Contracts § 302 (1979). *Snyder*, 300 N.C. at 220-21, 266 S.E.2d at 604 (1973 version is identical to the 1979 version). Restatement (Second) of Contracts § 302 provides:

> § 302. Intended and Incidental Beneficiaries
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the *intention of the parties* and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the *promisee* intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Id. (emphases added). Although § 302 of the Restatement (Second) eliminates the earlier "donee" and "creditor" beneficiary categories used in the first Restatement in favor of the comprehensive category of "intended beneficiary," the comments to the Restatement (Second) explain that "[t]he type of beneficiary covered by Subsection (1)(a) is often referred to as a 'creditor beneficiary,' " and the type of beneficiary covered by Subsection (1)(b) is often referred to as a "donee beneficiary." Restatement (Second) of Contracts § 302 comments b-c (1979). *See also Snyder*, 300 N.C. at 221, 266 S.E.2d at 604 (citing comment b).

There is thus a two-part test under the Restatement (Second) for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Here, the plaintiff claims to be a donee or Restatement (Second) of Contracts § 302(1)(b) beneficiary. Consistent with *Vogel, Snyder*, and the Restatement (Second) in determining the existence of a third party donee or § 302(1)(b) beneficiary, the primary focus should be placed upon the promisee's intent because the promisee is the party "who pays for the promise in question." 4 Corbin, *supra*, § 776. This appears to represent the majority view. 2 Hunter, Modern Law of Contracts Par. 23.03[4][a] (1987). According to Professor Corbin,

> the ideas that lie behind such terms as 'purpose,' 'motive,' and 'intention' are obscure and elusive, ... When a contract is made, the two or more contracting parties have separate purposes; each is stimulated by various motives, of some of which he may not be acutely conscious. The contract itself has no purpose, motive, or intent. The two parties have purposes, motives, and intentions; but they never have quite the same ones.
>
> In third party cases, the right of such party does not depend upon the purpose, motive, or intent of the promisor. The motivating cause of his making the promise is usually his desire for the consideration given by the promisee.

4 Corbin, *supra*, § 776. However, while the emphasis is on the intent of the promisee, it is also necessary before third party beneficiary status is established that the promisor must have understood that the promisee intended to benefit the third party. We consider that application of this test of emphasizing the intent of the promisee but requiring that the promisor must have reasonably understood the promisee's intent as a prerequisite to third party donee or § 302(1)(b) beneficiary status fully implements the two-part test of the Restatement (Second) of Contracts.

Having determined whose intent is important in determining third party beneficiary status, it is next necessary to determine what evidence is admissible on the issue of intent. In cases involv-

ing third party beneficiaries, our courts do not follow traditional contract rules to determine intent which mandate that resort to extrinsic evidence may be had only when the contract is ambiguous. *See CF Indust., Inc. v. Transcontinental Gas Pipe Line Corp.*, 448 F. Supp. 475, 479-80 (W.D.N.C. 1978). Rather, questions involving the intention of the parties are generally regarded as questions of contract construction, the parties' intent being determined by the contractual provisions, construed in the light of both the circumstances under which the contract was made and the apparent purpose that the parties were trying to accomplish. *Bolton Corp. v. State of North Carolina*, 95 N.C. App. 596, 600, 383 S.E.2d 671, 673-74 (1989) (citation omitted), *disc. rev. denied*, 326 N.C. 47, 389 S.E.2d 85 (1990); *Lane v. The Aetna Cas. & Sur. Co.*, 48 N.C. App. 634, 638-39, 269 S.E.2d 711, 714-15 (1980), *disc. rev. denied*, 302 N.C. 219, 276 S.E.2d 916 (1981). *See also* Restatement of Contracts § 133(1)(a) (looking to "the accompanying circumstances"); Restatement (Second) of Contracts § 302 Reporter's Note ("court in determining the parties' intention should consider the circumstances surrounding the transaction as well as the actual language of the contract"). "When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement." *Lane*, 48 N.C. App. at 638, 269 S.E.2d at 714. However, we note that "[i]t is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made." Restatement (Second) of Contracts § 308; *see also* Restatement (Second) of Contracts § 302 comment c (contact or communication with beneficiary not essential).

The defendants produced evidence which negates the plaintiff's assertion of intent. Although the defendants were generally aware that a third party might get a copy of the audited financial statements, they never knew for a fact that IMC was going to distribute the statements to anyone, including Dun & Bradstreet. Wolfgang Jansen, IMC's chief executive officer, testified that "it was never the mutually expressed intention between IMC and Cherry, Bekaert & Holland to create any rights in the plaintiff, Raritan River Steel, or any other unsecured third party trade creditor." IMC never informed the plaintiff that defendants' audit was being performed for plaintiff's benefit. The contract between IMC and the defendants expresses no intent to benefit any third party. It also does not refer to any particular third party. The

contractual language in this case which the defendant argues evidences no intention by IMC and defendants to create third party beneficiary rights in the plaintiff reads as follows:

> As you know, management has the primary responsibility for properly recording transactions in the records, for safeguarding assets and for preparing accurate financial statements. *Our basic audit function is to add reliability to those financial statements.* [Emphasis added.]

Furthermore, the plaintiff never received a copy of the contract or copies of the audited financial statements. This fact is consistent with IMC's general policy in 1981 which was "to limit the distribution of IMC's financial statements as much as possible, especially not to distribute them routinely to trade creditors." IMC refused the plaintiff's request to provide a copy of the statements to the plaintiff. In fact, of the 150 to 200 copies of the audited financial statements that the defendants sent to IMC, the plaintiff can only point to one trade creditor claiming to have received a copy of the statements. The defendants' services were directed solely to IMC's benefit, defendants' obligation under the contract being fully performed upon completion of the audit. The defendants argue that the benefit of the added reliability to the financial statements was intended to go to IMC's management, lenders, and shareholders, not to the plaintiff. From the evidence of both the circumstances existing at the time of the contract and the contracting parties' apparent purposes, the defendants contend that no clear intent to benefit the plaintiff can be found within the contractual language or the surrounding circumstances. With this evidence the defendants have met their burden of proving that no genuine issue of fact exists as to whether IMC and the defendants intended that the plaintiff benefit from their contract. However, the plaintiff's forecast of the evidence tends to establish that a genuine issue of material fact does exist in this case.

In asserting that the parties intended the plaintiff to receive the benefit of the contract, the plaintiff produced the following evidence: Chris Rasmussen, the defendants' Audit Manager in charge of the IMC audit, testified that "[i]n my experience, audits are done to supply the needs of some third party individual, either absentee owners or creditors." The defendants' technical manual provides that "financial statements are the means by which the information accumulated and processed in financial accounting is

periodically communicated to those who use it. They are designed to serve the needs of a variety of users, particularly owners and creditors." At all times in issue, the plaintiff was a multimillion dollar creditor of IMC. In an affidavit submitted by John Lewis, a certified public accountant, Mr. Lewis explained the purposes of financial reporting. He stated:

> The Financial Accounting Standards Board ('FASB'), a self-regulatory organization of the public accounting profession and U.S. industry responsible for promulgating accounting standards, has issued its *Statement of Financial Accounting Concepts No. 1, Objectives of Financial Reporting by Business Enterprises, November, 1978 ('SFAC #1')*. . . . SFAC #1 includes the following statements:
>
> 'Many people base economic decisions on their relationships to and knowledge about business enterprises and thus are potentially interested in the information provided by financial reporting. Among the potential users are owners, lenders, suppliers, potential investors and creditors, employees, management, directors, customers, financial analysts and advisors, brokers, underwriters, stock exchanges, lawyers, economists, taxing authorities, regulatory authorities, legislators, financial press and reporting agencies, labor unions, trade associations, business researchers, teachers and students and the public.
>
> The function of financial reporting is to provide information that is useful to those who make economic decisions about business enterprises and about investments in or loans to business enterprises. Independent auditors commonly examine or review financial statements and perhaps other information, and both those who provide and those who use that information often view an independent auditor's opinion as enhancing the reliability or credibility of the information.'

In addition, the defendants never restricted dissemination of the audited financial statements, and in fact, IMC ordered and the defendants sent between 150 and 200 copies to IMC. In an affidavit submitted by Wilburn Robinson, vice-president and controller of IMC through its bankruptcy, Mr. Robinson discussed the process by which Dun & Bradstreet obtained the information from the audited financial statements for its published report. He also stated that "IMC had similarly allowed Dun & Bradstreet, in anticipation of publication of summary information, to review

copies of IMC's financial statements, audited by Cherry, Bekaert and Holland, for years prior to IMC's fiscal year ending September 30, 1981 and in fact Dun & Bradstreet had published summary information from pre-1981 Cherry, Bekaert and Holland audited financial statements." The plaintiff contends that the above conduct reveals that the contracting parties intended third parties to receive the information contained within the audited financial statements. The plaintiff argues that the above evidence concerning both the circumstances as they existed at the time of contracting and the contracting parties' apparent purposes for the contract establishes the reasonable meaning of the contractual language: IMC and the defendants intended for creditors, like the plaintiff, to benefit from the defendants' audit in that the added reliability of the audited financial statements would allow the creditors to determine accurately IMC's credit value, thus allowing them to extend credit to IMC confidently based upon IMC's positive net worth as shown in the audited financial statements.

Because the issues of whether IMC as promisee intended to benefit creditors, like the plaintiff, and whether defendant, promisor, reasonably understood that IMC had such intent are genuinely subject to dispute, summary judgment was improperly allowed, and these genuine issues remain to be decided by the jury. *See Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 351, 363 S.E.2d 215, 218, *disc. rev. denied*, 322 N.C. 111, 367 S.E.2d 910 (1988), *and Smith v. Currie*, 40 N.C. App. 739, 742, 253 S.E.2d 645, 647, *disc. rev. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979) (citation omitted) (issues of intent are "rarely susceptible to direct proof and almost always depends on inferences drawn from circumstantial evidence," therefore summary judgment is generally not appropriate when such an issue is involved, or where the evidence " 'is subject to conflicting interpretations,' " or where reasonable people might disagree on its significance).

Furthermore, contrary to the defendants' argument, reliance on the actual audited financial statements is not an element of this third party beneficiary claim. The elements of a third party beneficiary claim are " '(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit.' " *Raritan*, 79 N.C. App. at 85-86, 339 S.E.2d at 65; *cf. Raritan*, 322 N.C. at 206-07, 367 S.E.2d at 612-13 (reliance is element of tort of negligent misrepresentation).

While a lack of reliance may not defeat a third party beneficiary claim, reasonable reliance, "even though a third person is not an intended beneficiary of a promise, . . . *may* give rise to a right against the promisor." 3 Farnsworth, Farnsworth on Contracts § 10.3 (1990) (emphasis added). *See also* Restatement (Second) of Contracts § 302 comment d (1979). *Cf. Lee v. Paragon Group Contractors, Inc.*, 78 N.C. App. 334, 340, 337 S.E.2d 132, 136 (1985), *disc. rev. denied*, 316 N.C. 195, 345 S.E.2d 383 (1986). Reliance on the contract is also relevant to the issue of damages because "[a]fter a plaintiff has been established as a beneficiary with enforceable rights, the extent of his remedy may be affected by his having acted in reliance thereon." 4 Corbin, *supra*, § 779B.

The trial court's order allowing defendants' motion for summary judgment is reversed and the case is remanded.

Reversed and remanded.

Judge ORR concurs.

Judge DUNCAN dissents.

Judge DUNCAN dissented to this opinion prior to 30 November 1990.

Judge DUNCAN dissenting.

I disagree that there is a genuine issue of material fact here as to whether plaintiff is an intended beneficiary of defendant's contract with IMC. It is undisputed that the contract between defendant and IMC does not express an intent to benefit creditors and does not mention plaintiff. Neither creditors generally nor plaintiff in particular were informed that the audit was being performed. IMC had a stated policy of limiting the distribution of such audits, and specifically refused to supply plaintiff a copy. Nor did defendant send copies of the audit to plaintiff.

In fact, it is undisputed that plaintiff did not even *see* a copy of the audit itself. Two of plaintiff's officers saw only a Dun and Bradstreet synopsis. Further, plaintiff's president, who made the actual decision to continue shipping steel to IMC, saw neither the audit nor the Dun and Bradstreet report. Our Supreme Court has held that a plaintiff must have relied on the audited financial state-

ment itself in order to recover for negligent misrepresentation. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988). It is also undisputed that defendant had no knowledge that IMC intended to release the audit to Dun & Bradstreet.

In view of the undisputed evidence that defendant and IMC attempted to *limit* circulation of the audit on which plaintiff purports to have relied, and plaintiff's own admission that the officer who made the critical decision did not rely on the audit itself or the Dun & Bradstreet report, I would not extend defendant's potential liability on the basis of facts as attenuated as these.

STATE OF NORTH CAROLINA v. ROLAND DAVIS

No. 9026SC250

(Filed 18 December 1990)

1. **Rape and Allied Offenses § 4.1 (NCI3d)— rape and first degree sexual offense—defendant's prior offenses—admissible**

The trial court properly admitted evidence of defendant's prior sex offenses in a prosecution for first degree rape and first degree sexual offense to show plan, scheme, system, or design where the prior offenses were sufficiently similar to the crimes charged and were not too remote in time. Although over ten and one-half years elapsed between the offenses, the period of time exclusive of prison time was only 132 days. N.C.G.S. § 8C-1, Rule 404(b), N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Rape § 71.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

2. **Appeal and Error § 504 (NCI4th); Attorneys at Law § 31 (NCI4th)— rape and first degree sexual offense—defense witness called over defense counsel's objections—invited error—no prejudice**

There was no prejudicial error in a prosecution for rape and first degree sexual offense where defendant was allowed

to call a witness over his counsel's objections and the court failed to inform defendant of the gravity of his decision. Strategic trial decisions in North Carolina are ultimately decisions for the attorney; assuming without deciding that the trial court erred, there was no prejudice because a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. N.C.G.S. § 15A-1443(c).

Am Jur 2d, Appeal and Error § 717.

3. Rape and Allied Offenses § 5 (NCI3d)— first degree rape and first degree sexual offense—serious injury—evidence sufficient

The trial court did not err by accepting guilty verdicts in a first degree rape and first degree sexual offense prosecution where the court submitted to the jury as possible bases for the first degree convictions use of a deadly weapon and serious physical or mental injury to the victim and the verdict does not reflect the theory upon which defendant's convictions were based. Although defendant contended that there was insufficient evidence to support a conviction based upon serious injury, the victim testified to multiple sufferings indicative of residual injury to her mind and body.

Am Jur 2d, Rape §§ 63, 90.

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.

4. Rape and Allied Offenses § 7 (NCI3d)— first degree rape and first degree sexual offense—mandatory life sentence not cruel and unusual

Mandatory life sentences for first degree rape and first degree sexual offense do not constitute cruel and unusual punishment.

Am Jur 2d, Rape § 115.

Comment note: Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

APPEAL by defendant from judgments signed 11 August 1989 by *Judge Marvin K. Gray* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 24 October 1990.

Lacy H. Thornburg, Attorney General, by Harold M. White, Jr., Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

GREENE, Judge.

The defendant appeals from judgments signed 11 August 1989, which judgments were based upon a jury verdict convicting the defendant of one violation of N.C.G.S. § 14-27.2 (1986), first degree rape, and one violation of N.C.G.S. § 14-27.4 (1986), first degree sexual offense. The defendant was sentenced to two consecutive life sentences.

The State's evidence at trial tended to show the following: In mid-December, 1988, the victim visited some friends at their home in Charlotte, North Carolina. She stayed with them for three or four days. On one of these days, she met the defendant. On the evening of 17 December 1988, the defendant visited the victim and her friends on three separate occasions. First, he stopped by their home after he had finished working for the day. He returned a few hours later with his girlfriend. They sat around the house talking and drinking beer and wine for about an hour. The victim did not drink anything during this visit. Later, around 11:00 p.m., the defendant returned alone. He asked the victim if she would care to smoke some marijuana with him. She refused to do so in her friends' home, but she accepted the defendant's invitation to join him, his girlfriend, and his other friends at his house to smoke some marijuana.

When the defendant and the victim arrived at the defendant's house, he introduced the victim to his mother and sister. They then went down into the defendant's basement apartment where his friends were drinking beer and smoking pot and cocaine. The victim sat down on the couch and waited for the defendant and one of his friends to find some marijuana for her to smoke. They returned and the victim smoked some marijuana with them.

Later, the defendant's friends began to leave. After some time, only the defendant, his girlfriend, and the victim remained. The

defendant's girlfriend decided to go to the store for more beer. When she returned, she had an argument with the defendant outside his apartment. After a few minutes, his girlfriend came back into the apartment, got her coat, and left. The victim also decided to leave, so she followed the defendant's girlfriend out the door. The defendant went after the victim to stop her from leaving. He caught her after she had walked across the defendant's yard for some distance. The defendant told the victim that she owed him money and that "you either give me my money back or you can give me my money's worth." The victim reminded the defendant that she had previously told him that she had no money, but that if he really wanted money, she could get some at her friends' home. The victim tried to leave, but the defendant grabbed her again. He choked her until she blacked out, thus falling to the ground. She blacked out only for a few seconds. The defendant picked the victim up off of the ground and carried her back to his apartment.

Once inside his basement apartment, he placed the victim on the couch. She began to scream, but stopped when the defendant pulled out a gun. He then told her to be quiet and he would not hurt her. He locked the door. The victim begged the defendant to allow her to leave, but the defendant refused. One of the defendant's friends, Ricky Parker, returned to the apartment and knocked on the door. When the defendant answered the door, the victim asked Mr. Parker for help. He refused. After Mr. Parker left, the defendant pointed the gun at the victim, told her to be quiet, and demanded that she remove her clothing. The victim complied with the defendant's demands. The defendant then raped and sodomized the victim, first by vaginal intercourse, then by anal intercourse, and once again by vaginal intercourse. Afterwards, Mr. Parker returned to the apartment. The defendant told him that he was going to walk the victim back to her friends' home. The victim asked Mr. Parker to join them, and he agreed to go along. The three of them left the apartment, stopped at a liquor store to see if the defendant could find his girlfriend, and then proceeded to the victim's friends' home. While in route, the defendant said to Mr. Parker, "Man, I believe I done [sic] fucked up this time."

The State introduced into evidence, over strenuous objection, the testimony of three witnesses concerning two incidents of forcible sexual assault by the defendant against two females at the

defendant's basement apartment on 27 May 1978. The testimony showed that the defendant, at age 14, was standing outside his apartment at approximately 8:00 p.m. when Patricia Harris, a fifteen-year-old girl and acquaintance of the defendant, walked past him on her way home from a friend's house. The defendant tried to talk to Ms. Harris, and when she refused to talk with him, he grabbed her by the arm and pulled her towards the basement. Ms. Harris struggled with the defendant, but he continued to pull and drag her towards the basement. When they arrived at the basement, the defendant's aunt called out to him. He loosened his grip, and Ms. Harris escaped. Later in the evening, the defendant, while playing in the street, began talking to an eleven-year-old girl, also an acquaintance of the defendant. The defendant grabbed her hand and told her to talk with him or he would hit her. He then made her walk with him down a bike trail, twisting her arm all the while. He then forced her to go with him to the basement. Upon their arrival, the defendant told her to take her clothes off. Once she did, the defendant raped her. As he raped her, two other males entered the basement. They held her down, and the defendant continued to rape her. Before the defendant had finished, a police officer arrived at the apartment and rescued the young girl from the assault. The officer took the defendant to a juvenile detention facility where he admitted his deeds to an investigator with the Charlotte Police Department. Though the defendant was never convicted of raping the eleven-year-old girl, he was imprisoned from 19 June 1978 until 7 August 1988 for conduct associated with these assaults. Ms. Harris, the police officer, and the investigator testified to the above at trial. The State successfully argued that this testimony was admissible under Rule 404(b) of the Rules of Evidence. The State argued at trial that the defendant's conduct in 1978 combined with his conduct in question showed the defendant's intent, plan, and scheme to force female acquaintances into his basement and rape them.

At trial, over the defense counsel's objections, the trial court allowed the defendant to call a witness, Ricky Parker, to testify on his behalf. The trial court did not reach its decision lightly. To allow the defendant the opportunity to make an informed decision, the trial court held a *voir dire* hearing of Mr. Parker out of the jury's presence during which the defendant's counsel examined Mr. Parker. Before the hearing, the defendant had been informed of his right to the last argument should he not put on any

evidence. After the hearing, the trial court informed the defendant of the other consequences of calling Mr. Parker to testify before the jury, including the possibility that the jury would not believe his witness, his witness would be subject to cross-examination, and that on cross-examination the State could inquire as to his witness's criminal convictions, if he had any. The trial court asked the defendant if his decision to call Mr. Parker had been made of his own free will, without coercion, and voluntarily to which question the defendant responded, "Yes, sir." The trial court suggested that the defendant follow his counsel's advice and not call Mr. Parker, but the defendant refused saying,

> Like all the times I been to trial, like all the time, you know, since I been grown and tried. I done took all the advice, you know, she been telling me a lot of things and she say no and I say yes but, you know, I always agree with her. She ain't never agreed with me, she should go with me, you know, at least one time.

The trial court, having concluded its inquiry, allowed the defendant to call Mr. Parker and instructed the defendant's counsel to examine Mr. Parker, which she did. The defendant offered no further evidence.

The issues are: (I) whether the trial court properly admitted evidence concerning the defendant's prior sex offenses for the purpose of showing the defendant's plan, scheme, system, or design; (II) whether the trial court committed prejudicial error by allowing the defendant to call a witness on his behalf over defense counsel's objection; (III) whether the State presented sufficient evidence of the victim's serious personal injury to sustain a conviction of first degree rape and sexual offense on that basis; and (IV) whether mandatory life sentences for first degree rape and first degree sexual offense convictions constitute cruel and unusual punishment.

I

[1] Though N.C.G.S. § 8C-1, Rule 404(b) has long been considered to be a "general rule of exclusion" subject to many exceptions, recent appellate cases have unequivocally stated that Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original); *State v. Faircloth*, 99 N.C. App. 685, 689, 394 S.E.2d 198, 200-01 (1990).

Under Rule 404(b), " 'evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused.' " *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54 (emphases in original) (citations omitted). Thus, such relevant evidence is admissible unless "its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.* at 279, 389 S.E.2d at 54 (emphasis in original).

North Carolina courts liberally admit evidence of similar sex offenses. *Id.* at 279, 389 S.E.2d at 54-55. As our Court has explained,

> evidence of prior sex acts may have some relevance to the question of a defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity . . . . Such evidence is not offensive to the general prohibition against character evidence because it is admitted not to prove defendant acted in conformity with conduct on another occasion but rather as circumstantial proof of defendant's state of mind.

State v. Jones, 322 N.C. 585, 588, 369 S.E.2d 822, 823 (1988) (citations omitted). Here, the trial court concluded that evidence of the defendant's prior sex offenses was admissible for deciding only two issues: First, whether the defendant had the intent to commit the crimes charged, which according to the trial court was a necessary element of the crimes charged; and second, whether there existed in the defendant's mind a plan, scheme, system, or design to commit the crimes charged. We do not address the issue of whether the evidence was admissible to show the defendant's intent because we conclude that the evidence was admissible for the proper purpose of showing plan, scheme, system, or design. *See State v. Boone*, 307 N.C. 198, 209, 297 S.E.2d 585, 592 (1982) (intent not essential element of first degree rape or sex offense); *cf. State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250, *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987) (where defendant was tried for first degree attempted rape, defendant's prior conviction for assault with intent to rape admissible to show intent in present case).

When evidence of the defendant's prior sex offenses is offered for the proper purpose of showing plan, scheme, system, or design, "the ultimate test for determining whether such evidence is admissible [under Rule 404(b)] is whether the incidents are sufficiently similar and not so remote in time as to be more probative than

prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385, *disc. rev. denied*, 325 N.C. 435, 384 S.E.2d 545 (1989). Thus, the "ultimate test" for admissibility has two parts: First, whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time. *Jones*, 322 N.C. at 590, 369 S.E.2d at 825 (remoteness of time goes to admissibility, not merely to weight and credibility). Though the defendant argues to the contrary, we first conclude that the defendant's prior sex offenses are sufficiently similar to the crimes charged to be admitted for the purpose of showing the defendant's plan, scheme, system, or design of forcing unconsenting female acquaintances into his basement for the purpose of gratifying his sexual desires. *See Boyd*, 321 N.C. at 578, 364 S.E.2d at 120 (evidence of defendant's prior sexual offenses committed upon a young female relative admissible as showing a scheme, where in both cases the defendant sexually assaulted "young female relatives left in his custody while his wife was working"); *State v. Everett*, 98 N.C. App. 23, 29, 390 S.E.2d 160, 163, *disc. rev. denied*, 326 N.C. 599, 393 S.E.2d 884 (1990) (testimony by defendant's daughter concerning defendant's prior sex offenses upon her admissible to show plan or scheme to sexually abuse his daughter and stepdaughter while wife at work, where evidence showed defendant raped each after putting them to bed, covering their faces with a cloth, and wiping each clean after intercourse); *State v. Roberson*, 93 N.C. App. 83, 376 S.E.2d 486 (1989) (testimony by two witnesses that defendant had touched them in the same manner as the defendant was alleged to have touched the victim under consideration held admissible to show plan or scheme).

In both 1978 and 1988, the defendant would first attempt to talk to his intended victim, a female with whom the defendant was acquainted. After refusing the defendant's advances, the victim would attempt to leave, and the defendant would not allow it. In 1978, the defendant grabbed and twisted his victim's arm, pulling his victim forcefully towards his basement. In the present case, the defendant used physical force to get his victim down into his basement after she had tried to leave his presence. In 1978, Ms. Harris was able to escape the defendant's grasp as they arrived at the basement. The eleven-year-old girl in 1978 and the victim in this case were not able to escape. Once they arrived in the basement, the defendant told them to disrobe. In 1978, the defend-

ant's two friends assisted him in raping his victim. In 1988, the defendant used a gun thereby committing the acts by himself. Thus, in both cases, the defendant used some means of force beyond his own strength to accomplish the sex crimes. In 1978 and 1988, the defendant vaginally raped his victim. The only difference between the 1978 and 1988 offenses is that in 1978 the defendant only had vaginal intercourse with his victim, whereas in 1988 he had both vaginal and anal intercourse. This difference, when compared to the numerous similarities, does not justify exclusion of the evidence under the above test. *See State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983) (where defendant's identity was in issue, evidence that defendant committed sex crime against another person subsequent to crime for which he was being tried erroneously admitted because differences in the crimes outweighed similarities).

Not only are the offenses sufficiently similar, but they are not too remote in time and are thus admissible under Rules 403 and 404(b). Over ten and one-half years elapsed between the defendant's prior sex offenses and the ones for which he has been tried. However, the defendant spent the majority of that time in prison on charges connected with the 1978 sex offenses. Thus, the period of time between the offenses, exclusive of the prison time, was only 132 days. *Hall*, 85 N.C. App. at 451, 355 S.E.2d at 253 (where defendant was indicted for first degree attempted rape, defendant's nine-year-old conviction for assault with intent to rape admissible to prove intent, the conviction being not too remote under Rules 403 and 404(b) because "defendant had been released from prison for that offense only two days before the charged offense occurred, a fact which enhances its probative value"); *see also State v. Scott*, 318 N.C. 237, 244, 347 S.E.2d 414, 418 (1986) (where evidence of defendant's prior sex offense with sister occurring nine years before trial held to be too remote in time to be probative, Court noted that incarceration may effectively explain remoteness in time); *cf. State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) (remoteness in time more significant when evidence of prior sex offense offered to show plan or scheme as opposed to *modus operandi*, as it is "unlikely, though not inconceivable, that crimes committed several years apart were planned at the same time"). Because only 132 days, exclusive of prison time, separates the prior offenses from the present ones, we conclude that "the passage of time between the commission of the" offenses has not eroded the commonality between them, such that proof of the earlier offenses may

reasonably be regarded as proving the later ones. *Jones*, 322 N.C. at 588-90, 369 S.E.2d at 824 (plan or scheme purpose under Rule 404(b) "rests on the proposition that there may be some logical connection between two acts from which it can be said that proof of the one tends to establish the other"); *State v. Summers*, 92 N.C. App. 453, 460, 374 S.E.2d 631, 635 (1988), *disc. rev. denied*, 324 N.C. 341, 378 S.E.2d 806 (1989) (evidence of prior incidents occurring "within twelve months prior to the incident for which defendant was charged" held admissible to show plan or scheme as the earlier incidents were not too remote in time). Therefore, because the defendant's prior sex offenses are sufficiently similar to those in this case, and because they are not too remote in time, we conclude that the trial court did not abuse its discretion in admitting the evidence under Rules 403 and 404(b).

The defendant argues that if the rules of evidence are construed to allow into evidence testimony concerning the defendant's prior sex offenses, then the defendant's constitutional rights to a fundamentally fair trial will have been denied. This argument recently has been rejected by our Supreme Court. *State v. Shamsid-Deen*, 324 N.C. 437, 447-48, 379 S.E.2d 842, 849 (1989) (argument essentially restatement of rationale for "general rule excluding evidence of defendant's prior acts of misconduct").

II

[2] The defendant next argues that by allowing the defendant to call a witness over defense counsel's objections, and then by failing to inform the defendant of the gravity of his decision, the trial court committed prejudicial error requiring a new trial.

In North Carolina, strategic trial "decisions regarding witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately" decisions for the attorney. *State v. Luker*, 65 N.C. App. 644, 649, 310 S.E.2d 63, 66 (1983), *rev'd on other grounds*, 311 N.C. 301, 316 S.E.2d 309 (1984). *See also* ABA Standards for Criminal Justice, The Defense Function, § 4-5.2 (1986 Supp.); *Wainright v. Sykes*, 433 U.S. 72, 91, 53 L.Ed.2d 594, 611 (1977) (Burger, C.J., concurring). However, the trial court, over defense counsel's continued objections and after extensive questioning of the defendant, allowed the defendant to disregard his attorney's advice and call a witness. The defendant did not discharge his attorney because of their disagreement, N.C.G.S. § 15A-1242 (1988) (providing mandatory re-

quirements to be followed before defendant will be permitted to represent himself or herself at trial), and the defendant did not conduct the examination of his witness, rather, his counsel did. Assuming that the trial court erred in allowing the defendant to call a witness against the advice of his counsel, an issue we do not decide, the defendant could not have been prejudiced by any such error because "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (1988); *State v. Rivers*, 324 N.C. 573, 380 S.E.2d 359 (1989) (defendant could not complain of allegedly inadmissible testimony elicited by defense counsel on cross-examination of witness); *State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989), *vacated on other grounds*, --- U.S. ---, 108 L.Ed.2d 603 (1990) (where statement was elicited by defense counsel on cross-examination and admitted without objection, "[a]ny error thus was invited and defendant cannot complain of such error on appeal").

III

[3] The defendant argues that the trial court erred in accepting the jury's verdict because of the likelihood that the defendant was convicted of first degree rape and sexual offense on the grounds that the victim suffered serious injury, which in fact she did not. Rape and sexual offense are committed in the first degree when the defendant engages in vaginal intercourse and a sexual act "[w]ith a victim who is a child under the age of 13 years . . ." or "[w]ith another person by force and against the will of the other person, and" either "[e]mploys or displays a dangerous or deadly weapon . . ." or "[i]nflicts serious personal injury upon the victim . . ." or "[t]he person commits the offense aided and abetted by one or more other persons." N.C.G.S. §§ 14.27.2 and 14.27.4. Here, the trial court submitted to the jury two possible bases for first degree convictions, i.e., use of a deadly weapon and "serious physical or mental injury" to the victim. The defendant argues that because the verdict sheet does not reflect the theory on which the defendant's convictions are based, and because there was insufficient evidence to support convictions of the crimes on the basis of the victim having suffered serious injury, a new trial is required. Because the defendant does not argue lack of unanimity in the jury verdict we do not address that issue. *See State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) (disjunctively phrased jury instruction on indecent liberties did not deprive defendant of unanimous verdict). We only address the issue of whether there is sufficient

evidence of serious personal injury to support convictions of first degree rape and sexual offense.

"[P]roof of the element of infliction of 'serious personal injury' as required by G.S. 14-27.2(2)b. and G.S. 14-27.4(2)b. may be met by the showing of mental injury as well as bodily injury." *Boone*, 307 N.C. at 204, 297 S.E.2d at 589. Though there is no " 'bright line' rule as to when the acts of an accused cause mental upset which could support a finding of 'serious personal injury,' " it is clear that

> to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. Obviously, the question of whether there was such mental injury as to result in 'serious personal injury' must be decided upon the facts of each case.

Id. at 205, 297 S.E.2d at 589-90 (evidence of victim's shaking, crying, and hysteria immediately after crime and on morning of crime not indicative of residual injury to mind or nervous system therefore not evidence of serious personal injury).

Sufficient evidence exists to support the jury's verdict on the basis that the victim suffered serious personal injury in the form of both bodily and mental injury. The victim testified that in addition to the physical pain she experienced during and immediately after the rape and sodomy, she has continued to experience appetite loss, severe headaches, nightmares, sleep difficulty, difficulty in urination, and difficulty in bowel movements. These sufferings lasted from the evening of the rape and sodomy until the time of the trial. Because the victim's sufferings are indicative of residual injury to her mind and body, we conclude that the evidence could support the jury's verdict that the victim suffered serious personal injury resulting from the rape and sodomy.

IV

[4] The defendant finally argues that the mandatory life sentences imposed for his first degree rape conviction and for his first degree sexual offense conviction constitute cruel and unusual punishment as a matter of law and as applied to him. Our Supreme Court has rejected such an argument on many occasions. *State v. Spaugh*,

321 N.C. 550, 556, 364 S.E.2d 368, 373 (1988) ("imposition of sentences of life imprisonment for such offenses [first degree rape and first degree sexual offense] does not violate the prohibition against cruel and unusual punishments"); *State v. Holley*, 326 N.C. 259, 388 S.E.2d 110 (1990) (first degree sexual offense); *State v. Peek*, 313 N.C. 266, 275-76, 328 S.E.2d 249, 255-56 (1985) (discussing proportionality of consecutive life sentences in first degree rape cases).

No error.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

BARNEY A. KENNEDY, EMPLOYEE-PLAINTIFF v. DUKE UNIVERSITY MEDICAL CENTER, SELF-INSURED, EMPLOYER-DEFENDANT

No. 9010IC64

(Filed 18 December 1990)

1. **Master and Servant § 94 (NCI3d)— workers' compensation— incapacity to earn wages—evidence sufficient**

There was ample competent evidence upon which the Industrial Commission could properly rely in support of its findings that plaintiff did not have the capacity to earn wages from the date of the accident through the date of the hearing before the Deputy Commissioner.

Am Jur 2d, Workmen's Compensation §§ 339, 517.

2. **Master and Servant § 93.1 (NCI3d)— workers' compensation— continuing disability—burden of proof**

The Industrial Commission in a workers' compensation claim was referring to defendant employer's burden of rebutting plaintiff employee's initial showing of a continuing disability when it stated that defendant bore the burden of showing that plaintiff was capable of other employment. While it is the general rule that plaintiff has the initial burden of proving an impaired wage earning capacity, the Commission did not

act under a misapprehension of law in relying upon *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, to place the burden of proving wage earning capacity upon defendant under these facts.

Am Jur 2d, Workmen's Compensation §§ 339, 517.

3. Master and Servant § 94 (NCI3d)— workers' compensation—necessary findings of fact omitted—findings sufficiently definite

The Industrial Commission's findings of fact in a workers' compensation claim were sufficiently definite to determine the rights of the parties even though the Commission failed to make necessary findings regarding both the extent and the permanency of the plaintiff's disability. The Commission's opinion and award, taken as a whole, implies that plaintiff's disability is a temporary total one.

Am Jur 2d, Workmen's Compensation §§ 550, 554.

4. Master and Servant § 94.1 (NCI3d)— workers' compensation—temporary total disability—findings sufficient

The Industrial Commission's findings in a workers' compensation claim were sufficient to support the conclusion that plaintiff was entitled to temporary total disability benefits commencing with the accident and continuing through the date of the hearing to such time as his disability ends. Although defendant claimed that the findings of the Commission failed to include findings regarding the extent of the plaintiff's condition and that there was no finding of fact to support the conclusion that plaintiff was entitled to disability benefits beyond the date of the hearing, the correct interpretation of the findings brings them into harmony with the Commission's conclusion that plaintiff was entitled to temporary total disability benefits from the date of the accident until the date of the hearing. It would have been impossible for the Commission to make a finding regarding the termination date of temporary total disability benefits.

Am Jur 2d, Workmen's Compensation §§ 550, 554.

APPEAL by defendant from the North Carolina Industrial Commission. Order entered 27 July 1989. Heard in the Court of Appeals 29 August 1990.

On 5 July 1986, the plaintiff sustained a lumbosacral ("low back") strain while pushing and pulling a specialized patient bed weighing approximately 1600 pounds. Following the accident, the plaintiff experienced pain in his lower back and, with the exception of a few days immediately following his injury, has not worked since the date of the accident. The defendant voluntarily paid the plaintiff benefits for temporary total disability until 3 August 1987. On that date, defendant ceased paying the plaintiff benefits because the plaintiff had received a permanent partial disability rating of 10 percent to his back on 1 July 1987.

Plaintiff then filed a claim with the North Carolina Industrial Commission seeking payment of benefits for alleged continuing total disability under the North Carolina Workers' Compensation Act. A hearing was held before Deputy Commissioner Richard B. Harper in Durham on 17 November 1987. The Deputy Commissioner's opinion and award, issued on 17 August 1988, is quoted at length:

FINDINGS OF FACT

1. The plaintiff is a 33-year-old male. He is six feet, three inches tall and weighs approximately 218 pounds. He was employed from 1978 through 1986 as a patient service aide with the defendant employer. Plaintiff completed his employment with the defendant employer, the plaintiff had worked at a tobacco warehouse, at an automobile tire sales store, as a cloth helper and as brick layer's assistant.

2. Plaintiff's job duties with the defendant included transporting patients, moving equipment, folding linens, delivering specimens, samples and charts and answering telephones.

3. On July 5, 1986 the plaintiff sustained the stipulated injury by accident while pushing and pulling a specialized patient bed weighing approximately 1600 pounds. Following the accident he experienced pain in his lower back. With the exception of a few days immediately following his injury, the plaintiff has not worked since the accident.

4. As a consequence of the stipulated accident, the plaintiff sustained a lumbosacral strain. He has no injury to the nerves, discs or bony structures of the spine.

5. The plaintiff reached maximum medical improvement on July 1, 1987.

6. As a result of the stipulated injury by accident on July 5, 1986, the plaintiff was incapable of earning any wages with the defendant employer or any other employer from the date of the accident to July 1, 1987.

7. As a result of the injury on July 5, 1986, the plaintiff has a 10 percent partial impairment of the spine.

8. Since July 1, 1987 the plaintiff has been capable of earning wages with the defendant employer or another employer.

9. The plaintiff offered no evidence tending to show that the plaintiff was capable only of earning wages less than he earned prior to the stipulated injury by accident.

CONCLUSIONS OF LAW

1. Plaintiff has failed to establish by a preponderance of the credible evidence that since July 1, 1987 he has been totally disabled, either permanently or temporarily. G.S. § 97-29.

2. In declining to offer proof of permanent partial disability and its degree beyond the 10 percent rating of the back . . . plaintiff manifested his election to receive compensation under G.S. § 97-31(23) rather than G.S. 97-30. *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987).

3. As a result of his injury by accident on July 5, 1986, the plaintiff has a 10 percent permanent partial disability of the spine for which he is entitled to compensation at the stipulated rate for 30 weeks. G.S. § 97-31(23).

4. The Industrial Commission is the sole judge of the credibility of witnesses and the weight to be afforded their testimony. *Henry v. A.D. Lawrence Leather Co.*, 231 N.C. 477, 57 S.E.2d 760 (1950); *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E.2d 827 (1971).

AWARD

1. Defendant shall pay to the plaintiff compensation for 10 percent permanent partial disability of his back. Said compensation has accrued and shall be paid in a lump sum subject to the attorney's fee hereinafter approved.

2. An attorney's fee in the amount of 25 percent is approved for plaintiff's counsel. Said amount shall be deducted from

the benefits due the plaintiff and paid directly to [plaintiff's counsel].

3. . . . .

Pursuant to N.C. Gen. Stat. § 97-85 (1985), plaintiff appealed to the full Commission for a review of the Deputy Commissioner's award. The full Commission issued an opinion and award on 27 July 1989 which modified the Deputy Commissioner's opinion and award as follows:

FINDINGS OF FACT

Paragraphs 5, 7, 8 and 9 are STRICKEN.

Paragraphs [sic] 6 is modified to read as follows:

"6. As a result of the stipulated injury by accident on July 5, 1986, the plaintiff was incapable of earning any wages with the defendant employer or any other employer form [sic] the date of the accident through the date of the hearing in this cause on November 17, 1987."

CONCLUSIONS OF LAW

Paragraphs 1, 2 and 3 are STRICKEN

There is substituted therefore:

"1. Plaintiff is entitled to temporary total disability benefits for a period commencing with the accident of July 5, 1986, continuing through the date of the hearing on November 17, 1987 and to such time as his disability ends, and for such medical treatment and supplies as may reasonably be required to effect a cure of or give relief from the medical condition resulting from the accident of July 5, 1986."

AWARD

Paragraphs 1 and 2 are STRICKEN and replaced with the following:

"1. Defendant shall pay the plaintiff accrued temporary total disability benefits for the period August 3, 1987 until the end of his temporary total disability, or the present, at the rate of $151.21 per week, in one lump sum, subject to the attorney's fee hereinafter approved. Notwithstanding any controversy between the parties as to the termination date of plaintiff's tem-

porary total disability, said sum shall include such benefits accrued to and including November 17, 1987, which shall be paid forthwith.

2. . . . .

3. . . . .

The defendant now appeals the opinion and award of the full Commission.

Taft, Taft & Haigler, by Robin E. Hudson, for employee-plaintiff.

Office of the University Counsel, Duke University, by Andrea K. Sigman, for employer-defendant.

DUNCAN, Judge.

Defendant's appeal asserts three assignments of error, which are essentially as follows: First, the defendant contends that there is no competent evidence in the record to support the full Commission's Finding of Fact number 6, which states that the plaintiff was incapable of earning any wages from the date of the accident through the date of the hearing before the Deputy Commissioner. Second, the defendant argues that the full Commission erred in failing to make findings regarding both the extent and the permanency of the plaintiff's disability. Third, the defendant asserts that the Commission's findings of fact did not support the conclusion that the plaintiff was entitled to temporary total disability benefits from the date of the accident through the date of the hearing before the Deputy Commissioner. We find no merit in any of these contentions and, therefore, affirm the opinion and award of the Industrial Commission.

I

[1] In order to obtain compensation under the Workers' Compensation Act, the claimant must prove the existence of a disability as well as its extent. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). "Disability" is defined by N.C. Gen. Stat. § 97-2(9) (1985) as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." "To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff

was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378-9 (1986).

The defendant does not contend that the Commission failed to make the findings necessary to a determination of disability. Rather, the defendant contends that there was no competent evidence upon which the Commission could properly rely in finding that the plaintiff did not have the capacity to earn any wages. We disagree.

We note at the outset that under the Workers' Compensation Act, the Industrial Commission is vested with exclusive authority to find facts. *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965); *Moore v. Adams Elec. Co.*, 259 N.C. 735, 131 S.E.2d 356 (1963). On appeal, therefore, the Court of Appeals is bound by the Commission's findings of fact when they are supported by direct evidence or by reasonable inferences drawn from the record. *Gosney v. Golden Belt Mfg.*, 89 N.C. App. 670, 671, 366 S.E.2d 873, 874, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 276 (1988). In the instant case, our review of the transcript indicates that there was ample competent evidence upon which the Commission could properly rely in support of its finding.

Dr. Lawrence Frank, who saw the plaintiff at the request of the Duke University Workers' Compensation Office, testified that the plaintiff was suffering from a "lumbosacral strain that had become chronic." He assigned the plaintiff a 10 percent permanent partial disability rating. He acknowledged, however, that he had not taken any vocational factors into account. Dr. John W. Cromer, Jr., who was employed by the defendant as the Assistant Director of the Employee Occupational Health Center, testified that as of six days prior to the hearing before the Deputy Commissioner, the plaintiff was still not able to return to work because his injury continued to produce a great deal of pain and limitation of movement. Mr. Mike Massey, a Vocational Rehabilitation counselor who assessed the plaintiff's vocational skills and potential, testified that it was not reasonable to expect that a job could presently be found for the plaintiff, given his physical limitations coupled with his vocational abilities. Ms. Joan Dunston, the Patient Service Supervisor at Duke, testified that she "did not want him (the plaintiff) there (at work)" because her expectations of his working capacity could not have been fulfilled. Finally, the plaintiff himself testified

that he had not been able to decrease his level of pain to a point at which he could comfortably perform his everyday activities, such as household chores, yard work, cooking, and even bowel movements.

Our Supreme Court has approved the use of expert medical testimony on the issue of a claimant's ability to earn wages. *See Fleming v. K-Mart Corp.*, 312 N.C. 538, 544, 324 S.E.2d 214, 217 (1985). Similarly, this court has approved the use of testimony by vocational rehabilitation specialists on the issue of wage earning capacity. *See Niple v. Seawell Realty and Indus. Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988). Testimony by the plaintiff him/herself has also been found to be competent on the issue of wage earning capacity. *See Singleton v. D.T. Vance Mica Co.*, 235 N.C. 315, 325, 69 S.E.2d 707, 714 (1952); *Niple*, 88 N.C. App. at 139, 362 S.E.2d at 574. In sum, we find the testimony of these individuals to be amply competent to support the Commission's finding that the plaintiff had no capacity to earn wages in either the same or any other employment up to the date of the hearing before the Deputy Commissioner.

[2] The defendant further claims that the Commission erroneously placed the burden of proving wage earning capacity upon the defendant. The full Commission opened its opinion with the following statement: "Plaintiff sought benefits for alleged continuing total disability, and the defendant, having tacitly conceded that he [the plaintiff] remained incapable of returning to his former employment as a patient service aide, had the burden of showing that the plaintiff was capable of other employment. That it failed to do." The defendant contends, in the first instance, that it did not "tacitly concede" anything. Second, the defendant contends that the Commission acted under a misapprehension of law when it relied upon the holding of *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 368 S.E.2d 388, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988), to support its statement that "the defendant . . . had the burden of showing that the plaintiff was capable of other employment." We do not agree.

First, the above-quoted testimony of Ms. Joan Dunston, the plaintiff's supervisor, tends to support the Commission's reference to the "tacit concession" that the plaintiff was unable to return to his former employment. For a similar finding, see *Watson v.*

Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988) (holding that evidence of an employer's refusal to allow an employee to return to work because there was no "light" work available supports a finding that the employee was incapable of earning any wages in the same employment).

Second, while it is the general rule that the plaintiff has the initial burden of proving an impaired wage earning capacity, *Watson*, 92 N.C. App. at 475, 374 S.E.2d at 485, we do not believe that the full Commission acted under a misapprehension of law in relying upon *Bridges* to place the burden of proving wage earning capacity upon the defendant under these facts. In *Bridges*, the plaintiff challenged the sufficiency of the evidence to support the Industrial Commission's finding that he " 'was employable outside [his former employment]' and 'could have earned the same wages he was earning prior to [the date of his accident].' " *Bridges*, 90 N.C. App. at 398, 368 S.E.2d at 389. Although the plaintiff was capable of doing light work, he claimed that he was nonetheless disabled because, after several attempts, he could not procure employment. The defendant claimed, on the other hand, that the plaintiff was capable of earning wages in employment outside his former industry. The plaintiff's evidence tended to show that he was (1) 61 years old; (2) educated only to the fifth grade; (3) skilled only in work which was physically unsuitable; (4) afflicted with a breathing condition which was easily aggravated; and (5) unable to procure a job even though he had attempted to do so. *Id.* at 400, 368 S.E.2d at 390. The defendant countered this evidence with a survey prepared by the Employment Security Commission which merely listed the available jobs in the area. *Id.* However, no evidence was presented that the plaintiff was capable of obtaining any of the jobs listed in the survey. The *Bridges* court concluded that the evidence was insufficient to support the Commission's finding that the plaintiff was capable of other employment. The court stated:

> [B]efore it can be determined that [the] plaintiff is employable and can earn wages it must be established, not merely that jobs are available or that the average job seeker can get one, but that [the plaintiff] can obtain a job taking into account his specific limitations.

Id. at 400-01, 368 S.E.2d at 391.

Bridges did not change the long-standing rule that the claimant has the initial burden of proving that his/her wage earning capacity

has been impaired by injury. Rather, *Bridges* stands for the proposition that once the claimant meets this initial burden, the defendant who claims that the plaintiff *is* capable of earning wages must come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.

Thus, we believe that the Commission was referring to the defendant's burden of rebutting the plaintiff's initial showing of a continuing disability when it stated that the defendant bore the burden of showing that the plaintiff was capable of other employment. It is, therefore, apparent from the Commission's opinion that the defendant failed to do so, and we cannot disturb that determination, since the Industrial Commission has the exclusive authority to assign the weight to the evidence which is presented. *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965).

Although the defendant points to other evidence which it feels was incompetent to support the full Commission's findings of fact, we find it unnecessary to decide those points of contention in light of the rule that findings of fact which are supported by competent evidence are conclusive on appeal, even though other incompetent evidence may have been improperly admitted. *Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 368, 163 S.E.2d 17, 20 (1968). Here, we conclude that the above-mentioned testimony was amply competent to support the Commission's finding that the plaintiff was incapable of earning wages during the times stated in its opinion.

II

[3] The defendant next contends that the Commission failed to make necessary findings regarding both the extent and the permanency of the plaintiff's disability. Although we agree that the Commission failed to make *specific* findings regarding both the extent and the permanency of the plaintiff's injury, we nonetheless conclude that the findings were sufficiently definite to determine the rights of the parties.

Crucial facts, upon which the question of the plaintiff's right to compensation depends, require specific findings by the Commission. *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E.2d 280, *disc. review denied*, 300 N.C. 372, 267 S.E.2d 675 (1980). The findings must be such that, on appeal, the court can determine whether they are supported by the evidence and whether the law has been

properly applied to them. *Gaines v. L.D. Swain & Son*, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

We acknowledge that duration is a critical finding necessary to support an award of compensation under N.C. Gen. Stat. §§ 97-29 and 30. *See Gamble*, 45 N.C. App. at 508, 263 S.E.2d at 281. "Once the Industrial Commission has found that a 'disability' exists, the Commission must then determine whether that disability is (1) permanent total, (2) permanent partial, (3) total temporary, or (4) partial temporary." *McKenzie v. McCarter Elec. Co.*, 86 N.C. App. 619, 621, 359 S.E.2d 249, 250 (1987). In its Finding of Fact number 6, the Commission merely found that "[a]s a result of the stipulated injury by accident on July 5, 1986, the plaintiff was incapable of earning any wages with the defendant employer or any other employer form [sic] the date of the accident through the date of the hearing in this cause on November 17, 1987." Ordinarily, this finding would be insufficient to establish the crucial fact of duration upon which the plaintiff's right to compensation depends and to support an award of compensation. However, when taken as a whole, the Commission's opinion and award implies that the plaintiff's disability is a temporary total one. The opinion contains references to the gradual improvement of plaintiff's physical condition, and to "a slow return to activity." These references imply that the plaintiff's condition is temporary. Moreover, the Commission's finding of fact that the plaintiff was incapable of earning *any* wages, and its many references to the "length of temporary total disability" suggest that the plaintiff's injury was both temporary and total.

Although it should have been more clearly set out, we elect to treat the Commission's finding that the plaintiff was incapable of earning *any* wages with the defendant or any other employer from the date of the accident through the date of the hearing before the Deputy Commissioner as a finding of temporary total disability. *Compare Gamble*, 45 N.C. App. at 509, 263 S.E.2d at 282, where the court stated:

> The Commission in deleting 'permanent' from the Deputy Commissioner's finding of fact and conclusion of law, in referring in its opinion to plaintiff's case as one 'wherein no one knows what the future holds' and in concluding that the defendants owe plaintiff compensation 'until plaintiff is tendered or obtains work suitable to his capacity or has a change in condition'

has, in effect, found that the duration of plaintiff's disability is temporary.

III

[4] The defendant's final assignment of error is that the Commission's findings of fact were insufficient to support the conclusion that the plaintiff was entitled to temporary total disability benefits "commencing with the accident on July 5, 1986, continuing through the date of the hearing on November 17, 1987, and to such time as his disability ends . . . ." The defendant claims that the findings of fact do not support the conclusion because the Commission failed to make any findings regarding the *extent* of the plaintiff's condition. In addition, the defendant claims that there was no finding of fact which would support the conclusion that the plaintiff was entitled to disability benefits beyond the date of the hearing before the Deputy Commissioner. We disagree with both of these contentions.

First, our interpretation of Finding of Fact number 6, under Argument II, now brings it into harmony with the Commission's conclusion of law that the plaintiff is entitled to temporary total disability benefits from the date of the accident until the date of the hearing before the Deputy Commissioner. Second, it would have been impossible for the Commission to properly make a finding regarding the termination date of temporary total disability benefits. The only evidence before the full Commission was that which was before the Deputy Commissioner, evidence which was gathered some eighteen months prior to the full Commission's review. The full Commission apparently did not consider, nor was it required to consider, evidence in addition to that which was considered by the Deputy Commissioner. *See* N.C. Gen. Stat. § 97-85 (1985). If the defendant desired the full Commission to consider any circumstances which may have changed during the interim between the date of the hearing before the Deputy Commissioner and the date of the full Commission's review, it could have requested such consideration. Moreover, N.C. Gen. Stat. § 97-29 states that an employer must pay a temporary totally disabled employee benefits "during such [period of] total disability . . . ." It does not require a finding nor a conclusion regarding the termination date of temporary total disability benefits. Such a requirement would be illogical since a case of temporary total disability is one in which the duration of the disability is uncertain. *See generally*

Gamble, 45 N.C. App. at 508, 263 S.E.2d at 281 (citing 2 A. Larson, The Law of Workmen's Compensation § 57.10 (1976)).

For the reasons set forth above, the opinion and award of the Industrial Commission is

Affirmed.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA v. LONNIE DALE EASTER

No. 9017SC66

(Filed 18 December 1990)

1. **Appeal and Error § 147 (NCI4th)— court reporter's certificate omitted—raised for first time in brief—issue not considered**

The State's contention in a homicide prosecution that the appeal should be dismissed because the record does not contain the court reporter's certification that copies of the completed transcript were delivered to the parties was not addressed since the State raised the issue for the first time in its brief and not by filing a motion for dismissal. N.C. Rule of Appellate Procedure 7(b)(2) (1990).

Am Jur 2d, Appeal and Error §§ 553, 554.

2. **Criminal Law § 1123 (NCI4th)— voluntary manslaughter—sentencing—premeditation and deliberation as aggravating factor—evidence sufficient**

There was sufficient evidence to find premeditation and deliberation as an aggravating factor when sentencing defendant for voluntary manslaughter where defendant drove from Mount Airy to Lambsburg, Virginia upon learning that his wife had dated Taylor, the victim; defendant carried with him a .45 caliber pistol; Taylor's wife told defendant that Taylor was living in Mount Airy; defendant told Taylor's wife that he would "hit him one time for you too"; defendant went the next day to the house where Taylor was living; defendant was armed with the pistol; defendant fired four shots into Taylor's truck and two shots into the house when he found

no one home; defendant finally confronted Taylor and, after a heated argument, told Taylor that he would be back that night to "get him"; defendant tried to back over Taylor as he was leaving; and, while defendant contends that Taylor first threatened to kill him as he was walking towards defendant and his wife in the final confrontation, all of the gunshot wounds to Taylor's body were in his back and the record indicates that there was more than one wound.

Am Jur 2d, Homicide §§ 439, 554.

3. **Criminal Law § 1123 (NCI4th)— voluntary manslaughter—sentencing—premeditation and deliberation—related to purposes of sentencing**

Premeditation and deliberation are appropriate nonstatutory aggravating factors when defendant pleads guilty to voluntary manslaughter. The North Carolina Supreme Court has held that premeditation and deliberation are reasonably related to the purposes of sentencing when a defendant pleads guilty to second degree murder, and there is no distinction which would make premeditation and deliberation reasonably related to the purposes of sentencing for murder but not for voluntary manslaughter. Moreover, premeditation and deliberation are not inherent to second degree murder or voluntary manslaughter.

Am Jur 2d, Homicide §§ 439, 554.

4. **Criminal Law §§ 1239, 1240 (NCI4th)— manslaughter—sentencing—mitigating factors—provocation and threat—not found**

The trial court did not err when sentencing defendant for voluntary manslaughter by failing to find the statutory mitigating factors that the offense was committed under strong provocation or threat where the evidence was conflicting, so that the trial court could find that statements made by defendant and his wife were contradicted and lacked credibility.

Am Jur 2d, Homicide §§ 64, 65, 290, 552.

5. **Criminal Law § 1242 (NCI4th)— manslaughter—sentencing—mitigating factor—extenuating relationship—not found**

The trial court did not err by failing to find as a mitigating factor when sentencing defendant for voluntary manslaughter that there was an extenuating relationship between defendant

and the victim based on the alleged adulterous relationship between the victim and defendant's wife. The record states only that defendant's wife dated the victim an unspecified number of times, there is a conflict as to whether the dating occurred one year or three years before the shooting, and there is no inference in the record that the date or dates escalated into the adulterous relationship argued by the defendant. Furthermore, there is nothing on the face of the statute to indicate that the legislature meant to provide shorter prison terms for defendants motivated by jealousy or rage.

Am Jur 2d, Homicide §§ 64, 65, 290, 552.

6. Criminal Law § 1430 (NCI4th)— manslaughter—sentencing—restitution as condition for work release

The trial court when sentencing defendant for voluntary manslaughter was without authority to order that defendant pay one-third of his income to the clerk of court for disbursement to the minor children of the victim as a condition of work release. The language in N.C.G.S. § 15A-1343(b) referring to an "order" for restitution or reparation is made inapplicable by the language of N.C.G.S. § 148-33.2(c), which makes clear that the restitution or reparation may be only recommended. Moreover, an applicable provision of N.C.G.S. § 15A-1343 requires that the amount of restitution must be limited to that supported by the record, and the evidence in this case does not support restitution in the amount of one-third of whatever defendant's income may be for an undetermined period of time.

Am Jur 2d, Criminal Law §§ 572, 574.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR3d 976.

APPEAL by defendant from judgment entered 8 August 1989 by *Judge James C. Davis* in SURRY County Superior Court. Heard in the Court of Appeals 26 September 1990.

Lacy H. Thornburg, Attorney General, by E. Burke Haywood, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by James R. Glover and Ann B. Petersen, for defendant-appellant.

GREENE, Judge.

The defendant was charged with murder, injury to real property and injury to personal property. He entered pleas of guilty to voluntary manslaughter, injury to real property and injury to personal property on 1 August 1989. Judgments were entered after a sentencing hearing on 8 August 1989. The trial court sentenced the defendant to twenty years imprisonment for the offense of voluntary manslaughter. The other two offenses were consolidated for judgment and the defendant was sentenced to two years imprisonment to begin at the expiration of the twenty-year sentence. The defendant appeals.

At the sentencing hearing, the State introduced testimony which tends to show that on 17 September 1988, the defendant's wife told the defendant that she had dated one Mike Taylor approximately three years earlier. That same day the defendant left his home in Mount Airy and traveled to the home of Taylor's wife in Lambsburg, Virginia. The defendant took with him a .45-caliber pistol.

In Virginia, the defendant told Taylor's wife that he was upset because Taylor had dated his wife. Taylor's wife told the defendant that she and Taylor were separated, and that Taylor lived on Race Track Road in Mount Airy. As the defendant was leaving Mrs. Taylor's residence he said, "I'll hit him one time for you too."

The following afternoon, the defendant and his wife went to Bradley Hull's house on Race Track Road, the house in which Taylor was supposed to be living. Taylor and Hull had gone to Atlanta the day before to play in a softball tournament. Finding no one at home, the defendant fired four shots from the .45-caliber pistol into Taylor's truck which was parked in the yard, then fired two shots into the house. The defendant and his wife then went to the home of the defendant's father-in-law in Mount Airy. They left their child there and drove back to Bradley Hull's house on Race Track Road.

By the time the defendant and his wife started back to Hull's house, Hull and Taylor had returned home from Atlanta. Soon after Hull and Taylor arrived they noticed the damage to the truck and the house. Two women also arrived at Hull's house a few minutes later. While everyone else remained inside the house, Taylor went outside.

A short while later, the defendant and his wife pulled into the driveway and parked. Taylor and the defendant began arguing in the driveway, with the defendant "cussing and raising hell." The argument brought Hull and the two women outside. According to the defendant's wife, the defendant told Taylor that he would be back that night to "get him."

The defendant then backed out of the driveway at a high rate of speed and tried to back over Taylor. After driving a short distance down the highway the defendant stopped his car and got out. He asked Hull, "Do you want some of this?" Hull replied, "You damn right, buddy, if you done this . . . here." The defendant then got back in his car and drove off.

After the defendant left, Taylor asked someone to get his gun and bullets from inside the house. Taylor loaded his .38-caliber pistol and drove off in Hull's truck alone.

The defendant drove to a Coca-Cola plant approximately two or three miles away. The defendant pulled in to switch drivers because he did not have a valid driver's license. As the defendant's wife was pulling out of the plant, Taylor turned into the driveway and parked with his truck still partly in the highway. Both the defendant and his wife stated to the police that Taylor got out of his truck and started walking toward them saying, "I'm going to kill you." The defendant then shot Taylor an unspecified number of times.

The head of the Mount Airy Rescue Squad was passing by the Coca-Cola plant when the shooting occurred. He pulled in to give aid, but Taylor died almost immediately after he arrived. All of the gunshot wounds were found to be in Taylor's back.

The trial court found as mitigating factors that the defendant had no criminal record, that the defendant voluntarily acknowledged his wrongdoing prior to his arrest, and that the defendant had been a person of good character in his community. The trial court found as the only nonstatutory aggravating factor that the defendant acted with premeditation and deliberation in killing Taylor. Upon finding that the aggravating factor outweighed the mitigating factors, the court imposed the statutory maximum of twenty years imprisonment. The court also ordered that, as a condition of work release or parole, the defendant would have to pay one-third of

his income to the clerk of court to be disbursed to the minor children of the deceased.

The issues are: (I) whether the trial court erred in finding as an aggravating factor that the defendant acted with premeditation and deliberation because (A) the factor is not supported by the evidence, and (B) because the factor is not reasonably related to the purposes of sentencing in a voluntary manslaughter case; (II) whether the trial court erred in not finding as mitigating factors that the defendant acted under threat, and that he acted under strong provocation or that the relationship between the defendant and the victim was otherwise extenuating; and (III) whether the court's order that the defendant pay one-third of his income to the clerk of court for disbursement to the minor children of the deceased was beyond the power of the trial court.

[1] We first note that the State argues in its brief that this appeal should be dismissed because the record does not contain the court reporter's certification that copies of the completed transcript have been delivered to the parties as required by N.C.R. App. P. 7(b)(2) (1990). Since the State's contention is raised for the first time in its brief, and not by filing a motion for dismissal, we do not address this argument. N.C.R. App. P. 25, 37 (1990). *See also Morris v. Morris*, 92 N.C. App. 359, 374 S.E.2d 441 (1988) (declining to address a motion to dismiss raised in the defendant's brief where the record contained no motion to dismiss filed in accordance with Rule 37).

I

[2] The defendant first argues that the trial court erred by finding as a nonstatutory aggravating factor that the defendant acted with premeditation and deliberation.

A

The defendant contends that there is no evidence to support a finding that he acted with premeditation and deliberation. We disagree.

The State bears the burden of proving by a preponderance of the evidence the existence of an aggravating factor. *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986). The terms "premeditation" and "deliberation" have been explained as follows:

> Premeditation has been defined by this Court as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. [Citations omitted.] An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a "fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." [Citations omitted.]

State v. Williamson, 72 N.C. App. 657, 658, 326 S.E.2d 37, 38 (1985) (quoting *State v. Corn*, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981)).

Premeditation and deliberation must usually be established by circumstantial evidence. *State v. Lloyd*, 89 N.C. App. 630, 636, 366 S.E.2d 912, 916, *disc. rev. denied*, 322 N.C. 483, 370 S.E.2d 231 (1988). The circumstances which may tend to establish premeditation and deliberation include:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

Id. (quoting *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L.Ed.2d 166 (1986)).

In addition to the circumstances above, it has also been held that the nature and number of the victim's wounds may also support an inference of premeditation and deliberation. *See State v. Carter*, 318 N.C. 487, 491, 349 S.E.2d 580, 582 (1986).

The record indicates that upon learning that his wife had dated Taylor, the defendant drove from Mount Airy to Lambsburg, Virginia in an effort to find Taylor. He carried with him on this trip a .45-caliber pistol. Taylor's wife told the defendant that Taylor was living in Mount Airy. Before driving back to Mount Airy, the defendant told Taylor's wife that he would "hit him one time for you too." The next day, still armed with the .45-caliber pistol, the defendant went to Bradley Hull's home to confront Taylor. When he found no one home, the defendant fired four shots into

Taylor's truck and two shots into the house. After leaving his child with his father-in-law, the defendant finally confronted Taylor. After a heated argument, the defendant told Taylor that he would be back that night to "get him." As the defendant was leaving, he tried to back over Taylor. In the final confrontation at the Coca-Cola plant, the defendant contends that Taylor first threatened to kill the defendant as he was walking toward the defendant and his wife. However, all the gunshot wounds to Taylor's body were in his back. While the record is not specific as to the number of gunshot wounds to Taylor's body, it does indicate that there was more than one wound.

This evidence is sufficient to support a finding by the trial court that the State established by a preponderance of the evidence that the defendant acted with premeditation and deliberation.

B

[3] The defendant next argues that premeditation and deliberation are improper factors to be considered under the circumstances of this case because (1) these factors are not "reasonably related to the purposes of sentencing," as required by N.C.G.S. § 15A-1340.4(a), and (2) deliberation and premeditation are inherent to the offense of voluntary manslaughter.

(1)

The relevant statute provides the following:

> The primary purposes of sentencing a person convicted of a crime 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.

N.C.G.S. § 15A-1340.3 (1988).

Our Supreme Court has held that "when a defendant pleads guilty to murder in the second degree, a determination by the preponderance of the evidence in the sentencing phase that he premeditated and deliberated the killing is reasonably related to the purposes of sentencing[,]" and that "[s]uch aggravating factors may be considered in determining an appropriate sentence for the

killer." *State v. Melton*, 307 N.C. 370, 376, 298 S.E.2d 673, 678 (1983). We are unable to discern, and indeed the defendant does not argue, any distinction which would make premeditation and deliberation reasonably related to the purposes of sentencing where the defendant pleads guilty to murder, but not where he pleads guilty to voluntary manslaughter. Accordingly, we hold that premeditation and deliberation are appropriate nonstatutory aggravating factors where the defendant pleads guilty of voluntary manslaughter.

(2)

We also reject the defendant's argument that premeditation and deliberation are inherent to the offense of voluntary manslaughter and cannot, therefore, be considered as aggravating factors upon a plea of guilty to voluntary manslaughter. *See* N.C.G.S. § 15A-1340.4(a)(1) (evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation). Murder in the first degree is the intentional and unlawful killing of a human being with malice, premeditation, and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984). Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation, or deliberation. *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983). Thus, premeditation and deliberation are inherent to first-degree murder, but not to second-degree murder or voluntary manslaughter.

Accordingly, the trial court did not err by finding premeditation and deliberation as aggravating factors.

II

[4] The defendant next argues that the trial court erred by failing to find as statutory mitigating factors, under N.C.G.S. § 15A-1340.4(a)(2), that the offense was committed under threat, and that it was committed under strong provocation or that the relationship between the defendant and the victim was otherwise extenuating.

Where the evidence in support of a mitigating factor is uncontradicted and manifestly credible, it is error for the trial court to fail to find the mitigating factor. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). The defendant has the burden of establishing

a mitigating factor by a preponderance of the evidence. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E.2d 732 (1983), *cert. denied*, 310 N.C. 310, 312 S.E.2d 653 (1984).

The defendant contends that there was uncontroverted evidence that the victim blocked the defendant's vehicle, approached the defendant with his gun drawn, and uttered a threat to kill. The defendant further argues that these acts constituted both a threat and strong provocation as contemplated by the statute.

The evidence relied upon by the defendant came from statements made by the defendant and his wife to the investigating officer shortly after the shooting. However, when the defendant's wife told the officer that the victim had pulled into the Coca-Cola plant and blocked them in, the officer told her that their vehicle was not blocked when he arrived. The defendant's wife then stated that she had subsequently moved the car. The head of the Mount Airy Rescue Squad was immediately on the scene, however, and he told the investigating officer that the vehicles were still in the same location they were in when he arrived. Furthermore, the defendant and his wife stated that the victim approached them with a gun in his hand and threatened to kill. However, all the gunshot wounds to the victim's body were in his back. We find from the record that the evidence was conflicting such that the trial court could find that the statements made by the defendant and his wife were contradicted and lacked credibility.

[5] The defendant also contends that there was an extenuating relationship between the defendant and the victim because the victim's behavior tends to shift part of the moral fault for the crime to the victim. *See State v. Martin*, 68 N.C. App. 272, 314 S.E.2d 805 (1984) (the legislature apparently had in mind circumstances that morally shift the fault for a crime). The basis for this argument is the alleged adulterous relationship between the victim and the defendant's wife. However, the record does not support this contention. The record states only that the defendant's wife dated the victim an unspecified number of times. There is a conflict as to whether the dating occurred one year or three years before the shooting, but there is no inference in the record that the date or dates escalated into the "adulterous relationship" argued by the defendant. Furthermore, "[t]here is nothing on the face of the statute to indicate that our legislature meant to provide shorter prison terms for defendants motivated by jealousy or rage."

State v. Puckett, 66 N.C. App. 600, 606, 312 S.E.2d 207, 211 (1984). *See also State v. Monroe*, 70 N.C. App. 462, 320 S.E.2d 14 (1984).

Therefore, the trial court did not err by failing to find these mitigating factors.

III

[6] The defendant's final argument is that the trial court erred by including in its sentence an order that the defendant pay one-third of his income to the clerk of court for disbursement to the minor children of the victim as a condition of work release. The defendant contends that restitution may only be recommended as a condition of work release, and that it cannot be unconditionally ordered. He further contends that the order was not supported by the evidence. We agree on both bases.

The statute pertaining to restitution paid by prisoners with work release is N.C.G.S. § 148-33.2. Prior to a 1985 amendment, the statute provided that the court shall consider whether "restitution or reparation shall be *ordered or recommended* . . . as a condition of attaining work-release privileges." N.C.G.S. § 148-33.2(c) (1978) (emphasis added). In part, the amended statute reads as follows:

> When an active sentence is imposed, the court shall consider whether, as a rehabilitative measure, it should *recommend* to the Secretary of Correction that restitution or reparation be made by the defendant out of any earnings gained by the defendant if he is granted work-release privileges and out of other resources of the defendant. . . . If the court determines that restitution or reparation should not be recommended, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be recommended, the court shall make its recommendation a part of the order committing the defendant to custody. The *recommendation* shall be in accordance with the applicable provisions of G.S. 15A-1343(d).

N.C.G.S. § 148-33.2(c) (1987) (emphasis added).

While N.C.G.S. § 15A-1343, which pertains to conditions of probation, speaks in terms of an "order" for restitution or reparation, the amended N.C.G.S. § 148-33.2(c) makes clear that restitution or reparation may only be recommended as a condition of work release, and if such recommendation is made it is to comply with

the *applicable* provisions of N.C.G.S. § 15A-1343(d). Thus, the language in that section referring to an "order" for restitution or reparation is made inapplicable by the language of N.C.G.S. § 148-33.2(c). Accordingly, the trial court is without the authority to "order" restitution as a condition of work release.

One part of N.C.G.S. § 15A-1343 which we do find applicable is the provision that "[t]he amount [of restitution] must be limited to that supported by the record. . . ." N.C.G.S. § 15A-1343(d) (1988). Restitution is intended to be compensatory, not punitive. *State v. Burkhead*, 85 N.C. App. 535, 355 S.E.2d 175 (1987). The record before us reveals only that the victim was separated from his wife, and that they had two children who lived with their mother at the time the victim died. This evidence does not support restitution in the amount of one-third of whatever the defendant's income may be for an undetermined period of time.

In summary, with the exception of the order requiring the defendant to pay one-third of his income to the clerk, which is vacated, the trial court is affirmed. We remand for a new hearing and judgment on the question of any recommended conditions of work release.

Affirmed in part, vacated in part and remanded.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

FRANK H. CHRISTENSEN v. CHERYL D. CHRISTENSEN

No. 8915DC1274

(Filed 18 December 1990)

1. Divorce and Alimony § 30 (NCI3d) — equitable distribution — valuation of marital property — post-separation occurrences incompetent

The equitable distribution statute, N.C.G.S. § 50-21(b), renders evidence of post-separation occurrences incompetent

for the purpose of valuing marital property. Consequently, a trial court had a duty to exclude such incompetent evidence from its consideration, and its failure to do so is reviewable by the appellate court even in the absence of an objection to the evidence at trial.

Am Jur 2d, Divorce and Separation § 938.

Proper date for valuation of property being distributed pursuant to divorce. 34 ALR4th 63.

2. **Divorce and Alimony § 30 (NCI3d)— equitable distribution—valuation of marital asset—post-separation residency change—erroneous reliance**

The trial court erred in adopting an expert's valuation of a management company as a marital asset where the expert relied on defendant's out-of-state residency in arriving at the valuation, but defendant was a resident of North Carolina at the time of the separation of the parties.

Am Jur 2d, Divorce and Separation § 938.

Proper date for valuation of property being distributed pursuant to divorce. 34 ALR4th 63.

3. **Divorce and Alimony § 30 (NCI3d)— equitable distribution—stipulation of equal division—marital home—post-separation appreciation and credits—findings unnecessary**

Where the parties stipulated that an equal division of the marital property was equitable, the trial court properly refused to make separate findings of fact regarding the post-separation appreciation of the marital home, its post-separation occupancy by the plaintiff, and tax savings allegedly realized by the plaintiff from making post-separation mortgage payments.

Am Jur 2d, Divorce and Separation § 903.

4. **Divorce and Alimony § 30 (NCI3d)— equitable distribution—marital assets—giving parties options to purchase**

Where the trial court classified as marital property and valued an athletic club and a management contract, the court did not err in providing a method of distribution which gave defendant the first option to purchase the assets under a set formula, gave plaintiff the second option, and provided that the assets should be sold and the proceeds divided between

the parties in accordance with the set formula if neither party exercised its option to purchase within a specified time.

Am Jur 2d, Divorce and Separation §§ 900, 933.

APPEAL by defendant from judgment entered 7 April 1989 and order entered 21 June 1989 by *Judge Patricia Hunt* in ORANGE County District Court. Heard in the Court of Appeals 21 September 1990.

Tharrington, Smith & Hargrove, by Carlyn G. Poole, and Boxley, Bolton & Garber, by J. Mac Boxley, for plaintiff-appellee.

Moore & Van Allen, by Edward L. Embree, III, and Porter, Steel, Humphries and Porter, by W. Travis Porter, for defendant-appellant.

GREENE, Judge.

The defendant appeals from an equitable distribution judgment entered on 7 April 1989.

The parties to this case were married on 23 July 1979, separated on 19 July 1985, and were divorced on 29 December 1986 on the ground of one year's separation. At the time of the parties' separation, the plaintiff was a licensed medical doctor, Board certified in ophthalmology and plastic surgery. In December of 1982, he began his private medical practice in Chapel Hill, North Carolina.

At about the time the plaintiff began his medical practice, the parties began pursuing their interest in establishing a racquetball, swim, and fitness center in the Durham-Chapel Hill area. The center was ultimately established, named Metrosport, and built on land leased from Duke University in Durham, North Carolina. Towards that goal the parties established CDC Associates, a limited partnership. The general partner in CDC Associates was CDC Management Corporation (CDC Management). CDC Associates financed Metrosport and as a part of the financial arrangement, the parties and the defendant's parents personally guaranteed payment on a $1,000,000 loan obtained by CDC Associates. Pursuant to a contract entered into between CDC Associates and CDC Management, CDC Management was to provide management services for Metrosport in exchange for a management fee of $36,000 a year.

After receiving evidence from the parties' expert witnesses, including Dr. Finley Lee, Ray Jennings, and Curtis Beusman, the trial court made the following finding of fact regarding the value of CDC Management:

> 12. The parties have acquired the following marital property during the course of their marriage:
>
> . . . .
>
> (g) The parties' marital interest in CDC Management Corporation and CDC Associates, operating as the MetroSport athletic club, a racquetball, swim and fitness center located close to Duke Medical Center in Durham, North Carolina.
>
> . . . .
>
> Further, the Court finds that the net fair market value, as of the date of separation, of the marital asset CDC Management Corporation, the general partner in CDC Associates, is $218,848.00. This asset consists of the management contract with CDC Associates for $36,000.00 a year for forty (40) years, and which capitalized at a rate of .1645 for the life of the forty year lease with Duke University, is $218,845.00. The Court finds that the capitalization rate of .1645 used by Dr. Lee for this purpose is a fair and appropriate rate (similar to the rate used by Ms. Shaffer in her valuation of the medical practice). Dr. Lee found that this rate was approximately five percent (5%) over the required rate of return for a long term corporate bond after considering premiums for illiquidity, administrative costs, bankruptcy and other risks.

The only evidence presented at trial which supports this finding of fact comes from the testimony and valuation summary of Dr. Lee, the plaintiff's expert. Dr. Lee valued CDC Management using a process called capitalization which in this case, according to the defendant, apparently involved assuming the receipt of the $36,000 per year management fee "for a six year period beginning on the date of separation and extending to July 1991, or the number of years a purchaser would be willing to pay in advance in order to acquire the entity [CDC Management]."

In describing his valuation of CDC Associates, Dr. Lee mentioned several times that the defendant lived in Pittsburgh. The evidence shows that the defendant lived in Roxboro, North Carolina at the date of separation, not in Pittsburgh, Pennsylvania. The

following questions and answers indicate that Dr. Lee also considered the defendant's post-separation residency in his classification of the $36,000 a year management fee due under the management contract between CDC Associates and CDC Management:

> Q. Mrs. Cristiansen [sic], as general partner of CDC Associates, was paid an annual management salary of $36,000.00 a year which she received monthly?
>
> A. Well, I would not call it salary. I'd call it a fee. I would assume salary as cost of the service and I don't know that you can provide services from 500 miles away.
>
> . . . .
>
> Q. You have called management fee of $36,000.00 a year received by CDC Management as an unearned stream of cash flow rather than as a wage?
>
> A. No, I have said that I believe, looks to me like it is a dividend, like dividends. The reason it looks like dividends is because the lady lives in Pittsburgh.
>
> Q. Okay, but you considered it as an unearned stream of cash flow, didn't you?
>
> A. No, not exactly, left it right there in the income statement.. [sic]
>
> Q. But in capitalizing it, haven't you considered it in the stream of unearned income?
>
> A. As far as the management corporation, yes, in the sense that it is a value to that particular business and it is not clear what services are associated. Now, to the extent that there are true—let me back up, Mrs. Christensen is a general partner; she's also a limited partner, she in my mind makes atrip [sic] down once a year to attend a partnership meeting, I consider that incidental. I would have to consider what services, exactly what services she provides from Pittsburg [sic] before I could ever take part of it out—
>
> Q. You simply have no knowledge what she's doing from Pittsburgh to assess to management, CDC Management?
>
> A. I think you have to say that. I really can't get into her mind and activities. All I can do it [sic] look and see that

there is an absentee manager, absentee management, and my experience with absentee management, it's that nothing much goes on and when it does go on, it's not very good.

Q. If your assumption were incorrect—how would it affect your evaluation?

A. Well, it would affect my evaluation in that I was incorrect in my assumption. . . . if it were shown to me how a person can manage a company in Durham, North Carolina from Pittsburgh before I would change my assumptions.

When describing how he valued CDC Management, Dr. Lee testified that he attempted to value CDC Management in basically the same manner as he valued CDC Associates. He also stated that he valued CDC Management "[a]s of the month of separation, July, 1985." However, when discussing the manner in which he arrived at the .1645 capitalization rate, Dr. Lee stated:

I adjusted my rate to reflect several things—illiquated that particular investment, administrative costs, say 5% additional for that, although I don't know whether that's enough, living in Pittsburghas [sic] opposed to Duke, a disadvantage—I don't think probably that type of administrative factor should be there but I put it there anyway.

The trial court found as fact that the parties held marital interests in CDC Associates, CDC Management, and the management contract, that the defendant had been employed as the general partner of Metrosport since 1982, and also that between the date of the parties' separation and the summer of 1988 the defendant received to the exclusion of the plaintiff $90,000 pursuant to the management contract with CDC Associates. The trial court then concluded that the plaintiff was entitled to a one-half credit of the marital asset in the amount of $45,000. The trial court also ordered the following regarding the parties' interests in CDC Associates and CDC Management:

Each party has the right to purchase the others [sic] interest in the marital property as set out in Paragraph 22(c), which paragraph is adopted and incorporated herein by reference.

Paragraph 22(c) reads as follows:

> Defendant is given the first opportunity to purchase the Metrosport athletic club including the parties' interest in CDC Associates and the management contract, formerly known as CDC Management Corporation by paying Plaintiff the sum of $129,148.42 and also simultaneously refinancing the existing $1,000,000.00 loan on the club, or taking such other action as is satisfactory to this Court in regard to the Metrosport athletic club, so that Plaintiff is completely relieved of any and all liability that may exist in regard to the $1,000,000.00 Note which he guaranteed.
>
> Plaintiff is next given the option to purchase Defendant's interest in the parties' marital asset known as the Metrosport athletic club including the parties' interest in CDC Associates and the management contract, formerly known as CDC Management Corporation, for the sum of $42,160.58 and simultaneously refinancing the existing loan or taking such other action as is satisfactory to this Court, so as to remove Defendant from any and all liability that may exist in regard to the $1,000,000.00 note in regard to the Metrosport club.
>
> In the event the parties are unable to purchase each others [sic] interest in the Metrosport athletic club and refinance the loan as provided above by May 1, 1989, the Court finds that this marital asset should be sold at the earliest possible date, including the parties' marital interest in CDC Associates and the management contract, formerly known as CDC Management Corporation, and all interest the parties have in the Metrosport athletic club. Either party may present information regarding prospective buyers to the Court for its consideration and approval. Out of the net proceeds of the sale, the Plaintiff shall be paid $129,148.42, and the Defendant will be paid $42,160.58. In the event there are additional proceeds from the sale of their interest, they are to divide any such amount equally. In the event the proceeds of sale are not adequate to pay these parties' sums herein ordered, then each party is to receive their pro-rata percentage share according to the ratio of 129 Plaintiff and 42 Defendant of the net proceeds of sale. Pending sale of the club and the management contract, the parties will receive, effective from the date of the Equitable Distribution Trial, the following percentage of the $36,000.00

annual management fee: Plaintiff fifty percent (50%) and Defendant (50%) per year.

One of the marital assets acquired by the parties was the marital home located in Chapel Hill. After the parties' separation in 1985, the plaintiff remained in the home, continued making the monthly mortgage payments, and preserved the marital asset.

This matter was heard over a period of approximately nine days, beginning on 8 August 1988 and ending on 10 October 1988. On 28 March 1989, the trial court signed its judgment of equitable distribution in which it classified, valued, and distributed the parties' marital assets. The judgment was entered on 7 April 1989 when the Clerk of Court mailed notice of the judgment's filing to the parties pursuant to N.C.G.S. § 1A-1, Rule 58. On 17 April 1989, the defendant filed motions for additional findings of fact, a new trial, and relief from the judgment. Upon trial court denial of these motions, the defendant filed timely notice of appeal.

The issues are (I) whether the trial court erred when it adopted Dr. Lee's valuation of marital assets; (II) whether the trial court erred in its consideration of costs and credits associated with the parties' marital home; and (III) whether the trial court erred when it provided a method for distributing marital assets which was to occur in the future but within a defined time frame after the signing of the judgment.

I

The defendant argues the trial court erred when it adopted the plaintiff's expert's valuation of CDC Management because the valuation evidence was based upon post-separation occurrences. In response, the plaintiff argues that the defendant should not be allowed to make this argument on appeal because the defendant did not object at trial to the admission of the expert's testimony and valuation summary.

Generally, the "[f]ailure to object to the introduction of evidence is a waiver of the right to do so, 'and its admission, even if incompetent, is not a proper basis for appeal.' " *State v. Lucas*, 302 N.C. 342, 349, 275 S.E.2d 433, 438 (1981) (citations omitted). However, "where evidence is rendered incompetent by statute, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, whether objection is interposed and exception noted or not."

State v. McCall, 289 N.C. 570, 577, 223 S.E.2d 334, 338 (1976). "As applied to evidence generally, . . . [incompetent] is sometimes used in the broad sense of *inadmissible*, but more often and more accurately to indicate evidence inadmissible for some reason other than irrelevance." 1 Brandis, Brandis on North Carolina Evidence § 3 (3d ed. 1988). *See also* 29 Am. Jur. 2d *Evidence* § 257 (1967) ("competency of evidence depends on whether it is of the sort or type which may be accepted on any issue to which it is relevant").

[1] Our equitable distribution statute provides that "marital property shall be valued as of the date of the separation of the parties," N.C.G.S. § 50-21(b) (1987), and it requires the trial judge to "determine the net market value of the marital property as of" that date. *Willis v. Willis*, 86 N.C. App. 546, 550, 358 S.E.2d 571, 573 (1987). The statute thereby requires the trial court to consider only evidence of the value of the marital property as of the date of separation, thus rendering evidence of post-separation occurrences incompetent for the purpose of valuing marital property. Consequently, a trial court is under a duty to exclude such incompetent evidence from its consideration, and its failure to do so is reviewable by this Court in the absence of an objection to the evidence at trial. *McCall*, 289 N.C. at 577, 223 S.E.2d at 338.

If the record on appeal contains competent evidence which supports the trial court's findings of fact, the trial court is rebuttably presumed to have relied upon it and disregarded any incompetent evidence. *Best v. Best*, 81 N.C. App. 337, 342, 344 S.E.2d 363, 366 (1986). *See also Chappell v. Winslow*, 258 N.C. 617, 624, 129 S.E.2d 101, 106 (1963) (trial court rebuttably presumed to have acted "only on the basis of competent evidence"). Given this presumption, the party claiming the trial court relied on incompetent evidence has the burden of proving the same on appeal. *Best*, 81 N.C. App. at 341-42, 344 S.E.2d at 366.

[2] In this case, the record points unerringly to the fact that Dr. Lee considered the defendant's out-of-state residency, a fact not in existence at the time of separation, in arriving at the value of CDC Management, a marital asset. A valuation based upon circumstances not in existence at the date of separation is incompetent evidence for establishing the value for CDC Management. The trial court relied upon this incompetent evidence as demonstrated by finding of fact number 12(g). Therefore we vacate this finding of fact and all conclusions of law and portions of the order based

upon it and remand this case to the trial court for a finding based on competent evidence in the record, for conclusions of law based upon the new finding, and for a new order. If there is no competent evidence in the record to support a finding of the valuation of CDC Management, the trial court under these circumstances is required to accept additional evidence for this limited purpose.

II

The defendant generally argues that the trial court erred in its consideration of costs and credits associated with the parties' marital home. Specifically, the defendant argues that the trial court erred by (1) failing to make separate findings of fact pertaining to the appreciation in value of the marital home from the date of separation to the date of the hearing, (2) failing to account for post-separation occupancy of the marital home by the plaintiff and the resultant use value, and (3) failing to make a specific finding of fact as to the tax savings the plaintiff realized with regard to the interest payments made within the post-separation mortgage payments.

Generally, when evidence of a N.C.G.S. § 50-20(c) distributional factor is introduced, the trial judge is required to consider the factor and make a finding of fact with regard to it. *Armstrong v. Armstrong*, 322 N.C. 396, 405-06, 368 S.E.2d 595, 600 (1988).

> However, where the parties . . . stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in § 50-20(c). . . .

Miller v. Miller, 97 N.C. App. 77, 81, 387 S.E.2d 181, 184 (1990).

[3] The parties stipulated to an equal division of the marital property which is equivalent in this case to a stipulation that an equal division of the marital property is equitable. Accordingly, the trial court properly refused to make separate findings of fact regarding the post-separation appreciation of the marital home, its post-separation occupancy by the plaintiff, and the tax savings allegedly realized by the plaintiff because of the post-separation occupancy of the house. *Id.*

III

[4] The defendant argues that the trial court erred by failing to order a final distribution of the parties' interest in CDC Management and CDC Associates. According to the defendant, the district court, by leaving the distribution of this marital property open and uncertain for an indefinite period of time in hopes that the parties themselves could provide an equitable settlement, engaged in conduct which is the antithesis of an equitable distribution. We disagree.

In *Carr v. Carr*, 92 N.C. App. 378, 374 S.E.2d 426 (1988), this Court was faced with an incomplete and erroneous equitable distribution judgment. Among its many failings included the following:

> (1) Instead of identifying, classifying, valuing and distributing the various bank accounts and articles of household property that the parties were found to have acquired during the marriage, the judgment left everything relating to these properties open for an indefinite period in the hope that the parties, who have agreed about very little in recent years, will evaluate and divide them. This is the antithesis of a distribution and it rendered interlocutory what purports to be and should be a final judgment. It also prevents us from knowing what properties the parties will receive, much less their value, and made meaningless the statement that the distribution is equitable.
>
> . . . .
>
> (4) Instead of dividing and distributing the three tracts of marital real estate in some practical and equitable manner (a simple thing to do since each tract has approximately the same fair market value and a balance can be readily achieved by reducing the major recipient's personal property or requiring an appropriate payment), the judgment merely declared that the parties own each tract as tenants in common and directed that if they do not divide the tracts within an unstated time, they be sold by commissioners under the Judicial Sales Act. This is not a distribution, but a dilatory and potentially wasteful substitute that neither reason nor the record justifies.

Id. at 379-80, 374 S.E.2d at 427-28.

The trial court in *Carr*, rather than classifying, valuing, and distributing the marital property as required by the statute, directed

the parties themselves to follow the three-step process and to do so within an unlimited period of time. Here, the trial court classified and valued both CDC Associates and CDC Management. The parties were not required to agree as to the manner of distribution; rather, the trial court provided a method of distribution which gave the defendant the first option to purchase these assets under a set formula. Additionally, the trial court did not leave unbridled the time within which distribution was to occur. The trial court allowed barely a month for the parties to decide who, if either of them, would purchase these assets. If the time period ultimately lapsed without either of the parties exercising its option to purchase the assets, the trial court ordered that the assets immediately be sold with the proceeds distributed to the parties according to the same formula to have been used had a party exercised its option to purchase. Accordingly, the judgment did classify and value the marital assets and the method of distribution was not inconsistent with N.C.G.S. § 50-20.

The other assignments of error and arguments made by the defendant have either been reviewed and determined to be without merit or have been abandoned. Several of the arguments in the defendant's brief are not supported by assignments of error in the record and they are deemed abandoned. N.C.R. App. P. 10(a). Other assignments of error are deemed abandoned because they do not "state plainly and concisely and without argumentation the basis upon which error is assigned." N.C.R. App. P. 10(c); *Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E.2d 435 (1988). Other issues raised in the brief are not supported by argument or authority and are deemed abandoned. N.C.R. App. P. 28(b)(5); *see also Joyner v. Adams*, 97 N.C. App. 65, 387 S.E.2d 235 (1990). In several instances the defendant set forth valid assignments of error but did not argue them in the brief and they are deemed abandoned. N.C.R. App. P. 28(b)(5).

Accordingly, the judgment of the trial court is

Affirmed in part, vacated in part and remanded.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

STATE OF NORTH CAROLINA v. HAROLD WAYNE MOOSE, JR., DEFENDANT/APPELLANT

No. 8926SC1306

(Filed 18 December 1990)

1. **Constitutional Law § 67 (NCI3d)— right of confrontation— identity of informant—in-camera testimony**

Defendant had no right to complain on appeal that his right of confrontation was violated when the trial court permitted an officer to give an in-camera answer to a question as to whether an informant was a competitor or an employee of defendant where defense counsel stated that he had no objection to the officer giving an in-camera response to that question.

Am Jur 2d, Criminal Law § 729.

2. **Constitutional Law § 67 (NCI3d)— informant—disclosure of identity not required**

A defendant charged with trafficking in cocaine by possession failed to show that the circumstances of his case mandated disclosure of an informant's identity where his counsel merely asserted that his question as to whether the informant was a competitor or an employee of defendant went to the informant's motive for telling the police that he had seen a large quantity of cocaine in defendant's business office. Furthermore, evidence that the informant had placed a finger in the white powder and touched it to his lip did not show that the informant was a participant in the crime charged so as to require the disclosure of his identity.

Am Jur 2d, Criminal Law §§ 1002-1004.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer. 76 ALR2d 262.

3. **Searches and Seizures § 24 (NCI3d)— confidential informant— affidavit for search warrant**

An officer's affidavit based on information from a confidential informant who had not previously furnished information to the police was sufficient to provide probable cause for a warrant to search defendant's business premises where it stated that the informant had seen cocaine and drug paraphernalia

in defendant's business office at a certain address the previous day, and that the informant gave the officer a description of where the cocaine could be found at defendant's business premises, how the cocaine was packaged, and an approximation of the quantity of cocaine to be found.

Am Jur 2d, Searches and Seizures § 69.

4. **Searches and Seizures § 45 (NCI3d)— renewed motion to suppress—hearing not required**

Defendant was not entitled to a hearing under N.C.G.S. § 15A-975(c) of his renewed motion at trial to suppress the fruits of a search after a pretrial motion had been denied where defendant did not allege the discovery of new facts but alleged that cases decided by the Court of Appeals had changed the contents requirements of an affidavit for a search warrant. Moreover, the court's denial of the motion would not have been altered by the cases cited by defendant.

Am Jur 2d, Evidence § 427.

5. **Criminal Law § 75.7 (NCI3d)— officer executing search warrant—statements by defendant—no custodial interrogation**

Defendant's statements to an officer executing a search warrant were not the result of custodial interrogation where the officer informed defendant that he had a search warrant, defendant stated, "You don't need that; it's in there," the officer asked what defendant meant, and defendant replied, "The cocaine you're looking for is in there." Nor was the statement involuntary because officers entered defendant's business with their guns drawn.

Am Jur 2d, Evidence §§ 613, 614.

6. **Searches and Seizures § 41 (NCI3d)— execution of search warrant—notice of identity and purpose**

Officers executing a search warrant sufficiently gave notice of their identity and purpose in compliance with N.C.G.S. § 15A-249 where they wore jackets which identified them and their purpose; they entered defendant's business yelling that they were police officers with a search warrant; and an officer entered defendant's office and told defendant, "Hang up, we have a search warrant."

Am Jur 2d, Searches and Seizures §§ 114, 115.

7. Searches and Seizures § 42 (NCI3d)— reading of search warrant—sufficient compliance

An officer sufficiently complied with the requirement of N.C.G.S. § 15A-252 that a search warrant be read to the person in control of the premises to be searched prior to its execution where the officer entered defendant's office and told defendant to hang up the telephone and that he had a search warrant; defendant stated, "You don't need that," and told the officer where cocaine could be found; and the officer followed defendant's direction to locate a metal box, read the warrant to defendant, and then opened the box and discovered cocaine therein. There is no requirement that the officer read the warrant immediately no matter what the circumstances, and defendant prevented immediate compliance with the statute by volunteering the information about the location of the cocaine. Furthermore, any violation of the statute was harmless in that the officer complied with the statute as soon as was practicable.

Am Jur 2d, Searches and Seizures §§ 114, 115.

8. Criminal Law § 823 (NCI4th)— interested witness—undercover agent—informant—defendant not entitled to instruction

Defendant was not entitled to an undercover agent interested witness instruction where the officer who testified for the State did not participate in the crime for which defendant was convicted in an undercover capacity. Nor was defendant entitled to an informant interested witness instruction because the officer used an undisclosed informant in the case.

Am Jur 2d, Trial § 861; Witnesses § 663.

9. Searches and Seizures § 43 (NCI3d)— motion to suppress—announcement of ruling in newspaper interview—absence of prejudice

Defendant was not prejudiced when the trial judge announced in a newspaper interview that he would deny defendant's motion to suppress a few weeks prior to entering a formal ruling in court.

Am Jur 2d, Judges §§ 166-169.

APPEAL by defendant from order entered 18 May 1989 in MECKLENBURG County Superior Court by *Judge Shirley L. Fulton*, and from judgment entered 20 July 1989 in MECKLENBURG County Superior Court by *Judge John M. Gardner*. Heard in the Court of Appeals 8 June 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David M. Parker, for the State.

Morrison & Peniston, by Dale S. Morrison, and Goodman, Carr, Nixon & Laughrun, by George V. Laughrun, II, for defendant-appellant.

DUNCAN, Judge.

From a judgment imposing a sentence of thirty-five years imprisonment following his conviction of trafficking in cocaine, defendant appeals. For the reasons that follow, we find no error.

I

On 20 October 1988, Officer B.C. Couch of the Charlotte, North Carolina Police Department met with a citizen (hereafter "the informant") who had phoned the Charlotte police to make a report of criminal activity. The informant, who had not provided the police with information prior to this, reported seeing a large quantity of cocaine in defendant's office at his business, Sport Divers. The informant described articles which Officer Couch recognized as cocaine paraphernalia. Officer Couch questioned the informant about the informant's criminal record, where the informant lived, for how long, and where the informant worked. All answers given by the informant were verified to be true.

On the basis of the informant's information, the police went to Sport Divers and observed that the defendant was there. The next day Officer Couch applied for, and was granted a search warrant for defendant's business. Officer Couch then went to Sport Divers with several other officers. They entered the shop clothed in jackets identifying them as Charlotte police yelling, "Police, Search Warrant." Some officers secured the front of the business while Officer Couch, with the search warrant in his back pocket, continued to the rear of the building, into a classroom area occupied by a woman. He then continued toward the defendant's office, the door to which was closed.

Officer Couch opened the door and observed the defendant sitting at his desk talking on the telephone. He told the defendant to hang up the telephone, stand up and place his hands on the wall. He also informed the defendant that he had a search warrant. The defendant complied and made no effort to resist. Before Officer Couch could read the warrant, the defendant said, "You don't need that; it's in there." Officer Couch said, "What do you mean?" The defendant responded, "The cocaine you're looking for is in there." He then pointed to a cabinet under the copy machine located next to his desk.

Officer Couch then read the search warrant to defendant and opened the metal box under the cabinet. Inside he found a white powder which was later established to be 980.9 grams of cocaine. Defendant was subsequently arrested and advised of his *Miranda* rights.

II

[1] Defendant first assigns error to the trial judge holding the in-camera hearing out of his presence. During the in-camera hearing defendant's attorney asked if the informant is one of defendant's employees and Officer Couch whispered the answer to the trial judge. Defendant now contends that his right to confront and cross examine his accuser as provided by the Sixth Amendment to the United States Constitution and Article I, Section 23, of the Constitution of North Carolina was violated. We disagree with defendant and find no error.

First, the defendant's attorney asked Officer Couch if the informant was a competitor of the defendant and the district attorney objected. Defendant's attorney then stated that he had no objection to Officer Couch answering that question in-camera. Having assented to an in-camera response with respect to the informant's identity, defendant should not be heard to complain on appeal.

[2] Second, in *Roviaro v. United States*, the Supreme Court stated the rule for disclosure of an informant's identity:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case taking into consideration

> the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.

353 U.S. 53, 62, 1 L.Ed. 2d 639, 646 (1957). *See also State v. Watson*, 303 N.C. 533, 279 S.E.2d 499 (1981). "However, before the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *Watson*, 303 N.C. at 537, 279 S.E.2d at 582 (citations omitted). In *Watson*, our Supreme Court determined that based on the questions asked, the trial judge could only speculate as to the need defendant had for the information and that the defendant made no showing at the time of the questions of a particular need for knowing the identity of the source.

In this case, counsel for the defendant asked whether the informant was a business competitor or an employee of the defendant. Counsel stated that the questions were intended to elicit the motive for the informant's going to the police, and immediately added that he would not mind the officer answering the question in-camera. Having offered merely the bare statement that the question went to the motive of the informant, defendant did not carry his burden of showing that the particular circumstances of his case mandate disclosure of the informant's identity.

Defendant further contends that the trial court erred by failing to order the State to identify the concerned citizen in that the citizen's identity was necessary for a fair determination of his case and material to his defense. These contentions are also unavailing.

In *State v. Grainger*, this court cited substantial authority establishing that nondisclosure is permissible "where the informant is neither a participant in the offense, nor helps arrange its commission, but is a mere tipster who only supplies a lead to law enforcement officers." 60 N.C. App. 188, 190, 298 S.E.2d 203, 204 (1982), *disc. review denied*, 307 N.C. 579, 299 S.E.2d 648 (1983). In support of his argument, defendant refers to evidence that the informant told Officer Couch that he/she had placed a finger in the white powder and touched it to his/her lip which then became numb. From this, according to the defendant, it can be inferred that the informant may have been a participant in the offense charged.

Defendant was charged with trafficking in cocaine and the informant would have had to participate in that offense as it is defined in N.C. Gen. Stat. § 90-95(h)(3) (1989). Trafficking "has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of [the drug]." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987). Possession is defined as "having the power and intent to control disposition or use of the contraband." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). In this case, the fact that the informant put a finger into the cocaine does not establish that the informant had power and intent to control its disposition or use. We therefore overrule this assignment of error.

III

[3] Defendant next assigns error to the trial judge's denial of his motion to suppress the evidence seized pursuant to execution of the search warrant. He contends that the information given to the magistrate was insufficient to constitute probable cause to issue a warrant. We disagree and find no error.

Appellate court review of a magistrate's probable cause decision is not subject to a technical *de novo* review, but is limited to whether "the evidence as a whole provided a substantial basis for a finding of probable cause . . ." *State v. Arrington*, 311 N.C. 633, 640, 319 S.E.2d 254, 258 (1984). Probable cause to search exists if a person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched. *State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983). With respect to the reliability of information provided by an informant, the Supreme Court has instructed, "even if we entertain some doubt as to an informant's motives, his explicit detailed description of alleged wrongdoing with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *Illinois v. Gates*, 462 U.S. 213, 234, 76 L.Ed. 2d 527, 545 (1983).

In *State v. Barnhardt*, this court applied the foregoing rules in holding that there was probable cause to issue a search warrant where the affidavit provided information that cocaine was seen on the premises within twenty-four hours, described the premises to be searched in detail and set out the basis of the informant's ability to identify. 92 N.C. App. 94, 373 S.E.2d 461 (1988), *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593. *Barnhardt* is instruc-

tive in the case at bar. In this case, Officer Couch's affidavit included information that the informant gave him a description of where the cocaine could be found on the defendant's business premises, how the cocaine was packaged and an approximation of the quantity of cocaine to be found. The affidavit included a description, provided by the informant, of the premises to be searched and that cocaine had been seen in the defendant's office.

Based upon the foregoing discussion, we find that the affidavit included information almost identical in quality to that in *Barnhardt*. Accordingly, we find no error and overrule this assignment of error.

IV

[4] Defendant next assigns error to the trial judge's denial of his second motion to suppress the fruits of the search pursuant to N.C. Gen. Stat. § 15A-975(c) (1988). Defendant contends that the trial judge is required to make findings of fact and conclusions of law in accordance with that statute and that the failure to do so entitles him to a new trial. We disagree with defendant.

Section 15A-975(c) provides:

> If, after a pretrial determination and denial of the motion [to suppress], the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery or alleged new facts, during trial.

The statute clearly requires a showing of previously undiscovered facts to renew a motion to suppress evidence. In the case at bar, defendant was not alleging that new facts had come to light but that cases decided by this court changed the content requirements for an affidavit supporting an application for a search warrant. Thus, he was not entitled to a new hearing as he did not comply with the statute.

Assuming arguendo that defendant had complied with Section 15A-975, in *State v. Marshall*, this court held that an affidavit which set forth the informant's reliability and included his statement that he had seen cocaine in the defendant's residence in the previous forty-eight hours was sufficient. 94 N.C. App. 20,

380 S.E.2d 360 (1989), *disc. review denied*, 325 N.C. 275, 384 S.E.2d 526. The information included in the affidavit in this case includes the same type of information. Thus, the case law defendant cited at the second motion to suppress did not alter the outcome of the motion and since defendant brought forth no new facts, the denial of his motion was proper. Defendant failed to meet the threshold showing and thus we find no error.

V

[5] Defendant next assigns error to the trial judge's denial of his motion to suppress statements made at his arrest. Before Officer Couch could read the search warrant to him, the defendant said, "You don't need that; it's in there." When Officer Couch asked what defendant meant, he replied, "The cocaine you're looking for is in there." Defendant now contends that the statements indicating where the cocaine could be found were made while he was in custody and were involuntary. We disagree.

In *State v. Haddock*, 281 N.C. 675, 190 S.E.2d 208 (1972), our Supreme Court held that a voluntary statement made while in custody does not become the product of an "in-custody interrogation" simply because an officer asks the defendant to clarify a statement already made voluntarily. In the case at bar, the defendant contends that the statement was not made voluntarily because the officers came in with their guns unholstered, and the defendant was not free to leave. This contention is unavailing.

The test is whether the statements were made in response to an interrogation. The fact that defendant made an incriminating statement in response to the police officers' presence, and not in response to questioning initiated by the officers, does not make it a custodial interrogation. Furthermore, Officer Couch only asked what defendant meant by his statement, "You don't need that," which defendant made without any prompting from Officer Couch. We therefore find that the trial judge did not commit error in denying defendant's motion to suppress his statements made incident to his arrest as they were not the product of a custodial interrogation.

VI

Defendant further assigns error to the trial judge's failure to make a formal ruling, complete findings of fact and accurate conclusions of law on his motion to suppress the fruits of the search

warrant executed in violation of N.C. Gen. Stat. § 15A-249 and § 15A-252. Defendant contends first, that the warrant was not read and a copy handed to the defendant prior to its execution by the officers; and second, defendant contends that the officers failed to give notice of their identity and purpose before entering the defendant's business. We disagree with defendant.

N.C. Gen. Stat. § 15A-249 (1988) provides:

> The officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give notice in a manner likely to be heard by anyone who is present.

Further, N.C. Gen. Stat. § 15A-252 (1988) provides:

> Before undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises or vehicle to be searched.

[6] In *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970), our Supreme Court held that even though the police officers have a valid search or arrest warrant, ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. *Accord, State v. Gaines*, 33 N.C. App. 66, 234 S.E.2d 42 (1977) (construing N.C. Gen. Stat. § 15A-249). In the case at bar, the officers wore search and raid jackets which identify them and their purpose and they entered the defendant's business yelling, "police officers; search warrant." Officer Couch testified that after he entered the business, he proceeded to defendant's office and said, "Hang up, we have a search warrant." The officers here complied with the requirements of Section 15A-249.

[7] With respect to compliance with N.C. Gen. Stat. § 15A-252, Officer Couch testified that as he entered the office, he directed the defendant, who was sitting at his desk, talking on the telephone, to hang up the telephone and put his hands on the wall. The defendant, still seated at the desk, then said, "you don't need that," and commenced to tell Officer Couch where the cocaine was. Aside

from the lack of a requirement that an officer read the warrant immediately, no matter what the circumstances, defendant's contention fails in that the defendant prevented immediate compliance with Section 15A-252 by volunteering the information. Officer Couch followed defendant's direction to locate a metal box and then read the search warrant to the defendant. Assuming that Officer Couch violated the statute, the violation was harmless in that he complied with the statute as soon as was practicable. Further, we find that the trial judge did not commit reversible error in denying defendant's motion to suppress the evidence on the grounds of statutory noncompliance.

Defendant also contends that the trial judge committed error by making a finding that defendant told Officer Couch, "he didn't need to read that." The statements the defendant was alleged to have made were, "you don't need that" or "you don't need to do that." Under the circumstances, any error in the trial judge's insertion of the words "to read" was harmless.

VII

[8] Defendant next assigns reversible error to the trial judge's failure to instruct the jury on the testimony of undercover agents and informants. He contends that the officer executed all of his duties in this case in an undercover fashion and that the informant's need for anonymity raised the need for an instruction on interested witnesses. We find these contentions unavailing.

The defendant requested and was denied an instruction on informants and undercover agents. That instruction is N.C.P.I. 104.30 (1986) which provides:

> You may find from the evidence that a State's witness is interested in the outcome of this case because of his activities as an [informer] [undercover agent]. If so, you should examine such testimony with care and caution in light of that interest. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

In *State v. Black*, this court held that it was error for a trial judge not to give the special instruction for the testimony of an undercover agent where the officer participated in an undercover capacity in the offense for which the defendant was convicted. 34 N.C. App. 606, 239 S.E.2d 276 (1977), *disc. review denied*, 294

N.C. 362, 242 S.E.2d 632 (1978). In this case, Officer Couch did not engage in trafficking in cocaine, for which the defendant was convicted, in an undercover capacity and thus, the defendant was not entitled to the undercover agent instruction. *Accord, State v. Sowden*, 48 N.C. App. 570, 269 S.E.2d 274 (1980) (finding no error in not referring to an officer as an undercover agent where the officer acted in an undercover capacity to investigate and execute a search warrant on the defendant). Also, the instructions given by the trial judge specifically state that the jurors may consider any "interest, bias or prejudice" a witness may have.

With regard to defendant's assertions that he was entitled to an interested witness instruction in light of the use of an informant, we find defendant's argument is unpersuasive. Defendant contends that "Officer Couch had reason and motive to protect the informant's confidentiality in that it made it impossible for the defendant to impeach the credibility of the informant, to show that the informant allegedly engaged in harassing behavior or to show an interest other than that alleged by the State." While defendant's argument is unclear, in light of other evidence presented by the State, particularly the cocaine which was discovered, those contentions would be more appropriately addressed to the issue of probable cause to issue a search warrant than proving that Officer Couch was interested in the outcome of the trial. Furthermore, assuming, for the sake of argument, that there was error in omitting the instruction, defendant has failed to show how he was prejudiced by its omission. Thus, we find no prejudicial error.

VIII

[9] Finally, defendant assigns error to the trial judge announcing in a newspaper interview that he would be denying the defendant's motion to suppress two to three weeks prior to entering a formal ruling in court. Defendant cites cases which set forth the general rule that an order is entered only when properly announced in court or signed in session. *See, e.g., State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984). He further contends that his confidence in the judicial system was undermined so that he was unable to communicate with his attorneys and assist in the preparation of his defense. However, defendant offers no support for this allegation, and we find it to be without merit. Furthermore, if the defendant is contending that the judge committed some form of misconduct, the appropriate forum in which to seek relief would be the Judicial

Standards Commission. We therefore overrule this assignment of error.

IX

For the foregoing reasons, we find

No error.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA v. FRANKIE ELAINE BROWN

No. 9021SC235

(Filed 18 December 1990)

1. **Criminal Law § 42.6 (NCI3d) — cocaine seized from defendant's residence — no showing of detailed chain of custody required**

The State did not need to establish a detailed chain of custody of cocaine seized from defendant's residence, since the evidence in question was identified as the same evidence involved in the incident, and there was never a question at trial that the items offered had undergone any material change.

Am Jur 2d, Evidence § 774.

2. **Narcotics § 3.3 (NCI3d) — expert's opinion as to weight of cocaine — proper foundation**

The trial court did not err in admitting an expert's testimony concerning the weight of cocaine seized from defendant's residence, and there was no merit to defendant's contention that the State allegedly failed to establish a proper foundation for its admission, since defendant did not request on cross-examination that the witness state the basis for his opinion. N.C.G.S. § 8C-1, Rule 705.

Am Jur 2d, Drugs, Narcotics, and Poisons § 44; Expert and Opinion Evidence § 121.

3. **Narcotics § 4.3 (NCI3d) — constructive possession of cocaine — sufficiency of evidence**

Evidence was sufficient to show defendant's constructive possession of cocaine where it tended to show that officers

found one bag of cocaine in a cookie jar in defendant's kitchen, an area in her house and under her control; they observed defendant throw another bag of cocaine into the kitchen sink; and defendant was in such close juxtaposition to the cocaine that the jury could have reasonably concluded that defendant had constructive possession of the cocaine.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession. 56 ALR3d 948.

4. **Narcotics § 4 (NCI3d)— possession of drug paraphernalia— sufficiency of evidence**

The trial court did not err in denying defendant's motion to dismiss the charge of possession of drug paraphernalia where the evidence tended to show that officers conducted a search of defendant's premises and found a test tube cooker, a glass bottle and a glass pipe of the type used for drugs, and two packs of rolling papers.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Prosecution based upon alleged illegal possession of instruments to be used in violation of narcotic laws. 92 ALR3d 47.

5. **Criminal Law § 133 (NCI4th)— tender of guilty plea to lesser offense—no plea arrangement with State—court's refusal to accept proper**

The trial court did not err in refusing to accept defendant's tender of a guilty plea to a lesser offense, since defendant had no prior plea arrangement with the State; the State opposed defendant's offer to plead guilty to the lesser offense; and it was within the court's discretion to determine whether to accept or reject defendant's plea.

Am Jur 2d, Criminal Law § 488.

APPEAL by defendant from judgment entered 28 September 1989 by *Judge W. Steven Allen, Sr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 24 October 1990.

On 7 August 1989, defendant was indicted under N.C. Gen. Stat. § 90-95 for trafficking by possession of cocaine, possession

of cocaine with intent to sell and felonious possession of cocaine. Further, defendant was indicted for "maintaining a building for use and sell of controlled substances" under N.C. Gen. Stat. § 90-108(a)(7) and (b).

Defendant's trial on the above charges began 27 September 1989. On 28 September 1989, a jury found defendant guilty of trafficking by possession of more than 28 grams of cocaine, two counts of simple possession of cocaine, of knowingly keeping and maintaining a building which was used for the purpose of keeping and selling controlled substances and knowingly possessing with the intent to use drug paraphernalia to introduce into the body a controlled substance. The trial court sentenced defendant to a total of ten years imprisonment and vacated the conviction for felony possession of cocaine.

Defendant appeals from the judgment of 28 September 1989.

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

Lawrence J. Fine for defendant-appellant.

ORR, Judge.

Defendant makes five assignments of error on appeal. For the reasons below, we find that the trial court did not err and affirm its judgment of 28 September 1989.

The following facts are pertinent to this case on appeal. Officer J.E. Swaim of the Winston-Salem Police Department testified at trial that around 3:40 a.m. on 8 June 1989, he observed a yellow taxi in the 800 block of Woodcote Street. The taxi drove onto Charles Court, which runs parallel to Woodcote Street. He had been ordered to watch for a yellow taxi in this area which was allegedly transporting illegal drugs.

As he approached the cab, Officer Swaim observed defendant seated in the back seat of the taxi with several shopping bags and also observed a man (later identified as James Hargrove) seated in the front seat. While talking to the taxi driver, Officer Swaim observed defendant and Hargrove exit the taxi to go into defendant's house to get money to pay the driver. The taxi driver told Officer Swaim that defendant and Hargrove were going to 846 Woodcote Street.

Officer Swaim then drove from Charles Court to 846 Woodcote Street. It took less than a minute for him to arrive. As he drove up, he saw defendant standing in the front yard in front of the porch. Officer Swaim asked defendant if he could enter the house and defendant agreed. As he entered the house, he heard noise at the back of the house that sounded like someone going out the back door (the officers involved in the subsequent search of the premises were unable to determine if anyone left the house).

Defendant and Hargrove were in the kitchen, and Hargrove acted nervous. Officer Swaim requested that Hargrove keep his hands out of his pockets, but Hargrove refused. Officer Swaim then conducted a pat-down search on Hargrove and found 2.07 grams of cocaine and some marijuana.

When other officers arrived, Officer Swaim placed Hargrove under arrest. At that time Officer Swaim and another officer observed defendant throw an object into the kitchen sink. Officer Swaim retrieved the object which was later identified as a plastic bag containing 3 grams of cocaine.

The officers conducted a search of the premises with defendant's verbal and written permission, and discovered a ziplock bag containing 107.08 grams of cocaine in a cookie jar in the pantry, a test tube cooker, a glass bottle and a glass pipe of the type used for drugs and two packs of rolling papers. The officers also found an electric bill addressed to defendant at the same address. The officers then arrested defendant for several drug related offenses.

I.

Defendant's first four assignments of error deal with motions to dismiss based upon evidentiary issues. The last one addresses an attempt to plead guilty to a lesser offense. We shall address them in order. We note at the outset that in ruling on a motion to dismiss, the trial court must view all evidence in the light most favorable to the State and give the State the benefit of every inference. *State v. Griffin*, 319 N.C. 429, 433, 355 S.E.2d 474, 476 (1987) (citation omitted).

[1] Defendant first argues that the trial court erred in denying her motion to dismiss the indictments for trafficking by possession of cocaine, possession of cocaine with intent to sell and felonious possession of cocaine because there was no competent evidence

that the evidence seized was contraband in violation of the Controlled Substances Act.

Defendant maintains that the State "failed to put forward any evidence that the evidence seized from the Defendant and her residence was the same evidence analyzed by Dr. Leake [sic] [the State's forensic chemist and expert witness]." The basis for this argument is that the State allegedly failed to establish a detailed chain of custody for the contraband between the arresting officers and the forensic chemist. This argument is without merit.

It is well-settled law in this State that a two-pronged test must be met before real evidence may be admitted into evidence: (1) the evidence offered must be identified as the same object in question, and (2) it must be established that the evidence has not undergone a material change. *State v. Zuniga*, 320 N.C. 233, 255, 357 S.E.2d 898, 912-13, *cert. denied*, 484 U.S. 959, 108 S.Ct. 359, 98 L.Ed.2d 384 (1987), *citing*, *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984). The trial court has sound discretion to determine the standard of certainty required to show that the evidence offered is the same as the one involved in the incident and has not been changed materially. *Id.* A detailed chain of custody must be established only if the evidence offered is not readily identifiable or is susceptible to alteration and such alteration has been alleged. *Id.* Moreover, if there are weak links in the chain of custody, these links relate to the weight of the evidence, not its admissibility. *Id.*

Based upon the above principles of law, we find that the State met both prongs of the test, and that a detailed chain of custody need not be established because defendant did not raise an issue regarding alteration of the evidence. First, all evidence in question was identified as the same evidence involved in the incident. At trial, Officer Swaim identified the plastic bag of cocaine (State's Exhibit 2) as the same one defendant threw in the sink. Officer Swaim testified that he kept the evidence in his possession until he sent it to the forensic lab for analysis. He further testified that he removed a bag containing a white powdery substance from a cookie jar in defendant's kitchen (State's Exhibit 4) and kept that in his possession until he sent it to the forensic lab for analysis.

Dr. Leak, forensic chemist, testified that he received the above evidence and placed it in his private locker at the lab until he analyzed it and then returned it to Officer Swaim. He then testified

that State's Exhibit 2 contained three grams of cocaine and State's Exhibit 4 contained 107.08 grams of cocaine. We find this to be sufficient to meet the first prong of the test.

Second, there was never a question at trial that the items offered had undergone any material change. The above testimony establishes that Officer Swaim seized the items of evidence in question and kept them in his possession until he sent them for analysis. Dr. Leak received the evidence, analyzed it, marked it for identification and returned it to Officer Swaim. We find this to be sufficient evidence that the items offered into evidence had not undergone a material change.

Further, we find that the State did not need to establish a detailed chain of custody under the above principles of law because defendant never raised an issue at trial that the evidence was not readily identifiable or had been altered in any way. Therefore, defendant's arguments concerning the chain of custody of Exhibits 2 and 4 are without merit.

[2] Defendant next argues that the trial court erred in admitting Dr. Leak's testimony concerning the weight of the cocaine in State's Exhibit 4 because the State allegedly failed to establish a proper foundation for its admission. We find no error.

Under N.C. Gen. Stat. § 8C-1, Rule 705 (1988),

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question. (1983, c. 701, s. 1.)

Under this rule, an expert does not have to identify the basis of his opinion, absent a specific request by opposing counsel. *State v. Fletcher*, 92 N.C. App. 50, 57, 373 S.E.2d 681, 686 (1988); *Cherry v. Harrell*, 84 N.C. App. 598, 353 S.E.2d 433, *disc. review denied*, 320 N.C. 167, 358 S.E.2d 49 (1987).

In the case *sub judice*, Dr. Leak testified that he conducted certain tests on State's Exhibit 4 and determined that it was cocaine. The State then asked Dr. Leak to "describe the weight of the cocaine . . . ." Dr. Leak replied that, "[i]t was 107.08 grams." On cross-examination, defendant did not request that Dr. Leak state the basis for his opinion that the cocaine weighed 107.08 grams. Because defendant failed to request the factual basis for Dr. Leak's opinion as required under Rule 705, we find that the trial court did not err in permitting the expert testimony concerning the weight of the cocaine.

Moreover, defendant's reliance on *State v. Diaz*, 88 N.C. App. 699, 365 S.E.2d 7, *cert. denied*, 322 N.C. 327, 368 S.E.2d 870 (1988), is misplaced. In *Diaz*, this Court recognized that there is no statutorily prescribed method for weighing contraband under N.C. Gen. Stat. § 90-95(h), and in this context, stated, "ordinary scales, common procedures, and reasonable steps to ensure accuracy must suffice." *Id.* at 702, 365 S.E.2d at 9. In *Diaz*, the expert testified to the exact methods of weighing the contraband and the factual basis for the opinion testimony. *Id. Diaz* does not apply when the opposing party on cross-examination does not request the factual basis for the opinion. Under *Diaz* (and Rule 705), a defendant may not fail to request the factual basis for expert opinion and subsequently raise an issue on appeal of sufficiency of the evidence to support such opinion.

[3] Defendant next argues that the trial court erred in denying her motion to dismiss the charge of trafficking by possession of cocaine on the ground of insufficient evidence to show that she had constructive possession of cocaine. We have reviewed this assignment of error and find it to be without merit.

In *State v. King*, 99 N.C. App. 283, 393 S.E.2d 152 (1990), this Court stated,

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment

> as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' (Citations omitted.)

Id. at 287-88, 393 S.E.2d at 155, *citing, State v. Leonard*, 87 N.C. App. 448, 455, 361 S.E.2d 397, 401 (1987), *disc. review denied and appeal dismissed*, 321 N.C. 746, 366 S.E.2d 867 (1988).

The facts in the present case establish that defendant was in constructive possession of the cocaine. First, the police officers found the cocaine in defendant's house. They found one bag in a cookie jar in defendant's kitchen and observed defendant throw another bag of cocaine into the kitchen sink. While defendant may deny knowledge of the cocaine found in the cookie jar, it was found in her house in an area under her control. Second, defendant was in such "close juxtaposition" to the cocaine that the jury could have reasonably concluded that defendant had constructive possession of the cocaine.

Finally, the courts in this State have found constructive possession of contraband under similar circumstances. *See State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983) (sufficient evidence of constructive possession exists when bills addressed to defendant were found in a dwelling next to an outbuilding containing heroin, and the mailbox in front of the dwelling bore defendant's name); *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971) (constructive possession is a jury issue when heroin found in defendant's residence even though defendant was not on the premises at the time of discovery); *State v. King*, 99 N.C. App. 283, 393 S.E.2d 152 (1990) (constructive possession for both defendants when cocaine found in a bedroom in defendants' residence, and one defendant was outside and one inside during the search).

[4] Defendant's final assignment of error concerning sufficiency of the State's evidence is whether the trial court erred in denying defendant's motion to dismiss the charge of possession of drug paraphernalia. We have reviewed this assignment of error and find that the trial court did not err. *See generally* N.C. Gen. Stat. § 90-113.21(b) (1985) (factors which may be considered with other relevant evidence in determining whether a particular object is drug paraphernalia). *Cf. State v. Nichols*, 268 N.C. 152, 150 S.E.2d 21 (1966) (a defendant's unexplained possession of several legitimate implements such as gloves, chisels, tape, crowbars, hammers and

punches, in the middle of the night, near a closed grocery store which he was leaving where the lock was damaged, far from his residence, held sufficient to establish that the implements were tools used in the burglary).

II.

[5] Defendant's remaining assignment of error concerns whether the trial court erred in refusing to accept her tender of a guilty plea to felonious possession of cocaine. We find no error.

At trial, after the jury was empaneled and before any evidence was taken, defendant tendered a plea of guilty to felony possession of more than one gram of cocaine. This offense is a lesser included offense of possession with intent to sell more than one gram of cocaine, which is a lesser included offense of trafficking by possession of more than 28 grams of cocaine. *See State v. McGill*, 296 N.C. 564, 251 S.E.2d 616 (1979); *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987); *State v. Peoples*, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Defendant had no prior plea arrangement with the State. The State opposed defendant's offer to plead guilty to felony possession of more than one gram of cocaine. The trial court ruled in the State's favor on the ground that the State was entitled to convict defendant of the crimes charged and that defendant could not force the State to accept a plea.

This issue has not been addressed specifically in the courts of this State. We receive guidance, however, from *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980), and *State v. McClure*, 280 N.C. 288, 185 S.E.2d 693 (1972).

In *McClure*, our Supreme Court stated that it is within the discretion of the trial court to determine whether or not to accept a defendant's plea, and it is the duty of the trial court, in accepting a plea, to determine if it is knowingly, understandingly and voluntarily made. 280 N.C. at 293-94, 185 S.E.2d at 696-97, *citing, North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Although *McClure* addressed a defendant who had pled guilty to second degree murder without expressly admitting his guilt, the facts of this case have no bearing on the above principle that whether or not to accept a plea is within the sound discretion of the trial court.

Therefore, we find that under the facts in the present case, the trial court has the discretion to accept or reject a defendant's plea. To overcome the trial court's ruling, defendant must show prejudicial error under N.C. Gen. Stat. § 15A-1443 (1988). Defendant has shown no prejudice.

The test under § 15A-1443 is whether there is a reasonable possibility that a different result would have been reached at trial had the error not been committed. *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988). The jury convicted defendant of, *inter alia*, two counts of simple possession of cocaine. At the sentencing phase, the trial court vacated the conviction on one count of simple possession of cocaine as a lesser included offense of the charge of felony possession of more than one gram of cocaine, the crime to which defendant offered to plead guilty. Therefore, the crime to which defendant sought to plead guilty was vacated, and there was no prejudice.

In *Collins*, the trial court refused to enforce a plea arrangement between the defendant and the prosecutor. Relying on contract principles, our Supreme Court stated that there is no absolute right of a defendant to have a guilty plea accepted by the court. 300 N.C. at 148, 265 S.E.2d at 176.

We find this equally applicable in the case *sub judice*. Under *Collins* and the cases cited therein, a trial court may not force a defendant to enter into a plea agreement with the State, and likewise, may not force the State to enter into a plea agreement with a defendant. As in *Collins*, our defendant had neither entered a guilty plea prior to trial nor relied on any plea agreement to his detriment. Defendant simply can show no reason why the trial court may force the State to accept her offer to plead guilty to the offense which carried the least punishment.

Moreover, we find no statutory or other authority which places such an unreasonable burden on the State. If we accepted defendant's argument in the present case, it would be possible for any defendant to maintain his innocence until trial, and avoid conviction of the most serious offenses charged, simply by pleading guilty to a lesser included offense. Further, if a trial court could force the State to accept a defendant's guilty plea at trial to a lesser included offense, it may force the State to accept a plea at trial that it would not accept during plea negotiations at an earlier stage. We find this to be unacceptable and will not authorize such.

The State has every right to attempt to convict a defendant of the crimes charged.

In summary, for the above reasons, we find that the trial court did not err in its judgment of 28 September 1989, and therefore, affirm the judgment.

Affirmed.

Judge GREENE concurs.

Judge DUNCAN concurred prior to 29 November 1990.

CHRISALIS PROPERTIES, INC., PLAINTIFF v. SEPARATE QUARTERS, INC., DEFENDANT

No. 8915SC1275

(Filed 18 December 1990)

1. **Ejectment § 5 (NCI3d); Judgments § 37.5 (NCI3d)— summary ejectment—past rent and damages claimed—res judicata to breach of contract action**

Having claimed both past rent and damages in a summary ejectment proceeding, plaintiff agreed to limit its recovery to the amount which the magistrate was authorized to award, and judgment in the summary ejectment proceeding was therefore res judicata to the present breach of contract action for past-due rents and damages under the lease; furthermore, the judgment of the magistrate could not have collateral estoppel effect, but instead had that of res judicata, since res judicata applies where there are two actions involving the same parties and the same claims, collateral estoppel where there are two actions involving the same parties but different claims, and both actions here involved the same parties and the same claims.

Am Jur 2d, Ejectment §§ 125, 131; Judgments §§ 447, 448.

2. **Rules of Civil Procedure § 15 (NCI3d)— motion to amend complaint made after summary judgment entered—motion properly denied**

The trial court did not err in denying plaintiff's motion to amend its complaint where the motion was made after the

trial court had entered summary judgment for defendant; the trial court did not allow plaintiff's motion to set aside or amend the judgment pursuant to N.C.G.S. § 1A-1, Rules 59 and 60; and the court therefore could not allow plaintiff's motion to amend the complaint.

Am Jur 2d, Pleadings § 317.

APPEAL by plaintiff from judgment entered 17 July 1989 by *Judge F. Gordon Battle* in ORANGE County Superior Court. Heard in the Court of Appeals 30 May 1990.

Edith R. Salmony and Heidi G. Chapman for plaintiff-appellant.

Newsom, Graham, Hedrick, Bryson & Kennon, by James M. Tatum, Jr., Richard S. Boulden and Dieter Mauch, for defendant-appellee.

PARKER, Judge.

In this action plaintiff seeks to recover past-due rent, taxes and other damages aggregating $37,722.47 on account of defendant's breach of its lease. Plaintiff appeals from the entry of summary judgment for defendant and denial of certain post-judgment motions. We affirm.

In July 1984 the parties entered into a written five-year commercial lease agreement for a building at 1819 Durham-Chapel Hill Boulevard. The lease was to expire 31 July 1989. The pertinent terms of the lease are as follows: (i) monthly payments on a graduated scale over the five-year lease term ($3,200.00 per month during the last four years); (ii) a portion of the annual property taxes; (iii) costs of maintenance of the premises; and (iv) right of re-entry, after giving notice of default, in case of nonpayment of rent. In 1987 and 1988 defendant defaulted in its rental, tax and maintenance payments; and on 28 October 1988 plaintiff notified defendant of its default and of plaintiff's intention to re-enter the premises.

When defendant failed to vacate the premises, plaintiff initiated a summary ejectment action in December 1988 pursuant to G.S. 42-26 based on defendant's breach of a condition of the lease. In describing the breach on the complaint in summary ejectment form, plaintiff specified that "Defendant owes $8,452.43 in back rent and taxes which have accrued from June 1987 to present." Plaintiff also claimed on the form "$1,000.00 costs to re-lease" as

the amount of damages owed in addition to past-due rent. After hearing, the magistrate found that plaintiff had proved its case based on G.S. 42-26(2)—breach of a provision of the lease thereby allowing re-entry of the premises—and ordered that plaintiff be put in possession of the premises. Additionally, on the judgment form, in the space marked "other damages," the magistrate awarded plaintiff $1,500.00, the maximum amount that the magistrate could award. The space marked "rent owed" was left blank. Neither party appealed from the magistrate's judgment.

In January 1989 plaintiff instituted the present action against defendant for breach of contract. The complaint sought recovery of all unpaid rent, taxes and maintenance fees under the lease, including payments for rent and taxes for the unexpired term of the lease which accrued subsequent to plaintiff's possession of the premises. Defendant answered claiming that the judgment in the summary ejectment action, which returned possession to plaintiff and awarded $1,500.00 in damages, barred plaintiff from maintaining the breach of contract action. Based on the pleadings and judgment in the summary ejectment proceeding, defendant moved for summary judgment. Concluding that the proceeding in summary ejectment, which included an award for money damages, was *res judicata* as to the claims alleged in this breach of contract action, the trial court granted defendant's motion for summary judgment.

Plaintiff moved for relief from judgment or, alternatively, to amend the judgment pursuant to G.S. 1A-1, Rules 59 and 60. Plaintiff also moved to amend the complaint to add a cause of action requesting the court to pierce the corporate veil of defendant Separate Quarters, Inc., and to hold the dominant shareholders in Separate Quarters, Inc., personally liable for the corporation's outstanding debts. The trial court denied all plaintiff's post-judgment motions.

On appeal plaintiff presents two issues for consideration: (i) whether the award of damages to a lessor in a summary ejectment proceeding bars any subsequent action to recover additional rents or damages due under the terms of a lease and (ii) whether the trial court erred in denying plaintiff's post-judgment motion to amend its complaint.

I.

[1] The trial court may properly grant summary judgment only when the moving party establishes the absence of a genuine issue

of material fact and its entitlement to judgment as a matter of law. G.S. 1A-1, Rule 56. *See also Conner Co. v. Spanish Inns*, 294 N.C. 661, 242 S.E.2d 785 (1978). In ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party. *Sharpe v. Quality Education, Inc.*, 59 N.C. App. 304, 307, 296 S.E.2d 661, 662 (1982). In the present case defendant's motion for summary judgment was based solely on its contention that, as a matter of law, the judgment in the prior summary ejectment proceeding precluded plaintiff's breach of contract action against defendant for nonpayment of rent due under the lease agreement between the parties.

Under the doctrine of *res judicata*, a final judgment on the merits by a court of competent jurisdiction is conclusive as to rights, questions and facts in issue. Such judgment bars all subsequent actions involving the same issues and the same parties or those in privity with them. *First Union National Bank v. Richards*, 90 N.C. App. 650, 653, 369 S.E.2d 620, 621 (1988); *Shelton v. Fairley*, 72 N.C. App. 1, 5, 323 S.E.2d 410, 414 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E.2d 394 (1985). The doctrine of *res judicata* also applies to those issues which could have been raised in the prior action but were not. *Kabatnik v. Westminister Co.*, 63 N.C. App. 708, 712, 306 S.E.2d 513, 515 (1983). Thus, the doctrine is intended to force parties to join all matters which might or should have been pleaded in one action. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure, Jurisdiction* § 4406 (1981); *see also Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556-57 (1986). The doctrine only applies, however, when a party attempts to litigate the same cause of action after a full opportunity to do so in a prior proceeding. *King v. Grindstaff*, 284 N.C. 348, 355-56, 200 S.E.2d 799, 804 (1973).

Plaintiff contends that summary ejectment is merely a partial remedy designed to put the lessor in quick possession of the premises with the option of obtaining minimal monetary damages to "tide him over" until he proceeds with a comprehensive action for the full range of damages due under the lease agreement. Defendant acknowledges that the statute gives the lessor the option of bringing separate actions to recover possession and monies due under the lease. Defendant contends, however, that, having claimed both past rent and damages in the summary ejectment proceeding, plaintiff agreed to limit its recovery to the amount which the magistrate was authorized to award and, therefore, the judgment in the sum-

mary ejectment proceeding precludes the present breach of contract action for past-due rents and damages under the lease.

General Statute 42-26 provides in pertinent part the following:

> Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:
>
> . . . .
>
> (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

G.S. 42-26(2). In the present case the lease specified that if the rent was not paid within 15 days of the first of each month, the date on which rent was due, plaintiff would have the right to re-enter the premises after notifying defendant of the forfeiture of the estate. Therefore, proper grounds existed for the summary ejectment proceeding. *Morris v. Austraw*, 269 N.C. 218, 152 S.E.2d 155 (1967); *compare Stanley v. Harvey*, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

General Statute 42-28 in effect at the time the present case arose and was decided provides:

> When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put into possession of the leased premises . . . . *[he] may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed one thousand five hundred dollars ($1,500.00), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery.*

G.S. 42-28 (emphasis added). General Statute 42-30 then in effect provides:

> The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the plaintiff proves his case by a preponderance of the evidence

> . . . the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; *and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding one thousand five hundred dollars ($1,500.00), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and give judgment as he may find the fact to be.*

G.S. 42-30 (emphasis added). To summarize, a lessor in North Carolina has three separate remedies under our summary ejectment statute: (i) possession of the premises; (ii) an award of unpaid rent; and (iii) an award of damages for the tenant's occupation of the premises after the cessation of the estate. In this summary proceeding, however, monetary relief—the recovery of rent in arrears and damages for hold-over occupancy—is limited to the amount that the magistrate is authorized to award. This conclusion is supported by the plain language of G.S. 42-28 and 42-30. This conclusion is also supported by the statutory provisions which generally govern small claims actions before a magistrate. General Statute 7A-210 in effect at the time of this action specifies that a small claim action is one in which "[t]he amount in controversy, computed in accordance with G.S. 7A-243, does not exceed one thousand five hundred dollars ($1,500.00) . . . ."

In the present case plaintiff admits in its brief on appeal that "Chrisalis asked to be put in possession of the premises and to recover $1,000.00 in damages and $8,452.42 in rent past due." This admission, coupled with the information entered on the complaint in summary ejectment form, supports the conclusion that plaintiff sought recovery on each of its causes of action in the summary ejectment proceeding. Although G.S. 42-28 does not explicitly state that assertion of a claim for damages and past-due rents in the summary ejectment proceeding will bar a separate action for that claim, the necessary implication of the language "but if he omits to make such a claim, he shall not be prejudiced thereby in any other action for their recovery" is that if the plaintiff does make such claims in the summary ejectment proceeding he shall be prejudiced in another action whereby he attempts to relitigate these claims.

Plaintiff was not compelled to seek in its complaint for summary ejectment the amount of past-due rent or any amount for

damages. Plaintiff needed only to allege a violation of the terms of the lease entitling plaintiff to re-enter the leased premises in order to successfully maintain an action for summary ejectment. Plaintiff made a strategic decision to seek both possession of its property and a speedy recovery of a monetary award in magistrate's court, as opposed to seeking immediate possession of its property followed by a subsequent action in superior court for the full amount of the past-due rent and damages.

As noted by Justice Stacey in dicta in *Seligson v. Klyman*, 227 N.C. 347, 42 S.E.2d 220 (1947),

> Plaintiff elected not to claim "damages for the occupation of the premises since the cessation of the estate of the lessee," G.S., 42-28, as he is authorized to do without prejudice to his right to sue for same in another action, and this no doubt for the reason plaintiff did not wish to limit his claim to an amount within the jurisdiction of a justice of the peace.

Id. at 349, 42 S.E.2d at 222 (citations omitted). In the present case plaintiff prayed for past-due rents and damages, presented evidence to support the claims and accepted the award; therefore, plaintiff is bound by its decision to submit all its claims to the magistrate.

Plaintiff also contends that, at most, the judgment of the magistrate should have collateral estoppel effect, not that of *res judicata*. Specifically, plaintiff argues that because in the first action plaintiff did not explicitly claim the "rents" due under the lease from the time of plaintiff's re-entry through the end of the term, *res judicata* cannot apply to plaintiff's current claim for such "rents" and the prior judgment can only have collateral estoppel effect as to the rents and damages which had accrued at the time that plaintiff filed the summary ejectment action. Defendant asserts that, having petitioned the magistrate for monetary relief in the summary ejectment proceeding, plaintiff could and should have raised at that time all claims for damages proximately resulting from the breach and termination of the lease, including any claim for future "rents."

The doctrine of *res judicata* applies where there are two actions involving the same parties and the same claims or demands; the doctrine of collateral estoppel operates where there are two actions involving the same parties, but where the second action

arises from a different claim or demand. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. at 427-28, 349 S.E.2d at 556 (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 24 L.Ed. 195 (1877)). In the present case all plaintiff's damages, claimed in both the summary ejectment action and in the action filed in superior court, resulted from defendant's breach of the lease agreement between the parties. Our courts have held that all of a party's damages resulting from a single wrong must be recovered in one action. *See Mangum v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 721, 724-25, 301 S.E.2d 517, 519 (1983). The fact that the summary ejectment statute specifically allows a lessor to bring an action to regain possession of the premises separate from an action for damages does not create an exception to the general rule that all damages must be recovered in one action. Absent evidence raising an issue of mitigation of damages, plaintiff's damages for future rents could have been determined at the time of the summary ejectment proceeding. *See Monger v. Lutterloh*, 195 N.C. 274, 280, 142 S.E. 12, 16 (1928); *Isbey v. Crews*, 55 N.C. App. 47, 52, 284 S.E.2d 534, 538 (1981). Our review of the record on appeal reveals that there was no evidence before the magistrate raising an issue as to plaintiff's failure to mitigate its damages; therefore, the damages for future rents would have been ascertainable at the time of the summary ejectment proceeding and the claim should have been raised at that time.

For the foregoing reasons, we hold that under the doctrine of *res judicata*, all plaintiff's claims in the present action merged in the judgment in the summary ejectment proceeding. Therefore, entry of summary judgment dismissing plaintiff's action was proper.

II.

[2] Plaintiff contends on appeal that since G.S. 1A-1, Rule 15(a) provides that leave to amend "shall be freely given when justice so requires" the trial court erred in denying plaintiff's motion to amend its complaint. This Court has said:

> Although N.C.G.S. § 1A-1, Rule 15(a) provides that leave to amend "shall be freely given when justice so requires," the trial court has broad discretion in permitting or denying amendments after the time for amending as a matter of law has expired. . . .

The trial court's ruling on a motion to amend is not reviewable on appeal in the absence of an abuse of discretion.

Banner v. Banner, 86 N.C. App. 397, 399-400, 358 S.E.2d 110, 111, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 70 (1987) (citations omitted). In the order denying plaintiff's motion to amend its complaint, the trial court did not state its reasons for denying leave to amend. Failure to state any reason for denying a motion to amend has been held to be an abuse of discretion. *See Duncan v. Ammons Construction Co.*, 87 N.C. App. 597, 361 S.E.2d 906 (1987). However, "[a]bsent any declared reason for denial to amend, the appellate court may examine any apparent reasons for such denial." *Banner v. Banner*, 86 N.C. App. at 400, 358 S.E.2d at 111; *see also United Leasing Corp. v. Miller*, 60 N.C. App. 40, 298 S.E.2d 409 (1982), *disc. rev. denied*, 308 N.C. 194, 302 S.E.2d 248 (1983); *Kinnard v. Mecklenburg Fair*, 46 N.C. App. 725, 266 S.E.2d 14, *aff'd*, 301 N.C. 522, 271 S.E.2d 909 (1980).

In the present case plaintiff did not move to amend its complaint until after the trial court had entered summary judgment for defendant. After the entry of summary judgment, plaintiff moved to set aside the judgment or, alternatively, to amend the judgment pursuant to G.S. 1A-1, Rules 59 and 60. Plaintiff then moved to amend its complaint to name additional defendants and causes of action. The trial court denied the motion to set aside or amend the judgment and simultaneously denied the motion to amend the complaint. As a general rule, once judgment is entered amendment of the complaint is not allowed unless the judgment is set aside or vacated under Rule 59 or Rule 60. *See generally* 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1489 (2d ed. 1990). This Court has previously applied this general rule to a dismissal pursuant to Rule 12(b)(6), *Johnson v. Bollinger*, 86 N.C. App. 1, 7-8, 356 S.E.2d 378, 382 (1987), to a dismissal pursuant to Rule 12(c), *Harris v. Medical Center*, 38 N.C. App. 716, 718, 248 S.E.2d 768, 770 (1978), and to the entry of summary judgment, *Sentry Enterprises, Inc. v. Canal Wood Corp.*, 94 N.C. App. 293, 298, 380 S.E.2d 152, 155 (1989). As discussed above, the court correctly entered judgment for defendant based on the doctrine of *res judicata* and, therefore, properly denied plaintiff's motion to set aside or amend the judgment. Since the trial court did not allow plaintiff's motion to set aside or amend the judgment pursuant to Rule 59 and Rule 60, it could not allow plaintiff's motion to amend the complaint.

Affirmed.

Judges WELLS and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

PERRY L. THOMAS, EMPLOYEE, APPELLANT v. OVERLAND EXPRESS, INC. AND/OR LEASCO, INC., EMPLOYER, CITY INS. CO., CARRIER, APPELLEES

No. 8910IC1208

(Filed 18 December 1990)

1. **Master and Servant § 86 (NCI3d)— workers' compensation— out-of-state accident—jurisdiction of Industrial Commission— place employment contract entered—last act test**

The "last act" test will be applied to determine whether a contract of employment was made in North Carolina within the meaning of the provision of N.C.G.S. § 97-36 giving the Industrial Commission jurisdiction over a workers' compensation claim arising from an out-of-state accident when the contract of employment was made in North Carolina. Therefore, the Industrial Commission did not have jurisdiction over a workers' compensation claim for an injury sustained by an employee in Florida where the evidence showed that the final act necessary to make a binding contract of employment occurred in Indiana.

Am Jur 2d, Workmen's Compensation §§ 86, 87, 88.

2. **Master and Servant § 86 (NCI3d)— workers' compensation— out-of-state accident—jurisdiction of Industrial Commission— employer's principal place of business—minimum contacts test inapplicable**

A minimum contacts test will not be used to determine the applicability of the provision of N.C.G.S. § 97-36 giving the Industrial Commission jurisdiction over a workers' compensation claim arising from an accident in another state if the employer's principal place of business is in North Carolina. Although defendant employer conducted substantial business

in North Carolina, the Industrial Commission did not have jurisdiction over plaintiff's claim for an injury sustained in Florida where all the evidence showed that defendant's principal place of business was in Indiana.

Am Jur 2d, Workmen's Compensation §§ 86, 87, 88.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 24 July 1989. Heard in the Court of Appeals 8 May 1990.

Daniel S. Walden for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher B. Kincheloe, for defendant-appellees.

PARKER, Judge.

The primary issue for determination in plaintiff's appeal is whether the North Carolina Industrial Commission had subject matter jurisdiction over plaintiff's claim for personal injury occurring outside North Carolina.

Plaintiff, an experienced tractor-trailer driver, is a resident of North Carolina. Defendant employer (herein defendant) operates a tractor-trailer fleet. In the spring of 1986 plaintiff applied for a job with defendant by filling out an application form and turning it in at defendant's terminal in Greensboro. Defendant arranged for plaintiff to fly to Indianapolis, Indiana, along with other prospective employees for a road test and general orientation to the company. While in Indiana, plaintiff signed certain papers which provided in pertinent part as follows:

AGREEMENT

MADE this 24 day of April, 1986, by and between Leasco, Inc., an Indiana corporation with its principal place of business at 1631 W.Thompson Road, Indianapolis, Indiana 46217 ("Employer"), and Perry L. Thomas, an individual residing at 2212 Olive Dr., Reidsville, North Carolina 27320
(Street Address, City, State, Zip)
("Employee").

WITNESSETH

WHEREAS, Employer is in the business of hiring qualified employees to perform various tasks in the trucking business; and

WHEREAS, Employee desires to work in the trucking business for Employer; and

WHEREAS, Employee's duties require travel regularly in Employer's service in Indiana and in other states;

NOW, THEREFORE, the parties hereto, intending to be legally bound, hereby covenant and agree as follows:

1. Employee's employment is principally localized in Indiana.

2. The laws of the State of Indiana, including the Indiana Workmen's Compensation Act and its benefits, shall apply to the settlement of any claim arising out of any job-related injury or disease of the Employee.

3. Employee agrees to this method of resolution regardless of his or her state of residence or domicile.

4. Employee consents to the filing of this agreement with any appropriate state agency which handles the administration of workers' compensation claims for any state.

On 26 April 1986 plaintiff drove his first load from defendant's Greensboro, North Carolina, terminal. Plaintiff was a regional driver who drove primarily within the State of North Carolina until September 1986. In September 1986, however, defendant held a drivers' meeting at the Holiday Inn-Four Seasons in Greensboro, North Carolina, and informed the drivers that because defendant was losing money, drivers would be required to start making trips of five to seven days' duration into South Carolina, Georgia, Florida and Virginia. Additionally, instead of being dispatched from the Greensboro terminal as in the past, drivers were now dispatched by telephone from Indianapolis.

On 9 December 1986 plaintiff suffered an injury by accident to his right foot while picking up a load for defendant in Madison, Florida. He immediately reported his injury to defendant. Defendant filed a claim with the Industrial Board of the State of Indiana and plaintiff was compensated for temporary total disability under Indiana law at a rate of $190.00 per week for the following periods: 12 December 1986 through 14 December 1986, 3 February 1987

through 19 August 1987, and 22 December 1987 through 2 May 1988. Plaintiff resumed driving for defendant in August 1987 and left his employment voluntarily on 19 October 1987. On 21 December 1987 plaintiff filed a claim with the North Carolina Industrial Commission for benefits under the North Carolina Workers' Compensation Act claiming compensation for mileage and medication reimbursement, for an additional $55.86 per week in temporary total disability benefits, and, later, for a 40% permanent partial disability to his right foot—none of which was recoverable under the laws of Indiana.

After plaintiff's claim was filed with the North Carolina Industrial Commission, defendant filed a petition in the United States Bankruptcy Court for the Southern District of Indiana, seeking protection under Chapter 11. Plaintiff moved the Bankruptcy Court to lift the automatic stay to allow the present claim to proceed and plaintiff's motion was granted. Plaintiff's claim was heard on 23 May 1988 in Wentworth, North Carolina, before former Deputy Commissioner Richard B. Harper. At this hearing the parties stipulated that on 9 December 1986 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant. The parties also stipulated to the treating doctor's report showing plaintiff to have a 40% permanent partial disability to his right foot resulting from the 9 December 1986 accident.

On 30 January 1989 former Deputy Commissioner Harper issued his Opinion and Award dismissing plaintiff's claim by interpreting G.S. 97-36 to mean that the Commission did not have subject matter jurisdiction over plaintiff's claim. Plaintiff appealed to the Full Commission. On 24 July 1989 the Commission issued its Opinion and Award affirming and adopting as its own the Opinion and Award of the Deputy Commissioner. On 17 August 1989, within the 30-day period for taking appeal as specified in G.S. 97-86, plaintiff filed his written notice of appeal.

On appeal plaintiff brings forward four assignments of error. First, plaintiff contends that the Commission erred in finding and concluding that the contract of employment was made in Indiana as opposed to North Carolina. Second, plaintiff asserts that the Deputy Commissioner erred in finding and concluding that defendant's principal place of business was in Indiana as opposed to Greensboro, North Carolina. Third, plaintiff argues that the Deputy Commissioner erred in finding and concluding that the North Carolina

Industrial Commission may not exercise subject matter jurisdiction over plaintiff's claim. Finally, plaintiff contends that the Commission erred in finding that G.S. 97-36 is a jurisdictional statute that precludes application of the Act to plaintiff's claim.

As to plaintiff's contention that the Commission erred in finding and concluding that plaintiff's contract of employment was made in Indiana, the Commission made the following pertinent findings of fact to which plaintiff has not excepted:

> 3. On or about March 26, 1986 plaintiff responded to an employment ad placed by defendant, Overland Express, in the Greensboro News and Record. This ad stated several terms of employment including a requirement that employees must live within a 50 mile radius of Greensboro, North Carolina and that retirement and life insurance programs were provided as benefits.
>
> 4. Plaintiff submitted an application for employment to the dispatcher at the Overland Express Terminal located near the intersection of Interstate 40 and Chimney Rock Road in Greensboro, North Carolina near the end of March 1986. Following that application, the plaintiff was contacted by an agent of Overland Express and was informed of a flight reservation at the Greensboro Airport. Plaintiff arrived at the Greensboro Airport and was flown to Indianapolis, Indiana along with other prospective employees.
>
> 5. Following his arrival in Indiana the plaintiff was given a physical and road test by employees of Overland Express.

Since plaintiff has not excepted to these findings, they are binding on appeal. *Salem v. Flowers*, 26 N.C. App. 504, 216 S.E.2d 392 (1975). Plaintiff has excepted to the Commission's finding that:

> 6. On 24 April 1986, four days after his arrival in Indiana and while still in Indiana, plaintiff was informed that he had been hired as a driver by Overland Express. Plaintiff signed employment papers that day and agreed to become an employee of defendant.

In appeals from the Industrial Commission, when the assignments of error bring forward for review the findings of fact made by the Commission, the Court will review the evidence to determine whether there is any competent evidence to support the findings;

if so, the findings of fact are conclusive. If a finding of fact is a mixed question of fact and law, it is also conclusive if supported by competent evidence. The appellate court can only review for errors of law. *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E.2d 410 (1954). Our review of the transcript of the hearing before the Deputy Commissioner reveals that there was competent evidence to support this finding of fact; therefore, it is binding on appeal.

Based on these findings, the Commission concluded:

> 1. The contract of employment between plaintiff and defendants [sic] was made on 24 April 1986 in the State of Indiana when, by his own admission, plaintiff accepted defendant's first formal offer of employment. See, *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15 aff'd 277 N.C. 223, 176 S.E.2d 784 (1970).

Plaintiff objects to this conclusion on the grounds that the document which plaintiff signed in Indiana was not a contract of employment, but instead was a "waiver and release" of plaintiff's right to bring any claims under the North Carolina Workers' Compensation Act. Plaintiff also contends that finding that the contract was "made" in Indiana merely because plaintiff signed his W-2 forms and the release in Indiana is an arbitrary, technical and rigid manner of determining where the contract was entered into.

Contrary to plaintiff's contention that G.S. 97-36 is not a jurisdictional statute and that the North Carolina legislature did not intend to limit the protection provided by the Workers' Compensation Act to only those persons who were injured within the territorial limits of our State, G.S. 97-36 lists certain conditions which must be met before the Commission can exercise jurisdiction over claims arising from work-related accidents occurring outside North Carolina. "The Industrial Commission is primarily an administrative agency of the State," but when a claim for compensation is presented the Commission is constituted a "special" tribunal, "is invested with certain judicial functions, and possesses the powers and incidents of a court . . . ." *Hanks v. Utilities Co.*, 210 N.C. 312, 319-20, 186 S.E. 252, 257 (1936). The Commission is not a court of general jurisdiction and "has no jurisdiction except that conferred upon it by statute." *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551, 28 A.L.R.3d 1057, 1062 (1966).

The original version of the statute gave the Industrial Commission jurisdiction over accidents happening outside North Carolina only where the contract of employment was made in North Carolina, where the employer's place of business was in North Carolina and where the employee was a resident of North Carolina. *Reaves v. Mill Co.*, 216 N.C. 462, 465, 5 S.E.2d 305, 306 (1939). In 1963 the statute was amended to grant the Industrial Commission jurisdiction over accidents happening outside the State where the contract of employment was made in North Carolina, the employer's place of business was in North Carolina and the contract of employment did not expressly provide for services exclusively outside North Carolina. The 1963 amendment deleted the requirement that the employee be a resident of North Carolina in order for the provisions of our workers' compensation statute to apply to claims for injuries resulting from out-of-state accidents. *Rice v. Boy Scouts*, 263 N.C. 204, 206, 139 S.E.2d 223, 226 (1964). The statute as currently written grants jurisdiction to the Industrial Commission only if the contract of employment is made in North Carolina or if the employer's principal place of business is in North Carolina. G.S. 97-36. *See also Leonard v. Johns-Manville Sales Corp.*, 59 N.C. App. 454, 297 S.E.2d 147 (1982), *rev'd*, 309 N.C. 91, 305 S.E.2d 528 (1983).

In determining whether the contract of employment in the present case was made in this State for the purposes of G.S. 97-36, the Commission apparently applied the "last act" test. For the purpose of determining whether North Carolina courts have jurisdiction over a foreign corporation under the long-arm statute by virtue of a contract made in this State, our appellate courts have held that for a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here. *Goldman v. Parkland*, 277 N.C. 223, 176 S.E.2d 784 (1970) (holding that where the final act necessary to make a binding agreement was its acceptance, and the plaintiff accepted by signing the agreement in Greensboro, North Carolina, the trial court had personal jurisdiction over the foreign corporation); *Realty Corp. v. Savings & Loan Assoc.*, 40 N.C. App. 675, 253 S.E.2d 621, *disc. rev. denied and appeal dismissed*, 297 N.C. 612, 257 S.E.2d 435 (1979), *cert. denied*, 469 U.S. 835, 83 L.Ed.2d 69 (1984) (holding that letter sent from North Carolina borrower to Florida lender was an acceptance of lender's offer and was the final act necessary to make a binding obligation); *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E.2d 229 (1978) (holding that a lease and assumption agree-

ment executed by defendant corporation in Texas, but executed by plaintiff in North Carolina provided statutory basis for personal jurisdiction over the foreign corporation). Our courts also employ this "last act" test to establish where a contract was made for the purpose of determining whether North Carolina law will be applied to interpret the contract. *See Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967).

[1] General Statute 97-36 does not specify the test to be applied in determining whether the contract of employment was made in North Carolina. The test employed under our long-arm statute and under our choice of laws doctrine is in our opinion the appropriate test to be applied under G.S. 97-36. Although the Commission's findings of jurisdictional facts are not conclusive on appeal, *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976), our review of the record in the present case reveals that the events which culminated in plaintiff accepting employment with defendant, and the "last act" for purposes of conferring extraterritorial jurisdiction on the Commission, occurred in Indiana rather than in North Carolina.

[2] As to the Commission's determination that defendant's principal place of business was not in North Carolina, plaintiff contends that an employer such as defendant which conducts substantial business within the boundaries of North Carolina, which maintains more than the jurisdictionally requisite number of employees and which maintains substantial business facilities in North Carolina should not be allowed to avoid the burdens imposed by our laws when the employer clearly has enjoyed the protection of these laws. Plaintiff contends that all that is required by G.S. 97-36 is a showing of minimum contacts and, therefore, defendant's substantial business presence within our State is sufficient to confer jurisdiction on the Industrial Commission even though the evidence shows that defendant's principal place of business is not located in North Carolina.

We agree that defendant's business contacts with North Carolina are sufficiently substantial to meet minimum due process requirements. G.S. 1-75.4(1)(d). Where the language of a statute is clear and unambiguous, however, there is no room for judicial construction and the courts must apply the statute so as to give the language of the statute its plain and definite meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d

184, 192 (1977). The provision of this statute, which requires that the employer's principal place of business be located in North Carolina in order to confer jurisdiction on the Commission over claims arising from accidents occurring outside North Carolina, is clear and unambiguous; therefore, we are required to apply the provision giving the words their plain and definite meaning. This Court cannot separate the word "principal" from place of business and establish a minimum contacts test for application of our compensation statute to accidents which occur outside North Carolina. The function of the court is to declare what the law is and not what the law ought to be. *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 633, *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1968). All the evidence of record in the present case shows that defendant's principal place of business was in Indianapolis, Indiana. For this reason, although it is also uncontradicted that defendant conducted substantial business in North Carolina, we are constrained to conclude that the Industrial Commission did not have jurisdiction over the claim arising from plaintiff's out-of-state injury.

Additionally, plaintiff contends that the recitals of place of performance of plaintiff's work were wholly false and wrongfully calculated to secure the employee's promise that he would forego compensation for work-related injuries except for any compensation provided by the State of Indiana, that this agreement contravened the public policy of our State as codified at G.S. 97-6 and, thus, that the agreement is void. Plaintiff also proposes that defendant's practice of flying prospective employees to Indiana and "hiring" the employees while in Indiana was an elaborate scheme designed to relieve defendant of any obligation which might arise under our Workers' Compensation Act. We do not reach the issue of whether the agreement was void in this particular case since we have decided that the Commission lacks jurisdiction over the claim in any event.

Having established that G.S. 97-36 is a statutory provision limiting the Commission's jurisdiction over claims arising from accidents which occur outside North Carolina and having concluded that under the facts in this case the jurisdictional prerequisites are not present, we affirm the decision of the Commission that it lacked jurisdiction to determine this matter.

Affirmed.

Judges WELLS and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

BARBARA ROGERS, PLAINTIFF v. T.J.X. COMPANIES, INC. AND MICHAEL NOURSE, DEFENDANTS

No. 9010SC243

(Filed 18 December 1990)

1. **False Imprisonment § 2.1 (NCI3d)— store customer—false imprisonment—genuine issues of material fact**

Evidence offered by defendants in support of their motion for summary judgment raised genuine issues of material fact sufficient to support plaintiff's claim of false imprisonment where deposition testimony offered by defendants tended to show: when plaintiff left defendant corporation's store, she was stopped by defendant store employee who produced a badge identifying himself as the store security officer and asked plaintiff to accompany him back into the store; plaintiff felt that she had no choice but to return to the store; the security officer directed plaintiff to his office at the rear of the store and followed closely behind her as she walked to the office; the security officer asked another store employee to join them in his office; once inside his office, the security officer questioned plaintiff for approximately thirty-five minutes about some merchandise he had allegedly seen her remove from the lingerie department; after repeated attempts by plaintiff to prove to the security officer that she had not taken any of the store's merchandise and had not been in the lingerie department that day, defendant threatened to handcuff her to a chair, call the police, and have her arrested; and the security officer told plaintiff that she could not leave until she had signed documents stating that she released the store from liability and indicating that she understood her *Miranda* rights.

Am Jur 2d, False Imprisonment § 92.

2. **False Imprisonment § 1 (NCI3d)— detention of customer—no immunity under statute**

A merchant who detained plaintiff customer was not immune from liability for false imprisonment under N.C.G.S. § 14-72.1(c) where the jury could find from the evidence that the detention was unreasonable.

Am Jur 2d, False Imprisonment § 94.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 ALR3d 998.

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

The trial court erred in entering summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress where plaintiff alleged in her deposition that she was stopped by defendant security officer as she was leaving defendant corporation's store; the officer asked her to accompany him back into the store and followed closely behind her as she proceeded through the store toward his office in plain view of customers shopping in the store; the officer repeatedly demanded the store's merchandise but refused to tell plaintiff what particular item she had allegedly taken; the officer resisted all attempts by plaintiff to prove her innocence, insulted plaintiff with statements such as "Usually the dog that barks the loudest is guilty," and threatened to handcuff her to a chair and have her arrested; following the incident plaintiff became very sick, nervous and upset and required medical attention for a sleep disturbance; and plaintiff felt "stripped of her dignity."

Am Jur 2d, Torts § 39.

4. **Damages § 11.2 (NCI3d)— punitive damages—insufficient forecast of evidence**

Plaintiff's forecast of evidence failed to show elements of outrageous conduct which would support her claim for punitive damages in actions for false imprisonment and intentional infliction of emotional distress.

Am Jur 2d, Damages § 906.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by plaintiff from *Hight (Henry W., Jr.), Judge*. Judgment entered 3 October 1989 in Superior Court, WAKE County. Heard in the Court of Appeals 26 September 1990.

This is a civil action wherein plaintiff seeks to recover compensatory and punitive damages from defendants for personal injuries allegedly resulting from plaintiff's detention by the individual defendant, Michael Nourse, at the T.J. Maxx department store in Cary, North Carolina.

On 10 February 1989, defendants filed a motion for summary judgment. In support of their motion, defendants submitted the depositions of plaintiff and the individual defendant, Michael Nourse.

The evidence presented tends to show the following: On 17 July 1988, at approximately 4:30 p.m., plaintiff went to the T.J. Maxx department store (hereinafter "the store") on Western Boulevard Extension in Cary, North Carolina to shop for kitchen linens and tablecloths. When she entered the store, plaintiff was wearing bermuda shorts, a white T-shirt and sandals and carrying a pocketbook. Plaintiff's pocketbook contained two cosmetic bags, her wallet, her glasses case, a packet of material samples in a clear ziploc bag, and a couple of pens. Upon entering the store, plaintiff went directly to the cosmetic counter. From there, she proceeded to the linen area. Plaintiff then exited the store after stopping to look at some dishes and cut glass. Plaintiff was in the store approximately twenty to twenty-five minutes. At no time during this period did plaintiff enter the lingerie department or examine any lingerie.

Plaintiff exited the store through the front door, and as she stepped onto the sidewalk outside the store, defendant Michael Nourse approached her, showed her a badge, and identified himself as store security. He then told plaintiff that he would like to speak to her about some merchandise and asked her to return to the store with him. Plaintiff told him that he was making a mistake, but agreed to reenter the store. Once inside, defendant Nourse directed plaintiff to his office at the rear of the store. Plaintiff proceeded to defendant Nourse's office while he followed closely behind her in plain view of customers shopping in the store. On the way to his office, defendant Nourse asked another store employee, Sheri Steffens, to accompany them into his office.

Once inside his office, defendant Nourse told plaintiff to have a seat. Plaintiff responded by stating that "this would not take long because [she] was a good customer, [and] had not stolen anything" to which Nourse responded, "Good customers will steal." Plaintiff then immediately dumped the contents of her pocketbook onto defendant Nourse's desk. At this point, he told plaintiff again to have a seat. He then left plaintiff and Ms. Steffens alone in the office for approximately fifteen minutes. Plaintiff stated that during this time she did not feel free to leave because he had told her that he would be back. After waiting several minutes for defendant Nourse to return, plaintiff picked up her belongings from the desk and told Ms. Steffens that she had not done anything wrong and wished to leave, and asked her to page defendant Nourse. At this point, he returned to the office stating, "Ma'am, all we want is our merchandise. What did you do with it? You were in our lingerie department." Plaintiff explained to him that she had not been in the lingerie department and did not know what he was talking about. Once again, plaintiff dumped the contents of her pocketbook onto defendant Nourse's desk. She picked up the pack of material samples and said, "If you saw anything go into my purse, it was this. I took it out and put it back in, and that is all I have. I have not stolen anything."

Defendant Nourse continued demanding the store's merchandise, but refused to tell plaintiff what item in particular he was looking for. Plaintiff reached to pick up her belongings from the desk, and defendant Nourse told her not to touch them. Then, he called her attention to a clipboard hanging on the wall of his office. He handed the clipboard to plaintiff and asked her to read a piece of paper attached to it. The paper stated that the store had the right to detain and question anyone that it had reason to believe had been shoplifting. After reading the paper, plaintiff handed it back to defendant Nourse and said that he was wrong, that she had not shoplifted, and that she did not have anything that belonged to the store. Defendant Nourse responded, "Ma'am, I was only five feet from you the whole time you were in the store." Plaintiff then stated, "If you were only five feet from me, you know I was not in the lingerie department. You know I didn't steal anything."

Next, defendant Nourse asked plaintiff to read a card containing a statement of the *Miranda* warnings. Plaintiff asked him why he was giving that card to her if she was not under arrest. He

told her that he could "handcuff [her] to the chair," call the police, and have her arrested. While plaintiff tried to read the card, defendant Nourse continued questioning her about where she had put the merchandise. Plaintiff asked him to be quiet so that she could read the card, to which he responded, "Usually the dog that barks the loudest is guilty." Again, plaintiff stated that she had not stolen anything and that she was being falsely accused.

At this point, defendant Nourse told plaintiff that he had some paperwork to do and that he would call the police if she wanted them to settle it. Plaintiff, being "scared to death" patted down the pockets of her shorts and indicated the contents of her pocketbook on his desk. Defendant Nourse then asked plaintiff for her driver's license, social security number and telephone number. Plaintiff provided the requested information, and defendant Nourse told plaintiff that she had to sign the statement of her "*Miranda* rights" and a statement releasing the store from liability before she could leave. Plaintiff signed both statements without filling in any other information on the sheets. She then asked for copies of her signed statements, but defendant Nourse refused to give them to her. Finally, after approximately thirty minutes, defendant Nourse told plaintiff that she was free to go.

As a result of this incident, plaintiff became sick, nervous, upset and experienced trouble sleeping for which she required medical treatment. She further alleged that she "can't go shopping [sic] anymore" because defendant Nourse "stripped [her] of every bit of dignity [she] ever felt like [she] had in a store to feel free to shop without people looking over [her] shoulder and accusing [her] of something."

On 3 October 1989, Judge Hight granted defendants' motion for summary judgment and dismissed plaintiff's action with prejudice finding "that there is no genuine issue of any material fact." Plaintiff appealed.

Toms, Reagan & Montgomery, by Frederic E. Toms and Charles H. Montgomery, for plaintiff, appellant.

Maupin Taylor Ellis & Adams, P.A., by Thomas W. H. Alexander, Sharon L. Hartman, and Glenn E. Gray, for defendants, appellees.

HEDRICK, Chief Judge.

[1] Plaintiff first contends the trial court erred in granting defendants' motion for summary judgment with respect to her false imprisonment claim "for the reason that the pleadings and deposition testimony presented disclose that there are genuine issues as to material facts and that the defendants are not entitled to judgment as a matter of law." We agree.

Summary judgment is a drastic remedy and must be used cautiously. *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E.2d 908 (1983). Summary judgment is appropriate only where there are no genuine and material issues of fact to be resolved. *Harris-Teeter Supermarkets, Inc. v. Hampton*, 76 N.C. App. 649, 334 S.E.2d 81, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 857 (1985).

The tort of false imprisonment is defined in *Hales v. McCrory-McLellan Corp.*, 260 N.C. 568, 133 S.E.2d 225 (1963), as follows:

> 'False imprisonment is the illegal restraint of the person of any one against his will' (citation omitted). . . . There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment . . . .

Id. at 570, 133 S.E.2d at 227.

In the present case, defendants contend that plaintiff failed to establish facts sufficient to support her claim of false imprisonment. However, the deposition testimony offered by defendants in support of their motion for summary judgment tends to show that: (1) plaintiff was stopped by defendant Nourse as she was leaving the store; (2) defendant Nourse produced a badge identifying himself as store security and asked plaintiff to accompany him back into the store; (3) plaintiff felt that she had no choice but to return to the store with defendant Nourse; (4) defendant Nourse directed plaintiff to his office at the rear of the store and followed closely behind her as she walked to the office; (5) defendant Nourse asked another store employee to join them in his office; (6) once inside his office, defendant Nourse questioned plaintiff for approx-

imately thirty to thirty-five minutes about some merchandise he had allegedly seen her remove from the lingerie department; (7) after repeated attempts by plaintiff to prove to defendant Nourse that she had not taken any of the store's merchandise and that in fact she had not been in the lingerie department that day, defendant threatened to "handcuff her to a chair," call the police, and have her arrested; and (8) defendant told plaintiff that she could not leave until she had signed documents stating that she released the store from liability and which indicated that she knew and understood her *Miranda* rights. We find that this evidence, offered by defendants in *support* of their claim for summary judgment, supports the inference that plaintiff was "compelled to remain where [she did] not wish to remain, or to go where [she did] not wish to go" and certainly raises genuine issues of material fact sufficient to support plaintiff's claim of false imprisonment.

[2] Defendants further argue that the trial court properly granted summary judgment in their favor with respect to this claim because "N.C.G.S. 14-72.1 provides a complete defense . . . ", and they were thus entitled to judgment as a matter of law. G.S. 14-72.1(c) provides in pertinent part:

> A merchant, or his agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is in a reasonable manner for a reasonable length of time, if in detaining or in causing the arrest of such person, the merchant, or his agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section.

In *Ayscue v. Mullen*, 78 N.C. App. 145, 336 S.E.2d 863 (1985), this Court held that G.S. 14-72.1 does not absolutely immunize merchants and their employees from liability for false imprisonment and that a jury could find that the statute is not applicable where the evidence shows that the detention was unreasonable. We cannot say that a jury could not find the conduct of defendant Nourse to have been unreasonable; and, therefore, defendants were not entitled to judgment as a matter of law based on this statute.

We therefore hold the trial court erred in entering summary judgment against plaintiff on her claim for false imprisonment,

and the judgment of the trial court will be reversed with respect to this claim.

[3] Next, plaintiff contends the trial court erred in entering summary judgment in favor of defendants on her claim for intentional infliction of emotional distress. Again, we agree with plaintiff and must reverse the judgment of the trial court with respect to this claim.

In *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), our Supreme Court held that liability for the tort of intentional infliction of emotional distress arises "when a defendant's conduct exceeds all bounds of decency tolerated by society and the conduct causes mental distress of a very serious kind." *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988). To assert a claim for intentional infliction of emotional or mental distress, plaintiff must allege facts sufficient to show: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). "The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Id.*

In the present case, plaintiff alleged facts in her pleadings sufficient to assert a claim for intentional infliction of emotional distress. Furthermore, in her deposition, plaintiff alleges that defendant Nourse (1) followed closely behind her as she proceeded through the store toward his office in plain view of customers shopping in the store at the time; (2) repeatedly demanded the store's merchandise, but refused to tell plaintiff what item in particular he was looking for; (3) resisted all attempts by the plaintiff to prove her innocence; (4) insulted plaintiff with statements such as "Usually the dog that barks the loudest is guilty"; and (5) threatened to "handcuff her to a chair" and have her arrested. Plaintiff stated that following the incident she became very sick, nervous and upset and required medical attention for a sleep disturbance. Additionally, plaintiff felt "stripped of her dignity."

In a similar case, our Supreme Court found that a store employee's "unrelenting attack, in the face of explanation, was both extreme and reckless under the circumstances." *West*, 321 N.C. at 706, 365 S.E.2d at 626. We find the facts of the case *sub judice* sufficient to raise genuine issues of material fact as to whether "defendant's actions indicate a reckless indifference to the likelihood

that they will cause emotional distress" and hold the trial court erred in entering summary judgment against plaintiff with respect to her claim for intentional infliction of emotional distress.

[4] Finally, plaintiff contends the trial court erred in entering summary judgment against her and dismissing her claim for punitive damages. On this contention, we disagree with plaintiff.

It is well settled that a plaintiff seeking to collect punitive damages must allege and prove "some additional element of a social behavior which goes beyond the facts necessary to create a simple case of tort." *Shugar v. Guill*, 51 N.C. App. 466, 469, 277 S.E.2d 126, 129 (1981). "Punitive damages are recoverable only in tort actions where there are allegations and proof of facts showing some aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and willful wrong, insult, indignity or a reckless or wanton disregard of plaintiff's rights." *Id.* Whether plaintiff has alleged and proven sufficient facts to bring the case within the rule allowing punitive damages is a question of law for the court. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976).

In the present case, we hold the forecast of evidence lacks "those elements of outrageous conduct which would subject the defendants to punitive damages." *Ayscue*, at 149, 336 S.E.2d at 866. Therefore, the trial court properly granted defendants' motion for summary judgment with respect to this claim.

The result is: summary judgment in favor of defendants with respect to plaintiff's claims for false imprisonment and intentional infliction of emotional distress will be reversed; summary judgment in favor of defendants with respect to plaintiff's claim for punitive damages will be affirmed.

Reversed in part; affirmed in part.

Judge ARNOLD concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

I agree that the record materials considered by the court raise issues of fact as to plaintiff's claims for false imprisonment and

intentional infliction of emotional distress, and that those claims were erroneously dismissed. I do not agree that the materials fail to support plaintiff's claim for punitive damages; for, in my opinion, when looked upon from plaintiff's viewpoint, they indicate that defendant Nourse's conduct was deliberately and persistently insulting and oppressive in willful and wanton disregard for her feelings and rights.

TERESA D. EVANS, ADMINISTRATRIX OF THE ESTATE OF BARRY STEVEN POSEY v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, DIVISION OF VICTIM AND JUSTICE SERVICES, CRIME VICTIMS COMPENSATION COMMISSION

No. 9010SC301

(Filed 18 December 1990)

1. **Criminal Law § 1666 (NCI4th)— crime victim compensation—misconduct of claimant—proximate cause**

Where a crime victim compensation claimant's injuries are a direct result of the criminally injurious conduct of another, the claimant's own misconduct must have been a proximate cause of those injuries in order for the Crime Victims Compensation Commission to deny or reduce an award for those injuries under N.C.G.S. § 15B-11(b).

Am Jur 2d, Criminal Law §§ 1052, 1053, 1056-1058.

Statutes providing for governmental compensation for victims of crime. 20 ALR4th 63.

2. **Criminal Law § 1666 (NCI4th)— crime victim compensation—what constitutes misconduct—reasonable man standard**

The conduct of a claimant is misconduct if it is not within the accepted norm or standard of proper behavior, which includes unlawful conduct, and the test for accepted norms and proper behavior is determined by use of a reasonable man standard or what a reasonable person would have done under similar or like circumstances.

Am Jur 2d, Criminal Law §§ 1052, 1053, 1056-1058.

Statutes providing for governmental compensation for victims of crime. 20 ALR4th 63.

3. Criminal Law § 1666 (NCI4th)— crime victim compensation—contributory misconduct—denial or reduction of award—appellate review

The Crime Victims Compensation Commission should be affirmed in denying or reducing a claimant's benefits for contributory misconduct if there is in the record substantial evidence that a person of ordinary prudence would have reasonably foreseen that the conduct in question would lead to an injurious result, and if this conduct was unlawful or breached the standard of conduct acceptable to a reasonable person. If there is not substantial evidence in the record to support such conclusions, any order of the Commission reducing or barring claimant's recovery must be reversed.

Am Jur 2d, Criminal Law §§ 1052, 1053, 1056-1058.

Statutes providing for governmental compensation for victims of crime. 20 ALR4th 63.

4. Criminal Law § 1666 (NCI4th)— crime victim compensation claim—denial for contributory misconduct—insufficient evidence

A decision by the Crime Victims Compensation Commission denying compensation to a stabbing victim on the ground that he had engaged in "contributory misconduct" was unsupported by substantial evidence where it was based upon findings that the victim left a bar with two women, one of whom had two tattoos on her back, under the assumption that they were going dancing at another bar, and that one of the women stabbed the victim after they had pulled into an empty parking lot.

Am Jur 2d, Criminal Law §§ 1052, 1053, 1056-1058.

Statutes providing for governmental compensation for victims of crime. 20 ALR4th 63.

APPEAL by petitioner from judgment entered 17 January 1990 by *Judge I. Beverly Lake, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 28 September 1990.

Bode, Call & Green, by S. Todd Hemphill, for petitioner-appellant.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Assistant Attorney General, for the State.

GREENE, Judge.

The petitioner appeals from a judgment filed in Wake County Superior Court on 18 January 1990, affirming a final determination of the North Carolina Crime Victims Compensation Commission (Commission) which denied compensation to the petitioner for injuries suffered by one Barry Steven Posey, a crime victim.

Barry Steven Posey originally filed a claim for compensation on 17 November 1987. Subsequently, Posey was killed in an incident unrelated to this case. Following his death, Posey's estate was substituted as claimant and his sister, Teresa D. Evans, was named administratrix of the estate. On 15 July 1988, the Director of the Crime Victims Compensation Commission entered a recommendation that the Commission allow compensation in the amount of $11,157.94. On 2 August 1988, the Commission entered its determination that "[n]ot withstanding the recommendation of the Director, by unanimous vote of the members claimant's claim for compensation is disallowed."

The petitioner then filed a petition for a contested case and the matter was heard by an Administrative Law Judge. The Administrative Law Judge entered the following findings of fact and conclusions of law:

Findings of Fact

1. The Petitioner-claimant in this case is the estate of Barry Steven Posey, Teresa D. Evans, Administratrix.

2. Respondent has the authority and responsibility under North Carolina General Statutes Chapter 15B, the ["]North Carolina Crime Victims Compensation Act," to administer the Act in North Carolina, including the investigation and award or denial of claims.

3. Barry Steven Posey was an interstate truck driver. On October 15, 1987 he completed a delivery in Monroe, North Carolina and received permission to proceed to a truck stop in Charlotte for diesel fuel and to await further instructions.

4. While awaiting further instructions from his dispatcher, Barry S. Posey met another driver and his wife and went with them to Kiker's Bar on Freedom Drive in Charlotte to drink beer and play pool.

5. Upon arriving at Kiker's Bar Barry S. Posey met two women in the parking lot as the women were parking their car.

6. The two women, identified as Sandy and Bonanita, invited Barry S. Posey to sit at a table with them and to play pool.

7. Barry S. Posey and the two women each were consuming beer in the bar.

8. While sitting with the two women, Bonanita offered to show and did show Barry S. Posey a tattoo on her right shoulder blade. Sandy asked Barry S. Posey if he would like to go dancing with the two women after they played pool. Barry S. Posey accepted the offer with the understanding that the women would transport him to the proposed location for dancing and afterward return him to his truck at the truck stop.

9. After playing some pool, Barry S. Posey asked to see Bonanita's tattoo again. She showed him the tattoo again as well as another one located on her left shoulder blade.

10. Sandy, Bonanita, and Barry S. Posey left Kiker's Bar with Barry S. Posey sitting in the middle and with Sandy driving.

11. Sandy produced a partially filled bottle of Jim Beam liquor from which she drank before passing it to Barry S. Posey who also drank from it and passed it on to Bonanita.

12. Sandy was weaving as she drove. Bonanita and Barry S. Posey both asked Sandy to let someone else drive but she refused.

13. Sandy proceeded along Freedom Drive in Charlotte and pulled into an empty parking lot. Barry S. Posey stated that "it's closed", to which Sandy replied, "yea it is."

14. The three of them got out of the car in the empty parking lot. Bonanita disappeared from Barry S. Posey's view. Sandy came around the front of the car, turned to her right and stabbed Barry S. Posey in the stomach.

15. Barry S. Posey ran into the woods off the empty parking lot after being stabbed and, after falling down, crawled and hid in a wooded area adjacent to the parking lot.

16. After a period of time the car drove off and Barry S. Posey lay still. The car returned and someone called out "Barry" in a low voice and then drove off.

17. After waiting for a while, Barry S. Posey crawled out of the woods and yelled for help.

18. A nearby resident heard Barry S. Posey's calls for help and summoned police and emergency medical personnel.

19. Barry S. Posey was transported to Charlotte Memorial Hospital and treated for the stab wound. The following costs were incurred:

Charlotte Memorial Hospital	$ 8,547.60
Charlotte Memorial Hospital	1,584.84
Charlotte Radiology	51.00
Southeast Anesthesia	756.00
Charlotte-Mecklenburg Health Services	61.00
Mecklenburg County Ambulance	157.50
TOTAL	$11,157.94

20. Barry S. Posey filed a claim for compensation under G.S. Chapter 15B on November 17, 1987. He recovered from his injury and and [sic] returned to his employment. On May 16, 1988 Barry S. Posey was killed in a motor vehicle accident in York, Pennsylvania while in the course of his employment.

21. Barry S. Posey was divorced and left no dependents. His sister, Teresa D. Evans, was named administratrix of his estate.

22. Barry S. Posey fully cooperated with law enforcement and Respondent in the investigation of this matter.

23. Barry S. Posey made the following payments against expenses before his death:

Charlotte Memorial Hospital	$ 550.00
Charlotte Radiology	51.00
Southwest Anesthesia	756.00
Charlotte-Mecklenburg Health Services	61.00
Mecklenburg County Ambulance	157.50
TOTAL	$1,575.50

24. Claimant has no source of reimbursement from any collateral source of benefits for the remaining economic loss.

25. Respondent's Director Robert A. Hassell has certified that claimant has no collateral source for compensation in connection with this case.

26. G.S. 15B-11 lists grounds for denial of a claim for compensation or for reduction of an award. None of the grounds for denial or reduction of award are present in this case.

27. G.S. 15B-10(d) requires the Commission Director, in this case Robert A. Hassell, to "send each claimant a written statement of a decision made under subsection (a) or (b) (of G.S. 15B-10) that gives the reasons for the decision." No written statement containing the reasons for the decision of the Commission in this case was sent to claimant Barry S. Posey or to his estate, Teresa D. Evans, Administratrix.

Conclusions of Law

1. The parties are properly before the Office of Administrative Hearings.

2. Criminally injurious conduct is defined in G.S. 15B(5) which provides, in pertinent part:

> "(c)riminally injurious conduct" means conduct that occurs or is attempted in this State which by its nature poses a substantial threat of personal injury or death, and is punishable by fine or imprisonment or death or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this State . . . ."

3. The stabbing which Barry S. Posey suffered on the night of October 15, 1987 in Charlotte, North Carolina was criminally injurious conduct because it resulted in serious bodily injury and is conduct punishable by a fine and imprisonment under G.S. Chapter 14.

4. G.S. 15B-4, regarding awards of compensation, provides that "compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met."

5. Substantial evidence is defined in G. S. 15B-2(12a) as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion."

6. The substantial evidence in this contested case establishes that Barry Steven Posey was a victim of criminally injurious conduct within this State on October 15, 1987 and is not disqualified under any of the conditions stated in G.S. 15B-11. His estate, Teresa D. Evans, Administratrix, is entitled to an award in the amount of $11,157.94 as sought in his petition and found appropriate by Commission Director Robert A. Hassell.

7. The decision of the Commission to deny compensation to claimant in this case is defective for two reasons.

   1. the Commission failed to use proper procedure within the meaning of G.S. 150B-23(a)(3) when its Director failed to give claimant written reasons under G.S. 15B-11(d) for its decision to deny compensation and,

   2. the Commission's decision denying compensation is not supported by any evidence and is arbitrary and capricious within the meaning of G.S. 150B-23(a)(4) as described by the North Carolina Supreme Court in *Commissioner of Insurance v. Rate Bureau*, because the decision does not show any reasoned decision making or careful consideration of the facts and the law in this case. 300 N.C. 381, 269 S.E.2d 547 (1980).

Based upon these findings of fact and conclusions of law, the Administrative Law Judge recommended to the Commission that it "reverse its earlier decision denying compensation to the estate of Barry Steven Posey and that the Commission award the sum of $11,157.94 to the estate of Barry Steven Posey, Teresa D. Evans, Administratrix."

The Commission declined to adopt the Administrative Law Judge's finding of fact number 27, and conclusions of law number 6 and number 7. The Commission concluded as follows:

6. Based upon the findings of fact of the Administrative Law Judge, the actions of the deceased, Barry Steven Posey, in picking up two women at a bar and leaving with them, as well as the facts and circumstances under which the criminally

injurious conduct occurred, establishes that the deceased engaged in contributory misconduct which directly resulted in the injuries he suffered and the claim of his estate is, therefore, disqualified under the provisions of G.S. 15B-11(b). This conclusion is consistent with other determinations of this Commission.

The petitioner appealed the Commission's decision to the Superior Court, which affirmed the Commission's final determination.

The dispositive issue is whether the Commission's final conclusion that Barry Steven Posey engaged in contributory misconduct is supported by substantial evidence.

The North Carolina Crime Victims Compensation Act is set out in Chapter 15B of the North Carolina General Statutes. In this case, the petitioner's claim for compensation was denied pursuant to a provision of the Act which provides that "[a] claim may be denied and an award of compensation may be reduced upon finding contributory misconduct by the claimant or a victim through whom he claims." N.C.G.S. § 15B-11(b) (1987).

The scope of review of a decision of an administrative agency is governed by the Administrative Procedure Act set out in Chapter 150B of the North Carolina General Statutes. *Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue*, 95 N.C. App. 151, 381 S.E.2d 815 (1989). Under the act, this Court may "reverse or modify" the agency's decision only 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.

N.C.G.S. § 150B-51(b) (1987). " 'Review in this court is further limited to the exceptions and assignments of error set forth to the order of the superior court' and by the arguments made in brief." *Walls* at 154, 381 S.E.2d at 817 (quoting *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987)). The petitioner asserts that the Commission's decision to deny compensation based on a conclusion that Posey engaged in contributory misconduct is (1) not supported by substantial evidence, (2) arbitrary and capricious, and (3) erroneous as a matter of law. However, the essential argument in the petitioner's brief is that the Commission's decision is not supported by substantial evidence, and we address only that issue.

In applying N.C.G.S. § 150B-51(b)(5), the Court employs the "whole record" test to determine whether the Commission's conclusions are supported by substantial evidence. *Walls* at 154, 381 S.E.2d at 817.

> The 'whole record' test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached . . . . 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . It is more than a scintilla or a permissible inference.

Watson at 639, 362 S.E.2d at 296 (quoting *Lacky v. N.C. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)). Since there is no dispute as to the facts in this case, the question before us is whether the Commission's findings constitute substantial evidence that Posey engaged in "contributory misconduct" as that term is used under N.C.G.S. § 15B-11(b). We conclude that it does not.

The question of what constitutes "contributory misconduct" is one of first impression for this Court. In determining the legislative intent behind the use of these words, we are guided by a 1989 amendment to the North Carolina Crime Victims Compensation Act which provides that "[t]he Commission shall follow the rules of liability applicable to civil tort law in North Carolina." N.C.G.S. § 15B-4(a) (1990).

The legislature authorized the Commission to reduce or deny a claim for compensation where "misconduct" on the part of an injured claimant in some way contributed to the claimant's injury. Consistent with principles of tort law, in order for claimant's misconduct to be contributory it must combine with criminal action on the part of another to become a "real, efficient and proximate cause of the injury." *Crouse v. Woodruff*, 48 N.C. App. 719, 721, 269 S.E.2d 706, 708 (1980). This Court has defined proximate cause as

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, *and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.*

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (emphasis added). "The test of foreseeability as an element of proximate cause does not require that the actor should have been able to foresee the injury in the precise manner in which it actually occurred." *Adams v. Mills*, 312 N.C. 181, 193, 322 S.E.2d 164, 172 (1984). Neither does the actor need to foresee the events which are merely possible, but only those which are reasonably foreseeable. *Id.*

[1] Therefore, where a claimant's injuries are a direct result of the criminally injurious conduct of another, the claimant's own misconduct must have been a proximate cause of those injuries in order for the Commission to deny or reduce a claim under the statute.

[2] Misconduct is defined as follows:

> A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior. . . .

Black's Dictionary 901 (5th edition 1979). While misconduct includes unlawful conduct as a matter of law, it may be something less than unlawful conduct, though more than an act done in poor taste. Misconduct requires some deviation from the accepted norm or standard of proper behavior. Accordingly, the conduct of the claimant is misconduct if it is not within the accepted norm or standard of proper behavior, which includes unlawful conduct. Consistent with principles of tort law, the test for determining accepted norms

and proper behavior is best determined by use of a reasonable man standard or what a reasonable person would have done under similar and like circumstances.

[3] Accordingly, if there is in the record substantial evidence that a person of ordinary prudence would have reasonably foreseen that the conduct in question would lead to an injurious result, and if this conduct was unlawful or if it breached the standard of conduct acceptable to a reasonable person, the Commission should be affirmed in denying or reducing claimant's benefits. If there is not substantial evidence in the record to support such conclusions, any order of the Commission reducing or barring claimant's recovery under the Act must be reversed.

[4] Here we do not find substantial evidence in the record to support the conclusion of the Commission that the claimant engaged in contributory misconduct.

The Commission's findings indicate that Posey left a bar with two women, one of whom had two tattoos on her back, under the assumption that they were going dancing at another bar. The record contains no substantial evidence to support a conclusion that Posey's injuries were reasonably foreseeable in light of his conduct. The Commission argues that it could rightfully conclude under the circumstances that Posey had solicited for purposes of prostitution, and that it is logical to assume there was a dispute over the price or when payment was to be made, leading to an assault on Posey and an attempted robbery. The record indicates no such conclusion on the part of the Commission, nor is there any evidence, much less any substantial evidence, to support the scenario suggested by the Commission. Accordingly, we find that the Commission erred by denying compensation to the petitioner.

Reversed and remanded.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

STATE OF NORTH CAROLINA v. CLARENCE MEBANE

No. 9015SC172

(Filed 18 December 1990)

1. **Narcotics § 1.3 (NCI3d); Constitutional Law § 34 (NCI3d)— one possession of cocaine—two offenses charged—double jeopardy**

Although possession of one gram or more of cocaine is not a lesser included offense of possession of cocaine with intent to sell or deliver, double jeopardy principles bar punishment for both offenses for possession of the same cocaine.

Am Jur 2d, Criminal Law §§ 267, 277, 279; Drugs, Narcotics, and Poisons §§ 41, 48; Indictments and Informations § 223.

2. **Narcotics § 1.3 (NCI3d); Constitutional Law § 34 (NCI3d)— one possession of cocaine—two offenses charged—double jeopardy**

Principles of double jeopardy barred defendant's punishment for possession with intent to sell and deliver cocaine under N.C.G.S. § 90-95(a)(1) and trafficking in the same cocaine by possession under N.C.G.S. § 90-95(h)(3).

Am Jur 2d, Criminal Law §§ 267, 277, 279; Drugs, Narcotics, and Poisons §§ 41, 48; Indictments and Informations § 223.

3. **Narcotics § 6 (NCI3d)— vehicle used in commission of felony—no felony use of vehicle—forfeiture proper**

The trial court did not err in ordering the forfeiture of defendant's Corvette pursuant to N.C.G.S. § 90-112(c)(4) where defendant was convicted of felonies under the Controlled Substances Act in which the vehicle was used, notwithstanding defendant was convicted only for a misdemeanor under N.C.G.S. § 90-108(b) involving the violation of using the vehicle.

Am Jur 2d, Forfeitures and Penalties § 25.

APPEAL by defendant from a judgment entered 11 August 1989 by *Judge J. Milton Read, Jr.* in ALAMANCE County Superior Court. Heard in the Court of Appeals 13 November 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Patricia F. Padgett, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant-appellant.

LEWIS, Judge.

The first question on appeal is whether the defendant's conviction and sentencing under the North Carolina Controlled Substances Act by the trial court violated the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution and in the North Carolina Constitution, article I § 19. The second question on appeal is whether the trial court erred in ordering the forfeiture of the defendant's vehicle pursuant to the Act.

The defendant was convicted and punished for committing the following crimes on 20 January 1989 in one drug related transaction:

1) felonious possession of cocaine under N.C.G.S. § 90-95(a)(3);

2) possession with intent to sell or deliver cocaine under N.C.G.S. § 90-95(a)(1);

3) sale and delivery of cocaine under N.C.G.S. § 90-95(a)(1);

4) conspiracy to sell or deliver cocaine under North Carolina common law; and

5) maintaining of vehicle (Chevrolet Corvette) under N.C.G.S. § 90-108(a)(7).

The defendant was convicted and punished for committing the following crimes on 3 February 1989 in one drug related transaction:

1) felonious possession of cocaine under N.C.G.S. § 90-95(a)(3);

2) possession with intent to sell or deliver cocaine under N.C.G.S. § 90-95(a)(1);

3) sale and delivery of cocaine under N.C.G.S. § 90-95(a)(1); and

4) conspiracy to sell or deliver cocaine under North Carolina Common Law.

The defendant was convicted and punished for committing the following crimes on 17 February 1989 in one drug related transaction:

1) felonious possession of cocaine under N.C.G.S. § 90-95(a)(3);

2) possession with intent to sell or deliver cocaine under N.C.G.S. § 90-95(a)(1);

3) maintaining of vehicle (Nissan Maxima) under N.C.G.S. § 90-108(a)(7);

4) conspiracy to traffic in cocaine under North Carolina Common law;

5) trafficking in cocaine by possession under N.C.G.S. § 90-95(h)(3); and

6) sale and delivery of cocaine under N.C.G.S. § 90-95(a)(1).

The trial judge consolidated the cases for judgment and sentenced the defendant to fifteen years imprisonment. The trial judge also ordered that the defendant forfeit the Chevrolet Corvette allegedly involved in the cocaine transaction of 20 January 1989.

Double Jeopardy

"The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted). Here we are concerned with multiple punishments for the same offense.

The defendant was convicted of possession with intent to sell or deliver a controlled substance and possessing a controlled substance under N.C.G.S. § 90-95(a)(1) and N.C.G.S. § 90-95(a)(3) on three separate occasions. The defendant committed one transaction relating to the two convictions on each of the days in question. The defendant argues that principles of double jeopardy bar the defendant's conviction and punishment for both offenses on each of the days in question. We agree.

[1] Although possession of one gram or more of cocaine is not a lesser included offense of possession of cocaine with intent to sell or deliver, the North Carolina Supreme Court has held and this Court has recently reiterated that double jeopardy principles bar punishment for both offenses for possession of the same cocaine. *State v. McGill*, 296 N.C. 564, 568, 251 S.E.2d 616, 619 (1979); *State v. Williams*, 98 N.C. App. 405, 407, 390 S.E.2d 729, 730 (1990).

Unless and until the Supreme Court overrules these decisions, we are bound by their holdings.

The trial judge should have instructed the jury to first consider the offense of possession with intent to sell and deliver cocaine; if, and only if, the jury found him not guilty of that offense were they to consider the offense of possession of cocaine. *McGill*, 296 N.C. at 569, 251 S.E.2d at 620. Therefore, we arrest judgment on the three charges of possession of cocaine. With respect to this issue, we find no error in the three convictions on possession with intent to sell and deliver.

[2] The defendant also contends that principles of double jeopardy bar defendant's punishment for possession with intent to sell and deliver cocaine under N.C.G.S. § 90-95(a)(1), and trafficking in the same cocaine by possession under N.C.G.S. § 90-95(h)(3). The defendant argues that possession with intent to sell and deliver cocaine is a lesser included offense of trafficking in cocaine by possession.

In *State v. Sanderson*, 60 N.C. App. 604, 610, 300 S.E.2d 9, 14, *disc. rev. denied*, 308 N.C. 679, 304 S.E.2d 759 (1983), the North Carolina Court of Appeals held that possession of marijuana with intent to sell is a lesser included offense of trafficking by possessing one hundred pounds of marijuana. The court did not expressly review the elements of each offense involved and, thus, did not explain its conclusion. However, the court did apply the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932), to determine whether the offenses are not the "same offense" within the meaning of the double jeopardy clause. The *Blockburger* test is: "whether each provision requires proof of an additional fact which the other does not." *Id.* Applying the *Blockburger* test, the court held in *Sanderson* that "possession under G.S. 90-95(a) does not require proof of any additional facts beyond those required under G.S. 90-95(h)(1), therefore convictions under both statutes violate defendants' protection against double jeopardy, and the convictions for the lesser included offenses should be vacated." *State v. Sanderson*, 60 N.C. App. 604, 610, 300 S.E.2d 9, 14, *disc. rev. denied*, 308 N.C. 679, 304 S.E.2d 759 (1983).

After *State v. Sanderson*, the North Carolina Supreme Court held in *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), that "[i]n single prosecution situations, the presumption raised by the *Blockburger* test is only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding

on state courts nor conclusive." *Id.* at 455, 340 S.E.2d at 709. Likewise, "where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose cumulative punishments under the statutes." *Id.* at 453, 340 S.E.2d at 708 (quoting *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983)). Thus, the *Blockburger* test is not considered determinative of whether the defendant's rights not to be put in double jeopardy have been violated. Instead, we must address the legislature's intent.

To prove the offense of possession with intent to sell and deliver cocaine, the State must show: 1) possession of cocaine and 2) that the person intended to sell or deliver it. *State v. McGill*, 296 N.C. 564, 568, 251 S.E.2d 616, 619 (1979). To prove the offense of trafficking in cocaine by possession the State must show: 1) possession of cocaine and 2) that the amount possessed was 28 grams or more. However, the *purpose* behind N.C.G.S. § 90-95(h), which deters the statutorily defined "trafficking," is to prevent large scale distribution of controlled substances. *State v. Tyndall*, 55 N.C. App. 57, 60-61, 284 S.E.2d 575, 577 (1981). "Our legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale." *Id.* Although the offense of trafficking under N.C.G.S. § 90-95(h) does not specifically require that the State prove that the person intended to sell or deliver the controlled substance, such intent is implied from the large amount of controlled substance possessed. This is most likely the reason why the Court of Appeals in *Sanderson* found the two convictions and punishments in violation of the double jeopardy clause when *Blockburger* was considered controlling. Without such rationale, a double jeopardy question may not have arisen. *See State v. Swann*, 322 N.C. 666, 678, 370 S.E.2d 533, 540 (1988) (citing *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987)).

Although we are mindful of *Gardner*, we are bound to follow the North Carolina Supreme Court's reasoning in *McGill*, and the recent cases that comply with its holding that the defendant not be punished for such closely related offenses. *See State v. McGill, supra; State v. Williams*, 98 N.C. App. 405, 407, 390 S.E.2d 729, 730 (1990). The only difference between this case and *McGill* is the amount of the controlled substance in the defendant's possession: in *McGill*, the offense was possession of more than one ounce

of marijuana; and here, the offense is possession of 28 grams or more of cocaine ("trafficking").

Moreover, we hold that the legislature did not intend that cumulative punishments be imposed for possession with intent to sell and deliver cocaine and trafficking in the same cocaine by possession at the same time. "The traditional means of determining the intent of the legislature where the concern is only one of multiple punishments for two convictions in the same trial include the examination of the subject, language, and history of the statutes." *State v. Gardner*, 315 N.C. 444, 461, 340 S.E.2d 701, 712 (1986).

Legislative history reveals that the legislature intended the trafficking statute to prevent large scale distribution of controlled substances. *State v. Tyndall*, 55 N.C. App. 57, 60-61, 284 S.E.2d 575, 577 (1981). On its face, it is apparent that the statute forbidding possession with intent to sell and deliver cocaine was also passed to prevent distribution of cocaine. The only difference is the amount of cocaine distributed. Thus, regardless of whether the two statutes proscribe the same conduct under the *Blockburger* test, the legislature did not intend that a defendant be punished for both of the statutory crimes in issue. We arrest judgment on the charge of possession with intent to sell and deliver on 17 February 1989. The conviction and punishment for trafficking by possession of cocaine is without error.

Forfeiture of the Vehicle

[3] The defendant's last contention is that the trial court erred in ordering the forfeiture of the defendant's Corvette. The defendant argues that if he is found not guilty of N.C.G.S. § 90-108(7), the forfeiture of a vehicle under N.C.G.S. § 90-112 is prohibited. N.C.G.S. § 90-108 provides in pertinent part:

> (a) It shall be unlawful for any person: . . .
>
> (7) To knowingly keep or maintain any . . . vehicle . . . , which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.
>
> (b) Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the criminal pleading alleges that the violation was committed intentionally, and upon trial

it is specifically found that the violation was committed intentionally, such violations shall be a Class I felony.

N.C.G.S. § 90-112 provides in pertinent part:

> The following shall be subject to forfeiture: . . .
>
> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the provisions of this Article;
>
> (2) All money . . . acquired, used, or intended for use, in selling, . . . delivering, . . . a controlled substance in violation of this Article . . .
>
> (4) All conveyances, including vehicles, . . . which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2) except that . . .
>
> c. No conveyance shall be forfeited unless the violation involved is a felony under this Article. . . .

In *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985), *disc. rev. denied*, 315 N.C. 591, 341 S.E.2d 31 (1986), this Court interpreted N.C.G.S. §§ 90-108(a)(7) and 90-108(b) to mean that if a defendant is found to have "knowledge that [the vehicle] is resorted to by persons for the use, keeping or selling of controlled substances" that the defendant is guilty of a misdemeanor; however, if the defendant is found to have "intent that it be so used" the defendant shall be guilty of a class I felony. *Id.* at 242, 337 S.E.2d at 89. Here, the defendant was found guilty of a misdemeanor under N.C.G.S. § 90-108.

The primary question is whether the word "felony" in N.C.G.S. § 90-112(a)(4)c. is a reference to 1) only a felony involving the violation of using the vehicle, or 2) a felony involving violations in which the vehicle was used. The defendant in this case was found guilty of felonies in which the vehicle was used. However, the defendant claims that because he was only found guilty of a misdemeanor involving the violation of using the vehicle, that N.C.G.S. § 90-112(a)(4)c. does not allow forfeiture of the Corvette.

The intent of the legislature controls the interpretation of a statute. *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294 (1975).

The legislative history of the statute demonstrates that the intent of the legislature was to expand the situations in which a vehicle could be forfeited. Originally, N.C.G.S. § 90-112(4)(c) only allowed forfeiture if the defendant violated 90-95(a)(1) or 90-95(a)(2). N.C.G.S. § 90-112(4)(c) (Supp. 1971). The change in the statute was called "AN ACT TO PERMIT FORFEITURE OF CONVEYANCES UNDER ADDITIONAL CIRCUMSTANCES." (1973 N.C. Sess. Laws ch. 447.) As the language indicates, the legislature intended to expand the statute to cover all felonies under the Act in which a vehicle was used. Thus, we find no error in the forfeiture of the defendant's Corvette.

Conclusion

As the convictions of possession of cocaine and the conviction of possession of cocaine with the intent to sell and deliver cocaine on 17 February 1989 may have influenced the trial judge's sentence after consolidation of the cases for judgment under N.C.G.S. § 15A-1340.4(b), we remand the case for resentencing.

89 CRS 6298—possession of cocaine—arrested;

89 CRS 6298—possession with intent to sell or deliver cocaine—no error;

89 CRS 6300—knowingly maintaining a vehicle for purpose of unlawfully keeping or selling controlled substances—forfeiture—no error;

89 CRS 6301—possession of cocaine—arrested;

89 CRS 6301—possession with intent to sell or deliver cocaine—no error;

89 CRS 6304—possession of cocaine—arrested;

89 CRS 6304—possession with intent to sell or deliver cocaine—arrested;

89 CRS 6305—trafficking in cocaine by possession—no error.

Remand for Resentencing.

Chief Judge HEDRICK and Judge DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

INVESTORS TITLE INSURANCE COMPANY, PLAINTIFF v. DAVID F. HERZIG, JERRY S. CHESSON, SOUTHEASTERN SHELTER CORPORATION, LEE L. CORUM, AND EVERETT, CREECH, HANCOCK & HERZIG, A PARTNERSHIP, DEFENDANTS

No. 9014SC259

(Filed 18 December 1990)

1. **Assignments § 2 (NCI4th)— action for fraud and unfair and deceptive trade practices—assignability**

An action for fraud and unfair and deceptive trade practices, arising from a breach of contract, was assignable.

Am Jur 2d, Assignments § 40.

2. **Evidence § 24 (NCI3d)— defendant present at deposition—no right of defendant to challenge admissibility**

Defendant could not challenge the admissibility of a deposition where defendant was present at the deposition and had an opportunity to develop testimony by cross-examination.

Am Jur 2d, Depositions and Discovery § 192.

3. **Evidence § 31.2 (NCI3d)— original trust agreement lost—reasonable efforts to find document—copy admissible**

The trial court did not err in admitting into evidence a copy of plaintiff's trust agreement where the original had not been located when the matter came on for trial despite plaintiff's attempts to obtain it, and the trial judge appeared to be of the opinion that plaintiff had made every reasonable effort to obtain the original from another defendant. N.C.G.S. § 8C-1, Rules 1003, 1004.

Am Jur 2d, Evidence §§ 453, 462.

4. **Attorneys at Law § 60 (NCI4th)— unfair and deceptive trade practice—award of attorney's fees proper**

The trial court did not abuse its discretion in awarding plaintiff reasonable attorney's fees where the court found that defendant's conduct, as found by the jury, constituted an unfair and deceptive trade practice.

Am Jur 2d, Costs § 72.

5. Partnership § 5 (NCI3d)— torts by law partner—apparent authority of partner

In an action against a law partnership where plaintiff alleged fraud, breach of warranties, and unfair and deceptive trade practices based on the actions of a lawyer in certifying title to property in which he had an interest, the trial court properly directed verdict against defendant partnership on the issue of apparent authority where the evidence tended to show that certifying title to property was within the partnership's general practice of law; lawyers in the partnership had previously certified title to properties in which they had an interest; and the partnership was unable to establish that the lawyer in question lacked authority to certify titles on behalf of the partnership and that plaintiff had notice of such restriction.

Am Jur 2d, Attorneys at Law § 216.

Vicarious liability of attorney for tort of partner in law firm. 70 ALR3d 1298.

APPEAL by defendants Southeastern Shelter Corporation and Everett, Creech, Hancock & Herzig from judgments and orders entered 6 September 1989 and 2 October 1989 by *Judge Orlando F. Hudson* in DURHAM County Superior Court. Heard in the Court of Appeals 25 September 1990.

Plaintiff brought this civil action alleging fraud, breach of warranties and unfair and deceptive trade practices. From the denial of its motion for a new trial, Southeastern Shelter Corporation appeals. From the denial of its motion for judgment notwithstanding the verdict or, in the alternative, a new trial, Everett, Creech, Hancock & Herzig appeals.

Maxwell & Hutson, P.A., by James H. Hughes and Stephanie C. Powell, for plaintiff-appellee.

McCall & James, by Randolph M. James and M. Lee Decker, for defendant-appellant Southeastern Shelter Corporation.

Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, Elizabeth L. Riley and J. Keith Tart, for defendant-appellant Everett, Creech, Hancock & Herzig.

JOHNSON, Judge.

In September of 1985, the Redevelopment Commission of the City of Henderson ("Commission") recorded a Declaration of Restrictions which imposed certain restrictions and covenants on a tract of land located in Vance County. The tract consisted of four parcels, which were purchased by the City of Henderson for redevelopment. Southeastern Shelter Corporation ("Southeastern") was selected to be the redeveloper of this land. Henderson Heights, Ltd. ("Henderson Heights") entered into an agreement with Southeastern and Jerry Chesson whereby Southeastern assigned to Henderson Heights all of the rights under the contract with the Commission. Pursuant to the terms of the assignment agreement between Henderson Heights and Southeastern, Henderson Heights was to pay Southeastern and Chesson jointly $100,000 for the assignment of the contract with the Commission. On 11 November 1980, the Commission deeded the property to Henderson Heights.

Henderson Heights subsequently failed to pay Southeastern the payments pursuant to the assignment agreement, thereby causing Southeastern and Chesson to refuse to close on the land. To complete the closing, Henderson Heights conveyed two parcels of the land, described as Tracts 1 and 4 on 18 November 1980 to Southeastern as security for the $45,000 due and owing under the assignment agreement. Simultaneously, Henderson Heights and Southeastern entered into a contract for sale whereby upon payment of the $45,000 the two parcels would be conveyed back to Henderson Heights. Henderson Heights, nevertheless, failed to pay the $45,000 owed to Southeastern.

Defendant David Herzig thereafter told Southeastern and Chesson that he could obtain a $30,000 loan by holding the two parcels in the law partnership's trust account and using the purchase agreement between Southeastern and Henderson Heights as security. Southeastern subsequently signed a deed and simultaneously assigned the contract for sale from Henderson Heights to secure the loan from the partnership. By deed dated 2 February 1981, the two parcels were conveyed from Southeastern to Herzig.

On 27 March 1981, Herzig obtained a $30,000 loan from Planters National Bank ("Planters Bank"), evidenced by a promissory note being secured by a Deed of Trust encumbering Tracts 1 and 4. Planters Bank, in turn, was presented with a preliminary certificate of title signed by Attorney Lee Corum which noted three excep-

tions. Corum, over the objection of Herzig, went to Vance County and discovered the deed from Southeastern to Herzig was not recorded and listed an additional exception on the subject property. The attorney's final certificate of title was signed by Herzig below the typed name of his former partnership, Everett, Creech, Hancock & Herzig ("the Partnership"). Herzig reported that he had examined the condition of the title vested in him and that there were no violations of the restrictive covenants and deed restrictions.

Based upon the final certificate of title, a title insurance policy on the subject property was issued in favor of Planters Bank by Investors Title Insurance Company ("Investors Title"). For payment of $30,000 plus interest, Planters Bank assigned all rights arising out of the claim to Investors Title. A loan was thereafter made by Planters Bank, with Chesson receiving $20,000 of the proceeds and Herzig receiving the remaining $10,000.

Herzig subsequently defaulted on the $30,000 note and Planters Bank then instituted a foreclosure proceeding. Foreclosure, however, was denied as a result of a set of restrictive covenants placed on the property in 1975.

On appeal, Southeastern brings forth eight questions for this Court's review and the Partnership brings forth another five. While we have considered all issues raised by both appeals, our discussion is limited to those issues we believe to be dispositive.

SOUTHEASTERN'S APPEAL

[1] First, Southeastern contends that the claims of conspiracy to commit fraud and conspiracy to commit unfair and deceptive trade practices are nonassignable as a matter of law. We disagree.

While we recognize that the law regarding the assignability of claims of conspiracy to commit unfair trade practices is barren, we also recognize that the "assignability of things in action is the rule, and nonassignability the exception." 6 Am. Jur. 2d, Assignments, § 40 (1963). Further,

> [i]n a jurisdiction following the rule that a right of action for fraud and deceit is nonassignable, it has been held that such rule does not preclude an insurance company . . . from setting up as a defense . . . the fraud and deceit of the insured in procuring the issuance of the policy from such other company.

Id. Thus, an action sounding in fraud and deceit is assignable. 40 ALR 4th 684, *Assignability of Claim for Legal Malpractice.* This is an action sounding in both fraud and unfair and deceptive trade practices.

Investors Title's position is predicated upon the holding in *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595 (1984), wherein the Texas Court of Appeals determined that an insured was entitled to assign a portion of her claim against her insurer and that the assignment properly assigned her cause of action under the Texas Deceptive Trade Act and the Insurance Code. The insured's assignment of her rights to a third party was a direct result of the insurance company's failure to timely settle a claim in accordance with her insurance policy. Southeastern's position, however, is premised primarily upon *Southern Railway Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 318 S.E.2d 872 (1984), and similar cases wherein it was held that an assignment of a personal injury claim or an intentional tort claim was ineffective under common law and was contrary to public policy.

Unquestionably, the case *sub judice* is one of first impression. In our research, we have found no North Carolina law addressing this issue and therefore look to other jurisdictions for guidance. Upon review of both arguments, we must agree with Investors Title's position. In making such a holding, it should be noted that the instant case is clearly an action arising out of a breach of contract not an action arising out of an intentional tort, as Southeastern would have us believe.

Pursuant to an agreement between Investors Title and Planters Bank, Planters Bank received $30,000 plus interest and Investors Title received all of Planters Bank's rights arising out of any claim against Herzig. Investors Title was therefore entitled to all of the rights that Planters Bank had against Herzig when Herzig defaulted on the $30,000 note, including an action for unfair and deceptive trade practices. *See Allstate Ins. Co. v. Kelly, supra.* Having found nothing contrary to public policy in holding that this action for fraud and unfair and deceptive trade practices, arising from a breach of contract, is assignable, we overrule this assignment.

[2] Second, Southeastern challenges the admissibility of the deposition of David Herzig taken at a foreclosure proceeding. In light of the fact that Southeastern was present at the deposition of

Herzig and had an opportunity to develop testimony by cross-examination, this assignment is without merit.

[3] Third, Southeastern contends that the trial court erred in admitting into evidence plaintiff's trust agreement. Specifically, Southeastern argues that Investors Title's introduction of the duplicated trust agreement raised genuine issues of authenticity.

G.S. § 8C-1, Rule 1003 provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Pursuant to G.S. § 8C-1, Rule 1004, a duplicate is admissible if the original is, *inter alia*, lost or destroyed, not obtainable or in the possession of the opponent.

When this matter came on for trial, the original trust agreement had not been located despite Investors Title's attempt to issue a *subpoena duces tecum* to defendant Herzig. In determining that the duplicate trust agreement was admissible pursuant to the N.C. Rules of Evidence, the trial judge appears to have been of the opinion that Investors Title made every reasonable effort to obtain the original trust agreement from defendant Herzig, but was unsuccessful. We agree. This assignment is overruled.

[4] Last, Southeastern contends that the trial court abused its discretion in awarding attorney's fees. We disagree.

Reasonable attorney's fees may be awarded for a G.S. § 75-1.1 violation upon a specific finding by the trial judge that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such action." G.S. § 75-16.1.

Here, the trial judge found that Southeastern's conduct, as found by the jury, constituted an unfair and deceptive trade practice and "[t]hat the act of committing fraud upon Planters National Bank constitute[d] a willful and intentional act entitling the Plaintiff to reasonable attorney's fees pursuant to G.S. § 75-16.1." These findings of fact are supported by competent evidence. Therefore, the trial judge's determination that Investors Title was entitled to an award of reasonable attorney's fees is supported by the findings of fact.

[5] First, the Partnership contends that the trial court erred in granting Investors Title's motion for directed verdict on the issue of apparent authority.

In ruling on a motion for directed verdict, the trial court "must consider the evidence in the light most favorable to the nonmovant and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant." *Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 240, 388 S.E.2d 178, 181 (1990), *quoting Williams v. Jones*, 322 N.C. 42, 48, 366 S.E.2d 433, 437 (1988). Where there are any conflicts, inconsistencies or contradictions, the nonmovant is to be given the benefit of every inference to be reasonably drawn in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E.2d 788 (1978).

A partnership is liable for loss or injury caused "by any wrongful act or omission of any partner *acting in the ordinary course of business of the partnership or with the authority of his copartners* . . . to the same extent as the partner so acting or omitting to act." G.S. § 59-43 (emphasis added). *See also Heath v. Craighill, Rendleman, Ingle & Blythe, supra* at 241, 388 S.E.2d at 181. Where a principal has held the agent out as possessing certain authority, or where he has permitted the agent to represent that he possesses certain authority such agent will be said to have apparent authority. *Zimmerman v. Hogg & Allen*, 22 N.C. App. 544, 207 S.E.2d 267, *rev'd on other grounds*, 286 N.C. 24, 209 S.E.2d 795 (1974). The principal's liability will then be determined by the authority the third person, in the exercise of reasonable care, justifiably believed that the agent had, under the circumstances. *Id.*

The Partnership cites several cases, namely, *Zimmerman v. Hogg & Allen, supra*, to support its contention that "a lawyer who in the name of the law partnership and without the knowledge, consent or authority of his co-partners fraudulently certifies title to property for the purpose of personal gain does not act in the ordinary course of the business of the partnership." Such reliance, however, is misapplied. *Zimmerman v. Hogg & Allen, supra*, and similar cases do not stand for the basic proposition that upon review of liability, the threshold issue is whether the *wrongful performance of the act* falls within the scope of the partnership's practice of law. Instead, these cases provide that the ultimate issue is whether

the *general act* committed by an attorney in the partnership was within the scope of the partnership's practice of law.

In light of the uncontroverted facts before this Court which reveal that certifying title to property is within the Partnership's general practice of law; other evidence which further reveals that lawyers in the Partnership have previously certified title to property in which that lawyer had an interest; and the Partnership's inability to establish that: (1) defendant Herzig lacked authority to certify titles on behalf of the Partnership and (2) Investors Title had notice of such restriction, the trial court properly directed verdict against the Partnership on the issue of apparent authority. This assignment is overruled.

Finally, the Partnership contends that the trial court erred in granting Investors Title's motion for directed verdict on the defense of estoppel and in failing to consider the issues of proximate cause and constructive knowledge. We disagree.

To establish a claim of equitable estoppel, the following elements must be met:

> (1) The conduct to be estopped must amount to false representation or concealment of material fact or at least which is reasonably calculated to convey the impression that the facts are other than and inconsistent with those which the party afterwards attempted to assert;
>
> (2) Intention or expectation on the party being estopped that such conduct shall be acted upon by the other party or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon;
>
> (3) Knowledge, actual or constructive, of the real facts by the party being estopped;
>
> (4) Lack of knowledge of the truth as to the facts in question by the party claiming estoppel;
>
> (5) Reliance on the part of the party claiming estoppel upon the conduct of the party being sought to be estopped;
>
> (6) Action based thereon of such a character as to change his position prejudicially.

Transit, Inc. v. Casualty Co., 285 N.C. 541, 206 S.E.2d 155 (1974). In this case, the defense of equitable estoppel is unavailable to the Partnership since it failed to put forth evidence to support this defense. Similarly, the Partnership has failed to meet its burden of showing that the trial court improperly issued a directed verdict on the issues of proximate cause and constructive notice.

Accordingly, the judgment of the trial court is

Affirmed.

Judges EAGLES and PARKER concur.

DEE E. ROBERTS, EMPLOYEE, PLAINTIFF v. ABR ASSOCIATES, INCORPORATED, EMPLOYER, AND U. S. FIRE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9010IC337

(Filed 18 December 1990)

1. **Appeal and Error § 418 (NCI4th)— argument not supported by assignment of error—assignment not argued in brief—no consideration on appeal**

An argument not supported by an assignment of error and an assignment of error not argued in the brief will not be considered on appeal. N.C.G.S. § 1A-1, Rule 10(a).

Am Jur 2d, Appeal and Error § 649.

2. **Master and Servant § 89.4 (NCI3d)— workers' compensation—recovery from third party—reimbursement for treatment expenses—showing required**

An employer or insurance carrier claiming a right to reimbursement under N.C.G.S. § 97-10.2(f)(1)(c) must show, pursuant to N.C.G.S. § 97-25, (1) that the treatment provided was in the form of medical treatment, surgical treatment, hospital treatment, nursing services, medicines, sick travel, rehabilitation services, or other treatment including medical and surgical supplies *and* (2) that the treatment provided was reasonably required either to effect a cure, give relief, or lessen the period of plaintiff's disability.

Am Jur 2d, Workmen's Compensation §§ 429, 437, 440.

3. Master and Servant § 89.4 (NCI3d)— workers' compensation—recovery from third party—reimbursement of rehabilitation expenses—insufficient findings

The Industrial Commission made insufficient findings to support its conclusion that an expense of $3,301.31 incurred by defendant insurance carrier for a rehabilitation specialist constituted a lien pursuant to N.C.G.S. § 97-10.2 on third-party settlement funds collected by plaintiff where the Commission made no findings as to whether the services were reasonably required either to effect a cure, give relief, or lessen the period of disability.

Am Jur 2d, Workmen's Compensation §§ 429, 437, 440.

4. Master and Servant §§ 75, 89.4 (NCI3d)— workers' compensation—rehabilitation expenses—Commission approval unnecessary

The requirement of Industrial Commission approval pursuant to N.C.G.S. § 97-90(a) does not apply to the costs of rehabilitation services provided under N.C.G.S. § 97-25. Therefore, defendant carrier did not need the Commission's approval for expenses incurred for rehabilitation services provided to plaintiff in order to obtain reimbursement for those expenses.

Am Jur 2d, Workmen's Compensation § 387.

APPEAL by plaintiff from order of North Carolina Industrial Commission filed 29 December 1989. Heard in the Court of Appeals 25 October 1990.

Rand, Finch & Gregory, P.A., by Anthony E. Rand, for plaintiff-appellant.

Crossley McIntosh & Prior, by Francis B. Prior, for defendant-appellees.

GREENE, Judge.

The plaintiff appeals the Opinion and Award of the Industrial Commission filed 29 December 1989 in which the Full Commission concluded that an expense of $3,301.31 incurred by the defendant's insurance carrier (defendant-carrier) constitutes a lien pursuant to N.C.G.S. § 97-10.2 (1985) on third party settlement funds collected by the plaintiff.

On 25 November 1986, the plaintiff was injured in an automobile accident caused by a third party's negligence. Because the accident occurred during the course and scope of her employment, the defendant, the plaintiff's employer, paid workers' compensation benefits to and on behalf of the plaintiff. Eventually, the plaintiff settled her negligence claim with the third party for $75,000. Between the time of the accident and the resulting settlement, the defendant-carrier, also a defendant in this case, employed American Rehabilitation, Inc. to provide services for the plaintiff. With regard to the services performed, the Full Commission made the following finding of fact:

> 1. On or about January 9, 1987, the defendant carrier employed the services of American Rehabilitation to coordinate the treatment rendered by the physicians involved and to attempt to return the employee to gainful employment as soon as he [sic] was medically able to do so. The duties performed by the rehabilitation specialists included arranging appointments with the various physicians, accompanying the employee to the physicians, reviewing the doctors' reports and making verbal as well as written reports on the employee's progress. The rehabilitation specialist, on one occasion. [sic] identified a potential medical problem, which up to that point had not been addressed by the employee's treating physician, took the initiative and obtained an appointment with a plastic surgeon. She then accompanied the employee with the pertinent medical information to that physician. From time to time she issued reports on the progress of the case to the insurance carrier. In addition, she discussed from time to time the progress of the plaintiff's treatment with the plaintiff's attorney.

After American Rehabilitation provided these services, it submitted its bill for $3,301.31 to the defendant-carrier, and the defendant-carrier paid it.

From the $75,000 settlement with the negligent third party, the plaintiff reimbursed the defendant for the workers' compensation benefits paid to or on behalf of the plaintiff. However, the plaintiff refused to reimburse the defendant-carrier for the amount spent on the services rendered by American Rehabilitation. The defendant-carrier claims it is entitled to a lien pursuant to N.C.G.S. § 97-10.2 in the amount of $3,301.31, the amount it paid for the services. In May, 1988, Commissioner William H. Stephenson ordered

that $3,301.31 of the settlement proceeds be kept in escrow account pending a determination concerning the defendant-carrier's rights. This case was first heard before Deputy Commissioner Richard B. Ford on 7 February 1989. In his Opinion and Award filed 14 March 1989, Deputy Commissioner Ford denied the defendant-carrier's claim of lien against the settlement funds in the amount of $3,301.31. On appeal, the Full Commission reversed Deputy Commissioner Ford's decision, thus granting the defendant-carrier's claim of lien.

The issues are: (I) whether there was any competent evidence before the Full Commission to support its findings of fact; (II) whether the Full Commission's conclusions of law are supported by adequate findings of fact; and (III) whether the requirement of Commission approval pursuant to N.C.G.S. § 97-90(a) (1985) applies to the costs of rehabilitation services provided under N.C.G.S. § 97-25 (1985).

I

The plaintiff argues that three portions of the Full Commission's two findings of fact are unsupported by the evidence. When an appellate court reviews an appeal from the Industrial Commission, the court

> is limited in its inquiry 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 Commission's findings of fact justify its legal conclusions and decision.

Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 120-21, 334 S.E.2d 392, 394 (1985). If there is competent evidence in the record to support the Commission's findings of fact, those findings will be conclusive on appeal even where other evidence in the record supports contrary findings of fact. *Id.*

(A)

First, the plaintiff argues that the following portion of the Commission's first finding of fact is unsupported by the evidence. We agree.

> On or about January 9, 1987, the defendant carrier employed the services of American Rehabilitation . . . to attempt to return the employee to gainful employment as soon as he [sic] was medically able to do so.

The record contains no evidence to support this finding of fact. When asked about the services American Rehabilitation provides to injured employees, Ms. Bender, one of the rehabilitation nurses who provided services for the plaintiff, testified:

> Normally, we coordinate the medical. Go with the claimant to the doctor's office and try to help facilitate getting the claimant back to work as early as possible when the doctor says that they are medically ready to return to work.

The defendants argue that this evidence supports the Commission's finding of fact. Although Ms. Bender's subsequent testimony tends to show that she in fact coordinated the medical aspects of the plaintiff's case, and that she accompanied the plaintiff to the doctor's office, there is no evidence in the record to support the finding that the defendant-carrier employed American Rehabilitation to attempt to return *the plaintiff* to gainful employment as soon as she was medically able. However, because this finding is not necessary to support any relevant conclusion, the fact that it is not supported in the evidence is immaterial.

(B)

Second, the plaintiff argues that another portion of the first finding of fact is unsupported by the evidence. It reads:

> The rehabilitation specialist, on one occasion. [sic] identified a potential medical program, which up to that point had not been addressed by the employee's treating physician, *took the initiative* and obtained an appointment with a plastic surgeon. [Emphasis added.]

The plaintiff argues that from the defendant-carrier's own records it is obvious that the rehabilitation specialist had not *taken the initiative*, rather, it was the plaintiff's attorney who had done so. In a report made by Ms. Bender, Ms. Bender wrote:

> Dr. Logel did not think the numbness in the bottom of the claimant's left foot was significant. After Dr. Logel left the room, I told the claimant that I had made an appointment for her to be evaluated by Dr. John Briggs, a plastic surgeon, on Tuesday, April 14, 1987. She seemed pleased. *She said her attorney had told her about another plastic surgeon with whom he was going to schedule an appointment, but she agreed to go to Dr. Briggs.* [Emphasis added.]

This report supports the questioned portion of the Commission's first finding of fact. This report tends to show that Ms. Bender had scheduled an appointment with the plastic surgeon before speaking with the plaintiff about the matter, that at the time Ms. Bender made the appointment, she did not know that the plaintiff's attorney was thinking about doing the same with another plastic surgeon, and of even more importance, that the plaintiff's attorney had not scheduled an appointment for the plaintiff at the time Ms. Bender scheduled the plaintiff's appointment. Because Ms. Bender was the first to schedule an appointment for the plaintiff with a plastic surgeon, and because she scheduled the appointment without knowing about the plaintiff's attorney's plans, the Commission's finding of fact is supported by the evidence.

(C)

[1] Third, the plaintiff argues that the services were not rendered pursuant to N.C.G.S. § 97-25 because the Commission did not make any findings of fact that the services were rendered to "effect a cure," "give relief," or would tend to "lessen the period of disability." Because this argument is unsupported by an assignment of error, we do not consider it on this appeal. N.C.R. App. P. 10(a). Furthermore, because the plaintiff does not argue in her brief her third assignment of error questioning the sufficiency of the evidence to support a portion of the Commission's second finding of fact, this assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(5).

II

The plaintiff argues that the Commission's following conclusions of law are not supported by adequate findings of fact. The conclusions of law read as follows:

> 1. The expense of $3,301.31 incurred by the defendant carrier with American Rehabilitation constitutes a lien on the third party settlement funds for said sum of $3,301.31 under the provisions of G.S. 97-10.2.
>
> 2. The defendant carrier is entitled to subrogation out of said third party settlement funds for said sum of $3,301.31, subject to counsel fee.

Specifically, the plaintiff argues that before the Commission may conclude that the defendant-carrier is entitled to a lien or subroga-

tion under N.C.G.S. § 97-10.2(f)(1) (1985), the Commission must first find as fact pursuant to N.C.G.S. § 97-25 that the services were rehabilitative in nature as here contended by the defendant-carrier and reasonably "required to effect a cure or give relief" to the plaintiff. We agree.

"Although the Commission's findings are conclusive on appeal if supported by competent evidence, its legal conclusions are reviewable by our appellate courts. . . . Particularly, when the factual findings are insufficient to determine the rights of the parties, the court *may* remand to the Commission for additional findings." *Grant v. Burlington Indust.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985) (citation omitted) (emphasis added). *See also Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 70 S.E.2d 706 (1952).

North Carolina Gen. Stat. § 97-10.2(f)(1)(c) (1985) provides that reimbursement may be had by the employer "for all benefits by way of compensation or medical treatment expenses paid" for the injured employee. Additionally, N.C.G.S. § 97-10(g) (1985) provides that "[t]he insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer. . . ." Therefore, through subrogation, the employer's insurance carrier is also entitled to reimbursement under N.C.G.S. § 97-10.2(f)(1)(c). To determine what types of medical treatment expenses may be provided by an employer or its insurance carrier, we must look to N.C.G.S. § 97-25. Under N.C.G.S. § 97-25, a statute entitled "Medical treatment and supplies," rehabilitation services are listed as a type of treatment which may be provided by an employer or its insurance carrier. The statute reads, in pertinent part, as follows:

> 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, . . . shall be provided by the employer.

[2, 3] As N.C.G.S. § 97-10.2(f)(1)(c) and N.C.G.S. § 97-25 relate to the same subject matter, they must be construed *in pari materia*. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E.2d 363 (1968); *Becker County Sand & Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E.2d 19 (1967). A fair and reasonable reading of these statutes requires the party claiming a right to

reimbursement under N.C.G.S. § 97-10.2(f)(1)(c), i.e., the employer or its insurance carrier, to show, pursuant to N.C.G.S. § 97-25, (1) that the treatment provided was in the form of medical treatment, surgical treatment, hospital treatment, nursing services, medicines, sick travel, rehabilitation services, or other treatment including medical and surgical supplies *and* (2) that the treatment provided was reasonably required for at least one of three purposes, namely, to effect a cure, give relief, or lessen the period of the plaintiff's disability. Additionally, the Commission must make findings of fact regarding (1) whether the treatment provided was in the form of medical treatment, surgical treatment, hospital treatment, nursing services, medicines, sick travel, rehabilitation services, or other treatment including medical and surgical supplies *and* (2) whether it was reasonably required to effect a cure, give relief, or lessen the period of the plaintiff's disability. *Schofield v. The Great Atlantic & Pacific Tea Co.*, 299 N.C. 582, 595, 264 S.E.2d 56, 64-65 (1980); *Hudson v. Mastercraft Div., Collins & Aikman Corp.*, 86 N.C. App. 411, 418, 358 S.E.2d 134, 138, *disc. rev. denied*, 320 N.C. 792, 361 S.E.2d 77 (1987). Here, the Commission failed to make the necessary finding as to whether the services were reasonably required for one of the three purposes. Because there are insufficient findings to determine the rights of the parties under N.C.G.S. § 97-10.2(f)(1)(c) and N.C.G.S. § 97-25, we vacate the Opinion and Award of the Full Commission and remand it for findings consistent with this opinion, such findings to be made on the evidence previously presented to the Commission.

III

[4] The plaintiff argues that the Commission's conclusion of law that N.C.G.S. § 97-90(a) does not apply in this case is an error of law. Specifically, the plaintiff argues that because the defendant-carrier did not seek approval from the Industrial Commission as required by N.C.G.S. § 97-90(a) for the charges paid to American Rehabilitation for the services provided to the plaintiff, the defendant-carrier may not be reimbursed for these charges under N.C.G.S. § 97-10.2(f)(1)(c). The conclusion of law reads in pertinent part as follows:

> We are of the opinion that the provisions of G.S. 97-90 do not control when we determine what the subrogation interest of a carrier should be in a given case. The service rendered by the rehabilitation specialists in our view was required under

the provisions of G.S. 97-25 and is properly a part of the costs of the claim which may be recouped as subrogation from the third party funds.

North Carolina Gen. Stat. § 97-90(a) reads in pertinent part as follows:

> Fees for attorneys and physicians and charges of hospitals for services and charges for nursing services, medicines and sick travel under this Article shall be subject to the approval of the Commission. . . .

Although medical treatment, hospital treatment, nursing services, medicines, sick travel, and rehabilitation services were expressly included under N.C.G.S. § 97-25 as treatment which may be provided by the employer, and although charges for medical treatment, hospital treatment, nursing services, medicines, and sick travel were included in N.C.G.S. § 97-90(a), our legislature did not include charges for rehabilitation services in the N.C.G.S. § 97-90(a) list of charges subject to Commission approval. Furthermore, when our legislature amended both N.C.G.S. § 97-25 and N.C.G.S. § 97-90(a) in 1973, the legislature added the words "rehabilitation services" to N.C.G.S. § 97-25, but did not add those words to N.C.G.S. § 97-90(a). Therefore, under the canon of statutory construction *expressio unius est exclusio alterius*, we conclude that our legislature did not intend N.C.G.S. § 97-90(a) to include rehabilitation services. Consequently, because N.C.G.S. § 97-90(a) does not require approval of the Commission for rehabilitation services, the defendant-carrier did not need the Commission's approval for the charges connected with the services provided by American Rehabilitation in order to obtain reimbursement for those expenses under N.C.G.S. § 97-10.2(f)(1)(c).

In summary, we vacate the award, the conclusions of law, and that part of the Commission's first finding of fact which is unsupported by the evidence. The case is remanded for new findings as may be supported by the evidence in the record and for new conclusions as may be supported by the new findings, if any.

Vacated and remanded.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

STATE OF NORTH CAROLINA v. THOMAS WADE NORRIS

No. 9018SC102

(Filed 18 December 1990)

1. **Criminal Law § 86.3 (NCI3d)— finding that fourteen-year-old conviction was admissible erroneous—failure of defendant to take stand—defendant not prejudiced by finding**

In a prosecution of defendant for rape of his nine-year-old stepdaughter, the trial court erred in finding that a fourteen-year-old conviction of defendant for incest involving his eight- and nine-year-old natural daughters demonstrated a "pattern of behavior" which was probative for impeachment purposes, since the circumstances surrounding the 1975 incest conviction and the present allegations were so similar that admitting the old conviction would have prejudiced defendant with such little corresponding probative value that it should have been excluded; however, because defendant did not take the stand and the State did not use the stale conviction to impeach him, and because defendant's failure to take the stand had little bearing on the outcome of the case in light of the overwhelming evidence against him, the trial court's error was not prejudicial. N.C.G.S. § 8C-1, Rules 404, 609.

Am Jur 2d, Rape § 71.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offenses. 88 ALR3d 8.

2. **Rape and Allied Offenses § 4.2 (NCI3d)— physical examination of rape victim two years after offense—admissibility of evidence**

In a prosecution of defendant for rape of his stepdaughter, the trial court did not err in admitting into evidence testimony by a physician who examined the victim two years after the alleged offense where the testimony corroborated the victim's testimony that she was sexually abused over a long period of time, and defense counsel was able to bring the fact of the remoteness of the exam and other factors affecting the weight to be assigned to the testimony before the jury. N.C.G.S. § 8C-1, Rules 401, 403.

Am Jur 2d, Rape § 81.

3. Criminal Law § 88.1 (NCI3d)— cross-examination of rape victim—scope—burden on defendant to show admissibility

In a prosecution of defendant for rape of his stepdaughter where defendant indicated that, if certain medical testimony were allowed, he would seek to cross-examine the victim about specific sexual behavior to show that the condition of the victim's vagina was caused by someone other than defendant, defendant carried the burden of establishing the admissibility of such evidence, and failure of the court to initiate the process outlined in N.C.G.S. § 8C-1, Rule 412 was not plain error.

Am Jur 2d, Rape §§ 65, 100; Witnesses §§ 520, 568.

4. Rape and Allied Offenses § 3 (NCI3d)— unspecified offense date in indictment—defendant not prejudiced

In a prosecution of defendant for rape of his stepdaughter where the indictment charged that the offense occurred in June or July three years earlier, there was no merit to defendant's contention that the combined effect of an unspecified offense date and a three-year time lapse between the date of the alleged offense and the date of trial deprived him of an opportunity adequately to present a defense.

Am Jur 2d, Rape § 52.

5. Rape and Allied Offenses § 3 (NCI3d)— date of offense—no variance between indictment and proof

There was no merit to defendant's contention in a rape case that the variance of one to two years in the indictment and the time established by the victim was fatal and required dismissal of the charge, since the victim's mother fixed the date of the incident at the time contained in the indictment, and the date given in the bill of indictment was not an essential element of the crime charged.

Am Jur 2d, Rape § 52.

6. Criminal Law § 434 (NCI4th)— prosecutor's statement—no reference to defendant's prior conviction

A statement by the prosecutor in a rape case that, "The law was written so he will never ever do this to anybody's daughter or to his own daughter again" did not impermissibly reference defendant's incest conviction and therefore require a mistrial, since the conviction was never introduced into

evidence and was never alluded to at trial; the victim testified that she sometimes called defendant "Dad" and that defendant treated her like his daughter; and the jury could not have leapt to the conclusion that the references to "his own daughter" meant that he was previously convicted of incest with his natural children.

Am Jur 2d, Trial § 269.

7. **Rape and Allied Offenses § 4 (NCI3d)— evidence of victim's and defendant's relationship—evidence admissible**

In a prosecution of defendant for rape of his stepdaughter, the trial court did not err in admitting testimony by the victim's mother that the victim was defendant's favorite of the children and that he purchased fancy lace underwear for the child.

Am Jur 2d, Infants § 17.5; Rape § 55.

8. **Rape and Allied Offenses § 6 (NCI3d)— prior acquittal—instructions about allegations in earlier case not required**

There was no merit to defendant's contention that the jury should have been instructed about the allegations in an earlier first degree sexual offense case in which he was acquitted and the interrelationship between the earlier acquittal and the current rape charge "to clear up confusion" since there were no references to the alleged sex offenses and no possible confusion on this point.

Am Jur 2d, Rape § 108.

9. **Criminal Law § 861 (NCI4th)— mandatory life sentence—instruction not required**

Defendant was not entitled to an instruction from the judge to the jury regarding the mandatory life sentence for first degree rape.

Am Jur 2d, Rape § 108.

APPEAL by defendant from a judgment entered 27 September 1989 by *Judge Thomas W. Ross* in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 October 1990.

The defendant was convicted of first degree statutory rape. The court imposed a mandatory life sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lorinzo L. Joyner, for the State.

Assistant Public Defender John Bryson for the defendant.

LEWIS, Judge.

Defendant was convicted of raping his nine year old stepdaughter. Evidence at trial established that the rape occurred in the master bedroom of the victim's house while the child's mother was gone. The defendant positioned the child on the edge of the bed, and he stood while performing intercourse.

I. Admissibility of a Fourteen Year Old Conviction

[1] Defendant first argues that the trial court committed prejudicial error when it denied his motion *in limine* to prohibit the State from introducing evidence of his 1975 incest conviction. The 1975 conviction involved the defendant's eight and nine year old natural daughters. The evidence in that case was that while their mother was gone, he sat his daughters down on a commode top and stood while performing intercourse. Like the victim in the case at bar, both girls had abnormally large vaginal areas and were about the age of the alleged victim here.

The district attorney gave notice he intended to introduce evidence of the 1975 conviction under Rules of Evidence 404 and 609. G.S. § 8C-1, Rules 404, 609. The defendant objected and the trial judge heard the matter in the absence of the jury. The trial judge granted the defendant's motion as to Rule 404(b), finding the conviction too remote to show a common scheme or plan and holding that the probative value was substantially outweighed by the prejudicial effect. However, the judge denied the objection as to Rule 609(b) indicating he would admit the evidence if presented, specifically finding that the similarity in the crimes showed a "pattern of behavior" and that the probative value substantially outweighed any prejudicial effect. The defendant did not testify and therefore there was no cross-examination and the conviction never came before the jury.

Rule 609(b) admits evidence of "stale" convictions, *i.e.*, more than ten years old for the purpose of impeachment if the court makes findings supported by specific facts that show that the probative value of the conviction substantially outweighs its prejudicial effect. G.S. § 8C-1, Rule 609; *State v. Hensley*, 77 N.C. App. 192,

334 S.E.2d 783 (1985), *disc. rev. denied*, 315 N.C. 393, 338 S.E.2d 882 (1986). It is relevant if the old conviction involves "a continuous pattern of behavior." *Id.* 77 N.C. App. at 195, 334 S.E.2d 785.

In the present case, the trial judge found that the 1975 conviction demonstrated a "pattern of behavior" which was probative for impeachment purposes. We disagree. The circumstances surrounding his 1975 incest conviction and the present allegations are so similar that admitting the old conviction would have so prejudiced the defendant with such little corresponding probative value that it should have been excluded. However, because the defendant never took the stand, the State never offered the stale conviction into evidence to impeach the defendant. Our Supreme Court has previously addressed this same situation in *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988). In *Lamb*, the defendant's motions *in limine* were denied and the defendant did not testify. On appeal the defendant argued that the erroneous ruling impermissibly chilled her constitutional right to testify on her own behalf. The court held that the defendant was prejudiced because it was clear that had the judge granted her motions, she would have testified. *Id.* at 648, 365 S.E.2d 608. However, the court also held that, "[n]ot every denial of a defendant's motion *in limine* results in a chilling of defendant's right to testify. Whether this result occurs depends on the peculiar facts of each case." 321 N.C. 648, 365 S.E.2d 608. In *Lamb* the court focused on the fact that the State's case was comprised solely of testimony from the defendant's relatives that proved to be equivocal and arguably weak. Based on that circumstance, the court held that the defendant's failure to take the stand because of fear of impeachment was "fraught with prejudice." *Id.* at 649, 365 S.E.2d at 608.

Here, while it does appear from the record that the defendant chose not to testify at least in part because he feared being impeached with his 1975 conviction, there was such overwhelming evidence of his guilt that his failure to take the stand did not rise to the level of prejudicial error. The prosecuting witness testified that her stepfather had raped her. The victim's mother and brother corroborated her testimony. Furthermore, there was physical evidence that the child had been sexually active in a manner consistent with her testimony. We find, based upon the evidence in this case, no prejudicial error occurred. We cannot speculate why the defendant elected to remain silent or whether this conviction would

have even been offered by the State had the defendant taken the stand and testified under these circumstances.

II. Admissibility of Results of a Medical Examination Conducted More than Two Years After the Alleged Offense

[2] The defendant also made a motion *in limine* to exclude the testimony of Dr. McCormick, the physician who examined the victim in October, 1988. The trial court conducted a voir dire which tended to show that the physical examination she performed corroborated the victim's testimony that she was sexually abused over a long period of time. The results of the examination were also consistent with the victim's testimony that her vagina had been penetrated by either a penis or finger.

The defendant challenges the admissibility of this evidence because the examination was conducted at least two years after the alleged rape. We hold that the trial court did not err in allowing the jury to hear this testimony.

We find that this evidence was both relevant and admissible. G.S. § 8C-1, Rules 401, 403. The physician's testimony tended to prove that the child had been sexually active, which is clearly relevant. The fact that her examination occurred months or even two years after the alleged abuse does not in this case render the evidence inadmissible under Rule 403. Defense counsel was able to bring this fact, and others affecting the weight to be assigned this testimony, before the jury. Whether or not the stretching in the victim's vaginal area was abnormal, or was caused by the defendant rather than by something else, was for the jury. The examination was not so remote as to be unfairly prejudicial to the defendant.

III. Right to Recall the Prosecuting Witness and Examine Her About Specific Instances of Sexual Behavior

[3] On the first day of trial, defense counsel filed several motions *in limine*. In conjunction with the motion to exclude the medical testimony of Dr. McCormick, the defendant indicated that if the court allowed the testimony, he would seek to cross-examine the victim about specific sexual behavior to show that the medical findings were caused by someone other than the defendant. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986), discusses what the defense must do before making such an offer of proof under G.S. § 8C-1, Rule 412:

> Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. . . .

Id. at 728-29, 340 S.E.2d 433. The defense, as proponent of the evidence of specific sexual acts, carries the burden of establishing the admissibility of the evidence. Here, the defendant never made a request for an *in camera* hearing, and he made no offer of proof to establish the admissibility of this evidence. He never requested the court to recall the victim. The failure of the trial court to initiate this process *ex mero motu* was not plain error. This assignment of error is overruled.

IV. Failure to Allow a Bill of Particulars and Failure to Dismiss the Indictment for Vagueness

[4] Defendant's indictment alleges that Mr. Norris committed the offense of first degree rape in "June 1986 or July 1986." On 24 April 1989, the defendant filed a Motion for a Bill of Particulars stating that without a more specific allegation as to date and time, the defendant could not adequately prepare his defense. On 7 September 1989, defendant filed a motion to dismiss stating that because the indictment covered a possible sixty day period occurring more than three years ago, such vagueness of allegation as to time had deprived him of an opportunity to adequately present his defense. Both of these motions were denied.

Defendant concedes that indictments are not defective because they allege a period of time rather than a specific date. *See State v. Oliver*, 85 N.C. App. 1, 354 S.E.2d 527 (1987). Instead he argues that the combined effect of an unspecified offense date and a three year time lapse between the date of the alleged event and the date of trial deprived him of an opportunity to adequately present a defense. We disagree.

The indictment charged that the defendant raped the prosecuting witness between June and July 1986. The child's uncertainty as to when the offense was committed goes to the weight of her testimony. Where there is sufficient evidence that the defendant committed each essential act of the offense, nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed. *State v. Effler*, 309 N.C. 742, 749, 309 S.E.2d 203, 207 (1983). This assignment of error is overruled.

V. Variance Between the Time of the Offense and the Time Established by the Evidence

[5] The victim testified that she was "eight or nine years old" when the rape occurred and the defendant suggests that based upon the testimony the date of the rape would have been 1984 or 1985. Defendant argues that the variance of one to two years in the indictment and the time established by the victim is fatal and requires dismissal of the charge. We disagree. First, the victim's mother fixed the date of the incident as June or July 1986, the time contained in the indictment. Furthermore, the date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal. *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). We reject this assignment of error.

VI. Defendant's Motion for Mistrial

[6] Defendant argues that the following statement made by the State in its closing argument was so egregious that the defendant was entitled to a mistrial:

> The law was written so he will never ever do this to anybody's daughter or to his own daughter again.

Defendant argues that this statement impermissibly referenced the defendant's incest conviction. We disagree. The victim testified that she sometimes called the defendant "Dad" and that the defendant treated her like his daughter. Although the trial court ruled that the defendant's prior conviction for incest would be admissible to impeach the defendant, the conviction was never introduced into evidence and was never alluded to at trial. The jury could not have leapt to the conclusion that the references to "his own daughter" meant that he was previously convicted of incest with his natural children. We reject this assignment of error.

VII. Evidence that the Defendant Purchased Lace Underwear for the Victim

[7] Defendant objected to the introduction of testimony by the victim's mother that the victim was the defendant's favorite of the children and that he purchased fancy lace underwear for the child. He argues that the evidence is irrelevant or unduly prejudicial. We disagree. The trial court did not abuse its discretion in allowing this testimony. If evidence has any logical tendency, however slight, to prove a fact in issue, it is relevant. G.S. § 8C-1, Rule 401. He has failed to show how this evidence was unduly prejudicial. We reject this assignment of error.

VIII. Reference to the Defendant's Acquittal of First Degree Sexual Offense in Robeson County

[8] The trial court excluded as substantive evidence the 1975 incest conviction and an acquittal in 1988 of first degree sexual offense in Robeson County involving the prosecuting witness. The defendant argues that the jury should have been instructed about the allegations and the interrelationship between his 1988 acquittal and his rape charge "to clear up confusion." However, a review of the record reveals that there were no references to the alleged sex offenses in Robeson County. Finding no possible confusion on this point, we reject this assignment of error.

IX. Instruction on Mandatory Life Sentence

[9] Finally, the defendant contends that he was entitled to an instruction from the judge to the jury regarding the mandatory life sentence for first degree rape. We disagree. "In the absence of some compelling reason which makes disclosure as to punishment necessary in order 'to keep the trial on an even keel' and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases." *State v. Rhodes*, 275 N.C. 584, 592, 169 S.E.2d 846, 851 (1969); we reject this assignment of error.

X. Conclusion

Defendant received a fair trial, free of prejudicial error.

Affirmed.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. CECIL FRANKLIN FOSTER, JR.

No. 9027SC205

(Filed 18 December 1990)

1. **Criminal Law § 1123 (NCI4th)— second degree murder— aggravating factor of premeditation and deliberation— sufficiency of evidence**

Evidence was sufficient to support the trial court's finding as an aggravating factor for second degree murder to which defendant pled guilty that defendant committed the offense after premeditation and deliberation where it tended to show that defendant went to the victim's home armed with a .22-caliber pistol on the morning after being told that the victim had molested defendant's daughter; defendant refused to allow the victim's wife to leave the living room; with her still in the room, defendant shot the victim once in the chest; he fired the pistol five more times, shooting the victim in the head; before defendant fired the last shot, the victim's wife pleaded with him to stop shooting because the victim was already dead; defendant refused to believe her and fired the last shot into the victim's head; once defendant and the victim's wife were outside, defendant said, "let's go back inside and if he ain't dead we'll shoot him some more."

Am Jur 2d, Homicide §§ 439, 554.

2. **Criminal Law § 1238 (NCI4th)— mitigating factor of strong provocation—evidence of cooling off period**

Strong provocation may be found to mitigate the offense where defendant acted in the "heat of passion" other than that arising as a result of a direct challenge or threat by the victim; however, defendant in this case failed to show strong provocation where the evidence tended to show that he did not go to the home of the victim until the morning after he was told that the victim had molested his daughter; he thus had a cooling off period; and his actions were more consistent with a prior determination to seek out a confrontation rather than a state of passion placing him beyond control of his reason. N.C.G.S. § 15A-1340.4(a)(2)i.

Am Jur 2d, Homicide §§ 62, 69.

3. Criminal Law § 1081 (NCI4th) — mitigating factors outweighed by one aggravating factor — no error

In a prosecution of defendant for the second degree murder of a man who allegedly molested defendant's daughter, the trial court did not err in finding that the aggravating factor of premeditation and deliberation outweighed the mitigating factors of no criminal record, voluntary acknowledgment of wrongdoing at an early stage, honorable discharge from the armed services, good reputation in the community, and mental or emotional condition which was insufficient to cause the offenses but which may have contributed to defendant's actions.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 290, 554.

APPEAL by defendant from judgment entered 2 December 1988 by *Judge John M. Gardner* in CLEVELAND County Superior Court. Heard in the Court of Appeals 28 September 1990.

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Special Deputy Attorney General, for the State.

Lamb Law Offices, P.A., by William E. Lamb, Jr., for defendant-appellant.

GREENE, Judge.

The defendant entered a plea of guilty to murder in the second degree on 2 December 1988. A sentencing hearing was held and judgment was entered the same day. The trial court sentenced the defendant to fifty years imprisonment. The defendant appeals.

The evidence from the sentencing hearing tends to show that on 26 July 1988, the defendant was interviewed by Detective Luckadoo of the Cleveland County Sheriff's office regarding allegations that the defendant had molested his own daughter. Later the same day, the defendant received information that his wife's brother-in-law, Howard Champion, was the one who had molested the defendant's daughter. The defendant's wife and other family members were aware that the defendant's daughter had been molested by Champion, but the defendant knew nothing of it until 26 July 1988.

The following morning, the defendant tried to call Detective Luckadoo but he was unavailable. A short time later, the defendant went to Champion's home, taking with him a .22-caliber pistol.

When the defendant arrived at Champion's home, he found Champion's wife unloading groceries from her car. The defendant told her he wanted to talk to Champion. Mrs. Champion called her husband who was in the bedroom asleep. The defendant waited about five or ten minutes and Champion came out to the living room where the defendant was waiting and sat down on the couch.

In his statement to the police, the defendant stated that when Champion entered the living room, he confronted Champion about molesting his daughter and that Champion denied it. While the defendant was talking to Champion he saw a photograph of Champion holding the defendant's daughter in his lap. Suddenly, Champion jumped up from the couch and told the defendant he was getting tired of him. The defendant pulled his gun from his pocket and shot Champion in the chest. Champion's wife began screaming, asking the defendant not to shoot Champion because Champion did not mean to hurt the defendant's daughter. The defendant then fired the remaining five rounds in the pistol, shooting Champion in the head.

At the sentencing hearing, Champion's wife testified that she and Champion entered the living room together that morning and Champion sat down on the couch. Mrs. Champion turned and saw the defendant holding the gun in his hand. The defendant then told Champion to tell his wife what he had done to the defendant's daughter. Champion denied doing anything. Mrs. Champion started to leave the room, but the defendant pointed his gun at her and told her to sit down. The defendant then said, "I've been to Social Services and they . . . and I just can't take anymore. Bad mother. . . ." At that point, the defendant shot Champion. Mrs. Champion began screaming for the defendant to stop. She stated that every time the defendant pulled the trigger he said, "Bad boy. Bad boy." Just before the defendant fired the last shot, Mrs. Champion screamed for him to stop, telling the defendant that Champion was dead. The defendant said "he ain't either" and fired the last shot. The defendant then told Mrs. Champion she could go outside. Once outside, Mrs. Champion asked the defendant to "just let me go down there," referring to the home of one of her relatives. The defendant said, "No, come on, let's go back in and if he ain't dead we'll shoot him some more."

At the conclusion of the sentencing hearing, the trial court found as statutory mitigating factors (1) that the defendant had

no criminal record; (2) that the defendant voluntarily acknowledged wrongdoing to a law enforcement officer at an early stage; (3) that the defendant had been honorably discharged from the armed services; and (4) that the defendant was a person of good reputation in his community. The trial court found as a nonstatutory mitigating factor that the defendant suffered from a mental or emotional condition that was insufficient to cause the offense but which may have contributed to the defendant's actions. The court found as the sole aggravating factor the nonstatutory factor that the defendant had specific intent to kill after premeditation and deliberation. The court then found that the aggravating factor outweighed the mitigating factors, and imposed the sentence from which the defendant appeals.

The issues are: (I) whether the trial court's finding of premeditation and deliberation as an aggravating factor is supported by the evidence; (II) whether the court erred by failing to find as a mitigating factor that the defendant acted under strong provocation; and (III) whether the court erred by finding that the aggravating factor outweighed the mitigating factors.

We first note that the defendant has provided in the record only one assignment of error for his three arguments, and that the one assignment of error is defective in that it does not state the "legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). However, we choose to suspend the rules as provided by N.C.R. App. P. 2, and address the defendant's arguments.

I

[1] The defendant first concedes that premeditation and deliberation is a proper nonstatutory aggravating factor where the defendant pleads guilty to murder in the second degree. *See State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983). However, the defendant contends that there was insufficient evidence to support such a finding in this case. We disagree.

The State has the burden of proving by a preponderance of the evidence the existence of an aggravating factor. *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986). Premeditation and deliberation must usually be established by circumstantial evidence. *State v. Lloyd*, 89 N.C. App. 630, 636, 366 S.E.2d 912, 916, *disc. rev. denied*, 322 N.C. 483, 370 S.E.2d 231 (1988). Our Supreme

Court has found that the circumstances which tend to establish premeditation and deliberation include:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

Id. (quoting *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986)).

The Court has also held that the nature and number of the victim's wounds may infer premeditation and deliberation. *State v. Carter*, 318 N.C. 487, 491, 349 S.E.2d 580, 582 (1986).

In the present case, the defendant went to Champion's home, armed with a loaded .22-caliber pistol, on the morning after being told that Champion had molested the defendant's daughter. There was evidence that the defendant refused to allow Mrs. Champion to leave the living room. With her still in the room, the defendant shot Champion one time in the chest. He proceeded to fire the pistol five more times, shooting Champion in the head. Before firing the last shot, Mrs. Champion pleaded with the defendant to stop shooting because Champion was already dead. The defendant refused to believe her and fired the last shot into Champion's head. Once the defendant and Mrs. Champion were outside, the defendant said "let's go back inside and if he ain't dead we'll shoot him some more."

We conclude that the defendant's conduct and statements, as well as the number and nature of the wounds inflicted, establishes circumstances from which the trial court could find that the defendant committed the offense after premeditation and deliberation.

II

[2] The defendant next argues that the court erred by failing to find as a statutory mitigating factor that the defendant acted under strong provocation. N.C.G.S. § 15A-1340.4(a)(2)i (1988) (providing as a mitigating factor that the "defendant acted under strong provocation . . ."). The defendant contends he was provoked by

receiving information that Champion had molested the defendant's daughter.

The State argues that in order to support a finding of provocation, there must be a showing that the defendant was threatened or challenged by the victim. *See State v. Faison*, 90 N.C. App. 237, 368 S.E.2d 28 (1988); *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985); *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), *disc. rev. denied*, 315 N.C. 392, 338 S.E.2d 881 (1986); *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985); *State v. Puckett*, 66 N.C. App. 600, 312 S.E.2d 207 (1984). The defendant concedes that he was never threatened or challenged by the victim in this case, but instead argues that "provocation" should be expanded to include an offense committed in the heat of passion. The defendant further argues that "heat of passion" means that the defendant's state of mind was so violent as to overcome his reason such that he could not think to the extent necessary to form a deliberate purpose and control his actions. *See State v. Pope*, 24 N.C. App. 217, 210 S.E.2d 267 (1974), *cert. denied*, 286 N.C. 419, 211 S.E.2d 799 (1975). The defendant concludes that he possessed such a state of mind at the time he killed Champion because of the information he received to the effect that Champion molested the defendant's daughter.

There are cases which suggest that provocation, for purposes of sentencing, is not limited to situations where the victim threatened or challenged the defendant before the defendant committed the offense. In *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985), the trial court failed to find as a mitigating factor that the defendant acted under strong provocation where the defendant pled guilty to murder in the second degree for killing a man he had mistaken for his wife's alleged paramour. The defendant made no contention that the victim threatened or challenged him in any way. The Supreme Court upheld the trial court on this issue. However, the Court's holding was based on the presence of conflicting evidence. The Court did not conclude that there must be an actual threat or challenge to the defendant. Similarly, in *State v. Watson*, 311 N.C. 252, 316 S.E.2d 293 (1984), the trial court failed to find provocation as a mitigating factor where the defendant murdered his wife after learning that she was leaving him and upon finding evidence that someone had been visiting his wife at home that same day. The Supreme Court upheld the trial court, finding insufficient evidence to prove by a preponderance of the evidence that the

defendant acted under strong provocation. Again, however, the Court did not dismiss the argument based on a holding that provocation is limited to a threat or challenge by the victim. Thus, strong provocation may be found to mitigate the offense where the defendant acted in the "heat of passion" other than that arising as a result of a direct challenge or threat by the victim.

However, provocation will not be found where the defendant had time for a "cooling of the blood." In *State v. Highsmith*, 74 N.C. App. 96, 327 S.E.2d 628, *disc. rev. denied*, 314 N.C. 119, 332 S.E.2d 486 (1985), this Court held that the defendant failed to show that he acted under strong provocation where he was originally threatened by the victim, but then walked six blocks to his residence, obtained a shotgun and shells, then, approximately twenty minutes later, returned to the vicinity where the original altercation with the victim had occurred and assaulted the victim. In *State v. Faison*, 90 N.C. App. 237, 368 S.E.2d 28 (1988), this Court held that the evidence did not compel a finding of provocation where the defendant first confronted the victim at work, then the defendant walked out to his car, obtained a rifle, returned and shot the victim numerous times. In *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988), the Supreme Court upheld a finding of no provocation by the trial court where the victim stabbed the defendant and then threatened the defendant when he was released from the hospital, and where the defendant killed the victim forty-eight hours after this initial altercation.

In the present case, the defendant confronted the victim the day after the defendant received the information that the victim had molested the defendant's daughter. The defendant's actions on the day he killed the victim were "more consistent with a prior determination to seek out a confrontation rather than a state of passion without time to cool placing defendant beyond control of his reason." *Highsmith* at 100-101, 327 S.E.2d at 631. Assuming, *arguendo*, that the defendant was "provoked" as that term is used in the statute, we find that the lapse of time between the provocation and the defendant's actions tends to contradict the defendant's contention that he acted under strong provocation. The trial court's failure to find a mitigating factor will not be overturned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985). Accordingly,

we find no error in the court's failure to find the mitigating factor of strong provocation.

III

[3] The defendant's final argument is that the trial court erred by finding that the aggravating factor outweighed the mitigating factors. However, the defendant rests this argument primarily on the alleged errors addressed above. The defendant contends that, by erroneously finding the aggravating factor of premeditation and deliberation and by erroneously failing to find the mitigating factor of strong provocation, the court's weighing of the factors was tainted. Since we find no error in the trial court's findings with respect to aggravating and mitigating factors, we find no error in the court's finding that the aggravating factor outweighs the mitigating factor.

Affirmed.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

ATLANTIC TOBACCO COMPANY, PLAINTIFF v. JOSEPH B. HONEYCUTT AND WIFE, BARBARA W. HONEYCUTT, INDIVIDUALLY, HONEYCUTT TRUCK STOP, INC., A NORTH CAROLINA CORPORATION, AND HASSMAN ENTERPRISES, INC., A NORTH CAROLINA CORPORATION, D/B/A HONEYCUTT TRAVEL STORE AND PAYLESS CIGARETTE HOUSE, DEFENDANTS

No. 907SC559

(Filed 18 December 1990)

1. **Corporations § 6 (NCI4th)— action for accounts due—piercing corporate veil—factors**

The Supreme Court in expanding on the mere instrumentality rule for piercing the corporate veil has relied on a definition which requires the domination and control of the corporate entity; the use of that domination and control to perpetrate a fraud or wrong; and the proximate causation of the wrong complained of by the domination and control. Factors which

have been included in determining whether to pierce the corporate veil include inadequate capitalization; noncompliance with corporate formalities; complete domination and control of the corporation so that it has no independent identity; and excessive fragmentation of a single enterprise into separate corporations. It must be remembered above all that the theory of piercing the corporate veil is an equitable one, and would therefore be flexibly applied to serve the ends of justice.

Am Jur 2d, Corporations §§ 43, 49, 52, 53.

2. Corporations § 6 (NCI4th)— action on accounts due—piercing the corporate veil—not justified

A directed verdict was properly granted for defendant Barbara Honeycutt in an action for accounts due in which plaintiff attempted to pierce the corporate veil because it was apparent that Barbara Honeycutt did not exercise the requisite degree of control over the activities of either Honeycutt Truck Stop, Inc. or Hassman Enterprises, Inc. to justify piercing the corporate veil with respect to her. Although she believed, but was not sure, that she was secretary of the two corporations, there was nothing to suggest that she exercised any control over the operations of the businesses as a result of that capacity and all of plaintiff's evidence regarding control was directed at the activities of Joseph Honeycutt, who was president of the corporations and sole stockholder.

Am Jur 2d, Corporations §§ 43, 49, 52, 53.

3. Corporations § 6 (NCI4th)— action on accounts due—piercing the corporate veil—evidence sufficient to go to jury

There was sufficient evidence against Joseph Honeycutt to take the case against him to the jury in an action on accounts due in which plaintiff attempted to pierce the corporate veil where Joseph Honeycutt was the president and sole shareholder of the corporations in question; it was undisputed that Joseph Honeycutt completely controlled the two corporate entities indebted to plaintiff, dominating the operations of the entities to the extent of dictating to the bookkeeper which bills to pay, when to pay them, and to what extent; and plaintiff's evidence was that funds from the corporations were transferred to a personal account at Joe Honeycutt's direction to pay mortgages on individually owned property, having the

effect of both increasing the Honeycutts' personal equity in their property and decreasing the assets of the corporations available for creditors.

Am Jur 2d, Corporations §§ 43, 49, 50-52.

Stockholder's personal conduct of operations or management of assets as factor justifying disregard of corporate entity. 46 ALR3d 428.

APPEAL by plaintiff from order entered 17 April 1990 in NASH County Superior Court by *Judge Napolean Barefoot.* Heard in the Court of Appeals 25 October 1990.

Joseph B. Honeycutt and Barbara W. Honeycutt, husband and wife, operated three separate businesses on land they owned at I-95 and Bagley Road in Kenly, North Carolina: Honeycutt Truck Stop, Inc., originally incorporated in 1967, which operated a filling and service station and Honeycutt Travel store; Honeycutt Restaurant, Inc.; and Hassman Enterprises Inc., which did business under the name of Payless Cigarettes, selling cigarettes, candy and similar items. The three businesses operated out of two main buildings at the location in question. Joseph and Barbara Honeycutt owned the land in their individual capacities.

American Tobacco Company ("plaintiff") is a North Carolina corporation which sold merchandise such as candy, cigarettes and sundries to Honeycutt Truck Stop, Inc. and Hassman Enterprises, Inc. over a period of time. Plaintiff sold a total of $71,910.28 worth of merchandise to the Honeycutt businesses ($24,641.95 to Honeycutt Truck Stop, Inc., and $47,268.33 to Hassman Enterprises, Inc.) for which it was not paid. At the time this action was filed, Honeycutt Truck Stop, Inc. had filed bankruptcy, and Hassman Enterprises, Inc. and Honeycutt Restaurant, Inc. had ceased operations.

Plaintiff filed a complaint on 10 February 1988 against Joseph and Barbara Honeycutt as individuals doing business as Honeycutt Travel Store and Payless Cigarette House for the amount due on the merchandise it had sold and delivered. Plaintiff later amended its complaint to sue the two corporations, Honeycutt Truck Stop, Inc. and Hassman Enterprises, Inc., which owned the businesses. Plaintiff moved for summary judgment against both the corporations and the individual defendants. The trial court granted plaintiff's motion for summary judgment against the two

corporations, but denied it as to the individuals. The two actions as to the individuals were consolidated for trial. At the close of plaintiff's evidence, Joseph and Barbara Honeycutt moved for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50. The trial court granted the motion, stating that the plaintiff had failed to present evidence from which the jury could infer all the necessary elements of its cause of action. Plaintiff appealed.

Moore, Diedrick, Carlisle & Hester, by J. Edgar Moore, for plaintiff-appellant.

Stubbs, Perdue, Chesnutt, Wheeler & Clemmons, P.A., by Trawick H. Stubbs, Jr. and Linda G. Cauffman, for defendant-appellee.

Smith, Debnam, Hibbert & Pahl, by Bettie Kelly Sousa and Elizabeth B. Godfrey, for defendant-appellee Barbara W. Honeycutt.

DUNCAN, Judge.

The only issue presented on this appeal is whether the trial court erred in directing a verdict for Joseph and Barbara Honeycutt. We hold that the trial court did commit error in directing a verdict in favor of Joseph Honeycutt, but did not err in directing a verdict in favor of Barbara Honeycutt.

Preliminarily, we note that where the question of whether to grant a directed verdict is a close one, it is the better practice for the trial court to allow the case to be submitted to the jury. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 669-70, 231 S.E.2d 678, 680 (1977). In that event, if the jury returns a verdict in favor of the moving party a decision on the motion becomes unnecessary. If, on the other hand, the jury finds for the nonmoving party, the judge has an opportunity to reconsider in the context of a motion for judgment notwithstanding the verdict. If, on appeal, it appears that the motion was improvidently granted, the court may then order entry of judgment on the verdict and avoid the expense and delay of a retrial. *Id.* (citing Comment, G.S. § 1A-1, Rule 50 (1969); 5A Moore's Federal Practice and Procedure § 50.14 (2d ed. 1975)).

On a defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *Norman v. Banasik*, 304 N.C. 341, 283 S.E.2d 489 (1981). Only where

the evidence, when considered in that light, is insufficient to support a verdict in the plaintiff's favor should defendant's motion for a directed verdict be granted. *Snow v. Duke Power Co.*, 297 N.C. 591, 256 S.E.2d 227 (1979).

[1] Plaintiff in the instant case is attempting to "pierce the corporate veil" of the two insolvent debtor corporations and reach the individual assets of Joseph and Barbara Honeycutt as owners. This court has recognized that the doctrine that a corporation is a legal entity distinct from the persons composing it is a legal fiction devised to serve the ends of justice. *Glenn v. Wagner*, 313 N.C. 450, 329 S.E.2d 326 (1985). As an equitable doctrine, it cannot be invoked to subvert the reasons which brought it into existence; thus, a court will disregard the corporate form when necessary to prevent fraud or to achieve equity. *Id.* at 454, 329 S.E.2d at 330 (citing 18 Am. Jur. 2d, *Corporations* § 15 (1965)).

Our Supreme Court has held that where a corporation is so operated that "[i]t is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person . . . ." *Henderson v. Security Mortgage & Finance Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). In expanding on the "mere instrumentality rule" referred to in *Henderson*, our Supreme Court has relied on the definition set forth in *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 9, 149 S.E.2d 570, 576 (1966), which requires the following elements:

1. the domination and control of the corporate entity;

2. the use of that domination and control to perpetrate a fraud or wrong;

3. the proximate causation of the wrong complained of by the domination and control.

Factors which have been considered in determining whether to pierce the corporate veil include:

1. inadequate capitalization;

2. non-compliance with corporate formalities;

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

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

Wagner, 313 N.C. at 455, 329 S.E.2d at 330 (citing *generally*, Robinson, North Carolina Corporation Law §§ 2-12, 9-7 to -10 (3d ed. 1983)).

It must be remembered above all that the theory of piercing the corporate veil is an equitable one, and will therefore be flexibly applied to serve the ends of justice. "It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked had 'no separate mind, will or existence of its own' and was therefore the 'mere instrumentality or tool' of the dominant [shareholder]." *Id.* at 458, 329 S.E.2d at 332.

[2] When the above considerations are applied to the facts of this case, it becomes apparent that Barbara Honeycutt did not exercise the requisite degree of control over the activities of either Honeycutt Truck Stop, Inc. or Hassman Enterprises, Inc. to justify piercing the corporate veil with respect to her. Barbara Honeycutt testified that she believed that she was secretary of the two corporations, but was not sure. There is nothing, however, to suggest that she exercised any control over the operations of the businesses as a result of that capacity. Her duties included managing the restaurant, ordering the food, making out the schedules, making out the menus, and ordering the items sold by the cigarette store. All of plaintiff's evidence regarding control is directed at the activities of Joseph Honeycutt, who was the president of the corporations and *sole* stockholder.

Since there is no evidence establishing the threshold existence of Barbara Honeycutt's domination and control of the corporate entities, it is not possible to proceed to the further issues of whether that control was used to perpetrate a wrong, or whether the control proximately caused plaintiff's injuries. We therefore hold that the directed verdict as to Barbara Honeycutt was proper.

[3] There was, however, sufficient evidence as to Joseph Honeycutt to take the case against him to the jury. As mentioned above, Joseph Honeycutt was the president and sole shareholder of the corporations in question. That in itself is significant, but there was also additional evidence of the extent to which he dominated the corporations' activities. Sherrill Creech, corporate bookkeeper,

testified that he was only allowed to pay bills at Mr. Honeycutt's direction. Although he could perform the ministerial task of signing the checks, Mr. Honeycutt would tell him whom to pay, when to pay them, and how much to pay them; he had no discretion in that regard.

At the heart of plaintiff's argument is its contention that "money was transferred at will among the various corporations and bank accounts at his [Mr. Honeycutt's] instruction without any effort to collect money owed by each account or corporation, without any formal debt instruments, and without any agreement as to interest or repayment." In taking plaintiff's evidence as true, as we must in reviewing a motion for directed verdict, we find that it was sufficient to take to the jury the question of the appropriateness of disregarding the corporate entity with respect to Joseph Honeycutt.

Mr. and Mrs. Honeycutt set up a bank account, the Honeycutt Rental Account, from which funds were transferred to and among the three corporations. The Rental Account was used to receive funds from the Honeycutts' rental property, both business and personal. The Honeycutts owned various properties, including trailer parks, apartments, rental houses and an ABC store. The rent from those properties was deposited into the Rental Account. In addition, the Honeycutts personally owned the land on which the truck stop and travel store, restaurant and cigarette house were located. The Honeycutts leased that property to the corporations, with the rental payments from the corporations also going to the Rental Account. The rent was based on a formula determined by Joseph Honeycutt, and represented a percentage of the sales at each facility.

Each of the corporate entities had a separate ledger within the Rental Account. Out of the Rental Account, Joseph Honeycutt would direct the payment of the mortgage on the truck stop property, the payment of the business loan taken out to construct the facilities, as well as repair and maintenance expenses. In addition, the Rental Account would, at Joseph Honeycutt's direction, also make the payments on rental property owned by the Honeycutts personally.

As the businesses began to decline, the rent paid, based as it was on a percentage of sales, would no longer cover the amount of the note payments. When that happened, money would be pulled from one of the other corporations and paid to the Rental Account

to cover the payment of the loans. There were thus numerous circular transfers representing loans back and forth among the corporations. All the transfers were noted on the corporate ledgers, but there was no other documentation than the checks themselves. No rate of interest was charged on the loans, and no repayment terms were ever discussed. The bookkeeper testified that the Honeycutts never received any personal checks from the Rental Account. He further testified that the amounts received as rent from the Honeycutts' other income-producing property were more than enough to cover the disbursements—for mortgages and expenses—on behalf of those properties. However, the largest item paid out of the Rental Account was the mortgage on the property on which the truck stop was located—property which the Honeycutts owned as individuals. Rental payments from the corporations were thus being used to directly increase the Honeycutts' equity in the property they owned individually.

Plaintiff also introduced into evidence a ledger page from the corporate records showing that the Honeycutt Truck Stop owed the Rental Account $1,091,736.82. Both defendants contest the validity of this figure, arguing that if all the corporations' records were examined, they would show no deficit from the Truck Stop to the Rental Account, since the corporations were all borrowing from one another.

We hold that plaintiff's evidence is sufficient to go to the jury on the question of whether the corporate entities here should be disregarded with respect to Joseph Honeycutt. First, there is the undisputed fact of Joseph Honeycutt's complete control of the two corporate entities indebted to plaintiff—Honeycutt Truck Stop, Inc., and Hassman Enterprises, Inc. As president and sole shareholder, he dominated the operations of the entities to the extent of dictating to the bookkeeper which bills to pay, when to pay them, and to what extent.

With respect to the element of fraud, Joseph Honeycutt contends that no evidence was presented to show that he personally benefitted from any of the payments from the Rental Account. It is uncontested that no checks were made out to the Honeycutts personally, but that alone is not determinative.

The plaintiff's evidence, which we must take as true, is to the effect that funds from both Honeycutt Truck Stop, Inc., and Hassman Enterprises, Inc., were transferred to the Rental Account

at Joe Honeycutt's direction to pay mortgages on individually owned property. This would have the effect of both increasing the Honeycutts' personal equity in their property and decreasing the assets of Honeycutt Truck Stop and Hassman Enterprises that would be available for creditors. There is certainly sufficient evidence to raise a jury question in this regard.

As to causation, Joseph Honeycutt's complete and exclusive control over fiscal policy and the movement of funds from one account to another could certainly be viewed as proximately causing a deficiency of funds in the accounts of the corporations to pay plaintiff's claims.

Accordingly, the judgment of the trial judge is

Affirmed in part; reversed and remanded in part.

Judges ORR and GREENE concur.

RONNIE BARFIELD MYERS AND SHELBY MYERS, PLAINTIFFS-APPELLANTS v. THAD J. BARRINGER, M.D.; THAD J. BARRINGER, JR., M.D.; RALEIGH PSYCHIATRIC ASSOCIATES, P.A.; JAFAR M. SHICK, M.D.; WAKE ANESTHESIOLOGY ASSOCIATES, INC.; RICHARD WEISLER, M.D.; AND WAKE PSYCHIATRIC HOSPITAL, INC., D/B/A HOLLY HILL HOSPITAL, DEFENDANTS-APPELLEES

No. 9010SC174

(Filed 18 December 1990)

1. **Appeal and Error § 122 (NCI4th)— summary judgment as to one defendant—premature appeal**

An order granting summary judgment only for defendant psychiatric hospital in plaintiffs' medical malpractice action against the hospital, treating physicians and anesthesiologists did not affect a substantial right and was not immediately appealable where the duty owed to plaintiff patient by defendant hospital was different from the duties owed plaintiff by independent contractor physicians and anesthesiologists and the issues in all cases were thus not the same.

Am Jur 2d, Appeal and Error §§ 104, 724, 853.

2. Appeal and Error § 178 (NCI4th)— summary judgment on one claim—notice of appeal—remaining claims not stayed

Plaintiff's notice of appeal from an order granting summary judgment for defendant psychiatric hospital in his medical malpractice action did not stay plaintiff's remaining malpractice claims against his treating physicians and anesthesiologists since the issues involved in each claim are different and severable, and the remaining claims are thus not matters embraced in the the claim against defendant hospital within the meaning of N.C.G.S. § 1-294. Therefore, the trial court could properly dismiss the remaining claims under N.C.G.S. § 1A-1, Rule 41(b) for failure to prosecute and to comply with the trial court's order to prosecute.

Am Jur 2d, Appeal and Error § 371.

3. Hospitals § 3.2 (NCI3d)— negligence by hospital employees—insufficient evidence of proximate cause

Plaintiff's forecast of evidence was insufficient to show that the failure of defendant psychiatric hospital's staff to record plaintiff's complaints about hip and thigh pain after receiving ECT treatments and to report those complaints to the treating physicians was a proximate cause of plaintiff's injuries where plaintiff's deposition stated that he made the same complaint of pain to his treating physicians, and the physician who administered the treatments testified by deposition that he would have responded in the same manner whether a complaint of hip and leg pain was made directly to him by a patient or was conveyed to him by the hospital staff.

Am Jur 2d, Hospitals § 44.

APPEAL by plaintiffs from order entered 11 October 1989 in WAKE County Superior Court by *Judge Henry W. Hight, Jr.*, and from judgment entered 13 November 1989 in WAKE County Superior Court by *Judge Henry V. Barnette*. Heard in the Court of Appeals 21 September 1990.

Loflin & Loflin, by Thomas F. Loflin III, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Timothy P. Lehan, for defendant-appellee Thad Barringer, M.D.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale, for defendant-appellee Thad Barringer, Jr., M.D.

Yates, McLamb & Weyher, by Joseph W. Yates, III and Barbara B. Weyher, for defendant-appellees Jafar M. Shick, M.D. and Wake Anesthesiology Associates, Inc.

Newsom, Graham, Hedrick, Bryson & Kennon, by William P. Daniell, for defendant-appellee Wake Psychiatric Hospital, Inc.

DUNCAN, Judge.

In this appeal, plaintiffs, Ronnie and Shelby Myers ("the Myers"), seek to overturn the order of summary judgment granted to defendant Wake Psychiatric Hospital, Inc. ("Holly Hill"). The Myers also seek to overturn the judgment dismissing their remaining claims against the non-Hospital defendants. For the reasons which follow, we affirm the decisions of the trial judge.

I

Ronnie Myers ("Mr. Myers") brought this action for medical malpractice against Thad J. Barringer ("Dr. Barringer"), Thad J. Barringer, Jr. ("Dr. Barringer, Jr."), Jafar M. Shick ("Shick"), Wake Anesthesiology Associates, Inc. ("Anesthesiology Associates"), and Holly Hill.

Mr. Myers was a patient at Holly Hill undergoing treatment for depression and migraine headaches. Mr. Myers was a patient of Dr. Barringer prior to his hospitalization; Dr. Barringer was treating him for depression, for which he recommended electroconvulsive therapy treatments ("ECT"). The complaint alleges that he misdiagnosed Mr. Myers' condition and negligently failed to recommend effective medication treatment, but instead recommended ECT.

Dr. Barringer, Jr., administered the eight ECT treatments Mr. Myers received. The complaint alleges that he was negligent in administering the ECT treatments and that the proximate result of that conduct was fractures in both of Mr. Myers' hips which ultimately necessitated replacement of both hips. The complaint also alleges that Dr. Barringer, Jr. was also negligent in failing to adequately diagnose Mr. Myers' condition, to recommend alternative medication treatment, and to properly advise and inform Mr. Myers of the risk and side effects associated with ECT, particularly the risk of seizures and muscle contractions which can cause fractures to the body.

Shick is an employee of Anesthesiology Associates, whose personnel acted as anesthesiologists during each of the eight ECT treatments Mr. Myers received. Shick was the attending anesthesiologist during the third, fourth and fifth ECT treatments. The complaint alleges that Shick and Anesthesiology Associates improperly advised Mr. Myers of the side effects associated with ECT, and that they took improper precautions, including failure to administer sufficient dosages of proper medications to control Mr. Myers' muscle contractions and seizures while he underwent ECT treatments.

As to Holly Hill, the complaint alleges that the hospital, through its employees, failed to document and insure that the physicians treating Mr. Myers were aware of his complaints of pain and soreness, particularly his complaints of pain and soreness in his hips and legs which he alleges he made after each ECT treatment. The complaint further alleges that Holly Hill failed to properly advise Mr. Myers of the risks of seizures and muscle contractions associated with ECT treatments.

Shelby Myers ("Mrs. Myers") brought a claim against the same defendants for loss of consortium. Holly Hill filed a motion for summary judgment which was granted. The Myers filed notice of appeal to the order granting summary judgment for Holly Hill. They were advised that trial would be held on the remaining claims in ten days and the trial judge offered them the opportunity to seek a writ of supersedeas, which they did not pursue. On the day of trial, the Myers refused to proceed and the trial judge entered an order dismissing their remaining claims with prejudice. From those orders the Myers appeal.

This appeal presents three issues:

(1) Whether the appeal of the summary judgment as to one but not all defendants is premature;

(2) Whether notice of appeal stayed further action by the trial judge as to the remaining claims; and

(3) Whether the order of summary judgment granted to Holly Hill was proper.

II

The Myers assign error to the trial judge's ruling that the trial court retained jurisdiction to try this case with respect to

the remaining defendants after they filed a notice of appeal with respect to the summary judgment granted to Holly Hill. They contend that their interlocutory appeal with respect to Holly Hill deprived the trial court of the jurisdiction to try this case as to the remaining defendants. Before we reach the issue of the propriety of the summary judgment awarded to Holly Hill, we must address the propriety of this appeal.

Summary judgment granted to some but not all defendants is an interlocutory judgment since it "does not dispose of the case but leaves it for further action for the trial court in order to settle and determine the entire controversy." *Veazy v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). In *Davidson v. Knauff Ins. Agency*, this court made an analysis of the appealability of interlocutory judgments and concluded that there are two means of appealing judgments which are interlocutory. 93 N.C. App. 20, 376 S.E.2d 488 (1989), *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772.

First, if there has been a final disposition of at least one but fewer than all claims, the final disposition of those claims may be appealed if the trial judge in addition certifies that there is no just reason to delay the appeal. *Davidson*, 93 N.C. App. at 24, 376 S.E.2d at 490 (citations omitted). In this case, the trial judge failed to certify in its order granting Holly Hill summary judgment that there was no just reason to delay the appeal. Thus, there can be no appeal of the summary judgment under Rule 54(b).

The second means of appeal for an interlocutory order is available if the order qualifies under the pertinent provisions of N.C. Gen. Stat. §§ 1-277 and 7A-27(d) (1989). Under those Sections appeals are commonly allowed if delaying the appeal will affect any substantial rights. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). *Accord Davidson, supra.* Our Supreme Court has stated that in order to determine whether a substantial right will be affected by delaying an interlocutory appeal we must examine each case by considering the particular facts of the case and the procedural context in which the order from which appeal is sought is entered. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Our Supreme Court has further instructed that "the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Davidson*, 93 N.C. App. at 25, 376 S.E.2d at 491 (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982)). The rationale for that proposition being

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

Davidson, at 25, 376 S.E.2d at 491.

N.C. Gen. Stat. § 1-294 (1983) provides that perfecting an appeal stays further proceedings upon the judgment appealed from and "upon matters embraced therein." Thus, the possibility of two trials of the same factual issues is averted.

[1] The Myers cite *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982), to support their position that this case involves a substantial right in that there is the possibility of inconsistent verdicts and that it is their right to have a jury decide if the conduct of one, some, all or none of the defendants caused injury to them. *Bernick* is distinguishable in that it involved an interlocutory order with regard to a products liability claim but the trial judge did not adjudicate the remaining claim of respondeat superior. The factual issues were the same in that the question remained whether the alleged negligent, intentional or malicious conduct was contemplated in the warranty or was foreseeable by the manufacturer and distributors of the product in question. This case, on the other hand, involves medical malpractice claims against defendants, each of whom had a separate and distinct contract from the others and each of whom owed a different duty to the Myers. An independent contractor physician stands legally apart from a hospital which provides an environment for the physician to practice medicine. *Davis v. Wilson*, 265 N.C. 139, 143 S.E.2d 107 (1965). Thus, the claim against Holly Hill involves issues which are not factually the same, particularly the duty a hospital owes a patient and the duty owed by an independent contractor physician to his patient, and this appeal is premature.

[2] Further, since we have determined that the issues involved in the Myers' claims against each defendant are severable, the remaining causes of action are not "matters embraced" in the action against Holly Hill. Thus, the remaining actions were not stayed. In light of the fact that the Myers refused to proceed to trial when ordered to do so, they did not make a motion for a continu-

ance, nor did they seek a writ of supersedeas—despite a specific offer by the court of the opportunity to do so, we find that the court properly exercised its jurisdiction in dismissing the remaining claims under N.C. Gen. Stat. § 1A-1, Rule 41(b) (1983) for failure to prosecute and to comply with the trial judge's order to prosecute.

III

[3] We now turn to the issue of whether summary judgment was properly granted as to Holly Hill. On a motion for summary judgment, all pleadings, affidavits, answers to interrogatories and other materials offered must be viewed in the light most favorable to the party against whom summary judgment is sought. *Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E.2d 316, 318 (1979). Summary judgment is properly granted where there is no genuine issue of material fact to be decided and the movant is entitled to a judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

On appeal, the Myers make two contentions. First, they contend Mr. Myers complained to the hospital staff about hip and thigh pain after receiving ECT treatments but that the hospital staff was negligent in recording and reporting those complaints to Dr. Barringer, Jr. We find that contention unavailing. Mr. Myers testified in his deposition that he made the very same complaints of pain to his treating physicians that he allegedly made to the nurses and employees of Holly Hill.

The Myers' second contention is that even if the treating physicians knew about Mr. Myers' hip and thigh pain from their communications with him, if the hospital staff would have reported and recorded his complaints, the duplicity of those complaints would have caused the treating physicians to take Mr. Myers' complaints more seriously. That contention is unavailing in that Dr. Barringer, Jr., testified on deposition that he would have responded in the same manner whether a complaint of hip and leg pain was made directly to him by a patient or was conveyed to him by the nursing staff. We therefore find that the order of summary judgment granted to Holly Hill was proper in that there is no evidence that the conduct of the hospital was the proximate cause of the Myers' injuries.

IV

We therefore find that the order of summary judgment is Affirmed.

The order dismissing the Myers' remaining claims is Affirmed.

Judges ORR and GREENE concur.

JAMES HARTLEY BLANKLEY, JR. v. RALPH MARTIN

No. 9023SC387

(Filed 18 December 1990)

Automobiles and Other Vehicles § 595 (NCI4th)— turning—collision between vehicles going same direction—failure of plaintiff to meet statutory duty of signaling—contributory negligence properly submitted to jury

In a negligence action arising from an automobile accident, the trial court did not err in submitting to the jury an issue concerning plaintiff's contributory negligence where plaintiff's van was stopped in the highway waiting to make a left turn when it was struck by defendant's following vehicle; plaintiff was required pursuant to N.C.G.S. § 20-154 to determine that his turn could be made in safety and to give a turn signal for at least 200 feet before his intended turning point; plaintiff's own testimony that he gave a signal for 150 feet was some evidence that he did not meet his statutory duties; and it was thus for the jury to decide if plaintiff violated the statute in any respect, and, if so, whether the violation, when considered with all the other evidence, showed plaintiff to have been contributorily negligent and whether plaintiff's negligence proximately caused or contributed to his injuries.

Am Jur 2d, Automobiles and Highway Traffic §§ 851, 852, 882, 890, 891.

Liability for accident arising from failure of motorist to give signal for left turn at intersection as against motor vehicle proceeding in same direction. 39 ALR2d 13.

APPEAL by plaintiff from judgment filed 8 December 1989 by *Judge Julius A. Rousseau, Jr.*, in WILKES County Superior Court. Heard in the Court of Appeals 25 October 1990.

Franklin Smith for plaintiff-appellant.

Moore, Willardson & Lipscomb, by John S. Willardson, for defendant-appellee.

GREENE, Judge.

The plaintiff appeals from a judgment filed on 8 December 1989 based upon a jury verdict finding the plaintiff to have been contributorially negligent in the events leading up to a car wreck between the plaintiff and the defendant.

The plaintiff filed this negligence action against the defendant on 25 February 1988. The defendant admitted his own negligence but argued that the plaintiff was contributorially negligent. This case came on for trial before a jury on 27 November 1989. The plaintiff presented the following evidence: On the morning of 7 December 1987, the defendant was driving south on U.S. 21 Business in Elkin, North Carolina. The plaintiff was also driving south on U.S. 21 Business, driving a delivery van to make his usual deliveries for his employer, White Swan Uniform Rental. Both the plaintiff and the defendant had entered U.S. 21 Business from another adjoining highway. The speed limit on U.S. 21 Business was 45 miles per hour. At the time of the accident, the plaintiff was headed to a business known as the Video Connection to make a delivery. To get to the Video Connection, the plaintiff had to make a left turn off of U.S. 21 Business. The plaintiff began to apply his brakes at or just after passing an intersection located approximately one-quarter to one-third of a mile before the necessary turning point thereby making a safe, slow stop. This turning point was located at the bottom of a hill on U.S. 21 Business. The plaintiff testified that he gave a left turn signal for approximately 150 feet before the necessary turning point, and that his turn signal lights were very large and in working order. After coming to a complete stop on the flat part at the bottom of the hill, the plaintiff waited for oncoming, northbound traffic to pass before making the left

turn. He had waited for three or four seconds at the bottom of the hill when from the rear he heard the sound of screeching tires. After the defendant's car skidded for approximately sixty feet, it collided with the back of the plaintiff's stopped van causing the plaintiff to suffer head, neck, and back injuries. According to the plaintiff, the defendant drove negligently in that during clear driving conditions the defendant drove over the speed limit, failed to keep a proper lookout, failed to see the plaintiff's stopped van in front of him, and subsequently ran into the plaintiff's van.

The defendant's evidence shows that at some point before the collision, the defendant had been driving in front of the plaintiff. The defendant testified that as he was traveling south on U.S. 21 Business at 45 miles per hour, the plaintiff pulled out and passed him at a speed in excess of 45 miles per hour. The plaintiff testified that he passed the defendant on a section of the highway which was temporarily a two-lane road going south, and that he passed the defendant at a speed in excess of 30 miles per hour. According to the defendant's estimate, the plaintiff passed the defendant approximately 250 yards before the intersection on U.S. 21 Business, the same intersection at or just after which the plaintiff first began applying his brakes. Not long after the plaintiff had passed the defendant and reentered the southbound lane of the highway, the defendant passed the intersection, checking both to his left and right for approaching traffic. Soon after the defendant had passed by the intersection, the plaintiff suddenly stopped thereby giving the defendant an insufficient amount of time to stop safely. The defendant realized that the plaintiff had stopped when he was approximately seventy-five to ninety feet from the plaintiff's stopped van. Though the defendant did not remember seeing a turn signal from the plaintiff's van at any point between the intersection and the place of the accident, he did notice the plaintiff's brake lights. He also observed the back end of the plaintiff's van lift up when it stopped. The defendant applied his brakes and skidded into the rear of the plaintiff's van.

At the end of the evidence, the defendant argued that only the issues of the plaintiff's contributory negligence and damages should be submitted to the jury. The plaintiff argued that the issue of contributory negligence should not be submitted to the jury because the defendant did not produce evidence of the plaintiff's alleged negligence. The trial court submitted both issues to the jury. The jury found that the plaintiff was contributorially

negligent and awarded no damages. The plaintiff made two post-trial motions which the trial court denied.

We note initially that the plaintiff has abandoned the three assignments of error supporting his three arguments on this appeal. "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). Because the plaintiff's assignments of error do not state the legal basis upon which error is assigned, they are deemed abandoned. However, pursuant to N.C.R. App. P. 2, we have chosen to address the merits of the plaintiff's argument concerning the allegedly erroneous submission of the issue of contributory negligence to the jury. Because our resolution of this argument renders moot the plaintiff's third argument, we refuse to address the third argument.

The issue is whether the trial court erred in submitting the issue of the plaintiff's contributory negligence to the jury where the evidence showed that the plaintiff violated N.C.G.S. § 20-154 (1989).

The burden of proving the plaintiff's contributory negligence rests with the defendant. *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 38, 365 S.E.2d 198, 201, *disc. rev. denied*, 322 N.C. 610, 370 S.E.2d 257 (1988). The defendant "has the burden of proving by the greater weight of the evidence that plaintiff's negligence was one of the proximate causes of his injury or damages." *Clark v. Bodycombe*, 289 N.C. 246, 253, 221 S.E.2d 506, 511 (1976). "[T]he defendant is entitled to have the issue submitted to the jury if all the evidence and reasonable inferences drawn therefrom and viewed in the light most favorable to defendant tend to establish or suggest contributory negligence." *Wentz*, 89 N.C. App. at 38, 365 S.E.2d at 201. " 'If there is more than a scintilla of evidence, contributory negligence is for the jury.' " *Tatum v. Tatum*, 79 N.C. App. 605, 607, 339 S.E.2d 817, 818, *modified and aff'd*, 318 N.C. 407, 348 S.E.2d 813 (1986) (citation omitted).

From the record, it appears that the primary reason the trial court submitted the issue of contributory negligence to the jury was based upon the plaintiff's own testimony suggesting that he had not complied with N.C.G.S. § 20-154. The statute provides as follows:

(a) The driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. . . .

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device approved by the Division, . . .

. . . .

All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last 100 feet traveled prior to stopping or making a turn. Provided, that in all areas where the speed limit is 45 miles per hour or higher and the operator intends to turn from a direct line of travel, a signal of intention to turn from a direct line of travel shall be given continuously during the last 200 feet traveled before turning.

. . . .

(d) A violation of this section shall not constitute negligence per se.

"The manifest purpose of G.S. 20-154 is to promote safety in the operation of automobiles on the highways, and not to obstruct vehicular traffic. This safety statute must be given a reasonable and realistic interpretation to effect the legislative purpose." *Farmers Oil Co. v. Miller*, 264 N.C. 101, 106, 141 S.E.2d 41, 44 (1965). Additionally, the purpose behind the signaling requirements of N.C.G.S. § 20-154(b) is to afford the driver of a following vehicle a turn signal, "maintained for a sufficient distance and length of time to enable the driver of the following vehicle to observe it and to understand therefrom what movement is intended" by the driver ahead of him. *Id.*

Generally, this statute requires two things of a driver who intends to turn from a direct line of travel. First, the driver must "see that the movement can be made in safety." *Clarke v. Holman*, 274 N.C. 425, 429, 163 S.E.2d 783, 786 (1968). Second, the driver must "give the required signal when the operation of any other

vehicle may be affected." *Id.* (emphasis omitted). As we have recently elaborated, N.C.G.S. § 20-154(a)

> is designed to impose upon a driver the legal duty to exercise reasonable care under the circumstances in ascertaining that his movement can be made with safety to himself and others before he actually undertakes the movement. . . . It does not mean that a motorist may not make a turn on a highway unless the circumstances render such turning absolutely free from danger. The duty to signal is imposed only where the surrounding circumstances afford the driver reasonable grounds for apprehending his turn might affect the operation of another vehicle.

Sass v. Thomas, 90 N.C. App. 719, 722-23, 370 S.E.2d 73, 75 (1988) (citation omitted). While a driver's failure to meet the statutory requirements is not negligence per se, it must be considered along with all the other facts and circumstances as evidence of the driver's alleged contributory negligence.

> 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.

Kinney v. Goley, 4 N.C. App. 325, 332, 167 S.E.2d 97, 102 (1969) (We note that this case was decided after the 1965 amendment to N.C.G.S. § 20-154(b), which amendment stated that a "violation of this Section shall not constitute negligence per se." While this added proviso was deleted in 1981, the 1973 amendment to N.C.G.S. § 20-154 added subsection (d), which subsection is identical to the deleted proviso of subsection (b) and which subsection applies equally to all of N.C.G.S. § 20-154.); *see also Spruill v. Summerlin*, 51 N.C. App. 452, 276 S.E.2d 736 (1981) (decided before the effective date of the 1981 amendment).

On direct examination, the plaintiff testified that he began to give his turn signal 150 feet before his intended point of turning off of U.S. 21 Business. Based upon N.C.G.S. § 20-154(a) and (b), because the speed limit on this highway was 45 miles per hour, and because the plaintiff was intending to turn from a direct line, the plaintiff had the duties to determine that his turn could be

made in safety and to give a turn signal for at least 200 feet before his intended turning point if the surrounding circumstances gave him reasonable grounds for apprehending that his turning off of the highway might affect the operation of the defendant's vehicle. Whether the plaintiff met these duties is a question of fact for the jury. As there is some evidence that the plaintiff did not meet these duties, we are not prepared to say as a matter of law that the plaintiff was not contributorially negligent. Therefore, the trial court properly submitted the issue of the plaintiff's contributory negligence to the jury, thus allowing the jury to decide whether the plaintiff violated the statute in any respect, and if so, whether the violation, when considered with all the other evidence, shows the plaintiff to have been contributorially negligent, *Kinney*, and if so, whether the plaintiff's "negligence proximately caused or contributed to" his injuries. *White v. Lacey*, 245 N.C. 364, 368, 96 S.E.2d 1, 4 (1957).

No error.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

JOHN DEWITT WOLFE, PLAINTIFF v. JOHN CARL BURKE, DEFENDANT

No. 9015SC226

(Filed 18 December 1990)

1. Automobiles and Other Vehicles § 542 (NCI4th)— pedestrian crossing other than at crosswalk—failure of driver to keep proper lookout—sufficiency of evidence

In an action to recover for injuries sustained by plaintiff pedestrian who was struck by defendant driver while crossing the roadway, the trial court erred in directing verdict for defendant on the ground that there was insufficient evidence that defendant was negligent and such negligence was a proximate cause of plaintiff's injury, since there was evidence the collision occurred on a straight strip of road; there were no obstructions for 60 to 70 yards from the top of the hill where

the road curved to the bottom of the straight strip of road; defendant did not see plaintiff prior to impact though his father, who was a passenger in his vehicle, saw plaintiff at impact; defendant's headlights were burning; plaintiff was wearing dark clothing; the evidence was conflicting regarding the point of impact, the amount of lighting at the scene, and defendant's speed; and there was thus sufficient evidence to reach the jury on the issue of whether defendant failed to keep a proper lookout and was negligent.

Am Jur 2d, Automobiles and Highway Traffic §§ 286, 477-479.

2. **Automobiles and Other Vehicles § 614 (NCI4th)— pedestrian crossing other than at crosswalk—failure to yield to vehicle—no contributory negligence as a matter of law**

Where the evidence tended to show that plaintiff pedestrian crossed at a place other than a crosswalk, then plaintiff had a duty to yield to defendant's vehicle under N.C.G.S. § 20-174(a), but failure to do so was not contributory negligence as a matter of law where the jury could infer that plaintiff failed to keep a proper lookout, but there was an unobstructed view of only 60 to 70 yards, and the evidence did not so clearly establish plaintiff's failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion was possible.

Am Jur 2d, Automobiles and Highway Traffic §§ 480, 481.

APPEAL by plaintiff from judgment entered 26 October 1989 by *Judge F. Gordon Battle* in CHATHAM County Superior Court. Heard in the Court of Appeals 21 September 1990.

On 6 January 1987 at approximately 7:00 p.m., plaintiff, a pedestrian, was injured while crossing RP 1012 from west to east where he was hit by defendant's automobile traveling north. Plaintiff had been employed since 1984 by T & J Securities as a security guard at Townsend, Inc., which is located on both sides of RP 1012 near Pittsboro. In order to make his rounds, it was necessary for plaintiff to cross the road at least 30 times during his shift.

RP 1012 is a two lane road which is 20 feet wide at the place where plaintiff crossed. There is no marked crosswalk. Heading north, the road curves at the top of a hill and then, still curving,

slopes downward with no obstructions for 60 to 70 yards to the straight strip of road in front of Townsend. The speed limit is 55 m.p.h. but changes to 35 m.p.h. before reaching Townsend. The first of two 35 m.p.h. signs before reaching Townsend is located up the hill 210 to 260 feet from the bottom of the straight strip where plaintiff crosses. Another sign is located at the bottom of the hill, and debris from the accident was found 25 to 40 yards from this sign.

Plaintiff's witness John Cheek testified that he was walking on the east side of the road and saw plaintiff leave the guardhouse on the west side of the road in a dark colored uniform. Mr. Cheek testified that though there were company lights at Townsend, there was not "much light . . . to illuminate the highway." Mr. Cheek looked away, heard a "lick," and found plaintiff lying behind him.

Regarding lighting conditions, plaintiff testified that there were some company lights so that he was able to walk around to make his rounds without using his flashlight, which he used to check the thermometers. According to plaintiff, he was wearing a dark uniform; he was walking at his usual pace; he did not recall what happened before the collision; and he never saw defendant.

Trooper George Steil of the North Carolina Highway Patrol testified that defendant told him at the accident scene that he was going around 40 m.p.h. where the speed limit is 35 m.p.h. and he never saw plaintiff, and that he did not recall whether defendant mentioned an approaching southbound motor vehicle. Regarding lighting conditions, Trooper Steil testified that at the accident scene people were using flashlights, but he could not recall whether any lights were on. His accident report indicated it was dark but the street was lighted. He further stated that he determined the impact occurred near the shoulder of the northbound lane because of damage to the windshield and right front quarter of the car and glass located near the edge of the northbound lane.

Defendant's father, William Burke, who was riding in the front passenger seat of defendant's car, testified that defendant had his headlights on and was going 45 to 50 m.p.h. in the 55 m.p.h. zone but slowed to 30 to 35 m.p.h. in the 35 m.p.h. zone though he admitted he did not see the speedometer after leaving the 55 m.p.h. zone. Regarding the point of impact, Mr. Burke stated that he saw an oncoming southbound car and immediately before impact

saw plaintiff come from behind the car, hit defendant's left front fender, cross the windshield and fall off the car on the right front shoulder. Though he admitted the windshield was damaged and there was a dent in the left front fender, he denied that the right front quarter of the automobile was damaged.

Defendant testified that he was going 45 m.p.h. in the 55 m.p.h. zone but slowed to 30 to 35 in the 35 m.p.h. zone even though he admitted that he had told Trooper Steil at the accident scene that he was going 40 m.p.h. Regarding lighting conditions, he testified that he knew there were company lights at Townsend, that it was dark, but that he was able to see Mr. Cheek by natural light when he got to the bottom of the hill. According to defendant, right before the crash, he saw an oncoming southbound vehicle and a blur in the southbound lane but never saw plaintiff. Regarding the point of impact, defendant testified that after the collision his car was dented only on the left front bumper and not the right, and the bottom right half of his windshield was damaged. He further stated that he was familiar with the area and was aware that many people crossed the road at Townsend during the day and night.

Plaintiff filed this civil action to recover damages for personal injury resulting from the alleged negligence of the defendant. Defendant answered alleging that plaintiff's contributory negligence was a proximate cause of plaintiff's injury.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant moved for a directed verdict. Both motions were denied, and the action was submitted to the jury. The jury failed to return a verdict and was discharged. Defendant renewed his motion for a directed verdict, and the trial court granted the motion.

From this judgment, plaintiff appeals.

Hutchins, Tyndall, Doughton & Moore, by Laurie L. Hutchins, for plaintiff-appellant.

Walter L. Horton, Jr., for defendant-appellee.

ORR, Judge.

The issue on appeal is whether the trial court erred in granting defendant's motion for directed verdict on the grounds that 1)

there was insufficient evidence regarding the issue of defendant's negligence which was a proximate cause of plaintiff's injury to go to the jury, and 2) the evidence disclosed that the plaintiff was contributorially negligent as a matter of law. For the reasons set forth below, we conclude that the trial court erred in granting defendant's motion for a directed verdict.

In determining a motion for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 (1990), the trial court must "consider all the evidence in the light most favorable to the nonmoving party. A directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant." *Watkins v. Hellings*, 321 N.C. 78, 81, 361 S.E.2d 568, 570 (1987).

Plaintiff argues that the evidence was sufficient to go to the jury on the issues of defendant's and plaintiff's negligence. "[S]ince negligence usually involves issues of due care and reasonableness of actions under the circumstances, it is especially appropriate for determination by the jury." *Radford v. Norris*, 74 N.C. App. 87, 88-89, 327 S.E.2d 620, 621-22, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985).

In North Carolina, a pedestrian has "a common law duty to exercise reasonable care for his own safety by keeping a proper lookout for approaching traffic before entering the road and while on the roadway." *Whitley v. Owens*, 86 N.C. App. 180, 182, 356 S.E.2d 815, 817 (1987). Further, N.C. Gen. Stat. § 20-174(a) (1989) provides that a pedestrian "crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

In addition to a motorist's common law duty " 'to exercise due care to avoid colliding with' a pedestrian," *Gamble v. Sears*, 252 N.C. 706, 710, 114 S.E.2d 677, 679 (1960) (quoting *Landini v. Steelman*, 243 N.C. 146, 148, 90 S.E.2d 377, 379 (1955)), N.C. Gen. Stat. § 20-174(e) (1989) provides that "[n]otwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary . . . ."

> Under G.S. 20-174(e), a motorist has the duty . . . to operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when

special hazards exist with respect to pedestrians, and give warning of his approach by sounding his horn if the circumstances warrant.

State v. Fearing, 48 N.C. App. 329, 336, 269 S.E.2d 245, 249, *cert. denied*, 301 N.C. 99, 273 S.E.2d 303, *disc. review denied*, 301 N.C. 403, 273 S.E.2d 448 (1980), *aff'd in part and new trial granted in part on other grounds*, 304 N.C. 471, 284 S.E.2d 487 (1981).

[1] In the instant case, there was evidence the collision occurred on the straight strip of road, and there were no obstructions for 60 to 70 yards from the top of the hill where the road curves to the bottom of the straight strip of road. Defendant did not see plaintiff prior to impact though his father saw plaintiff at impact. Further, the evidence tends to show that defendant's headlights were burning, and plaintiff was wearing dark clothing. The evidence was conflicting regarding the point of impact, the amount of lighting at the scene, and whether defendant was speeding. Thus, we conclude that there was sufficient evidence below to reach the jury on the issue of whether defendant failed to keep a proper lookout and was negligent.

[2] Regarding the issue of plaintiff's contributory negligence, the evidence shows that plaintiff was not crossing at a crosswalk and therefore had a duty to yield under § 20-174(a). However, our courts have held that the "failure to yield the right-of-way [as required under N.C. Gen. Stat. § 20-174(a)] is not contributory negligence *per se*, but rather that it is only evidence of negligence to be considered with other evidence in the case in determining whether the plaintiff is chargeable with negligence which proximately caused or contributed to his injury." *Dendy v. Watkins*, 288 N.C. 447, 456, 219 S.E.2d 214, 220 (1975).

Even though failing to yield the right-of-way to an automobile is not contributory negligence *per se*, it may be contributory negligence as a matter of law. *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47 (1985). "[T]he court will nonsuit . . . when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible." *Ragland v. Moore*, 299 N.C. 360, 364, 261 S.E.2d 666, 668 (1980) (quoting *Blake v. Mallard*, 262 N.C. 62, 65, 136 S.E.2d 214, 216 (1964)). "A rule which by definition requires contributory negligence to be so clear 'that no other reasonable inference may be drawn therefrom' will by its

nature be satisfied only infrequently and only in extreme circumstances." *Wagoner v. Butcher*, 6 N.C. App. 221, 231-32, 170 S.E.2d 151, 158 (1969). In *Meadows*, we stated that "[i]f the road is straight, visibility unobstructed, the weather clear, and the headlights of the vehicle in use, a plaintiff's failure to see and avoid defendant's vehicle will consistently be deemed contributory negligence as a matter of law." 75 N.C. App. at 89-90, 330 S.E.2d at 50.

Defendant cites *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968), and *Dendy*, where the Court found both plaintiffs contributorially negligent as a matter of law. In *Anderson*, the Court stated that plaintiff was not contributorially negligent as a matter of law in crossing where plaintiff saw defendant 275 to 300 feet away. However, once plaintiff realized defendant was traveling faster than he had previously thought, he continued to walk at the same pace into the path of the car and was contributorially negligent as a matter of law. In *Dendy*, the plaintiff walked diagonally across a six lane road and was hit by the defendant, who was traveling 30 m.p.h. in a 45 m.p.h. zone, and there was a half mile of unobstructed view. Defendant also cites *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967), where there was a half mile of visibility, and *Rosser v. Smith*, 260 N.C. 647, 133 S.E.2d 499 (1963), where there was 500 to 600 feet of visibility. In both cases where there was high visibility, the plaintiffs were found contributorially negligent as a matter of law. In *Meadows*, plaintiff was standing in defendant's lane when defendant pulled onto the highway from the parking lot 100 to 150 feet away, and the road was straight and the view unobstructed. Though right before impact, defendant was going 43 m.p.h. in a 55 m.p.h. zone, presumably, he was going very slowly at the time he pulled onto the highway. Further, between the time defendant pulled out and the collision, plaintiff took steps toward the center of the road.

Considering all the evidence in the light most favorable to plaintiff, a jury could infer that plaintiff failed to keep a proper lookout. However, from the top of the hill to the bottom of the straight strip of road in front of Townsend, the road continued to curve, and there was an unobstructed view of only 60 to 70 yards. Thus, under the circumstances, we cannot conclusively say that plaintiff was contributorially negligent as a matter of law.

For the reasons above, we conclude that the trial court erred in granting defendant's motion for a directed verdict.

New trial.

Judge GREENE concurs.

Judge DUNCAN concurred prior to 29 November 1990.

TRIAD BANK, PLAINTIFF v. JAMES E. ELLIOTT, DEFENDANT

No. 9018SC397

(Filed 18 December 1990)

1. **Chattel Mortgages and Conditional Sales § 16 (NCI3d)— automobile purchase—default—summary judgment for plaintiff proper**

The trial court did not err by granting plaintiff's motion for summary judgment on the issue of default in an action for a deficiency judgment on purchase notes for a Rolls Royce and a Bentley where defendant conceded that he made no payments after September of 1987 on either note and the discrepancy in the sum listed as interest did not rise to the level of a disputed material fact.

Am Jur 2d, Secured Transactions § 637.

2. **Uniform Commercial Code § 46 (NCI3d)— automobile purchase note—default—commercially reasonable sale**

Summary judgment was properly granted for plaintiff on the issue of commercially reasonable sale in an action for a deficiency judgment on purchase notes for a Rolls Royce and a Bentley where defendant acknowledged that the address used by plaintiff is the correct one and that he does not recall informing plaintiff of any other; a ten-day redemption period not required by statute but mentioned in plaintiff's letter was provided; it is difficult to see how defendant could have been misled by the redemption period since he contends he never received the letter; the notice described the vehicle substantially as it was described in the security agreement; and the difference of one year in make, which may have been a clerical error, was not a substantial deviation. N.C.G.S. § 25-9-601.

Am Jur 2d, Secured Transactions §§ 612, 614, 619, 620, 639.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 ALR3d 401.

APPEAL by defendant from judgment entered 31 January 1990 in GUILFORD County Superior Court by *Judge Russell G. Walker.* Heard in the Court of Appeals 25 October 1990.

Turner, Enochs, Sparrow, Boone & Falk, P.A., and Peter Chastain, for plaintiff-appellee.

J. Sam Johnson, Jr., for defendant-appellant.

DUNCAN, Judge.

On 25 April 1986, James E. Elliott ("defendant") executed and delivered to Triad Bank ("plaintiff") a promissory note and security agreement for $35,756.59 secured by a 1976 Rolls Royce automobile. On 6 May 1986, defendant executed another promissory note and security agreement with plaintiff for $43,793.06 secured by a 1981 Bentley automobile. The proceeds of the notes were used for the purchase of the automobiles. The first note on the Rolls Royce is an installment note requiring 24 equal monthly payments of $600.00 each plus interest. The first payment was due on 25 May 1986. The second note on the Bentley was also an installment note payable in 36 monthly installments of $600.00 each plus interest beginning 15 June 1986.

Defendant undertook repairs to both vehicles to make them suitable for resale. He received verbal permission from one of plaintiff's financing officers to take the cars to Florida for that purpose. While the cars were in Florida plaintiff began to debit defendant's accounts to make payments on the two automobile loans. Defendant had authorized plaintiff's officers to debit his checking account for missed or late loan payments. However, plaintiff also began to debit several other accounts, including a corporate account and a joint account with defendant's daughter. As a result of the debits, defendant received checks which he had written to other parties and which were returned for insufficient funds. Defendant complained to Karen Dillard, one of plaintiff's branch managers. Ms. Dillard agreed to immediately look into the matter, put the money

back in appropriate accounts, refund any service charges that resulted from the returned checks, and to write a letter of apology to each party that had received a check covered by insufficient funds. Defendant did not withdraw his authorization from plaintiff to debit his personal account for missed loan payments. Shortly thereafter, Ms. Dillard contacted Mr. Elliott and requested that he return the automobiles to North Carolina.

On 20 October 1987, plaintiff notified defendant that it was calling both loans due because of his failure to return the automobiles to North Carolina. On 22 January 1988, plaintiff and defendant negotiated a change in the security agreement, by which defendant agreed to return the automobiles to North Carolina, and plaintiff agreed to forbear in its collection effort for a period of ninety days during which the automobiles were to be listed for sale. The automobiles were not sold during that period, and on 2 May 1988, plaintiff repossessed both of them. On 6 May 1988 plaintiff wrote defendant informing him that it had repossessed the automobiles because he was in default in his payments, and that he could redeem the cars by paying the outstanding balance of $43,614.55 for the first note, and $33,493.20 for the second note. The letter enclosed two notices of sale, and stated that the cars would be sold at public auction under the terms of the notices. The letter and the notices of sale were sent to a post office box address in Greensboro, North Carolina, which defendant acknowledges was correct at the time and, in fact, still was correct at the time of discovery.

On 16 May 1988 the automobiles were sold at public auction. The Rolls Royce was sold to the Glynn Collection for $19,000.00. The Bentley was also sold to the Glynn Collection for $28,000.00. After applying the funds received from the sale to the collection and sale expenses and the outstanding balances on the notes, deficiencies remained as to both vehicles. The outstanding balance on the first note is $19,573.57, plus interest. The outstanding balance for the second note is $20,142.70, plus interest.

On 14 July 1988 plaintiff filed a complaint seeking a deficiency judgment on both notes. The defendant denied the indebtedness, asserting the defenses of breach of contract, violation of statutory sale requirements, and stating a counterclaim for negligence and intentional misconduct. The trial court granted plaintiff's motion for summary judgment. Defendant appeals.

I

The question presented is whether the trial court erred in granting plaintiff's motion for summary judgment. In general, summary judgment is appropriate when the pleadings, answers to interrogatories, affidavits and admissions show that no material issue of fact exists and the movant is entitled to summary judgment as a matter of law. *Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E.2d 316, 318 (1979).

In order for the plaintiff to prevail, it must establish the absence of any material issue of fact, either by showing the nonexistence of an essential element of the defendant's cause of action, or by showing that defendant cannot provide evidence to support an essential element of his claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). In considering a motion for summary judgment, all pleadings and other information must be viewed in the light most favorable to the nonmoving party. *Dickerson, Inc. v. Board of Transp.*, 26 N.C. App. 319, 215 S.E.2d 870 (1975).

II

[1] Defendant argues preliminarily that the trial court erred in granting summary judgment because there was a genuine issue of material fact as to whether he was actually in default on his loan payments, and if so, by how much. This argument is meritless. Defendant in fact conceded in a deposition that he made no payments to plaintiff after September of 1987 on either note. With respect to the amount, defendant claims that there is a discrepancy between the amount prayed for in the complaint and the amount awarded in the judgment. However, the amount awarded in the judgment ($39,716.27) is the same as the sum of the principals of the two notes ($19,573.57 in the first note, plus $20,142.70 in the second note). The only difference is in the sums listed as interest, which would obviously vary with time. This discrepancy, if indeed there is one, does not rise to the level of a disputed material fact.

III

[2] The primary issue raised by defendant is whether the plaintiff's sale of the two vehicles in question was commercially reasonable. For the following reasons, we hold that the granting of summary judgment in this case was proper.

N.C. Gen. Stat. § 25-9-601 governs the disposition of collateral by public sale, and provides as follows:

> Disposition of collateral by public proceedings as permitted by G.S. 25-9-504 may be made in accordance with the provisions of this part. The provisions of this part are not mandatory for disposition by public proceedings, but any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part shall conclusively be deemed to be commercially reasonable in all respects.

Thus, the statute creates the presumption that substantial compliance with its terms constitutes a commercially reasonable sale. In fact, this court has held that absent special circumstances that do not exist here, a showing by the secured party that the contents of the notice of the sale were substantially in accord with N.C. Gen. Stat. § 25-9-602, that the notice of sale was posted and mailed substantially in accord with N.C. Gen. Stat. § 25-9-603, and that a public sale was held in accordance with the notice of sale, makes a prima facie showing of substantial compliance with the statutory requirements. *Wachovia Bank and Trust Co., N.A. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101, *disc. review denied and appeal dismissed*, 295 N.C. 557, 248 S.E.2d 734 (1978).

Defendant makes several specific objections to the commercial reasonableness of the public sale procedure:

> 1. that he never received the plaintiff's letter or the notices of sale;
>
> 2. that the plaintiff's letter assured him of the right to redeem within ten days, but plaintiff conducted the sale on the tenth day; and
>
> 3. that the notice inaccurately described the collateral.

Each of these objections will be considered in turn.

With respect to the letter defendant now contends that plaintiff knew that he was staying in Charleston, South Carolina, and that he did not receive the notices because they were sent to an old post office box. However, in his deposition testimony defendant conceded that the post office box address was a correct one, and that it was in fact correct even at the time the deposition was taken. He further conceded that he could not recall whether he had ever given plaintiff a South Carolina address. N.C. Gen.

Stat. § 25-9-603(2) sets out the requirements for the mailing of the notice of sale, and provides that the party holding the sale send notice to the debtor:

> (a) at the actual address of the debtors, if known to the secured party, or
>
> (b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address.

Here, defendant acknowledges not only that the address used by plaintiff is the correct one, but also that he does not recall informing them of any other. This argument is without merit.

Defendant argues that even though the plaintiff's letter assured him of the right to redeem the vehicles within ten days, the plaintiff conducted the sale on the tenth day. First it should be noted that the ten day redemption period defendant refers to is not provided by statute. It was merely mentioned in plaintiff's letter, which read, in pertinent part, as follows:

> You may redeem these vehicles by paying the unpaid "Outstanding balance" of $43,614.55 for #11742-02 and $33,493.20 for #11742-03 plus all costs incurred for said repossession and storage of the vehicle within ten (10) days of the date of this letter.

The letter was dated 6 May 1988 and the sale was conducted on 16 May 1988. It appears that the plaintiff provided exactly what it promised—a ten day period between the date of the letter and the date of the sale within which defendant could redeem the collateral. Plaintiff did not agree to provide more; the statute does not require that. In any event, since defendant contends that he never received the letter or the notices, it is difficult to see how he could have been misled.

The defendant next argues that plaintiff advertised the wrong collateral, in that it described the vehicle covered by the first note as a 1977 Rolls Royce, when it was in fact a 1976 Rolls Royce. In all other respects, the description was correct. N.C. Gen. Stat. § 25-9-602(c) requires that the notice of sale shall do as follows:

> (c) describe personal property to be sold substantially as it is described in the security agreement pursuant to which the power of sale is being exercised, and may add such further

description as will acquaint bidders with the nature of the property.

We hold that the notice described the vehicle substantially as it was described in the security agreement, and that the difference of the one year in make, which may well have been a clerical error, is not a substantial deviation.

Based on the foregoing discussion, we hold that the plaintiff has substantially complied with the procedures set out in N.C. Gen. Stat. § 25-9-601, and that the sale shall be deemed to be commercially reasonable in all respects as a matter of law. *See generally Murphy, supra.*

Our holding, however, does not completely dispose of this appeal. As the defendant points out, the trial judge failed to rule expressly on the defendant's counterclaims. While we believe the trial judge was correct in granting summary judgment in favor of the plaintiff on its claim, there has been no final determination on the merits of the defendant's counterclaim. We must therefore remand this case so that the trial court may completely dispose of all issues presented by this case.

IV

Accordingly, the judgment appealed from is

Affirmed in part, and remanded.

Judges ORR and GREENE concur.

REBECCA E. SIPPE, PLAINTIFF v. J. LAWRENCE SIPPE, DEFENDANT

No. 8926DC1404

(Filed 18 December 1990)

Pensions § 1 (NCI3d)— qualified domestic relations order—initial determination by plan administrator

The Retirement Equity Act requires that an employee pension plan administrator make the initial determination as to whether a domestic relations order issued by the district court meets the requirements of a "qualified domestic relations

order" so as to permit garnishment of an employee's benefits to enforce an alimony obligation.

Am Jur 2d, Pensions and Retirement Funds §§ 464-467.

APPEAL by defendant from orders entered 17 October 1989 in MECKLENBURG County District Court by *Judge Robert P. Johnston.* Heard in the Court of Appeals 24 August 1990.

Horack, Talley, Pharr & Lowndes, by Tate K. Sterrett, for plaintiff-appellee.

Bailey, Patterson, Caddell & Bailey, P.A., by G. Russell Kornegay, and Moore and Van Allen, by C. Wells Hall, III, for defendant-appellant.

DUNCAN, Judge.

On June 3, 1987, the plaintiff, Rebecca Sippe (plaintiff), filed a complaint seeking temporary and permanent alimony, child custody and support, and attorneys' fees. On July 23, 1987, the defendant, J. Lawrence Sippe (defendant), filed an answer which included a counterclaim for divorce from bed and board. At the time suit was filed, defendant resided in Charlotte, North Carolina and was employed at the Nalle Clinic there. Judgment in plaintiff's action was subsequently entered directing defendant to pay plaintiff alimony in the amount of $2,700 per month until the death of either party, plaintiff's remarriage, or further order of the court. By the time of entry of judgment, defendant had moved to Arizona and was practicing medicine in that state.

Defendant has failed to pay the amount of alimony required by the judgment every month since its entry, and eventually ceased making payments altogether. As a result, on July 14, 1989, plaintiff filed a motion to enforce judgment and secure payment of alimony, and on September 18 filed an amendment to that motion seeking the entry of a Qualified Domestic Relations Order (QDRO) assigning to her the right to receive payments from the defendant's retirement plan with the Nalle Clinic, known as the Nalle Clinic Company Pension Plan and Trust.

Following a hearing on the matter, on October 17, 1989, the trial court entered the following three orders:

1. A contempt order finding that defendant's failure to pay alimony as required was wilful and unjustified, and that he was therefore in contempt of court;

2. An order concluding that plaintiff was entitled to the entry of a QDRO assigning to her the right to receive funds under the defendant's retirement plan with the Nalle Clinic; and

3. A QDRO assigning to plaintiff the right to receive from defendant's account the sum of $11,500 for amounts past due, and the right to receive the sum of $2,700 per month from the account for a period of 360 months until the death of the plaintiff or defendant, the plaintiff's remarriage, or the exhaustion of funds in the account.

From these orders, defendant appeals.

I

The sole issue raised by this appeal is whether the domestic relations order entered below is in fact a qualified domestic relations order (QDRO) within the meaning of the Retirement Equity Act. The district court found, and the defendant does not dispute, that he is a participant in the plan, and is fully vested in all funds in his account under the plan. Rather, defendant argues that the QDRO entered is fatally flawed in that it fails to meet the specific requirements set forth in the Internal Revenue Code of 1986 (hereinafter "the Code") for five reasons:

1. it attempts to enjoin the defendant from receiving benefits to which he is entitled under the plan;

2. it fails to specify the amount or percentage of the participant's benefit to be paid to the alternate payee;

3. it fails to specify the number of payments or the period to which the order applies;

4. it requires the plan to provide a type or form of benefit not otherwise provided under the plan; and

5. it contains an injunction prohibited by the plan because it does not permit required minimum distributions to be made to the defendant.

We find, however, nothing in the record to indicate that the plan administrator has made a determination of whether the order

in question is a QDRO. Because the Retirement Equity Act specifically requires such a determination we remand for further proceedings consistent with this opinion.

II

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to establish a comprehensive federal scheme for the protection of pension plan participants and their beneficiaries. *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 120 (1979). Its "most important purpose" was to "assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." *Smith v. Mirman*, 749 F.2d 181, 182 (quoting from S. Rep. No. 93-127, 93d Cong., 2d Sess. (1974), reprinted in U.S. Code Cong. & Admin. News, pp. 4639, 4849 (1974)). To serve this purpose by insuring that an employee's accrued benefits would be available upon retirement, ERISA includes an anti-assignment provision, requiring each plan to provide that benefits thereunder may not be assigned or alienated. 29 U.S.C. § 1056(d)(1) (1990). The Internal Revenue Code contained similar provisions. I.R.C. § 401(a)(9), (13) (1990). In order to qualify for favorable tax treatment, a plan must prohibit any assignment or alienation of benefits. *See Mirman*, 749 F.2d at 182.

Further, ERISA specifically provides that it supersedes any state laws relating to employee benefits plans. 29 U.S.C. § 1144(a) (1985). Thus, ERISA has effectively preempted this area of law.

Because of the preemption and anti-assignment provisions the question initially arose as to whether ERISA prevented state courts from entering domestic relations orders garnishing retirement plans to enforce alimony or child support obligations. *See, e.g., Tenneco, Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688 (4th Cir. 1983). A majority of the courts which addressed the issue concluded that ERISA in fact did not prevent such assignments. *See Operating Engineers, Etc. v. Zamborsky*, 650 F.2d 196, 198 (9th Cir. 1981). However, Congress resolved any uncertainty in 1984 by enacting the Retirement Equity Act, which amended ERISA to create an exception to its anti-assignment provisions for a state domestic relations order that meets the requirements of a "qualified domestic relations order." 29 U.S.C. § 1056(d)(3)(A). In order to constitute a QDRO, the order must meet the technical requirements set out

in 29 U.S.C. § 1056(d)(3)(B)-(D). These requirements are the ones on which the parties here focus. However, there is another requirement that concerns us preliminarily.

29 U.S.C. Section 1056(d)(3)(G)(i) provides that in the case of any domestic relations order received by a plan,

> (i) the plan administrator shall promptly notify the participant and any other alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and
>
> (ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

The statute goes on to provide that a plan must establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distribution under such qualified orders. Further, 29 U.S.C. § 1056(d)(3)(H)(i) provides,

> During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (*by the plan administrator, by a court of competent jurisdiction, or otherwise*) the plan administrator shall segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order. (emphasis added).

The statute certainly appears to contemplate that the plan administrator make the initial determination whether the domestic relations order issued by the district court is a QDRO within the terms set out in the plan itself. Although we find no cases directly on point, either in North Carolina or elsewhere, two of the three cases from other jurisdictions cited by the appellee came to their respective Supreme Courts for review from a determination by the plan administrator that the order in question was not a QDRO.

In *Taylor v. Taylor*, 44 Ohio St. 3d 61, 541 N.E.2d 55 (1989), the trial court rendered its decision in favor of the wife and issued a withholding order to the husband's employer, Columbia Gas Co., the employer which issued the plan in question. Counsel for Columbia Gas responded indicating that it could not comply with the

court's order because, in its opinion, the order in question was not a QDRO. Similarly, in *Stinner v. Stinner*, 520 Pa. 374, 554 A.2d 45 (1989), Mrs. Stinner filed two writs of execution on appellee Bethlehem Steel Corporation to garnish Mr. Stinner's pension, which Bethlehem Steel established under the provisions of ERISA. Bethlehem Steel refused to comply with the garnishment on the ground that, in its opinion, the writ of execution served on the plan administrator did not constitute a QDRO under the Retirement Equity Act.

It thus appears that the Retirement Equity Act itself and the few cases that have interpreted it require the pension plan itself to make the initial determination of whether a domestic relations order issued by the district court is a QDRO under the terms of the plan. Since there is no indication in the record that that has been done here, we remand with instructions to the trial court to issue the appropriate order to the Nalle Clinic Company Pension Plan and Trust for its determination of validity.

III

For the foregoing reasons the orders of the trial judge are

Reversed and remanded.

Judges ORR and COZORT concur.

HENRY LEE WILDER, PLAINTIFF v. JAMES E. HOBSON, JOHN CASTLE, ERNEST O. FAIR, ALBERT R. DAWKINS, WILBERT TORRENCE, SR., EDWARD O. TRACEY, SR., ELISHA L. BOYD, WALTER D. TRACEY, WILLIE J. TABOR, HARVEY DAVIS, A. M. HASAN AND CAL SMITH, JR., INDIVIDUALLY AND DOING BUSINESS AS SAFETY TAXI, DEFENDANTS

No. 9019SC356

(Filed 18 December 1990)

Partnership § 1.1 (NCI3d)— personal injury—negligence imputed to partnership—failure to show existence of partnership

In an action to recover for injuries sustained in a collision with a taxi displaying a "Safety Taxi" sign and telephone number, the owners of other taxis doing business as "Safety

Taxi" were not liable for those injuries based on imputed liability pursuant to general agency and partnership law, since the evidence clearly showed that "Safety Taxi" was merely a taxicab telephone dispatch service to which each defendant contributed a small monthly fee in order to receive dispatch services; there was no evidence that defendants shared each other's profits or losses, filed joint tax returns, had authority of any kind over each other, or in any other way behaved as a partnership; and defendants did not hold themselves out as a partnership by signing a certificate of assumed name, displaying the "Safety Taxi" sign on their cars, and sharing a common dispatcher.

Am Jur 2d, Automobiles and Highway Traffic §§ 995, 1084; Partnership § 648.

APPEAL by plaintiff from order granting defendants' motions for summary judgment and dismissing plaintiff's complaint entered 19 February 1990 in ROWAN County Superior Court by *Judge William H. Helms*. Heard in the Court of Appeals 24 October 1990.

On 2 July 1987 plaintiff Wilder was injured by a taxicab negligently driven by John Gilmore. John Gilmore's taxicab displayed the name and telephone number of "Safety Taxi." Following the injury, Wilder and Gilmore reached a settlement wherein Gilmore paid Wilder the $25,000 limit of his insurance policy in exchange for a covenant not to sue Gilmore.

Plaintiff then brought this action against defendants, the remaining drivers doing business as "Safety Taxi," based on imputed liability pursuant to general agency and partnership law. In their answers, defendants denied the existence of a partnership or joint venture. On the motions for summary judgment, defendants' forecast of evidence showed that "Safety Taxi" is merely a taxicab referral service to which each driver pays a monthly fee for telephone dispatch service. Each driver individually owns and is solely responsible for expenses relating to his taxi, no drivers share profits or losses, each driver insures his own taxi, each driver maintains his own business records, and no driver has authority or control over another driver.

Defendants jointly and severally moved for summary judgment on the grounds that imputed liability was improper since no partnership or joint venture existed and, had imputed liability existed,

the covenant not to sue entered into by plaintiff and John Gilmore released defendants. The trial court granted defendants' motions for summary judgment. Plaintiff appeals.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for plaintiff-appellant.

Hancock and Hundley, by R. Darrell Hancock and Jennifer B. Flynn, for defendants-appellees.

Caudle & Spears, P.A., by Lisa M. Crotty and Lloyd C. Caudle, for defendant-appellee Willie J. Tabor.

Wyatt Early Harris Wheeler & Hauser, by Kim R. Bauman, for defendant-appellee Harvey Lee Davis.

WELLS, Judge.

Plaintiff contends that the trial court erred in granting defendants' motions for summary judgment since a genuine issue of material fact exists whether "Safety Taxi" constitutes a partnership or a joint venture. Plaintiff contends that even if defendants are not engaged in a classic partnership, a question of fact exists whether defendants held themselves out to the public to be a partnership by filing a certificate of assumed name pursuant to N.C. Gen. Stat. § 66-68 and displaying the "Safety Taxi" sign and telephone number on their taxis. Defendants contend that summary judgment was proper because their affidavits, indicating defendants individually owned their taxis and did not share profits, negate the existence of a partnership as a matter of law.

Summary judgment shall be rendered forthwith if the materials presented 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 (1983); *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985). A defending party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E.2d 61 (1986) (*citing Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)). In their affidavits presented to the court, defendants establish that no claim for relief exists in this case and the trial court properly granted defendants' motions for summary judgment.

The North Carolina Uniform Partnership Act defines a partnership as ". . . an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36(a) (1989); *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 362 S.E.2d 807 (1987) (*quoting Johnson v. Gill*, 235 N.C. 40, 68 S.E.2d 788 (1952)). Existence of a partnership does not require an express agreement and the parties' intent to formulate a partnership can be inferred by the conduct of the parties by examining all the circumstances. *Peed v. Peed*, 72 N.C. App. 549, 325 S.E.2d 275, *cert. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). "A partnership is a combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business." *Zickgraf Hardwood Co. v. Seay*, 60 N.C. App. 128, 298 S.E.2d 208 (1982) (*citing Johnson v. Gill*, 235 N.C. 40, 68 S.E.2d 788 (1952)). Our appellate courts have clearly held that co-ownership and sharing of any actual profits are indispensable requisites for a partnership. *Sturm v. Goss*, 90 N.C. App. 326, 368 S.E.2d 399 (1988). Although sharing profits does not of itself establish a partnership, the Uniform Partnership Act emphasizes the importance of sharing profits in the existence of a partnership by mandating that the receipt by a person of a share of business profits is *prima facie* evidence that he is a partner. . . . N.C. Gen. Stat. § 59-37(3) and (4) (1989). Filing a partnership tax return is significant evidence of a partnership. *Reddington v. Thomas*, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

We reject plaintiff's contention that materials offered opposing defendants' motions for summary judgment create a genuine issue regarding the existence of a partnership. A genuine issue is one which can be maintained by substantial evidence. *Sturm, supra.* Plaintiff based his claim on the theory that defendants held themselves out as a partnership or joint venture by signing a certificate of assumed name, displaying the "Safety Taxi" sign on their cars and sharing a common dispatcher. Plaintiff offered evidence that the defendants filed a Certificate to Transact Business Under an Assumed Name, required to be filed of all persons, partnerships or corporations doing business under an assumed name pursuant to N.C. Gen. Stat. § 66-68 (1985). Plaintiff offers no authority and we find no authority suggesting that such a certificate manifests intent to form a partnership. Instead, N.C. Gen. Stat. § 66-68 is

intended to protect the public and creditors against fraud. *Bank v. Murphy*, 189 N.C. 479, 127 S.E. 527 (1925).

Plaintiff also offered evidence that defendants display on their taxis a sign bearing the name "Safety Taxi" and its telephone number. However, defendants presented evidence negating any implication of co-ownership suggested by the display of "Safety Taxi's" name and telephone number. Defendants offered uncontroverted evidence that defendants individually own their vehicles, pay their own insurance, taxes and repairs. Defendants each manage their own business records. Defendants do not share each other's profits or losses. Defendants filed no joint tax return. Plaintiff presented no evidence that defendants share any profits, income, expenses, joint business property or have authority of any kind over each other. The only evidence plaintiff presented of co-ownership among defendants was the assumed name certificate.

The evidence presented clearly shows that "Safety Taxi" is merely a taxicab telephone dispatch service to which each defendant contributes a small monthly fee in order to receive dispatch services. We hold that plaintiff has failed to present substantial evidence to create a genuine issue regarding the existence of a partnership or joint venture among defendants. Therefore, we hold that the trial court correctly granted defendants' motions for summary judgment.

In light of the above holding, we do not reach plaintiff's contention regarding the effect of John Gilmore's covenant not to sue.

Affirmed.

Judges COZORT and LEWIS concur.

ESTELLA DURHAM v. JOSEPH E. HALE AND WIFE, ROBBIE M. HALE

No. 9012DC368

(Filed 18 December 1990)

Contracts § 27 (NCI3d)— terms of contract—sufficiency of evidence to support findings

In an action to recover the balance due on a contract for the sale of plaintiff's house to defendants where defendants counterclaimed for repairs they made to the property, evidence was sufficient to support the trial court's findings with regard to the sales price, defendants' assumption of first and second mortgages on the property, plaintiff's renting of the premises, unpaid rent and late charges, plaintiff's unauthorized removal of a refrigerator from the premises, and lack of defendants' entitlement to recovery for repairs.

Am Jur 2d, Vendor and Purchaser § 743.

Judge WYNN dissenting.

APPEAL by defendants from *Cherry (Sol G.), Judge*. Judgment entered 16 January 1990 in District Court, CUMBERLAND County. Heard in the Court of Appeals 3 December 1990.

This is a civil action wherein plaintiff seeks to recover from defendants the balance due on the purchase price from the sale of her home to defendants. Defendants filed an answer denying that they owed plaintiff anything and alleged in a counterclaim that plaintiff owed them for repairs they had made on the property.

After a hearing, without a jury, Judge Cherry made detailed findings of facts and conclusions of law which are set out in part as follows:

> 2. That on or about the 2nd day of March, 1988, the Plaintiff and Defendants entered into an agreement for the purchase and sale of a residence owned by the Plaintiff and located at 5244 Brownwood Drive, Fayetteville, North Carolina.
>
> 3. That the Defendants agreed to purchase the property from the Plaintiff for a total price of $54,027.00.
>
> 4. That as a part of the purchase price, the Defendants agreed to assume and pay the outstanding balance due on

a first mortgage to First Wachovia Corporation in the amount of $38,900.00.

5. That the Defendants further agreed to assume and pay the outstanding balance on a second mortgage to Fleet Finance Company in the amount of $9,311.00.

6. That the balance due the Plaintiff at the time of closing the transaction was $5,805.00.

7. That on the 15th day of March, 1988 the Plaintiff executed and delivered a Warranty Deed to the Defendants conveying title to the property.

8. That the Plaintiff agreed to occupy and pay rent on the premises from the 1st day of March, 1988 to the 1st day of July, 1988; that the amount of the rent was $595.00 per month.

9. That the Plaintiff did in fact occupy the residence and pay the monthly rental until mid June, 1988, leaving a balance due of $358.75 for unpaid rent and late charge.

10. That under the terms of the Sales Contract, the Plaintiff agreed to leave a refrigerator in the residence, which said refrigerator was removed by the Plaintiff at the time she vacated the premises; that the fair market value of the refrigerator on May 2, 1988 and on July 1, 1988 was $700.00.

2. That the Plaintiff is entitled to recover of the Defendants the sum of $5,805.00 as the balance due on her contract, setting off and deducting from said amount the sum of $700.00 for the refrigerator removed by Plaintiff, and the sum of $358.75 for rental due on the contract, but the Defendants are not entitled to recover from the Plaintiff any items of repair claimed in their counterclaim.

Based on its findings and conclusions, the trial court entered a judgment ordering that plaintiff have and recover of defendants $4,746.25. Defendants appealed.

Downing, David, Maxwell & Melvin, by Harold D. Downing, for plaintiff, appellee.

Barrington, Herndon & Raisig, P.A., by Carl A. Barrington, Jr., and Paul A. Raisig, Jr., for defendants, appellants.

HEDRICK, Chief Judge.

By their two assignments of error brought forward and argued on appeal, defendants' principal contention is that the findings of fact made by the trial judge are not supported by the evidence and that the conclusions of law drawn therefrom do not support the judgment entered. We disagree.

Defendants argue that the trial judge "misconstrued" the agreement between the parties with respect to the sale and purchase of the property. In their brief, defendants state "[t]he trial court, under the guise of construction, had no power to write into the contract between [plaintiff] and [defendants] any provision that was not there in fact or by implication of law."

It is well settled that where the terms of a written contract are unambiguous, the interpretation is a question of law; but when the terms of the contract are ambiguous, or leave something to be decided, it is for the finder of fact to construe the contract. *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E.2d 271 (1983); *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E.2d 113 (1962).

In the present case, Judge Cherry was the "finder of fact," and his findings and conclusions with respect to the terms of the agreement between the parties were amply supported by the evidence presented. Therefore, the judgment of the trial court will be affirmed.

Affirmed.

Judge LEWIS concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I must respectfully dissent from the majority opinion in this case.

The appellants (hereinafter referred to as "buyers") tendered an offer to purchase to the appellee (hereinafter referred to as "seller") on 2 March 1988 to purchase seller's mortgaged residence for the sum of $54,027.00. In connection with this offer, the buyers offered to assume an existing mortgage on the property in the amount of $38,911.00, thereby leaving a balance to the seller in the amount of $15,116.00. The contract stated that "the loan balance

and the balance of the purchase price are to be adjusted to the date of closing." This part of the contract was signed and dated by the buyers and seller on 2 March 1988.

Apparently, a second assumable mortgage existed on the residence. Also, the seller was in substantial default on both mortgages. In light of these additional facts, a handwritten proviso was put on the back of the contract stating:

> Buyers to assume 2d mortgage which is held by Fleet Finance Co. in the amount of approximately 9,311.00.
>
> If Seller moves before July 1st [R]ent for each month will be deducted from $2000.00
>
> Buyers are actively engaged in real estate and purchasing said property for monetary gain.
>
> Buyers to catch 1st and 2d mortgage[s] payments up by the 17th of March 1988. (3,805.00)
>
> Buyers will give Seller $2,000 July 1, 1988.
>
> /s Joseph E. Hale /Estella Dunn
>
> /s Robbie M. Hale

This proviso was signed by all parties at a time period that was not stated in either the contract or the record on appeal.

The trial court construed the contract as implying that the seller's proceeds from the sale were to be the difference between the stated price and the outstanding mortgages, notwithstanding the buyers' assumption of the arrearages. Moreover, the trial court did not address the express terms of the contract which provided that the seller was to receive from the buyers the sum of $2,000.00, less any deduction for any unpaid rent.

In my view, the contract expressly provided for the following result:

Selling price	$54,027.00
Minus 1st mortgage	38,911.00
Minus 2nd mortgage	9,311.00
Minus amount in arrears	3,805.00
Balance to Seller (less other deductions)	$ 2,000.00

Because I believe the above-stated result was clearly intended by the parties, I disagree with the trial court's ruling which held otherwise.

STATE OF NORTH CAROLINA v. JAMES GALLAGHER

No. 9011SC315

(Filed 18 December 1990)

Criminal Law § 88.2 (NCI3d)— prior convictions—improper cross-examination—defendant prejudiced

Cross-examination of defendant in a rape case with regard to prior crimes which went beyond the time and place of defendant's convictions and the punishment imposed was improper and unfairly prejudiced defendant where the testimony of the serologist was inconclusive; there was conflicting testimony about defendant's whereabouts around the time of the crime; there was no physical evidence linking defendant to the crime and no witness other than the victim who placed defendant at the scene of the crime; and those facts in addition to the fact that the victim's identification of defendant may have been suspect in that defendant was the only person pictured wearing a baseball cap made the case turn on the question of credibility.

Am Jur 2d, Witnesses § 582.

APPEAL by defendant from judgments entered 29 September 1989 in HARNETT County Superior Court by *Judge Orlando F. Hudson*. Heard in the Court of Appeals 24 October 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mary Jill Ledford, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

DUNCAN, Judge.

From judgments imposing a life sentence plus a consecutive term of two years following his conviction of first degree rape

and felonious breaking or entering, defendant appeals. For the reasons that follow, we find error.

I

The evidence for the State tended to show that in the afternoon of 3 July 1989, Patricia Allen was sleeping in the bedroom of her home. She was wakened by the presence of a man. When Ms. Allen screamed, the man slapped her and broke a drinking glass on a nearby table. When Ms. Allen tried to get up, the man slapped her again, held the broken glass up to her in a menacing fashion causing her to fear that he was going to kill her. The man then dropped the glass, got on top of her and forced her to have sex with him. He then left after saying, "Thank you." Ms. Allen testified that the intruder had bad teeth, smelled bad, and was wearing a baseball cap during the rape.

Ms. Allen testified that she picked defendant's picture out of a photographic lineup. She also identified the defendant in court as the man in the lineup and the perpetrator of the crimes.

Gary Dwight Lee testified that he saw the defendant sitting on the porch of a "migrant house" at about 12:45 p.m. on the day in question. He testified that the migrant house is about a mile from Ms. Allen's house.

Lily Sullivan testified that she and defendant worked together in Mr. Weaver's fields and that on the day in question she and defendant came back from the fields at about 2 or 3 p.m. She testified that the defendant left the migrant house about twenty minutes after they got back and that he did not return until 5:30 or 6:00 p.m. She left Mr. Weaver's employment the next day due to an argument with him.

Detective Bernice Oates testified that she took a statement from Ms. Allen, including her description of the perpetrator. According to Detective Oates, Ms. Allen's description of the perpetrator was that he had crooked teeth, wore a baseball cap and smelled bad. Detective Oates further testified that Ms. Allen picked defendant out of a photographic lineup. No physical evidence linked the defendant to the crimes.

Defendant presented evidence which tended to show James Weaver, defendant's boss, testified that defendant was in the field all day, from about 8:00 a.m. until 4:45 p.m. He testified that Lily

Sullivan was mistaken about defendant having left the field early that day; that he had checked on his workers, including defendant, every half hour or so all day long. Mr. Weaver denied telling Detective Oates that he did not see defendant that day.

Robert Hall, one of defendant's co-workers, also testified that defendant was in the field all day that day, until 4:00 or 5:00 p.m.

Defendant testified on his own behalf. He denied committing the crimes, insisting that he was in the field working all day long.

Brenda Bissette, a forensic serologist, testified that semen was found in the vagina of Ms. Allen, but no conclusions could be drawn as to the blood type of the perpetrator, nor could she conclude that defendant was or was not the perpetrator.

On rebuttal, Detective Oates was allowed to testify that Mr. Weaver had said that he had not seen defendant after lunch that day.

II

Defendant admitted on direct examination that he pled not guilty to possession of marijuana, but that he understood that the case was dismissed; that he was convicted of trespass, of carrying a concealed weapon and burglary. He first assigns error to the trial judge overruling his objections to the State's questions of defendant regarding the facts and circumstances surrounding crimes with which defendant was charged and convicted. He contends that the prosecutor conducted cross-examination of him which was beyond the scope of proper cross-examination and which unfairly prejudiced him. We agree.

We note first that defendant assigned error to the trial judge allowing six questions/exchanges on cross-examination of the defendant. However, only four of them were objected to, thus the remaining two questions are waived as they were not properly preserved on appeal. N.C. R. App. P. 10(b)(1) (1990); *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986).

Defendant assigns error to the trial judge overruling his objections to the following questions:

> Q. Now let's talk about criminal history. You have had a lot of experience with the criminal justice system haven't you, and you have learned all the ways you can . . . play the system to your advantage?

[objection overruled]

Q. Now, isn't it true that Sergeant McDonald, Miami Police Department, made this arrest at a bus stop?

A. Yes.

Q. And when Sergeant McDonald approached you, you ran from him?

A. Yes. Sergeant McDonald and Sergeant [inaudible]

Q. And you didn't tell those two officers, I'm sorry, I'm just using this knife for my work. I didn't understand the law. You ran from them, because that wasn't the knife you had for work.

[objection overruled]

Q. Until I brought it up you didn't bother to tell these 13 folks about the second concealed weapon you had on you, did you?

[objection overruled]

Q. Now, going to the marijuana case that you told the jury about that you said was dismissed, you said that was dismissed because the seller wasn't in court?

A. I'm going by what Judge Robert Klein—

Q. Isn't it true that the way the marijuana case arose, the officer observed you hanging out in a hotel doorway and you had marijuana and you threw it down

[objection overruled]

For the purposes of impeachment, a witness, including the defendant, may be cross-examined with respect to prior convictions. N.C. Gen. Stat. § 8C-1, Rule 609(a); *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977). In *State v. Rathbone*, this court reiterated the rule that "inquiry into prior convictions which exceeds the limitations established in *Finch* is reversible error." 78 N.C. App. 58, 64, 336 S.E.2d 702, 705 (1985) (citations omitted), *disc. review denied*, 316 N.C. 200, 341 S.E.2d 582 (1986). In *Rathbone* this court held that defendant Rathbone had not met the test of prejudicial error contained in N.C. Gen. Stat. § 15A-1443(a) (1988). That is not the situation in the case at bar.

Section 15A-1443(a) provides,

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

In the case at bar, defendant points to the fact that the testimony of the serologist was inconclusive; there is conflicting testimony about defendant's whereabouts around the time of the crime; there is no physical evidence linking the defendant to the crime and no witness other than Ms. Allen who placed the defendant at the scene of the crime. Those facts in addition to the fact that Ms. Allen's identification of the defendant may be suspect in that the defendant was the only person pictured wearing a baseball cap, make this case turn on the question of credibility. As we have determined that the questions objected to were inquiries which went beyond the time and place of defendant's convictions and the punishment imposed, we also find that in this case, which turned on credibility, the defendant was prejudiced by the trial judge's overruling defendant's objections to those questions.

Having determined that the trial court committed prejudicial error in overruling defendant's objections to improper questions as to his prior convictions, we need not address defendant's other assignments of error.

III

For the foregoing reasons, the judgments of the trial judge are reversed and defendant is entitled to a

New trial.

Judges ORR and GREENE concur.

WILLIAM HOWARD SHAFFNER, JR., PLAINTIFF v. WESTINGHOUSE ELECTRIC CORPORATION, DEFENDANT

No. 9021SC138

(Filed 18 December 1990)

Master and Servant § 10.2 (NCI3d)— workers' compensation— termination for misrepresenting extent of disability — no violation of statute

The evidence supported the jury's verdict finding that plaintiff was not terminated from his employment in violation of N.C.G.S. § 97-6.1(a) because he instituted a claim under the Workers' Compensation Act where it showed that the employer did not question the fact of plaintiff's disability but terminated plaintiff for misrepresentations about the extent of his disability.

Am Jur 2d, Workmen's Compensation § 55.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 ALR4th 1221.

APPEAL by plaintiff from judgment entered 21 July 1989 in FORSYTH County Superior Court by *Judge W. Steven Allen.* Heard in the Court of Appeals 30 August 1990.

Herman L. Stephens for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr., C. Daniel Barrett and Clayton M. Custer, for defendant-appellee.

DUNCAN, Judge.

William Shaffner, Jr. ("plaintiff") was employed by Westinghouse Electric Corporation ("defendant") for over fourteen years. At the time of his final injury he was working as a senior electrician. During the course of his employment plaintiff sustained a number of injuries; he received workers' compensation benefits for all those injuries for which claims were made. On 15 April 1987, plaintiff's supervisor directed him to return an electric motor to a storage crib. The particular building in which the crib was housed did not have a storage attendant to receive merchandise, so plaintiff had to lift the motor himself—something he did not normally do.

Immediately after lifting the motor, the muscles in his lower back began to tighten up, and his condition worsened throughout the day.

The next morning plaintiff experienced low back pain in addition to the tightened muscles. His condition worsened after he returned to work, and by Monday of the following week he went to see Dr. Middleton, the plant doctor. Dr. Middleton prescribed medication and recommended a week's bed rest; plaintiff nevertheless continued to work that week and the following one. When he was seen again, it was recommended that he visit a specialist, and he was eventually seen by Dr. Holthusen, an orthopaedic surgeon who had operated on him previously. Despite recurring pain, plaintiff continued to work until 26 May 1987, when Dr. Holthusen placed him on bed rest.

On 30 May 1987, plaintiff took his children to the annual company picnic at the Carowinds Amusement Park, and accompanied his sons on several rides. On 2 June 1987, plaintiff returned to Dr. Holthusen, who continued to state that plaintiff should not work. Dr. Holthusen was not aware that plaintiff had gone to Carowinds and ridden on the rides.

On 29 June 1987, plaintiff returned to see Dr. Holthusen, and was released to return to work. When plaintiff reported to work he was placed on suspension without pay pending an investigation into the circumstances surrounding his disability. Plaintiff was subsequently terminated effective 29 June 1987. He was given the following reason:

> After reviewing all the events, circumstances and facts surrounding your disability condition we have no alternative except to convert your indefinite suspension into discharge for violation of the Plant Rules of Conduct . . . Misrepresentation and/or falsification of records or attendance reports.

An internal company appeals board upheld the termination, and plaintiff then brought this action seeking damages for wrongful discharge and reinstatement to his prior position. The jury found that plaintiff had not been terminated because he had instituted a workers' compensation claim, and held in favor of the defendant. The trial court denied plaintiff's motion for judgment notwithstanding the verdict, and this appeal followed.

I

Plaintiff's primary argument on appeal is that the trial court erred in denying his motions for a directed verdict and for judgment notwithstanding the verdict, because defendant's explanation of plaintiff's determination establishes that it discharged him for instituting a workers' compensation claim. Since the standard for determining the appropriateness of a motion for directed verdict and a motion for judgment notwithstanding the verdict is the same, *Dickinson v. Pake*, 284 N.C. 576, 584-85, 201 S.E.2d 897, 903 (1974), the following discussion applies to both.

In considering a plaintiff's motion for directed verdict, the defendant's evidence must be taken as true and must be considered in the light most favorable to defendant, giving defendant the benefit of every reasonable inference to be drawn therefrom. *See, e.g., Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). Plaintiff argues that defendant's own evidence establishes a violation of N.C. Gen. Stat. Section 97-6.1 which provides, in pertinent part, as follows:

> Protection of claimants from discharge or demotion by employers.
>
> (a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

There is no dispute here that plaintiff did, in fact, institute a claim. Plaintiff argues further that by terminating him for misrepresenting his disability, defendant was challenging the existence of his disability—a determination which is within the exclusive province of the Industrial Commission. *See* N.C. Gen. Stat. Section 97-84. Plaintiff argues that the only avenue open to defendant to contest his disability was through the workers' compensation process, and that defendant's action was in effect an impermissible collateral attack on the Commission's jurisdiction.

Although plaintiff makes a compelling argument, we are constrained to disagree for two reasons. First of all, the anti-retaliation language of Section 97-6.1(a) is limited to an employee's instituting a charge or testifying in a proceeding. Here, neither of those specific actions precipitated defendant's response. Plaintiff instituted his

claim under the Workers' Compensation Act on 18 April 1987. He was suspended on 29 June 1987 and terminated on 17 July 1987, retroactively effective on 29 June 1987. There is thus no close temporal connection between plaintiff's instituting a charge and his termination. Plaintiff notes himself that prior to this most recent injury, he had suffered injuries on the job for which he received workers' compensation benefits.

Plaintiff's broader argument is that defendant's terminating him for misrepresentation challenged the very issue before the Industrial Commission—the existence of his disability. That argument can be responded to by making a point that even plaintiff recognizes: Defendant was not questioning his representations about the *fact* of his disability, but rather its *extent*. Dr. Holthusen also testified that upon learning of plaintiff's trips and activities, he felt that plaintiff had not been honest with him. Under plaintiff's interpretations of the statute, an employee could sustain a minor, but disabling injury, and misrepresent the gravity of it without fear of sanction.

The jury here found that the defendant did not discharge plaintiff because he instituted a claim under the Workers' Compensation Act. Giving the defendant, as we must, the benefit of every reasonable inference to be drawn from the facts, we cannot find that the trial court erred in denying plaintiff's motions for summary judgment and judgment notwithstanding the verdict.

II

We have examined plaintiff's other assignments of error and find them to be without merit.

Accordingly, the judgment appealed from is

Affirmed.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA v. GEORGE LOPEZ

No. 904SC58

(Filed 18 December 1990)

1. **Bills of Discovery § 6 (NCI3d)— failure to comply with discovery—sanctions—continuance or recess**

The trial court did not abuse its discretion in refusing to exclude statements made by defendant to a fellow inmate because the State failed to provide these statements to defense counsel within the time required by N.C.G.S. § 15A-903(a)(2) where the statements were made available to defendant on the day of trial, and the trial court offered defense counsel the choice either to continue the case until the next session or to recess until the following morning. N.C.G.S. § 15A-910.

Am Jur 2d, Depositions and Discovery §§ 427, 431.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like—modern cases. 27 ALR4th 105.

2. **Narcotics § 3.1 (NCI3d)— defendant's association with cocaine seller—relevancy**

The trial court in a prosecution for trafficking in cocaine did not abuse its discretion in permitting a witness to testify that he was either selling or cooking cocaine on several occasions while he was talking to defendant since the evidence was relevant to establish the nature and duration of the relationship between defendant and the witness and the probability that defendant would confide in the witness and make incriminating statements to him.

Am Jur 2d, Drugs, Narcotics, and Poisons § 46.

APPEAL by defendant from judgment entered 24 August 1989 in ONSLOW County Superior Court by *Judge James R. Strickland.* Heard in the Court of Appeals 13 November 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Norma S. Harrell, for the State.

Janet M. Lyles for defendant-appellant.

DUNCAN, Judge.

On 15 February 1989, police officers in Jacksonville, North Carolina executed a search warrant on Room 225 of the local Econo Motor Lodge. When the officers entered the room, it was occupied by Carmen and Carlos Hernandez and a minor child. The police found a white sock containing a quantity of white powder in the bathtub. The white powder was subsequently analyzed as being 70.5 grams of cocaine.

While the police officers were in the room, George Lopez ("defendant") knocked on the door and entered. As the officers had been observing Room 225, prior to obtaining the search warrant, they had observed defendant leaving the room and going to the parking lot. After defendant had been admitted to the room, Carlos Hernandez consented to a search of his truck, which was in the parking lot. Defendant had the keys to the truck in his pocket; he gave the keys that would open the truck to one of the officers. No cocaine or other illegal substances were found in the truck, but defendant was searched and placed under arrest. Defendant was charged with two counts of conspiracy to traffic in cocaine and trafficking in cocaine by transportation.

On 5 April 1989 defendant filed a discovery motion seeking to obtain all statements made by him which the state intended to offer into evidence. On the day of trial the Assistant District Attorney gave defendant's counsel statements defendant allegedly made to Gerald Waller ("Mr. Waller"), who was incarcerated at the same time as defendant. Mr. Waller's statements were to the effect that defendant said he brought the cocaine down to North Carolina with him from Connecticut, and that the cocaine was not his personally, but that he came here with the cocaine and Carlos Hernandez. According to Mr. Waller, defendant stated that he (defendant) and Mr. Hernandez were partners, and were on their way to Miami to pick up more cocaine.

Defendant's counsel moved to suppress the statements. The trial court denied the motion, but offered counsel the choice of either continuing the case until the next session of court, or to recess until 9:30 the next morning. Defense counsel chose the recess.

At trial Mr. Waller testified as to the statements made by defendant to him while they were incarcerated together. Mr. Waller

further testified that he (Mr. Waller) had seen defendant on previous occasions when he (Mr. Waller) was cooking or selling cocaine.

The jury found defendant guilty of trafficking in cocaine. Defendant received a seven year sentence and a $50,000.00 fine. Defendant appealed.

I

[1] Defendant first argues that the trial court erred in denying the motion to suppress his statements to Mr. Waller, since those statements were not made available to him until the day of trial.

N.C. Gen. Stat. § 15A-903(a)(2) (1988) provides, in part, that

Upon motion of a defendant, the court must order the prosecutor:

> (2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial; except that disclosure of such a statement is not required if it was made to an informant whose identity is a prosecution secret and who will not testify for the prosecution, and if the statement is not exculpatory. *If the statement was made to a person other than a law enforcement officer and if the statement is then known to the State, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial.* (emphasis added.)

Since the state failed to comply with the time frame set forth in the statute, the question arises as to the remedies available to the defendant for that failure. N.C. Gen. Stat. § 15A-910 (1988) provides as follows:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) grant a continuance or recess, or

(3) prohibit the party from introducing evidence not disclosed, or

(3a) declare a mistrial, or

(3b) dismiss the charge, with or without prejudice, or

(4) enter other appropriate orders.

Thus, the remedies set out by statute include the very ones the trial court made available. The trial court offered defendant's counsel the option of a recess or a continuance until a later date. Defendant chose the recess. Defendant now argues that that allowed insufficient time to prepare for cross-examination of Mr. Waller. In response, first of all, defendant had the option of a continuance for a longer period of time. Defendant argues that a continuance was not an attractive option since, having been unable to post bail, he would have had to stay in jail. Clearly both options had advantages and disadvantages; they were nevertheless viable options. Defendant's selection of the recess gave him time to prepare, and he did conduct a cross-examination of Mr. Waller. Defendant undoubtedly would have preferred having additional time, but does not show, nor does the record suggest, that additional time would have yielded information that reasonably could have been expected to lead to a different result.

The determination of what are appropriate sanctions for violation of a discovery order is within the sound discretion of the trial court. *See, e.g., American Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 251 S.E.2d 885, *disc. review denied*, 297 N.C. 304, 254 S.E.2d 921 (1979). We find no abuse of discretion here.

II

[2] Defendant argues that the trial court committed reversible error in allowing Mr. Waller to testify that on several occasions while he was talking to defendant, Mr. Waller was either selling or cooking cocaine. Defendant argues that the sole purpose of the testimony was to show defendant's association with persons who sold cocaine, thus making it more probative that defendant would also engage in such activity. As such, defendant argues, the evidence was prejudicial and inflammatory, and had no probative value.

Whether to exclude evidence on the basis that its probative value is substantially outweighed by the danger of unfair prejudice is a matter within the sound discretion of the trial court. *State*

v. Mason, 340 S.E.2d 430, 315 N.C. 724 (1986) (citing N.C. Gen. Stat. § 8C-1, Rule 403). We find no abuse of discretion here. The evidence was relevant to establish the nature and duration of the relationship between defendant and Mr. Waller, and the probability that defendant would confide in him.

We have examined defendant's remaining assignments of error and find them to be without merit. We hold that defendant received a fair trial, free from prejudicial error. Accordingly, the judgment is

Affirmed.

Chief Judge HEDRICK and Judge LEWIS concur.

STATE OF NORTH CAROLINA v. RICKY DALE WILFONG

No. 9025SC161

(Filed 18 December 1990)

1. **Constitutional Law § 34 (NCI3d); Larceny § 1 (NCI3d) — single transaction — convictions of larceny from the person and armed robbery — double jeopardy**

Defendant's indictment, conviction, and sentence for larceny from the person arose out of a single transaction involving a single person for which he was also convicted of armed robbery and must therefore be arrested.

Am Jur 2d, Robbery §§ 50, 112.

2. **Criminal Law § 273 (NCI4th) — absence of witnesses — failure to subpoena until five days before trial — continuance properly denied**

The trial court did not err in denying defendant's motion for a continuance and for a mistrial at the close of all the evidence based on his inability to ascertain the whereabouts and secure the attendance of witnesses, since defendant's lawyer had over five months to prepare his case but waited until five days before trial to issue subpoenas, and two witnesses did in fact show up and testify on behalf of defendant while three others did not.

Am Jur 2d, Continuances § 32.

3. Criminal Law § 260 (NCI4th)— substitution of private counsel— motion for continuance denied

The trial court did not err in refusing to grant defendant a continuance on the day of trial to seek and retain private counsel to represent him in his trial.

Am Jur 2d, Continuances § 35.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 ALR3d 725.

APPEAL by defendant from a judgment entered 24 October 1989 by *Judge James U. Downs* in Superior Court, CATAWBA County. Heard in the Court of Appeals 27 September 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Bruce McKinney, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for the defendant.

LEWIS, Judge.

The defendant was convicted of armed robbery and larceny from the person and sentenced to consecutive sentences of twenty years and of ten years, respectively. Defendant appeals.

I. Larceny from the Person Conviction

Defendant first argues that the trial court erred because it denied his motion to dismiss for insufficient evidence that the defendant "took and carried away property." G.S. 14-72(b)(1). There must be a taking and carrying away of personal property of another to complete the crime of larceny otherwise there is only an attempt to commit the offense. *State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969). We find that there was sufficient evidence of a taking and carrying away of the victim's property to uphold the conviction. However, this issue is moot because we also find that the defendant's judgment in the larceny conviction must be arrested for the reasons set forth in defendant's second argument.

[1] In his second argument, defendant contends and the State concedes that his indictment, conviction and sentence for larceny from the person arose out of a single transaction involving a single person for which he was also convicted of armed robbery, and,

therefore, must be arrested. The rationale for this rule is that there is a presumption in such cases that the legislature did not intend multiple punishments to be inflicted upon the defendant for crimes arising from the same act. *State v. White*, 322 N.C. 506, 521, 369 S.E.2d 813, 821 (1988). Larceny is a lesser included offense of armed robbery. *Id.* The State concedes that *White* is dispositive of this issue and we accordingly arrest that portion of the defendant's judgment and sentence for larceny from the person.

II. Entitlement to a New Trial

[2] The defendant asserts that the trial court erred when it denied his motion for a continuance and for a mistrial at the close of all of the evidence. It is well settled that a motion for continuance is addressed to the discretion of the trial judge and we will not disturb that ruling absent an abuse of that discretion. *State v. Rigsbee*, 285 N.C. 708, 711, 208 S.E.2d 656, 658 (1974). However, the defendant argues that his motions are based on his state and federal Constitutional rights of confrontation and compulsory process. When a defendant's motion to continue " 'is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable.' " *State v. Davis*, 33 N.C. App. 736, 741, 236 S.E.2d 722, 725 (1977), *quoting State v. Smathers*, 287 N.C. 226, 230, 214 S.E.2d 112, 114 (1975). Defendant sought a continuance in order to ascertain the whereabouts and secure the attendance of some of his witnesses. Two witnesses did in fact show up and testify on behalf of the defendant. Three other witnesses were served subpoenas in time to testify at trial but failed to appear. The defendant offered a forecast of evidence as to the testimony of the missing witnesses; however, counsel admitted that he had not interviewed these witnesses.

Under these circumstances, we hold that it was not error for the trial court to deny defendant's request for a continuance or a new trial. Unlike the defendant in *Davis*, the defendant here had an opportunity and did in fact present witnesses in his defense. Defendant was indicted on 21 May 1989. Counsel had over five months to prepare his defense. He chose to wait until 5 days before trial to issue subpoenas. It is not the job of the State to act as an absolute insurer of the existence and attendance of the State's witnesses at trial. To hold otherwise would produce absurd results. We cannot permit defense counsel to send out subpoenas at the

last moment before trial and then, as a tactical decision, obtain a continuance to look for these absent witnesses. This is particularly true where, as in this case, the defendant's lawyer had over five months to prepare his case and he failed to interview the absent witnesses prior to trial. We find no error.

[3] Finally, defendant assigns as error the refusal of the trial court to grant a continuance to allow the defendant to discharge his appointed counsel and retain private counsel to represent him at trial.

The record shows that the defendant mailed a letter on 20 October 1989 to the district attorney's office requesting permission to fire his appointed counsel and for a continuance to allow him to retain private counsel. This letter was not received by the district attorney until 23 October 1989. The district attorney brought the matter to the attention of Judge Downs before trial on 24 October 1989. The defendant stated that he was "totally dissatisfied" with counsel because his lawyer had not contacted his witnesses and had "not show[n] any kind of concern or interest in [his] case so far." He asked the trial court to grant him a thirty day continuance to seek other counsel. The trial court denied his motion to continue. We find no error in the court's refusal to grant a continuance. The defendant was represented by his appointed counsel for almost five months before trial without complaint. The record indicates that he did not provide his lawyer the names of his witnesses until 18 October 1989, some six days before trial. His lawyer subpoenaed witnesses shortly thereafter.

Defendant also claims that he requested his lawyer to arrange a lineup and that his lawyer failed to make the necessary arrangements. However, he did not show why he was entitled to have a lineup nor how this lineup would have affected his defense. An indigent defendant does not have the right to have counsel of his choice appointed to represent him. *State v. McNeil*, 263 N.C. 260, 270, 139 S.E.2d 667, 674 (1965). If court-appointed counsel is reasonably competent to present the defendant's case, and any conflict between the defendant and his counsel would not render counsel ineffective to represent him at trial, denial of the defendant's motion is proper. *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). We find that the trial court did not err in refusing to grant the defendant a continuance on the day of trial to seek and retain private counsel to represent him in his trial.

III. Conclusion

We arrest that portion of defendant's judgment sentencing him to ten years imprisonment for his conviction for larceny from the person. We otherwise hold that defendant received a fair trial, free of prejudicial error.

Judgment arrested as to the larceny conviction. No error otherwise.

Judges WELLS and COZORT concur.

CLYDE PENLEY v. BETTY ROBERTS PENLEY AND HAMBURG VALLEY, INC.

No. 9028SC62

(Filed 18 December 1990)

Corporations § 12 (NCI3d)— misappropriation of corporate assets and opportunities—insufficient evidence

Plaintiff's evidence was insufficient to show that the individual defendant converted or misappropriated any of the funds or other property of a corporation formed by the parties to operate a fried chicken restaurant. Furthermore, the individual defendant was under no duty to turn over to the corporation a new fried chicken franchise which she obtained while the corporation was in the process of liquidation.

Am Jur 2d, Corporations §§ 104, 107, 143.

APPEAL by plaintiff from judgment entered 14 September 1989 by *Judge Forrest A. Ferrell* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 28 August 1990.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon and Robert H. Haggard, for defendant appellees.

PHILLIPS, Judge.

In 1978 plaintiff and the individual defendant, then husband and wife, formed defendant corporation primarily to operate a Kentucky Fried Chicken restaurant business that defendant Betty Roberts Penley owned a franchise for and had operated for about ten years. In 1979 they separated. In 1981 plaintiff brought this action, *inter alia*, to establish his stock interest in the corporation, to prevent the individual defendant from mismanaging the business, to recover corporate assets she had allegedly converted, and to liquidate the corporation. The stock ownership claim was determined by a 1982 trial, eventually upheld by our Supreme Court, in which it was adjudged that plaintiff owned 48% of the stock in defendant corporation, the individual defendant owned 48%, and their son the remaining 4%. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

During the several years that plaintiff's other claims remained in the trial court the parties disagreed about many matters, most of which were of little or no consequence either to the case or the appeal, but they eventually agreed upon two things material to both. First, in 1981 they agreed that a receiver for the defendant corporation would be appointed and for the rest of its existence the company was operated under orders of the court; and in 1985, after the receiver's management of the company did not satisfy plaintiff they agreed, pursuant to plaintiff's motion and defendant's countermotion, to liquidate the corporation. In due course the appointed receiver sold the company's property, paid its debts, distributed the remaining proceeds to the stockholders, and was discharged. While the company was being liquidated defendant Betty Penley, who never ceased to own the first Kentucky Fried Chicken franchise she received, obtained a new franchise and started another Kentucky Fried Chicken business in Hendersonville. In his amended complaint plaintiff claimed that the new franchise was obtained by company funds that the individual defendant converted and that obtaining the franchise for herself violated her fiduciary duties to the corporation. When those claims were tried in September, 1989 they were dismissed by a directed verdict at the end of plaintiff's evidence. The judgment appealed from is affirmed.

Plaintiff presented no evidence that defendant converted or misappropriated any of the corporation's funds or property and nothing in the record indicates that she had a duty to turn her

newly obtained Kentucky Fried Chicken franchise over to defendant corporation, then in the throes of liquidation. Indeed, plaintiff's witness, Andrew Stull, an accountant who investigated the corporation's affairs at the request of the receiver, testified that he found no evidence of any improprieties or misappropriations by her; and while Harvey Jenkins, the accountant who prepared the corporate tax returns, testified that the company gave defendant various checks, he testified in explanation that defendant often loaned the company money and the checks were in payment of those debts. And the claim that while the corporation was being put out of business at plaintiff's insistence the individual defendant had a duty to promote its future profit by turning the new franchise over to it is supported by no principle of law or equity of which we are aware. Furthermore, the uncontradicted evidence also shows that the franchise could not be conveyed to the corporation since its terms prohibited it from being assigned to a corporation in which the individual defendant had less than a 51% interest.

All of plaintiff's other contentions concern matters set at rest long before the judgment appealed from was entered. None of the actions or orders now complained of was appealed or even excepted to until years later when this appeal was being perfected. One contention concerns the trial court's proper refusal to act upon the adjudication that plaintiff owned 48% of the corporate stock while that adjudication was being contested on appeal. *See Kirby Building Systems, Inc. v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990). The others concern the receiver who was discharged in October, 1987 by an order stating that there was "no objection to the accounting presented by the receiver"; an order that plaintiff opposed only by filing a broadside objection six days later. Rule 3(d), N.C. Rules of Appellate Procedure; *Smith v. Independent Life Insurance Co.*, 43 N.C. App. 269, 258 S.E.2d 864 (1979).

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	
BENJAMIN F. HOLMES	)	ORDER
	)	
&	)	
	)	
BERNARD PENN	)	

For good cause shown, IT IS ORDERED that the opinion in this case, previously filed as an unpublished opinion on the 15th day of May, 1990, and reported in Volume 98 N.C. App. 515, 391 S.E.2d 864, be published.

This the 14th day of December, 1990.

The above order is therefore certified to the Clerk of Superior Court, Forsyth County, North Carolina.

Witness my hand and official Seal this the 14th day of December, 1990.

Francis E. Dail
Clerk of the Court of Appeals

STATE OF NORTH CAROLINA v. BENJAMIN F. HOLMES AND BERNARD PENN

No. 8921SC525

(Filed 15 May 1990)

1. **Criminal Law § 83 (NCI3d)— statements to wife—procurement of gun—privileged confidential communications**

Statements made by defendant to his wife that he was going to shoot and kill the victim because he had messed up his money and defendant's actions in taking a gun from a kitchen cabinet in his wife's presence constituted confidential communications within the meaning of N.C.G.S. § 8-57(c) where defendant had instructed two other men to go outside the house because he wanted to talk to his wife before he made the statements and procured the gun. Therefore, defendant had the right to prohibit his wife from testifying both about his statements to her and his actions in procuring the gun.

Am Jur 2d, Witnesses § 149.

2. **Criminal Law § 83 (NCI3d)— husband-wife privilege—intent to commit crime—similar communications**

The privilege of a confidential communication between marriage partners is not removed because the communication shows the intention of one spouse to commit a crime or because the same or a similar communication was made to third persons on other occasions.

Am Jur 2d, Witnesses § 149.

3. **Criminal Law § 74.2 (NCI3d)— codefendant's incriminating statements—acting in concert—Bruton rule inapplicable**

A codefendant's statements to the police which primarily implicated himself and did not refer to defendant were not inadmissible in defendant's trial under the *Bruton* rule because defendant was tried under the theory of "acting in concert."

Am Jur 2d, Evidence § 539.

4. **Criminal Law § 74.3 (NCI3d)— defendant's statements—deletion of statements about codefendant—defendant not prejudiced**

A defendant charged with murder was not prejudiced when the trial court sanitized his statements to a witness

under the *Bruton* rule by deleting a statement that a codefendant fired the first two shots and admitting only the statement that defendant fired the third shot because he did not want the victim to suffer where a pathologist had previously testified that the victim had been shot three times, other testimony clearly alleged that the codefendant had fired some if not all the shots, and the deletion did not materially change the nature of defendant's statements to the witness. N.C.G.S. § 15A-297(c)(1).

Am Jur 2d, Evidence § 540.

5. **Criminal Law § 74.2 (NCI3d)— defendant's statements incriminating codefendant—exclusion under Bruton rule—hearsay**

The trial court correctly prevented a witness from testifying about what defendant said he had seen the night the victim was shot since, following the purpose of the *Bruton* rule, a codefendant had the right to demand protection from being incriminated by defendant's admissions, and since the testimony was hearsay.

Am Jur 2d, Evidence § 540.

6. **Homicide § 21.7 (NCI3d)— second degree murder—acting alone or in concert—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of second degree murder either under the theory that defendant acted alone or under the theory that he acted in concert with a codefendant where it tended to show that defendant and the codefendant picked up the victim on the morning of the murder and those three were together virtually the entire day; the victim had been shot three times, and defendant admitted to a witness that he had shot the victim one time; defendant smoked Kool cigarettes and a Kool cigarette butt was found close to the victim's body; and defendant told his sister-in-law that he had killed the victim.

Am Jur 2d, Homicide §§ 425, 426.

7. **Criminal Law § 793 (NCI4th)— acting in concert—refusal to instruct on causation—no error**

The trial court did not err by refusing defendant's request for a special instruction regarding the issue of causation on the theory of acting in concert.

Am Jur 2d, Homicide § 476.

APPEAL by defendants from judgment entered by *Judge James A. Beaty, Jr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals on 16 January 1990.

Defendant Bernard Penn and co-defendant Benjamin Holmes were indicted for the murder of "Danny Boy" Hooper. The cases came on to be joined and tried together over Penn's objection on 12 December 1988. The State sought second-degree murder convictions and the defendants pled not guilty. A jury found both defendants guilty as charged. At sentencing Judge Beaty found aggravating factors against both defendants and sentenced each to fifty years imprisonment. Defendants appealed.

At trial the State presented the following evidence:

Theodore Tolliver testified that on the morning of 11 January 1988, the victim Hooper was in a liquor house that he ran in Winston-Salem, North Carolina. At about 11:30 a.m., defendants Penn and Holmes drove up to the house. Penn was driving and Holmes was riding in the front seat. Penn got out of the car, announced that he wanted to see Hooper and went inside the house. About forty minutes later, Penn came outside with Hooper and tried to persuade Hooper to get into the car. A bystander named Edward Johnson approached the car, but Penn said he did not want Johnson to go with them. Hooper got in the back seat and Penn drove off. Co-defendant Holmes did not get out of the car or say anything during this time. Johnson testified and confirmed Tolliver's testimony.

Martha Hairston also substantially confirmed Tolliver's testimony. Hairston, who was Hooper's girlfriend, testified that she was inside the liquor house on 11 January when Penn entered. As Hooper left with Penn, Hairston gave Hooper some money and asked him to buy a package of Newport cigarettes.

The State then called Debra Penn, Penn's wife and the sister of Holmes. She testified that at about 3:15 p.m. on 11 January, Penn, Holmes and Hooper came into her house where she, Penn, and their children lived. Hooper used the telephone. Then Penn told both Holmes and Hooper "to go outside—step out on the porch, that he wanted to talk to [Debra] about something." After the men left, Penn reached in a cabinet and took out a gun. At this point in Debra's testimony, Penn objected and asserted his statutory and common law privilege to prevent his wife from testifying about confidential communications that occurred during their marriage. The trial court excused the jury and held a *voir dire*

to determine if the communications constituted a privileged confidential communication. The court allowed the testimony over objection, and Debra testified that Penn told her that he "was going to shoot and kill the guy, Danny Boy, because he had messed up his money." Debra further testified that Penn wrapped the gun in a sweater and left with the others at about 3:40 p.m. She stated that Penn came home at about 11:30 p.m. on 11 January. Debra admitted that she told police an entirely different story on 13 January. Debra also testified that her brother Holmes smoked Kool cigarettes.

Luther Ijames testified that he lived in an apartment complex off Mineral Avenue in Winston-Salem, that he was driving home from work after 7 a.m. on 12 January 1988 and that he spotted Hooper's body lying on the ground in a wooded area off Mineral Avenue. Ijames had not seen the body when he drove by at 10:30 p.m. the night before.

Winston-Salem policeman Ken Bishop testified that he found Hooper's body in some woods off Mineral Avenue about fifteen feet from the street. A number of houses and apartments are within about fifty yards of the point where the body was found. Bishop found Hooper's jacket lying on some branches about thirty feet from the body, a Kool-brand cigarette butt about five feet from the body and open and unopened packages of Newport cigarettes in Hooper's pockets. Two .38 caliber half copper-jacketed lead hollow point bullets were removed from Hooper's body at the autopsy. Bishop testified he found similar bullets in a teapot and drawer when he searched Penn's house on 13 January 1988. The officer said that a .38 caliber handgun would make a "significantly loud noise" when fired, which could be heard from at least 200 yards.

Winston-Salem policeman W.C. Crump testified that police canvassed the area and found no one who heard any gunshots or who knew when the body was put there. Crump said he searched Penn's car on 13 January and found no blood but did find Newport cigarette butts in the rear ashtrays.

A pathologist testified that there were three gunshot wounds to the victim's body, two in the left chest and a third in the left side of the face. One shot to the chest penetrated the heart and was the cause of death and the other chest shot nicked the heart and was "potentially fatal." The shot to the face was not potentially fatal.

The remaining evidence from the State consisted of testimony regarding admissions made by the defendants. Jerry Galloway testified that Penn came to his house about 9:00 a.m. on 12 January "seeking an alibi." Penn said he had shot Hooper three times because the victim had "fucked up" $1,200 or $12,000 worth of his dope. Galloway testified that Penn told him that "he shot the boy twice in the upper chest and once in the head." Galloway and Penn talked about evidence. Penn then made a telephone call and told the person on the line to get all the bullets out of the house and get rid of them. Penn then reiterated that he had to get an alibi and left.

Elijah Moses testified for the State about a statement that co-defendant Holmes allegedly made to him on the night of 11 January. Holmes immediately objected to this testimony and the trial court excused the jury. Holmes stated he had received notice of the contents of the statement allegedly made to Moses. The statement Holmes allegedly made to Moses was: "Penn fired the first two shots and then he (Holmes) fired the third shot because he didn't want him (Hooper) to suffer." The trial court ordered the statement "sanitized" under the *Bruton* rule, and the prosecutor was allowed to ask Moses the following question: "Did Holmes tell you that he shot Hooper one time and he shot him because he did not want him to suffer?" Over objections from both defendants, Moses replied, "Yeah."

Defendant Holmes testified that he was a cocaine addict and that he sold cocaine for Penn. Holmes said he was afraid of Penn and depended on Penn to supply him with drugs. Holmes stated that on the morning of 11 January Penn drove the two defendants to Tolliver's, got out of the car, returned in fifteen minutes with Hooper, got in the car with Hooper, drove off and then asked Hooper, "have you got my money?" Penn drove the three men around rural Forsyth County for several hours, stopped at three houses and a convenience store and talked with Hooper about cocaine and money. Holmes did not recall stopping at Penn's house. When it began to get dark, Penn told Holmes to drive. Penn got in the front seat and gave Holmes directions to Mineral Avenue. After they arrived at Mineral Avenue, Holmes cut the car off, heard Penn talking to Hooper inside the car and then he heard a shot. Holmes jumped out of the car, looked around and saw Hooper fall out of the back seat of the car onto the street. Penn then dragged the victim into the woods. Hooper was moaning and

Penn shot Hooper again. Holmes and Penn got back in the car, circled the block and saw that Hooper had moved about four feet. Penn got out of the car and shot Hooper again. Penn then dropped Holmes off at Moses' liquor house, where he drank some wine, used some drugs and then told Moses what had happened. Holmes testified that he did not mention Penn's name to Moses and did not tell Moses that he fired a shot to put Hooper out of his misery.

Penn did not put on any evidence. He only called co-defendant Holmes' sister-in-law Geraldine Holmes who testified that on 12 January Holmes told her that he killed the victim. Holmes rebutted this testimony by calling his mother Willa Mae Holmes. She testified that on 12 January Holmes told her and Geraldine Holmes not that he had killed the victim, but that he knew who killed Hooper.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the State.

Crawford and Hough, by David R. Crawford and William A. Hough, III, for defendant appellant Holmes.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant Penn.

ARNOLD, Judge.

I. Penn's Assignments of Error

[1] Defendant Penn first assigns error to the trial court's admission into evidence of a privileged confidential communication between him and his wife in violation of N.C. Gen. Stat. § 8-57(c). He argues this violation was reversible error. We agree. N.C. Gen. Stat. § 8-57(c) provides that in criminal cases, "[n]o husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage." The North Carolina Supreme Court has held that "spouses shall be incompetent to testify against one another in a criminal proceeding . . . if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage." *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453 (1981). This rule was recently reiterated: "[W]e have said that a spouse's testimony is . . . incompetent if the substance of the testimony concerns a confidential communication." *State v. Britt*, 320 N.C. 705, 709 n.2, 360 S.E.2d 660, 662 (1987). The privilege rendering a spouse incompetent to testify about the

other spouse's confidential marital communication is a rule of longstanding and wide acceptance. *See* 1 Brandis on North Carolina Evidence § 60 (3d ed. 1988).

To fall within the purview of this privilege, the communication must have been made confidentially between wife and husband during the marriage. *Freeman*, 302 N.C. 591, 276 S.E.2d 450. The test for a confidential communication is "whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *Id.* at 598, 276 S.E.2d at 454.

In the case *sub judice*, when the State called Penn's wife as a witness, Penn immediately objected and asserted his privilege. Over his objection, Debra Penn testified that on 11 January she was at home when Penn, Holmes and Hooper arrived. After a few minutes, Penn instructed the two other men to go outside the house because he wanted to talk to his wife about something. After the two men left and she and Penn were alone, her husband reached into a kitchen cabinet and took out a gun. Penn then told her that he was going to shoot and kill Hooper because Hooper had messed up some of his money. He wrapped the gun in a sweater and left.

In contrast, in *Freeman* the potential witness spouse stipulated that had she been allowed to testify she would have stated that the defendant, her husband, drove into a public parking lot where she was sitting in another car with her brother. The husband left his car and approached the car with the wife and brother inside. The husband asked if either of them wished to speak with him and then immediately discharged the shotgun, killing the brother. At trial the defendant husband objected to the wife's testimony concerning the events that transpired in the parking lot on the grounds that his comments and actions were confidential communications. Nevertheless, the court held that the witness spouse's testimony was competent and admissible. "Such actions in a public place and in the presence of a third person could not have been a communication made in the confidence of the marital relationship or one which was induced by affection and loyalty in the marriage." *Freeman*, 302 N.C. at 598, 276 S.E.2d at 455; *accord, State v. Funderburk*, 56 N.C. App. 119, 286 S.E.2d 884 (1982).

In the case before us, Penn asked the third parties to leave before he spoke to his wife in their home. Penn's communications

were made to his spouse during the duration of their marriage and they were made in confidence. Debra testified that Penn trusted her when he made the communications. No evidence was offered that anyone overheard the communications. All the circumstances here show that Penn's statements were induced by the confidence of his marital relationship and thus were protected. *See Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967).

Generally, the privilege of a confidential communication extends only to utterances and not to acts. 8 Wigmore, *Evidence* § 2337 (McNaughton rev. 1961). Nevertheless, an action may be protected if it is intended to be a communication and is the type of act induced by the marital relationship. 97 C.J.S. Witnesses § 269 (1957). In this case, Penn told Holmes and Hooper to leave before he took the gun out of the cabinet. Penn could have asked his wife to leave the room or secured the gun at another time if he had not wished her to see his actions. The facts here lead us to conclude that Penn acted in front of his wife out of a feeling of trust induced by their marriage relationship. We hold that Penn had the right to assert the privilege against Debra and prohibit her from testifying both about his statements to her and about his actions in procuring the firearm.

[2] In an order allowing the wife's testimony, the trial court stated that it allowed Debra to testify because Penn's conversation with his wife was "an expression of his intent to commit a criminal act." The court also justified the testimony by categorizing the conversation as corroboration. However, there is no support in the law for either of these positions. It is well settled that if the requirements of a confidential communication exist, the privilege is not removed where the communication shows the intention of one spouse to commit a criminal offense. Specifically, "[t]he rule excludes testimony by a wife of threats of her husband, made to her alone, that he would kill a third person . . . ." 97 C.J.S. Witnesses § 269 (1957). Neither is the privilege removed by the fact that the same or similar communications were made to third persons on other occasions. 97 C.J.S. Witnesses § 272 (1957); *Koon v. State*, 10 Fla. L. Week 49, 463 So.2d 201, *cert. den.*, 472 U.S. 1031, 87 L.Ed.2d 641 (1985).

Finally, evidence rendered incompetent by N.C. Gen. Stat. § 8-57 is excludable and failure to do so is reversible error. *See*

Freeman, 302 N.C. 591, 276 S.E. 2d 450. Therefore, we are required to grant defendant Penn a new trial.

As will be made clear below, it is not necessary to address Penn's other assignment of error.

II. Holmes' Assignments of Error

Co-defendant Holmes first assigns error to the trial court's admission of several out-of-court statements made by Penn that tended to incriminate and implicate him. The statements that Holmes contends were erroneously admitted include Penn's statement to his wife that he was going to shoot and kill Hooper and several other statements Penn made to the police after the shooting tending to show that he was trying to cover up the crime.

[3] As to the first statement, Holmes made no objection to this testimony at trial, and we will not consider an objection to the admission of evidence that is made for the first time on appeal. Concerning the other statements he objects to, we are unpersuaded by Holmes' argument here because these statements do not refer to him. While Holmes concedes that the statements primarily implicate Penn, he contends they indirectly implicate him because he was tried under the theory of "acting in concert." We disagree. We fail to see any prejudice toward Holmes in admitting these statements. This is an attempt by defendant to stretch the principle underlying the *Bruton* rule much farther than is plausible. *See infra.* This assignment of error is dismissed.

[4] Holmes' next three assignments of error center around the testimony and cross-examination of the witness Elijah Moses. On the night of 11 January 1988, Penn dropped Holmes off at Moses' drink house. Holmes made certain statements of what had transpired that night, which Moses later reiterated to the police. The essence of the statements was that Holmes had told Moses that Penn fired the first two shots and that he (Holmes) fired the third shot because he did not want Hooper to suffer. Under the *Bruton* rule, the court ruled admissible only the portion of the statement in which Holmes said that he fired the third shot because he did not want Hooper to suffer. *See Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476 (1968). *Bruton* holds that a defendant's sixth amendment right to confront witnesses against him is violated if he is implicated by the confession of a co-defendant being tried with

him who does not testify. *Bruton* has been codified at N.C. Gen. Stat. § 15A-927(c)(1).

The rule requires the exclusion of extrajudicial statements of a defendant which tend to incriminate another defendant unless the portions incriminating the nondeclarant defendant can be deleted "without prejudice either to the State or the declarant." *State v. Fox*, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968). Holmes contends that the admission of the redacted statement was erroneous because elimination of the portion of the statement attributing the first two shots to Penn distorted the statement and left Holmes to appear to have acted more egregiously than had the entire admission been allowed into evidence.

State v. Giles involved a situation where the trial court complied with *Bruton* and N.C. Gen. Stat. § 15A-927(c)(1) in that defendant's statement was sanitized by deleting all references to a co-defendant before the statement was admitted into evidence against the declarant defendant. *Giles*, 83 N.C. App. 487, 350 S.E.2d 868 (1986), *rev. denied*, 319 N.C. 460, 356 S.E.2d 8 (1987). In *Giles* we held the deletions did not materially change the nature of the statement and that the admission of the sanitized version did not prejudice the defendant. *Id.* at 494, 350 S.E.2d at 872.

The trial court below allowed Moses to testify that Holmes told him that he (Holmes) shot Danny Boy once so the victim would not suffer. Previous to Moses' testimony, evidence had been presented by a pathologist that the victim had been shot three times. Other testimony in the trial clearly alleged that defendant Penn had fired some if not all the shots. As in *Giles*, we fail to see how the deletions here materially changed the nature of defendant Holmes' statement. This assignment of error is overruled.

In a related argument, Holmes contends that the trial court erroneously permitted the prosecutor to ask Moses a leading question concerning Holmes' admission. The prosecutor asked Moses, "Did Holmes tell you that he shot Hooper one time and he shot him because he did not want him to suffer?" Moses replied, "Yeah." The use of leading questions on direct examination is a matter entirely within the discretion of the trial judge, and such a ruling is not reviewable on appeal absent a showing of abuse of discretion. *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986); N.C. Gen. Stat. § 8c, Rule 611(c). Furthermore, when this issue arose at trial, defendant's counsel participated in a bench conference concerning

the court's approval of a sanitized version of the statement. In order to protect defendant Penn, the judge ordered that the sanitized portion of the statement be read directly to the witness. This effort was consistent with the principle behind the *Bruton* rule, and in doing so, the judge did not abuse his discretion in allowing the use of the leading question. The assignment of error is overruled.

[5] In another related assignment of error, Holmes contends that the court went too far in protecting Penn when it precluded Holmes from cross-examining Moses about what Holmes contends he actually said to Moses. On cross-examination of Moses, Holmes' attorney sought to elicit testimony that Holmes had actually told Moses that he (Holmes) had witnessed a murder and had asked Moses for money to buy drugs because he was so shook up by what he had seen. The court sustained an objection to the following question asked of Moses: "He (Holmes) asked you (Moses) for that money so he could buy drugs because he was so shook up about what he had seen. Is that not true?" The objection made was sustained as to what Holmes had seen. Defendant Holmes' attorney then asked, "Well, didn't he ask you to borrow money so he could do some drugs because he was shook up?" The objection to this question was overruled. Holmes contends the court's action unduly restricted his ability to confront witnesses against him as guaranteed by the sixth amendment of the United States Constitution. He claims the restrictions compelled him to take the stand to accomplish what he had been forbidden to do on cross-examination.

The longstanding rule in this jurisdiction is that the scope of cross-examination is largely within the discretion of the trial judge, whose rulings thereon will not be held in error absent a showing that the verdict was improperly influenced by the limited scope of cross-examination. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982). Defendant makes no showing that the verdict here was improperly influenced by the trial court's actions. The court correctly prevented Moses from testifying about what Holmes said he had seen that night. Again, following the purpose of the *Bruton* rule, Penn had the right to demand protection from incriminations that might arise from admissions made by Holmes. Furthermore, as Holmes admits in his brief, testimony from Moses about what Holmes said he had seen on the night of the shooting was hearsay. The court then overruled an objection to the second question asked of Moses that didn't Holmes ask him (Moses) for money so he

could buy drugs because he was shook up. Moses gave a somewhat unclear answer, but instead of following up to clarify, Holmes' attorney switched his focus and immediately began to attack Moses' credibility. Therefore, this assignment of error is also overruled.

[6] Holmes next contends that the court below erred by denying his motion to dismiss because the State failed to present substantial evidence with respect to each essential element of the crime charged. In a criminal action, the evidence is considered in the light most favorable to the State. Discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977). The State presented the following inculpatory evidence against the co-defendant: (1) Holmes was with Penn when they picked up the victim on the morning of the murder, and he was with Penn and Hooper virtually that entire day; (2) Holmes admitted that he was at the scene of the shooting; (3) Holmes smoked Kool cigarettes and a Kool cigarette butt was found very close to the victim's body; (4) Holmes admitted to Moses that he had shot the victim one time; and (5) Geraldine Holmes testified that Holmes told her that he killed the victim.

After the presentation of the evidence, the court instructed the jury that as to defendant Holmes it should return a verdict of guilty if it found that Holmes either acting alone had intentionally and with malice killed the victim, or if Holmes acting "in concert" with defendant Penn had killed the victim. Then as part of its instruction on the theory of acting in concert, the court gave the following instruction: "If two or more persons act together with a common purpose to commit second degree murder, each of them is held responsible for the acts of others done in the commission of second degree murder." We find ample evidence in the record to support defendant's conviction for second degree murder under either theory submitted to the jury. By his own admission, defendant Holmes was at the scene of the shooting and two people testified that Holmes admitted shooting the victim. This assignment of error is overruled.

[7] Next defendant Holmes contends that the trial court erred by refusing his request for a special instruction regarding the issues of causation on the theory of acting in concert. In requesting this special instruction, defendant's counsel cited a case to the trial

judge that involved the theory of accessory before the fact. Defendant's argument here is misplaced. The case cited is not applicable in this situation. We noted above the court's instruction to the jury concerning the theory of acting in concert. This instruction was correct. *See State v. Ferrell and State v. Workman*, 46 N.C. App. 52, 264 S.E.2d 134 (1980); Strong's North Carolina Index 4th Criminal Law § 793 (1989).

We have examined defendant Holmes' other assignments of error and found them to be without merit. They are overruled.

In summary, we order a new trial for defendant Penn, but find no error in the trial of defendant Holmes.

Chief Judge HEDRICK and Judge WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 DECEMBER 1990

BAILEY v. FIRST PRESBYTERIAN CHURCH No. 9010IC522	Ind. Comm. (637440)	Affirmed
BIGGS v. N.C. DEPT. OF HUMAN RESOURCES No. 9017SC3	Rockingham (89CVS922)	Affirmed in part; Remanded in part with instructions
CALDWELL v. MURRAY BAKERY PRODUCTS No. 8910SC1235	Wake (88CVS3850)	Affirmed
CHRISTENBURY v. K-MART CORP. No. 9027SC549	Gaston (89CVS303)	Vacated & remanded
CORRELL v. ALLEN No. 9011DC363	Johnston (85CVD0430)	Affirmed
GRAY v. GRAY No. 9021DC87	Forsyth (86CVD3174) (87CVD3056)	Appeal Dismissed
GREER v. WATSON No. 9013SC269	Brunswick (87CVS350)	Affirmed
HICKS v. GILLESPIE MOTORS, INC. No. 9017SC687	Stokes (89CVS66)	Affirmed
HORTON v. BAILEY No. 9023DC143	Wilkes (88CVD1085)	Vacated
IN RE CAUDLE No. 9026DC433	Mecklenburg (85J307) (85J308)	Dismissed
IN RE CLARK No. 897DC1045	Edgecombe (86J82)	Affirmed
IN RE ESTATE OF STEWART No. 895SC1131	New Hanover (88E837)	Reversed
INTEGON GENERAL INS. CORP. v. UNIVERSAL UNDERWRITERS INS. CO. No. 8921SC1338	Forsyth (88CVS4096)	Affirmed

INTEGON GENERAL INS. CORP. v. UNIVERSAL UNDERWRITERS INS. CO. No. 8921SC1339	Forsyth (88CVS4022)	Affirmed
LANIER v. LANIER No. 9027DC41	Lincoln (89CVD478)	Affirmed in part, reversed & remanded in part
MARTIN v. MARTIN No. 9023DC440	Wilkes (90CVD13)	Dismissed
N.C. DEPT. OF CRIME CONTROL v. HOOKS No. 9010SC225	Wake (89CVS00478)	Affirmed
S. F. McCOTTER & SONS v. AMERICAN GUARANTY INS. CO. No. 903SC142	Pamlico (88CVS62)	New trial on damages only
SHINE v. GALBAUGH No. 9021SC220	Forsyth (88CVS1683)	New Trial
SPIVEY v. BRUNSWICK CO. BD. OF EDUCATION No. 8913SC1360	Brunswick (88CVS141)	Affirmed
STATE v. BUNCH No. 9010SC264	Wake (89CRS78663) (88CRS78664)	No Error
STATE v. FELD No. 902SC217	Beaufort (89CRS3457)	No Error
STATE v. MORETZ No. 9022SC72	Alexander (89CRS1072) (89CRS1073)	New Trial
STATE v. PHIPPS No. 904SC249	Duplin (88CRS5353) (88CRS5354)	No Error
STATE v. PORTER No. 8921SC1139	Forsyth (87CRS35718)	Affirmed
STATE v. RAWLINSON No. 9021SC390	Forsyth (89CRS13315) (89CRS13319) (89CRS26955)	No Error
STATE v. ROBERTSON No. 9025SC111	Catawba (89CRS2074) (89CRS2075)	No Error

STATE v. STAMEY No. 9029SC422	McDowell (89CRS1619)	No Error
STATE v. TODD No. 9021SC219	Forsyth (89CRS18945) (89CRS18946) (89CRS18944) (89CRS17397)	Reversed in part; No Error in part
TAYLOR v. BOONE No. 903SC344	Craven (89CVS683)	Affirmed
TRIANGLE BEVERAGE CO. v. ALLBEV, INC. No. 9014SC468	Durham (89CVS1435)	Affirmed
WALKER v. MONUMENTAL GENERAL INS. CO. No. 9028SC80	Buncombe (88CVS2378)	Affirmed
WASEL v. CANTON HARDWOOD CO. No. 9010IC173	Ind. Comm. (670482)	Affirmed
WIGGS v. WIGGS No. 8911DC1318	Johnston (88CVD1835)	Affirmed

STATE OF NORTH CAROLINA v. JAMES HUBERT AUTRY, CARLOS TYRONE DICKSON, PRESTON COOKE, TERESA ANN OLIPHANT, AND JANICE DENISE OLIPHANT

No. 9026SC428

(Filed 15 January 1991)

1. **Criminal Law § 374 (NCI4th)— limiting instruction—no expression of opinion**

The trial judge did not express an opinion to the jury that cocaine found on a kitchen table either belonged to defendant or no one when he instructed the jury that testimony by a forensic chemist concerning cocaine found by officers on a downstairs kitchen table could only be considered in determining the guilt or innocence of defendant and could not be considered in determining the guilt or innocence of two codefendants who were upstairs at the time of the search.

Am Jur 2d, Drugs, Narcotics, and Poisons § 44.

2. **Narcotics § 4.3 (NCI3d)— constructive possession—intent to sell—sufficiency of evidence**

There was sufficient evidence to establish that defendant had constructive possession of .88 grams of cocaine found on a kitchen table on premises controlled by others and that he had the intent to sell or deliver the cocaine where it tended to show that defendant was standing only a few feet from the cocaine; two other persons were in the kitchen; the table was surrounded by chairs, one of which was turned sideways from the table and tilted toward defendant; a leather jacket was hanging on the back of the chair; a pistol, four packages of powder containing the cocaine, and forty-seven dollars in cash were on the table; and defendant told officers that the jacket and the cash belonged to him.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Conviction of possession of illicit drugs found in premises of which defendant was in non-exclusive possession. 56 ALR3d 948.

3. Narcotics § 4.4 (NCI3d)— constructive possession—acting in concert—insufficiency of evidence

The State's evidence was insufficient to support defendant's conviction of trafficking in cocaine under the theory of constructive possession or under the theory of acting in concert where it tended to show only that two other persons were found in an upstairs bedroom with 34 grams of cocaine and drug paraphernalia, defendant was found in a landing or hallway leading to the bedroom, and defendant had no control over the premises.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Conviction of possession of illicit drugs found in premises of which defendant was in non-exclusive possession. 56 ALR3d 948.

APPEAL by defendants Autry and Dickson from judgments entered 11 October 1989 in MECKLENBURG County Superior Court by *Judge John M. Gardner*. Heard in the Court of Appeals 14 November 1990.

Lacy H. Thornburg, Attorney General, by LaVee Hamer Jackson, Assistant Attorney General, for the State.

Susan J. Weigand for defendant-appellant Autry.

Isabel Scott Day, Public Defender, by Marc D. Towler, Assistant Public Defender, for defendant-appellant Dickson

GREENE, Judge.

Defendant Autry was charged with two counts of trafficking in cocaine and one count of possession with intent to sell or deliver cocaine. The two counts of trafficking were dismissed at the close of the State's evidence, and a jury returned a verdict of guilty of possession with intent to sell or deliver cocaine. Autry appeals from a judgment entered 11 October 1989 sentencing him to ten years imprisonment. Defendant Dickson was charged with two counts of trafficking in cocaine. The jury returned a verdict of guilty of one count. Dickson appeals from a judgment entered 11 October 1989 sentencing him to fifteen years imprisonment.

The State's evidence tends to show that at approximately 11:55 p.m. on 20 March 1989, a vice squad team of fourteen officers

served a search warrant upon the residence of Teresa and Janice Oliphant, located on East Sixth Street in Charlotte. After identifying themselves and announcing that they had a search warrant, the door was forced open and eleven officers entered the residence. Several officers proceeded upstairs while others went into the kitchen and living room areas downstairs.

Upstairs, the officers found two bedrooms, a bathroom and a small hallway or landing. They saw Dickson midway between a door leading to one of the bedrooms and the door to the bathroom. One officer searched Dickson, finding nothing, while another entered one of the bedrooms. In the bedroom the officer found Janice and Teresa Oliphant sitting on the bed. Also on the bed were two bags containing a total of 20.8 grams of cocaine. The officer also found in the bedroom a plate containing 13.3 grams of cocaine, scales, a spoon, a sifter, plastic sandwich bags, and a container of Inositol. An additional one-tenth gram of cocaine was found on Janice Oliphant's person during a search. Dickson and the Oliphants were arrested.

Downstairs, officers entered the kitchen and found a table surrounded by several chairs. On the table were a .25-caliber semi-automatic pistol, $47.00 in cash, and four packages containing a total of .88 grams of cocaine. A leather jacket was hanging on the back of one of the chairs. Defendant Autry was first observed standing at a kitchen counter within arm's length of the chair with the jacket hanging on it. There were two other men in the kitchen, one of whom ran out the back door and was later apprehended and returned to the house. One of the officers told Autry to leave. He started to leave, but then pointed at the chair and asked, "Can I get my jacket?" The officer took the jacket from the chair, patted it down, and then handed it to Autry. Autry then pointed at the table and asked, "Well, can I get my money, too?" Autry was then arrested.

At trial, the State introduced the testimony of an expert in forensic chemistry, who testified that the .88 grams of "white powder" found in the kitchen on the night of the arrests contained cocaine. During this testimony, defendant Dickson requested a limiting instruction to the jury on the grounds that the cocaine found in the kitchen was not related to the case against Dickson. The court instructed the jury as follows:

> Ladies and gentlemen of the jury, I instruct you that you may consider the testimony of this witness, that is the testimony of Ms. Mills, only in determining the guilt or innocence of the defendant James Hubert Autry of the charge of felonious possession with intent to sell or deliver controlled substance, to wit, cocaine, as alleged in the first count of the indictment, Case Number 89CRS18863.
>
> You may not consider this evidence in any way in determining the guilt of [sic] innocence of Mr. Autry as to the remaining two charges in that indictment, nor may you consider this evidence in any way in determining the guilt or innocence of the defendant Janice Denise Oliphant as to any charges against her, or the guilt or innocence of the defendant Carlos Dickson as to any charges against him.

Defendant Dickson presented the testimony of three witnesses. Diane Guy, Dickson's girlfriend, testified that Dickson was living with her on North Davidson Street. She also stated that Dickson's daughter, Tamara Oliphant, the niece of Janice and Teresa Oliphant, was also staying with her and Dickson because Tamara had been suspended from school and her mother was in the hospital. Guy testified that Dickson had gone to sleep around 9:30 p.m., but that she woke him at approximately 11:15 p.m. and asked him to go out and get her some cigarettes. Before leaving, Dickson told Guy that he was going to go to Janice and Teresa Oliphant's home to arrange a ride to school for his daughter the next morning.

The principal of Pinewood Elementary School testified that Tamara Oliphant had been suspended from school during the spring of 1989, and that he had met with Dickson about getting Tamara enrolled back in school, though he could not remember the exact day of the meeting.

Dickson's third witness, Charles Barber, testified that he ran into Dickson behind Dickson's house a little after 11:00 p.m. on the evening of 20 March 1989. Barber stated that Dickson asked him to walk to the store with him, and that Dickson explained that he needed to first stop by the Oliphant home to arrange a ride for his daughter for the next morning. They had been in the house two or three minutes when the police arrived.

No evidence was presented by the other defendants.

The issues are: (I) whether the trial court erred in the trial of Autry in that (A) the limiting instruction to the jury regarding the testimony of the State's expert in forensic chemistry was an impermissible expression of opinion, and (B) there was insufficient evidence to support a conviction based upon a theory of constructive possession of cocaine; and (II) whether the trial court erred in the trial of Dickson in that there was insufficient evidence to support a conviction based upon a theory of either constructive possession of cocaine, or acting in concert to traffic in cocaine.

I. AUTRY

Defendant Autry argues that the trial court's instruction to the jury concerning the testimony of the State's expert in forensic chemistry constituted an improper and prejudicial expression of opinion by the court, and that the court erred in denying his motion to dismiss for insufficiency of the evidence.

A

[1] From the trial court's instruction to the jury, defendant Autry contends that the court expressed an opinion to the jury that the cocaine found on the kitchen table either belonged to Autry or to no one. As a statutory basis for his argument, Autry asserts N.C.G.S. § 15A-1232 (1988), which provides that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved . . . ."

When two or more defendants or two or more offenses are tried jointly, it is logical that certain evidence may be admissible only as to one defendant or as to one charge. Indeed, our rules of evidence have anticipated and addressed these problems by providing:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

N.C.R. Evid. 105 (1988). In this case, the trial court gave the instruction to the jury pursuant to a request from defendant Dickson. For several reasons, we find no error.

First, the record indicates that, including defendant Autry, there were nine persons present on the premises the night of

Autry's arrest, two of whom were in the kitchen with Autry where the cocaine was found. Though the court instructed the jury that the chemist's testimony regarding the identity of the "powder" found on the kitchen table was not to be considered in the case against defendant Janice Oliphant or defendant Dickson, we are not persuaded that the jury could have interpreted the court's limiting instruction as an expression of the court's opinion that the cocaine could not belong to the other two persons in the kitchen with Autry, or to anyone else in the house, or to anyone else who may have recently been in the house, or, as argued by defendant Autry, "that the cocaine on the kitchen table belonged either to Mr. Autry or it belonged to no one."

Second, any potential for such an interpretation by the jury was cured when in its final jury instructions the trial court stated:

> The law requires the presiding judge to be impartial. You're not to draw any inference from any ruling that I've made, or any inflection in my voice or expression on my face, or any question I may have asked a witness, or anything else I may have said or done during the course of this trial, that I have an opinion or have intimated an opinion, as to whether any part of the evidence should be believed or disbelieved, as to whether any fact has or has not been proved, or as to what your findings ought to be.

Third, in its final jury instructions regarding the charges against defendant Autry, the court instructed the jury as follows:

> In deciding whether the State has proved the defendant guilty of this offense beyond a reasonable doubt, the offense as hereafter defined in these instructions, you may consider only the following evidence: State's Exhibits Number One, Number Two and Number Three, and the testimony of . . . Mills. . . .

Exhibits one, two and three are the gun, the ammunition magazine, and the four bags of cocaine, respectively, found on the kitchen table. Mills is the State's expert in forensic chemistry whose testimony prompted defendant Dickson to request the limiting instruction at issue. However, in instructing the jury as to the charges against defendants Dickson and Janice Oliphant, the court instructed that in deciding whether they possessed cocaine in an amount of twenty-eight grams or more but less than 200 grams, the jury could "only consider the evidence concerning the weight of the

substances found on the plate and in the two bags on the bed in the upstairs bedroom . . ." and that they could not "consider any evidence as to the weight of any other substance found on the premises or on any person in the premises." The effect of this instruction was the same as the limiting instruction given during the trial, i.e., that the evidence of the cocaine found downstairs on the kitchen table was to be considered only in the case of defendant Autry. The transcript indicates, however, that Autry specifically informed the court that he had no objection to these final jury instructions. *See State v. Ayers*, 92 N.C. App. 364, 374 S.E.2d 428 (1988) (N.C.R. Civ. P. 10(b)(2), requiring objection to jury charge before jury retires to consider its verdict in order to assign error to the charge on appeal, is mandatory and not merely directory).

For these reasons we find no error in the court's limiting instruction to the jury concerning the testimony of the State's expert in forensic chemistry.

B

[2] Defendant Autry next argues that the trial court erred by denying his motion to dismiss the charge of possession with intent to sell or deliver cocaine, made at the close of the State's evidence and at the close of all the evidence, upon the grounds that there was insufficient evidence to establish that Autry had constructive possession of cocaine, or that he intended to sell or deliver cocaine.

In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the state, giving the state the benefit of all reasonable inferences which may be drawn from the evidence. *State v. Sanders*, 95 N.C. App. 494, 504, 383 S.E.2d 409, 415, *disc. rev. denied*, 325 N.C. 712, 388 S.E.2d 470 (1989). The court must determine whether there is substantial evidence of each essential element of the crime charged, and if so, the motion must be denied and the case submitted to the jury. *State v. Styles*, 93 N.C. App. 596, 602, 379 S.E.2d 255, 260 (1989). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

Constructive possession of a substance applies where the defendant "has both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972).

When the substance is found on premises under the exclusive control of the defendant, this fact alone may support an inference of constructive possession. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989). If the defendant's possession over the premises is nonexclusive, constructive possession may not be inferred without other incriminating circumstances. *Id.*

In the present case, there was no evidence that defendant Autry had either exclusive or nonexclusive control or possession over the premises. Rather the evidence indicates that the premises were under the control of the Oliphants. We therefore determine whether Autry had the "power and intent" to control the disposition or use of the cocaine found in the kitchen of the premises. Since the cocaine was found on a table a few feet away from Autry, he had the "power" to control its disposition. Therefore, the determinative question is whether Autry had the "intent" to control it.

Intent is defined as a "[d]esign, resolve, or determination with which a person acts." Black's 727 (5th ed. 1979). "Intent is a mental attitude which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it can be inferred." *State v. Kendrick*, 9 N.C. App. 688, 691, 177 S.E.2d 345, 347 (1970).

The circumstances established by the State's evidence in this case indicate that defendant Autry was found standing with two other persons in a kitchen measuring approximately six feet by eight feet. On one wall of the kitchen there was a table surrounded by several chairs. One chair was turned sideways from the table, and tilted toward Autry. A leather jacket was hanging on the back of the chair. Autry was standing within arm's reach of the chair, and told a police officer that the jacket was his. On the table were a .25-caliber semi-automatic pistol, four packages of powder containing cocaine, and $47.00 in cash. Autry informed the police that the $47.00 belonged to him as well. Thus, of the four items on or near the table, those being the jacket, the cash, the pistol and the cocaine, Autry claimed ownership of two items.

Giving the State the benefit of all reasonable inferences which may be drawn from the evidence, the evidence is sufficient for a reasonable mind to infer and conclude from the circumstances that Autry had the determination or intent to exercise control over the cocaine found on the kitchen table and, therefore, that

Autry constructively possessed the cocaine. Accordingly, we find substantial evidence of the essential element of possession of cocaine.

Furthermore, the fact that the cocaine was out on the table in plain view, that two other persons were with Autry in the kitchen, that while there was a total of only .88 grams of cocaine it was distributed among four separate, small packages, and that an amount of cash was found alongside the cocaine on the table, all present circumstances from which a reasonable mind may infer that Autry intended to sell or distribute the cocaine. *See State v. Williams*, 71 N.C. App. 136, 321 S.E.2d 561 (1984) (method of packaging may constitute evidence from which a jury may infer intent to distribute); *State v. Roseboro*, 55 N.C. App. 205, 284 S.E.2d 725 (1981), *disc. rev. denied, appeal dismissed*, 305 N.C. 155, 289 S.E.2d 566 (1982) (location and packaging of drugs relevant to question of intent to sell). We therefore find substantial evidence, when considered in a light most favorable to the State, that Autry possessed cocaine with the intent to sell or deliver.

Accordingly, the trial court did not err by denying Autry's motion to dismiss at the close of the State's evidence.

II. DICKSON

[3] Defendant Dickson argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence to support his conviction under a theory of constructive possession.

In defendant Dickson's case, there was no evidence that he actually possessed cocaine, or that he had either exclusive or nonexclusive control over the premises. We therefore determine whether Dickson had "both the power and intent" to control the disposition or use of cocaine. *Harvey.*

The State's evidence indicates that Dickson was found upstairs standing in a small hallway or landing. Opening into this hallway was a bedroom where the Oliphants were found along with a total of approximately thirty-four grams of cocaine and paraphernalia. Another bedroom and a bathroom also opened into the hallway.

This court has held that the mere presence in a room where drugs are located does not itself support an inference of constructive possession. *State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986). However, in the present case the State's evidence does not even place Dickson in the same room with the cocaine. Nor

is there any other evidence to establish any link between Dickson and the cocaine. We therefore find no substantial evidence that Dickson possessed cocaine, an essential element to the offense of trafficking by possession.

Since the jury was also instructed on the theory of acting in concert, we also address the issue of whether there was evidence to support a conviction under that theory. "When the State has established . . . that a defendant was present while a trafficking offense occurred and that he acted in concert with others to commit the offense pursuant to a common plan or purpose, it is not necessary to invoke the doctrine of constructive possession." *State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986). The defendant need not do an act constituting a part of a crime to be convicted of the crime under the theory of acting in concert, but "it is nevertheless necessary that there be sufficient evidence to show he is acting together with another or others pursuant to a common plan or purpose to commit the crime." *State v. Forney*, 310 N.C. 126, 134, 310 S.E.2d 20, 25 (1984).

In reviewing the record, we find no evidence to show that defendant Dickson was acting pursuant to any common plan or purpose with the Oliphants to traffic in cocaine. There is therefore no evidence to support a conviction based on a theory of acting in concert.

Accordingly, the trial court erred in denying defendant Dickson's motion to dismiss the case against him.

No error in the case of defendant Autry.

Reversed in the case of defendant Dickson.

Judges PHILLIPS and ORR concur.

CONSTANCE A. HENDERSON, EXECUTRIX OF THE ESTATE OF VIRGIL E. HENDERSON, PLAINTIFF v. E. JOSEPH LEBAUER, BRUCE R. BRODIE, JEFFREY KATZ, DRS. LEBAUER, WEINTRAUB, BRODIE, PATTERSON & ASSOCIATES, P.A., DAVID L. RINEHULS, CHARLES M. HASSELL, AND THE MOSES H. CONE MEMORIAL HOSPITAL, DEFENDANTS

No. 9018SC332

(Filed 15 January 1991)

1. **Conspiracy § 2.1 (NCI3d)— wrongful death—conspiracy to misrepresent cause of death—insufficiency of evidence**

In an action for wrongful death arising from defendants' alleged medical negligence in treating plaintiff's husband where plaintiff further alleged that there had been a conspiracy among defendants to cover up and misrepresent the cause of decedent's death, the trial court properly granted summary judgment for defendants, since a threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed, but plaintiff's evidence of notes and phone calls between defendants did not reasonably lead to anything other than suspicion or conjecture that there was ever any underlying agreement.

Am Jur 2d, Death § 77.

2. **Physicians, Surgeons, and Allied Professions § 17 (NCI3d)— malpractice—treatment below standard of care—punitive damages—sufficiency of evidence**

The trial court erred in entering summary judgment for defendants on plaintiff's claims for punitive damages arising from defendants' allegedly gross negligence in their medical treatment of plaintiff's husband where plaintiff's offer of proof included affidavits and depositions from many medical experts, including two who stated that defendants' method of treatment of decedent's anemia and congestive heart failure and the improper reporting of heart catheterization results were far below the standards of practice in the community.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 371.

Allowance of punitive damages in medical malpractice action. 27 ALR3d 1274.

3. Physicians, Surgeons, and Allied Professions § 16.1 (NCI3d)— doctor who performed autopsy—claims based on conspiracy theory—insufficiency of evidence

The trial court in a medical malpractice case did not err in entering summary judgment for defendant who performed the autopsy on plaintiff's decedent, since plaintiff's claims against him focused solely on the existence of a conspiracy, but plaintiff's forecast of evidence was insufficient to support that theory; moreover, the court could not pass on new theories of liability raised by plaintiff for the first time on appeal.

Am Jur 2d, Death § 77.

4. Appeal and Error § 118 (NCI4th)— denial of summary judgment motion—appeal interlocutory

In a medical malpractice action defendant hospital's appeal from denial of its motion for summary judgment was interlocutory, since denial of a summary judgment motion is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under N.C.G.S. § 1A-1, Rule 54(b).

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

APPEAL by plaintiff from judgment entered 13 November 1989 in GUILFORD County Superior Court by *Judge Lester P. Martin, Jr.* Defendant Moses H. Cone Memorial Hospital (Hospital) also appeals from this judgment. Heard in the Court of Appeals 23 October 1989.

Plaintiff brought this wrongful death action for compensatory and punitive damages for the medical negligence of defendants in treating plaintiff's husband. She also alleged that there had been a conspiracy among the defendants (excluding defendant Rinehuls) to cover up and misrepresent the cause of Mr. Henderson's death. The defendants moved for summary judgment on all issues, with defendants LeBauer, Brodie, Katz, Rinehuls, and the professional group subsequently withdrawing their motion as to plaintiff's claim for compensatory damages for medical negligence.

Plaintiff's forecast of the evidence before the trial court tended to show that plaintiff's decedent was admitted to Wesley Long

Hospital on 8 March 1985 by defendant Brodie for evaluation of possible heart problems. He was discharged on 12 March 1985 and instructed to take two aspirins daily. Defendant Brodie examined decedent again on 27 March 1985, and then admitted him to defendant Hospital for elective coronary angiography. Both his hematocrit and hemoglobin levels had declined.

On 3 April 1985, decedent underwent a cardiac catheterization procedure. Different sets of coronary angiographic results are listed in Brodie's handwritten notes, the typed catheterization results and decedent's discharge instructions. Following the procedure, plaintiff was enlisted to hold a sandbag over decedent's catheter insertion wound for several hours. On 5 April 1985, decedent was discharged from the hospital, despite plaintiff's protests. Neither the discharge order nor the discharge instructions were countersigned at the time by a physician. On 7 April 1985, decedent returned to the hospital, complaining of pain in his left leg and groin area (where the catheter had been inserted). He was readmitted.

Defendant LeBauer diagnosed decedent as suffering from a false aneurysm. Surgery was performed in an attempt to repair the problem. Decedent continued to show a decrease in hematocrit and hemoglobin levels. The hemoglobin level had dropped to the "panic level" on 12 April 1985, but there was no notation in the laboratory records that this was called to the attention of the nurses or physicians. Decedent was scheduled for discharge on 13 April 1985. During the night of 12 April, however, decedent's condition worsened. LeBauer was called at his home at 11:15 and again at 11:50. His chart entries begin at 12:30. LeBauer worked to save decedent for approximately three hours, including administering Heparin, an anticoagulant. Decedent had a history of gastrointestinal bleeding. Decedent was pronounced dead at 3:30 a.m.

Defendant Hassell performed an autopsy on 13 April 1985. The preliminary diagnoses listed massive gastric hemorrhage, marked coronary arteriosclerosis, and hypertrophied myocardium. These diagnoses were sent to the physicians and to plaintiff in a letter. On a copy of the letter sent to Brodie is the notation "Joe-call me about this." The certificate of death prepared by LeBauer listed the cause of death as cardiac arrest due to myocardial ischemia as a result of coronary artery disease. He listed a massive gastric hemorrhage as a "significant condition."

Plaintiff's daughter began inquiring into the cause of death. On 23 April 1985, she met with LeBauer and Brodie at their offices. LeBauer reiterated his opinion that her father had died as a result of myocardial ischemia and that the gastric hemorrhage was an incidental finding. She asked for copies of her father's records, which they made available to her the next day. She then consulted with other physicians and medical experts for their opinions regarding the quality of care received by her father and the cause of death.

LeBauer did not finish the discharge summary until 24 June 1985. In this summary, he states that decedent suffered chest pain at 11:45 on the night of his death, though there is no notation of this in the nursing progress notes. Hassell finished the autopsy report on 11 July 1985. When it was completed, he sent a copy to LeBauer with a memo stating: "Joe: here is the 'uncorrected' copy of autopsy on Virgil Henderson. I will be mailing it to his wife, Mrs. Constance Henderson, in the next few days. Please contact me if you have a question or see an error." It was not mailed until after the final public hearing on 17 July 1985 for competitive review of the application defendant Hospital had submitted for another cardiac catheterization laboratory. The autopsy listed coronary arteriosclerosis, marked, right and left coronary systems, hypertrophied myocardium, arteriosclerosis of aorta, marked, atheromatous embolization, multiple organs with micro-infarcts, and ischemic necrosis of the myocardium. Massive gastric hemorrhage was not included in the list of principal diagnoses. Plaintiff's daughter challenged this autopsy in a letter to the Hospital's president, who stood by it.

Defendants' forecast of evidence tended to show that Brodie performed the catheterization and made a preliminary set of notations, then finalized his assessment of decedent's coronary artery disease. After the procedure, decedent was seen several times by members of the defendant cardiology group. After monitoring decedent for two days, he was released without protest. The order was countersigned by defendant Katz.

The surgery ordered to repair the false aneurysm was successful. LeBauer noted the falling hemoglobin and hematocrit levels, but decided against a blood transfusion. Decedent appeared to be stable, and LeBauer decided that the potential risks of the procedure outweighed the potential gains. Doctor Burney was aware

of the hematocrit and hemoglobin levels on 12 April 1985, and noted that the hematocrit was stable.

On the night decedent died, LeBauer was called and he ordered certain tests over the phone. He was called again, and went straight to the hospital, arriving just as Code Blue was declared. He talked with those who had been attending decedent and began resuscitative efforts. LeBauer felt that the dose of Heparin was necessary, based on decedent's clinical condition.

LeBauer obtained decedent's family's permission to have an autopsy performed. The initial stage of the autopsy was a gross examination from which tentative diagnoses were drawn. The 15 April 1985 letter pointed out: "I emphasize that these are 'gross tentative diagnoses.' These diagnoses may be altered and other diagnoses may be added following the microscopic examination of the various organs."

Hassell sent a final copy of the autopsy report to LeBauer, but the two did not communicate any further about the report. Hassell did not include massive gastric hemorrhage in the list of principal diagnoses in the final report since he observed no areas of ulceration within the stomach and no blood was observed in the bowel. LeBauer's discharge summary, in which he claims that decedent suffered chest pain, was prepared from his progress notes which were prepared at the time of the treatment.

The trial court granted defendants' motion for summary judgment on all claims for conspiracy, to include all claims against Hassell and all claims alleged in plaintiff's fourth claim for relief, as well as any claim for punitive damages. Defendant Hospital's motion for summary judgment as to plaintiff's claim for compensatory damages against it for medical negligence was denied. Plaintiff and defendant Hospital have filed separate appeals.

Hatfield, Mountcastle, Deal & Van Zandt, by John P. Van Zandt, III, for plaintiff-appellant/cross-appellee.

Tuggle, Duggins, Meschan & Elrod, P.A., by Joseph E. Elrod III and Robert A. Ford, for defendant-appellee Charles M. Hassell and defendant-appellee/cross-appellant Moses H. Cone Memorial Hospital.

Bell, Davis & Pitt, P.A., by William Kearns Davis and J. Dennis Bailey, for defendants-appellees E. Joseph LeBauer, Bruce R. Brodie, Jeffrey Katz, Drs. LeBauer, Weintraub, Brodie, Patterson & Associates, P.A., and David L. Rinehuls.

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). Plaintiff claims that on the basis of the materials presented to the trial court, genuine issues of material fact remain regarding her allegations of conspiracy, the liability of defendant Hassell, and her claim for punitive damages. Defendant Hospital also assigns error to the denial of its motion for summary judgment on the issue of its alleged medical negligence. We affirm in part and reverse in part.

[1] Defendants have correctly pointed out that there is no action for civil conspiracy recognized in North Carolina. In *Johnson v. Beverly-Hanks & Associates, Inc.*, 97 N.C. App. 335, 388 S.E.2d 584, *disc. review on additional issues denied*, 326 N.C. 482, 392 S.E.2d 90 (1990), we noted the North Carolina rule:

> [a]ccurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable. (Citations omitted).

Defendant is not seeking damages, however, arising out of the alleged conspiracy or combination. She is seeking damages arising out of acts she claims were committed pursuant to it—covering up and misrepresenting the cause of her husband's death. In *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984), which also involved a wrongful death action and allegations of a cover-up, the Court

held that actions taken pursuant to a conspiracy which tended to obstruct, impede or hinder public or legal justice were actionable.

A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed. The existence of a conspiracy requires proof of an agreement between two or more persons. *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737 (1987). Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Plaintiff has not forecast sufficient evidence that an agreement was reached between any of the defendants to perform the acts she complains of. She has pointed to a note on a copy of defendant Hassell's letter which contained his preliminary diagnoses which states "Joe-call me about this," various phone conversations, and a memo from Hassell to LeBauer stating "Joe: here is the 'uncorrected' copy of autopsy on Virgil Henderson. I will be mailing it to his wife, Mrs. Constance Henderson, in the next few days. Please contact me if you have a question or see an error." Plaintiff has also produced a great deal of circumstantial evidence which she claims points to a conspiracy, but we hold that this evidence does not reasonably lead to anything other than suspicion or conjecture that there was ever any underlying agreement. The trial court did not err in rendering judgment on this issue.

[2] Plaintiff also assigns error to the entry of summary judgment as to all claims for punitive damages. Plaintiff's claims are grounded in her conspiracy claim and allegations of gross negligence against all defendants. As stated, we affirm the court's judgment that the offer of proof does not raise a jury question as to the existence of a conspiracy. Any issue of punitive damages, then, must arise out of gross negligence.

A personal representative may bring a claim in a wrongful death action for "[s]uch 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." N.C. Gen. Stat. § 28A-18-2 (1982). While there is authority which equates gross negligence with wanton conduct, *see Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988), we cannot apply this definition in the context

of this statute. "By providing for recovery of punitive damages upon a showing of 'maliciousness, wilful or wanton injury, *or* gross negligence' it appears that the General Assembly intended to establish three separate categories of conduct which would afford a recovery." *Cole v. Duke Power Co.*, 81 N.C. App. 213, 344 S.E.2d 130, *disc. review denied*, 318 N.C. 281, 347 S.E.2d 462 (1986). N.C. Gen. Stat. § 28A-18-2 allows recovery of punitive damages in wrongful death actions involving gross negligence even when no wilful or wanton conduct was involved. *Id.* To establish gross negligence, the plaintiff must show negligence of an aggravated character. *Id.*

In a medical malpractice action, generally there must be expert testimony that tends to show a deviation from the normal standard of care. *Assaad v. Thomas*, 87 N.C. App. 276, 360 S.E.2d 503 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 917, *reh'g denied*, 321 N.C. 747, 366 S.E.2d 856 (1988). Plaintiff's offer of proof included affidavits and depositions from many medical experts. Dr. Thomas A. Preston stated in his affidavit that:

> The attending clinicians were negligent in not noting the severity of anemia, and treating it properly. Not only did the anemia go untreated, but the patient had a history of a GI bleed in 1982, which would make any finding of anemia all the more urgent. The patient was never treated with packed red blood cells, despite a diagnosis of anemia and grossly insufficient treatment of ferrous sulfate. In summary, there was negligence in not recognizing the severity of the anemia and treating it sufficiently, and negligence in not diagnosing and treating congestive heart failure. I will testify that negligence in these areas was a proximate cause to the patient's death. *The care of the attending physicians was far below the standard of practice in any community in this country, and even minimal attention to either the congestive heart failure or the anemia would more than likely have saved the life of Virgil E. Henderson.* (Emphasis added).

Dr. Embree H. Blackard stated in his affidavit that:

> There was an intent to send him home with his hemoglobin and hematocrit still not reversed and on the upside. Therefore one could anticipate further hypoxia, further effect on increased cardiac output and further danger to an individual with a compromised cardiac status. Diagnosing the anemia and ordering ferrous sulfate indicated that they were aware of the anemia.

> *However, it was a grossly inappropriate treatment.* Not to have given packed cells well before his fatal event is substandard and was a proximate cause of his death. (Emphasis added).
>
> There was an official typed catheter report indicating a mild degree of obstruction. However, the progress notes in the chart indicated a more severe degree of narrowing. This would correlate with the autopsy findings. To have one catheterization report with such divergent results is substandard and indicates a sloppiness. The official typed report would be the one given the most weight by the subsequent doctors and this is the one that is abnormally reported. *This is quite substandard.* This would serve to have the effect of misleading subsequent doctors if their judgment relied on this report. (Emphasis added).

We hold that this expert testimony was a sufficient forecast of evidence to survive a summary judgment motion as to whether the treatment provided by defendants LeBauer, Brodie, and Katz rose to the level of "aggravated negligence" or an "extreme departure from the ordinary standard of conduct." *See Cole, supra.* LeBauer, Brodie, Katz, and the defendant professional association have admitted that these physicians were employed by Drs. LeBauer, Weintraub, Brodie, Patterson & Associates, P.A., and acted in the course and scope of their employment. Summary judgment on the punitive damages issue, then, was also inappropriately granted in favor of the association. *See Mazza v. Medical Mut. Ins. Co. of North Carolina*, 311 N.C. 621, 319 S.E.2d 217 (1984); *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 23 S.E.2d 894 (1943). We affirm the judgment of the trial court as to defendants Rinehuls, Hassell and Hospital.

[3] Plaintiff also assigns error to the entry of summary judgment on all claims against defendant Hassell. In both her complaint and amended complaint, plaintiff's claims against Hassell focus solely on the existence of a conspiracy. In her brief, she attempts to argue that Hassell was negligent and grossly negligent in supervising the Hospital's "quality assurance program," based primarily on the fact that there is no notation in the laboratory records that decedent's "panic-level" hemoglobin was reported to any physician or nurse. She also argues that Hassell was negligent in conducting his investigation into the cause of death. We find nothing in the record which would indicate that this theory of liability was

asserted in the complaint or in the trial court. The court's order indicates to the contrary, stating:

> IT IS THEREFORE ORDERED AND ADJUDGED that the defendants' motions as to all claims for conspiracy, to include all claims against defendant Charles M. Hassell and all claims alleged in plaintiff's fourth claim for relief, are allowed and the same are dismissed with prejudice. . . .

We are therefore left to assume, then, that plaintiff is asking us to pass on these theories of liability for the first time on appeal. This we cannot do. *Bryant v. Eagan*, 88 N.C. App. 741, 364 S.E.2d 704, *cert. denied*, 322 N.C. 325, 368 S.E.2d 863 (1988). The trial court's order is affirmed as written regarding Hassell.

[4] Defendant Hospital's appeal is interlocutory. The denial of a motion for summary judgment is not a final judgment, and is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983). We fail to see how any substantial right will be lost by a trial of the issues. The Hospital's appeal is therefore dismissed.

As to plaintiff's appeal,

Reversed in part, affirmed in part.

As to defendant Hospital's appeal,

Dismissed.

Judges COZORT and LEWIS concur.

MARY T. FERGUSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES W. FERGUSON, JR., DECEASED, PLAINTIFF v. MARGARET WILLIAMS AND RING DRUG COMPANY D/B/A BOBBITT'S PROFESSIONAL PHARMACY, DEFENDANTS

No. 9021SC393

(Filed 15 January 1991)

1. **Physicians, Surgeons and Allied Professions § 12.2 (NCI3d)—liability of pharmacy and pharmacist—anaphylactic reaction—directed verdict for defendants improper**

The trial court erred by granting defendants' motion for a directed verdict in an action against a pharmacist and a pharmacy arising from a fatal anaphylactic reaction where it is undisputed that the pharmacist knew decedent was allergic to Percodan, knew that Percodan contains aspirin, knew that decedent had suffered an anaphylactic reaction to Percodan, and plaintiff's three pharmacy experts testified that this information was sufficient to have alerted the pharmacist that decedent might suffer from a cross-sensitivity with Indocin, the prescribed medicine. Whether or not the pharmacist owed decedent a duty depends on what was said during the conversation that occurred while she filled the prescription; the only testimony of that conversation is from defendant herself; and witness credibility is a determination made by a jury.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 54, 60.

2. **Physicians, Surgeons and Allied Professions § 12.2 (NCI3d)—liability of pharmacy and pharmacist—contributory negligence**

A directed verdict for defendants on the basis of decedent's contributory negligence was improper where decedent died from an anaphylactic reaction after taking Indocin where, although decedent might have averted this tragedy with a more explicit explanation of his drug allergies, three expert witnesses testified that decedent apparently gave the pharmacist enough information to alert her that decedent might have a severe allergic reaction to Indocin.

Am Jur 2d, Drugs, Narcotics, and Poisons § 64.

3. Physicians, Surgeons and Allied Professions § 12.2 (NCI3d)— liability of pharmacy and pharmacist—anaphylactic reaction—causation

A directed verdict for defendants on the grounds of causation in an action against a pharmacy and pharmacist arising from decedent's fatal anaphylactic reaction was inappropriate where decedent told a friend to call an ambulance because he thought he was dying; decedent handed the friend a bottle containing Indocin capsules and told him to give it to the doctor at the hospital because it contained medication he had taken that morning; it was discovered later that the bottle contained forty-nine capsules while the prescription called for fifty capsules; decedent was allergic to a number of allergens; no one saw decedent take the Indocin; an autopsy examination of decedent's stomach contents revealed only fragments of a white tablet which was not Indocin; no traces of a pink and white capsule were found; Indocin was a pink and white capsule; no trace of Indocin was discovered in decedent's urine; the autopsy evidence was uncontroverted that decedent died from a severe anaphylactic reaction caused by an allergen; and a toxicologist testified that the Indocin capsule would have been absorbed into the stomach lining and then into the bloodstream and that, given the timing of events, he would not have expected to see any Indocin in decedent's urine.

Am Jur 2d, Drugs, Narcotics, and Poisons § 56.

4. Evidence § 33.2 (NCI3d)— liability of pharmacy and pharmacist for prescribed medication—testimony of emergency room physician—decedent's statements repeated by third party—not admissible

The trial court did not err in a negligence action against a pharmacist and pharmacy arising from a fatal anaphylactic reaction by excluding portions of the deposition testimony of the emergency room physician where the contested statements were all remarks made by decedent to a third party and then to the physician and constituted hearsay within hearsay.

Am Jur 2d, Depositions and Discovery § 176; Evidence § 683.

5. Evidence § 34.5 (NCI3d)— liability of pharmacy and pharmacist—dying declaration—statements of love and affection—not admissible

The trial court did not err in a negligence action against a pharmacist and pharmacy arising from a fatal anaphylactic reaction by excluding statements made to a third party as decedent was dying and a letter from decedent because, even though the statement and letter constituted a dying declaration, statements of love and affection do not fall within the exception to the hearsay rule.

Am Jur 2d, Evidence § 676.

Admissibility of dying declarations in civil case. 47 ALR2d 526.

6. Evidence § 26 (NCI3d)— liability of pharmacy and pharmacist—anaphylactic reaction—bottles of medication—not admissible

The trial court did not err in a negligence action against a pharmacy and pharmacist arising from a fatal anaphylactic reaction by excluding empty bottles of medication because the proper foundation for showing that the bottles were sufficiently identical to ones used at the time of death had not been laid.

Am Jur 2d, Evidence § 774.

7. Evidence § 33.1 (NCI3d)— liability of pharmacy and pharmacist—Physician's Desk Reference—not admissible as exhibit

The trial court did not err in a negligence action against a pharmacist and pharmacy arising from a fatal anaphylactic reaction by excluding exhibits of blown-up excerpts from the Physician's Desk Reference. Statements from learned treatises may be read into evidence, but may not be received as exhibits. N.C.G.S. § 8C-1, Rule 803(18).

Am Jur 2d, Evidence § 890.

8. Appeal and Error § 330 (NCI4th)— civil appeal—formal request for transcript—substantial compliance

The Court of Appeals declined to disturb a trial court ruling that plaintiff had "substantially complied" with North Carolina Rule of Appellate Procedure 7(a)(1), requiring an ap-

pellant in a civil case to make a formal request for a copy of the trial transcript within ten days of filing notice of appeal.

Am Jur 2d, Appeal and Error §§ 86, 404.

CROSS-appeals by plaintiff and defendants from judgments entered 12 October and 20 November 1989 by *Judge Joseph John* in FORSYTH County Superior Court. Heard in the Court of Appeals 27 November 1989.

This medical malpractice action was originally brought by plaintiff, Mary T. Ferguson, wife of the decedent Charles W. Ferguson, Jr., against Dr. John T. Hayes, Margaret Williams and Ring Drug Company d/b/a Bobbitt's Professional Pharmacy ("Bobbitt's"). The complaint alleges that in December 1984 Hayes prescribed a drug for the decedent known as Indomethacin or Indocin, and that the prescription was properly filled by Williams, who at the time was a pharmacist employed by Bobbitt's. The complaint further alleges the medication was taken the following day, 18 December 1984, and that the decedent suffered an anaphylactic reaction which resulted in his death.

Thereafter, defendants Williams and Bobbitt's filed a motion to dismiss pursuant to Rule 12(b)(6), and on 27 April 1987 the motion was granted. Plaintiff reached a settlement with Hayes and a dismissal was taken as to the allegations and suit against him. Plaintiff appealed the judgment as to Williams and Bobbitt's and in an opinion filed 20 December 1988, this Court reversed the 12(b)(6) dismissal.

A jury trial in this matter began on 7 August 1989 in Forsyth County Superior Court. The trial lasted two weeks. Both at the close of plaintiff's evidence and again at the close of all evidence, defendants made motions for a directed verdict pursuant to Rule 50(a). The trial judge reserved ruling upon these motions. After deliberating for one day, the jury foreman reported the jury would be unable to ever reach a verdict. Judge John made findings that the jury was hopelessly deadlocked and declared a mistrial. On 12 October 1989, Judge John granted defendants' motion for directed verdict and plaintiff gave notice of appeal.

On 25 October 1989, defendants filed a motion to dismiss plaintiff's appeal pursuant to Rules 7(a)(1) and 25 of the North Carolina Rules of Appellate Procedure because plaintiff had failed to file

a written order for a copy of the trial transcript with the court reporter within ten days of filing notice of appeal. The trial court denied the motion to dismiss the appeal, finding that plaintiff had "substantially complied" with the appellate rules. Defendants have appealed this order.

Plaintiff's evidence tends to show the following facts: At the time of his death, Charles W. Ferguson, Jr., the deceased husband of plaintiff, was a forty-two-year-old electrician. During the last two years of his life, Ferguson suffered from some serious health problems. He had explosive asthma, which in the past had resulted in sudden life-threatening attacks. Ferguson also suffered from a rare medical condition known as "triad asthma," which has three components: asthma, sensitivity to aspirin and the presence of polyps in the nose. Persons with this condition have a severe reaction to aspirin or aspirin-containing compounds.

In the summer of 1984, Ferguson had almost died after taking Percodan, a medication that contains the narcotic oxycodone and aspirin. After taking one tablet of Percodan, Ferguson had had an anaphylactic-bronchospastic reaction to the aspirin component of the Percodan and nearly died.

Both before and after the Percodan incident, Ferguson's doctors had warned him of the severity and rarity of his condition and had told him that if he ingested aspirin or aspirin-containing products he would die. One of Ferguson's doctors told Ferguson never to take *any* medication without first calling him. At least two doctors told Ferguson to get a medical alert bracelet to show his allergies. Ferguson never got the bracelet, but he carried an emergency medical card, which listed his drug allergies as "aspirin, penicillin, Percodan."

On 17 December 1984, Ferguson visited Hayes, an orthopedic surgeon, for a follow-up visit regarding pain in his legs. Hayes diagnosed the problem as gout and prescribed the drug Indocin. Although allegedly asked by Hayes if he had any drug allergies, Ferguson apparently responded that he was only allergic to penicillin. According to Hayes' testimony, Ferguson never mentioned the Percodan incident, nor did he show Hayes his card listing his drug allergies. However, after this litigation arose, a copy of Ferguson's medical card showing his three drug allergies was found in Hayes' file on Ferguson. Hayes also advised Ferguson not to leave the area for a few days in the event he might have some reaction

to the Indocin. Ferguson, however, told Hayes he could not follow these instructions because he had to leave town to go to a job site.

Ferguson took the prescription for Indocin to Bobbitt's Pharmacy. He had never traded at Bobbitt's and he did not know defendant Williams, who was a licensed pharmacist working there. Ferguson presented the prescription to the pharmacist and a discussion followed concerning his drug allergies. Ferguson told Williams he was allergic to Percodan and described his earlier brush with death. On Ferguson's prescription, Williams wrote, "Allergic to Percodan." Ferguson asked Williams if Percodan and Indocin were related. She replied that the two drugs were in different classes.

According to Williams, Ferguson did not tell her of his other allergies. He did not mention his aspirin allergy or show her his emergency medical card. While this conversation ensued, Williams properly filled the prescription for fifty pink and white colored Indocin capsules.

Ferguson then left for Charleston, South Carolina to go to a work site. He arrived at the site on the evening of 17 December 1984 and met Tim Ellison, a friend and co-worker. Ellison testified that Ferguson spoke about his concern over taking the new prescription and wanted Ellison to be familiar with how to administer his asthma medication and with the route to the nearest hospital.

On the morning of 18 December, Ferguson suffered a severe attack of bronchial asthma, apparently triggered by an anaphylactic reaction. He died in the emergency room of a Charleston hospital. According to the autopsy report, the cause of death was an anaphylactic reaction probably due to Indocin. The autopsy, however, did not confirm the presence of Indocin in Ferguson's body. Remnants of a white tablet, which was not Indocin, were found in the decedent's stomach, but no trace of a pink and white capsule was found.

Michael R. Nash for plaintiff appellant.

Petree Stockton & Robinson, by J. Robert Elster and Stephen R. Berlin, for defendant appellants.

ARNOLD, Judge.

Although plaintiff brings forth a number of assignments of error, the crux of this appeal is whether plaintiff presented sufficient evidence to withstand defendants' motion for directed verdict

on three grounds. The first is whether plaintiff presented evidence sufficient to show Williams breached the applicable standard of care when she advised Ferguson that Percodan and Indocin were unrelated. Second is whether plaintiff provided sufficient evidence to show Ferguson's ingestion of Indocin caused his death; and third, whether decedent was contributorily negligent in not telling Williams that he was allergic to aspirin or that he had triad asthma.

[1] The party moving for a directed verdict bears a heavy burden in North Carolina. *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987). Ordinarily, a judgment for directed verdict is not proper unless as a matter of law recovery cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977).

A directed verdict motion tests the legal sufficiency of the evidence to take the case to the jury in support of a verdict for the nonmoving party. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E.2d 816 (1981). A directed verdict is appropriate only when the issue submitted presents a question of law based on admitted facts where no other conclusion can reasonably be reached. *Seaman v. McQueen*, 51 N.C. App. 500, 277 S.E.2d 118 (1981). When considering a defendant's motion for a directed verdict, a trial court must view the evidence in the light most favorable to the plaintiff, resolving all conflicts in his favor and giving the plaintiff the benefit of every inference that reasonably can be drawn in his favor. *Cantey v. Barnes*, 51 N.C. App. 356, 276 S.E.2d 490 (1981). The reviewing court performs the identical task, that is, to determine whether the evidence, when considered in the light most favorable to the nonmovant, was sufficient to have been submitted to the jury. *Meacham v. Montgomery County Board of Education*, 59 N.C. App. 381, 297 S.E.2d 192 (1982), *cert. denied*, 307 N.C. 577, 299 S.E.2d 651 (1983).

The movant's burden is even heavier in cases, such as the one before us, in which the principal issues are negligence and contributory negligence. *Taylor*, 320 N.C. 729, 360 S.E.2d 796. Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the applicable standard of care is generally for the jury. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979). In cases involving negligence and contributory negligence, greater judicial caution is therefore

called for. *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E.2d 827 (1978), *cert. denied*, 296 N.C. 736, 254 S.E.2d 178 (1979).

Applying these principles here, we conclude that the trial court erred in allowing defendants' motion for directed verdict.

It is clear that a pharmacist who properly fills a prescription as written by a physician is under no duty to warn a customer about potential risks or dangers associated with taking the medication. *Batiste v. American Home Products Corp.*, 32 N.C. App. 1, 231 S.E.2d 269, *cert. denied*, 292 N.C. 466, 233 S.E.2d 921 (1977); *see also Ferguson v. Williams*, 92 N.C. App. 336, 374 S.E.2d 438 (1988). A druggist simply has the duty to act with due, ordinary care and diligence in compounding and selling drugs. *Batiste*, 32 N.C. App. at 8, 231 S.E.2d at 274 (citing *Spry v. Kise*, 179 N.C. 417, 102 S.E.2d 708 (1920)). *Batiste*, however, recognizes that if a pharmacist undertakes to advise a client concerning a medication, the pharmacist is under a duty to advise correctly. *Id.*

Plaintiff presented the testimony of three pharmacy experts who testified that once Williams undertook to advise Ferguson about the relationship between Indocin and Percodan in the context of Ferguson possibly having a severe drug allergy, she did not exercise due care in advising him that the two drugs were unrelated. Percodan contains oxycodone, a Schedule II narcotic, and aspirin. Indocin does not contain aspirin, but like aspirin, it is a nonsteroidal anti-inflammatory agent. Both have the same "mechanism of action" in inhibiting prostaglandin biosynthesis, and both share a common cross-sensitivity in that if a person is allergic to aspirin, it is probable he will be allergic to Indocin.

It is undisputed that Williams knew Ferguson was allergic to Percodan and that she knew Percodan contains aspirin. It is also clear she knew Ferguson had suffered from an anaphylactic reaction to Percodan. According to the three experts, this information was sufficient to have alerted Williams that Ferguson might suffer from a cross-sensitivity with Indocin. Faced with this evidence, it was error for the trial judge to grant defendant's motion for directed verdict on the basis plaintiff did not establish defendant owed the decedent any legal duty.

We are further persuaded in reaching this conclusion because the credibility of a witness is crucial in the determination here.

Whether or not Williams owed Ferguson a duty depends on what was said during the conversation that occurred while Williams filled Ferguson's prescription. The only testimony of that conversation is from the defendant herself. Witness credibility is a determination made by a jury, not a judge. *Stutts v. Green Ford, Inc.*, 47 N.C. App. 503, 267 S.E.2d 919 (1980).

[2] Closely related to the issue of Williams' duty to Ferguson is whether Ferguson was contributorily negligent in bringing about his own death. A directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence, taken in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference or conclusion may be drawn. *Horne v. Trivette*, 58 N.C. App. 77, 293 S.E.2d 290, *cert. denied*, 306 N.C. 741, 295 S.E.2d 759 (1982).

While it is obvious Ferguson might have averted this tragedy with a more explicit explanation of his drug allergies, we are not prepared to say, based on plaintiff's evidence, that the decedent's conduct renders him negligent as a matter of law. Three expert witnesses testified Ferguson apparently gave Williams enough information to alert her that Ferguson might have a severe allergic reaction to the Indocin. We believe reasonable people could form differing opinions on this issue based upon this evidence. Therefore, directed verdict based on the decedent's contributory negligence was improper.

[3] Defendants also argue plaintiff failed to show to a reasonable degree of certainty that Ferguson's death was precipitated by his ingestion of Indocin. Defendants point to several facts established by plaintiff's evidence to support their contention: Ferguson was allergic to a number of allergens that could have triggered his asthmatic bronchospasm; no one saw Ferguson take the Indocin; a gross examination of the decedent's stomach contents on autopsy revealed only fragments of a white tablet, no traces of a pink and white capsule were found; and no trace of Indocin was discovered in the decedent's urine.

A directed verdict is appropriate when the "evidence raises a mere conjecture, surmise and speculation as to [causation]." *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990). We find, however, plaintiff's evidence is certain to a reasonable degree to show causation.

Tim Ellison testified that after Ferguson's attack started on 18 December, the decedent told Ellison to call an ambulance because he thought he was dying. In close proximity to this statement, Ferguson handed Ellison the bottle containing the Indocin capsules and told Ellison to give it to the doctor at the hospital because the bottle contained the medication he had taken that morning. After Ferguson died, it was discovered that the bottle of medication contained forty-nine capsules. Ferguson's prescription called for fifty capsules.

The autopsy evidence was uncontroverted that Ferguson had suffered from a severe anaphylactic reaction caused by an allergen. A toxicologist testified the Indocin capsule would have been absorbed into the stomach lining and then into the bloodstream. The toxicologist also testified that within less than an hour after the anaphylactic reaction hit and Ferguson suffered respiratory and cardiac arrest, his circulation would cease and no more urine would have been produced. Given the timing of the events, the toxicologist stated he would not have expected to see any Indocin in the decedent's urine. The directed verdict was therefore inappropriate on the ground that the facts failed to establish the element of causation to a sufficiently certain degree.

[4] Plaintiff also assigns as error the trial court's exclusion of portions of the testimony of two witnesses and several exhibits. Excluded from admission were portions of the deposition testimony of Dr. Bishop, the emergency room physician who treated Ferguson and pronounced him dead. The contested statements are all remarks made by Ferguson to Ellison and then to Bishop. As such, all the statements constituted hearsay within hearsay and failed to fall under any exception to the rule. Therefore, they were properly excluded. *See* N.C.R. Evid. 805. This assignment of error is overruled.

[5] Plaintiff also contends the trial court erroneously excluded testimony and a letter concerning a hearsay statement made by Ellison. Plaintiff contends Ellison should have been allowed to testify that as Ferguson was dying, the decedent said, "[t]ell Mary [his wife] and the kids I love them," because the statement constituted a dying declaration. Plaintiff also sought to introduce a letter written by Ellison containing the same declaration. We find no error in these assignments. To fall within this hearsay exception, the declaration must deal with the cause and circumstances of the declarant's anticipated death. 1 L. Brandis, *Brandis on North Carolina*

Evidence, § 146 at 673 (3d ed. 1988). Statements of love and affection, which plaintiff sought to introduce for purposes of proving damages, do not fall within the rule.

[6] Plaintiff also complains the trial court erred in excluding from evidence exhibits of empty bottles of Percodan and Indocin. The labels on these bottles listed the active ingredients of each medication. The exhibits, however, were not the actual bottles involved in the 1984 incident, *see State v. Zuniga*, 320 N.C. 233, 255, 357 S.E.2d 898, 912 (1987), *cert. denied*, 484 U.S. 959, 98 L.Ed.2d 384 (1987), nor, at the point in time plaintiff's counsel sought to have them introduced, had plaintiff's counsel properly shown that the bottles were sufficiently identical duplicates to the 1984 bottles. *State v. Hunt*, 297 N.C. 258, 254 S.E.2d 591 (1979). Our reading of the record shows that when plaintiff's counsel sought to introduce the exhibits and defendant properly objected, the proper foundation for showing that the bottles were sufficiently identical to the ones used in 1984 had not been laid. Later, plaintiff arguably elicited testimony to show the exhibits were identical duplicates, but then did not move to have the exhibits introduced as exhibits. This assignment of error is overruled.

[7] Finally, plaintiff assigns error to the trial court's exclusion of exhibits of blown-up excerpts from the treatise, the Physician's Desk Reference, concerning the contraindications for Percodan and Indocin. Statements from learned treatises, however, if admitted, may be read into evidence but may not be received as exhibits. N.C.R. Evid. 803(18). Plaintiff's assignment of error is overruled.

[8] Defendants have appealed one issue from below. On 25 October 1989, defendants brought a motion to dismiss plaintiff's appeal pursuant to Rules 7 and 25 of the North Carolina Rules of Appellate Procedure. Rule 7(a)(1) requires an appellant in a civil case to make a formal request for a copy of the trial transcript within ten days of filing notice of appeal. In their motion, defendants asserted plaintiff failed to comply with this rule. Judge John held a hearing and denied defendants' motion, finding that plaintiff had "substantially complied" with the rule. We decline to disturb this finding on appeal.

The order granting defendants' motions for directed verdict is reversed. Plaintiff is entitled to a new trial.

New trial.

Judges EAGLES and PARKER concur.

RICHARD D. TURNER, ADMINISTRATOR OF THE ESTATE OF JANE L. TURNER v. DUKE UNIVERSITY, PRIVATE DIAGNOSTIC CLINIC, AND ALLAN H. FRIEDMAN, M.D.

No. 9014SC263

(Filed 15 January 1991)

1. **Rules of Civil Procedure §§ 11, 26 (NCI3d)— deposition stricken—appropriate sanction—actions of counsel rather than party—sanction not barred**

The sanctioning court in a medical malpractice case did not abuse its discretion in striking a doctor's deposition taken in California six days before trial, which took place two years after plaintiff initiated the action, since it was logical and reasonable that the deposition procured in violation of deposition rules be prohibited at trial; furthermore, the fact that defendant's counsel and not defendant itself committed the acts giving rise to the sanction was not a bar to its imposition.

Am Jur 2d, Depositions and Discovery §§ 193, 196.

2. **Rules of Civil Procedure § 11 (NCI3d)— admission of deposition prejudicial—opportunity to cross-examine denied—new trial properly ordered**

The sanctioning court in a medical malpractice case did not err in ordering a new trial on the ground that the admission of a doctor's deposition at trial was prejudicial to plaintiff, since plaintiff was denied an opportunity to cross-examine the doctor; there was no merit to defendant's contention that the deposed doctor's testimony was cumulative as plaintiff's cross-examination had the capacity to reduce the credibility of the doctor's direct testimony to the jury, and there was thus a significant distinction between the deposed testimony and the live testimony; defendant could not argue that plaintiff waived his right to cross-examine the doctor when he failed to appear for the taking of a deposition which was improperly noticed

in violation of N.C.G.S. § 1A-1, Rules 11 and 26; and the granting of the new trial was a reasoned and just result of the striking of the doctor's deposition testimony.

Am Jur 2d, Depositions and Discovery §§ 193, 196.

3. Rules of Civil Procedure § 11 (NCI3d) — sanctions for improper deposition — objection to deposition at trial not essential

Since the trial court may impose sanctions upon its own initiative, plaintiff's objection at trial to the use of a deposition improperly noticed was not essential to the imposition of sanctions.

Am Jur 2d, Depositions and Discovery §§ 193, 196.

APPEAL by defendant Duke University from order entered 23 October 1989 by *Judge Robert H. Hobgood* in DURHAM County Superior Court. Heard in the Court of Appeals 26 September 1990.

Leonard T. Jernigan, Jr., P.A., by Leonard T. Jernigan, Jr., for plaintiff-appellee.

Maxwell & Hutson, P.A., by John C. Martin, and Yates, Fleishman, McLamb & Weyher, by Beth R. Fleishman, for defendant-appellant.

GREENE, Judge.

The defendant, Duke University (Duke), appeals from an Order of Sanctions entered by the trial court on 23 October 1989, pursuant to a remand from the North Carolina Supreme Court. The facts in this case have been set out in detail in *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989). Here, we limit the facts to those necessary to address the issues raised.

The plaintiff filed this wrongful death action on 25 July 1985, alleging medical malpractice on the part of the defendants Duke University, Private Diagnostic Clinic, and Allan H. Friedman, M.D. Trial was originally set for 16 February 1987, but the case was continued twice with trial finally set for 27 July 1987.

On 6 July 1987, Duke University delivered to plaintiff's counsel two Notices of Deposition, scheduling the deposition of Robert A. Havard, M.D., for 21 July 1987 in California, and scheduling the deposition of R. P. Scheerer, M.D., for 23 July 1987 in Florida.

Dr. Havard was one of the attending physicians to the decedent while she was at Duke University Medical Center in 1983. Dr. Scheerer was an oncologist who had treated the decedent for cancer in Florida in 1982.

On 17 July 1987, the plaintiff gave notice that he would not attend the scheduled depositions, moved to strike the Notices of Deposition, and moved for sanctions under N.C.R. Civ. P. 11(a), 26(g) and 37(b), alleging that the intent behind the depositions was to harass the plaintiff, to disrupt pre-trial preparation and to needlessly increase the cost of litigation. The motion for sanctions was denied on 20 July 1987. The defendant took the depositions as scheduled and the plaintiff did not attend either deposition.

Trial before a jury was held on 27 July 1987. Both depositions were admitted into evidence at trial. The trial court granted a directed verdict in favor of the defendants Dr. Friedman and the Private Diagnostic Center, and the jury returned a verdict in favor of the defendant Duke University. Judgment was entered upon the verdict on 7 August 1987.

The plaintiff appealed and the Supreme Court held that the trial court erred by granting the directed verdict for the defendants Dr. Friedman and the Private Diagnostic Clinic. *Turner* at 171, 381 S.E.2d at 717. The Court also held that the trial court erred in denying the plaintiff's motion for Rule 11 and Rule 26 sanctions, finding several of the plaintiff's arguments in support of sanctions to be meritorious. First, the Court found that the defendant failed to identify Dr. Havard in response to discovery requests. *Id.* at 169, 381 S.E.2d at 716. Second, the Court found that by noticing and taking the depositions so close to trial, the defendant had threatened to increase the plaintiff's litigation costs and cause unnecessary delay of the trial. *Id.* at 171, 381 S.E.2d at 717. This conclusion was further supported by a finding that Dr. Scheerer's deposition testimony was cumulative and duplicative of another physician's expert opinion. *Id.* Third, the Court found persuasive the plaintiff's argument that by scheduling the depositions so close to trial such that the plaintiff's counsel would not be able to adequately prepare for trial had counsel attended the depositions, the noticing and taking of the depositions represented an attempt to harass the plaintiff's counsel. *Id.* The Supreme Court, after reversing the denial of sanctions, ordered that the case be remanded for entry of sanctions. *Id.*

On remand, the plaintiff, on 11 October 1989, filed a "Supplement to Motion for Sanctions" requesting *inter alia* that "a new trial be granted plaintiff against Duke University." The sanctioning court ordered defendant's counsel to pay attorney's fees to the plaintiff's counsel in the amount of $6,445.00. (The award of attorney fees was subsequently paid and is not at issue on appeal.) The sanctioning court also entered the following pertinent conclusions of law:

> 10. Plaintiff is entitled to have the notices of deposition of Drs. Havard and Scheemer [sic] stricken and therefore, the existing depositions may not be introduced into evidence at any subsequent trial.
>
> 11. The plaintiff is entitled to a new trial against Duke University as a Rule 11(a) sanction due to the prejudicial effect of the testimony of Dr. Havard, a person whom the jury may well have considered to be a key witness.

Finally, the sanctioning court ordered:

> . . . .
>
> 2. That the notices of depositions of Drs. Havard and Scheerer are struck and the existing depositions of Drs. Havard and Scheerer may not be used in any subsequent trial.
>
> . . . .
>
> 5. That a new trial is granted to plaintiff against Duke University for the violation of the Superior Court's order to identify witnesses, this being a Rule 11(a) sanction.
>
> . . . .

The issues are: (I) whether the sanctioning court abused its discretion by (A) striking Dr. Havard's deposition, and (B) ordering a new trial upon the grounds that the admission of Dr. Havard's testimony at trial was prejudicial to the plaintiff; and (II) whether the failure of the plaintiff to object at trial to the introduction of the deposition precluded plaintiff from asserting it as a basis for sanctions.

I

North Carolina statutes authorizing the imposition of Rule 11 and Rule 26 sanctions do not authorize specific types of sanctions,

as are provided in Rule 37(b)(2), but instead authorize a trial court to impose "appropriate sanction[s]." *See* N.C.G.S. § 1A-1, Rule 11(a) (1990); N.C.G.S. § 1A-1, Rule 26(g) (1990). In the absence of statutory specificity relating to the selection of sanctions, our Supreme Court has approved an abuse of discretion standard as a proper means for reviewing the appropriateness of a particular sanction. *Turner* at 165, 381 S.E.2d at 714. *See also* Federal Judicial Center, The Rule 11 Sanctioning Process, 127 (1988) ("[t]he options available to a . . . judge in tailoring a sanction for a given case seem limited only by the judge's imagination and the possibility of appellate review under an abuse-of-discretion standard"). The trial court abuses its discretion "only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

A

[1] The first question is whether the striking of the notice of the taking of the deposition of Dr. Havard in light of the circumstances of this case is a reasoned and just result. We believe the selection of this sanction was both logical and supported in reason and therefore not an abuse of discretion. In fact Duke abandoned its assignment of error on this issue and submitted in its brief that the striking of the notices of deposition of Dr. Havard "may arguably be considered a reasonable sanction under the circumstances of this case and therefore not an abuse of discretion." Indeed, it is very reasonable that the deposition procured in violation of deposition rules be prohibited at trial. *See* Manual for Complex Litigation Second § 42.3 (listing 21 categories of sanctions employed by federal courts, including the preclusion of evidence for failure to comply with discovery orders).

Furthermore, the fact that Duke's counsel, and not Duke itself, committed the acts giving rise to the sanction is not a bar to its imposition. Such lack of misconduct by a party to a lawsuit can mitigate against the use of severe sanctions. *See, e.g.*, Fed. R. Civ. P. 11 Advisory Committee Notes ("in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed"). However, the selection of sanctions remains within the discretion of the trial court, and Rules 11 and 26 specifically authorize imposition of appropriate sanctions not only against the person who commits the

improper act, but also against the person on whose behalf the improper act was committed. N.C.R. Civ. P. 11, 26. *See also* Manual for Complex Litigation § 42.22 (referring to sanctions in general, "[s]anctions that affect the client . . . may, if otherwise warranted, be imposed although the attorney is solely responsible"). Here, while there was no misconduct by Duke, and while Duke is greatly affected by the sanction, we are unaware of any other sanction which would have corrected the prejudice to plaintiff. Therefore, we find no abuse of discretion by the sanctioning court.

B

[2] The second question is whether the granting of the new trial is a reasoned and just result of the striking of Dr. Havard's deposition testimony. Again, we find this sanction to be both logical and supported in reason and therefore not an abuse of discretion.

Plaintiff argues that he was unfairly prejudiced by the admission of Dr. Havard's deposition testimony because he was denied an opportunity to cross-examine Dr. Havard. Duke contends that Dr. Havard's testimony was not prejudicial because Duke introduced other evidence essentially the same as Dr. Havard's deposition testimony. *See Warner v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *disc. rev. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985) (admission of incompetent testimony not prejudicial when testimony is merely cumulative). Specifically, Duke argues that another physician, Dr. Weber, offered live testimony at trial very similar to Dr. Havard's deposition testimony.

Plaintiff offered evidence that the decedent's colon had been perforated during the administration of an enema. Both Dr. Havard and Dr. Weber examined the decedent after the administration of the enema, and both testified that while the decedent complained of abdominal cramping, she did not have symptoms consistent with a perforated colon. Dr. Weber, however, was cross-examined by the plaintiff and during that cross-examination the plaintiff elicited the following:

> Q. Do you know about what time it was that you actually wrote your notes down, or when you actually saw her?
>
> A. I don't know exactly. I don't have any independent recollection of that. The best that I can put it together is that I know that it was in the morning, and it was after we ordinarily do rounds. My guess is late morning or midday.

Q. Well, you have, moaning and complaining of abdominal pain post enema. You are aware that the notes indicate that the enema was administered around 11:00 o'clock that morning?

A. Right. I heard that this morning.

Q. And I believe she was transferred sometime around 2:00 o'clock?

A. It was somewhere between 11:00 and 2:00 o'clock. I saw her on Reed Ward.

Q. You were there for a neurosurgery consult that day, is that correct?

A. Mrs. Turner was admitted to the neurosurgical service. I wasn't there as a consultant. She was admitted to our service and it was a portion of the evaluation that every patient gets when they come to our service or to any service in the hospital.

Q. When you did your examination you were primarily interested in her neurosurgical status?

A. Yes, sir.

Q. You were not there to evaluate her necessarily for her gastronomical problems if she had any of those?

A. No, sir.

Q. Do you remember what she looked like?

A. No, sir.

. . . .

Q. When did you come to work, do you recall that?

A. We begin our day at 6:30 in the morning.

Q. Had you worked like 36 hour shift?

A. Yes, sir.

Q. A lot of residents work pretty long hours in a hospital, don't they?

A. Yes, sir.

Q. How long would you have been basically constantly working up until . . . You started at 6:00 on the 25th at the a.m.?

A. Yes, sir.

Q. And then you would have seen her sometimes around 11:00 . . . well, between 11:00 and 2:00 on the following day, is that right?

A. Yes.

Q. Had you had any sleep between those . . . that entire time?

A. I don't recall that day specifically, but unlikely or I wouldn't have done her evaluation, but prior to that time.

Plaintiff's cross-examination had the capacity to reduce the credibility of Dr. Weber's direct testimony to the jury on the issue of whether decedent's colon had been perforated during or after the administration of the enema. Since plaintiff did not have an opportunity to cross-examine Dr. Havard, a significant distinction between Dr. Havard's testimony and Dr. Weber's testimony is presented. This distinction precludes any conclusion that Dr. Havard's testimony was cumulative and supports a conclusion that plaintiff was unfairly prejudiced by the introduction of Dr. Havard's testimony. Furthermore, it is not required, as Duke contends, "that the record developed without [the assistance of cross-examination] affirmatively pin-point the harm in so many words. It is sufficient if we can see [as we can in this case] . . . that the development of this record and the development of the testimony of [Dr. Havard] as a witness might well have been quite different had the Plaintiff been accorded the right to put [Dr. Havard] through all of the rigors of a sharp, relentless, pressing, vigorous cross examination . . . " *Degelos v. Fidelity and Cas. Co. of New York*, 313 F.2d 809, 814 (1963). "Indeed, one of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses . . . ." *Barnes v. Highway Commission*, 250 N.C. 378, 394, 109 S.E.2d 219, 232 (1959).

Duke contends that plaintiff cannot use its failure to cross-examine Dr. Havard to support a finding of prejudice because plaintiff did not appear at the taking of the deposition. We disagree. Duke should not now be heard to argue that plaintiff waived his right to cross-examine Dr. Havard when he failed to appear for the taking of a deposition which was improperly noticed in violation of Rules 11 and 26.

We therefore conclude that the sanctioning court's order striking the notice of deposition and prohibiting its further use and the order of the new trial were authorized sanctions under Rules 11 and 26 and there is no evidence of an abuse of discretion.

II

[3] Duke next argues that since the plaintiff did not object, at trial, to the admission into evidence of Dr. Havard's deposition testimony, he should not be permitted to assert that testimony as a basis for the selection of an appropriate sanction. Generally, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record." N.C.G.S. § 8C-1, Rule 103(a)(1) (1988). However, since the trial court may impose sanctions "upon its own initiative . . . ," *see* Rules 11 and 26, plaintiff's objection at trial to the use of Dr. Havard's deposition is not essential to the imposition of sanctions. To hold otherwise would unduly limit the wide discretion vested in the trial court in its selection of appropriate sanctions. *Turner* at 165, 381 S.E.2d at 714.

Affirmed.

Judges ORR and DUNCAN concur.

Judge DUNCAN concurred in this opinion prior to 30 November 1990.

THOMAS H. RUSSELL AND SUSAN ELIZABETH RUSSELL SISSON, PLAINTIFFS v. CORA C. RUSSELL AND NANCY D. RUSSELL, DEFENDANTS

No. 903SC147

(Filed 15 January 1991)

1. Wills § 48 (NCI3d)— bodily heirs—adopted children

Where testator's will devised a remainder to his daughter "and the heirs of her body" and further provided that "in the event of the death of my said daughter without bodily heirs, then and in that event I give and devise said prop-

erties to my heirs-at-law," any child adopted by the daughter could satisfy the conditions of the will and inherit as a bodily heir.

Am Jur 2d, Adoption § 98.

Adopted child as within class in testamentary gift. 86 ALR2d 12.

2. **Wills § 43 (NCI3d)— death in 1951—testator's wife not heir-at-law under will**

The wife of a testator who died in 1951 was not an "heir-at-law" under his will where the will devised a life estate to testator's wife with the remainder to his daughter "and the heirs of her body" and further provided that "in the event of the death of my said daughter without bodily heirs, then and in that event I give and devise said properties to my heirs-at-law" in fee simple. N.C.G.S. § 29-1, Rule 8 (1943).

Am Jur 2d, Wills § 1211.

Husband or wife as heir within provision of will or trust. 79 ALR2d 1438.

3. **Wills § 36.1 (NCI3d)— construction of will—life estate—estate tail—defeasible fee**

Where the will of a testator who died in 1951 devised a life estate to his wife with the remainder to his daughter "and the heirs of her body" and further provided that "in the event of the death of my said daughter without bodily heirs, then and in that event I give and devise said properties to my heirs-at-law" in fee simple, the will vested a life estate in the wife with an estate tail in remainder to the daughter which was converted by N.C.G.S. § 41-1 into a fee simple defeasible upon her death without bodily heirs, and testator's other two children received a remainder contingent upon the daughter's death without bodily heirs.

Am Jur 2d, Estates §§ 43, 45-47.

Judge PARKER concurs in the result.

APPEAL by plaintiffs and cross-appeal by defendants from judgment entered 14 November 1989 by *Judge William C. Griffin* in

CARTERET County Superior Court. Heard in the Court of Appeals 18 September 1990.

Plaintiffs appeal and defendants cross-appeal the trial court's interpretations of the relative interests of the parties as to real property described in the will of Nat Russell.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by Claud R. Wheatly, Jr., for plaintiffs-appellants.

L. Patten Mason, P.A., by L. Patten Mason, for defendants-appellees.

JOHNSON, Judge.

The pertinent facts are as follows: Nat Russell (hereinafter "testator") executed a will on 8 September 1948. He died on 29 March 1951. Shortly thereafter on 3 April 1951, the will was probated. The disputed provision of the will reads as follows:

> I give and devise to my beloved wife, Cora C. Russell, the following real estate, to wit: [real estate described] to have and to hold to afore sescribed [sic] properties to her, said Cora C. Russell, for the period of her natural life, and at her death to my daughter, Nancy D. Russell, to have and to hold the same to her and the heirs of her body; however, in the event of the death of my said daughter without bodily heirs, then and in that event I give and devise said properties to my heirs-at-law to be divided between them equally, share and share alike, surviving children of deceased parents to have the part said parent would have taken had he or she lived, to have and to hold the same to them and their heirs in fee simple, subject to the life estate of the said Cora C. Russell.

Nat Russell was married two times. By his first marriage, he had two children, Thomas Russell and Susan Russell Sisson, the plaintiffs. His second marriage to Cora C. Russell resulted in the birth of one child, Nancy D. Russell. No other children were born of Nat Russell. At his death, Mr. Russell was survived by his wife Cora, and his three children, Thomas, Susan and Nancy.

At the time Nat Russell executed the will in question, plaintiffs were grown and living on their own. Defendant Nancy Russell, however, was approximately 15 years old and living at home.

Cora Russell, the appointed Executrix, administered her husband's estate until its conclusion on 16 May 1953.

Nancy Russell is now approximately 56 years old, is unmarried, and has not given birth to a child or children.

Cora Russell has conveyed her life estate to Nancy Russell.

Nancy Russell is now claiming to own all of the property, in fee simple.

On appeal, plaintiffs bring forth two questions for review. Defendants bring forth four additional questions on cross-appeal. For the sake of clarity, we will address the legal questions raised by plaintiffs first. We then shall discuss defendants' questions.

PLAINTIFFS' APPEAL

At the outset, we note that the testator died on 29 March 1951 and the Intestate Succession Act was not passed until 1959, therefore, the case *sub judice* is governed by the Statute of Descents, G.S. § 29-1 (1943). As our current statute provides that "[e]very person seized of an estate in tail shall be deemed to be seized of the same in fee simple," G.S. § 41-1 (1984) is also applicable to the interpretation of the disputed provision of Nat Russell's will.

[1] Initially, plaintiffs contend that the trial court erred in failing to find that the will and the intent of the testator, by the use of the terms "heirs of her body" and "bodily heirs" meant not just children, but "natural children." Plaintiffs, however, in their complaint, only assert a claim for declaratory relief as to the relative interests of the parties. The complaint does not raise the issue of whether defendant Nancy Russell could satisfy the condition in her father's will by adopting a child as opposed to giving birth to a child. Thus, this issue cannot be raised for the first time on appeal. *Bryant v. Eagan*, 88 N.C. App. 741, 364 S.E.2d 704, *cert. denied*, 322 N.C. 325, 368 S.E.2d 863 (1988).

Assuming, *arguendo*, that this issue was properly raised, the applicable rule provides that the word "child" standing alone "shall be construed to include any adopted person unless the contrary plainly appears by the terms of the will itself." *Simpson v. Simpson*, 29 N.C. App. 14, 17, 222 S.E.2d 747, 748 (1976). "This rule of construction shall apply whether the will was executed before or after the final order of adoption and whether the will was executed before or after the enactment of the statute." *Id.*, *citing Peele*

v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973); *Stoney v. MacDougall*, 28 N.C. App. 178, 220 S.E.2d 368 (1975), *cert. denied*, 289 N.C. 302, 222 S.E.2d 702 (1976). Therefore, any child adopted by Nancy will satisfy the conditions of her father's will and can inherit as a bodily heir. *See also* G.S. § 48-23(3) and *Simpson*, 29 N.C. App. 14, 222 S.E.2d 747. This assignment is overruled.

[2] By Assignment of Error number two, plaintiffs contend that the trial court erred in concluding that the testator intended the words:

> to my heirs at law, to be divided between them equally, share and share alike, surviving children of deceased parents to have the part their parents would have taken had he or she lived, to have and to hold the same to them and their heirs in fee simple, subject to the life estate of Cora C. Russell

to include Cora Russell as his "heir-at-law." We agree.

Unquestionably, the distribution of an estate among heirs and distributees is governed by the law as it existed at the time of the death of the intestate. *Johnson v. Blackwelder*, 267 N.C. 209, 148 S.E.2d 30 (1966). Pursuant to the Statute of Descents, a husband and wife could not inherit real property directly from each other. Wiggins, Wills and Administration of Estates in North Carolina § 178 (1983). Where, however, "any person dies intestate leaving none who can claim as an heir to the deceased person, but leaving surviving a widow or husband, such widow or husband shall be deemed an heir and as such inherit his estate." G.S. § 29-1, Rule 8. As Nat Russell died testate with heirs, this general rule is inapplicable to the case *sub judice*. Thus, Cora Russell is not an heir of Nat Russell.

To determine the relative interests of the parties as created by the testator, we must first examine the disputed devise which reads in pertinent part:

> . . . I give and devise to my beloved wife, Cora C. Russell . . . for the period of her natural life, and at her death to my daughter, Nancy D. Russell, to have and to hold the same to her and the heirs of her body; however, in the event of the death of my said daughter without bodily heirs, then and in that event I give and devise said properties to my heirs-at-law . . . .

Next, we must look to the intestacy law in effect at the time of Nat Russell's death. *Rawls v. Rideout*, 74 N.C. App. 368, 328 S.E.2d 783 (1985). And finally, we are guided by the intent of the testator. *Slater v. Lineberry*, 89 N.C. App. 558, 366 S.E.2d 608 (1988). Such intent is ascertained

> from the . . . language and in light of conditions and circumstances existing at the time the will was made. In considering the language used, technical words will be presumed to have been used in their technical sense unless the language of the will evidences a contrary intent; however, when the testator obviously does not intend to use words in their technical sense, they will be given their ordinary and popular meaning. In any event, the use of particular words, clauses or sentences must yield to the purpose and intent of the testator as found in the whole will. (Citations omitted.)

Kale v. Forrest, 278 N.C. 1, 6, 178 S.E.2d 622, 625 (1971). Ordinarily, the word "heirs" is "used to describe those persons who are entitled under the intestate succession statute to the decedent's property upon his death intestate." Wiggins, Wills and Administration of Estates in North Carolina § 134 (1983).

[3] The devise to Cora Russell for her natural life and at her death to the testator's daughter and "her bodily heirs," vests a life estate in the land to Cora Russell, with an estate tail in remainder to Nancy Russell. Nancy's interest under the purview of G.S. § 41-1 is converted into a defeasible fee simple. Thomas Russell and Susan Russell Sisson therefore have a contingent remainder. The contingency that will activate this remainder is Nancy's death without bodily heirs. *See Davis v. Brown*, 241 N.C. 116, 84 S.E.2d 334 (1954). At such time, this contingent limitation will defeat Nancy's fee simple, and title will pass to Nat Russell's heirs-at-law.

The parties' identifiable interests have not changed despite the fact that Cora Russell has conveyed her present life estate interest to her daughter, Nancy. Nancy Russell's interest has merely been accelerated. In the event that Nancy dies without bodily heirs, her fee simple estate will be defeated.

We conclude, however, that Nat Russell did not use the words "heirs-at-law" in the technical sense. This is evidenced by the special provision contained in the will entitling Nancy and her children

to the real estate to the exclusion of Thomas and Susan and their heirs. We believe a strict reading of the disputed provision would produce a result in opposition to Nat Russell's testamentary intent and could result in someone, other than a lineal descendant of Nancy, taking her share when the language in the will suggests an intention to keep the property in the family. Moreover, we are unable to adopt defendants' overall position that Nat Russell intended for Nancy to take the real property as an heir-at-law as a result of a condition that would have initially deprived her of the property. Thus, we conclude that Nat Russell meant that *if* Nancy had children, she and her children would take the property *but* Susan and Thomas would share the property equally in the event that Nancy died without having children.

In summary, we find that Cora Russell is not Nat Russell's heir-at-law. We also find that Nancy Russell presently has a fee simple defeasible title to the properties of the testator, Nat Russell, and that her interest could only be defeated and therefore equally divided by Thomas Russell and Susan Russell Sisson in the event that she dies without having children.

DEFENDANTS' APPEAL

In light of our holdings above, we find it unnecessary to address the questions raised in defendants' cross-appeal. Suffice it to say, the trial court's holdings that the Rule in *Wild's case* does not apply and that the issue of the parties' rights could be determined were both proper. The trial court erred, however, by holding that the term "heirs of her body" did not create a fee tail which was converted by the operation of the statute into a fee simple estate.

The judgment of the court below is

Affirmed in part; Reversed in part.

Judge EAGLES concurs.

Judge PARKER concurs in the result.

Judge PARKER concurring in the result.

I concur in the result only. In my view the language of testator's Will did not create a fee tail estate in Nancy Russell and G.S. 41-1, therefore, has no applicability.

I am also of the opinion that the complaint for declaratory judgment to determine the relative interests of the parties under Nat H. Russell's Will did in fact raise the issue of whether bodily heirs would include both natural and adopted children of defendant Nancy Russell. Paragraph 5 of the complaint asserts plaintiffs' position that Nancy Russell must die survived by natural children. The prayer for relief seeks a declaration that "if she is not survived by natural children . . . the real estate will be solely the property of Thomas H. Russell and Susan Elizabeth Russell Sisson, their heirs and assigns as tenants in common . . . ." Therefore, this issue was properly before the trial court, and plaintiffs preserved their right to raise it on appeal.

Further, plaintiffs' interest under the Will is, in my opinion, an executory interest rather than a contingent remainder. The interests of the parties created by the Will in testator's property were as follows: (i) Cora Russell received a life estate; (ii) Nancy Russell received a vested remainder in the fee simple defeasible upon her death without a child surviving her; (iii) Thomas Russell and Elizabeth Sisson received an executory interest in the fee simple which will take effect in the event the contingent limitation occurs, namely that Nancy Russell dies without a child surviving her. *See Ziegler v. Love*, 185 N.C. 40, 115 S.E. 887 (1923). As noted by the majority, under the current statute, G.S. 48-23, the child may be an adopted child.

Finally, under the holding in *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976), I concur in that portion of the majority opinion holding that testator's heirs at law to take in the event Nancy dies without a child surviving her would not include Nancy or persons taking under her. Additionally, contrary to defendants' contention, under *White*, testator's heirs at law for purposes of who shares in the executory interest, should the contingency occur, are determined at the time of the testator's death. 290 N.C. at 81, 224 S.E.2d at 621.

S.E.T.A. UNC-CH, INC., PETITIONER-APPELLANT v. WILLIAM D. HUFFINES, M.D., CHAIRMAN OF THE INSTITUTIONAL ANIMAL CARE AND USE COMMITTEE, OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENT-APPELLEE

No. 9010SC353

(Filed 15 January 1991)

1. **Animals, Livestock, or Poultry § 1 (NCI4th)— experiments using animals—fears of violence from disclosure—applications to IACUC not protected**

Information in applications to the Institutional Animal Care and Use Committee (IACUC) for approval of research experiments using animals is not required to be protected because of researchers' fears of violence and harassment.

Am Jur 2d, Animals § 30.5.

2. **Animals, Livestock, or Poultry § 1 (NCI4th)— experiments using animals—applications to IACUC—no trade secrets**

Information in applications to the IACUC for approval of research experiments using animals did not constitute confidential trade secrets protected from disclosure by N.C.G.S. § 66-152.

Am Jur 2d, Animals § 30.5; Depositions and Discovery § 47.

Applicability of state animal cruelty statute to medical or scientific experimentation employing animals. 42 ALR4th 860.

3. **Animals, Livestock, or Poultry § 1 (NCI4th)— experiments using animals—applications to IACUC—academic freedom**

Information in applications to the IACUC for approval of research experiments using animals was not protected from public disclosure by principles of academic freedom under the First Amendment.

Am Jur 2d, Animals § 30.5; Depositions and Discovery § 29.

4. **Animals, Livestock, or Poultry § 1 (NCI4th)— experiments using animals—applications to IACUC—portions required to be disclosed**

The IACUC is required by N.C.G.S. § 132-9 to disclose to petitioners portions of applications for approval of animal research experiments relating to the titles of the project; the species and number of animals to be used; justification for

use of the animals and significance of the projects; procedures to be performed on the animals; whether surgery will be performed and, if so, pre- and postoperative care; steps taken to minimize pain and discomfort; and the method of euthanasia, if any. However, petitioners are not entitled to the disclosure of information in the applications relating to the department name and the names, telephone numbers, addresses and experience of the applicants and any other researchers or staff members participating in the experiments.

Am Jur 2d, Animals § 30.5; Depositions and Discovery §§ 21, 34-36.

Applicability of state animal cruelty statute to medical or scientific experimentation employing animals. 42 ALR4th 860.

APPEAL by petitioner from a judgment entered 20 December 1989 by *Judge J. B. Allen, Jr.*, in Superior Court, WAKE County. Heard in the Court of Appeals 24 October 1990.

Gary L. Francione and Alexander Charns for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James Wallace, Jr. and Special Deputy Attorney General Charles M. Hensey, for respondent-appellee.

LEWIS, Judge.

On 14 January 1989, petitioner, Students for the Ethical Treatment of Animals, University of North Carolina—Chapel Hill (hereinafter "SETA"), an incorporated, voluntary student organization, sought access to various documents of the Institutional Animal Care and Use Committee (hereinafter "IACUC") relating to the care and use of animals in scientific experiments. The respondent refused to provide the "application for approval" forms for four particular experiments submitted for review to the IACUC. The respondent also refused to provide copies of the minutes of the IACUC meetings.

On 9 October 1989, SETA petitioned the Superior Court for an order compelling disclosure. In its application, petitioner requested that: (1) the court enter an order directing the respondent to release the records sought by petitioner or show cause why respondent should not be required to produce the records; (2) the

court declare the requested records to be "public records" under N.C.G.S. § 132-9; (3) respondent be enjoined permanently from denying access to these records; and (4) the court award to petitioners the costs and expenses of suit, including a reasonable attorney's fee.

On 20 December 1989, the court denied petitioner's application finding that each requested document contained confidential information of proprietary value, which could not be redacted, and that public policy considerations protected information relating to experiments on live animals and outweighed any need for disclosure. Based upon these findings of fact, the court concluded as a matter of law that: (1) the requested documents contained "trade secrets" as defined by N.C.G.S. § 66-152; (2) the court identified Art. 24, Chap. 66 of the North Carolina General Statutes as an independent ground for denial of disclosure; (3) the court concluded that "public policy considerations alone served as a basis for denial"; and (4) the court held that a "Qualified privilege of academic freedom guaranteed by the First Amendment of the Constitution of the United States," exempted the requested documents from disclosure. From denial of its petition, SETA appeals.

We first note that SETA has voluntarily dismissed its appeal regarding the disclosure of the minutes of the IACUC meetings. Accordingly, this opinion does not discuss the merits of that aspect of the case. This appeal addresses the issue of whether the respondents are required under N.C.G.S. § 132-1 *et seq.* (Public Records Law) to disclose any or all of the information contained in the applications submitted by research scientists to the IACUC.

The IACUC is a committee created under the Federal Animal Welfare Act, 7 U.S.C. §§ 2131-2157 (1985), to inspect animal study areas and animal facilities, and to review all potential research experiments to ensure that all experiments minimize pain and distress in animals used in experiments. In conjunction with its duty to review potential research, the IACUC requires the "principal investigation" seeking funding for a research project using vertebrate animals, to submit to the committee a protocol application. The application seeks to elicit information regarding the care and use of the animals throughout the experimentation as well as the method of euthanasia, if necessary. SETA presently seeks to obtain access to four of these applications: 1. "Effects of Opiate Manipulations on Latent Inhibitions in Rabbits: Sensitivity of the Medial Septal Region to Intracranial Treatments"; 2. "Recovery

and Regeneration of Spinal Neuron Injury"; 3. "Long-Term Neurobiological Effects of Early Social Isolation," and 4. "Neurophysiological Studies of Respiratory Control." We grant their petition in part.

We hold that the trial court erred in finding that no portion of the requested applications could be disclosed to petitioners and that the information could not be redacted. The information requested in the applications include (1) the title of the project; (2) the name and phone number of the researchers; (3) the researcher's department; (4) the species and number of animals to be used; (5) justification for use of the animals and significance of the project; (6) procedures to be performed on the animals; (7) whether survival surgery would be performed and if so, pre and post operative care; (8) names and phone numbers of personnel who would work with the animals; (9) their training and experience; (10) what steps would be taken to minimize pain and discomfort; and (11) the method of euthanasia.

[1] Respondents argue that the information contained in the applications is confidential and proprietary information which must be protected to insure the safety and security of the researcher. The affidavits submitted by respondent indicate that the researchers fear disclosure of their projects would result in violence against them and their staff as well as jeopardize any publication and commercial interest they may have in the research. In essence respondent argues that releasing the applications would cause a "chilling effect" on university research.

We reject respondent's argument that the entire IACUC application must be protected because of the researcher's fear of violence and harassment. The applications are so general in nature as to reveal little or nothing to others. The "chilling effect" contemplated should not occur. *See University of Pennsylvania v. Equal Employment Opp. Com.*, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). It is significant that after the research proposal has received approval from the IACUC Committee, it is submitted to the applicable federal funding agency. The federal applications for funding are much more detailed documents than the original applications to the IACUC Committee. Also, the federal applications disclose much more fully the nature of the proposed research. These documents are subject to disclosure under the Freedom of Information Act. *See* 5 U.S.C. §§ 552 *et seq.*

Portions of the federal applications may not be made public if the procedures therein could be patented. That is a valid basis for excluding information and we recognize it as such. No one has contended that any part of the four "applications" before us contains patentable ideas or procedures. If subsequent applications on the state level in North Carolina contain material which could be patented, that will surely be made clear to the court having cognizance.

SETA has obtained the federal grant applications for all four of the IACUC projects which are the subject of this appeal. However, we are sensitive to the needs of researchers to protect their privacy and the privacy of their staffs. We conclude that public policy does require that any information contained in the applications relating to the names of the researcher and staff members, their telephone numbers, addresses, their experience and the department name be redacted from the IACUC applications. We also conclude that applications not approved need not be made public.

[2] The respondent also contends that the applications are protected because *all* of the information contained in the applications constitutes confidential trade secrets. We disagree. N.C.G.S. § 66-152 defines a "trade secret":

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use. . . .

N.C.G.S. § 66-152(3)a.

We conclude that the information elicited by the questions in these applications are not "trade secrets" subject to protection. What type and how many animals are going to be used in a particular research project is not a trade secret, nor is whether surgery is going to be performed or the type of anesthesia to be used. Pre and postoperative procedures are not trade secrets, nor is how the animals' pain and discomfort is to be minimized nor the method of euthanasia, if any. The IACUC must disclose this information. Furthermore, while the application seeks a brief discussion of the justification of the proposed research and the projects' objec-

tives, it is clear that the committee is only seeking a very general description from the applicant. Such general description can hardly be considered as a "trade secret" as defined above. The description required is far less detailed than the information required to be submitted which is obtainable through the Freedom of Information Act in federal grant applications. We have examined the four requested applications *in camera* and find that as to these applications the questions relating to research objectives and justifications are not trade secrets. *See ASPCA v. State University of New York at Stony Brook*, 556 N.Y.S.2d 447 (1990) (questions asked on an IACUC application regarding justification and objective of research held not to be trade secrets under applicable state law).

[3] Finally, respondents argued below that the information was protected by the First Amendment. They argue that the First Amendment creates an academic exception for disclosure of documents. This argument has been rejected by the United States Supreme Court. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). This case was handed down after Judge Allen's decision so he could not have known of it. We are bound by this decision and conclude that the trial court erred in concluding that disclosure was not permitted because of academic privilege.

[4] As to these eleven matters on these four applications, we find as follows:

(1) The "Title of the Project" is not excludable and must be made public.

(2) The names and phone numbers and addresses of the applicant and researchers are confidential and need not be released.

(3) The researcher's department need not be released.

(4) The species and number of animals used is not excludable and should be released.

(5) Justification for use of the animals and significance of the project in these applications is not excludable and should be released.

(6) Procedures to be performed on the animals are, in these applications, not excludable and should be released.

(7) Whether or not survival surgery would be performed and if so, pre and postoperative care, is not excludable in these applications and should be released.

(8) The names, addresses, departments and phone numbers of personnel who would work with the animals should not be disclosed.

(9) The training and experience of the applicant and researchers should not be disclosed.

(10) Steps taken to minimize pain and discomfort as described here are not excludable and should be disclosed.

(11) Method of euthanasia, if any, in these applications is not excludable and should be disclosed.

It is conceivable that some of the answers to questions in future applications could contain "trade secrets" or be patentable and hence excludable. These questions will have to be decided on a case by case basis. In the present case, we hold that the Public Records Law weighs on the side of disclosure of public documents.

We cannot permit a procedure to be withheld from the public merely because someone chooses to label it a "trade secret," when it is performed daily by many people and taught in schools all over the world.

Remanded to Wake County Superior Court for entry of an order consistent with this opinion.

Judges WELLS and COZORT concur.

HAROLD L. LUTZ, SR. v. EDITH M. LUTZ

No. 9027DC671

(Filed 15 January 1991)

1. Divorce and Alimony § 21.9 (NCI3d)— equitable distribution—claim not asserted before divorce judgment—claim lost

The bare reservation by a trial court of the issue of equitable distribution only preserves the claim of equitable

distribution for the party who has asserted the right prior to judgment of absolute divorce; therefore, the trial court's reservation of the issue of equitable distribution in its judgment of absolute divorce preserved the plaintiff's claim for equitable distribution, not defendant's, defendant having lost her claim by failing to assert it prior to the judgment of absolute divorce.

Am Jur 2d, Divorce and Separation § 962.

2. Divorce and Alimony § 21.9 (NCI3d)— equitable distribution claim barred by divorce judgment—plaintiff not equitably estopped from relying on N.C.G.S. § 50-11(e)

There was no merit to defendant's contention that the trial court erred in dismissing her claim for equitable distribution because the plaintiff should be equitably estopped from relying on N.C.G.S. § 50-11(e), since defendant alleged that the parties had been engaged in discovery and negotiations for nearly two years; defendant could not have been prejudiced by plaintiff's conduct in carrying on negotiations, as she had already lost her right to assert a claim for equitable distribution by the judgment of absolute divorce prior to negotiations; and the prejudice alleged to have been suffered by defendant was the nearly two years of negotiations and discovery, but, during that time frame, plaintiff's claim for equitable distribution was still alive, and he was entitled to conduct such negotiations.

Am Jur 2d, Divorce and Separation § 962.

APPEAL by defendant from order filed 30 March 1990 in GASTON County District Court by *Judge Harley B. Gaston, Jr.* Heard in the Court of Appeals 14 December 1990.

Frank Patton Cooke, by Thomas A. Will, Jr., for plaintiff-appellee.

Childers, Fowler & Childers, P.A., by Max L. Childers, for defendant-appellant.

GREENE, Judge.

The defendant appeals from an order filed 30 March 1990 in which the trial court concluded that the defendant's claim for equitable distribution was destroyed by judgment of absolute divorce,

and that the plaintiff was entitled to voluntarily dismiss without prejudice his claim for equitable distribution pursuant to N.C.G.S. § 1A-1, Rule 41(a), thereby leaving no further issue of equitable distribution in the matter.

On 2 October 1987, the plaintiff filed a complaint seeking an absolute divorce from the defendant and equitable distribution of the marital property. Though the defendant was served with the summons and complaint, the defendant did not file a timely answer. On 13 November 1987, the trial court granted to plaintiff a judgment of absolute divorce. In its judgment the trial court specifically noted "that other issues including equitable distribution are continued for disposition at the proper time [.]"

On 1 December 1987, counsel for the defendant sent a letter to counsel for the plaintiff inquiring as to whether the plaintiff intended to proceed with his claim for equitable distribution, and if so, whether the parties could discuss the matter. The defendant argues that in response to this letter counsel for both parties agreed that the defendant would file an answer for equitable distribution even though the time for filing it had passed and the judgment for absolute divorce had been entered. Counsel for the plaintiff denies this agreement ever occurred. Counsel for both parties filed affidavits supporting their version of the events occurring after judgment of absolute divorce.

On 14 December 1987, the defendant filed an answer to the plaintiff's complaint. The defendant admitted the allegations of the complaint and requested "an unequal equitable distribution of the marital property in favor of defendant." Subsequently, counsel for both sides discussed the equitable distribution of the marital property, filed affidavits regarding the marital property, filed interrogatories and answers to them, and engaged in a pre-trial conference. On 5 September 1989, the defendant filed a motion for the unequal distribution of the marital property. On 19 September 1989, the plaintiff filed a voluntary dismissal without prejudice as to his claim for equitable distribution. The trial court denied the defendant's motion, and the defendant appealed.

The issues are (I) whether the defendant, who failed to assert a claim for equitable distribution before judgment of absolute divorce, is entitled to assert a claim for equitable distribution after the judgment of absolute divorce where the plaintiff asserted a claim

for equitable distribution before judgment of absolute divorce and the judgment of absolute divorce states that the issue of equitable distribution is being continued for disposition at a later time; and (II) whether the plaintiff is equitably estopped from relying on N.C.G.S. § 50-11(e) (1987) where the defendant failed to assert a claim of equitable distribution before judgment of absolute divorce but the parties continued to negotiate and engage in discovery during the pendency of the plaintiff's claim for equitable distribution.

I

[1] The defendant argues that the trial court erred in dismissing her claim for equitable distribution because the trial court's judgment of absolute divorce filed 13 November 1987 left the issue open for disposition at a later time.

N.C.G.S. § 50-11(e) provides that "[a]n absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce . . . ." This provision is subject to two exceptions, neither of which apply in this case. *See id.*; N.C.G.S. § 50-11(f) (1987). According to the Supreme Court,

> a married person is entitled to maintain an action for equitable distribution upon divorce if it is properly applied for and not otherwise waived. However, equitable distribution is not automatic. The statute provides that a party seeking equitable distribution must specifically apply for it. This may be done either by way of cross-action in an action brought for absolute divorce or as a separate action.

Hagler v. Hagler, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987). Therefore, if a person entitled to equitable distribution does not *specifically* apply for it by cross-action or by a separate action prior to the judgment of absolute divorce, the divorce judgment destroys that person's statutory right to equitable distribution. Here, because the defendant did not file a cross-action or a separate action asserting her right to equitable distribution prior to the divorce judgment, the defendant lost her right to equitable distribution.

The defendant acknowledges the application of N.C.G.S. § 50-11(e). However, she argues that the issue of equitable distribution was specifically left open by the trial court in the judgment

of absolute divorce, and consequently, on the basis of *Stone v. Stone*, 96 N.C. App. 633, 386 S.E.2d 602 (1989), *disc. rev. denied*, 326 N.C. 805, 393 S.E.2d 906 (1990), she is entitled to an equitable distribution. We disagree.

In *Stone*, the plaintiff sought and received a judgment of absolute divorce from his wife. *Id.* at 633, 386 S.E.2d at 603. In addition to the decree of absolute divorce, the judgment stated that *both* the plaintiff and the defendant had filed claims for equitable distribution, and that "[t]he issue of Equitable Distribution is hereby reserved for hearing by the Court at a later date." *Id.* at 633-34, 386 S.E.2d at 603. Approximately two weeks later, the plaintiff moved to dismiss the defendant's equitable distribution claim pursuant to N.C.G.S. § 50-11(e). *Id.* at 634, 386 S.E.2d at 603. The matter was heard before Judge Richardson, a trial judge different from the judge who rendered the judgment of absolute divorce, Judge Gardner. *Id.* Judge Richardson dismissed the defendant's equitable distribution claim, finding the following fact:

> That the reservation of the equitable distribution action in the divorce judgment was improper since defendant failed to file a counterclaim or separate action for equitable distribution on or before the date the judgment for divorce absolute was granted by this Court.

Id. The defendant appealed this judgment to this Court, and this Court vacated and remanded it. This Court noted that the plaintiff's motion to dismiss the defendant's claim for equitable distribution amounted "to nothing more than a collateral attack on the judgment entered by Judge Gardner . . . wherein the parties were divorced absolutely, and *defendant's claim* for equitable distribution was left open for trial at a later date." *Id.* (emphasis added). This Court also noted that neither party appealed the judgment of absolute divorce which included the reservation relating to equitable distribution. *Id.* at 634-35, 386 S.E.2d at 603. This Court held that while "Judge Gardner had *jurisdiction and authority* to enter the [absolute divorce] judgment," "Judge Richardson had no authority *as a trial judge* to find error and reverse or vacate Judge Gardner's order . . . ." *Id.* at 635, 386 S.E.2d at 603 (emphases added). Accordingly, *Stone* stands for the proposition that a district court judge has no authority to dismiss a party's claim for equitable distribution where a prior order reserved for a future hearing the issue of

that party's claim for equitable distribution, which claim had been asserted prior to the divorce decree.

The present case differs from *Stone*. In this case, while the trial court specifically reserved the issue of equitable distribution for the future in its judgment of absolute divorce, neither party contests the fact that the defendant had not and the plaintiff had asserted a claim for equitable distribution prior to the judgment of absolute divorce. Therefore, when the trial court reserved the issue of equitable distribution, the trial court reserved only the plaintiff's claim as the plaintiff was the only party to have asserted its claim prior to judgment of absolute divorce. In contrast, though the trial court in *Stone* reserved the issue of equitable distribution in its judgment of absolute divorce, the trial court specifically noted in its judgment that *both* parties had applied to the trial court for equitable distribution. Whether the parties in *Stone* had in fact asserted claims for equitable distribution is irrelevant because neither party challenged that judgment on appeal. Therefore, when the trial court in *Stone* reserved the issue of equitable distribution, it did so for *both* parties. Accordingly, we hold that the bare reservation by a trial court of the issue of equitable distribution only preserves the claim of equitable distribution for the party who has asserted the right prior to judgment of absolute divorce. Applied here, the trial court's reservation of the issue of equitable distribution in its judgment of absolute divorce preserved the plaintiff's claim for equitable distribution, not the defendant's, the defendant having lost her claim by failing to assert it prior to the judgment of absolute divorce.

II

[2] The defendant argues that the trial court erred in dismissing her claim for equitable distribution because the plaintiff should be equitably estopped from relying upon N.C.G.S. § 50-11(e).

This Court has recently held that a spouse may be equitably estopped from relying upon N.C.G.S. § 50-11(e) as a bar to the other spouse's right to equitable distribution where one spouse's misrepresentations cause the other spouse "to forego pleading for equitable distribution *prior* to divorce . . . ." *Harroff v. Harroff*, 100 N.C. App. 686, 692, 398 S.E.2d 340, 344 (1990) (emphasis added). This Court has described the doctrine as follows:

> '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 either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts".'

Webber v. Webber, 32 N.C. App. 572, 576, 232 S.E.2d 865, 867 (1977) (citation omitted).

The defendant argues that the parties "have been engaged in this case for nearly two years, have expended countless hours in negotiations and in discovery, and have done so pursuant to an understanding that the claim for Equitable Distribution would be left open for both parties involved." Therefore, the defendant argues that the doctrine of equitable estoppel should preclude the plaintiff from asserting N.C.G.S. § 50-11(e) in response to her claim for equitable distribution. We disagree. First, even assuming that counsel for both parties reached some agreement, such an agreement would have been reached *after* the judgment for absolute divorce. Therefore, the defendant could not have been prejudiced by the alleged wrongful conduct by the plaintiff because the defendant had already lost her right to assert a claim for equitable distribution, such right having been destroyed by the judgment of absolute divorce *prior* to any alleged agreement between counsel. Second, the prejudice alleged to have been suffered by the defendant is the nearly two years of negotiations and discovery. However, what the defendant fails to recognize is that during that time frame the plaintiff's claim for equitable distribution was still alive, and the plaintiff was entitled to conduct negotiations and discovery regarding his pending claim for equitable distribution. Accordingly, the plaintiff was not equitably estopped from relying on N.C.G.S. § 50-11(e) in response to the defendant's motion for equitable distribution.

In summary, the trial court did not err in dismissing the defendant's tardy claim for equitable distribution either on the ground that the trial court had left the issue open, or upon the ground that the plaintiff was equitably estopped from relying on N.C.G.S. § 50-11(e). Because the defendant did not assert an affirmative right to relief prior to the judgment of divorce, the plaintiff was entitled to take a voluntary dismissal of his claim for equitable distribution pursuant to N.C.G.S. § 1A-1, Rule 41(a). W. Shuford, North Carolina Civil Practice and Procedure § 41-4 (3d ed. 1988); *McCarley v. McCarley*, 289 N.C. 109, 111-15, 221 S.E.2d 490, 492-94 (1976). Accordingly, the judgment of the trial court is

Affirmed.

Judges PARKER and COZORT concur.

BELL ARTHUR WATER CORPORATION, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. 903SC326

(Filed 15 January 1991)

1. **Highways and Cartways § 9 (NCI3d)— state highway improvement project—relocation of water and sewer lines—nonbetterment costs to be paid by Dept.—no requirement that project be "let to contract"**

In enacting N.C.G.S. § 136-27.1 it was the clear intent of the legislature to require the Department of Transportation to pay for nonbetterment costs due to relocation of sewer and water lines by nonprofit corporations as a result of a state highway improvement project; therefore, there is no requirement that the project be "let to contract."

Am Jur 2d, Highways, Streets, and Bridges §§ 125, 278.

2. **Highways and Cartways § 9 (NCI3d)— relocation of water and sewer lines—reimbursement of nonbetterment costs—work as "improvement"—summary judgment improper**

The trial court erred in entering summary judgment for defendant as to plaintiff's claim for reimbursement of the costs

for relocation of water and sewer lines along Highway 222 since the only description in the record of the work performed on the highway was that it was work performed to replace a "blown out" storm drain pipe, and there thus remained a material issue of fact as to whether the work done was actually an improvement within the meaning of N.C.G.S. § 136-27.1.

Am Jur 2d, Highways, Streets, and Bridges §§ 125, 278.

3. **Highways and Cartways § 9 (NCI3d)— relocation of water and sewer lines—reimbursement of nonbetterment costs—uncontradicted affidavit submitted by plaintiff**

The trial court erred in ordering that defendant determine the nonbetterment costs relating to state roads 1124 and 1262 in light of the fact that plaintiff submitted an uncontradicted affidavit as to the costs.

Am Jur 2d, Highways, Streets, and Bridges §§ 125, 278.

4. **Statutes § 5.1 (NCI3d)— legislative intent—legislator's affidavit inadmissible**

The trial court did not err in refusing to allow an affidavit of a legislator to show the intent of the legislature in passing N.C.G.S. § 136-27.1.

Am Jur 2d, Statutes §§ 161, 169.

5. **Highways and Cartways § 9 (NCI3d)— relocation of water and sewer lines—reimbursement of nonbetterment costs—action not barred by doctrine of sovereign immunity**

In an action for reimbursement of costs incurred in relocating water and sewer lines during improvement to roads, there was no merit to defendant's contention that the doctrine of sovereign immunity barred plaintiff from suing defendant, since N.C.G.S. § 136-27.1 expressly provides that the Department of Transportation shall pay certain costs, and the statute logically implies waiver of sovereign immunity as to those costs the Department of Transportation is obligated to pay.

Am Jur 2d, Highways, Streets, and Bridges §§ 125, 228.

Judge COZORT concurring in part and dissenting in part.

APPEAL by both plaintiff and defendant from a judgment entered 26 February 1990 in Superior Court, PITT County by *Judge Thomas S. Watts*. Heard in the Court of Appeals 23 October 1990.

Speight, Watson and Brewer, by William H. Watson and James M. Stanley, Jr., for plaintiff-appellant and plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Eugene A. Smith, for defendant-appellee and defendant-appellant.

LEWIS, Judge.

Plaintiff's appeal involves three questions: 1) whether the trial court erred in entering summary judgment for defendant as to plaintiff's claim for reimbursement of costs relating to highway 222, 2) whether the trial court erred in ordering that the defendant determine the non-betterment costs for state roads 1124 and 1262 in light of the fact that the plaintiff submitted an uncontradicted affidavit as to the costs, and 3) whether the trial court erred in ruling that an affidavit of a legislator stating the legislature's intent in passing N.C.G.S. § 136-27.1 not be admitted into evidence.

Defendant's appeal involves the issue of whether the trial court erred in entering summary judgment for plaintiff as to plaintiff's claim for reimbursement of costs relating to state roads 1124 and 1262.

The plaintiff, Bell Arthur Water Corporation, is a nonprofit corporation which owned water and sewer lines located on state roads 1124 and 1262, and North Carolina highway 222. Due to road work, the plaintiff was required by the defendant, North Carolina Department of Transportation, to relocate the water and sewer lines located in the right-of-way roads in question. The work performed by the Department of Transportation on state roads 1124 and 1262 was paving and other incidental work. The work performed on highway 222 was repair of a "blown out" storm drain.

The plaintiff brought this action to recover the costs it incurred in relocating its water and sewer lines. Plaintiff cites N.C.G.S. § 136-27.1 as the authority to allow reimbursement. N.C.G.S. § 136-27.1 provides:

> The Department of Transportation shall pay the nonbetterment cost for the relocation of water and sewer lines, located

> within the existing State highway right-of-way, that are necessary to be relocated for a State highway improvement project and that are owned by: (i) a municipality with a population of 5,500 or less according to the latest decennial census; (ii) any water or sewer association or corporation; or (iii) any water or sewer system organized pursuant to Chapter 162A of the General Statutes.

N.C.G.S. § 136-27.1. (Emphasis added.)

The plaintiff filed two affidavits. One affidavit is a statement by the president of Bell Arthur Water Corporation which discloses its costs allegedly incurred for each of the three roads and which was derived from "company business records." The second affidavit is a statement by Jeff H. Enloe, Jr. a member of the North Carolina General Assembly who sponsored the legislation that resulted in Section 136-27.1 of the North Carolina General Statutes. Mr Enloe's affidavit addresses the intent of the legislature in adopting N.C.G.S. § 136-27.1.

Plaintiff's Appeal

The first issue is whether the trial court erred in entering summary judgment for defendant as to plaintiff's claim for reimbursement of the relocation costs relating to highway 222.

[1] The 1985 Session Laws state that N.C.G.S. § 136-27.1 should apply "only to State highway improvement projects let to contract after July 1, 1985." This portion of the session laws was not codified. The defendant claims that the legislature intended that the statute only apply to situations where the state has contracted for the project to be performed, and not in situations, as here, where the project is performed by state personnel and equipment. Although the session laws may indicate the legislature's intent in passing a statute, if a strict literal interpretation of the language of a statute conflicts with the purpose of the legislature, the purpose of the statute should control. *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). Here, a strict literal interpretation of the language in the session laws would override the clear legislative intent to require the Department of Transportation to pay for non-betterment costs due to relocation of sewer and water lines by nonprofit corporations as a result of a state highway improvement project. Therefore, there is no requirement that the project be "let to contract."

[2] Plaintiff contends that the work done on highway 222 was a "highway improvement project" within the meaning of N.C.G.S. § 136-27.1. "In construing the language of statutes we are guided by the primary rule of construction that the intent of the Legislature controls." *In re Hardy*, 294 N.C. at 95, 240 S.E.2d at 371. "Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted." *Lafayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (citations omitted). Webster's Dictionary defines "improvement" to mean "the enhancement or augmentation of value or quality: an increasing of profitableness, excellence, or desirability." It is unclear from the record exactly what work was done to highway 222. If a larger or improved drain pipe was constructed in its place, this would be considered an improvement. The only description in the record of the work performed on highway 222 is that it was work performed to replace a "blown out" storm drain pipe. Thus, there remained a material issue of fact as to whether the work done on highway 222 was actually work that was an improvement. We hold that the trial court erred in granting summary judgment as to that claim and remand the case to determine whether or not the work was an "improvement" or merely "repair or maintenance."

[3] The plaintiff contends that the trial court erred in ordering that the defendant determine the non-betterment costs for state roads 1124 and 1262 in light of the fact that plaintiff submitted an uncontradicted affidavit as to the costs. The affidavit of the president of Bell Arthur Water Corporation stated that the business records reflect that the total necessary non-betterment costs for highways 1124 and 1262 were $11,985.00 and $6,666.75, respectively. Rule 56(e) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein." N.C.G.S. § 1A-1, Rule 56(e). Plaintiff's affidavit stated that he was familiar with the projects in question and that he had reviewed the business records before giving his affidavit. The defendant presented no contradicting affidavit. We hold that the plaintiff adequately met his burden. The trial judge should have also entered summary judgment in plaintiff's favor with respect to the costs as indicated in the plaintiff's affidavit.

[4] The plaintiff also contends that the trial court erred in refusing to allow an affidavit of a legislator to show the intent of the legislature in passing N.C.G.S. § 136-27.1. The Supreme Court of North Carolina has stated that "[t]he intention of the legislature cannot be shown by the testimony of a member." *Styers v. Phillips*, 277 N.C. 460, 472, 178 S.E.2d 583, 590 (1971). The plaintiff clearly intended to use the affidavit to show the intent of the legislature. Therefore, we hold that the trial judge was correct in refusing to allow the affidavit of the legislator into evidence.

Defendant's Appeal

[5] The defendant's assignment of error concerns whether the trial court erred in entering summary judgment for the plaintiff as to the plaintiff's claims for reimbursement of costs relating to state roads 1124 and 1262. The defendant first states that the trial court erred in entering summary judgment because the doctrine of sovereign immunity barred the plaintiff from suing the defendant. N.C.G.S. § 136-27.1 expressly provides that the Department of Transportation shall pay certain costs. We hold that the statute logically implies waiver of sovereign immunity as to those costs the Department of Transportation is obligated to pay.

The defendant also contends that the statute only applies to projects which have been "let to contract," that we are bound to give these words their full effect, and that we should consider the fact that the agency administering the law interpreted the statute to apply only to projects "let to contract." We have already addressed this argument and find that the statute is not limited to situations where the project is "let to contract." Also, we are not bound by the agency's interpretation of the statute.

The defendant claims that N.C.G.S. § 136-27.1 must be strictly construed because it is in derogation of the common law rule "that a public utility is required to vacate and/or adjust at its own expense its utilities located in public streets when such relocation and/or adjustment is necessary to facilitate street and highway improvements." We have held that if the statute only applies to projects "let to contract," the intent of the legislature would be overridden. Thus, we are bound to construe the statute as we believe the legislature intended.

Lastly, the defendant claims that the issue of costs had not been determined and, thus, summary judgment was improper. We

have already addressed this issue and held that the trial judge should have also entered summary judgment for the plaintiff as to the costs involved in highways 1124 and 1262.

As to the trial court's ruling of summary judgment for defendant concerning highway 222—Reversed and Remanded.

As to the trial court's order that defendant determine the non-betterment costs for highways 1124 and 1262—Reversed.

As to the trial court's exclusion of affidavit of the legislature—Affirmed.

As to the trial court's ruling of summary judgment for the plaintiff concerning highways 1124 and 1262—Affirmed and also remanded for entry of judgment as to the non-betterment costs of highways 1124 and 1262.

Judge WELLS concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with all of the majority's opinion except that portion which remands the cause to the trial court for entry of judgment for plaintiff in the amounts of $11,985.00 and $6,666.75 for reimbursement of necessary non-betterment costs for State Roads 1124 and 1262, respectively. The affidavit of the president of plaintiff did not sufficiently establish those figures as accurate non-betterment costs. His affidavit is conclusory in nature and fails to include the specific business records, presumably statements, invoices, and billings, from which accurate costs can be ascertained. His affidavit contains these two statements: (1) "it appears that $2,765.00 could be considered as betterment . . ."; and (2) "it appears that $2,545.00 could be considered as betterment . . . ." In my opinion judgment should not be entered based on what "appears . . . could be considered as betterment" to the president of plaintiff. Rather, the trial court should view the records and receive testimony, if necessary, to find precisely the betterment and non-betterment costs. I vote to remand that particular issue to the trial court for appropriate findings and conclusions.

URSULA R. YOUNG AND EDWIN J. YOUNG, PLAINTIFFS v. WILLIAM H. STEWART, JR. AND A-1 SERVICES, LTD., DEFENDANTS

No. 9010SC274

(Filed 15 January 1991)

Damages § 13.2 (NCI3d)— injured plaintiff as partner in business —earning capacity evidence excluded—error

In an action to recover for injuries sustained in an automobile accident, the trial court erred in ruling that plaintiff's earning capacity evidence was inadmissible where the evidence tended to show that plaintiff and another person had formed a real estate partnership in which they were the only employees; each year the two placed all commissions earned by either of them in the partnership and, after subtracting certain expenses, divided the remainder equally; their commissions were not individually assigned to each partner; and the profits thus resulted from the personal efforts, attention, skill and connections of the two parties.

Am Jur 2d, Damages §§ 937-939.

Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death. 45 ALR3d 345.

APPEAL by plaintiffs from order entered 10 November 1989 in WAKE County Superior Court by *Judge Wiley F. Bowen* granting defendants' motion for a new trial on the issue of damages. Heard in the Court of Appeals 27 September 1990.

Plaintiffs' negligence action against defendants arises out of an automobile accident in which defendant Stewart, operating a truck owned by defendant A-1 Services, collided with the rear of a car owned and occupied by plaintiff Ursula Young. Prior to the accident Ursula Young [hereinafter plaintiff] had worked as a real estate broker. Plaintiff and Jim Barlow had formed a real estate partnership known as B & Y Associates in which the two were the only employees. Each year the two placed all commissions earned by either of them in the partnership and, after subtracting certain expenses, divided the remainder equally. Their commissions were not individually assigned to each partner, and neither partner had a separate list of clients from which commissions were generated.

Prior to the accident, plaintiff had been in good health and had worked long hours—60 to 80—hours a week since entering the real estate business in 1977. Plaintiff's total income from B & Y Associates and other sources, including commissions from two German investors for whom she worked outside the real estate partnership, for 1983 was $36,996.93; 1984, $39,252.23; 1985, $35,047.04; and for 1986 was $34,680.65. As a result of the accident, plaintiff suffered from a permanent impairment to her spine and from lower back pain. Following the accident, B & Y's earnings and commissions were greatly reduced and the real estate partnership technically dissolved in April 1987.

Plaintiff offered evidence through expert witness J. C. Poindexter, an economics professor at North Carolina State University. Poindexter reviewed plaintiff's individual and B & Y Associates' tax records in calculating plaintiff's future lost earnings from real estate. Plaintiff's earnings were readily ascertainable to include 50 percent of the gross commissions of B & Y Associates. Poindexter testified that plaintiff's average yearly taxable income for the years 1983 through 1986 was $27,049.00. He predicted an average yearly future income of $16,771.00. After hearing evidence regarding the nature of plaintiff's injuries and her damages, including lost earnings and lost earning capacity, the jury returned a verdict in the amount of $139,505.00 for injuries suffered by plaintiff.

Pursuant to Rules 50 and 59 of the North Carolina Rules of Civil Procedure, defendants moved for entry of judgment notwithstanding the verdict, or, in the alternative, for an order setting aside the verdict and for a new trial. At a 10 November 1989 hearing, the court denied defendants' motions for judgment notwithstanding the verdict, to set aside the verdict, and new trial on the issue of negligence, but granted defendants' motion for new trial on the issue of plaintiff's damages.

Among its findings entered pursuant to Rule 52, the court found the following facts: Plaintiff worked solely on a commission basis, and all commissions were paid into B & Y Associates. No evidence was introduced at trial to show what portion of the commissions paid into B & Y Associates was actually generated by plaintiff's efforts. Plaintiff's evidence presented on the issue of plaintiff's lost income and lost earning capacity was insufficient to go to the jury and the verdict was contrary to law. The testimony of plaintiff's witness, J. C. Poindexter, as to plaintiff's lost income

and lost earning capacity should have been excluded as speculative and confusing to the jury. Plaintiffs appeal.

Leonard T. Jernigan, Jr. for plaintiffs-appellants.

LeBoeuf, Lamb, Leiby & MacRae, by Kurt E. Lindquist II and Stephanie C. Hutchins, for defendants-appellees.

WELLS, Judge.

In their first assignment of error, plaintiffs contend the trial court erred in finding plaintiff Ursula Young's lost earning capacity evidence insufficient to go to the jury and that the verdict was not supported by the evidence and contrary to law. Defendants contend the order from which plaintiffs appeal is discretionary and is subject to review only for abuse of discretion. However, the decision is reviewable where the trial judge grants or refuses to grant a new trial based on some question of law or legal inference which the judge decides. *Hunnicutt v. Griffin*, 76 N.C. App. 259, 332 S.E.2d 525 (1985). In granting defendants' motion for new trial on damages, the trial court's decision was premised on the erroneous ruling that plaintiff Ursula Young's earning capacity evidence was inadmissible. Therefore, this ruling is reviewable as a matter of law.

A person engaged in a business who is injured by the negligence of another may recover lost earnings. However, as a general rule a person cannot recover lost business profits. A major exception to this general rule is that evidence of lost business profits is admissible as evidence of plaintiff's lost earning capacity in a proper case where the business earnings are due predominantly to a person's personal efforts and not from capital investment or employee labor. *Smith v. Corsat*, 260 N.C. 92, 131 S.E.2d 894 (1963), summarizes North Carolina law and states in part:

> In personal injury actions great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages, and as a broad general rule any evidence which tends to establish the nature, character and extent of injuries which are the natural and proximate consequences of the tortfeasor's acts is admissible in such actions, if otherwise competent. . . . In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings. . . .

> It is a generally accepted proposition that evidence of the profits of a business in which the injured party in a personal damage suit is interested, which depend for the most part upon the employment of capital, the labor of others, and similar variable factors, is inadmissible in such suit and cannot be considered for the purpose of establishing the pecuniary value of lost time or diminution of earning capacity, for the reasons that a loss of such profits is not the necessary consequence of the injury and such profits are uncertain and speculative. In such circumstances loss of profits cannot be considered either as an element or the measure of damages. In such case, the measure of damages is the loss in value of the injured person's services in the business. "Profits" and "earnings" are not synonymous. Loss of personal earnings is properly considered as an element of measure of damages. . . .
>
> However, where the business is small and the income which it produces is principally due to the personal services and attention of the owner, the earnings of the business may afford a reasonable criterion to the owner's earning power. . . . In cases where it is not established that the employment of capital, the use of labor of others, or similar variable factors were predominant in the injured person's business or determinative, for the most part, of the receipts realized, it is held that evidence of profits, in a restricted sense, or income (even if one or more of the factors mentioned were present and influential) may be used for the purpose of aiding in establishing a standard for the calculation of damages, if it conforms to the requirements of proximate cause and certainty. It has some bearing upon the question of damages, whether of loss of time or loss or diminution of earning capacity. Such evidence furnishes as safe a guide for the jury, under proper cautionary instructions, as in helping to determine the pecuniary value of loss of time or impairment of earning capacity. (Citations omitted).

The Court in *Smith v. Corsat* held plaintiff's evidence regarding business earnings from his small record selling company was admissible since the "predominating factors in the production of the business' profits were the attention, efforts, skill, connections and personal attributes of defendant, and that the employment of capital and the labor of others played a very small part. . . ." *Smith v. Corsat, supra.*

This Court has held that various cases fit into this exception and has approved the admission of evidence of business earnings to show lost earning capacity resulting from negligently inflicted injury. In *Griffin v. Disco, Inc.*, 49 N.C. App. 77, 270 S.E.2d 613 (1980), the Court held admissible evidence of plaintiff's business earnings where plaintiff owned and operated a paint and body shop and employed only one laborer. In *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E.2d 61 (1986), the Court stated that evidence of business earnings of a small door-to-door sales company, having only one employee—its president—would be admissible in a suit for lost earning capacity brought by its president. In *Smith v. Pass*, 95 N.C. App. 243, 382 S.E.2d 781 (1989), the Court held admissible evidence of plaintiff's van pool business earnings. The common thread in all of these cases is that each plaintiff's business earnings resulted from the personal efforts of the plaintiff and not from employment of capital or labor of others.

The evidence in this case tended to show that the profits from B & Y Associates were generated through the personal efforts of Jim Barlow and Ursula Young. No evidence was offered to suggest that B & Y Associates' profits were generated from capital investments or employee labor. No evidence was offered to contradict the evidence that B & Y Associates' profits were a result of anything but the attention, efforts, skill and connections of the two partners.

Notwithstanding these facts, defendants contend that because B & Y Associates' commissions cannot be traced back as generated by either partner personally, that the evidence is insufficient for jury consideration as a matter of law. We disagree. Other states have held admissible the evidence of partnership profits as long as the profits were generated by personal services and not the result of capital investments and employee labor. *Faber v. Gimbel Bros.*, 107 A. 222, 264 Pa. 1 (1919); *Thomas v. Union RY Co. of New York City*, 18 A.D. 185, 45 NYS 920 (1897); and as long as the future profits could be estimated with reasonable certainty. *Chicago, R.I. & P. RY. Co. v. Scheinkoenig*, 62 Kan. 57, 61 P. 414 (1900); *Normandin v. Kansas City*, 206 S.W. 913 (Mo. 1918). To hold otherwise would unreasonably and unfairly deny recovery of lost earning capacity for persons engaged in business partnerships.

Plaintiffs offered sufficient evidence of past earnings from which the jury could determine with reasonable certainty the profits of

B & Y Associates. The B & Y Associates' business records offered into evidence reflect that those profits fluctuated very little during the years preceding the accident. *Smith v. Pass*, 95 N.C. App. 243, 382 S.E.2d 781 (1989) (holding that even testimony lacking business records does not render evidence too speculative). Defendant had full opportunity to cross-examine plaintiffs and plaintiffs' expert witness in order to challenge the estimates. *See Peterson v. Johnson*, 28 N.C. App. 527, 221 S.E.2d 920 (1976).

Plaintiffs also assign as error the trial court's finding that Dr. Poindexter's testimony regarding plaintiff Ursula Young's earning capacity was speculative and prejudicial. The trial court's finding was clearly based on the erroneous belief, discussed above, that plaintiff Ursula Young's earning capacity evidence was incompetent and inadmissible. For the reasons stated, the trial court's order granting defendants a new trial on the issue of damages is

Reversed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. L. J. GREEN

No. 9030SC467

(Filed 15 January 1991)

1. Assault and Battery § 85 (NCI4th) — secret assault — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for secret assault where it tended to show that the victim was wounded by someone he could not see; he called for defendant who then came out of the woods with a .357 magnum rifle, fired at the victim four more times, striking him at least twice; the victim had earlier brought an action against defendant for allowing cattle to graze on his land; the victim and defendant did not get along; the victim observed defendant running into the woods but did not know what de-

fendant was doing at the time; and the victim testified that he did not know why defendant wanted to shoot him.

Am Jur 2d, Assault and Battery § 107.

2. Criminal Law § 1086 (NCI4th)— multiple offenses—same mitigating and aggravating factor in each case—no error

The trial court could properly sentence defendant on all charges by finding the same mitigating and aggravating factor in each case.

Am Jur 2d, Assault and Battery § 108; Criminal Law §§ 598, 599.

APPEAL by defendant from judgment entered 18 January 1990 by *Judge Claude S. Sitton* in HAYWOOD County Superior Court. Heard in the Court of Appeals 14 November 1990.

On 17 January 1990, a jury convicted defendant of secret assault in violation of N.C. Gen. Stat. § 14-31, assault with a deadly weapon with intent to kill inflicting serious injury in violation of § 14-32(a), discharging a firearm into an occupied vehicle in violation of § 14-34.1 and assault with a deadly weapon in violation of § 14-33(b)(1). For each offense, the trial court found the aggravating factor that defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement, and the mitigating factor that defendant was a person of good character or had a good reputation in the community. The trial court found that the aggravating factor outweighed the mitigating factor for each offense and sentenced defendant to a total of 36 years in prison and a two year suspended sentence with five years supervised probation.

Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. Sigsbee Miller and Special Deputy Attorney General Elisha H. Bunting, Jr., for the State.

Elmore & Powell, P.A., by Bruce Elmore, Sr.; and Clarke Wittstruck, for defendant-appellant.

ORR, Judge.

Defendant assigns 13 errors on appeal. For the following reasons, we find that defendant received a trial free from prejudicial error.

The following facts are pertinent to this case on appeal. On 13 August 1989, the victims, Edwin and Betty Allison, drove to their 245-acre tract of land to water their goats. Their land is located in a remote area of Haywood County near Jonathan Creek. In order to reach their property, they had to pass defendant's house on the main road at the foot of a hill.

As the Allisons drove to their property, they passed through a gate located on adjoining property. The gate was surrounded by thick vegetation. When the Allisons arrived at their property, they found that two water buckets and a solar fence unit were missing, and also discovered several boys drinking beer. The boys left the premises when the Allisons drove up. The Allisons followed the boys off the property and noticed that when the boys arrived at the gate, they pulled the metal post out of the ground, drove through and sped away. The Allisons then drove to a store and purchased a bucket. They returned to their property to water the goats and they noticed that the gate was in the same condition as it had been when they drove through it after the boys.

After they watered their goats, they drove back to the gate. Mr. Allison testified that he noticed that some treated lumber and a pipe had been placed against the gate which would require him to get out of his truck and open the gate. He also noticed additional "suspicious" tire tracks. Mr. Allison then observed defendant "humped over running over in the woods" near the gate.

When the Allisons reached the gate, Mr. Allison got out of his truck and reached down to open the gate. As he did, he heard what sounded like a small caliber gun discharge. As he pulled the gate open, he heard a second shot. He walked back to his truck to get his .22 caliber automatic pistol which he kept in the truck. He returned to the gate post and then heard a high powered rifle shot as he was struck in the left arm. He was then struck by another bullet in the shoulder and arm. Mr. Allison then got behind his truck and yelled for defendant to come out of the woods. Defendant then came out of the bushes and shot at least four more times at Mr. Allison. At least two of defendant's shots went through the truck where Mrs. Allison was located.

Mr. Allison got his gun to his wife who then fired in defendant's direction. Defendant fled the scene, and Mr. Allison jumped into his truck and drove away. Mrs. Allison was later able to get her husband to the passenger side of the vehicle in order to drive him to the hospital.

Defendant was located several days later in an adjoining county and arrested. At trial, Mr. Allison testified that he had prosecuted defendant in 1988 for letting his livestock roam on the Allison's property.

I.

[1] Defendant first argues that the trial court erred in denying defendant's motion to dismiss because there was insufficient evidence to establish each element of each of the charges against him. In his brief, defendant combined four assignments of error but argued only the sufficiency of the evidence to support the charge of secret assault (assignment of error nine).

Under Rule 28(b)(5) of the N.C. Rules of Appellate Procedure, when a party fails to cite authority in support of an assignment of error, the party abandons that assignment of error. N.C.R. App. P. 28(b)(5); *Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987). Therefore, we find that defendant has abandoned assignments of error six, seven and eight. We now turn to whether the evidence was sufficient to support the charge of secret assault.

In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State and determine if a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. *State v. Thomas*, 65 N.C. App. 539, 541-42, 309 S.E.2d 564, 566 (1983) (citations omitted). In order to withstand such motion, the State must provide substantial evidence of each element of the offense charged, which, in this context, is defined as more than a scintilla. *Id.*

The crime of secret assault is defined as:

> § 14-31. Maliciously assaulting in a secret manner.
>
> If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been

conscious of the presence of his adversary, he shall be punished as a Class F felon.

N.C. Gen. Stat. § 14-31 (1986).

Under this statute, the State must prove that the defendant (1) acted in a secret manner, (2) with malice, (3) perpetrated an assault and battery, (4) with a deadly weapon, and (5) with intent to kill. *State v. Hill*, 287 N.C. 207, 216-17, 214 S.E.2d 67, 74 (1975).

In the present case, the State presented sufficient evidence that after Mr. Allison was wounded by someone he could not see, he called for defendant. Defendant came out of the woods with a rifle and shot at Mr. Allison four more times. This is sufficient evidence to go to the jury on the elements of assault and battery with a deadly weapon.

The element of intent to kill may be inferred from the manner in which the defendant made the assault, the nature of the assault, the conduct of the parties and other relevant circumstances. *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982). This Court has held that one who deliberately fired a pistol into his victim's face at close range had the requisite intent to kill, even though the victim did not die. *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973). In the case *sub judice*, there was sufficient evidence that defendant fired a .357 magnum rifle several times at Mr. Allison, striking him at least twice. Therefore, we find that the jury could infer defendant's intent to kill from these facts.

Moreover, we find that there was sufficient evidence of defendant's malice and secret manner. Malice may be shown by evidence of ill will, hatred or animosity. *State v. Miller*, 189 N.C. 695, 128 S.E. 1 (1925). Mr. Allison testified that he had brought an action against defendant in 1988 for allowing cattle to graze on his land without his consent, and that he had warned defendant not to kill a deer and bring it across his property. Defendant also testified that he and Mr. Allison had problems, and that they did not get along. This evidence tended to show that defendant was motivated by animosity or ill will.

Regarding defendant's "secret manner," the victim does not have to be aware of the defendant's presence, but it is necessary that the victim not know the defendant's purpose. *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924). Here, Mr. Allison testified that

he observed defendant running into the woods and did not know what defendant was doing at the time. He also testified that he did not know why defendant wanted to shoot him. We find this sufficient to meet the secret manner element of this crime. Based upon the above evidence, we find that the State presented sufficient evidence to meet all elements of secret assault.

II.

[2] Defendant's next assignments of error concern whether the trial court abused its discretion in sentencing defendant on all charges by finding the same mitigating and aggravating factor in each case. We hold that the trial court did not err.

Under the Fair Sentencing Act, N.C. Gen. Stat. § 15A-1340.4, the trial court must consider all mitigating and aggravating factors before imposing a sentence other than the presumptive term. *State v. Parker*, 315 N.C. 249, 254, 337 S.E.2d 497, 500 (1985). The same aggravating factor may be used for more than one conviction. *State v. McCullers*, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

If the trial court imposes a sentence greater than the presumptive term for any conviction, it must consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighs the other. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983); *State v. Wood*, 61 N.C. App. 446, 300 S.E.2d 903, *disc. review denied*, 308 N.C. 547, 302 S.E.2d 884 (1983). It is within the trial court's discretion to determine the weight given to each aggravating or mitigating factor. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Moreover, once the trial court determines that an aggravating factor outweighs a mitigating factor, it is within the sound discretion of the trial court to decide the extent to which the sentence may exceed the presumptive term. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988); *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985). Upon appellate review, this Court reviews only errors of law. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E.2d 732 (1983), *cert. denied*, 310 N.C. 310, 312 S.E.2d 653 (1984).

In the present case, the trial court consolidated all charges for trial, but imposed separate judgments and sentences for each crime for which defendant was convicted. The trial court found

the same aggravating factor and mitigating factor, found that the aggravating factor outweighed the mitigating factor in each case, and entered appropriate written findings to this effect. The trial court then sentenced defendant to terms greater than the presumptive sentence, but not beyond the maximum sentence for each offense. We hold that the trial court's actions in the case *sub judice* are well within the above principles of law. Therefore, we find no error.

Defendant's remaining assignments of error concern whether the trial court erred in admitting and excluding certain testimony of Mr. Allison, and other witnesses. We have reviewed these assignments of error and find them to be without merit.

For the above reasons we find that the trial court did not err.

No error.

Judges PHILLIPS and GREENE concur.

IN THE MATTER OF THE ESTATE OF CALVIN LANCASTER TROGDON

No. 9021SC232

(Filed 15 January 1991)

Executors and Administrators § 23 (NCI3d); Fornication and Adultery § 4 (NCI3d)— year's allowance—forfeiture for adultery—evidence of adultery insufficient

The decision of the trial court finding that a wife was barred from receiving the surviving spouse's year's allowance under N.C.G.S. § 30-15 (1984) was reversed where, aside from extended cohabitation, there was no evidence of inclination to engage in adultery which could support an inference of adultery unless resort is made to the "suspicion and conjecture" which the Court of Appeals has attempted to avoid by its insistence on evidence of inclination as well as opportunity.

Am Jur 2d, Descent and Distribution § 133.

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 ALR3d 486.

Judge COZORT dissenting.

APPEAL by petitioner from judgment entered 19 January 1990 by *Judge Thomas W. Ross* in FORSYTH County Superior Court. Heard in the Court of Appeals 16 November 1990.

This case concerns the granting of a surviving spouse's year's allowance under G.S. § 30-15. Petitioner-appellant Patricia McNulty Trogdon, wife of Calvin Lancaster Trogdon, deceased, petitioned for a year's allowance following the death of her husband. The allowance was granted by Magistrate Vannoy. Respondent-appellee Bradley Floyd Trogdon, Administrator of the Estate of Calvin Lancaster Trogdon, appealed to the superior court. The matter was heard *de novo* by Judge Ross. From entry of judgment setting aside the assignment, petitioner appeals.

Bailey and Thomas, by Wesley Bailey, David W. Bailey, Jr. and John R. Fonda, for petitioner-appellant.

Morrow, Alexander, Tash, Long & Black, by Clifton R. Long, Jr., for respondent-appellee.

JOHNSON, Judge.

The testimony presented at the hearing tended to show the following facts. Appellant-wife and deceased were married for the second time on 14 June 1983 and remained lawfully married at the time of his death on 17 April 1988. Prior to this marriage, the husband was involved in a motorcycle accident which left him a quadriplegic. After the marriage, the wife and husband moved into a house which was built to accommodate the husband's physical condition. The wife left the marital home on 11 March 1985 and moved into the Village Apartments. At some time thereafter, Doug Winfrey moved into her apartment. Petitioner's son, the heir and administrator of the husband's estate, testified that petitioner told him she left the marital home because she just couldn't put up with it. He further testified to her saying that Doug Winfrey moved into her apartment because they couldn't see paying rent for two different apartments. Petitioner claimed her fifth amendment right and refused to answer any questions concerning the apartment. A private investigator testified that on 28 and 29 October 1987 he observed petitioner and Doug Winfrey remain together in the apartment during the night and leave together in the morning.

Judge Ross found from the evidence that petitioner was barred by G.S. § 31A-1(a)(2) from receiving a year's allowance in the personal property of her spouse.

The issue on appeal is whether the trial court erred in finding that the petitioner committed adultery and is therefore barred from receiving a year's allowance, when there was evidence of opportunity to commit adultery, in the form of an extended cohabitation, but no direct evidence of adultery and no other evidence of an inclination to commit adultery.

Specific acts which will bar surviving spouses, parents, slayers and others from exercising their rights in the property of the deceased are found in Chapter 15A of the N.C. General Statutes. As to spouses, every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, is entitled, out of the personal property of the deceased spouse, to an allowance of $5,000 for his support for one year after the death of the deceased spouse. G.S. § 30-15. However, a "spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned" is barred from receiving the year's allowance. G.S. §§ 31A-1(a)(2), 31A-1(b)(4). Chapter 31A is to be construed broadly so as to effect the policy of this State that no person shall be allowed to profit by his own wrong. G.S. § 31A-15.

Adultery may be proved by direct evidence but for obvious reasons is usually proved by circumstantial evidence. *State v. Davenport*, 225 N.C. 13, 33 S.E.2d 136 (1945). North Carolina follows the majority rule that where proof of adultery is by circumstantial evidence there must be proof of both opportunity and inclination to commit adultery. 1 R. Lee, *N.C. Family Law* § 65 (4th ed. 1979 and Supp. 1989). *Wallace v. Wallace*, 70 N.C. App. 458, 319 S.E.2d 680 (1984), *disc. rev. denied*, 313 N.C. 336, 327 S.E.2d 900 (1985). In the most recent case to consider the issue it was explicitly held that in order to establish adultery, there must be evidence to show both opportunity and inclination to commit the act and that evidence of opportunity alone is not enough. *Id.* The *Wallace* Court specifically criticized a previous decision where it had held that circumstantial evidence of opportunity together with improper circumstances, but without evidence of inclination, was sufficient to go to the jury. *See Owens v. Owens*, 28 N.C. App. 713, 716, 222 S.E.2d 704, 706, *disc. rev. denied*, 290 N.C. 95, 225 S.E.2d 324 (1976) (where the court said: "In some cases evidence of oppor-

tunity and incriminating or improper circumstances, without evidence of inclination or adulterous disposition, may be such as to lead a just and reasonable man to the conclusion of adulterous intercourse."). In *Owens*, plaintiff husband presented evidence that the defendant wife was living with another man for two months, that each morning the man left the house about 8:00 a.m. and that the two of them were seen together buying clothes. The *Owens* Court found this evidence sufficient to take the case to the jury.

In *Horney v. Horney*, 56 N.C. App. 725, 289 S.E.2d 868 (1982), we again faced the question of the sufficiency of evidence and being "concerned that [the] lack of a clear standard has resulted in precisely that which this Court and our Supreme Court have repeatedly held to be impermissible—trial by 'suspicion and conjecture,' " we attempted to "draw a more definite line" between permissible inference and mere conjecture. *Id.* at 727, 289 S.E.2d at 869. In *Horney*, plaintiff's evidence tended to show that the defendant husband had a friendly relationship with another woman, that they were alone together on several occasions in the woman's office and on at least one occasion in her home, that she made phone calls to him when he was out of town on business, that the husband was often away from home on Saturday afternoons, and that during a reconciliation period the husband refused to sleep with the wife and was often away in the evenings. The *Horney* Court held that this was insufficient evidence to go to the jury but suggested in *dicta* that had there been evidence of other suspicious circumstances such as being together very late at night, in state of undress, or evidence of feelings of love or of affectionate behavior, the result would have been different.

In *Wallace*, this Court reviewed the *Owens* and *Horney* decisions and concluded:

> We are persuaded that the "more definite line" needed to be drawn in adultery cases is to require that in order to establish adultery, the evidence, whether circumstantial or direct, must tend to show both opportunity and inclination to engage in sexual intercourse and that when the evidence shows no more than an opportunity, an issue of adultery should not be submitted.

70 N.C. App. at 462, 319 S.E.2d at 683. In *Wallace*, the plaintiff's evidence showed that the defendant left a farmhouse with a woman not his wife at 10:30 in the morning, entered the same motel that

the woman later entered, drove with her to the airport and to a restaurant, remained overnight in the same motel and remained overnight in his condominium with the woman. The Court held that this evidence supported only an inference that defendant had an opportunity to engage in adulterous conduct but did not allow a reasonable inference as to defendant's inclination to engage in adultery. Finding that the evidence failed to show an inclination, the Court held that the trial court erred in denying defendant's motion for a directed verdict.

In the case *sub judice*, plaintiff clearly presented sufficient evidence as to the opportunity prong of the test. However, there was no evidence of any inclination on the part of the wife to engage in an adulterous relationship with her "apartment-mate" aside from the extended cohabitation itself. Plaintiff's own evidence was that the spouse shared her apartment with Mr. Winfrey for economic reasons. Aside from the extended cohabitation, there was no evidence of inclination to engage in adultery which could support an inference of adultery unless resort is made to the "suspicion and conjecture" which this Court has attempted to avoid by its insistence on evidence of inclination as well as opportunity. *Wallace*, 70 N.C. App. 459, 319 S.E.2d 680.

We find that plaintiff's evidence on the issue of adultery must fail. The decision of the trial court finding the wife barred from receiving the year's allowance is

Reversed.

Judge WELLS concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I disagree with the majority's holding that there was insufficient evidence to support the trial court's decision that the wife's adultery barred her from receiving a year's allowance.

The administrator's evidence showed that the wife left her husband in March of 1985. At some point during 1985, Doug "Cookie" Winfrey moved into an apartment with the wife. The wife admitted to her son that she and Mr. Winfrey were living together. The son testified that his mother and Mr. Winfrey were still living

together on the date of the hearing below, which was 1 December 1988. The decedent died on 17 April 1988. Thus, there was ample evidence that the wife was living in an apartment with another man for the last two to three years of her husband's life.

The wife was called by the administrator as an adverse witness. When she was asked whether someone moved into the apartment with her, and whether Doug Winfrey lived with her, she refused to answer on the grounds that she might incriminate herself. The wife's invocation of the Fifth Amendment to the United States Constitution can be used against her in a civil proceeding, and the finder of fact can use her refusal to answer to infer that the testimony would have been unfavorable to her. In *Fedoronko v. American Defender Life Ins. Co.*, our Court quoted with approval this language from C.J.S.:

> "[W]hile the claim of privilege may not be used against defendant [or a witness] in a subsequent criminal prosecution, an inference that his testimony would have been unfavorable to him is available to his opponent in a civil cause in which defendant [or a witness] pleads the privilege. . . ."

69 N.C. App. 655, 657-58, 318 S.E.2d 244, 246 (1984) (quoting 98 C.J.S. *Witnesses* § 455, at 308 (1957)). The Court summarized the rule as follows:

> The relevant principle to be derived is that a witness's silence can provide the basis for an inference by the factfinder, even though it cannot be used as evidence from which to find him guilty.

Id. at 658, 318 S.E.2d at 246.

When the wife refuses to answer questions about her living arrangements, on the grounds that it may tend to incriminate her, in the face of evidence that she has been living with a man not her husband for two to three years, there is sufficient evidence for the trial court to infer that she has committed adultery. To hold otherwise defies common sense in favor of a hypertechnical legal principle.

I vote to affirm the trial court.

FEDERAL PAPER BOARD COMPANY, INC. AND ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY, PLAINTIFFS/APPELLANTS v. KAMYR, INC. AND KAMYR INSTALLATIONS, INC., DEFENDANTS/APPELLEES

No. 9013SC453

(Filed 15 January 1991)

1. **Negligence § 30 (NCI3d)— installation of flash tank—summary judgment for defendants—improper**

Defendants failed to show that there was no genuine issue of material fact in an action arising from an explosion in a flash tank in a continuous digester system at a paper mill where the evidence from plaintiffs' experts tends to show that the continuous digester system was improperly designed and that it did not include sufficient safety relief valves to protect against overpressurization, that it did not have a fail safe system for protecting against such an explosion, that the system was improperly installed, that the primary pressure relief device (a water loop seal) was closed based on defendant Kamyr's recommendation, plaintiffs contend that their systems operator followed Kamyr's operational instructions to avert overpressurization, and defendants contend that there were sufficient safety relief devices which were not properly operated by or inspected and maintained by plaintiffs, that the system was properly installed, that the water loop seal was an accessory to be installed and maintained by the customer, and that there could not have been an overpressurization if the facts leading up to the explosion were as plaintiffs suggest.

Am Jur 2d, Products Liability §§ 267, 368, 931, 933, 936, 946, 963.

2. **Negligence § 35.2 (NCI3d)— explosion of flash tank at paper plant—contributory negligence—summary judgment for defendants improper**

Summary judgment should not have been granted for defendants on the basis of contributory negligence in an action arising from the explosion of a flash tank in a continuous digester system in a paper mill. As to any intervening cause resulting from plaintiff's actions, the rule is that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left for the jury to deter-

mine whether the intervening act and the resulting injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act.

Am Jur 2d, Products Liability § 932.

3. Evidence § 47 (NCI3d)— explosion at paper plant—expert testimony

The Court of Appeals rejected defendants' contention that plaintiffs' experts were not qualified and that their opinions were without sufficient factual basis in an action arising from an explosion at a paper plant. Once the trial court determines that expert testimony will not mislead the trier of fact, any question as to the sufficiency of the factual basis of the opinion affects the credibility of the testimony but not its competence as evidence. That the experts were not the most qualified persons to express an opinion is not grounds for excluding their testimony. Questions of an expert's credibility may not be resolved by summary judgment.

Am Jur 2d, Expert and Opinion Evidence § 59.

APPEAL by plaintiffs from *Brooks (Dexter), Judge*. Judgment entered 23 December 1989 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 3 December 1990.

This is a civil action wherein plaintiffs seek to recover damages for defendants' negligence and breach of contract relating to defendants' design, manufacture, and installation of a continuous digester system in the Federal Paper Board (hereinafter FPB) mill located in Riegelwood, Columbus County, North Carolina. The record on appeal discloses that FPB and defendants entered into a contract whereby defendants were to construct and install a continuous digester system, the purpose of which is to turn wood chips into pulp for making paper, in the FPB paper mill. This system uses flash tanks to provide steam used in the process.

The system was installed and began to operate on 28 April 1981. On 1 June 1984, flash tank number 2 exploded, resulting in damage to FPB's property in addition to the continuous digester system, lost production, and extra operating expenses. FPB submitted a claim to its insurer, co-plaintiff Arkwright, who made payment to FPB in accord with the applicable insurance policy. Arkwright

and FPB instituted suit in July, 1986 to recover from the defendants the damages sustained as a consequence of the explosion.

In their complaint, plaintiffs averred that the number 2 flash tank failed as a result of an internal build up of pressure caused by the Kamyr's negligent failure to include sufficient protection in both the continuous digester system and the number 2 flash tank to guard against and/or prevent such overpressurization. Plaintiffs also allege that this failure to provide protection against overpressurization amounted to a breach of contract by defendants. Plaintiffs further allege that Kamyr Installations was negligent in connection with its failure to provide a properly erected number 2 flash tank.

Defendants filed an answer denying the material allegations of plaintiffs' complaint and moved for summary judgment. Defendants' motion was supported by answers to interrogatories, affidavits, and depositions tending to show the following: that plaintiffs' account of the events which led up to the accident could not have resulted in an explosion caused by overpressurization in the continuous digester system, that plaintiffs' experts were unqualified and/or their opinions were without a sufficient factual basis, that the pressure relief system was proper for the continuous digester system when used according to its operational instructions, that the system was not designed, manufactured or installed improperly, but was in the control of the plaintiff's operator who must not have taken the necessary steps to avoid overpressurization by utilizing the existing relief devices, and that the plaintiffs did not properly maintain or inspect the system.

After hearing evidence in support of and in opposition to the motion, and after having considered the memoranda and arguments of counsel for the parties, the Honorable Dexter Brooks entered summary judgment for the defendants on 27 December 1989. Plaintiffs appealed.

Robins, Kaplan, Miller & Ciresi, by Brent J. Kaplan and R. Dennis Withers, for plaintiff, appellant.

Smith & Smith, by W. G. Smith, for plaintiff, appellant.

Womble Carlyle Sandridge & Rice, by Gene A. Dickey, J. Keith Tart, and Daniel Donahue, for defendants, appellees.

HEDRICK, Chief Judge.

[1] Plaintiffs' argument on appeal is that the trial court erred by granting summary judgment for Kamyr and Kamyr Installations because there are disputed genuine issues of material fact and therefore defendants are not entitled to judgment as a matter of law. Plaintiffs argue that the issues which must be resolved by a jury include, but are not limited to: the cause of the failure of flash tank 2, alleged breach of contract and negligence of Kamyr in its design of the continuous digester system, and alleged negligence of Kamyr Installations in its supervision of the installation of flash tank 2.

Summary judgment is rarely appropriate in a negligence action. *Durham v. Vine*, 40 N.C. App. 564, 253 S.E.2d 316 (1979). The moving party must establish that there is no genuine issue of material fact and that the party is entitled to a judgment as a matter of law. N.C.R. Civ. P. 56. In determining whether summary judgment is proper, the court must view the record in the light most favorable to the opposing party, giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor. *Freeman v. Sturdivant Dev. Co.*, 25 N.C. App. 56, 212 S.E.2d 190 (1975).

The defendants have failed to show that there is no genuine issue of material fact. The record discloses that in answers to interrogatories and in depositions, the evidence from plaintiffs' experts tends to show that the continuous digester system was improperly designed in that it did not include sufficient safety relief valves to protect against overpressurization, that it did not have a fail safe system for protecting against such an explosion, and that the system was improperly installed. In addition, the "primary pressure relief device," a water loop seal, was closed off based on Kamyr's recommendation. Plaintiffs further argue that their systems operator followed Kamyr's operational instructions to avert overpressurization, and that the system nevertheless failed.

The defendants argue that there were sufficient safety relief devices which were not properly operated by plaintiff's operator nor inspected and maintained by plaintiffs, that the system was properly installed, and that the water loop seal was an accessory to be installed and maintained by the customer. They also contend that if the facts leading up to the explosion were as plaintiffs

suggest, there could not have been an overpressurization of the system.

These arguments show that there are multiple genuine issues of material fact when viewed in the light most favorable to the plaintiffs. Summary judgment may not be used to resolve factual disputes which are material to the disposition of the action. *Robertson v. Hartman*, 90 N.C. App. 250, 368 S.E.2d 199 (1988). Nor may summary judgment be used where conflicting evidence is involved. *Smith v. Currie*, 40 N.C. App. 739, 253 S.E.2d 645, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979). Where there is any question regarding the credibility of plaintiffs' evidence as to the operating conditions at the time of the failure, or if there is a question which can be resolved only by the weight of the evidence, summary judgment must be denied. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E.2d 190 (1980). Genuine issues exist in connection with causation and therefore preclude summary judgment in this action.

[2] Like negligence, contributory negligence is rarely appropriate for summary judgment. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978). The burden of showing contributory negligence is on the defendant, and the motion for non-suit may never be allowed on such an issue where the material facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary to rely totally or partially on evidence offered for the defense. The motion for summary judgment and the motion for a directed verdict, formerly non-suit, are functionally similar. *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979). Contradictions or discrepancies in the evidence, even when arising from claimant's own evidence, must be resolved by the jury rather than the trial judge. *Allen v. Pullen*, 82 N.C. App. 61, 345 S.E.2d 469, *cert. denied*, 318 N.C. 691, 351 S.E.2d 738 (1986). As to any intervening cause resulting from plaintiff's actions, the rule is that except in cases so clear that there can be no two opinions among men of fair minds, the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559 (1984). Based on the contradictions in the evidence, summary judgment should have been denied.

[3] The defendants also argue that plaintiffs' experts are not qualified, and that their opinions are without sufficient factual basis. An expert witness is one who through study and/or experience is better qualified than the jury to form an opinion on a particular subject. *Bryant v. Sampson Memorial Hospital*, 72 N.C. App. 203, 323 S.E.2d 390 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 478 (1984). An expert's testimony should not be excluded because there are others who are better qualified or more knowledgeable. *Watts v. Cumberland County Hospital Systems, Inc.*, 75 N.C. App. 1, 330 S.E.2d 242, *disc. review denied*, 317 N.C. 321, 345 S.E.2d 201 (1985). Expert testimony is admissible as long as the witness can be helpful to the jury because of his superior knowledge. *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981).

Once the trial court determines that the expert testimony will not mislead the trier of fact, any question as to the sufficiency of the factual basis of the opinion affects the credibility of the testimony but not its competence as evidence. *Barbecue Inn, Inc. v. Carolina Power & Light Co.*, 88 N.C. App. 355, 363 S.E.2d 362 (1988). If there is any question as to an expert's credibility in a summary judgment motion or if a question exists which can be resolved only by the weight of the evidence, summary judgment must be denied. *City of Thomasville*, 300 N.C. 651, 268 S.E.2d 190.

In this case, the record shows that plaintiffs' experts were sufficiently knowledgeable to express an opinion which would be helpful to the jury as to the causation of the explosion of the continuous digester system. That they were not the most qualified persons to express an opinion is not grounds for excluding their testimony. *Watts*, 75 N.C. App. 1, 330 S.E.2d 242. As to the question of the sufficiency of the factual basis of their opinions, this affects the credibility of the testimony and not its admissibility. *Barbecue Inn*, 88 N.C. App. 355, 363 S.E.2d 362. Questions of an expert's credibility may not be resolved by summary judgment. *City of Thomasville*, 300 N.C. 651, 268 S.E.2d 190.

For the foregoing reasons, we hold that granting summary judgment for defendants was improper because genuine issues of material fact exist, and defendants are not entitled to summary judgment as a matter of law. The decision of the Superior Court is reversed.

Reversed.

Judges LEWIS and WYNN concur.

DAVID R. DALE AND WIFE, VIRGINIA R. DALE; IRWIN C. WINTER; JERRY SHANNON v. TOWN OF COLUMBUS, N.C.; KATHLEEN P. McMILLIAN, MAYOR; RAYMOND C. BLACKWELL, COMMISSIONER; GROVER W. HUTCHERSON, COMMISSIONER; ROBERT E. ORMAND, COMMISSIONER; ELIZABETH C. SCRUGGS, EXECUTRIX, ESTATE OF PAULINE M. COWAN, DECEASED

No. 9029SC523

(Filed 15 January 1991)

1. **Municipal Corporations § 30.9 (NCI3d)— rezoning—not spot zoning**

A rezoning by the Board of Commissioners of the Town of Columbus from R-2 (Medium Density Residential) to HC (Highway Commercial) did not constitute illegal spot zoning where the small tract rezoned Highway Commercial is not surrounded by a much larger uniformly zoned area and no evidence supports plaintiffs' contention that the sole purpose of the Board's action was to benefit the landowner or that only the landowner would profit by the rezoning at the expense of the greater community.

Am Jur 2d, Zoning and Planning §§ 76, 77.

Spot zoning. 51 ALR2d 263.

2. **Municipal Corporations § 30.9 (NCI3d)— rezoning—not contract zoning**

A rezoning by the Board of Commissioners of the Town of Columbus from a residential designation to Highway Commercial was not illegal contract zoning where there was no evidence of any reciprocal agreement made between the Board and the current owner or anyone else concerning the property and the transcript is unequivocal that the Board understood that the owner of the property was not bound to operate

any specific establishment on the tract and that the Board was advised of all of the possible uses.

Am Jur 2d, Zoning and Planning § 17.

3. Municipal Corporations § 30.20 (NCI3d)— rezoning—proper procedures followed

All the proper rezoning procedures were followed in a rezoning from a residential to a commercial designation and there was no indication that the Board's decision was a foregone conclusion or that the decision-making procedures were a ploy to cover a hidden agreement between the landowner and the zoning authority.

Am Jur 2d, Zoning and Planning §§ 17, 47-49, 65.

APPEAL by plaintiffs from order entered 6 March 1990 by *Judge Hollis M. Owens, Jr.*, in POLK County Superior Court. Heard in the Court of Appeals 4 December 1990.

Plaintiffs filed a complaint in August 1989 seeking nullification of an amendment to a zoning ordinance enacted by the Board of Commissioners of the Town of Columbus, North Carolina, on 6 July 1989. Defendants filed a motion for summary judgment, and an order granting summary judgment was entered on 6 March 1990. Plaintiffs appealed.

In 1983 the Columbus Board of Commissioners enacted a comprehensive zoning plan dividing the town into six land use districts. The districts are designated as follows: Low Density Residential (R-1); Medium Density Residential (R-2); Central Business District (CBD); Highway Commercial (HC); Industrial District (IND); and Public Service (PS).

Plaintiffs are persons who own property and live in the Beechwood subdivision, which contains large, expensive residences and lies within a R-2 Residential District. Section 704 of the town's zoning plan provides that R-2 Residential Districts are "primarily intended to provide locations for residential uses and supporting recreational and community service uses. . . . This district is intended to protect existing single family homes and subdivisions within the Town."

The ordinance under attack here redesignated a 4.99-acre tract from R-2 Residential to HC Highway Commercial status. Property

zoned Highway Commercial permits a wide range of uses including schools, libraries, motels, banks, restaurants, theatres, hospitals and other commercial and noncommercial enterprises.

The property in question was originally part of a seventeen-acre parcel proposed for rezoning to Highway Commercial. The Board of Commissioners agreed only to rezone the much smaller tract in an effort to provide more buffer between the new commercial district and the established residences in the area. Beechwood subdivision is located north and east of the 4.99-acre tract. Only a few feet of the rezoned tract borders on property of any present objecting landowner.

According to the town's zoning map, the rezoned property is located at the western edge of the town limits. The land immediately north and east of the square-shaped tract remains R-2 Residential. The land immediately west is a small pie slice shaped tract, which is wedged in between the 4.99-acre tract on the east and the town limits on the west. This narrow sliver of land is also zoned R-2. The land west of the town limits is zoned Highway Commercial. On the south the property is bounded by Highway 108. This road is the main east-west thoroughfare through Columbus. Across Highway 108 and touching the southwest corner of the 4.99-acre tract is a recently annexed area zoned Highway Commercial. Moving east along Highway 108 and directly across the highway from the tract, the land is zoned Public Service and contains a hospital and doctors' offices. Approximately 1000 feet from the southeast corner of the property is the corner of a large Highway Commercial tract that extends several thousand feet eastward along both sides of Highway 108.

Along Highway 108 from the western boundary of town to the eastern boundary, there are only two areas of land contiguous to the highway that remain zoned R-2 Residential. All other property next to the highway is zoned Highway Commercial, Central Business District or Public Service. Most of the recent business growth in the town has occurred in the western end. Except for annexations zoned R-2 Residential, all zoning changes made by the town since the adoption of the original zoning law have been from R-2 Residential to Highway Commercial.

Francis M. Coiner for plaintiff appellants.

Arledge-Callahan Law Firm, by J. Christopher Callahan, for defendant appellees.

ARNOLD, Judge.

Summary judgment is appropriate when there is no genuine issue as to any material fact and either party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56. Here, there is no substantial controversy over the facts. The controversy is about the legal significance of those facts. Determining the validity of the ordinance enacted by the Columbus Board is, therefore, a proper case for summary judgment. *See Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

The authority to enact zoning legislation is incorporated in N.C. Gen. Stat. § 160A-381 (1987). In addition, the Columbus Board has the authority to rezone property "when reasonably necessary to do so in the interests of the public health, the public safety, the public morals or the public welfare. Ordinarily, the only limitation upon this legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1970).

[1] Plaintiffs first contend the Board acted arbitrarily and capriciously in that the July rezoning ordinance constituted illegal "spot zoning." Spot zoning has been defined as follows:

> [a] zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned . . . so as to relieve the small tract from restrictions to which the rest of the area is subjected. . . . It is beyond the authority of the municipality, in the absence of a clear showing of a reasonable basis for such distinction.

Blades, 280 N.C. at 549, 187 S.E.2d at 45. Although not every case of spot zoning is illegal, *Chrismon v. Guilford County*, 322 N.C. 611, 627, 370 S.E.2d 579, 588 (1988), we fail to see any interpretation of the facts that would render the proposed rezoning here a case of spot zoning. The small tract rezoned Highway Commercial is not surrounded by a much larger uniformly zoned area. The property is bounded by a R-2 Residential district only on the north and east (and a small pie shaped sliver of land on the west). On the south it faces a major highway and across that road, the land is zoned Public Service. At its southwest corner, the tract touches a Highway Commercial district and a city boundary.

Across that boundary is a county Highway Commercial district. This assignment of error is overruled.

Plaintiffs make a related argument based upon their erroneous belief that the action constituted spot zoning. As our Supreme Court has noted, "the true vice of illegal spot zoning is in its inevitable effect of granting a discriminatory benefit to one landowner and a corresponding detriment to the neighbors or the community without adequate public advantage or justification." *Chrismon*, 322 N.C. at 628-29, 370 S.E.2d at 589. Plaintiffs argue that the action by the Board only benefits the individual landowner, causes irreparable damage to the surrounding property owners and has a detrimental impact on the entire community. We disagree.

The property rezoned here borders on the main east-west thoroughfare through Columbus. The record is clear that the Board discussed the negative effects of highway traffic on any residential property along the road. The Board reviewed the commercial nature of the remainder of Highway 108 and the town's comprehensive plan of commercial development along the highway. It also discussed the possible benefits of increasing the town's tax base and providing more jobs through the establishment of more commercial enterprises. No evidence supports plaintiffs' contention that the sole purpose of the Board's action was to benefit the landowner or that only the landowner would profit by the rezoning at the expense of the greater community.

[2] Finally, plaintiffs contend that the action by the Board constituted "contract zoning." "Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract." *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593; *see Allred*, 277 N.C. 530, 178 S.E.2d 432, and *Blades*, 280 N.C. 531, 187 S.E.2d 35. Plaintiffs argue that in the original rezoning request the landowner assured the zoning authorities that the property would be used only for an automobile dealership. They contend any activity of the Board "would necessarily have been based upon the assumption that this was the use to which the property would be subjected," and that this reciprocal understanding resulted in a tacit agreement which constituted contract zoning.

The illegal aspect of contract zoning occurs when a zoning authority binds itself to enact a zoning amendment and agrees

not to alter the zoning change for a specified period of time. *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593 (citing Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267, 269 (1968)). When a zoning authority takes such a step and curtails its independent legislative power, it has acted *ultra vires* and the rezoning is therefore a nullity. *Id.*

We find no evidence of any reciprocal agreement made between the Board and the current owner, the applicant who filed for rezoning, or with anyone else concerning the property. The transcript is unequivocal that the Board understood that if the property was rezoned, the owner was not bound to operate an automobile dealership or any other specific establishment on the tract. The record is also clear that the Board was advised of all the possible uses that could be made in a Highway Commercial district and of the possible uses if the property remained R-2 Residential. After comparing the two alternatives, the Board made the decision to rezone.

[3] Furthermore, all the proper rezoning procedures were followed in this case. *See Chrismon*, 322 N.C. at 636, 370 S.E.2d at 593. Initially, the proposed change was referred to the Town Planning and Zoning Board, which endorsed the change. A public hearing was held, and at a separate public meeting, the Board unanimously adopted the zoning change. There is no indication that the Board's decision was a foregone conclusion or that the decision-making procedures were a ploy to cover up a hidden agreement between the landowner and the zoning authority. Plaintiffs' argument that the Board's knowledge of the landowner's intended use may have influenced their decision is not sufficient to support an allegation that contract zoning occurred. This assignment of error is overruled, and the order of the trial court is therefore

Affirmed.

Judges EAGLES and PARKER concur.

THE NALLE CLINIC COMPANY, A NORTH CAROLINA CORPORATION, PLAINTIFF v. MARK W. PARKER, DEFENDANT

No. 9026SC231

(Filed 15 January 1991)

Master and Servant § 11.1 (NCI3d)— medical practice—covenant not to compete against public policy

A covenant not to compete in defendant's employment contract with plaintiff was unenforceable as a matter of law as against public policy since the covenant prohibited defendant from practicing medicine in Mecklenburg County for two years after his employment with plaintiff ended; defendant was the only full time pediatric endocrinologist in Mecklenburg County; to prohibit him from practicing would create an excessive workload for the only part time pediatric endocrinologist in the county and would likely result in undesirable and possible critical delays in patient care and treatment; and enforcement of the covenant not to compete would create a substantial question of potential harm to the public health. Therefore, plaintiff likely would not prevail in a final determination of the matter, and it thus did not meet its burden of establishing the facts necessary for the issuance of a preliminary injunction.

Am Jur 2d, Master and Servant § 106; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 543, 554, 555.

Validity and construction of contractual restrictions on right of medical practitioner to practice incident to employment agreement. 62 ALR3d 1014.

APPEAL by defendant from *Gray (Marvin K.), Judge*. Order entered 21 December 1989 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 December 1990.

This is a civil action wherein plaintiff seeks to permanently enjoin defendant from "engaging in the practice of medicine and surgery in Mecklenburg County, North Carolina for a period of two years from the date of the termination of his employment with [plaintiff]" and to have the court enter judgment against defendant "in amount to be determined at trial" as liquidated damages resulting from defendant's alleged breach of his employment agreement with plaintiff.

The record discloses the following: On 23 October 1987, defendant became employed by plaintiff as a medical doctor with specialties in pediatrics and pediatric endocrinology. As a condition of his employment with plaintiff, defendant executed a "Junior Staff Contract" [hereinafter the "Agreement"] which set forth the terms and conditions of defendant's employment with plaintiff. Paragraph 17 of the Agreement provides:

> 17. *Practice Limitation.* The junior staff member, in the event of termination or expiration of this Agreement, covenants and agrees as follows:
>
> For a continuous period of twenty-four (24) months following the date of separation of the junior staff member from employment with the Clinic, the junior staff member shall not engage in the practice of medicine or surgery in the County of Mecklenburg, North Carolina. In the event the junior staff member breaches the foregoing provision by practicing medicine and/or surgery in Mecklenburg County within the period of time prohibited, he shall pay to the Clinic as liquidated damages an amount equal to fifty percent of his average monthly compensation pursuant to paragraph 3(b) during the term of such employment, for each calendar month such breach continues within the period of time prohibited. Such damages shall be pro-rated for fractions of months, and are to be in partial restitution for the loss or damages which it is anticipated the Clinic will suffer as a result of such breach and in partial recovery of its investment in the practice of the Junior Staff Member. Such liquidated damages are not alternatives to any other means of enforcing this provision of practice limitation. Payment of such liquidated damages will not entitle the Junior Staff Member to practice in breach of such provision.

On 1 November 1989, defendant resigned from his employment with plaintiff. Plaintiff accepted defendant's resignation to become effective 30 November 1989. After leaving plaintiff's employ, defendant opened an office and began practicing medicine at Suite 804, 1900 Randolph Road in Charlotte, North Carolina only a few blocks from plaintiff.

On 1 December 1989, plaintiff instituted this action and filed a motion to have the court enter a preliminary injunction against defendant. Following a hearing on plaintiff's motion, Judge Gray

found that defendant was "in competition" with plaintiff and concluded that:

> 1. Paragraph 17 of the Junior Staff Contract is valid and enforceable.
>
> 2. The Clinic has met its burden of establishing the facts necessary for the issuance of a preliminary injunction in that: (a) The facts presented lead the Court to conclude that the Clinic will likely prevail in a final determination of the matter; and (b) The facts presented lead the Court to conclude that the Clinic has met its burden of showing immediate and irreparable harm unless Parker is enjoined pending a final determination of this matter.

Based upon these findings of fact and conclusions of law, Judge Gray entered an order on 21 December 1989 enjoining defendant and his "agents, servants, and employees" from engaging in the practice of medicine or surgery in Mecklenburg County "until such time as this action comes on for trial and a final determination of the issues raised herein may be had on their merits." Defendant appealed.

Parker, Poe, Adams & Bernstein, by William L. Rikard, Jr., and Keith M. Weddington, for plaintiff, appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., Mark T. Calloway and John S. Arrowood, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant's first contention on appeal is that "the trial court erred in granting the plaintiff's motion for preliminary injunction." For the reasons set forth below, we agree.

A preliminary injunction:

> 'is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.' (citations omitted).

A.E.P. Industries v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983), *quoting*, *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). In reviewing the trial court's ruling on a motion for a preliminary injunction, "the scope of review is basically *de novo*" and "we are not bound by the trial court's findings, but may review and weigh the evidence and find facts for ourselves." *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 26, 373 S.E.2d 449, 452 (1988), *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1989).

In the present case, the trial judge concluded that "Paragraph 17 of the Junior Staff Contract is valid and enforceable" and that plaintiff would "likely prevail in a final determination of the matter." Our *de novo* review of the evidence presented and the applicable law, however, indicates that Paragraph 17 of the Agreement, entitled "Practice Limitation," is not a valid and enforceable covenant not to compete.

A covenant not to compete is valid and enforceable upon a showing that it is: (1) in writing, (2) made part of a contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. *A.E.P. Industries*, at 402-03, 302 S.E.2d at 760. The validity of the present contract provision attempting to limit defendant from engaging in the practice of medicine or surgery in Mecklenburg County for a period of two years is controlled by our decision in *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 373 S.E.2d 449 (1988), which was affirmed *per curiam* by our Supreme Court at 324 N.C. 327, 377 S.E.2d 750 (1989). In that case, we held that a covenant not to compete contained in the employment agreement entered into between a physician and a clinic was unenforceable as against public policy where "ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health . . . ." *Petrozza*, at 27, 373 S.E.2d at 453.

In the present case, defendant submitted affidavits from twenty physicians practicing in Mecklenburg County and specializing in pediatric medicine which tend to show that: (1) pediatric endocrinologists perform certain highly specialized tests and protocols which pediatricians and other doctors do not perform; (2) defendant is the only pediatric endocrinologist in Mecklenburg County other than Dr. Robert Schwartz; (3) Dr. Schwartz practices exclusively

at Charlotte Memorial Hospital where he is the Assistant Chairman of the Department of Pediatrics Residency Program; (4) due to Dr. Schwartz's teaching and administrative duties, he practices pediatric endocrinology only three afternoons per week, and for non-emergency patients there is up to a four-week wait to see him; (4) losing defendant's services would create an excessive workload on Dr. Schwartz; (5) one pediatric endocrinologist would not be able to meet the demand of Mecklenburg County for such services; (6) the nearest pediatric endocrinologist outside of Mecklenburg County is Dr. Lyndon Key, who is located in Winston-Salem, North Carolina; (7) if defendant were not able to practice in Mecklenburg County, it might force young children and their parents to have to travel approximately one and one-half hours to Winston-Salem for treatment by a pediatric endocrinologist, if Dr. Schwartz were unavailable; and (8) losing defendant's services would likely result in undesirable and possible critical delays in patient care and treatment. While there exists some conflict between these affidavits and those submitted by plaintiff as to the exact impact that loss of defendant's services would have on Mecklenburg County's medical community, we find, after reviewing the evidence *de novo*, that enforcement of the covenant not to compete would "create a substantial question of potential harm to the public health." *See Petrozza*, at 29, 373 S.E.2d at 454.

Thus, under the facts of this particular case, we hold the covenant not to compete to be unenforceable as a matter of law as against public policy; and since plaintiff bases its action against defendant on this provision in the employment agreement, we find that it would likely not prevail in a final determination of the matter and has not met its burden of establishing the facts necessary for the issuance of a preliminary injunction.

While we need not address defendant's other assignments of error brought forward and argued on appeal, we note, for the record, that we agree with defendant that the trial court erred in concluding that plaintiff would suffer irreparable harm if the preliminary injunction did not issue. In the order granting preliminary injunction in favor of plaintiff, the trial judge failed to make any findings of fact with respect to the harm plaintiff would potentially suffer if defendant were allowed to continue practicing medicine in Mecklenburg County, and our review of the record reveals that no competent evidence was presented to support this conclusion.

For the foregoing reasons, the order of the trial judge granting preliminary injunction in favor of plaintiff is reversed.

Reversed.

Judges WELLS and ORR concur.

JOHN R. TITTLE AND SALLY A. TITTLE, INDIVIDUALLY; SALLY A. TITTLE, GUARDIAN AD LITEM FOR SHAUN T. TITTLE, PLAINTIFFS/APPELLEES v. NANCY YOUNT CASE, MAE BELLE YOUNT AND WORLD OMNI LEASING, INC., A CORPORATION, DEFENDANTS/APPELLANTS

No. 9029SC542

(Filed 15 January 1991)

1. **Rules of Civil Procedure § 11 (NCI3d)— knowledge that claim is meritless—dismissal delayed—sanctions not required**

In some circumstances the failure to dismiss a case when irrefutable evidence has come to an attorney's attention that the case is meritless may require sanctions pursuant to N.C.G.S. § 1A-1, Rule 11; however, in this case arising from an automobile accident, the trial court properly refused to impose sanctions since instituting an action against defendant World Omni, which was listed as the owner of the car in the accident report, was reasonable, and plaintiffs' limited discovery of the other parties to the action before dismissing its claim against World Omni was not objectively unreasonable under the circumstances.

Am Jur 2d, Damages § 616; Dismissal, Discontinuance, and Nonsuit § 39.

2. **Appeal and Error § 147 (NCI4th)— motion for attorney fees—failure to argue in trial court—no consideration on appeal**

A question as to the trial court's denial of defendant's motion for attorney fees pursuant to N.C.G.S. § 6-21.5 was not preserved for review where there was nothing in the record to show that the question was ever argued before the trial court.

Am Jur 2d, Appeal and Error § 545.

APPEAL by defendant World Omni Leasing, Inc. from order entered 26 April 1990 in HENDERSON County Superior Court by *Judge Marvin K. Gray*. Heard in the Court of Appeals 4 December 1990.

Plaintiffs filed this action on 15 September 1989 for damages allegedly suffered in a motor vehicle accident with a car driven by defendant Case. Plaintiffs alleged that defendant World Omni Leasing, Inc. (World Omni) was the owner of the car driven by Case, and that Case was an employee or agent of World Omni and was operating the vehicle in the course and scope of her employment or agency at the time of the accident.

Counsel for plaintiffs and World Omni exchanged correspondence regarding the basis for these allegations, with World Omni providing information that it did not own the car at the time of the accident and had no record of Case ever being in its employ. Counsel for plaintiff responded by pointing to the accident report which listed World Omni as the registered owner of the car. World Omni moved to dismiss the case as to it pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 26 October 1989.

Defendants Case and Yount both answered and denied that the vehicle was owned by World Omni or that Case was World Omni's employee or agent. Counsel for plaintiffs then deposed Case and Yount on 1 December 1989. World Omni filed a motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure and for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 on 6 December 1989. The motions were calendared along with the motion to dismiss for 12 February 1990. On 9 February 1990, plaintiffs voluntarily dismissed their action against World Omni. The trial court denied the motion for sanctions pursuant to Rule 11 on 12 February 1990, and signed an order to that effect on 26 April 1990. World Omni appeals.

Toms & Bazzle, P.A., by James H. Toms and Eugene M. Carr III, for plaintiffs-appellees.

Hafer, Day & Wilson, P.A., by R. Wilson Day, for defendant-appellant.

WELLS, Judge.

Defendant assigns error to the trial court's entry of the order denying its motion for sanctions and for attorney's fees pursuant

to Rule 11 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 6-21.5. We affirm.

The standard for appellate review of a court's ruling on a Rule 11 motion is set out in *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989):

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these determinations in the affirmative it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

We will approach the issues in reverse order.

Our first inquiry is whether the trial court's findings of fact are supported by a sufficiency of the evidence. We have reviewed the record and hold that each of the trial court's findings are supported by a sufficiency of the evidence. The findings imply that plaintiffs' counsel made inquiry to the Department of Motor Vehicles regarding the state of the title to Case's car, which plaintiffs' counsel asserts he did in his brief, but we find no evidence of this inquiry in the record. Based on our holding below, however, we find this to be of no import.

[1] We must next determine whether the trial court's conclusions of law are supported by its findings of fact. The trial court's conclusion of law (though not so labelled) states:

> Based upon the foregoing findings of fact, and the Court's review of the record as a whole, and the Court having considered the arguments of counsel and citations to case law, the Court denies the Motion of counsel for Defendant, World Omni Leasing, Inc., to award attorney's fees and costs under Rule 11, North Carolina Rules of Civil Procedure. The Court is of the opinion that the Plaintiff, with World Omni Leasing, Inc. listed as owner of the vehicle on the relevant Department of Motor Vehicle[s] records and the accident report, acted with objective reasonableness in naming World Omni Leasing, Inc.

as a Party Defendant to this lawsuit, and proceeding as he proceeded.

The findings show that the accident report listed World Omni as the owner of the vehicle driven by Case. This would support the finding that the vehicle was listed by the Department of Motor Vehicles as owned by World Omni, and that the assignment of title asserted by World Omni had not been registered with the Department at the time of the accident. This provided a reasonable basis for plaintiffs to include a claim in their complaint against World Omni, given the statutory presumptions of N.C. Gen. Stat. § 20-71.1. Rule 11(a) imposes a standard of objective reasonableness under the circumstances. *Turner, supra.*

World Omni argues that even if it was objectively reasonable for plaintiffs to include a count against it in the complaint, plaintiffs violated Rule 11 by failing to dismiss this claim after it should have been apparent that the claim was baseless. The crucial issue for our determination is whether Rule 11 imposes a continuing duty to analyze the basis for a pleading, motion, or other paper signed pursuant to the rule and withdraw it when it becomes apparent, or should become apparent, that the pleading, motion, or other paper no longer comports with the rule.

The North Carolina Rules of Civil Procedure, including Rule 11, are, for the most part, verbatim recitations of the federal rules. *Turner, supra.* Decisions under the federal rules are thus pertinent to our analysis. *Id.* The federal courts have reached differing conclusions in analyzing this question, however. Some courts have focused on the language of the rule, which speaks to the signing of pleadings, motions, and other papers, and determined that the only inquiry is whether the attorney acted with objective reasonableness at the time of the signing. *See Oliveri v. Thompson*, 803 F.2d 1265 (2nd Cir. 1986), *cert. denied*, 480 U.S. 918, 94 L.Ed.2d 689 (1987). Other courts have focused on the apparent purpose of the rule as a policing mechanism and a desire not to undercut its full force in imposing a continuing duty. *See Herron v. Jupiter Transp. Co.*, 858 F.2d 332 (6th Cir. 1988).

While no North Carolina cases have spoken directly to the issue of a continuing duty, the Court's analysis in *Turner* must be seen as at least impliedly recognizing that such a duty exists under our own Rule 11. The Court found Rule 11 violations in the defendant's failure to adequately comply with a discovery order,

and in the noticing and taking of two depositions. Sanctions in that case, then, were based on an attorney's conduct of discovery, and not simply the improper signing of a pleading, motion, or other paper. In *Shook v. Shook*, 95 N.C. App. 578, 383 S.E.2d 405 (1989), *disc. review denied*, 326 N.C. 50, 389 S.E.2d 94 (1990), this Court held that the consistent use of inflated figures in a complaint, *after opportunity to amend*, was sufficient to support an award of sanctions. Taken together, these cases indicate that we are to view Rule 11 broadly in viewing an attorney's conduct during the course of litigation.

In some circumstances, then, the failure to dismiss a case when irrefutable evidence has come to an attorney's attention that the case is meritless may require sanctions pursuant to Rule 11. On these facts, however, we decline to overrule the trial court. We have held that instituting the action against World Omni was reasonable under the circumstances. World Omni sent information relating to the transfer of the car title and the fact that defendant Case did not work for it on 17 October 1989. On 6 November 1989, plaintiffs noticed the depositions of defendants Case and Tittle for 1 December 1989. Plaintiffs filed their voluntary dismissal on 9 February 1990. Given that the accident report listed World Omni as the owner of the car in direct contradiction to the information World Omni had provided, plaintiffs' limited discovery of the other parties to this action before dismissing its claim against World Omni was not objectively unreasonable under the circumstances. The trial court's findings of fact support its conclusions of law, and its conclusions support its judgment of no sanctions. This assignment of error is overruled.

[2] World Omni next assigns error to the trial court's denial of its motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5. This statute provides in pertinent part:

> In any civil action . . . the court, upon motion ot the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. . . . The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

The judgment below does not refer to World Omni's motion pursuant to N.C. Gen. Stat. § 6-21.5. There is nothing in the record

to show that this aspect of the motion was even argued before the trial court. Therefore, this question has not been preserved for our review.

The judgment of the trial court is

Affirmed.

Judges JOHNSON and COZORT concur.

TERRY BLEDSOE GREER v. DEANA LYNN GREER

No. 9021DC124

(Filed 15 January 1991)

1. **Divorce and Alimony § 24.8 (NCI3d)— child support—no finding as to changed needs of child—increase improper**

The trial court erred in requiring plaintiff to increase his child support payments where the court did not follow the presumptive guidelines in effect between 1 October 1989 and 1 July 1990; furthermore, the court did not make findings of fact supported by competent evidence which demonstrated changed circumstances where the court's findings did not address the changing needs of the child or the parties' incomes and expenses, but dealt only with plaintiff's income for the first eight months of 1989.

Am Jur 2d, Divorce and Separation §§ 1082, 1084-1085.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

2. **Divorce and Alimony § 24.8 (NCI3d)— increased child support—father's capacity to earn not considered**

The trial court could not consider plaintiff's capacity to earn in determining whether to order an increase in child support where the evidence indicated that plaintiff had lost his job due to no fault of his own, but the order contained no findings that plaintiff had deliberately stopped working to avoid his support obligations.

Am Jur 2d, Divorce and Separation §§ 1085, 1086.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 17.

APPEAL by plaintiff from order entered 14 November 1989 by *Judge Roland H. Hayes* in FORSYTH County District Court. Heard in the Court of Appeals 15 November 1990.

We must decide here if an order requiring plaintiff to increase his child support payments is supported by the finding of facts.

Morrow, Alexander, Tash, Long & Black, by Charles J. Alexander, II and Ronald B. Black, for plaintiff appellant.

Wolfe and Collins, P.A., by John G. Wolfe, III and Michael R. Bennett, for defendant appellee.

ARNOLD, Judge.

We enter a new period in North Carolina child support law with this case. In 1986, the General Assembly ordered the Conference of Chief District Judges to prescribe guidelines for the computation of child support obligations. N.C. Gen. Stat. § 50-13.4(c1) (1987). Those guidelines went into effect 1 October 1987. The guidelines were advisory in nature, *Morris v. Morris*, 92 N.C. App. 359, 374 S.E.2d 441 (1988), until 1 October 1989, when they became presumptive. *See* G.S. § 50-13.4(c1) (1987 & 1989 Cum. Supp.). The presumptive guidelines have already been revised, and those revisions govern orders entered after 1 July 1990. G.S. § 50-13.4(c1) (1990 Cum. Supp.). This case, however, falls into a small group involving support orders or modifications entered into between 1 October 1989 and 1 July 1990. The first set of presumptive guidelines govern the determination of child support orders entered during that period. The support modification order in this case was entered on 14 November 1989 so we apply the original set of presumptive guidelines, which read as follows:

> Effective October 1, 1989, and pursuant to G.S. 50-13.4(c), the advisory child support guidelines for the computation of child support obligations of each parent as adopted by the Conference of Chief District Judges shall operate as presumptive guidelines. That is, the percentages set out in Section A shall be applied in computing child support obligations, unless the

Court makes findings to vary the amount based on the factors set out in Section B.

The child support guidelines and factors for varying from the guidelines as adopted by the Conference of Chief District Judges are as follows:

A. A parent's support obligation for that parent's child or children shall be computed as follows:

One child	17%	of the parent's gross income
Two children	25%	of the parent's gross income
Three children	29%	of the parent's gross income
Four children	31%	of the parent's gross income
Five or more children	34%	of the parent's gross income

B. The amount of a parent's support obligation may vary from the amount as computed above based on one or more of the following factors:

(1) The special needs of the child, including physical and emotional health needs, educational needs, day-care costs, or needs related to the child's age.

(2) Any shared physical custody arrangements or extended or unusual visitation arrangements.

(3) A party's other support obligations to a current or former household, including the payment of alimony.

(4) A party's extremely low or extremely high income, such that application of the guidelines produces an amount that is clearly too high in relation to the party's own needs or the child's needs.

(5) A party's intentional suppression or reduction of income, hidden income, income that should be imputed to a party, or a party's substantial assets.

(6) Any support that a party is providing or will be providing other than by periodic money payments, such as lump sum payments, possession of a residence, payment of a mortgage, payment of medical expenses, or provision of health insurance coverage.

(7) A party's own special needs, such as unusual medical or other necessary expenses.

(8) Any other factor the court finds to be just and proper.

C. Notwithstanding the foregoing, a court determining a parent's child support obligation shall hear evidence and from the evidence find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to pay support.

A.O.C., Child Support Guidelines, AOC-A-162 (New 10/89). These guidelines apply to the modification of child support orders as well as initial orders. 1989 N.C. Sess. Laws ch. 529, § 9.

[1] It is apparent that the trial court did not apply the presumptive guidelines in this case. The guidelines are not mentioned in the order, neither does the order make reference to any of the factors used to vary a support payment from the presumptive amounts. Failure to follow the guidelines requires that the order be reversed.

In addition, N.C. Gen. Stat. § 50-13.7(a) (1987) provides that a court order awarding child support "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . ." Implementation of the presumptive guidelines does not change the trial court's duty to make findings of fact supported by competent evidence that demonstrate a showing of changed circumstances. Incumbent in this process, the court must determine the present reasonable needs of the child. *Mullen v. Mullen*, 79 N.C. App. 627, 339 S.E.2d 838 (1986). Specific findings of fact on the actual past expenditures for the child, the present reasonable expenses of the child and the parties' relative abilities to pay must be made. *Id.* at 630, 339 S.E.2d at 840. In determining the parties' relative ability to pay, the court must make specific findings of fact on their income, estates and present reasonable expenses. *Id.*

To support his order increasing plaintiff's child support payments, the trial judge made the following findings of fact:

That there has been a material and substantial change in the income of the Plaintiff; that the Plaintiff had been earning $8.00 per hour which increased to $12.00 per hour which later increased to $18.00 per hour prior to his termination by his

employer; that at the time the pending Motion was filed by Defendant the Plaintiff was employed earning $18.00 hour; that the Plaintiff's employment was terminated as of one week prior to the hearing; that the Plaintiff has sought employment and has not sought unemployment benefits; that it is reasonable while Plaintiff is in his present state of unemployment but having earned almost $30,000 from January 1, 1989 through August 30, 1989, that he should continue paying the formerly ordered $227.50 per month in child support together with ½ of the minor child's day care costs or a total of $341.00 per month.

These findings are deficient for several reasons. No findings of fact are made on the present needs of the child or on the relative abilities of the parties to pay. While the order documents plaintiff's income for the first eight months of 1989, no findings are made on the estates or present reasonable expenses of either party. It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made. *Sloan v. Sloan*, 87 N.C. App. 392, 360 S.E.2d 816 (1987); *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980). The trial court is required to make specific findings of fact with respect to factors listed in the statute. *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986). Such findings are required in order for the appellate court to determine whether the trial court gave "due regard" to the factors listed. *Id.*

The only change of circumstance addressed in the order is the increase in the father's income. Without evidence of any change of circumstances affecting the welfare of the child or an increase in need, however, an increase for support based solely on the ground that the support payor's income has increased is improper. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963). Although a court must make findings concerning the party's ability to pay, the changed circumstances with which the courts are concerned are those relating to child-oriented expenses. *See Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

[2] Under G.S. §§ 50-13.4 and 50-13.7, a party's ability to pay child support is ordinarily determined by his or her actual income at the time the award is made or modified. *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E.2d 751 (1982); *Holt v. Holt*, 29 N.C. App. 124, 223 S.E.2d 542 (1976). A person's *capacity* to earn income may be made the basis of an award if there is a finding that the party deliberately depressed his or her income or otherwise

acted in deliberate disregard of the obligation to provide reasonable support for the child. *Id.* The trial court in this case based its finding that plaintiff's income had increased on the fact that plaintiff had earned $30,000 in the first eight months of 1989. At the time of the entry of the support modification, however, plaintiff had no job and no income. Furthermore, the order contained no findings that plaintiff had deliberately stopped working to avoid his support obligations. Rather the evidence indicates that plaintiff lost his job due to no fault of his own. Without such findings the court may not consider plaintiff's capacity to earn in computing his income. *See Fischell v. Rosenberg*, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Finally, we note that all child support orders entered or modified beginning 1 October 1989 are subject to the requirements of N.C. Gen. Stat. § 110-136.3 (1990 Cum. Supp.).

For the foregoing reasons, the order of the trial court is reversed.

Reversed.

Judges EAGLES and PARKER concur.

JANIE L. McKOY, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, AND DAVID T. FLAHERTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENTS

No. 9011SC410

(Filed 15 January 1991)

1. Social Security and Public Welfare § 1 (NCI3d)— Medicaid benefits—burial fund—methodology more restrictive than social security

The trial court erred in an action for Medicaid benefits by reversing the hearing officer's affirmation of the Harnett County Department of Social Services denial of petitioner's application for benefits because her countable reserve funds were over the applicable statutory limit, despite petitioner's contention that a portion of this was a burial fund which had been accepted as such by the Social Security Administration.

The trial court relied on the language of 42 U.S.C. § 1396a(r)(2), which purports to prohibit states from using a more restrictive methodology in determining eligibility from Medicaid benefits than is used for determining eligibility for Supplemental Security Income (S.S.I.) benefits. Given the ambiguity in the statute, and the lack of any convincing indicator of Congressional intent, 42 U.S.C. § 1396a(r)(2) does not apply to limit the right of respondents to use a more restrictive methodology in determining eligibility for benefits pursuant to North Carolina's decision to take advantage of the 209(b) option.

Am Jur 2d, Welfare Laws § 41.

2. **Attorneys at Law § 64 (NCI4th)— Medicaid action—attorney fees under 42 U.S.C. 1988—denied**

The trial court's order denying attorney's fees under 42 U.S.C. § 1988 in a Medicaid action was affirmed since petitioner was not a prevailing party.

Am Jur 2d, Civil Rights § 278.

Construction and application of Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USCS sec. 1988), providing that court may allow prevailing party, other than United States, reasonable attorney's fees in certain civil rights actions. 43 ALR Fed 243.

APPEAL by respondent from judgment entered 8 February 1990 in HARNETT County Superior Court by *Judge Dexter Brooks*. Heard in the Court of Appeals 27 November 1990. Petitioner also appeals from this judgment.

Petitioner applied to the Harnett County Department of Social Services (DSS) for Medicaid benefits on 20 February 1989. The Harnett County DSS denied her application for full benefits, ruling that her countable reserve funds were over the applicable statutory limit of $1,500.00. Petitioner had $3,005.83 in a checking account which was reduced to $2,016.60 on 21 February 1989. Petitioner claimed that $1,500.00 of this account was her burial fund, had been accepted as such by the Social Security Administration, and was therefore not properly included in her reserve funds.

Petitioner requested an appeal which was heard on 22 June 1989. The hearing officer affirmed the decision of the county DSS and petitioner filed for judicial review. The trial court reversed

the ruling of the hearing officer, concluding that the cash in the bank account designated as a burial fund should not be included in petitioner's countable reserve, and denied petitioner's request for attorney's fees. Both respondents and petitioner appeal.

East Central Community Legal Services, by Iris V. Kirkman and Leonard G. Green, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane T. Friedensen, for respondents-appellants.

WELLS, Judge.

[1] Respondents bring forward seven assignments of error from the order of the trial court. We have reviewed the record and these assignments and regard the dispositive question of this appeal to be whether the trial court correctly interpreted the effect of 42 U.S.C. § 1396a(r)(2) on this State's treatment of Medicaid applications. We hold that it did not and therefore reverse.

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). An agency decision may be reversed or modified by the reviewing court if the agency's findings, inferences, conclusions, or decisions are, *inter alia*, affected by legal error, unsupported by substantial evidence in view of the entire record, or arbitrary or capricious. N.C. Gen. Stat. § 150B-51(b) (1985). The trial court found that the decision of the hearing officer and the North Carolina regulations on which he relied in denying full benefits to petitioner were in violation of 42 U.S.C. § 1396a(r)(2) and reversed the ruling denying full benefits.

The trial court relied on language in 42 U.S.C. § 1396a(r)(2) which purports to prohibit states from using "more restrictive methodology" in determining eligibility for Medicaid benefits than is used in determining eligibility for Supplemental Security Income (S.S.I.) benefits. Under the S.S.I. program, money set aside in a bank account designated as a burial fund is not counted as an asset in calculating an applicant's available reserve. The North Carolina Medicaid regulations include such funds as a countable asset. Individuals who would be eligible for S.S.I. benefits, then, may not be eligible for Medicaid benefits using North Carolina's

"methodology" of making the determination. Therefore, North Carolina's methodology is more restrictive within the meaning of 42 U.S.C. § 1396a(r)(2)(B).

North Carolina, however, has long been what is referred to as a "209(b) state." This provision (42 U.S.C. § 1396a(f)) states, in pertinent part:

> Notwithstanding any other provision of this title . . . no State . . . shall be required to provide medical assistance to any aged, blind or disabled individual . . . for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this title . . . and in effect on January 1, 1972 been in effect in such month. . . .

42 U.S.C. § 1396a(r)(2) refers explicitly to determinations of eligibility pursuant to subsection (f). Subsection (f) states that it applies "notwithstanding any other provision of this title." A conflict arises, then, when, as here, a state seeks to take advantage of its right pursuant to subsection (f) to limit the categories of people to which it is obligated to provide assistance by using a methodology purportedly prohibited by subsection (r)(2).

Both petitioner and respondents have attempted to reconcile the apparent conflict in the language of the subsections. While each has offered plausible arguments, we are not convinced by either interpretation. Petitioner also relies on the "plain language" of 42 U.S.C. § 1396a(r)(2) and the fact that it became law after 42 U.S.C. § 1396a(f) in urging that that particular subsection also applies to 209(b) states. Respondents rely on the "plain language" of 42 U.S.C. § 1396a(f) in urging that it does not. While we appreciate the difficulty of statutory construction this conflicting language created for the trial court, we must disagree with its result.

Medicaid is a cooperative federal-state funding program. *Harris v. McRae*, 448 U.S. 297, 65 L.Ed.2d 784, *reh'g denied*, 448 U.S. 297, 65 L.Ed.2d 1180 (1980). When the federal government legislates pursuant to its spending power, the legislation operates much like a contract. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 67 L.Ed.2d 694 (1981). In return for federal funds, the states agree to comply with certain conditions. *Id.* If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. *Id.*

The nature of the contract entered into by 209(b) states is set out in *Schweiker v. Gray Panthers*, 453 U.S. 34, 69 L.Ed.2d 460 (1981):

> In 1972, Congress replaced three of the four categorical assistance programs with a new program called Supplemental Security Income for the Aged, Blind, and Disabled . . . In some States the number of individuals eligible for SSI assistance was significantly larger than the number eligible under the earlier, state-run categorical need programs.
>
> The expansion of general welfare accomplished by SSI portended increased Medicaid obligations for some States because Congress retained the requirement that all recipients of categorical welfare assistance-now SSI-were entitled to Medicaid. Congress feared that these States would withdraw from the co-operative Medicaid program rather than expand their Medicaid coverage in a manner commensurate with the expansion of categorical assistance. "[I]n order not to impose a substantial fiscal burden on these States" or discourage them from participating, see S Rep No. 93-553, 56 (1973), Congress offered what has become known as the "§ 209(b) option."

In asserting that 42 U.S.C. § 1396a(r)(2) has limited this option by restricting a 209(b) state's choice of methodology for determining eligibility, petitioner must also show that the terms of this "contract" have been altered. Under the *Pennhurst* analysis, this would require an unambiguous indication of Congressional intent. *See Mowbry v. Kozlowski*, 914 F.2d 593 (4th Cir. 1990). The language of these subsections, within the same statute, but with (r)(2) stating it applies to (f) and (f) stating that it does not, makes discerning any such indication of intent difficult. The legislative history of the Omnibus Budget Reconciliation Act of 1989 also belies any such intent. In the House Conference Report, it is pointed out that the House budget bill would have resolved the conflict in the statutory language by removing the ambiguities over whether 209(b) states have the option of applying more restrictive methodologies in determining eligibility for Medicaid. This part of the House bill was not adopted. *See* H.R. Conf. Rep. 101-386, 101st Cong., 1st Sess., 41 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News, 3018, 3094.

We hold that the trial court erred in reversing the hearing officer's determination. Given the ambiguity in the statute, and

the lack of any convincing indicator of Congressional intent, we must hold that 42 U.S.C. § 1396a(r)(2) does not apply to limit the right of respondents to use a more restrictive methodology in determining eligibility for benefits pursuant to North Carolina's decision to take advantage of the 209(b) option.

[2] Petitioner has appealed from the court's order refusing to award attorney's fees pursuant to 42 U.S.C. § 1988. In her brief as appellant, petitioner argues that respondents violated 42 U.S.C. § 1396a(r)(2) and the Equal Protection Clause of the United States, and asserts various state law claims for attorney's fees. Petitioner limited her assignment of error, however, to the denial of attorney's fees pursuant to 42 U.S.C. § 1988, claiming that the alleged violations of her statutory and constitutional rights amount to a violation of 42 U.S.C. § 1983. 42 U.S.C. § 1988 provides for attorney's fees for a "prevailing party" in an action brought pursuant to 42 U.S.C. § 1983. Given our disposition of respondents' appeal, we cannot say that petitioner is a "prevailing party." The trial court's order denying attorney's fees is therefore affirmed.

As to respondents' appeal, the trial court's order is

Reversed.

As to petitioner's appeal, the order is

Affirmed.

Judges JOHNSON and COZORT concur.

D. C. GALLBRONNER AND WIFE, BEULAH H. GALLBRONNER, LESSORS, PLAINTIFFS v. E. LOWELL MASON, D/B/A AUTOMOTIVE ENTERPRISES, LESSEE, DEFENDANT

No. 9026SC187

(Filed 15 January 1991)

1. **Rules of Civil Procedure § 60.2 (NCI3d)— withdrawal of counsel—no attempt to obtain representation—no grounds for relief from judgment**

The trial court did not err in denying defendant's Rule 60(b) motion for relief from judgment where the evidence tended to show that defendant relied upon a named attorney to represent him in this action and took no measures to defend himself even though the attorney informed defendant verbally and in writing that he no longer represented defendant.

Am Jur 2d, Judgments §§ 724, 737.

2. **Rules of Civil Procedure § 15 (NCI3d); Landlord and Tenant § 19 (NCI3d)— action to recover rent—motion to recover security deposit made after judgment—attempt to amend complaint not timely**

In an action to recover rent where default judgment was entered for plaintiffs on 14 March 1989, the trial court erred in granting plaintiffs' 26 July 1989 motion for forfeiture of the security deposit made by defendant, since plaintiffs' motion was in essence an attempt to amend the complaint which made no reference to the security deposit, and a trial court has no authority to allow amendment of a complaint after judgment has been entered in the case.

Am Jur 2d, Pleading § 316.

APPEAL by defendant from Orders of *Judge Frank W. Snepp* entered 31 July 1989 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 20 September 1990.

Kenneth P. Andresen for plaintiff appellees.

Hedrick, Eatman, Gardner & Kincheloe, by Gregory C. York, for defendant appellant.

COZORT, Judge.

Defendant in the case below moved pursuant to Rules 55(d) and 60(b) of the North Carolina Rules of Civil Procedure for relief from judgment by default entered 14 March 1989. After a hearing, the trial court entered two orders, one denied defendant's motion for relief from judgment and the other granted plaintiffs' "Motion to Forfeit Security Deposit." We affirm the first order and vacate the second.

On 5 April 1988, plaintiffs and defendant executed a lease for a five-year term beginning 1 June 1988. Defendant agreed to pay a monthly rental of $1,500 beginning on 1 August 1988, and continuing for the term of the lease. On 12 December 1988, plaintiffs filed a complaint in summary ejectment, alleging defendant's failure to pay rent and his violation of Charlotte's fire code. The defendant answered pro se. On 28 December 1988, the magistrate entered judgment in the plaintiffs' possessory action, ordering that plaintiffs be put in possession of the premises leased to the defendant. The defendant appealed the magistrate's order to district court but subsequently withdrew that appeal.

On 24 January 1989, plaintiffs filed a new complaint seeking rent accruing under the lease through December 1988. On 10 February 1989, the complaint and summons were served on defendant. Defendant filed no answer, and on 14 March 1989, plaintiffs obtained a judgment by default in the amount of $7,500, plus interest at the legal rate. On 24 April 1989, defendant filed, among others, a motion for relief from the judgment of 14 March 1989 based on "mistake, inadvertence, surprise, or excusable neglect." On approximately 26 July 1989, plaintiffs filed a motion requesting the trial court to order forfeiture of the security deposit made by the defendant under the terms of the lease executed in April 1988. On 31 July 1990, after a hearing on both motions, the trial judge in open court entered one order (filed 3 August 1990) requiring the defendant to forfeit the security deposit and another order (filed 10 August 1990) denying the defendant's motion for relief from judgment.

[1] On appeal the defendant first contends that the trial court erred in denying his Rule 60(b) motion for relief from judgment. He concedes that the trial court's "findings of fact are essentially correct"; nevertheless, he argues that he "did not understand the

intricacies of the legal system or the normal responsibilities of an attorney within an attorney[-]client relationship."

To obtain relief under Rule 60(b), a party must show both excusable neglect and a meritorious defense. N.C. Gen. Stat. § 1A-1, Rule 60 (1990); *East Carolina Oil v. Petroleum Fuel and Terminal Co.*, 82 N.C. App. 746, 748, 348 S.E.2d 165, 167 (1986), *disc. review denied*, 318 N.C. 693, 351 S.E.2d 745 (1987). Appellate review of a trial court's decision on a Rule 60(b) motion "is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975). Facts found by the trial court "upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence." *Norton v. Sawyer*, 30 N.C. App. 420, 422, 227 S.E.2d 148, 151, *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976).

In the case below, the trial court made the following findings of fact and conclusions of law:

> 5. On or about January 19, 1989, Mason engaged the legal services of Mr. Jeffrey Rupe, a Charlotte attorney. Their relationship quickly deteriorated, however. Mr. Rupe, therefore, advised Mason, during several conversations in the first two weeks of February 1989, that he would no longer serve as Mason's lawyer. During one of these discussions, Mason appeared in Mr. Rupe's office with some documents which appeared to be a Summons and Complaint. After a brief discussion and without examining the documents, Mr. Rupe advised Mason to consult other counsel for the purpose of obtaining legal advice in connection with the new Summons and Complaint [of 24 January 1989].
>
> 6. In a letter to Mason dated February 17, 1989, Mr. Rupe documented these conversations and again told Mason that he would not continue to serve as Mason's lawyer. The letter also stated that, as a courtesy to Mason, Mr. Rupe had contacted Mr. Don Gillespie, another Charlotte lawyer, on Mason's behalf. Mr. Rupe also suggested that Mason call the Mecklenburg County Bar Lawyer's [*sic*] Referral Service.
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> * * * *
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> 8. Mason continued to insist that Mr. Rupe represent him. He returned a copy of Mr. Rupe's February 17, 1989, letter stating "Unacceptable, perhaps you had better get to work.

Ed." On February 20, 1989, Mason wrote a letter to Mr. Rupe in which he stated: "Until such time as I dismiss you, you are still in the Gallbronner case."

9. On March 3, 1989, Mr. Rupe wrote to Ms. Helen Stonestreet, Trial Court Administrator, advising that he no longer represented Mason in the Gallbronner matter and that, because he had not made a general appearance, he did not see a need to obtain leave of Court. Mr. Rupe sent a copy of the letter to Mason.

* * * *

11. At no time did Mr. Rupe make a general or limited appearance on Mason's behalf.

12. Mason did not reasonably believe that Mr. Rupe continued to represent him after their several discussions regarding the termination of their relationship in the first part of February 1989; nor did he reasonably believe that Mr. Rupe represented him after Mr. Rupe's February 17, 1989, letter to him or Mr. Rupe's March 3, 1989, letter to Ms. Stonestreet.

CONCLUSIONS OF LAW

1. Mason did not give the Superior Court Summons and Complaint the attention which an ordinary and prudent person would give to important business.

2. The default judgment obtained against Mason was not the result of surprise, mistake or other excusable neglect.

The trial court's conclusions of law are supported by its findings of fact, which are supported by competent evidence. We find no abuse of discretion in the court's denial of the defendant's Rule 60(b) motion.

[2] The defendant next contends that the trial court erred in granting the plaintiffs' motion of 26 July 1989, captioned "Motion to Forfeit Security Deposit." We agree.

Rule 7(b) of the North Carolina Rules of Civil Procedure provides in pertinent part as follows:

(b) *Motions and other papers.—*

(1) An application to the court for an order shall be by motion which . . . shall be made in writing, *shall state*

> *the grounds therefor*, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.
>
> (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules. [Emphasis added.]

While failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure. *See Home Health and Hospice Care v. Meyer*, 88 N.C. App. 257, 262, 362 S.E.2d 870, 872-73 (1987). Plaintiffs' motion is in essence an attempt to amend the complaint of 24 January 1989. That complaint, which made no reference to the security deposit, was reduced to judgment on 14 March 1989. A trial court has no authority to allow amendment of a complaint after judgment has been entered in the case. *See Sentry Enterprises, Inc. v. Canal Wood Corp.*, 94 N.C. App. 293, 298, 380 S.E.2d 152, 155 (1989). Our holding is without prejudice to further and proper action by the plaintiffs with regard to the security deposit.

For the reasons stated above, the trial court's Order (filed 10 August 1989), which denied the defendant's Rule 60(b) motion, is affirmed. The Order (filed 3 August 1989), which granted the plaintiffs' "Motion for Sanctions," is vacated.

Affirmed in part and vacated in part.

Judges WELLS and LEWIS concur.

PROVIDENT FINANCE COMPANY OF NORTH CAROLINA, INC., PLAINTIFF-APPELLEE v. ROBERT ROWE AND SUSAN ROWE, DEFENDANT-APPELLANTS

No. 9011DC196

(Filed 15 January 1991)

Consumer Credit § 1 (NCI3d)— action to collect amounts due— counterclaims—insufficient findings by court

The trial court erred in an action to collect amounts due on a note by granting judgment for plaintiff and dismissing defendants' counterclaims for violation of the Unfair and Deceptive Trade Practices Act and the North Carolina Consumer Finance Act. The court's only finding of fact on the counterclaim issues was "that the plaintiff has not committed any unfair or deceptive acts or practices entitling the defendants to any relief under their counterclaims"; as a matter of law, that finding is inadequate to support the trial court's conclusion that plaintiff was entitled to dismissal of defendants' actions. Judgment in favor of plaintiff depends first upon resolution of the issues raised by defendants' counterclaims because N.C.G.S. § 53-166(d) provides that loans made in violation of any provision of the Consumer Finance Act are void. N.C.G.S. § 1A-1, Rule 52(a)(1), N.C.G.S. § 75-1.1, N.C.G.S. § 53-180(g).

Am Jur 2d, Consumer and Borrower Protection §§ 302, 305.

APPEAL by defendants from judgment entered 14 September 1989 by *Judge T. Yates Dobson* in LEE County District Court. Heard in the Court of Appeals 20 September 1990.

Love & Wicker, P.A., by Jim Love, Jr., for plaintiff appellee.

East Central Community Legal Services, Inc., by M. Catherine Tamsberg and Celia Pistolis, for defendant appellants.

COZORT, Judge.

Plaintiff brought an action to collect $2,602.32 due on a secured promissory note made by defendants. After a bench trial, the plaintiff was granted judgment against the defendants in the net amount of $2,002.32. On appeal the defendants contend that the trial court erred in concluding both that the plaintiff was entitled to judgment and that all of the defendants' counterclaims should be dismissed. We hold that the trial court did not adequately address the issues

raised by the counterclaims and that the case must be remanded for additional findings and conclusions.

After defendants had obtained a loan from plaintiff and fallen behind in monthly installment payments, an employee of the plaintiff went to defendants' home "to try to get something worked out with" them. The next day defendants went to plaintiff's office and agreed to refinance their first loan. The amount of the new loan was $2,602.32. To secure that loan the plaintiff took a security interest in various personal property owned by the defendants. The defendants were soon in default, and the plaintiff invoked the note's acceleration clause.

On 16 May 1988, plaintiff filed a complaint to collect principal and interest on the loan. On the same day the plaintiff initiated a claim and delivery proceeding under N.C. Gen. Stat. Chapter 1, Article 36, to gain possession of all of the defendants' property in which it had a security interest. After a contested hearing, the clerk of superior court issued an order for the seizure only of the defendants' 1976 Ford automobile. On 1 July 1989, seeking an order of seizure for the remaining items in which it had a security interest, plaintiff appealed the clerk's order to district court.

In the meantime defendants filed an answer, stating counterclaims that alleged plaintiff committed violations of 15 U.S.C. § 1601 (the Truth in Lending Act), N.C. Gen. Stat. § 75-1.1 (unfair or deceptive business practice), and N.C. Gen. Stat. § 53-180(g) (the North Carolina Consumer Finance Act). After further pleadings, the case was tried without a jury on 13-14 September 1989.

At the close of all evidence the plaintiff moved for the dismissal of all three counterclaims. The trial court granted that motion. The trial court also entered judgment for the plaintiff in the amount of $2,602.32 less the value of the defendants' automobile, which the plaintiff had seized through claim and delivery proceedings.

Turning to the questions presented on appeal, we note initially that at trial the defendants voluntarily dismissed their first counterclaim, relating to the federal Truth in Lending Act. They contend, *inter alia*, that the trial court erred in dismissing their second and third counterclaims, relating to N.C. Gen. Stat. §§ 75-1.1 and 53-180(g). They maintain that the plaintiff took a non-possessory, non-purchase money security interest in the Rowe's household goods in violation of Federal Trade Commission Credit Practices as codified

at 16 C.F.R. §§ 441.1 and 441.2. They maintain further that violation of these regulations constitutes a violation of N.C. Gen. Stat. §§ 75-1.1 and 53-180(g).

Federal Trade Commission regulations involving credit practices provide in pertinent part as follows:

> In connection with the extension of credit to consumers in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is an unfair act or practice within the meaning of Section 5 of that Act for a lender . . . directly or indirectly to take or receive from a consumer an obligation that:
>
> * * * *
>
> (4) Constitutes or contains a non-possessory security interest in household goods other than a purchase money security interest.

16 C.F.R. § 444.2(a)(4) (1989). Household goods are defined to include the following:

> Clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the consumer and his or her dependents . . . .

16 C.F.R. § 444.1(i) (1989).

N.C. Gen. Stat. § 75.1-1(a) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 53-180(g) provides that "[n]o licensee [under the North Carolina Consumer Finance Act] shall engage in any unfair method of competition or unfair or deceptive trade practices in the conduct of making loans to borrowers pursuant to this Article or in collecting or attempting to collect any money alleged to be due and owing by a borrower."

While not uncontroverted, the evidence presented at trial by the defendants tended to show (1) that the plaintiff, acting as an insurance agent, sold the defendants disability insurance in connection with the first loan made to them; (2) that the plaintiff refused to assist them in making a claim under that policy; and (3) that the plaintiffs threatened to take "everything the [defendants] had"

unless they refinanced the first loan. Evidence at trial, contested in part by the plaintiff, also tended to show that it took a non-possessory, non-purchase security interest in the defendants' microwave oven, kerosene heater, fan, and sole television.

Although the court took judicial notice of the fact that a microwave oven is a kitchen appliance, the court's only finding of fact on the counterclaim issues raised by the pleadings and the evidence was "[t]hat the plaintiff has not committed any unfair or deceptive acts or practices entitling the defendant[s] to any relief under their counterclaims." As a matter of law, that finding is inadequate to support the trial court's conclusion "[t]hat plaintiff is entitled to dismissal of defendants' counterclaims."

N.C. Gen. Stat. § 1A-1, Rule 52, provides in pertinent part as follows:

> (a) *Findings.*—
>
> (1) In 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.

Rule 52(a)(1) requires the trial court to make 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). The rule "does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions, and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Chemical Realty Corp. v. Home Fed. Sav. & Loan*, 65 N.C. App. 242, 249, 310 S.E.2d 33, 37 (1983), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L.Ed.2d 69, 105 S.Ct. 128 (1984).

In the case below, the trial court's assertion, as a finding of fact, that the plaintiff committed no unfair or deceptive act leaves unanswered a number of factual questions raised by the pleadings and the evidence. On remand the following issues, at least, should be resolved by proper findings and conclusions. (1) Did the plaintiff violate Federal Trade Commission Credit Prac-

tices? (2) If so, does such a violation also constitute a violation of N.C. Gen. Stat. § 75-1.1 or § 53-180(g)? (3) Apart from the Federal Trade Commission regulations did actions of the plaintiff in refinancing the first loan to the defendants violate N.C. Gen. Stat. § 75-1.1(a) or § 53-180(g)?

N.C. Gen. Stat. § 53-166(d) provides that loans made in violation of any provision of the Consumer Finance Act are void. Thus, judgment in favor of the plaintiff depends first upon resolution of the issues raised by defendants' counterclaims. Accordingly, on this appeal we need not reach the defendants' assignments of error relating to that judgment.

For the reasons stated above, the judgment of the trial court is reversed, and the case is remanded for entry of an appropriate judgment, which includes specific findings of fact and conclusions of law. Upon remand the trial court may hear additional evidence, if the court determines such is necessary to resolve the issues raised.

Reversed and remanded.

Judges WELLS and LEWIS concur.

CHARLES IVEY, EMPLOYEE/PLAINTIFF v. FASCO INDUSTRIES, EMPLOYER, AND NATIONWIDE MUTUAL INSURANCE CO., CARRIER/DEFENDANTS

No. 9010IC609

(Filed 15 January 1991)

Master and Servant § 55.1 (NCI3d)— workers' compensation—1978 and 1982 injuries—separate accidents—contradictory findings by hearing commissioners—necessity for determination by Full Commission

Where plaintiff sustained an injury by accident in his employment on 2 February 1978; plaintiff was again injured in the course of his employment on 18 August 1982; a hearing officer determined that this injury resulted from a separate accident and ordered temporary total disability payments through 16 February 1983; the matter was rescheduled for a determination of plaintiff's entitlement to compensation for

temporary total disability and permanent partial disability beyond 16 February 1983; and a second hearing officer found that plaintiff's disability beginning in August 1982 was due to the injury by accident sustained by plaintiff in February 1978 and was related to a change of condition of the 1978 accident, the Full Commission erred in adopting the second hearing officer's opinion without addressing the conflict between the opinions of the two hearing officers as to whether plaintiff sustained a separate, compensable injury by accident in 1982.

Am Jur 2d, Workmen's Compensation § 551.

APPEAL by employee/plaintiff from an Opinion and Award by the Full Industrial Commission entered 3 April 1990. Heard in the Court of Appeals 13 December 1990.

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for employee/plaintiff-appellant.

Schiller & Barringer, by Marvin Schiller, for employer/carrier-appellees.

LEWIS, Judge.

Plaintiff sustained an injury arising out of and in the course of his employment on 2 February 1978. He underwent surgery and improved to the point that he returned to work with some restrictions on 23 March 1982. On 18 August 1982 plaintiff was again injured in the course of his employment.

On 30 April 1986 Deputy Commissioner Henry Burgwyn heard evidence on the issue of whether or not the employee had suffered an injury as a result of an accident. Deputy Commissioner Burgwyn then left the Industrial Commission without the case being decided. The case was rescheduled and reheard before Deputy Commissioner Scott M. Taylor on 15 June 1987 (hereinafter referred to as "the Taylor Opinion"). The parties stipulated that the issues could be decided on the basis of the record and transcripts previously furnished at the 1986 hearing. An Opinion and Award was entered on 25 November 1987, finding that the plaintiff had suffered an injury as a result of accident while in the course of his employment on 18 August 1982. Temporary total payments were ordered through 16 February 1983 and the matter was rescheduled for a determination on the plaintiff's entitlement to compensation for any tem-

porary total disability and permanent partial disability beyond 16 February 1983.

On 23 June 1988 Deputy Commissioner Haigh heard evidence on the issue of compensability beyond 16 February 1983. On 3 February 1989 he rendered his Opinion and Award (hereinafter referred to as "the Haigh Opinion") finding that there was no disability related to the 18 August 1982 accident from and after 16 February 1983. The plaintiff/employee appealed to the Full Commission from the Haigh Opinion and also filed a Rule 701 motion requesting that the Commission hear additional evidence of medical records not previously available. The Full Commission heard the case on 13 March 1990 and on 3 April 1990 affirmed the Haigh Opinion without making any ruling on plaintiff's Rule 701 motion. Plaintiff/employee appeals.

Plaintiff is appealing the finding of Deputy Commissioner Haigh that there was no second injury to plaintiff on 18 August 1982 entitling him to further compensation. He argues that in his findings of fact and conclusions of law, Deputy Commissioner Taylor had already determined that the 18 August 1982 accident was a separate and distinct accident from the 2 February 1978 accident. In his Conclusion of Law number one, Deputy Commissioner Taylor states, "On 18 August 1982, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer. N.C.G.S. § 97-2(6) (1987)." Plaintiff contends that the Haigh Opinion is in direct conflict with the Taylor Opinion's findings and conclusions when the former states, "it appears that plaintiff's disability beginning in August 1982 and continuing thereafter is due to the injury by accident which plaintiff sustained in February 1978. . . ." Evidently, Deputy Commissioner Haigh concluded that the 1982 incident was related to a "change of condition of the 1978 accident."

We agree with the plaintiff that the Opinion of the Full Commission adopting the Haigh Opinion without addressing the inherent conflict between the Haigh findings and conclusions and the Taylor findings and conclusions warrants reversal and remand. Defendant argues that there was sufficient evidence to uphold the Full Commission because Deputy Commissioner Haigh reviewed testimony from an expert witness, Dr. Wilkins, who related the 1982 problems back to plaintiff's 1978 injury. Deputy Commissioner Taylor did not hear this evidence when he issued his Opinion and

Award. The Commission may not find on the one hand that plaintiff is entitled to an award and compensation for the 18 August 1982 accident as a separate and compensable injury through February 1983, and then determine that it is not a separate and compensable injury. Deputy Commissioner Taylor was aware of the 1978 injury when he issued his Opinion and Award. Plaintiff's August 1982 injury either is or is not a separate and distinct injury from the 1978 accident for the purpose of determining compensability for all dates in question. The Full Commission should have addressed this issue in its decision. Apparently the Taylor award was not reviewed by the Full Commission when it was decided.

Where, as in this case, the Full Commission fails to address an inconsistency between two Opinions, the facts of the record are, "[i]nsufficient to enable the Court to determine the rights of the parties . . . (and) the proceeding must be remanded to the end that the Commission make proper findings." *Pardue v. Blackburn Bros. Oil & Tire Co.*, 260 N.C. 413, 416, 132 S.E.2d 747, 749 (1963). Now, on remand, the Commission must consider if the Haigh determination overrules the Taylor findings, and if it does, how this can be justified or reviewed by the Full Commission so long after the fact. We reverse and remand this case to the Full Commission for clarification on the issue of whether the plaintiff sustained a separate, compensable injury by accident in 1982 and if so, a determination of the amount of compensation, if any, he is to receive for any disability he may prove after 16 February 1983.

Finally, plaintiff argues that the Commission erred when it failed to rule upon his Rule 701 motion for consideration of new evidence. We respectfully urge the Full Commission to rule upon this motion before rendering its opinion upon remand.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

RICHARD M. LAUGHINGHOUSE, APPELLANT v. STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA PORTS RAILWAY COMMISSION, APPELLEE

No. 9010IC445

(Filed 15 January 1991)

1. **State § 7.1 (NCI3d)— tort claim—failure to name proper State employees and agency**

A claim under the Tort Claims Act was properly dismissed on the ground that plaintiff failed properly to identify the negligent State employees and agency in the affidavit initiating the action in the Industrial Commission where plaintiff alleged negligence by employees of the Ports Authority Railway Commission but the Industrial Commission found that the negligent employees were employees of the State Ports Authority.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 662.

2. **Master and Servant § 36 (NCI3d)— injury to state port railway worker—jurisdiction under F.E.L.A.**

The Industrial Commission did not have subject matter jurisdiction under the Tort Claims Act of a claim instituted by an injured railroad worker employed by the State Ports Authority since the Federal Employers' Liability Act preempts State laws covering injuries to railway employees engaged in interstate commerce; State port railroad operations are interstate in nature; and plaintiff was involved in interstate commerce at the time of his injury in that he was engaged in transporting lumber from the Soviet Union.

Am Jur 2d, Federal Employers' Liability and Compensation Acts § 4.

APPEAL by plaintiff from a judgment entered 18 July 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 December 1990.

This action for personal injuries arose out of an on-the-job injury to a railroad worker employed by the State of North Carolina at the Ports Authority in Morehead City. The action was commenced by filing an Affidavit under the Tort Claims Act, N.C. Gen. Stat. § 143-291 (1990), with the Industrial Commission. The matter was heard by former Chairman Ernest C. Pearson, sitting

as hearing officer, on 8 August 1988. The Decision and Order by Chairman Pearson concluded that the Industrial Commission had jurisdiction, but that the employee and specific agency named in the Affidavit were not negligent. *See* N.C. Gen. Stat. § 143-297 (1990). Appeal was taken to the Full Commission.

A Decision and Order from the Full Commission was filed 4 January 1990, affirming the dismissal based on plaintiff's failure to allege the state agency and the employee who was responsible for the alleged negligence, but the Commission noted "grave misgivings about this interpretation of the law . . . ." Plaintiff appealed.

DeBank, McDaniel, Holbrook & Anderson, by William E. Anderson, for plaintiff appellant.

Johnson & Lambeth, by Robert White Johnson and Maynard M. Brown, for defendant appellee.

ARNOLD, Judge.

Plaintiff brings forth two assignments of error, and defendant, one. First we examine defendant's claim that the Industrial Commission erred by failing to dismiss plaintiff's claim for lack of subject matter jurisdiction.

Plaintiff was injured on 31 January 1985, while throwing a "pit switch," a device set in the ground that when operated switches railway traffic from one track to another. This particular switch had been improperly maintained and had become defective. Maintenance personnel had been notified that the switch needed repairing, but no action had been taken.

Throwing a pit switch involves a manual maneuver using one's arms and body weight. When plaintiff attempted to throw the switch on this particular occasion, the switch stuck. Plaintiff exerted himself in an effort to throw the switch and severely injured his knee. As a result of the injury, plaintiff is partially, permanently disabled and can no longer perform the duties necessary to work as a railway employee. Plaintiff was forty-seven years old at the time of his injury.

[1] The Industrial Commission concluded the State was guilty of negligence in failing to maintain the switch, but refused to enter judgment on the technical grounds that the plaintiff failed to identify in the Affidavit the negligent State employee and agency.

See G.S. § 143-297; *Floyd v. N.C. State Highway and Pub. Works Commission*, 241 N.C. 461, 85 S.E.2d 703 (1955); *Woolard v. N.C. Dept. of Transp.*, 93 N.C. App. 214, 377 S.E.2d 267, *cert. denied*, 325 N.C. 230, 381 S.E.2d 792 (1989). The Industrial Commission concluded that the negligent employees were employees of the State Ports Authority, rather than the Ports Authority Railway Commission. The claim was dismissed because the Affidavit named the latter instead of the former.

We agree with the Industrial Commission that an often unfair and harsh rule has evolved in our case law whereby a plaintiff's pleadings may be fatal to his claim if he fails to properly identify the negligent State employee and agency in the Affidavit used to initiate an action with the Industrial Commission. We have previously voiced our criticism of this rule. *See Northwestern Distributors, Inc. v. N.C. Dept. of Transp.*, 41 N.C. App. 548, 550, 255 S.E.2d 203, 205, *cert. denied*, 298 N.C. 567, 261 S.E.2d 123 (1979). Nevertheless, like the Commission, we are not the proper body to initiate such a change; it is for our General Assembly or Supreme Court.

[2] Furthermore, this case is not the appropriate vehicle to institute this change. In our view, the Industrial Commission erred in failing to dismiss plaintiff's claim because it lacked subject matter jurisdiction. Early in this century, Congress enacted the Federal Employers' Liability Act (FELA) to provide a national law covering injuries sustained by railway employees that were the result of the negligence of their employers. *See* 45 U.S.C.A. § 51 (1986). It is clear that the FELA was created to provide a national law that would preempt varying state laws covering injuries to railway employees engaged in interstate commerce. *New York Cent. Ry. Co. v. Winfield*, 244 U.S. 147, 61 L.Ed. 1045 (1917). "In rulings dating from the enactment of the federal statute, it has invariably been stated that the FELA superseded state law insofar as the two cover the same field." Annotation, 97 L.Ed. 403, 404. Our state Supreme Court has recognized that where the FELA and state law overlap, the state law remedies are preempted, "because the Federal statute is exclusive and supersedes the right of action under the State law." *Renn v. Seaboard Air Line Ry. Co.*, 170 N.C. 176, 183, 86 S.E. 964, 967 (1915), *aff'd*, 241 U.S. 290, 60 L.Ed. 1006 (1916).

The FELA applies when an injury occurs to "[a]ny employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth . . . . " 45 U.S.C.A. § 51. Several cases have found that state port railroad operations, such as the one involved in this case, are interstate in nature. The U.S. Supreme Court has held that the state authority operating railroads at the Alabama state docks was an interstate carrier. *Parden v. Terminal Ry. of the Alabama State Docks Dept.*, 377 U.S. 184, 12 L.Ed.2d 233 (1964), *rev'd on other grounds, Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 97 L.Ed.2d 389 (1987). The Fourth Circuit Court of Appeals has found the railway operations of our State ports were "a link in interstate and foreign carriage of shipments controlled by ship and railway companies." *International Longshoremen's Ass'n., AFL-CIO v. N.C. Ports Auth.*, 463 F.2d 1, 4 (4th Cir.), *cert. denied*, 409 U.S. 982, 34 L.Ed.2d 245 (1972).

Furthermore, the evidence before the Commission supports a finding that plaintiff was involved in interstate commerce when he was injured on 31 January 1985. The testimony indicates that at the time of the injury plaintiff was engaged in transporting lumber from the Soviet Union. Based on this case law and evidence, we hold that the Industrial Commission erred in failing to dismiss this action for lack of subject matter jurisdiction.

This result makes it unnecessary for us to examine plaintiff's assignments of error. For the foregoing reasons, the judgment dismissing plaintiff's claim is

Affirmed.

Judges PARKER and ORR concur.

COMMONWEALTH LAND TITLE INSURANCE COMPANY, AND DENNIS ALAN O'NEAL v. N. V. STEPHENSON, JR. AND WIFE, RACHEL STEPHENSON

No. 9011DC543

(Filed 15 January 1991)

1. **Deeds § 24 (NCI3d)— covenant against encumbrances—no standing by title insurer**

A title insurer has no right to bring an action against the sellers of real property for breach of the covenant against encumbrances in a warranty deed since a covenant against encumbrances is a personal covenant and is not assignable at law, and only the immediate covenantee or his personal representative may take advantage of the personal covenant.

Am Jur 2d, Covenants, Conditions, and Restrictions § 82.

2. **Deeds § 24 (NCI3d)— covenant against encumbrances—septic tank on adjoining property**

The mislocation of a septic tank system on adjoining property did not constitute an encumbrance within the meaning of the covenant against encumbrances in a warranty deed.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 90, 94.

Judge WELLS concurring in the result.

APPEAL by plaintiffs from judgment entered 30 April 1990 by *Judge O. Henry Willis, Jr.* in HARNETT County District Court. Heard in the Court of Appeals 4 December 1990.

Commonwealth Land Title Insurance Company, as substituted plaintiff, brought this action against defendants for breach of warranty against encumbrances contained in a deed. Plaintiffs appeal the entry of summary judgment in favor of defendants.

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

Bain & Marshall, by Edgar R. Bain and Alton D. Bain, for defendants-appellees.

JOHNSON, Judge.

Defendants conveyed a parcel of land to plaintiff Dennis O'Neal by way of a standard warranty deed wherein defendants transferred all privileges and appurtenances to plaintiff O'Neal and covenanted that title was marketable and free and clear of all encumbrances. Unknown to all parties at the time of the transfer of this property, the septic tank system servicing the house thereon was located off the property sold and was buried in the property of the adjoining landowner.

In the summer of 1987, plaintiff O'Neal applied for a VA loan to refinance his mortgage on the property. In the course of having a septic tank location test performed, it was determined that plaintiff O'Neal's septic tank was actually located on his neighbor's property. Plaintiff O'Neal then attempted to obtain consent from his neighbor to allow for the maintenance of the septic tank, but was unsuccessful. The neighbor, instead, demanded the immediate removal of the septic tank from his property.

Thereafter, plaintiff O'Neal paid Jerry Pleasant $1,400 to remove the septic tank from the neighbor's property and install another septic tank on his property. As a result of the mislocation of the septic tank, the loan was not processed and the refinance did not take place.

Plaintiff O'Neal filed a claim with Commonwealth Land Title Insurance Company ("Commonwealth"). Commonwealth paid to plaintiff O'Neal $3,000 to resolve the claim pursuant to the purchased title insurance.

Demand was subsequently made upon the defendants for payment as a result of the breach of warranty against encumbrances contained in their warranty deed to plaintiff O'Neal.

On appeal, plaintiffs contend that summary judgment was improvidently granted to the defendants. Specifically, plaintiffs argue that the defendants are liable based on a breach of warranty against encumbrances. We disagree.

Initially, we note that summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. G.S. § 1A-1, Rule 56.

[1] An encumbrance is "[a] claim, lien, charge, or liability attached to and binding real property." Black's Law Dictionary 473 (5th ed. 1979). A covenant or warranty against encumbrances is a personal covenant and is not assignable at law. *Lockhart v. Parker*, 189 N.C. 138, 126 S.E.2d 313 (1925). Only the immediate covenantee or his personal representative can take advantage of the personal covenant. *Id.* In light of the fact that plaintiff O'Neal is the immediate covenantee and Commonwealth is not plaintiff O'Neal's personal representative, the trial court did not err in entering summary judgment against Commonwealth.

[2] North Carolina has recognized, *inter alia*, judgment liens, mortgages, attachments, covenants that run with the land, taxes and assessments as actionable encumbrances. *See Thompson v. Avery County*, 216 N.C. 405, 5 S.E.2d 146 (1939); *City of Winston-Salem v. Powell Paving Co.*, 7 F. Supp. 424 (1934); and *Gerdes v. Shew*, 4 N.C. App. 144, 166 S.E.2d 519 (1969). Our Courts have not spoken on the issue of whether a mislocated septic tank system creates an encumbrance. The instant case is therefore a case of first impressions and as such, we look to other jurisdictions for guidance in accordance with present North Carolina law.

We find *Magun v. Bombaci*, 40 Conn. Supp. 269, 492 A.2d 235 (1985), to be analogous with the case *sub judice*. In *Magun*, the plaintiff purchased real estate with a house and improvements by general warranty deed wherein the deed contained no reference to the location of the driveway or sewer lines. It was later determined, however, that a part of the driveway and portions of the sewer lines were located on property next to the deeded property. The condition existed when the defendants bought and sold the property and had no problems with the property. Plaintiffs brought an action based upon a breach of the covenant against encumbrances. It was held that the location of the driveway and sewer lines on the property of another did not constitute an encumbrance against the fee conveyed by the general warranty deed since land does not pass as an appurtenant to land.

In light of the present facts, our review of the forecasted evidence and the posture of current North Carolina law regarding the nature of encumbrances, we find that the trial court properly entered summary judgment for the defendants. An adoption of the plaintiffs' contention could result in increased liabilities and

would amount to the circumventing of our present system of certifying title for real estate. This assignment is overruled.

Accordingly, the judgment below is

Affirmed.

Judge COZORT concurs.

Judge WELLS concurs in the result.

Judge WELLS concurring in the result.

In our previous opinion in this case, reported at 97 N.C. App. 123, 387 S.E.2d 77 (1990), we recognized Commonwealth's standing as a party plaintiff and that is the law of this case on that issue.

I agree that the existence of a buried septic tank on the land of a stranger to the title in question is not an encumbrance on the title to the land conveyed, and on that narrow factual aspect of this case, I agree that summary judgment for defendants was correctly rendered.

IN THE MATTER OF: THE PROPOSED ASSESSMENT OF ADDITIONAL FRANCHISE TAX AGAINST R. J. REYNOLDS TOBACCO COMPANY FOR THE TAXABLE YEARS 1981 AND 1982

No. 9021SC191

(Filed 15 January 1991)

Taxation § 29 (NCI3d) — inventory tax credit — election of inventory method by taxpayer

In the absence of any authority directing which inventory method is to be used in the computation of the inventory tax credit, the right to elect the method rests with the taxpayer.

Am Jur 2d, State and Local Taxation § 212.

APPEAL by the Secretary of Revenue of the State of North Carolina from a judgment entered 17 November 1989 by *Judge Howard R. Greeson* in Superior Court, FORSYTH County. Heard in the Court of Appeals 20 September 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for appellant Helen A. Powers, Secretary of Revenue of the State of North Carolina.

Hendrick, Zotian, Cocklereece & Robinson, by John A. Cocklereece, Jr. and William A. Blancato, for appellee R.J. Reynolds Tobacco Company.

LEWIS, Judge.

This case strikes us as somewhat unique in that neither party has cited any case law nor direct statutory authority for their positions. We also note that the subject of this appeal, G.S. § 105-163.03(a) has been repealed so that this case will not be seen again.

The issue in this case is the proper inventory accounting method to be used for certain tax purposes. R.J. Reynolds Tobacco Company ("Reynolds") utilized two inventory accounting methods in the computation of their various state taxes: (1) LIFO (last in/ first out) and (2) FIFO (first in/ first out). The LIFO method disregards the actual flow of goods through inventory and assumes that the items first withdrawn from inventory are those most recently acquired. The effect of the LIFO method is to increase the cost of goods sold and to decrease taxable income and the amount at which Reynolds' ending inventory is shown on its books. FIFO assumes that the items first withdrawn from the inventory are the oldest.

The method of inventory accounting used by Reynolds is significant for a number of state tax purposes. First, inventory is a component of the "franchise tax base," from which Reynolds' franchise tax liability is determined. Second, inventory is also a component of the "property factor," which is used to determine the amount of Reynolds' income which is to be apportioned to and taxed by the state of North Carolina. Finally, Reynolds is entitled to a credit, referred to as the "inventory tax credit," against its corporate income tax liability based on the amount of local property taxes it pays.

For the years 1981 and 1982, Reynolds used the LIFO method of inventory accounting consistently in these state tax computations. Pursuant to § 471 of the Internal Revenue Code, Reynolds also elected to use the LIFO method of inventory valuation for

its federal income tax purposes. (This necessarily resulted in an identical election to use LIFO for North Carolina income tax purposes because North Carolina's corporate income tax law piggybacks onto the federal code at the net taxable income level. *See* G.S. § 105-163.02(1).)

In its Notice of Tax Assessment, the Secretary of Revenue proposed adjustments to Reynolds' franchise and income tax liabilities. The Secretary proposed that Reynolds use the FIFO method of inventory accounting to determine its franchise tax base for franchise tax purposes. The Secretary used the same accounting method to compute Reynolds' property factor for income tax apportionment purposes. The Secretary refused, however, to use the FIFO method to compute Reynolds' inventory tax credit, using the LIFO method instead. The cumulative effect of these adjustments was an assessment of franchise tax underpayment of $1,978,027 and an income tax overpayment of $278,837 for a net franchise and income tax underpayment of $1,699,190. This underpayment was paid by Reynolds under protest.

Reynolds appealed the Final Decision of the Secretary to the Tax Review Board which sustained the Secretary's position in Administrative Decision No. 246. Reynolds paid the assessment under protest and appealed to the Superior Court. From an order reversing Administrative Decision No. 246, the Secretary appeals.

We find it important to clarify from the outset that the only issue before us is the inventory method that Reynolds must use to determine the amount of Reynolds' inventory tax credit. Reynolds successfully argued below that in the interest of equity and uniformity, if the Secretary of Revenue uses the FIFO method to determine franchise tax and income tax apportionment, the Tax Board must also use the FIFO method for determining its inventory tax credit.

The focus of this dispute centers around the language contained in G.S. § 105-163.03(a), the inventory tax credit statute which specifies that the "book value of the manufacturer's qualifying inventories" are used to determine the inventory tax credit. "Book value" is defined as "[t]he net amount at which qualifying inventories *are valued for North Carolina income tax purposes*,. . . ." G.S. § 105-163.02(1) (emphasis added). Because Reynolds uses the LIFO accounting method for state income tax purposes, the Secretary of Revenue argues that qualifying inventories for the purposes

of the inventory tax credit must also be valued using the LIFO method. Reynolds contends that it *values* its inventories at cost for income tax purposes; once valued at cost, the accounting method used to track these inventories is irrelevant. The term "valued" as used in G.S. § 105-163.02(1) is not defined in the Code. It is not clear from the statute whether the term "valued" includes both the *cost* of the goods and materials reported on the state income tax form as well as the inventory method used to track the flow of those goods through inventory for state income tax liability.

The inventory tax credit statute does not set forth explicitly which accounting method is to be used in determining the inventory tax credit. Both the FIFO and the LIFO methods are standard, generally accepted accounting theories of inventory valuation. Both parties advance interesting, well-reasoned contentions as to which method the legislature intended the taxpayer to use in computing the credit. In the absence of any authority directing which method is to be used, we hold that the right to elect which inventory method to use in the computation of the tax credit rests with the taxpayer. Reynolds elected to use FIFO in the interest of uniformity, and we uphold the decision of the trial court, allowing Reynolds to elect that method for the purpose of computing its inventory tax credit.

Affirmed.

Judges WELLS and COZORT concur.

GENEVA THOMPSON AND DAVID O. THOMPSON, PLAINTIFFS v. WILLIAM H. NEWMAN, INDIVIDUALLY, AND WILLIAM H. NEWMAN, M.D., P.A., DEFENDANTS

No. 9012SC376

(Filed 15 January 1991)

Rules of Civil Procedure § 41.1 (NCI3d)— negligence action— voluntary dismissal—refiled action—summary judgment for defendants

A summary judgment for defendants in a medical negligence action was remanded for further findings of fact

as to when plaintiffs' voluntary dismissal took place where plaintiffs filed a civil action alleging that defendant Dr. Newman had negligently performed a mastectomy by failing to obtain informed consent; the court granted a motion to quash a subpoena for certain witnesses and denied plaintiffs' motion to continue prior to the case being called for trial; later that day, 7 November 1988, the trial court asked plaintiffs' attorney following a recess whether they were ready; plaintiffs' attorney responded "yes" and then stated that they were going to take a voluntary dismissal without prejudice; the court thanked plaintiffs' attorney and stated that "you may file that later in the week"; plaintiffs filed a written notice of voluntary dismissal on 9 November 1988; plaintiffs filed this action on 8 November 1989; and the trial court granted summary judgment for defendants because the three-year statute of limitations had run and because this action was not filed within one year of being voluntarily dismissed. In order for a voluntary dismissal to be effective, a plaintiff must state affirmatively either orally in open court or by filing a notice of dismissal that the plaintiff is in fact taking a voluntary dismissal at that time; a prospective oral statement of intent would not be sufficient.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 33; Limitation of Actions § 313.

Voluntary dismissal or nonsuit provision of statute extending time for new action in case of dismissal or failure of original action otherwise than upon the merits. 79 ALR2d 1290.

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiffs from order entered 29 January 1990 by *Judge E. Lynn Johnson* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 25 October 1990.

Plaintiffs filed a civil action on 2 June 1983 alleging defendant Dr. Newman negligently performed a mastectomy by failing to obtain plaintiff Geneva Thompson's informed consent. Prior to the case being called for trial, the court granted a motion to quash a subpoena for certain witnesses and denied plaintiffs' motion to continue. Later in the day, on 7 November 1988, following a recess, the trial court asked plaintiffs' attorney, "are you ready?" Plaintiffs'

attorney responded "yes" and then stated: "Your Honor, with regrets, rather than continue to consume the time of the Court and other people involved and the jury, with Geneva Thompson being in court with me now, we're going to take a voluntary dismissal without prejudice." The court thanked plaintiffs' attorney and stated "and you may file that later in the week." Plaintiffs filed written notice of voluntary dismissal on 9 November 1988.

On 8 November 1989, plaintiffs filed this action, and defendants moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that this action failed to state a claim upon which relief can be granted and is barred by the three-year statute of limitations of N.C. Gen. Stat. § 1-15(c) and by Rule 41(a)(1) because plaintiffs refiled this action more than one year from the taking of the voluntary dismissal by plaintiffs in open court on 7 November 1988.

The trial court entered summary judgment in favor of defendants pursuant to Rule 56 on 29 January 1990 on the grounds that there was no genuine issue of material fact because the three-year statute of limitations had run and this action was not refiled within one year under Rule 41(a)(1) after being voluntarily dismissed by plaintiffs.

From this order, plaintiffs appeal.

Bailey & Dixon, by David M. Britt, Gary S. Parsons and Mary Elizabeth Clarke, for plaintiff-appellants.

Anderson, Broadfoot, Johnson & Pittman, by Hal W. Broadfoot, for defendant-appellees.

ORR, Judge.

The issue on appeal is whether the trial court erred in granting defendants' motion for summary judgment. For the reasons set forth below, we conclude that the statement by plaintiffs' attorney in open court regarding the taking of a voluntary dismissal is ambiguous as to whether plaintiff is in fact taking a voluntary dismissal or is expressing an intention to do so.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990) of the North Carolina Rules of Civil Procedure provides in relevant part:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal

> at any time before the plaintiff rests his case. . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal. . . .

Although the rule specifies "filing a notice of dismissal," in *Danielson v. Cummings*, 300 N.C. 175, 180, 265 S.E.2d 161, 164 (1980), our Supreme Court held that

> when a case has proceeded to trial and both parties are present in court, the one-year period in which a plaintiff is allowed to reinstitute a suit from a Rule 41(a)(i) voluntary dismissal begins to run from the time of oral notice of voluntary dismissal given in open court.

Plaintiffs contend that *Danielson* is distinguishable from the present case in that the trial had not yet begun, neither defendants nor the jury was present, the trial court stated "you may file that later in the week," and the notice in the case *sub judice* was filed the following day.

Regarding plaintiffs' contention that the trial had not begun, we note that on 7 November 1988 the trial court granted a motion to quash and denied plaintiffs' motion to continue. Following a recess later in the day, the court asked plaintiffs' attorney, "Are you ready?" Whether in fact the trial court was ready at that immediate time to begin the trial is not clear from the record. The parties or their counsel were present, however.

Regarding the statement of the trial court, "you may file that later in the week," plaintiffs argue that the trial court "granted Plaintiffs' counsel specific permission to submit the written dismissal later in the week, rather than have the running of the one-year period begin on the date Plaintiffs' intention was announced." Plaintiffs cite *State v. Taylor*, 311 N.C. 266, 269, 316 S.E.2d 225, 227 (1984), where the court stated that "the trial judge has the inherent authority to control trial proceedings and to extend a term of court if, in his discretion, it is necessary for the prompt and efficient administration of justice." We do not believe that the trial court by its words was extending the term of court in the interest of the "prompt and efficient administration of justice." To the contrary, such an extension would not be in the interest of the "prompt and efficient administration of justice."

Plaintiffs cite no authority to support the contention that filing the following day overrides the oral notice given in open court. Further, we do not believe that the absence of the jury is significant, and though the defendants were not present, defendants were represented by counsel and the court inquired if the plaintiffs were ready to proceed.

The *Danielson* court stated:

> Clearly, when parties confront each other face-to-face in a properly convened session of court where a written record is kept of all proceedings, there is no necessity to file a paper writing in order to take notice of a voluntary dismissal. In such a case, oral notice of dismissal is clearly adequate, and fully satisfies the "filing" requirements of Rule 41(a)(6).

Danielson, 300 N.C. at 179, 265 S.E.2d at 163.

Here there is nothing in the record to indicate that anything other than a "properly convened session of court" was taking place. However, in order for a voluntary dismissal to be effective, a plaintiff must state affirmatively either orally in open court or by filing a notice of dismissal that plaintiff is in fact taking a voluntary dismissal at that time. A prospective oral statement of intent would not be sufficient. Here the statement made by plaintiffs' attorney that "we're going to take a voluntary dismissal without prejudice" is ambiguous in the absence of additional evidence as to whether plaintiffs' attorney was in fact taking a voluntary dismissal or was merely expressing an intention to do so. Neither the record nor the order of the trial court reflects the intention of the plaintiffs nor the understanding of the trial court as to *when* the actual dismissal took place. Accordingly, summary judgment was inappropriate and the case is remanded to the trial court to make findings of fact consistent with this opinion.

Reversed and remanded.

Judge DUNCAN concurred prior to 29 November 1990.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

The record indicates that at the time plaintiffs' counsel stated that "we're going to take a voluntary dismissal," court was in

session, the case was called for trial by the court, and all parties were represented in court by counsel. Therefore, I agree with the majority that the "parties confront[ed] each other face-to-face in a properly convened session of court" as required by *Danielson*, such that oral notice of a voluntary dismissal was permissible. *Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d 161, 163 (1980).

However, contrary to the majority, I believe the oral notice of voluntary dismissal was unambiguous and was, therefore, effective immediately. I am unable to distinguish the facts in this case from those in *Danielson*. In *Danielson*, the court minutes indicated that plaintiff's counsel stated that "a voluntary dismissal would be presented in this case." *Danielson* at 176, 265 S.E.2d at 161. I find the statement made by plaintiffs' counsel in the present case to be less ambiguous than that in the case of *Danielson*. Also, while in *Danielson* "the judge presiding stopped the trial, dismissed the jury and went on to other calendared business," *id.* at 176, 265 S.E.2d at 161, in the present case the judge expressly excused the parties after counsel announced that plaintiffs were "going to take a voluntary dismissal." Thus, in both cases the proceedings were terminated after the oral announcements were made in open court. Therefore, under *Danielson* the time during which to file the new action in the present case must be measured from the time of the oral notice in open court.

Accordingly, I vote to affirm.

ROY D. MORGAN, PLAINTIFF v. G. C. MUSSELWHITE, JR., AND QUICK STOP FOOD MART, INC., DEFENDANTS

No. 9022SC583

(Filed 15 January 1991)

1. Master and Servant § 10.2 (NCI3d)— retaliatory discharge for compensation claim—statute of limitations

Plaintiff's action for retaliatory discharge for filing a workers' compensation claim was barred by the one-year statute of limitations of N.C.G.S. § 97-6.1(f) where plaintiff admitted that he knew more than a year before he filed the action that defendant no longer planned to employ him, although

defendant was officially notified of his termination by letter less than a year before he filed the action.

Am Jur 2d, Workmen's Compensation § 55.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 ALR4th 1221.

2. **Master and Servant § 10.2 (NCI3d)— retaliatory discharge for compensation claim—insufficient forecast of evidence**

Plaintiff's forecast of evidence was insufficient to support his claim that his discharge was in retaliation for his filing of a workers' compensation claim where it showed only that he filed the claim and was terminated almost two years later while he was working for one of defendant's competitors.

Am Jur 2d, Workmen's Compensation § 55.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 ALR4th 1221.

APPEAL by plaintiff from order entered 18 December 1989 by *Judge Preston Cornelius* in ALEXANDER County Superior Court. Heard in the Court of Appeals 5 December 1990.

This appeal arises from an action for retaliatory discharge under N.C. Gen. Stat. § 97-6.1 (1985). On 5 December 1988, plaintiff Roy Morgan filed a complaint against defendants alleging that he had been terminated and discharged from employment with the corporate defendant in retaliation for his filing a workers' compensation claim.

Sometime prior to the hearing concerning the order before us, defendant Musselwhite was dismissed from the case because the complaint failed to state a claim as to him. At the motion hearing below, the corporate defendant moved pursuant to Rule 56 for summary judgment. The trial court granted defendant's motion, and this appeal followed.

Joel C. Harbinson for plaintiff appellant.

Fisher & Phillips, by Griffin B. Bell, Jr.; and Eisele & Ashburn, P.A., by Douglas G. Eisele, for defendant appellees.

ARNOLD, Judge.

According to plaintiff's deposition and other documents in the record, he sustained thirty percent permanent partial disability of his back as a result of an accident arising out of his employment in February 1986. After the accident, plaintiff filed a workers' compensation claim and began receiving benefits. Plaintiff resumed working in June 1986, but stopped again on 31 July 1986, claiming he had been injured by a work-related polygraph examination. Plaintiff again received benefits for his work-related injury. Starting in the fall of 1987, plaintiff worked for several months for another convenience store. After leaving in July 1986, plaintiff did not return to work for defendant.

On 16 December 1987, defendant informed plaintiff that, in accordance with the company's sixty-day leave of absence policy, his employment was terminated as of 15 December 1987. At that time, plaintiff had not worked for defendant for more than sixteen months and was working for one of defendant's competitors. Plaintiff admits that he has no evidence that his discharge was in retaliation for his filing the workers' compensation claim.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987). If any one ground is sufficient to sustain a finding of summary judgment, the trial court's judgment must be upheld. *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 317 S.E.2d 408 (1984).

[1] N.C. Gen. Stat. § 97-6.1(f) provides for a one-year statute of limitations for actions filed under the retaliatory discharge statute. Plaintiff admits in his affidavit and deposition testimony that by no later than the spring of 1987, and perhaps as early as November of 1986, "I knew that [the company] wasn't going to put me back to work." (See affidavit, but then says "Some time later . . ."; see also deposition of plaintiff at 65, 78-79, 82, 89.) Plaintiff filed this complaint on 5 December 1988. Plaintiff's own evidence, therefore, raises the question of whether his action was barred by the one-year statute of limitation.

Plaintiff argues that the statute of limitation did not begin to run until defendant officially notified him of his termination by a letter dated 16 December 1988. Plaintiff claims that his cause

of action did not accrue until he was officially discharged, and, concomitantly, that the statute of limitation did not begin to run until that time. We disagree. Plaintiff's cause of action arose when he became aware of defendant's alleged acts that would give rise to the claim. *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 32 N.C. App. 400, 232 S.E.2d 846 (1977), *aff'd* 294 N.C. 73, 240 S.E.2d 345 (1978). By no later than the spring of 1987, plaintiff states he knew defendant no longer planned to employ him. It was at this time that his cause of action arose, and a one-year period from that date expired well before this claim was filed. Summary judgment is affirmed.

[2] We also affirm the judgment because our review reveals that plaintiff's evidence is insufficient to support his claim that his discharge was in retaliation for his filing the workers' compensation claim. The burden of proof in a retaliatory discharge action is on the employee. G.S. § 97-6.1(b). The statute does not prohibit all discharges of employees who are involved in a workers' compensation claim, it only prohibits those discharges made *because* the employee exercises his compensation rights. *See Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 319 S.E.2d 290, *cert. denied*, 312 N.C. 622, 323 S.E.2d 923 (1984).

Plaintiff simply contends that because he filed the claim and then coincidentally was terminated almost two years later, he has provided sufficient evidence to avoid summary judgment. Plaintiff admits he has no other evidence that his termination resulted from his filing the disability claim. Plaintiff also admits defendant allowed him to return to work *after* he filed his claim and that he, not defendant, terminated the second period of employment. Plaintiff's contentions to the contrary, these allegations do not raise a triable, material issue of fact. Summary judgment is affirmed.

Affirmed.

Judges EAGLES and PARKER concur.

JOHN A. MILLER, PLAINTIFF v. SWANN PLANTATION DEVELOPMENT COMPANY, INCORPORATED; SWANN ENTERPRISES, INC.; J. C. REYNOLDS, JR., DEFENDANTS

No. 905SC586

(Filed 15 January 1991)

Appeal and Error § 121 (NCI4th)— partial summary judgment—no immediate appeal

An order granting partial summary judgment for plaintiff on his claim for an access easement across defendants' land to a river and leaving other claims unresolved did not affect a substantial right and was thus not immediately appealable since the record fails to show that defendants will be permanently harmed by allowing plaintiff to use the access easement until final judgment.

Am Jur 2d, Appeal and Error § 104.

APPEAL by defendants from judgment entered 14 March 1990 by *Judge E. Lynn Johnson* in PENDER County Superior Court. Heard in the Court of Appeals 5 December 1990.

On 8 July 1988, plaintiff John Miller filed a civil action against defendants Swann Plantation Development Co., Inc., Swann Enterprises, Inc., and J. C. Reynolds, Jr. Plaintiff asserted claims for slander of title, specific performance, sums due pursuant to contract, an access easement across defendant's property and malicious prosecution. A counterclaim is also pending and unresolved. The only issue on appeal, however, is plaintiff's claim for the access easement to the Northeast Cape Fear River running across defendants' property.

Erdman, Boggs & Harkins, by Harry H. Harkins, Jr., for plaintiff appellee.

Biberstein & Sowers, by R. V. Biberstein, Jr., for defendant appellants.

ARNOLD, Judge.

The order appealed from granted plaintiff partial summary judgment on only one of the claims for relief. Plaintiff argues on appeal that the order is interlocutory and not appealable at this time. We agree.

The analysis to determine whether an order from which an appeal has been taken is immediately appealable involves answering three questions. *See Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240 (1980). The first is whether the order is a final judgment, that is, whether it is the final determination of the cause as to all parties and claims in the action. *See* N.C. Gen. Stat. § 7A-27(b) and (c) (1989). Appeal from a final judgment, of course, is the most common means of perfection. In this case, however, a final determination as to all claims clearly has not been made.

Nevertheless, appeal from an order concerning a claim in an action that involves other unresolved claims may still be appealable if the requirements of N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990) have been met. To qualify for appeal under Rule 54(b), the judgment must be: (1) final as to one or more of the claims or parties; and (2) certified for appeal by the trial court. The trial court must determine in the judgment that "there is no just reason for delay" in appealing the order. G.S. § 1A-1, Rule 54(b). The order below was not certified and thus is not immediately appealable under Rule 54(b).

Finally, there are exceptions to the Rule 54(b) procedure for appeal of an order, which are set forth in N.C. Gen. Stat. § 1-277 (1983) and G.S. § 7A-27(d). None of these exceptions apply here, except possibly whether the decree involves a substantial right that would be lost, prejudiced, or less than adequately protected if an immediate appeal is not permitted. *See* G.S. § 1-277(a); G.S. § 7A-27(d)(1); *J & B Slurry Seal Co. v. Mid-South Aviation*, 88 N.C. App. 1, 362 S.E.2d 812 (1987).

The appealability of interlocutory orders pursuant to the substantial right exception is determined by a two-step test. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Id.* at 726, 392 S.E.2d at 736.

The substantial right test is "more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). And such a determination "usually depends on the facts and circumstances of each case." *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984). Defendants here

argue "it would seem undeniable" that an order disposing of one's property rights also affects a substantial right. We disagree.

The "right" contested here is the use or nonuse of an easement. We simply fail to see how defendants' claimed right to hold title to the property free from this encumbrance "will clearly be lost or irremediably adversely affected" if the order is not reviewed before final judgment. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983). Nothing in the facts indicate that allowing plaintiff use of this easement until final judgment will permanently harm defendants. The record contains no allegations that plaintiff plans to alter or damage the easement, which is the only possible lasting harm we can envision that might occur by waiting. Furthermore, any damage to the easement or defendants' property resulting from plaintiff's use during this period can be rectified later by monetary damages if necessary.

Accordingly, defendants' appeal is dismissed.

Dismissed.

Judges EAGLES and PARKER concur.

WILLIAM R. COLE v. NELL COLE GRAVES, INDIVIDUALLY AND AS THE SURVIVING PARTNER OF COLE POTTERY COMPANY (ALSO KNOWN AS J. B. COLE POTTERY), A PARTNERSHIP

No. 9010SC590

(Filed 15 January 1991)

Partnership § 8 (NCI3d)— death of partner—dissolution of partnership—disposition of partnership interest according to partner's will

The trial court properly concluded that a partnership between plaintiff's father and defendant dissolved upon the former's death and that Item IV of plaintiff's father's will constituted a settlement and disposition of his partnership interest in a manner other than required by the partnership act. N.C.G.S. § 59-84.

Am Jur 2d, Partnership §§ 1140, 1142, 1150; Wills § 1534.

APPEAL by plaintiff from *Allen (Steven), Judge.* Judgment entered 22 March 1990 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 12 December 1990.

This is a civil action wherein plaintiff seeks to have the court: (1) require defendant to make a final settlement of all of the partnership assets pursuant to G.S. 59-83 and "pay over to . . . [p]laintiff his share of such assets bequeathed to him by the [w]ill of his father, Waymon H. Cole . . . "; (2) require defendant "to appear . . . and show cause why she should not be required to post a bond . . . pursuant to G.S. 59-74 conditioned upon her faithful performance of her duties in the settlement of the partnership affairs, or in the alternative, why a collector of the partnership should not be appointed pursuant to the provisions of G.S. 59-75 and G.S. 59-83"; (3) direct "[t]hat a determination of the value of the tangible and intangible assets of the . . . partnership as of the date of the death of Waymon H. Cole be made . . . and that the value of the interest of [p]laintiff in said assets be determined and paid over to him"; (4) order defendant to compensate plaintiff for "any and all damages suffered by him" as a result of defendant's breach of her fiduciary duty and mismanagement; and (5) determine whether or not "an improper distribution of the partnership interest of Waymon H. Cole has been made by his estate and, if necessary, to order the reopening of said estate . . . ."

The following facts are uncontroverted: Plaintiff's father, Waymon H. Cole, and defendant were partners in Cole Pottery Company (also known as J. B. Cole Pottery). There was "no written partnership agreement." Waymon H. Cole died on 1 September 1987, and "ITEM IV" of his will, probated 2 October 1987, makes the following bequests to defendant:

> all of the testator's 'interest in all inventory, accounts receivable and work in process in Cole Pottery Company' and, in addition, bequeaths to her all of the testator's 'interest in all other properties of Cole Pottery Company, including, but not limited to, equipment in the business and any motor vehicles in which I (the testator) am listed as co-owner with Nell C. Graves for and during the term of her life.'

The will bequeathed to plaintiff "a vested remainder in my interest in Cole Pottery Company hereinabove devised to Nell C. Graves for her lifetime . . . ."

Defendant filed a motion for summary judgment, and on 22 March 1990, the trial court entered judgment for defendant on her motion concluding:

> 1. That the will of Waymon H. Cole constitute[s] a settlement of and disposition of his partnership interest in a manner other than required by the partnership act.
>
> 2. That defendant is entitled to a life estate in the partnership of Waymon Cole.
>
> 3. That until the death of defendant, plaintiff has no right to possess any specific partnership property or to manage any partnership property.
>
> 4. That plaintiff is entitled to an account of the value of the goodwill of the business and a list of the business debts as of the date of dissolution of the partnership on September 1, 1987.
>
> 5. That plaintiff is not entitled to have the partnership wound up, terminated, settled, distributed or valued.
>
> 6. There is no genuine issue as to material fact and defendant is entitled to judgment as a matter of law.

Plaintiff appealed.

Moser, Ogburn, Heafner, Schmidly & Wells, by John N. Ogburn, Jr., and Stephen S. Schmidly, for plaintiff, appellant.

O'Briant, O'Briant & Bunch, by Lillian B. O'Briant and Pierre C. Oldham, for defendant, appellee.

HEDRICK, Chief Judge.

The only question presented on this appeal is whether the trial judge was correct in concluding that the partnership between plaintiff's father, Waymon H. Cole, and defendant dissolved upon the former's death and that "ITEM IV" of his will "constitute[s] a settlement of and disposition of his partnership interest in a manner other than required by the partnership act."

G.S. 59-61(4) of the Uniform Partnership Act provides that a partnership is dissolved "[b]y the death of any partner, unless the partnership agreement provides otherwise." G.S. 59-84 of the Act further provides:

> When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this Chapter, the interest of such deceased partner shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will.

In the present case, there was no written partnership agreement. Therefore, the trial judge was correct in concluding that the partnership between Waymon H. Cole and defendant dissolved on the date of the former's death. Furthermore, since there was no partnership agreement which provided for the settlement of the deceased partner's interest in the partnership, the trial judge was correct in looking to the will of the deceased partner to determine the disposition of his interest in the partnership.

We hold that the plain language of "ITEM IV" of the will of Waymon H. Cole settled and disposed of his interest in Cole Pottery Company pursuant to G.S. 59-84. Thus, the trial court did not err in entering summary judgment in favor of defendant. The judgment appealed from will be affirmed.

Affirmed.

Judges WELLS and ORR concur.

JEWRUSHER McEACHIN, GUARDIAN AD LITEM, FOR PLIMPTON LEE ROBINSON, MINOR v. WAKE COUNTY BOARD OF EDUCATION

No. 9010IC184

(Filed 15 January 1991)

Schools § 11.1 (NCI3d); State § 8.4 (NCI3d)— injury from rolling school bus—no negligence by driver

In a proceeding under the Tort Claims Act to recover for personal injuries allegedly resulting from the negligence of a school bus driver, evidence was sufficient to show that the driver was not negligent where it tended to show that an acquaintance of the driver ran onto the bus, began shoving

the driver, and bumped against the emergency brake, causing it to release and the bus to roll forward, pinning plaintiff between the bus and another one in front of it.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 580.

APPEAL by plaintiff from the North Carolina Industrial Commission. Order entered 21 September 1989. Heard in the Court of Appeals 10 December 1990.

This is a proceeding under the North Carolina Tort Claims Act wherein plaintiff seeks to recover damages for personal injuries allegedly resulting from the negligence of Edwin Cannady, driver of a school bus for the Wake County Board of Education.

The evidence in the record tends to show the following: On 17 December 1986 at approximately 2:40 p.m., Wake County School Bus number 448, driven by 17-year-old Edwin Cannady, was parked in the standard bumper-to-bumper loading formation outside Enloe High School in Raleigh, North Carolina. Cannady was seated in the driver's seat with his seat belt on and the door to the bus open preparing to load students. Another school bus was parked less than five feet in front of Cannady's bus. Cannady was loading the students with the ignition on, the bus in neutral, and the emergency hand brake engaged. While Cannady was sitting in the driver's seat with the door to the bus open, Michael Jackson, an acquaintance of Cannady's from another school, ran onto the bus, grabbed Cannady by the shirt and began shoving him against the driver's seat. In the course of the attack, Jackson accidentally, and unbeknownst to Cannady, hit the emergency brake with his (Jackson's) leg causing the bus to roll forward and pin plaintiff, who was walking in front of Cannady's bus at that exact moment, between Cannady's bus and the bus in front of it.

From the evidence introduced at the hearing, the Commission made the following critical findings of fact:

7. Jackson's actions on 17 December 1986 were the sole proximate cause of plaintiff's injuries. Cannady had no control over Jackson's presence on the bus or his actions while on the bus. Cannady exercised due care in his efforts to get Jackson off the bus without engaging in an out-and-out fight with Jackson.

8. Cannady did not have a last clear chance to avoid the accident, inasmuch as he did not know Jackson had hit the emergency brake and that the bus was rolling until it actually hit plaintiff. Even if he had known, it all happened so fast that plaintiff did not have the time to get out of the way and Cannady, who was attempting to ward off Jackson, certainly did not have time and thus the means to stop the bus before it hit plaintiff.

From the findings of fact, the Commission made the following conclusions of law:

> . . . Under the circumstances, Cannady exercised due care in the operation of the school bus on 17 December 1986. . . . A reasonably prudent person could not in the exercise of ordinary care foresee that an uninvited acquaintance would board a bus for the sole purpose of harassing the driver and in the process hit the emergency brake to cause the bus to roll. Cannady was not negligent and in no way contributed to the negligence of Jackson so as to be a concurrent proximate cause of plaintiff's injuries. Jackson's conduct was the sole proximate cause of plaintiff's injuries and Cannady did not have the last clear chance to avoid the harm.

From an order denying plaintiff's claim, plaintiff appealed.

George Ligon, Jr., for plaintiff, appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kimberly L. Cramer, for the State.

HEDRICK, Chief Judge.

In order to prevail under the North Carolina Tort Claims Act, plaintiff must prove negligence on the part of the named State employee while acting within the course and scope of his employment. *Ayscue v. State Highway Commission*, 270 N.C. 100, 153 S.E.2d 823 (1967). The only question before the Commission in this case was whether the driver of the school bus was negligent in the operation of the bus and whether such negligence was a proximate cause of the injuries to plaintiff. The only question before us is whether the critical findings of fact made by the Commission are supported by the evidence and whether such findings support the conclusion of law that the driver was not negligent and that the

sole proximate cause of plaintiff's injuries was the conduct of Michael Jackson.

The critical findings made by the Commission are amply supported by the evidence, and these findings support the conclusion that Cannady was not negligent in any way and that the sole proximate cause of the injuries to plaintiff was the conduct of Jackson in running onto the bus, attacking Cannady and releasing the emergency brake allowing the bus to move forward and pin plaintiff between Cannady's bus and the bus in front of it.

The order of the Commission will be affirmed.

Affirmed.

Judges WELLS and ORR concur.

GLORIA PITT, EVA HARMON, AND VENNIS G. WOOTEN, PLAINTIFFS v. JOHN WILLIAMS, IN HIS CAPACITY AS PASTOR OF THE HOLY TRINITY/OUR LADY OF ATONEMENT PARISH, REGINA HANEY, IN HER CAPACITY AS SUPERINTENDENT OF SCHOOLS FOR THE DIOCESE OF RALEIGH, F. JOSEPH GOSSMAN, IN HIS CAPACITY AS BISHOP OF THE CATHOLIC DIOCESE OF RALEIGH, THE CATHOLIC DIOCESE OF RALEIGH, AND THE CHILD DEVELOPMENT CENTER OF THE HOLY TRINITY/OUR LADY OF ATONEMENT PARISH/CATHOLIC DIOCESE OF RALEIGH, DEFENDANTS

No. 908DC412

(Filed 15 January 1991)

Appeal and Error § 121 (NCI4th)— partial summary judgment—no appeal from interlocutory order

In an action for breach of an employment contract, an order granting one plaintiff's motion for partial summary judgment was interlocutory and no immediate right of appeal existed when the order adjudicated fewer than all of the claims of all of the parties and clearly did not contain a determination by the trial court that there was no just reason for delay in entering the order.

Am Jur 2d, Appeal and Error § 104.

PITT v. WILLIAMS

[101 N.C. App. 402 (1991)]

APPEAL by defendants from order entered 23 January 1990 by *Judge Arnold Jones* in LENOIR County District Court. Heard in the Court of Appeals 27 November 1990.

Plaintiffs commenced this action against the defendants seeking damages for the alleged breach of employment contracts. From an order granting plaintiff Gloria Pitt's motion for partial summary judgment, defendants appeal.

Eastern Carolina Legal Services, Inc., by Wesley Abney, for plaintiffs-appellees.

Richard M. Stearns for defendants-appellants.

JOHNSON, Judge.

Plaintiff Gloria Pitt was employed as the director of the Child Development Center, located in Kinston, North Carolina, and operated under the auspices of the Catholic Diocese of Raleigh. Sometime in 1984, plaintiff Pitt entered into a written contract of employment with the Diocese of Raleigh for a twelve month period. Plaintiff Pitt continued employment with the Child Development Center beyond the term of the written employment contract. On 28 April 1988, defendant John Williams decided to close the Child Development Center, effective 10 June 1988, as a result of financial instability. Plaintiff Pitt is claiming damages for the alleged breach of contract. Plaintiffs Eva Harmon and Vennis G. Wooten also bring forth actions alleging breach of contract. Their claims, however, were not before the trial court when plaintiff Pitt's motion for partial summary judgment was granted and accordingly are not presently before this Court.

On appeal, defendants bring forth two questions for this Court's review. Initially, defendants contend that the trial court erred in granting plaintiff Pitt's motion for partial summary judgment. Defendants further contend that the doctrine of impossibility justifies the alleged breach of contract. Having reviewed the briefs and the record in the instant case, we conclude that this appeal is interlocutory and dismiss it without addressing defendants' assignments of error.

Although not raised by the parties, the threshold question before this Court is whether the trial court's order granting plaintiff Pitt's motion for partial summary judgment is immediately appealable. G.S. § 1A-1, Rule 54(b) provides:

> *Judgment upon multiple claims or involving multiple parties.*— When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or *when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment.* Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not be subject to review either by appeal* or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added.)
>
> It is well established in North Carolina that:
>
> the trial court is granted the discretionary power to enter a final judgment as to one or more but fewer than all of the claims or parties, 'only if there is no just reason for delay *and it is so determined in the judgment.*' [Emphasis in the original.] By making the express determination in the judgment that there is '*no just reason for delay,*' the trial judgment in effect certifies that the judgment is a final judgment and subject to immediate appeal. *In the absence of such an express determination in the judgment, Rule 54(b) makes 'any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties,' interlocutory and not final.* (Emphasis added.)

Durham v. Creech, 25 N.C. App. 721, 724-25, 214 S.E.2d 612, 615 (1975), *quoting*, *Arnold v. Howard*, 24 N.C. App. 255, 258-59, 210 S.E.2d 492, 494 (1974). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231

N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). No appeal lies from an interlocutory order unless such order deprives an appellant of a substantial right and will result in injury if not reviewed prior to the final judgment. G.S. § 1-277(a).

In applying the above-mentioned principles to the case *sub judice*, the order granting plaintiff Pitt's motion for partial summary judgment adjudicated fewer than all of the claims of all of the parties and clearly does not contain a determination by the trial court that there was "no just reason for delay" in entering the order. Moreover, the trial court's order does not deprive the defendants of any substantial right. Thus, the order granting plaintiff Pitt's motion for partial summary judgment is interlocutory and no immediate right of appeal exists.

Accordingly, defendants' appeal is

Dismissed.

Judges WELLS and COZORT concur.

CINCINNATI THERMAL SPRAY, INC., PLAINTIFF v. PENDER COUNTY, DEFENDANT

No. 905SC324

(Filed 15 January 1991)

1. Counties § 52 (NCI4th)— promise of cooperation in constructing water and sewer facilities—no breach of contract

A complaint alleging that Pender County breached an oral contract to cooperate with plaintiff in the provision of adequate water and sewer systems for plaintiff's proposed facility failed to state a claim upon which relief could be granted because plaintiff was unable to show compliance with N.C.G.S. § 159-28(a), which requires a certificate of compliance authorizing construction of water and sewer facilities.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 494, 496, 497.

2. Counties § 36 (NCI4th)— fraudulent representations by agent of county—county not liable

A complaint alleging that an agent of defendant made certain factual representations to plaintiff which were false when made and known to be false when made was properly dismissed for failure to state a claim upon which relief could be granted because there is no authority for the proposition that a county is liable for fraud because of the actions of its employees.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 495, 501.

APPEAL by plaintiff from order entered 4 December 1989 by *Judge Ernest B. Fullwood* in PENDER County Superior Court. Heard in the Court of Appeals 23 October 1990.

Burney, Burney, Barefoot & Bain, by Mary Elizabeth Wertz, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by Johnny M. Loper and David R. Guin, for defendant appellee.

COZORT, Judge.

Cincinnati Thermal Spray, Inc., filed suit against Pender County alleging breach of contract and fraudulent misrepresentation stemming from plaintiff's purchase and development of property in Pender County. Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted. The trial court dismissed plaintiff's complaint.

Plaintiff appeals to this Court asserting that the allegations of its claim based on breach of contract and its claim based on fraud and misrepresentation are sufficient to state a claim upon which relief may be granted. We affirm.

Our review of the trial court's dismissal of plaintiff's complaint is to determine whether the pleading was legally sufficient. *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885, *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971). The issue is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory. *Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E.2d 69 (1981).

In considering a motion to dismiss, the allegations in plaintiff's complaint are treated as true. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). Plaintiff alleges that defendant, through its agent and employee, Cathy Bryan, entered into an oral agreement wherein defendant agreed to cooperate with plaintiff in the provision of adequate water and sewer systems for plaintiff's proposed facility. Plaintiff alleges that it agreed to purchase the property in Pender County because of defendant's promise to cooperate with plaintiff in construction of adequate water and sewer facilities. Plaintiff claims that by reason of defendant's failure to perform as agreed, plaintiff has sustained damages in excess of $40,000.

Second, plaintiff claims that Ms. Bryan in her capacity as employee of defendant represented to plaintiff:

> (1) That a permit existed to allow use of the existing septic system on the above described property for twenty-five (25) employees;
>
> (2) That money had been appropriated by the Pender County Board of Commissioners for a water and sewer system which would be in place within twelve months.

In its complaint, Cincinnati Thermal contends these representations were known to be false when made and that they were made to induce plaintiff to purchase the property in Pender County. Plaintiff alleges that, as a result of these misrepresentations made by the defendant, plaintiff has been defrauded and damaged in an amount in excess of $40,000.

[1] In its answer, defendant contends that no valid contract was formed as a result of the discussions between plaintiff and Ms. Bryan since the Pender County Board of Commissioners took no official action authorizing the alleged representations made by Ms. Bryan. We agree.

N.C. Gen. Stat. § 159-28(a) sets forth the requirements and obligations that must be met before a county may incur contractual obligations. N.C. Gen. Stat. § 159-28(a) in pertinent part reads:

> No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year

> the sums obligated by the transaction for the current fiscal year. No obligation may be incurred for a capital project or a grant project authorized by a project ordinance unless that project ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay the sums obligated by the transaction. If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially the following form:
>
> > "This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.
> >
> > _____
> >
> > (Signature of finance officer)."

Plaintiff has made no showing that such a certificate of compliance authorizing construction of water and sewer facilities exists. Further, defendant argues that none exists.

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

Oates v. JAG, Inc., 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985) (citations omitted). Therefore, we hold that plaintiff's first claim for relief fails because plaintiff is unable to show that N.C. Gen. Stat. § 159-28(a) has been followed.

[2] Plaintiff's second claim for relief alleges that Ms. Bryan, as agent of defendant, made certain factual representations to plaintiff which were false when made and known to be false when made. Plaintiff has cited no authority for the proposition that a county is liable for fraud because of the actions of its employees, and

we are aware of none. Thus, we hold that the trial court did not err in concluding that plaintiff's second claim for relief also fails.

Affirmed.

Judges WELLS and LEWIS concur.

STATE OF NORTH CAROLINA v. JAMES R. DAVIS

No. 9030SC239

(Filed 15 January 1991)

1. **Criminal Law § 648 (NCI4th)— motion to dismiss at close of State's evidence—presentation of defense evidence—appeal of sufficiency waived**

Defendant in a prosecution for driving with a revoked license waived his right to appeal the denial of his motion to dismiss at the close of the State's evidence where defendant stated that he would not present any evidence and moved for a dismissal based upon insufficient evidence; the trial court then admitted certain exhibits over defendant's objection; after a recess, defendant withdrew his decision not to present any evidence and defendant testified; and defendant renewed his motion to dismiss at the close of the evidence. Our courts have consistently held that, when a defendant presents evidence at trial, he waives his right to assert on appeal the trial court's error in denying the motion to dismiss at the close of the State's evidence. N.C. Rules of Appellate Procedure, Rule 10(b)(3).

Am Jur 2d, Trial §§ 538, 539, 572.

2. **Criminal Law § 97.1 (NCI3d)— State's evidence—exhibits introduced after State rested and defendant moved to dismiss**

There was no merit to defendant's assignment of error to admitting State's exhibits into evidence after the State rested its case and after defendant had moved for dismissal based upon insufficiency of the State's evidence.

Am Jur 2d, Trial §§ 538, 539, 572.

3. Criminal Law § 33.2 (NCI3d)— driving with revoked license— motion to dismiss appeal and order dismissing appeal of prior conviction—relevant—not prejudicial

The trial court did not err in a prosecution for driving with a revoked license by admitting as exhibits a motion to dismiss an appeal and an order dismissing an appeal of defendant's prior conviction for driving under the influence of alcohol. These exhibits are evidence of the finality of the judgment and therefore evidence of defendant's knowledge of the revocation of his license and, while prejudicial, the probative value of these exhibits outweighs their prejudicial effect. Moreover, defendant testified to the facts contained in these exhibits. N.C.G.S. § 8C-1, Rules 401, 402, 403.

Am Jur 2d, Automobiles and Highway Traffic § 1023; Evidence § 323.

APPEAL by defendant from judgment entered 13 September 1989 by *Judge Robert D. Lewis* in JACKSON County Superior Court. Heard in the Court of Appeals 14 November 1990.

On 2 March 1987, defendant was convicted in District Court of driving with a revoked license in violation of N.C. Gen. Stat. § 20-28. Defendant appealed and was again convicted in Superior Court of the same offense on 6 July 1987. Defendant appealed to this Court and was granted a new trial in Superior Court.

On 13 September 1989, a jury convicted defendant of the same offense, and the trial court entered its judgment, sentencing defendant to a twelve-month suspended sentence with three years supervised probation. Defendant appeals from this judgment.

Attorney General Lacy H. Thornburg, by Associate Attorney General Patsy Smith Morgan, for the State.

Samuel C. Briegel for defendant-appellant.

ORR, Judge.

Defendant assigns three errors on appeal. For the reasons below, we find that the trial court did not err.

[1] Defendant first argues that the trial court erred in denying defendant's motion to dismiss the charges at the close of the State's evidence. We disagree.

At the close of the State's evidence in the present case, defendant stated that he would not offer any evidence and moved for dismissal based upon alleged insufficiency of the State's evidence. The trial court denied defendant's motion.

The trial court then admitted Exhibits 3 and 3-A over defendant's objection. Defendant requested a recess to consider the impact of the admission of these exhibits. After the recess, defendant withdrew his decision not to present any evidence, and defendant testified. At the close of the evidence, defendant again renewed his motion to dismiss.

Under Rule 10(b)(3) of the N.C. Rules of Appellate Procedure,

> Sufficiency of the Evidence. A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

N.C.R. App. P. 10(b)(3).

Our courts have consistently held that when a defendant presents evidence at trial, he waives his right on appeal to assert the trial court's error in denying the motion to dismiss at the close of the State's evidence. *State v. Upright*, 72 N.C. App. 94, 99, 323 S.E.2d 479, 483 (1984), *disc. review denied*, 313 N.C. 513, 329 S.E.2d 400, *cert. denied*, 313 N.C. 610, 332 S.E.2d 82 (1985) (citation omitted). In the case before us, defendant presented evidence at trial. Therefore, under the rule, defendant waived his right to appeal the trial court's decision to deny his motion to dismiss at the close of the State's evidence.

[2] Defendant next maintains that the trial court erred in admitting State's Exhibits 3 and 3-A into evidence after the State rested its case. Defendant cites no authority for his argument in violation of Rule 28(b)(5) of the N.C. Rules of Appellate Procedure. Under this rule, assignments of error "in support of which no reason or argument is stated *or authority cited*, will be taken as abandoned." N.C.R. App. P. 28(b)(5) (emphasis added). We have, however, reviewed this assignment of error and find it without merit.

[3] Defendant's remaining assignment of error concerns whether the trial court erred in admitting into evidence State's Exhibits 3-B and 3-C. We find no error.

Defendant argues that these exhibits were irrelevant and prejudicial and should have been excluded under Rules 401 and 402 of the N.C. Rules of Evidence. Exhibits 3-B and 3-C are copies of a motion to dismiss an appeal and order dismissing the appeal of defendant's prior conviction for driving under the influence of alcohol. It was defendant's conviction for this offense which resulted in the revocation of his license. We find that these exhibits are evidence of the finality of the judgment, and therefore, evidence of defendant's knowledge of the revocation of his license at the time of the offense in the case *sub judice*.

We agree with defendant that these exhibits are prejudicial. However, their probative value outweighs their prejudicial effect, and therefore, they are admissible under Rule 403 of the N.C. Rules of Evidence. We also note that defendant testified to the facts contained in these exhibits, thereby diminishing their prejudicial impact of admission into evidence.

For the above reasons, we find no error.

No error.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. MAGGIE WILLIAMS

No. 904SC94

(Filed 15 January 1991)

Social Security and Public Welfare § 1 (NCI3d)— food stamp fraud —indictment dismissed—erroneous

The trial court erred by dismissing an indictment for food stamp fraud which charged defendant with obtaining $4,731 of food stamps to which she was not entitled by willfully making false statements as to income on nine separate occasions. Defendant's successive acts of misrepresentation were in essence a continuing act to reach her desired result, so that the trial

court erred by refusing to combine the alleged overpayments to reach the felony threshold. N.C.G.S. § 108A-53.

Am Jur 2d, Welfare Laws §§ 111-113.

APPEAL by the State from an order entered 29 August 1989 by *Judge Napoleon B. Barefoot* in SAMPSON County Superior Court. Heard in the Court of Appeals 23 October 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mary Jill Ledford, for the State, appellant.

Robert S. Griffith, II, for defendant appellee.

COZORT, Judge.

The State appeals, pursuant to N.C. Gen. Stat. § 15A-1445, the trial court's order dismissing the indictment charging defendant Maggie Williams with food stamp fraud.

The single issue presented in this appeal is whether the trial court erred in ruling each food stamp payment the defendant received was a separate occurrence and could not be combined to prove the felony amount of more than $400.00 in violation of N.C. Gen. Stat. § 108A-53. We hold that the trial court erred and that the case should not have been dismissed.

The indictment charged defendant with obtaining $4,731.00 of food stamps to which she was not entitled by willfully making the false statements that the only income in her household at the time was a social security check that she received for herself and that she received no support for her granddaughter. Defendant made the alleged false statements on nine separate occasions. The issue is whether the amounts that defendant received after making the false statements can be combined to reach the felony threshold of "more than four hundred dollars ($400.00)." N.C. Gen. Stat. § 108A-53 (1989).

In his order dismissing the indictment, the trial court found that the alleged overpayments of food stamps occurred on a monthly basis between March 1982 and November 1986. Further, the court found that the indictment "was returned more than two years after the last allegedly falsified report was filed, and more than two years after the last overpayment alleged." The trial court then concluded:

1. That each payment to the Defendant is a separate occurence, [*sic*] and multiple payments may not be combined to allege and prove the felony amount of more than $400.00 in violation of the statute.

2. That the allegations recited in the indictment in this cause allege a misdemeanor rather than a felony violation of NCGS 108A-53.

3. That more than two years have passed since the violation alleged, and the statute of limitations for a misdemeanor violation of NCGS 108A-53 has expired.

N.C. Gen. Stat. § 108A-53 in pertinent part reads:

Whoever knowingly obtains or attempts to obtain, or aids or abets any person to obtain by means of making a willfully false statement or representation or by impersonation or by failing to disclose material facts or in any manner not authorized by this Part or the regulations issued pursuant thereto, transfers with intent to defraud any food stamps or authorization cards to which he is not entitled in an amount more than four hundred dollars ($400.00) shall be guilty of a felony and shall be punished as in cases of larceny.

The State contends that the indictment charges a single continuing offense. The State argues that the defendant's actions constituted a continuous course of conduct involving one scheme to receive continuous monthly payments based upon her fraudulent misrepresentations. Finding no North Carolina authority on this issue, we look to the law of other jurisdictions for guidance.

Among the states which have addressed this issue are New York, New Jersey, Hawaii and Wisconsin. All four states have determined that where a person receives welfare benefits to which he is not entitled over a period of time based on a periodically repeated misrepresentation, the offense is a continuing one. *See People v. Bellamy*, 94 Misc.2d 1028, 406 N.Y.S.2d 250 (1978); *State v. Tyson*, 200 N.J. Super. 137, 490 A.2d 386 (1984); *State v. Martin*, 62 Haw. 364, 616 P.2d 193 (1980); *John v. State*, 96 Wis. 2d 183, 291 N.W.2d 502 (1980).

We adopt the reasoning of the New York court. In *People v. Bellamy*, 94 Misc.2d 1028, 406 N.Y.S.2d 250, the defendant was on public assistance from July 1971 to March 1976. During that

time, the defendant filed semi-annual recertification forms setting forth her income and assets. *Bellamy*, 406 N.Y.S.2d at 251. "In each report the defendant concealed the fact that while in receipt of public assistance she had a contingent asset in the form of a pending personal injury lawsuit." *Id.* The indictment alleged a concealment in violation of a New York Social Services law.

The New York court stated, "[t]he very essence of concealment is continuity for the period required to accomplish the desired result." *Id.* at 252. The court held that "[t]he fact that there were successive acts in aid of the concealment does not interrupt the continuity of the conduct which was directed to the accomplishment of a single purpose." *Id.*

Likewise in the present case, we find that defendant's successive acts of misrepresentation were in essence a continuing act to reach her desired result: obtain food stamps in an amount for which she would not have been otherwise qualified. We find that the alleged false statements made by defendant between 20 January 1982 and 5 November 1985 to receive the alleged overpayments between March 1982 and November 1985 were one continuous crime. Therefore, the trial court erred by refusing to combine the alleged overpayments to reach the felony threshold. Thus, we hold that the trial court erred by dismissing the felony indictment.

Reversed and remanded.

Judges WELLS and LEWIS concur.

VICKY DIXON PATE v. EASTERN INSULATION SERVICE OF NEW BERN, INC., AND THE NORTH CAROLINA HOME BUILDERS HEALTH BENEFIT TRUST

No. 907SC541

(Filed 15 January 1991)

1. **Trial § 53 (NCI3d) — summary judgment reconsidered by trial court — jurisdiction**

The trial court properly reconsidered its oral decision in an action to collect benefits under a group health insurance plan and possessed jurisdiction to deny defendant Eastern's

motion for summary judgment where plaintiff's attorney showed the trial court a recent Court of Appeals opinion after summary judgment had been granted for defendants, the court scheduled a new hearing on its own motion, and, after considering oral and written arguments of counsel, the court denied defendant Eastern's motion for summary judgment and allowed defendant Home Builders' motion as to plaintiff's claim and Eastern's cross-claim. No written notice of appeal had been filed when the trial judge scheduled the new hearing, the judge informed all parties of its decision to hear additional arguments in light of the Court of Appeals decision, and counsel for Eastern appeared at the hearing and argued in favor of upholding the grant of summary judgment, thereby waiving any objection as to inadequate notice.

Am Jur 2d, Motions, Rules, and Orders § 27; Summary Judgment § 28.

2. **Appeal and Error § 118 (NCI4th)— denial of motion for summary judgment—interlocutory**

An appeal on the merits of the denial of a motion for summary judgment was not considered because such denial was an interlocutory order not immediately appealable.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

APPEAL by defendant Eastern Insulation Service of New Bern, Inc., from order entered 21 February 1990 by *Judge Cy A. Grant, Sr.*, in WILSON County Superior Court. Heard in the Court of Appeals 4 December 1990.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson; and Thomas and Farris, P.A., by Allen G. Thomas and Julie A. Turner, for plaintiff appellee.

Howard, From, Stallings & Hutson, P.A., by John N. Hutson, Jr., for Eastern Insulation of New Bern, Inc., defendant appellant.

The McNair Law Firm, by James L. Stuart, for North Carolina Home Builders Health Benefit Trust, defendant appellee.

COZORT, Judge.

[1] Plaintiff filed this action against Eastern Insulation Service of New Bern, Inc. (hereinafter Eastern), and North Carolina Home Builders Health Benefit Trust (hereinafter Home Builders) seeking damages in the amount of $15,884.20. Plaintiff alleged that Eastern promised her that, if she paid the insurance premiums, she could continue to be covered under Eastern's group insurance plan with Home Builders even after she ceased to be an employee of Eastern. Subsequently, plaintiff accumulated $15,884.20 in medical bills which Home Builders refused to pay. Home Builders claimed that plaintiff was ineligible for health care benefits because she was no longer employed by defendant Eastern. Both defendants filed motions for summary judgment which were heard on 8 January 1990. The trial court orally granted summary judgment in favor of both defendants. On 9 January 1990, plaintiff's attorney presented to the trial court a recent decision by a panel of this Court. The court on its own motion scheduled a new hearing for 21 February 1990. After considering oral and written arguments of counsel for defendants and plaintiff, the trial court denied Eastern's motion for summary judgment and allowed Home Builders' motion as to plaintiff's claim and Eastern's cross-claim. Defendant Eastern appeals.

Eastern contends that the court lacked the power to enter the 21 February order denying summary judgment to Eastern. The issue is whether the trial court still had jurisdiction on 9 January 1990 to order a new hearing and to reverse its own order. We hold that the trial court had jurisdiction and that its actions were proper under N.C. Gen. Stat. § 1A-1, Rule 59(d).

We first note that no written notice of appeal, which would divest jurisdiction from the trial court, had been filed with the clerk of superior court when the trial judge scheduled the new hearing. *See* N.C.R. App. P. 3(a) (1990). N.C. Gen. Stat. § 1A-1, Rule 59(d) provides:

> Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

The trial court rendered a decision at the conclusion of the 8 January 1990 hearing and requested both defendants submit pro-

posed judgments. On the next day of the same regular session of Wilson County Superior Court, 9 January 1990, plaintiff approached the trial judge with the Court of Appeals' 4 January 1990 decision in *Carroll v. Daniels and Daniels Const. Co.*, 96 N.C. App. 649, 386 S.E.2d 752, *reversed*, 327 N.C. 616, 398 S.E.2d 325 (1990). On 17 January 1990, the judge sent a letter to counsel for all parties, stating:

> On Tuesday, January 9, 1990, Attorney James F. Rogerson presented me with a recent case from the Court of Appeals, filed January 4, 1990, on the issue of equitable estoppel. If I had been aware of this case at the time of the hearing on the Motion, my ruling may have been different. Therefore, in light of this recent case and the fact that Mr. Rogerson, the primary attorney for Ms. Pate, was unable to be present at the hearing, I desire to hear further arguments on this Motion before entering a judgment.
>
> I will have the trial court administrator add this matter to the calendar for the February 19, 1990 term of Civil Court in Edgecombe County, Tarboro, N.C. Also, I am enclosing a copy of the recent Court of Appeals decision.
>
> If you have any questions or comments, please do not hesitate to contact my office.

We find the trial court's letter complied with Rule 59(d).

We reject Eastern's argument that it was not given proper notice of the court's intention to reconsider its grant of summary judgment in favor of Eastern. The judge informed all parties of its decision to hear additional arguments in light of the Court of Appeals' decision in *Carroll*. Furthermore, counsel for Eastern appeared at the 21 February hearing and argued in favor of upholding the grant of summary judgment, thereby waiving any objection as to inadequate notice. *See Raintree v. Rave*, 38 N.C. App. 664, 248 S.E.2d 904 (1978).

[2] We hold that the trial court properly reconsidered its oral decision of 8 January 1990 and that the trial court still possessed jurisdiction to deny defendant Eastern's motion for summary judgment. We shall not consider the defendant's appeal on the merits of the denial of Eastern's motion for summary judgment because such denial is an interlocutory order not immediately appealable. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970). That

portion of Eastern's appeal must be dismissed. The result is that the case is remanded to the Superior Court of Wilson County for further proceedings on plaintiff's claim against defendant Eastern without prejudice to the consideration on appeal at the appropriate time of the trial court's order of 21 February 1990.

Affirmed and remanded.

Judges WELLS and JOHNSON concur.

ELLEN TOMLINSON v. CAMEL CITY MOTORS, INC., JAMES ALBERT (BABE) JOHNSON, JR., BARCLAYS AMERICAN/FINANCIAL, INC. AND LAWYERS SURETY CORPORATION

No. 9021DC195

(Filed 15 January 1991)

1. **Principal and Surety § 1.1 (NCI3d) — automobile dealer — unfair and deceptive trade practice — liability of surety**

The trial court did not err by granting summary judgment against Lawyers Surety Corporation, the surety for defendant Camel City Motors, in an action in which plaintiff claimed that defendants had promised to assume the payments on her trade-in vehicle and failed to do so, plaintiff included a claim for unfair and deceptive trade practices, defendants Camel City and Johnson failed to answer, a default judgment was entered against them for treble damages totaling $10,379.16, defendant Lawyers Surety Corporation admitted that it was the surety required by N.C.G.S. § 20-288 for defendant Camel City Motors, summary judgment was granted against Lawyers Surety, and Lawyers Surety assigns error to the requirement that it pay treble damages because there was no finding in any order of the trial court of a violation of N.C.G.S. § 75-1.1 or that it was responsible for more than compensatory damages. Lawyers Surety did not appeal from the judgment against the principal; it is well settled that findings of fact are unnecessary in summary judgment cases; the only inference that can be drawn from defendant's argument as to the existence of an issue of material fact is the limit of its liability as a

surety; the limit of liability in the statute was not exceeded; and summary judgment was therefore properly entered.

Am Jur 2d, Suretyship §§ 25, 165.

2. **Appeal and Error § 510 (NCI4th)— appeal lacking substantial merit—not frivolous—no sanctions**

A motion for sanctions against an automobile surety company for a frivolous appeal was denied where the Court of Appeals determined that the appeal lacked substantial merit, but could not say that it was frivolous. N.C. Rules of Appellate Procedure, Rules 34 and 37.

Am Jur 2d, Appeal and Error § 912.

APPEAL by defendant Lawyers Surety Corporation from order entered 7 February 1990 in FORSYTH County District Court by *Judge William B. Reingold.* Heard in the Court of Appeals 10 December 1990.

Plaintiff brought an action for damages arising out of a transaction with defendant Camel City Motors, Inc., through its agent defendant Johnson, in which plaintiff claimed that defendants had promised to assume the payments on her trade-in vehicle and failed to do so. She included a claim for unfair and deceptive trade practices and prayed that all damages be trebled pursuant to that statute. Defendants Camel City and Johnson failed to answer, and a default judgment was entered against them for treble damages totalling $10,379.16 and attorney's fees of $2,563.00.

Defendant Lawyers Surety Corporation (Lawyers Surety) admitted that it was the surety required by the North Carolina General Statutes for defendant Camel City Motors when the complained-of actions occurred. Plaintiff moved for summary judgment against Lawyers Surety based on its liability as a surety for these damages. Summary judgment was granted on 7 December 1989 against Lawyers Surety and for plaintiff. Lawyers Surety appeals.

Legal Aid Society of Northwest North Carolina, Inc., by Hazel M. Mack, for plaintiff-appellee.

Morgan, Herring, Morgan, Green, Rosenblutt & Gill, by David K. Rosenblutt, for defendant-appellant.

WELLS, Judge.

[1] Lawyers Surety assigns error to the order requiring it to pay the treble damages of $10,379.16 because there was no finding in any order of the trial court entered in this cause of a violation of N.C. Gen. Stat. § 75-1.1 or that it was responsible for more than compensatory damages. Insofar as this appeal attempts to attack the default judgment entered against defendants Camel City and Johnson, we note that while a surety has a limited right to appeal from a judgment against a principal, *see* 4 Am. Jur. 2d *Appeal and Error* § 200 (1962), Lawyers Surety did not appeal from the judgment against the principal. Lawyers Surety's attempt to appeal from the summary judgment entered against it is also fatally flawed. It has provided no authority for its scant argument that the trial court erred, and has thus subjected this appeal to dismissal through this inadequacy. *Byrne v. Bordeaux*, 85 N.C App. 262, 354 S.E.2d 277 (1987). We will, nevertheless, consider the merits of the appeal.

Lawyers Surety has assigned error to the entry of summary judgment because the judgment does not contain certain factual findings. It is well settled that findings of fact are unnecessary in summary judgment cases. *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987). The limited inquiry on appeal is whether there is a genuine issue of material fact and whether the moving party is entitled to summary judgment. *Id.* The only inference that can be drawn from defendant's argument as to the existence of a material fact is the limit of its liability as a surety. While it is true that the liability of a surety depends on the language of its contract or bond, *see In re Simon*, 36 N.C. App. 51, 243 S.E.2d 163 (1978), Lawyers Surety admitted that it was *the* surety pursuant to the North Carolina General Statutes for Camel City during the time complained of. The statute requiring the furnishing of a surety bond by car dealers is N.C. Gen. Stat. § 20-288, which provides:

> Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article or Article 15 shall have the right to institute an action to recover against such motor vehicle dealer and the surety.

The only limit of liability in this statute is the principal amount of the bond ($15,000.00), which was not exceeded in this case. The conduct complained of was a violation of the applicable article.

See NCNB Nat'l Bank of N.C. v. Western Sur. Co., 88 N.C. App. 705, 364 S.E.2d 675 (1988); N.C. Gen. Stat. § 20-294 (1989). Defendant did not show any forecast of evidence to the trial court sufficient to withstand plaintiff's motion. Summary judgment was therefore properly entered.

[2] Plaintiff has moved this Court for the imposition of sanctions against Lawyers Surety pursuant to Rules 34 (frivolous appeals) and 37 of the North Carolina Rules of Appellate Procedure, claiming that this appeal is frivolous and filed for the improper purpose of delaying payment of the judgment. While we have determined that Lawyers Surety's appeal lacks substantial merit, we cannot say that it was frivolous and we therefore deny plaintiff's motion.

As to defendant Lawyers Surety's appeal, the judgment of the trial court is

Affirmed.

As to plaintiff's motion for sanctions, that motion is

Denied.

Chief Judge HEDRICK and Judge ORR concur.

JAMES RIGGS, ET ALS, PETITIONERS v. ZONING BOARD OF ADJUSTMENT OF CARTERET COUNTY AND RICHARD K. CAPPS, RESPONDENTS

No. 903SC238

(Filed 15 January 1991)

Municipal Corporations § 30.11 (NCI3d)— construction of storage building—paved area—drainage system—definition of structure

A trial court's decision affirming the Carteret County Board of Adjustment's decision was reversed where respondent Capps applied to respondent Carteret County Zoning Board of Adjustment for a permit to construct a dry stack storage building within the B-2 Marina Business District; the proposed building would cover over 52.4% of the total area designated for development purposes; the required maximum structure and parking

area pursuant to the B-2 Marina Zoning District was 65%; the proposed plans did not provide for parking but provided for paving a large percentage of the land not covered by the building to meet drainage requirements; petitioner Riggs contended that the drainage plan caused more than 65% of the land to be covered and thereby should be considered a violation of the zoning ordinance; and the Zoning Board of Adjustment contended that the ordinance only limited the amount of land covered by structures and parking. Respondent Capps' storm water collection system is a structure as previously defined by our courts.

Am Jur 2d, Zoning and Planning §§ 66, 88.

APPEAL by petitioners from order entered 30 November 1989 by *Judge Herbert O. Phillips* in CARTERET County Superior Court. Heard in the Court of Appeals 11 December 1990.

Respondent, Richard Capps, applied to the Carteret County Zoning Board of Adjustment for a permit to construct a project within the B-2 zoning jurisdiction of Carteret County. The Zoning Enforcement Officer approved the construction of the project and petitioner, James Riggs, appealed the Zoning Enforcement Officer's decision to the Carteret County Zoning Board of Adjustment. A hearing was thereafter conducted which resulted in a decision affirming the Zoning Enforcement Officer's decision. The petitioners then petitioned the Carteret County Superior Court for a Writ of Certiorari which was allowed. From an order affirming the decision of the Carteret County Board of Adjustment, petitioners appeal.

Wallace, Morris, Barwick & Rochelle, P.A., by P. C. Barwick, Jr., for petitioners-appellants.

Hamilton, Bailey, Way & Brothers, by John E. Way, Jr., for respondent-appellee Zoning Board of Adjustment of Carteret County.

Richard L. Stanley for respondent-appellee Richard K. Capps.

JOHNSON, Judge.

The respondent, Richard Capps, proposed to develop a 1.48 acre tract of land on Highway 24 East, Cedar Point, North Carolina, with lands lying within the zoning jurisdiction of Carteret County. Capps proposed to develop the tract in accordance with the current B-2 zoning in the Marina Business District. The proposal included

the construction of a dry stack storage building which would cover over 52.4% of the total area designated for development purposes.

Pursuant to the B-2 Marina Zoning District, the required maximum structure and parking area coverage was 65%. The plans presented called for a building designated to cover 52.4% of the total acreage and did not provide for parking. In an attempt to meet drainage requirements, the plans also provided for paving of a large percentage of the land not covered by the building.

Petitioner Riggs appealed the decision of the Zoning Enforcement Officer, alleging that the drainage plan caused more than 65% of the land to be covered, and thereby should be considered a violation of the Carteret County Zoning Ordinance. The Carteret County Zoning Board of Adjustment ("Board of Adjustment") disagreed with petitioner Riggs' contention since the ordinance only limited the amount of land coverage by structures and parking. Upon a Writ of Certiorari to the Carteret County Superior Court, the decision of the Board of Adjustment was affirmed.

By Assignment of Error number one, petitioner Riggs contends that the Board of Adjustment's decision and subsequent order were arbitrary, oppressive, and a manifest abuse of authority. Specifically, petitioner Riggs contends that the Board of Adjustment did not interpret the clear language and intent of the ordinance. We agree.

The pivotal question raised by this appeal is whether respondent Capps' stormwater collection system consisting of asphalt coverage of the ground, concrete swales, and in-ground piping constitutes a structure. As previously defined by our Courts, a structure is "an edifice or a building of any kind; in the widest sense any product or piece of work artificially built-up *or composed of parts and joined together in some definite manner.*" *Watson Industries, Inc. v. Shaw, Comr. of Revenue*, 235 N.C. 203, 207, 69 S.E.2d 505, 509 (1952).

Article X-8, subsection A(6) of the Zoning Ordinance of Carteret County provides that the maximum coverage of *structure and parking area* is 65%. Unquestionably, the language of the ordinance should apply and be enforced by the Board of Adjustment. *Fogle v. Gaston County Board of Education*, 29 N.C. App. 423, 224 S.E.2d 677 (1976). Words of a zoning ordinance should be given their ordinary meaning. *Penny v. Durham*, 249 N.C. 596, 107 S.E.2d 72 (1959).

While respondents would have us believe that a structure is strictly a piece of work artificially built-up, we, in applying our well-entrenched definition of *structure* to the facts at hand, are unable to agree with this contention. Notably, in many instances, words in ordinances, when read by different people, take on different meanings. Where, however, as here, asphalt coverage of the ground, concrete swales, and in-ground piping are joined together in a definite manner, such piece of artificial work can only be classified as a structure. We therefore hold that respondent Capps' stormwater collection system is, in fact, a structure.

In interpreting Article X-8, subsection A(6) of the Zoning Ordinance, we must accord the term *structure* its natural, approved and recognized meaning. *See Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E.2d 505. Accordingly, we conclude that the paved area exceeding the 65% maximum coverage is in violation of the Carteret County Zoning Ordinance. A holding in accordance with the respondents' position is tantamount to dismissing the whole intent and purpose of the ordinance.

In view of our holding above, we find it unnecessary to discuss petitioner Riggs' second Assignment of Error that there were insufficient findings of fact to support the Board of Adjustment's conclusions of law and the trial court's subsequent order.

For the reasons stated, the order of the trial court affirming the Carteret County Board of Adjustment's decision is

Reversed.

Judges ARNOLD and LEWIS concur.

STATE OF NORTH CAROLINA v. JOHN A. McMILLIAN

No. 9012SC340

(Filed 15 January 1991)

Appeal and Error § 362 (NCI4th)— indecent liberties—failure to include judgment in record—appeal dismissed

An appeal from a conviction for taking indecent liberties with a minor was dismissed where defendant failed to include

the judgment as a part of the record on appeal and also failed to include such judgment in his appellate entries in giving his notice of appeal.

Am Jur 2d, Appeal and Error §§ 401, 402.

APPEAL by defendant from judgment entered 4 December 1989 in CUMBERLAND County Superior Court by *Judge D. B. Herring, Jr.* Heard in the Court of Appeals 24 October 1990.

On 28 November 1989 defendant was tried in Cumberland County Superior Court, Criminal Session, for first degree rape, first degree sexual offense and taking indecent liberties with his girlfriend's nine-year-old granddaughter. Defendant pleaded not guilty to all charges.

The evidence tended to show that defendant lived for the past 11 years with the victim's grandmother, Barbara Johnson. The victim had lived with defendant and Barbara Johnson from birth until 1987. Through interviews and trial testimony, the victim reported and described the various occasions defendant performed sexual intercourse and "messed" with her since she was five or six years old. The victim described a particular occasion at the drive-in movies where defendant unzipped his pants and told her to suck his penis while the two were inside defendant's car. Defendant told her to take one leg out of her pants and panties and she complied. By touching the victim's back, defendant pushed her head down but she kept her mouth closed. On this occasion her nose started to bleed.

The jury convicted defendant on two counts of first degree rape, one count of attempted first degree sexual offense and one count of taking indecent liberties with a minor. Defendant appeals.

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

James R. Parish for defendant-appellant.

WELLS, Judge.

I. *Rape and Attempted First-Degree Sex Offense Convictions*

Defendant was convicted of two counts of first degree rape and one count of attempted first degree sex offense. In his appeal,

defendant has abandoned his challenge to the sufficiency of the evidence to support these convictions.

Under a separate assignment of error, defendant has challenged the testimony of one of the State's witnesses. We find defendant's argument to be entirely without merit and overrule that assignment of error.

II. *Indecent Liberties Conviction*

The North Carolina Rules of Appellate Procedure, Rule 4(b) states the requirements for giving proper notice of appeal in criminal cases:

> *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall . . . designate the judgment or order from which appeal is taken. . . .

Appellate review is solely upon the record on appeal and the record in criminal actions must include a copy of the verdict and the judgment. North Carolina Rules of Appellate Procedure, Rule 9(a)(3)g. Defendant gave proper notice of appeal from the judgments entered in 88CRS20907-first degree rape, 88CRS20909-attempted first degree sexual offense, and 88CRS20910-first degree rape.

Consistent with an indictment, the jury returned a verdict of guilty for the offense of taking indecent liberties with children in violation of N.C. Gen. Stat. § 14-202.1(a)(1). Defendant attempts to argue in his brief that this judgment was in error. However, defendant failed to include such judgment for this offense as part of the record on appeal. In giving his notice of appeal, defendant also failed to include such judgment in his appellate entries. Because defendant has not perfected his appeal as to his conviction of taking indecent liberties, this Court is without jurisdiction to hear this appeal. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

As to the convictions for rape and attempted sex offense,

No error.

As to the purported appeal from the conviction of indecent liberties,

Appeal dismissed.

Judges COZORT and LEWIS concur.

LAURA LEIGH BOONE (STOTT) BROMHAL v. E. GREGORY STOTT

No. 9010DC572

(Filed 15 January 1991)

Appeal and Error § 105 (NCI4th)— domestic action—orders—interlocutory—appeal dismissed

An appeal was dismissed as interlocutory where defendant attempted to appeal from orders awarding plaintiff attorney's fees on her motion to compel answers to interrogatories and requests for admission, denying defendant's request for attorney's fees on his motion to compel answers to interrogatories and requests for admission, and ruling by partial summary judgment that the parties' separation agreement was valid but leaving the damages issue for later determination.

Am Jur 2d, Appeal and Error §§ 47, 50, 53, 135.

APPEAL by defendant from orders entered 4, 12, 17 January 1990 and 6 March 1990 by *Judge Jerry W. Leonard* in WAKE County District Court. Heard in the Court of Appeals 5 December 1990.

Brady, Schilawski, Earls and Ingram, by Michael F. Schilawski, for plaintiff appellee.

Jack P. Gulley for defendant appellant.

PHILLIPS, Judge.

The parties were formerly wife and husband. Plaintiff's action seeks the specific enforcement of their separation agreement. Defendant's appeal is from orders that—

(a) awarded plaintiff attorney's fees on her motion to compel answers to her interrogatories and requests for admission;

(b) denied defendant's requests for attorney's fees on his motions to compel answers to his interrogatories and requests for admission;

(c) ruled by partial summary judgment that the parties' separation agreement is valid but left the damages issue for determination later.

The appeal is unauthorized and we dismiss it. All the orders are interlocutory; none will deprive defendant of a substantial right that would be lost if the orders are not reviewed before final judgment. G.S. 1-277; G.S. 7A-27; *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Appeal dismissed.

Judges ORR and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 JANUARY 1991

BALLINGER v. SIX-CAROLINA, INC. No. 9018SC540	Guilford (89CVS2770)	Affirmed
BROWN v. STADIUM EXXON No. 9010IC297	Ind. Comm. (709270)	Affirmed
HILLIS v. PECHELES IMPORTS, INC. No. 907DC100	Wilson (88CVD1075)	Remanded
IN RE HUGHES v. HUGHES No. 9022DC96	Alexander (88J9)	Affirmed
IN RE MELVIN No. 9014DC240	Durham (85J109)	Affirmed
IN RE SMITH No. 8914DC1325	Durham (85J62)	Affirmed
JORDAN v. BENEFIELD No. 9027SC426	Gaston (88CVS502)	No Error
MARANTZ PIANO CO. v. KINCAID No. 9025DC298	Burke (89CVD1235)	Appeal from the 12 December 1989 Order denying defendant's motion to dismiss plaintiff's claims is Dismissed. Appeal from the 12 December 1989 Addendum Order striking defendant's additional defenses and counterclaims is Affirmed
PEARSON v. MARLOWE No. 907SC420	Nash (87CVS1151)	As to plaintiff Barney Pearson, new trial. As to plaintiff Jonanna Pearson, affirmed
PEELE v. PEELE No. 907SC462	Nash (89CVS779)	Affirmed
STATE v. ADKINS No. 908SC141	Greene (89CRS209)	No Error

STATE v. BOND No. 9010SC518	Wake (88CRS76321)	No Error
STATE v. BOWMAN No. 9017SC398	Surry (88CRS5234) (88CRS5788) (88CRS5792) (88CRS5793) (88CRS5794) (88CRS5795) (88CRS5796) (88CRS5797) (88CRS5799) (88CRS5800) (88CRS5801) (88CRS5802) (88CRS5803) (88CRS5804) (88CRS5805) (88CRS5809) (88CRS5810) (88CRS5811) (88CRS5812) (88CRS5813) (88CRS6199) (88CRS6480) (88CRS6622) (88CRS6623) (88CRS6624) (88CRS6625) (88CRS6626) (88CRS6627) (88CRS6628) (88CRS6629) (88CRS6630) (88CRS6632) (88CRS6633) (88CRS6634) (88CRS6635) (88CRS6636) (88CRS6637) (88CRS6638) (88CRS6639) (88CRS6640)	Affirmed
STATE v. BUCK No. 9013SC466	Brunswick (89CRS3660) (89CRS5005)	Dismissed
STATE v. COLLINGTON No. 9029SC432	Henderson (88CRS1349) (88CRS1350)	No Error

STATE v. CURETON No. 9025SC563	Catawba (89CRS8688)	No Error
STATE v. FLEMMING No. 9026SC204	Mecklenburg (89CRS25510)	No Error
STATE v. GALLOP No. 901SC90	Currituck (88CRS537)	No Error
STATE v. HARPER No. 9026SC447	Mecklenburg (89CRS32277)	No Error
STATE v. HILL No. 9018SC380	Guilford (89CRS48273) (89CRS48280)	No Error
STATE v. HOLLIS No. 908SC574	Lenoir (89CRS3402)	No Error
STATE v. IVEY No. 9026SC127	Mecklenburg (89CRS32469) (89CRS64261)	No Error
STATE v. LUCAS No. 9010SC599	Wake (89CRS53888)	No Error
STATE v. McCAULEY No. 9026SC538	Mecklenburg (89CRS8910) (89CRS8912) (89CRS8913)	No Error
STATE v. WILLIAMS No. 9010SC566	Wake (88CRS29032)	No Error
SWEETEN CREEK LIMITED PARTNERSHIP v. CITY OF ASHEVILLE No. 9028SC108	Buncombe (89CVS1934)	Affirmed
TERRY v. DAVIDSON COUNTY No. 9022SC253	Davidson (89CVS01670)	Affirmed
UMSTEAD v. ST. ANDREWS PRESBYTERIAN COLLEGE No. 9016SC120	Scotland (87CVS843)	Affirmed
VANSTORY OIL CO. v. PACEGRO, INC. No. 9018DC201	Guilford (89CVD6611)	Appeal Dismissed
WILLIAMS v. WILLIAMS No. 9022DC379	Alexander (78CVD69)	Reversed and Remanded

STATE OF NORTH CAROLINA, EX REL. ENVIRONMENTAL MANAGEMENT COMMISSION AND DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, PLAINTIFF v. HOUSE OF RAEFORD FARMS, INC., A NORTH CAROLINA CORPORATION AND NASH JOHNSON AND SONS' FARMS, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. 904SC283

(Filed 5 February 1991)

1. **Waters and Watercourses § 3.2 (NCI3d)— water pollution limits—violation of consent judgment and permit—civil penalties—judicial review—failure to exhaust administrative remedies**

The superior court had no jurisdiction to review civil penalties assessed by the Environmental Management Commission for violations of interim effluent pollution limits set forth in a consent judgment and NPDES permit because defendants failed to exhaust their administrative remedies under N.C.G.S. Ch. 150B. The Environmental Management Commission did not waive the exhaustion requirement as to penalties to be assessed against defendants in the future by signing a consent judgment settling ten enforcement proceedings pending against defendants in the superior court and in the Office of Administrative Hearings where statements in the consent judgment regarding retention of jurisdiction by the superior court referred only to matters in dispute between the parties at the time the consent judgment was entered. Nor was the superior court given jurisdiction over the NPDES permit and any violations thereof because the permit was attached to the consent judgment where it appears that the permit was attached to the judgment only to illustrate the water quality requirements that defendants were to meet. N.C.G.S. §§ 143-215.1(a)(2) and (6).

Am Jur 2d, Pollution Control § 492.

2. **Judgments § 21 (NCI3d)— modification of consent judgment—absence of consent of one party**

The trial court erred in modifying a consent judgment by substituting a schedule of less stringent interim effluent pollution limits where plaintiff Environmental Management Commission did not consent to the modification, and there was

no evidence in the record that the effluent limits in the original consent order were obtained by fraud or mutual mistake.

Am Jur 2d, Judgments § 688.

3. **Judgments § 21 (NCI3d)— modification of consent judgment— change of circumstances not shown**

Defendants' inability to bring their effluent pollution levels under control because of their underestimation of the problems, the weather, and continuing deterioration of defendants' facilities did not constitute a change of condition which, under the terms of a consent judgment, would permit a modification of the provisions of the consent judgment.

Am Jur 2d, Judgments §§ 717, 765.

4. **Judgments § 21.2 (NCI3d)— erroneous belief by defendants— unilateral mistake—consent judgment not modifiable**

Defendants' erroneous belief that they could stay within the interim effluent pollution limits required by a consent judgment did not constitute a mutual mistake of fact which would entitle them to a modification of the interim limits.

Am Jur 2d, Judgments §§ 717, 765.

5. **Rules of Civil Procedure § 60 (NCI3d)— motion for relief from judgment—amendment of judgment improper**

A judgment may not be amended pursuant to a motion under N.C.G.S. § 1A-1, Rule 60(b)(6) for relief from the judgment.

Am Jur 2d, Judgments § 679.

6. **Appeal and Error § 453 (NCI4th)— constitutional questions— necessity for ruling by trial court**

The appellate court will not pass upon the constitutionality of the statutory authority of the Environmental Management Commission to impose civil penalties where this issue was not presented to and passed upon by the trial court.

Am Jur 2d, Appeal and Error § 574.

7. Attorneys at Law § 64 (NCI4th)— attorney fees—prevailing party

Defendants were not entitled to attorney fees under N.C.G.S. § 6-19.1 where they are not the "prevailing party."

Am Jur 2d, Damages § 615.

APPEAL by plaintiffs and defendants from judgment and order entered 1 August 1989 by *Judge D. Marsh McLelland* in DUPLIN County Superior Court. Heard in the Court of Appeals 27 September 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for plaintiff appellant-appellee.

Jordan, Price, Wall, Gray & Jones, by Henry W. Jones, Jr., and Roseanne P. Carter, for defendant appellants-appellees.

COZORT, Judge.

Plaintiff Environmental Management Commission is the State agency charged with enforcement of State pollution control laws. In 1988 plaintiff and defendants entered into a Consent Judgment in Duplin County Superior Court for the purpose of settling ten enforcement proceedings then pending against defendants in the superior courts of Duplin and Wake Counties and in the Office of Administrative Hearings. The Consent Judgment provided that Duplin County Superior Court retained jurisdiction of that matter for determining motions for further relief based on changed circumstances. Plaintiff subsequently initiated enforcement proceedings against defendants for 48 alleged violations of the interim effluent limitations provided for in the Consent Judgment. The enforcement proceeding included a notification that $294,000.00 in civil penalties would be assessed against defendants for the alleged violations. Defendants sought relief in the Duplin County Superior Court, obtaining a Judgment and Order which, among other things, set aside the proposed assessment of $294,000.00 in civil penalties. On appeal, we find the trial court erred because defendants failed to exhaust administrative remedies provided under the laws of this State.

We begin with a rather detailed summary of the facts and procedural history of this matter, which is necessary for a complete understanding of the issues raised. Defendant House of Raeford

Farms, Inc. (Raeford), and defendant Nash Johnson and Sons' Farms, Inc. (Johnson), which owns 99 percent of the stock of Raeford, are North Carolina corporations which own and operate chicken and turkey hatcheries and chicken slaughtering and processing facilities. Raeford operates a wastewater treatment plant at its Rose Hill Division near Rose Hill, in Duplin County, North Carolina. Raeford's plant consists of two six-acre lagoons in series and a 33-acre spray irrigation field with an underdrain network. The effluent from the underdrain system is collected and discharged into Cabin Branch, which is classified by the Division of Environmental Management as a Class C swamp water in the Cape Fear River basin.

Raeford was issued National Pollutant Discharge Elimination System (NPDES) Permit Number NC 0002178 on 1 August 1986 with an expiration date of 31 December 1987. The State issued other permits to defendant, the sum total of which was to regulate the disposal of waste from the several facilities operated by defendants in Duplin County. The State of North Carolina, through plaintiff Environmental Management Commission (EMC), charged defendants with violations of various water pollution and related laws.

This cause began in the posture of a consolidation of the various cases instituted as a result of alleged violations by the defendants of the pollution control laws.

On 29 February 1988, plaintiff EMC and defendants Raeford and Johnson entered into a Consent Judgment to settle ten cases pending in the superior courts of Duplin and Wake Counties and in the Office of Administrative Hearings. The Consent Judgment required, among other things, that the defendants pay civil money penalties in the amount of $100,000.00 and the sum of $4,520.74 in investigation costs (which amounts were paid in full by the defendants) and that other various civil money penalties charged against the defendants for alleged violations of water pollution laws would be remitted over time in conjunction with the defendants' compliance with a comprehensive construction schedule and monitoring and reporting requirements. Defendants agreed to payment of stipulated penalties for failure to meet certain deadlines and requirements, unless the noncompliance was caused by events or circumstances beyond defendants' control. The Consent Judgment concluded with these two paragraphs:

> 8. All claims, demands and causes of action of the Plaintiff alleged in, or arising out of, or based on matters set forth

in Plaintiff's Complaint herein shall be merged in this Consent Judgment and completely settled and discharged by such merger.

9. The Court shall retain necessary jurisdiction of this matter for purposes of enforcing the terms of the Consent Judgment; for purposes of determining any matters in dispute; and for purposes of determining any motion for further relief based on changes of circumstances.

On 14 April 1988, defendant Raeford filed a motion in the cause requesting modification of the Consent Judgment. The Consent Judgment required the submission of a final plan for a wastewater treatment and disposal facility by 1 May 1988. Defendant Raeford had discharged an engineer employed to design this facility. Defendant then determined it would be unable to complete the plans by the deadline in the Consent Judgment. The superior court judge presiding over the case, Judge Henry C. Stevens, III, concluded that defendant Raeford had suffered a change in circumstances as set forth in the Consent Judgment. The court then modified the Consent Judgment to allow Raeford a reasonable time to submit a final plan for the wastewater treatment facility.

On 4 May 1989, defendants filed a second motion in the cause. The defendants presented three claims for relief. First, defendant Johnson stated that it "finds it commercially impractical to complete the construction of the previously anticipated improvements to the old chicken hatchery as permitted on 8 March 1988." The Consent Judgment provided that within 30 days of receipt of the permit, Johnson was to begin construction of the authorized improvements. Johnson's change of plans created a conflict with the Consent Judgment. Johnson wanted to be able to use its old hatchery as it was, *i.e.*, without the required improvements, until its new larger hatchery was ready. Defendant asserted that this change in plans was a change in circumstances justifying a modification of the Consent Judgment's requirement that the defendant construct certain improvements on its present chicken hatchery facility.

Also in this second motion in the cause, Raeford contended that it made a mistake in computing the original interim effluent limitations. Raeford asserted that for this reason it experienced a change in circumstances entitling it to relief from the Consent Judgment in the form of a modification amending the interim

effluent limitations established in the attachment to the Consent Judgment.

In the third claim for relief, Raeford sought modification of various filing requirements for the issuance of a nondischarge permit. Raeford claimed that it was unable to submit the additional soil mapping or submit final plans regarding the chicken processing facility as required by the Consent Judgment because the president of Raeford and Johnson had been hospitalized. On 15 May 1989, the defendants modified this claim for relief alleging that on 12 May 1989 they had complied with the submission requirements.

On 18 May 1989, defendants filed a second amendment to their motion in the cause asserting a fourth claim for relief. Through this amendment defendants notified the court that the plaintiff had notified them that defendants were being assessed civil penalties of $294,449.20 for failure to comply with deadlines and requirements set forth in the Consent Judgment. In this second amendment, the defendants asked the court to modify the effluent limitations provided for under the Consent Judgment, apply these modified limitations retroactively and find that the defendants have at all times complied with the effluent limitations, thus removing the justification for the proposed civil penalties. The defendants also asked for attorneys' fees.

The fines to which the defendants objected were assessed by plaintiff in a letter dated 12 May 1989. Plaintiff notified defendant that it was being assessed a penalty of $288,000.00 for 48 violations of N.C. Gen. Stat. § 143-215.1(a)(6) and NPDES Permit No. NC 0002178; $6,000.00 for one violation of N.C. Gen. Stat. § 143-215.1(a)(2) and NPDES Permit No. NC 0002178; and $449.20 for investigation costs. In the notice sent to defendants, the plaintiff informed defendants of three options: (1) pay the penalty; (2) submit a request for mitigation; or (3) submit a request for an administrative hearing. Plaintiff informed defendants they had 60 days to respond.

On 19 May 1989, defendants' motion for amendments to the Consent Judgment was heard in Duplin County Superior Court by Judge Stevens. In an order filed 5 June 1989, the court found that the parties had resolved the issues involved in the first claim for relief. The court determined that it had jurisdiction over the issues and matters in controversy raised by the plaintiff in its 12 May penalty assessment notice to defendants without defendants proceeding through the administrative process pursuant to N.C.

Gen. Stat. § 150B-23 *et seq.*, including jurisdiction over the civil penalties assessed for violations of the terms of the NPDES permit. The court's order set less stringent effluent limits. The court stated: "[T]his interim order is entered in the exercise of the courts [*sic*] equitable jurisdiction . . . the same being an inherent power of the Superior Court to maintain the status quo . . . and specifically to discourage the 'stockpiling' of repetitive litigation." Judge Stevens also recused himself from any further proceedings in the matter and continued the hearing to the 10 July 1989 term of Duplin County Superior Court to be heard by Judge D. Marsh McLelland. (The recusal of Judge Stevens and continuance of the matter are not at issue in this appeal.)

On 3 July, plaintiff filed a motion asking the court to reconsider the 5 June order asking the court to "consider the issue of jurisdiction previously considered by Judge Stevens as the question of subject matter jurisdiction may be raised at any time, and furthermore, that the administrative procedure Act, Chapter 150B, provides the exclusive statutory remedy for contesting the assessment of civil penalties by the Environmental Management Commission and the Director of the Division of Environmental Management."

The matter came on for hearing before Judge McLelland at the 10 July 1989 session of the Duplin County Superior Court. At this hearing plaintiff argued that the court was without jurisdiction to hear defendants' challenge to the propriety of the penalties assessed by the State inasmuch as such matters may be heard in the superior court only on a review of a decision of the Office of Administrative Hearings. The trial court rejected plaintiff's argument, and in an order filed 1 August 1989, the trial court held:

> [T]he election of this forum by the parties through their execution of the Consent Judgment may have precluded Defendants from contesting the propriety of penalty assessments in the Office of Administrative Hearings. If it did not, the granting of its motion to raise retroactively the level of effluent pollution limits would render moot the propriety of penalty assessments, not only in the past but also in the future, thus making first resort to the court the preferable procedure. And since there can be no doubt that the court is a proper forum to conduct hearings, find facts, reach conclusions and render judgments, there is no logical reason to hold that it is limited in cases of this nature to reviewing the hearing, finding of

facts, conclusions and judgment of an administrative agency. For these reasons and to avoid a multiplicity of hearings and forums, Plaintiff's challenge to the jurisdiction of the court to hear all aspects of the Defendants' Motion for Modification is overruled.

After making other findings of fact, the trial court reached the following pertinent conclusions of law:

1. The failure of the Defendants to comply with the limits on effluent pollution set out in the Consent Judgment is not a change of a circumstance that would constitute a basis for relieving Defendants of their obligations under the Consent Judgment. . . .

* * * *

2. The Defendants' contention that the assessment of civil penalties is unjust because Plaintiff's staff recommended assessment after giving Defendants the impression that it would recommend that no penalties be assessed, and that the court should relieve Defendants in the exercise of its equitable jurisdiction, as authorized by Rule 60(b) (6), Rules of Civil Procedure, N.C.G.S. §1A-1, is without merit.

3. The Defendants' contention that Plaintiff is barred by the Statute of Limitations, N.C.G.S. §1-54, from assessing civil penalties for violations occurring more than one year before the assessment, is without merit.

* * * *

6. The Defendants' contention that the Plaintiff failed to comply with the law in the determination of civil penalty amounts assessed on 12 May 1989, has merit. N.C.G.S. §143-215.6 (a) (3) provides: "In determining the amount of the penalty the Commission shall consider the degree and extent of harm caused by the violation and the cost of rectifying the damage." There is no other statutory criteria. . . . But [plaintiff's] consideration of the statutory criteria was perfunctory and was given no effect in setting the amounts. Without a basis in law for assessing penalties, there could be no validity to the fixing of amounts on the other criteria set forth in the Rules. Determining the amounts was purely discretionary and largely punitive.

The trial court reversed and set aside the assessed penalties of $294,000.00. The trial court affirmed a $50,000.00 stipulated penalty for failure to file a compliance report. The trial court denied defendants' motion to modify the Consent Judgment and denied defendants' motion for counsel fees.

Plaintiff filed notice of appeal on 22 August 1989; defendants filed notice of appeal on 24 August 1989. Plaintiff assigns as error: (1) the trial court's exercise of jurisdiction over the civil penalties assessed for violations of the interim terms and conditions of the NPDES permit and N.C. Gen. Stat. §§ 143-215.1(a)(2) and (6); (2) the trial court's conclusion that the plaintiff's consideration of the statutory criteria was perfunctory in setting the penalty amounts; (3) the trial court's reversal of plaintiff's assessment of civil penalties of $294,000.00; and (4) the trial court's modification of the interim effluent limits in the Consent Judgment. Defendants assign as error: (1) the trial court's decision not to modify the Consent Judgment to permanently change the effluent limitations; (2) the trial court's refusal to find that the civil penalties assessed against the defendants are unconstitutional; (3) the trial court's conclusion that plaintiff is not barred by the statute of limitations from assessing penalties against defendants; (4) the trial court's conclusion that defendants are liable for the $50,000.00 penalty stipulated in the Consent Judgment and the $449.20 investigation cost; and (5) the trial court's denial of defendants' motion for attorneys' fees. We shall address plaintiff's assignments of error first.

[1] Plaintiff contends that the trial court did not have jurisdiction over the penalties assessed by the EMC because jurisdiction is statutorily conferred upon the EMC and the Office of Administrative Hearings. Consequently, plaintiff argues, defendants must exhaust specific administrative remedies before proceeding to the superior court. We agree.

By enacting N.C. Gen. Stat. § 143-215.6, the General Assembly placed subject matter jurisdiction over the assessment and adjudication of civil penalties relating to violations of laws protecting North Carolina's water and air exclusively in the EMC. In § 143-215.5, the General Assembly limited the superior court to judicial review of the final agency action, as provided by N.C. Gen. Stat. § 150B-43, *et seq.*

Under the statutory scheme, the adjudication of civil penalties assessed under the authority of N.C. Gen. Stat. § 143-215.6 occurs

in contested cases. A " 'Contested case' means an administrative proceeding pursuant to this Chapter [Chapter 150B] to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." N.C. Gen. Stat. § 150B-2(2) (1990). Contested cases are heard before the Office of Administrative Hearings pursuant to § 150B-23, *et seq.*; the authority to make the final decision remains with the EMC. N.C. Gen. Stat. § 150B-36 (1990). It is only after a "final decision" that the superior court has jurisdiction. N.C. Gen. Stat. § 150B-43 states that "[a]ny person who is aggrieved by the *final decision* in a *contested case*, and who *has exhausted all administrative remedies* . . . is entitled to judicial review." (Emphasis added.)

Thus, N.C. Gen. Stat. Chapter 150B provides an effective procedure for defendants Raeford and Johnson to contest the fines assessed by the plaintiff EMC. Our courts have held that "[w]hen the statute under which an administrative board has acted provides an orderly procedure for an appeal to the superior court for review of the board's action, this procedure is the exclusive means for obtaining judicial review." *Snow v. Bd. of Architecture*, 273 N.C. 559, 570-71, 160 S.E.2d 719, 727 (1968); *see also State ex rel. Grimsley v. Buchanan*, 64 N.C. App. 367, 369, 307 S.E.2d 385, 387 (1983). In the case below there was no final order of the Commission requiring defendant to pay a civil monetary penalty. It would become final and subject to collection by civil suit only after all administrative remedies are exhausted. *State ex rel. Lee v. Williams*, 55 N.C. App. 80, 83, 284 S.E.2d 572, 574 (1981).

Defendants contend nevertheless that the superior court had jurisdiction over these fines because the plaintiff, by entering into the Consent Judgment, waived the exhaustion requirement. We hold that by entering into a Consent Judgment which resolved ten cases then pending in the courts and the administrative hearings office, the plaintiff did not waive the exhaustion requirement as to penalties which would be assessed in the future. In the introductory part of the Consent Judgment the parties agreed:

> The State of North Carolina, plaintiff, and House of Raeford Farms, Inc. and Nash Johnson and Sons' Farms, Inc., hereinafter defendants, hereby agree to the entry of this Consent Judgment to amicably resolve this and other matters in controversy

between them and to subject the defendants' operation of the covered facilities to the jurisdiction of the court.

However, in the "Stipulated Findings of Fact" section upon which the Consent Judgment is premised, the parties state:

> The parties agree that this Consent Judgment constitutes full settlement of all matters presently known to them regarding compliance with water quality permits issued by, or water quality laws administered by, the plaintiff Commission and Department, with the following caveat: the plaintiff reserves all rights to otherwise assess appropriate civil penalties pursuant to NCGS 143-215.6(a) in connection with the operation of all of the Rose Hill wastewater treatment facilities by the defendants, including but not limited to any failures to comply with applicable interim or final effluent limitations and monitoring requirements. The parties further agree this Consent Judgment is supplementary to the obligations of the defendant under state and federal water quality statutes.

Furthermore, in the last paragraph of the "Conclusions of Law," the Consent Judgment reads, "The Court shall retain necessary jurisdiction of *this matter* for purposes of enforcing the terms of the Consent Judgment; for purposes of determining any matters in dispute; and for purposes of determining any motion for further relief based on changes of circumstances." (Emphasis added.)

Considering the above language in the context of the entire Consent Judgment, we find that plaintiff did not waive the application of the Administrative Procedure Act to civil penalties which might be assessed subsequent to the execution of the Consent Judgment. We find that all statements regarding retention of jurisdiction refer to the matters in dispute between the parties at the time of entry into the Consent Judgment.

Defendants further contend that since the NPDES permit was attached to the Consent Judgment, the permit became a part of the Consent Judgment, and the trial court was thus given jurisdiction over the permit and any violations thereof. We find nothing in the Consent Judgment which indicates that the parties intended for the trial court to have jurisdiction over the penalties assessed for violations of the permits. The only mention of the attachment is:

> 3. Upon execution of this Consent Judgment, the defendant shall meet, and comply with, all terms and conditions of

> NPDES Permit No. NC0002178 except those effluent limitations for BOD_5, NH_3-N, and Fecal Coliform. *During the time in which this Consent Judgment is effective, the defendants shall comply with the interim effluent limitations and monitoring requirements contained in Attachment A.* (Emphasis added.)

Using the plain language of the Consent Judgment that the parties themselves drafted, it is clear that the NPDES permit was attached to the judgment to illustrate the requirements that the defendants were to meet. No other significance can be attached to the insertion of the permit in the Consent Judgment. The Consent Judgment's unambiguous terms must be given effect until the judgment is modified or set aside. *Peace v. High Point*, 236 N.C. 619, 73 S.E.2d 561 (1952); *see also Ferrell v. N.C. State Hwy. Comm.*, 252 N.C. 830, 115 S.E.2d 34 (1960).

We also find that the Consent Judgment is so detailed that the parties would have specifically provided for waiver of the exhaustion requirement, if they had intended such. *See Spruill v. Nixon*, 238 N.C. 523, 78 S.E.2d 323 (1953). Therefore we hold that the EMC's assessment of penalties was not subject to judicial review because defendants failed to exhaust their administrative remedies. *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462, *disc. review denied, appeal dismissed*, 327 N.C. 484, 397 S.E.2d 215 (1990). It follows that the trial court's decision to reverse the $294,000.00 penalty was in error because the trial court lacked jurisdiction over that issue; that portion of the trial court's order is vacated.

[2] We next consider plaintiff's argument that Judge Stevens and Judge McLelland erred in modifying the Consent Judgment during the pendency of the present litigation. We find plaintiff's argument has merit; we hold that plaintiff has been prejudiced by the errors.

In the order of 5 June 1989, Judge Stevens, without consent of plaintiff, modified the Consent Judgment until the 10 July hearing before Judge McLelland by substituting a schedule of less stringent effluent limitations. Judge McLelland continued the substituted effluent limits until the entry of his judgment on 1 August 1989. We can find no basis in law or equity which supports the modification of the Consent Judgment.

The North Carolina Supreme Court has stated the following rule with regard to consent judgments:

> A judgment entered by the consent of the parties cannot be changed or altered without the consent of the parties to it or set aside except on proper allegations and proof and a finding by the court that it was obtained by fraud or a mutual mistake or that consent in fact was not given, the burden being on the party attacking the judgment.

In re Johnson, 277 N.C. 688, 696, 178 S.E.2d 470, 475 (1971). In the present case, plaintiff did not consent to the substitution of the less stringent effluent limitations. The court made no finding that the effluent limitations in the original consent order were obtained by fraud or mistake; furthermore, there is no evidence in the record that the original limits were obtained by mutual mistake or fraud. Moreover, after the hearing in July, Judge McLelland, in addressing the defendants' request for permanent modification of the effluent limitations, concluded that the failure of a party to perform contractual obligations, even when both parties expect performance, is not a mistake of fact which relieves the nonperforming party of the duty to perform. The court stated:

> At bottom, the Defendants' Motion for Modification is an effort to be relieved of compliance with all restrictions on effluent pollution while correcting their inadequate wastewater treatment facilities. Whether the Plaintiff could have so contracted, it is plain that it did not, and it cannot on the facts of this case be compelled to do so.

The order temporarily modifying the Consent Judgment states that jurisdiction "has been properly invoked" in the exercise of the court's equitable jurisdiction "to maintain the status quo." We disagree. The order temporarily lowering the interim effluent limits had the effect of an injunction prohibiting the plaintiff EMC from assessing penalties against defendants for violations of the interim effluent limits set in the Consent Judgment.

The purpose of a preliminary injunction is to "preserve the *status quo* pending trial on the merits." *State v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). In the present case, the status quo at the time in question was the parties' agreement to abide by the Consent Judgment. Thus, the interim effluent limits set by the Judgment preserved the status quo; the trial court's order modifying the limits altered the status quo. Defendants' remedy is to pursue administrative review of the proposed penalties. Further, the plaintiff was substantially

prejudiced by the trial court's modification, because it was unable to assess penalties for defendants' alleged violations. *See id.* at 358, 261 S.E.2d at 913.

For these reasons, we vacate the portion of the trial court's orders modifying the interim effluent limits.

We now turn to defendants' appeal. Defendants first contend that the trial court erred in failing to modify the Consent Judgment to change the interim effluent limitations. Defendants argue (1) that various conditions causing impossibility of compliance constituted changed circumstances within the meaning of the Consent Judgment; (2) that the parties made a mutual mistake of fact in entering into the Consent Judgment; and (3) that agreements between the parties and the defendants' reliance on plaintiff's representations and actions justify relief from operation of the Consent Judgment pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. We reject all of defendants' arguments.

As stated above, the general rule is that a consent judgment cannot be modified without the consent of the parties or without proof that consent was obtained by fraud or mistake. *In re Johnson*, 277 N.C. at 696, 178 S.E.2d at 475. Defendants contend nonetheless that a phrase in the Consent Judgment supports modification.

[3] In the last sentence of the Consent Judgment of 29 February 1988 the court retained jurisdiction to enforce the terms of the Judgment and "for purposes of determining any motion for further relief based on changes of circumstances." Plaintiff contends that defendants failed to show changes in circumstances. We agree. After considering the evidence of both parties, Judge McLelland found, in a finding not excepted to by defendants, that "[n]either party presented evidence of specific causation of Defendants' violation of pollutant limits." He then concluded that there was no "change of a circumstance that would constitute a basis for relieving Defendants of their obligations under the Consent Judgment." The trial court's ruling is, in essence, that defendants failed to prove a change in circumstances. Defendants' argument on appeal is that the defendants' inability to effectively bring their effluent limits under control was due to defendants' underestimation of the problems, the weather, and continuing deterioration of defendants' facilities, which all add up to changes in circumstances. We categorically reject this argument and affirm the trial court's holding of no change in circumstances.

[4] Defendants next argue that the parties made a mutual mistake of fact in entering into the Consent Judgment. Mutual mistake is a ground for modification of a consent judgment when the mistake is common to both parties and led to what neither intended. *In re Will of Baity*, 65 N.C. App. 364, 366-67, 309 S.E.2d 515, 517 (1983), *cert. denied*, 311 N.C. 401, 319 S.E.2d 266 (1984).

"A consent judgment signed by the attorneys for the parties is presumed to be valid and the burden of proof is upon the one who challenges its invalidity." *Johnson*, 277 N.C. at 696, 178 S.E.2d at 475. Thus, the defendants must prove that both parties entered into the consent agreement under a mistake of fact. We find no evidence to support defendants' contention.

In *Will of Baity*, the propounders in a will contest argued that the parties' lack of knowledge of a prior will constituted a mutual mistake which would support an order setting aside a Consent Judgment. *Id.* at 367, 309 S.E.2d at 517. This Court held that, even if the existence of a prior will was a material fact, and that the propounders would not have entered into the agreement had they known of the document, "their assumption to the contrary was at most a unilateral mistake." *Id.* at 368, 309 S.E.2d at 518. In the present case, there is no evidence that the defendants' assumption that they could stay within the interim effluent limits was anything more than a unilateral mistake. We hold that the trial court did not err in finding that no mutual mistake of fact entitled defendants to a modification of the interim effluent limitations.

[5] Defendants further maintain that even if this Court finds no mutual mistake of fact, defendants are entitled to relief from the Consent Judgment under N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). Attacks on consent judgments are controlled by Rule 60(b)(6). *In re Will of Baity*, 65 N.C. App. at 367, 309 S.E.2d at 517. Rule 60(b)(6) permits motions for relief from judgments for "[a]ny other reason justifying relief from the operation of the judgment." However, it appears from defendants' brief that their request for relief pursuant to Rule 60(b)(6) is in reality a motion to amend the Consent Judgment. That result cannot be achieved by a motion under Rule 60(b)(6). *Coleman v. Arnette*, 48 N.C. App. 733, 269 S.E.2d 755 (1980). Nevertheless, we shall consider defendants' contention as a request for relief from the Judgment rather than a request for an amendment.

In *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 351 S.E.2d 779 (1987), this Court summarized the rules to be employed in reviewing the trial court's decision on a Rule 60(b)(6) motion for relief from a judgment:

> The setting aside of a judgment pursuant to G.S. 1A-1, Rule 60(b)(6) should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E.2d 9 (1980). In addition to these requirements, the movant must also show that he has a meritorious defense. *Sides v. Reid*, 35 N.C. App. 235, 241 S.E. 2d 110 (1978).
>
> General Statute 1A-1, Rule 60(b)(6) "is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought." *Kennedy v. Starr*, 62 N.C.App. 182, 186, 302 S.E.2d 497, 499-500, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). Our Supreme Court has indicated that this Court cannot substitute "what it consider[s] to be its own better judgment" for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it "probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 486-87, 290 S.E.2d 599, 604-05 (1982). Further, "[a] judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

84 N.C. App. at 24-25, 351 S.E.2d at 785.

Applying the foregoing rules to the case at bar, we find that the trial court did not abuse its discretion.

[6] In its fourth assignment of error, defendants contend that the trial court erred in failing to find that the assessment of civil penalties by the EMC violated Article IV, section 3 of the North Carolina Constitution.

Defendants have not complied with Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure which requires a question to be presented first to the trial court by objection or motion. The record on appeal does not reflect that the issue of the constitu-

tionality of the Commission's civil penalty authority was presented to the trial court. This Court has held that it will not pass upon the constitutionality of a statute where the record does not reveal that the trial court was confronted with the issue and passed upon it. *State v. Robertson*, 57 N.C. App. 294, 291 S.E.2d 302, *disc. review denied, appeal dismissed*, 305 N.C. 763, 292 S.E.2d 16 (1982). Thus, we will not pass upon defendants' fourth assignment of error.

Next, defendants argue that the trial court erred by ruling that the one-year statute of limitations in N.C. Gen. Stat. § 1-54 did not bar the plaintiff from assessing civil penalties for violations occurring more than one year before the assessment. We need not address this issue because we have ruled that the trial court did not have jurisdiction to review the civil penalties assessed by plaintiff. Defendants may raise this argument in their request for an administrative hearing.

Defendants' sixth assignment of error concerns the trial court's upholding the $50,000.00 stipulated penalty and $449.20 in investigation cost assessed by the plaintiff pursuant to the 1988 Consent Judgment. The Consent Judgment provides that specific penalties may be assessed against defendants for failure to meet certain deadlines established in the Consent Judgment. The Consent Judgment requires that defendants file a semi-annual report of compliance status. We have carefully reviewed defendants' argument and the portions of the record pertinent thereto. We find no merit to defendants' contentions and thus affirm this portion of Judge McLelland's judgment and order.

[7] We also summarily reject defendants' contention that defendants are entitled to attorneys' fees under N.C. Gen. Stat. § 6-19.1. Defendants are clearly not the "prevailing party," as contemplated in that statute.

In summary, all temporary modifications of the effluent limitations in the Consent Judgment are vacated, the trial court's reversal of the $294,000.00 civil penalty is vacated, and the remaining portions of the trial court's judgment and order of 1 August 1989 are affirmed.

Affirmed in part; vacated in part.

Judges WELLS and LEWIS concur.

SPARTAN LEASING INC. OF NORTH CAROLINA, PLAINTIFF v. BURNETT POLLARD, D/B/A BEAVER DAM LOGGING, AND LONG LEAF WOOD PRODUCTS, INC., DEFENDANTS

No. 9013SC359

(Filed 5 February 1991)

1. **Fraud § 12.1 (NCI3d)— signature on guaranty—allegedly obtained by fraud—summary judgment for plaintiff**

Summary judgment was properly granted for plaintiff on defendant Long Leaf's claim that its president's signature was obtained on a guaranty of a lease of a logging skidder by fraud where neither defendant Pollard (the lessee) nor defendant Long Leaf's president (Hutchison) alleged definite and specific misrepresentations by plaintiff's customer service representative and, even assuming misrepresentation, the facts are insufficient as a matter of law to constitute reasonable reliance.

Am Jur 2d, Fraud and Deceit §§ 268-270; Guaranty § 57.

2. **Guaranty § 1 (NCI3d)— addendum letter—modification of lease—not a guaranty**

In an action to enforce a guaranty of a lease for a logging skidder, an addendum letter was a modification of the original lease and not a guaranty. Summary judgment for plaintiff lessor was proper because there was no ambiguity in the terms of the letter.

Am Jur 2d, Guaranty §§ 79, 80.

3. **Guaranty § 2 (NCI3d)— guaranty of equipment lease—counterclaim for negligent repair**

The trial court erred in an action to hold a guarantor liable on the lease of a logging skidder by granting summary judgment for plaintiff-lessor on the issue of the guarantor's entitlement to a setoff for plaintiff's negligent repair of the skidder. The claim was for damages due to negligent repair, which did not sound in breach of contract or breach of warranty, did not arise from the guaranty agreement, and was an independent cause of action belonging to the lessee, defendant Pollard. Since Pollard and the guarantor, Long Leaf, were

sued jointly, Long Leaf could assert by setoff damages due to plaintiff's negligent repair of the skidder.

Am Jur 2d, Bailments §§ 156, 161.

4. **Rules of Civil Procedure § 55 (NCI3d)— entry of default—no default judgment—setoff claim allowed**

Defendant guarantor was not prevented from asserting as a setoff a claim for plaintiff lessor's negligent repair of the leased equipment where an entry of default was made by the clerk against the lessee, but no default judgment was entered against either defendant. The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. Summary judgment for plaintiff was improperly granted. N.C.G.S. § 1A-1, Rule 8(d), N.C.G.S. § 1A-1, Rules 55(a) and (d).

Am Jur 2d, Judgments §§ 1155, 1156.

5. **Unfair Competition § 1 (NCI3d)— signature on guaranty—not obtained through unfair and deceptive trade practice**

The trial court properly granted summary judgment for plaintiff on a guarantor's claim for an unfair and deceptive trade practice arising from the signing of the guaranty where defendant did not forecast sufficient evidence by which a jury could find that the statements made by plaintiff as alleged by defendant could have created the likelihood of deception.

Am Jur 2d, Guaranty § 57; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 696, 735.

Judge PARKER concurs in the result.

APPEAL by defendant Long Leaf Wood Products, Inc. from judgment entered 27 November 1989 by *Judge Giles R. Clark* in BRUNSWICK County Superior Court. Heard in the Court of Appeals 25 October 1990.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Reid G. Hinson, and Grier and Grier, P.A., by Richard C. Belthoff, Jr., for plaintiff-appellee.

Stevens, McGhee, Morgan, Lennon & O'Quinn, by Alan E. Toll, for defendant-appellant.

JOHNSON, Judge.

This is an action by plaintiff-appellee Spartan Leasing, Inc. ("Spartan"), lessor, to hold defendant-appellant Long Leaf Wood Products, Inc. ("Long Leaf"), liable as guarantor on the lease of a "logging skidder" by defendant-below Burnett Pollard, doing business as Beaver Dam Logging ("Pollard"). The action was filed in Mecklenburg County on 22 November 1988. Defendant Pollard filed no answer and an entry of default was entered against him on 13 February 1989. Defendant Long Leaf answered, asserting defenses and counterclaims against Spartan and a cross-claim against Pollard. Long Leaf moved for change of venue and the case was transferred to Brunswick County for the convenience of the witnesses. Spartan moved for summary judgment. Defendant Long Leaf appeals from the granting of summary judgment in favor of Spartan on all of Spartan's claims against both defendants and against Long Leaf's counterclaims. Defendant Pollard is not a party to this appeal.

The forecast of evidence, as taken from the verified pleadings, answers to interrogatories and affidavits of the parties and witnesses, would tend to show the following:

During the summer of 1987, Payton Warren, Customer Sales Representative for Spartan, contacted Steve Hutchison, president of Long Leaf, about the possibility of Long Leaf purchasing a skidder from Spartan. Hutchison informed Warren that Long Leaf was not interested in purchasing a skidder but suggested that Spartan contact Burnett Pollard, who was doing contract work for Long Leaf at the time. During the negotiations with Pollard, Spartan determined that they would not lease a skidder to Pollard unless Hutchison, individually, and as president of Long Leaf, unconditionally guaranteed the equipment lease. Spartan alleges that Hutchison agreed to obligate Long Leaf as guarantor but would not do so in his individual capacity. Spartan further alleges that they finally agreed that Hutchison's guarantee as president of Long Leaf would be sufficient. Hutchison alleges that he refused to guarantee Pollard's obligation in either his individual capacity or as president of Long Leaf. He did, however, agree to pay Pollard's lease payment directly to Spartan from monies owed Pollard by Long Leaf, with Pollard's permission. On 14 July 1987, Pollard signed a 36-month lease of the skidder. That same day, Pollard and Hutchison executed a "Guaranty" which neither of them read before signing.

The skidder broke down in October 1987. Pollard was not working at that time and could not pay the repair cost. Spartan arranged to have the skidder fixed for a cost of $6,500 and thereafter presented an "Addendum Letter" which both Pollard and Hutchison signed. The letter was an agreement that the amount of the monthly payments was increased to $2,750 per month to include the repair cost plus interest. Pollard signed on the line marked "Lessee." Hutchison signed on the line marked "Guarantor: Long Leaf Wood Products, Inc., Steve Hutchison, President."

In January 1988, Pollard failed to make payment on the lease. On 1 July 1988, Spartan accelerated the debt and repossessed the skidder. Spartan bought the skidder for $40,000 at public auction on 24 August 1988 and then brought suit against Pollard and Long Leaf to collect the deficiency. Long Leaf answered and set up various defenses. Pollard filed no answer and an entry of default was entered against him on 14 February 1989 by the clerk of superior court of Mecklenburg County. Pollard's motion to set aside the entry of default was denied by Judge Clark on 27 November 1989 and on that same day Judge Clark entered summary judgment for Spartan.

On appeal, Long Leaf contends that the trial court: (1) erred in granting summary judgment against Long Leaf on its defense that its signature on the guaranty was obtained by trick or fraud, (2) erred in granting summary judgment on the issue of whether Long Leaf is entitled to a setoff due to the negligent repair of the skidder, and (3) erred in dismissing Long Leaf's counterclaim for unfair and deceptive trade practices.

I.

[1] First, defendant contends that the trial court erred in granting summary judgment in favor of Spartan on Long Leaf's claim that Hutchison's signature on the guaranty was obtained by trick or fraud.

Defendant's evidence consists of affidavits by Hutchison and Pollard. In his affidavit Hutchison states:

> On July 14th Pollard said it was O.K. for me to pay his money directly to Spartan Leasing and [Warren] said that his company wanted me to sign a paper indicating Pollard had agreed to [Long Leaf] sending the payments directly to Spartan. It was then that [Warren] produced a paper. He said his Company

required this paper work and asked Pollard and I [sic] to sign it. It was signed on the hood of my truck. . . [Warren] led me to believe that I was signing an agreement to send payments directly to Spartan on behalf of Pollard.

Pollard stated in his affidavit:

At [Warren's] request, both Steve Hutchison and myself signed a document on the hood of Steve's car as we left the work site in Leland, North Carolina. At the time we signed the document, [Warren] indicated that this was "paperwork the Company required" and told both Steve and myself it was to show that I agreed that he could deduct the payments from my payroll and pay them directly to Spartan.

In fact, the document signed that day was an unconditional guaranty on a single typewritten page with the word "GUARANTY" printed prominently at its top. Hutchison signed his name on an empty line marked "_____, President." The words "Signature of Guarantor; Long Leaf Wood Products, Inc." appeared under the line. Another line marked "Signature of Guarantor: Steven M. Hutchison" was left blank. Neither Pollard nor Hutchison received a copy of the paper they signed.

The granting of a summary judgment motion is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. G.S. § 1A-1, Rule 56. Defendant contends that the trial court's granting of summary judgment on their defense of fraud was improper because there remained genuine issues of material fact to be resolved, namely whether Warren made a factual misrepresentation to Hutchison and whether Hutchison reasonably relied on it. We disagree.

The essential elements of fraud are:

(1) that defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the

representation, and acted upon it; and (6) that plaintiff thereby suffered injury.

Cofield v. Griffin, 238 N.C. 377, 379, 78 S.E.2d 131, 133 (1953).

As regards the first element, the fraudulent misrepresentation must be of a subsisting or ascertainable fact. *Berwer v. Insurance Co.*, 214 N.C. 554, 200 S.E. 1 (1938). Generally, the misrepresentation must be definite and specific, *New Bern v. White*, 251 N.C. 65, 110 S.E.2d 446 (1959), "but the specificity required depends upon the tendency of the statements to deceive under the circumstances." *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 500 (1974). Defendant contends that prior to Hutchison signing the guaranty, Spartan had requested that he (Hutchison) guarantee the lease, both individually and as president of Long Leaf and that he had refused. Defendant's evidence further showed that Hutchison had, however, agreed to forward directly to Spartan as monthly lease payments, monies that Long Leaf owed Pollard. On 14 July, after Pollard gave Hutchison permission to forward his money directly to Spartan, Warren produced the guarantee and requested that Pollard and Hutchison sign it. Hutchison alleges: "[Warren] led me to believe that I was signing an agreement to send payments directly to Spartan on behalf of Pollard." Pollard, by affidavit, alleges that at the time they signed the document, Warren "indicated that this was 'paperwork the Company required' and told both [Hutchison] and myself it was to show that I agreed that he could deduct the payments from my payroll and pay them directly to Spartan." Neither Hutchison nor Pollard alleges definite and specific misrepresentations by Warren that the paper in question was an agreement to forward the lease payments.

We find, however, that we need not decide whether defendant's allegations as to misrepresentation are sufficient to survive a summary judgment motion because we find that defendant's forecast of evidence on the element of reasonable reliance is insufficient as a matter of law.

One to whom a definite representation has been made is entitled to rely on that representation if the representation is of a character to induce action by a person of ordinary prudence and is reasonably relied upon. *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E.2d 522 (1965). A person signing a written instrument is under a duty to read it and ordinarily is charged with knowledge of its contents. *Mills v. Lynch*, 259 N.C. 359, 130

S.E.2d 541 (1963). These rules apply to the nonfiduciary relationship as exists between a creditor and a guarantor. *International Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 316 S.E.2d 619, *disc. review denied*, 312 N.C. 493, 322 S.E.2d 556 (1984).

Even assuming, *arguendo*, that Warren misrepresented the guaranty to be an agreement for forwarding payments, Hutchison must have reasonably relied on that misrepresentation when he signed it. In *Johnson v. Lockman*, 41 N.C. App. 54, 254 S.E.2d 187, *disc. review denied*, 297 N.C. 610, 257 S.E.2d 436 (1979), plaintiff sought reinstatement of a health insurance policy which he canceled as a result of misrepresentation by the agent that plaintiff's injury was not covered by the policy. The misrepresentation consisted of a definite and specific statement by the agent that the injury was not covered, the fallacy of which could have been discovered by reading the policy. In reliance on that representation, plaintiff decided to cancel the policy. At the time that defendant's agent returned plaintiff's premiums, he obtained plaintiff's signature on a memo which stated that plaintiff requested the policy be canceled and that he understood that he had two other options besides canceling the policy. In fact, the other two options had not been explained to him. On handing the memo to plaintiff for signing, defendant's agent informed him that he, the agent, had an appointment and was already late. Plaintiff signed without reading the memo. This Court held that summary judgment was improper on these facts and that a jury question remained as to reasonable reliance.

We believe that the facts as pleaded by defendant Long Leaf are insufficient as a matter of law to constitute reasonable reliance. Defendant's evidence showed that the guaranty was presented to Hutchison on the job site during working hours. The relationship between Spartan and Hutchison was one of independent businessmen, not fiduciaries. The guaranty was a one page typewritten document with the word "GUARANTY" appearing in large bold letters across the top. The line on which Hutchison signed was identified by the typewritten words "Signature of Guarantor: President, Long Leaf, Inc." There are no allegations that Warren prevented Hutchison from reading the document (*Johnson*, 41 N.C. App. 54, 254 S.E.2d 187), that Hutchison was illiterate (*Mills*, 259 N.C. 359, 130 S.E.2d 541), or that Spartan and Hutchison stood in a fiduciary relationship (*International Harvester*, 69 N.C. App. 217, 316 S.E.2d 619). Summary judgment was proper on this issue.

[2] Long Leaf next argues that the addendum letter supports its contention that there was no guaranty agreement and that it raises a jury question as to its terms and whether Spartan is estopped from raising the validity of the original guarantee. We disagree. The letter by its terms, modified the payments due under the 14 July 1987 lease and it incorporated all the terms and conditions contained in the original lease. It increased the monthly lease billing to $2,750 per month for 18 months until the full cost of the engine repair plus interest was satisfied. Both Pollard and Hutchison signed the addendum letter.

The addendum letter is not a guaranty but a modification of the original lease agreement. Hutchison signed the addendum letter making him a party to it and binding him to its terms. "Where the language of a contract is clear and unambiguous, the court is obligated to interpret the contract as written, and the court cannot look beyond the terms to see what the intentions of the parties might have been in making the agreement." *Renfro v. Meacham*, 50 N.C. App. 491, 496, 274 S.E.2d 377, 379 (1981).

Long Leaf also contends that the addendum letter is a new agreement to replace and supersede the previous guaranty. As stated above, we find that the letter is not a guaranty but a new contract which modifies the original lease agreement.

The guaranty provides in pertinent part:

> [Each of the undersigned guarantors] severally and unconditionally guarantees to you that [Pollard] will fully and promptly and faithfully perform, pay and discharge all its present and future obligations to you . . . and we agree to pay all sums due and to become due to you from [Pollard].

This guaranty by its terms is a continuing guaranty. *See Novelty Co. v. Andrews*, 188 N.C. 59, 123 S.E. 314 (1924); *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E.2d 601, *disc. review denied*, 316 N.C. 374, 342 S.E.2d 889 (1986). In *Amoco Oil Co.*, the guarantor argued that a subsequent agreement between the creditor and the principal debtor extinguished the guarantor's liability under the guaranty. In the instant case, the subsequent agreement was signed by the debtor and the guarantor, himself.

Defendant relies on *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 339 S.E.2d 49 (Judge Hedrick, dissenting), *aff'd*, 317 N.C. 330, 344 S.E.2d 788 (1986). In *Piedmont*, the language

of the guaranty was ambiguous as to whether it covered one loan only or covered future loans. Where that ambiguity existed on the face of the guaranty, this Court held that a jury question existed as to the intention of the parties. In the case *sub judice* there is no ambiguity in the terms of the letter nor are any alleged. We find that defendant's contention is without merit.

II.

[3] Defendant next contends that the trial court erred in granting summary judgment on the issue of Long Leaf's entitlement to a setoff due to the negligent repair of the skidder. We agree.

In its verified answer, Long Leaf alleged as its 8th defense that the negligent repair of the skidder by a repairman sent by Spartan caused the machine to lock up and quit running, preventing Pollard from using the machine and making his payments, and decreasing the value of the machine. Hutchison specifically alleged in his affidavit that "when Spartan sent a man out to fix it, the man cracked the seal using a heat gun." Spartan alleges that the machine was repaired at a diesel repair shop and that either Pollard or Hutchison contracted to make the repairs.

The issue is whether a guarantor on an equipment lease can claim as setoff, in an action by a creditor against a guarantor and principal debtor, jointly, the negligent repair by the creditor of the leased equipment.

On appeal, Spartan does not argue that it is not responsible through its repairman for the repair of the skidder but that any duty of care runs to Pollard and thus is personal to him and is an independent cause of action not available to Long Leaf.

The general rule is that a guarantor may plead a claim or defense which is available to his principal. 38 C.J.S. *Guaranty* § 11 (1943 and Supp. 1990). But a guarantor may not avail himself of a defense which is personal to the debtor. 38 Am. Jur. 2d *Guaranty* § 52 (1968 and Supp. 1990). Nor may the guarantor assert a claim which constitutes an independent claim belonging to the debtor when the debtor is not joined in the action. *Chrysler Credit Corp. v. Rebhan*, 66 N.C. App. 255, 311 S.E.2d 606 (1984). In *dicta*, this Court in *Chrysler Credit Corp.* opined that where the principal debtor has been sued jointly with the guarantor, a claim in favor of the debtor may be set off by the guarantor against the demand of the creditor. *Id.* at 259, 311 S.E.2d at 609.

A guarantor may not counterclaim for damages against a creditor but may assert a claim only by way of setoff. In *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E.2d 9 (1963), the plaintiff-creditor brought suit jointly against the debtor for breach of contract and against the guarantor on its guaranty. Both guarantor and debtor counterclaimed against the plaintiff for breach of warranty. With respect to the guarantor's counterclaim, our Supreme Court said:

> It is true that in an action by a creditor against the principal debtor and guarantor *jointly*, a claim existing in favor of the principal debtor may be set off by the guarantor against the demand of the creditor, unless the claim constitutes an independent cause of action in favor of the principal debtor. There is authority to the effect that a warranty does not inure to the guarantor. *But assuming that it does* in the instant case, Radiator [the guarantor] may insist on it only by way of setoff, and in so doing must stand in the shoes of Product Development [the principal debtor], and can realize no affirmative recovery against plaintiff.

Id. at 418, 131 S.E.2d at 23 (citations omitted) (emphasis added).

First, we note that Long Leaf's claim is for setoff for damages due to negligent repair. This claim does not sound in breach of contract or breach of warranty. "Negligent performance of a contract may constitute a tort as well as a breach of contract, the theory being that, accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done." *Sims v. Mobile Homes*, 27 N.C. App. 25, 28, 217 S.E.2d 737, 739, *cert. denied*, 288 N.C. 511, 219 S.E.2d 347 (1975); *see generally Ports Authority v. Roofing Co.*, 32 N.C. App. 400, 405, 232 S.E.2d 846, 850 (1977), *aff'd*, 294 N.C. 73, 240 S.E.2d 345 (1978) ("Negligence is the tortious breach of ordinary duty of due care, and this duty may arise as a consequence of contractual relationships.").

Pollard's claim for negligent repair does not arise out of the guarantee agreement between Spartan and Hutchison; it is therefore an independent cause of action belonging to Pollard. Since Pollard and Long Leaf were jointly sued in this action, Long Leaf may assert by way of setoff, any damages that might accrue to Pollard due to negligent repair of the skidder.

[4] Spartan contends that a default judgment was entered against Pollard and thus he, and Long Leaf, who "stands in [Pollard's] shoes," no longer have the right to raise negligent repair as a counterclaim. The record reveals, however, that an *entry of default* was made against Pollard by the clerk. *See* G.S. § 1A-1, Rule 55(a). Following the denial of his motion to set aside the default, G.S. § 1A-1, Rule 55(d), summary judgment was granted in favor of Spartan against both defendants, jointly and severally. A *default judgment* was never entered against either defendant.

When a defendant fails to timely answer a complaint, an entry of default may be made by the clerk on motion of the plaintiff. G.S. § 1A-1, Rule 55(a). The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint, G.S. § 1A-1, Rule 8(d), and is prohibited from defending on the merits of the case. *Bell v. Martin*, 299 N.C. 715, 264 S.E.2d 101, *reh'g denied*, 300 N.C. 380, 267 S.E.2d 686 (1980); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971); *Hasty v. Carpenter*, 51 N.C. App. 333, 276 S.E.2d 513 (1981). "If the default is established, the defendant has no further standing to contest the merits of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery." *Acceptance Corp.*, 11 N.C. App. at 509-10, 181 S.E.2d at 798, *quoting*, 3 Barron & Hoftzoff, *Fed. Prac. & Proc.* § 1216 (Wright ed.).

We hold that on the facts *sub judice*, Long Leaf may assert by way of setoff the claim of negligent repair which belongs to Pollard. Defendant is not prohibited as a matter of law from asserting this claim, its forecast of evidence was sufficient to establish that genuine issues of material fact exist as to this claim and therefore summary judgment was improperly granted.

III.

[5] Finally, Long Leaf contends that summary judgment was improper on its claim of unfair and deceptive trade practice under G.S. § 75-1.1.

To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to

his business. G.S. §§ 75-1.1 and 75-16. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). A practice is deceptive if it has the capacity or tendency to deceive the average consumer, but proof of actual deception is not required. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). Whether the practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. *Marshall*, 302 N.C. 539, 276 S.E.2d 397. The plaintiff need not show fraud, bad faith, deliberate acts of deception or actual deception, but must show that the acts had a tendency or capacity to mislead or created the likelihood of deception. *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 891 (1986).

We find that defendant has not forecast sufficient evidence by which a jury could find that the statements made by plaintiff as alleged by defendant could have created the likelihood of deception where plaintiff and defendant were independent businessmen, the one-page document was presented to the defendant on the job site during working hours, the guaranty at issue was clearly identified as a "GUARANTY" and the signature line also identified the signator as "Guarantor."

In conclusion: summary judgment was properly granted in favor of plaintiff on Long Leaf's defenses of fraud and unfair and deceptive trade practices. Summary judgment in favor of plaintiff was improper as to defendant's claim of setoff for negligent repair.

Affirmed in part, reversed in part.

Judge EAGLES concurs.

Judge PARKER concurs in the result.

JAMES OTIS SNEAD, PLAINTIFF v. JIMMY JUNIOR HOLLOMAN AND FLOWERS BAKING COMPANY OF HIGH POINT, INC., DEFENDANTS

No. 9011SC366

(Filed 5 February 1991)

1. **Automobiles and Other Vehicles § 638 (NCI4th)— automobile accident—defendant turning in front of plaintiff—contributory negligence—directed verdict for plaintiff**

The trial court correctly granted a directed verdict for plaintiff on defendants' contention of contributory negligence in an action arising from an automobile accident in which defendant turned in front of plaintiff where defendants produced no evidence that plaintiff failed to keep a proper lookout or that he could have avoided the accident but relied on plaintiff's testimony that the accident occurred so quickly that he was unable to apply his brakes. The evidence of plaintiff's failure to apply his brakes immediately prior to the accident, standing alone, did not create an issue of fact regarding contributory negligence which was sufficient to go to the jury.

Am Jur 2d, Automobiles and Highway Traffic §§ 1100, 1101.

2. **Damages § 9 (NCI3d)— automobile accident—failure to perform orthopedic exercises—instruction on duty to mitigate**

The trial court erred in an action arising from an automobile accident by failing to instruct the jury on plaintiff's duty to mitigate personal injury damages where plaintiff's orthopedic surgeon prescribed a certain exercise regimen which the plaintiff discontinued after one month and which the doctor continued to prescribe. Since the defendants properly requested that the jury be instructed on plaintiff's duty to minimize damages, the trial court's failure to so instruct the jury was reversible error.

Am Jur 2d, Damages §§ 533, 996.

Chief Judge HEDRICK concurs in the result.

APPEAL by defendants from judgment entered 11 December 1989 in JOHNSTON County Superior Court by *Judge Wiley F. Bowen.* Heard in the Court of Appeals 3 December 1990.

On 19 February 1988, plaintiff was injured when the car he was driving collided with a 26-foot delivery van being driven by defendant, Jimmy Junior Holloman. At the time of the accident, Mr. Holloman was within the course and scope of his employment with defendant, Flowers Baking Company of High Point. Plaintiff later filed an action against defendants, alleging that Mr. Holloman negligently operated the van causing injury to the plaintiff's person and property, and that such negligence was attributable to Flowers Baking Company. Defendants answered denying negligence and pleaded, in the alternative and in bar of plaintiff's claim, contributory negligence.

Plaintiff's evidence at trial tended to show that on the morning of 19 February 1988, plaintiff was travelling in a northerly direction on Highway 50 in Garner, North Carolina, when he noticed a bread delivery van which was facing south in the center turn-lane of Highway 50. Plaintiff testified that he was alert, that he was aware of the other traffic in the area, and that he knew the van intended to turn because its left-turn indicator was flashing. He further testified that because two or three cars were ahead of him, and because he was so close to the van, he did not expect the van to turn until he had passed. Nonetheless, according to plaintiff's testimony, the van suddenly turned in front of his vehicle. The plaintiff testified that he attempted to swerve and to apply the brakes of his car to avoid hitting the van but before he could do so, the two vehicles collided.

Finally, plaintiff testified that the speed limit in the area was 35 miles per hour, and that he was not travelling in excess of the speed limit at the time of the collision.

Following plaintiff's presentation of evidence, the defendants declined to present any evidence. Plaintiff then moved for a directed verdict on the issue of contributory negligence. The trial court granted the plaintiff's motion and, thereafter, submitted issues on defendants' negligence and damages to the jury. The jury returned a verdict in favor of plaintiff and defendants now appeal.

Lucas, Bryant & Denning, P.A., by Robert W. Bryant, for plaintiff-appellee.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for defendants-appellants.

WYNN, Judge.

I

[1] Defendants first assign as error the trial judge's granting of the plaintiff's motion for a directed verdict on the issue of contributory negligence. The defendants assert that the evidence at trial was sufficient to show that the plaintiff was negligent in the operation of his vehicle and that, therefore, the issue of contributory negligence should have been submitted to the jury. We disagree.

The purpose of a motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the nonmoving party. *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982). In passing upon a motion for a directed verdict, the evidence should be considered in the light most favorable to the nonmoving party, and such party should be given the benefit of all reasonable inferences. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). In the case of an affirmative defense, such as contributory negligence, a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his defense. *See Booker v. Everhart*, 33 N.C. App. 1, 15, 234 S.E.2d 46, 56 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E.2d 360 (1978); *Price v. Conley*, 21 N.C. App. 326, 204 S.E.2d 178 (1974) (On an affirmative defense, the burden of proof lies with the defendant); *Clary v. Alexander County Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975) (Contributory negligence is an affirmative defense, and the burden of proof on the issue rests on defendant).

This court has previously addressed the propriety of granting a motion for directed verdict against defendants who raise an affirmative defense. In *Booker v. Everhart, supra*, plaintiffs, by way of assignment, were the holders of a promissory note executed by one defendant and guaranteed by two others. When the defendants failed to make payment on the note, the plaintiffs instituted an action to enforce the defendants' respective obligations. In answer to the complaint, the defendants raised several affirmative defenses, including duress, failure of consideration, and illegality. At trial,

the court entered a directed verdict in favor of the plaintiffs at the close of all the evidence.

In *Booker*, the defendants asserted on appeal that since they had raised affirmative defenses, it was improper for the trial judge to direct a verdict in the plaintiffs' favor. It was the defendants' contention that by denying material allegations of the plaintiffs' complaint, they had raised issues of fact which the plaintiffs had the burden of proving. According to the defendants, the entry of the directed verdict in favor of the party with the burden of proof was improper under the holding in *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

While adhering to the ruling in *Cutts*, the *Booker* court disagreed with the defendants' interpretation of its meaning. The court stated that once the plaintiffs had established their right to recover on the note, the burden of proof of the affirmative defenses shifted to the defendants. *Booker* at 14-15, 234 S.E.2d at 56. The court went on to hold that the defendants' evidence was insufficient to create an issue of fact and, therefore, the entry of the directed verdict in favor of the plaintiffs was proper.

The above-discussed proposition in *Booker* is simply another way of stating that in order to justify submitting an affirmative defense issue to the jury, defendants who allege those affirmative defenses and who have the burden of proving them, must present more than a scintilla of evidence in support of each element of their defense. In the instant case, in order for the defendants to have survived plaintiff's motion for directed verdict, it was incumbent upon them to present more than a scintilla of evidence that the plaintiff was contributorily negligent. That they failed to do. The defendants produced no evidence that the plaintiff failed to keep a proper lookout or that he could have avoided the accident. Nor did the defendants produce any evidence tending to show that the accident did not occur exactly as the plaintiff alleged. Instead, defendants rely solely on evidence presented during the plaintiff's case-in-chief which they contend establishes contributory negligence on the part of the plaintiff.

The plaintiff's evidence tended to show that the plaintiff was approximately two or three car lengths away from defendant's van and was travelling at the 35 mile-per-hour speed limit when the van abruptly attempted to turn in front of him. The plaintiff testified that the accident occurred so quickly that he attempted

to apply his brakes but was unable to do so in order to avoid the accident. The defendants contend that the evidence of the plaintiff's failure to apply his brakes immediately prior to the accident was sufficient to raise an issue of fact regarding contributory negligence on the part of the plaintiff. We disagree.

Evidence which merely raises conjecture on the issue of contributory negligence is insufficient to go to the jury. *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970). In our opinion, the evidence of the plaintiff's failure to apply his brakes immediately prior to the accident, standing alone, did not create an issue of fact regarding contributory negligence which was sufficient to go to the jury.

Based upon plaintiff's evidence, which went uncontradicted by the defendants, we hold that reasonable minds could not have differed on the issue of plaintiff's contributory negligence. *See Spears v. Service Distributing Co.*, 23 N.C. App. 445, 209 S.E.2d 382, *cert. denied*, 286 N.C. 337, 211 S.E.2d 214 (1974). We conclude, therefore, that the trial judge properly granted the plaintiff's motion for a directed verdict.

II

[2] The defendants next assign as error the trial judge's failure to instruct the jury on the plaintiff's duty to mitigate personal injury damages. The defendants contend that the plaintiff failed to keep up the exercise regimen prescribed by his orthopedic surgeon, and that such failure justified a jury instruction on the duty to mitigate personal injury damages.

To support their contention, the defendants rely upon the doctrine of unavoidable consequences which was defined by the North Carolina Supreme Court as follows:

> The rule in North Carolina is that an injured plaintiff, whether his case be in tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had. This rule is known as the doctrine of unavoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable.

Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 73-4 (1968) (citations omitted).

This court has also addressed this issue by stating that "[d]amages will not be reduced merely because the injured party fails to follow the medical advice given. All he must do is to act reasonably concerning the advice which he receives. Since the test is one of reasonableness, . . . it is a jury question except in the clearest of cases." *Radford v. Norris*, 63 N.C. App. 501, 502-3, 305 S.E.2d 64, 65 (1983), *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985) (citations omitted).

In *Radford*, the issue was whether the trial judge erred in failing to instruct the jury on the plaintiff's duty to minimize damages. There, the plaintiff, who was injured in a collision with the defendant, consulted an orthopedic surgeon who prescribed a program of back exercises as part of the treatment for plaintiff's back injury. The plaintiff testified that he attempted to do the exercises in the beginning, but stopped doing them because they were too painful. The orthopedic surgeon testified that the back exercises were routine and were designed to work out stiffness and pain in the plaintiff's back. When the plaintiff advised the doctor that he had discontinued the exercises, the doctor repeatedly advised the plaintiff to resume the exercises. The doctor further testified that although he could not say with a reasonable degree of medical certainty that the exercises would have cured the plaintiff's back pain had they been performed regularly, he knew the exercises would make the pain better. Nonetheless, the plaintiff did not resume the regimen.

The *Radford* court held that the above evidence tended to show that the plaintiff's regular and continued performance of the exercises would have alleviated the pain and, thus, the pain was a consequence that may have been avoided. *Id.* at 503, 305 S.E.2d at 65. Since the defendant in *Radford* properly requested an instruction on avoidable consequences which was improperly denied, the *Radford* court remanded the case for a jury determination of the reasonableness of plaintiff's failure to follow his doctor's advice.

We are unable to make a meaningful distinction between the facts in *Radford* and those present here. In the instant case, the plaintiff's orthopedic surgeon, Dr. Tejpal Singh Dhillon, prescribed a certain exercise regimen which the plaintiff, for some unexplained reason, discontinued performing after one month. In his deposition, which was read into evidence at trial, Dr. Dhillon testified that

the exercises were designed to "relieve the [plaintiff's back] spasm and [to] make some more room for the nerves to get through to ease the irritation of the nerves." He further testified that he continued to prescribe the exercises for the plaintiff on at least two occasions after the plaintiff ceased performing them.

"When a party tenders a written request for a specific instruction which is correct and supported by the evidence, the failure of the court to give the instruction, at least in substance, is reversible error." *Bass v. Hocutt*, 221 N.C. 218, 220, 19 S.E.2d 871, 872 (1942). Since the defendants properly requested that the jury be instructed on the plaintiff's duty to minimize damages, we conclude that the trial judge's failure to so instruct the jury was reversible error under the holding in *Radford*. Accordingly, we remand this case for a new trial on the issue of damages.

III

Since the defendants' remaining assignments of error also relate to the issue of damages, we do not consider them as they may not recur on retrial.

IV

For the reasons set forth above, we find no error in the entry of the directed verdict in favor of the plaintiff. However, this case is remanded for a new trial on the issue of damages.

New trial on the issue of damages only.

Judge LEWIS concurs.

Chief Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA EX REL. EMPLOYMENT SECURITY COMMISSION, APPELLEE v. THELMA M. PARIS, APPELLANT v. MARY D. EMMERSON, APPELLEE

No. 9015SC284

(Filed 5 February 1991)

Master and Servant § 101 (NCI3d)— private nurse's assistant— independent contractor—no unemployment compensation

A private nurse's assistant was an independent contractor and was properly denied unemployment compensation benefits where the claimant worked as a nurse's assistant to Mary Emmerson; she negotiated the terms of her employment with Mrs. Emmerson's son; there was evidence in the record to show that at the time of contracting she knew that she would not be able to receive unemployment insurance benefits; there was testimony that the parties orally agreed that claimant would serve as an independent contractor; Mrs. Emmerson's son testified that he and claimant expressly discussed being an independent contractor and the consequences which followed being an independent contractor; claimant testified at the hearing before the Deputy Commissioner that she knew she would not have any benefits as the job was set up and that she would make her money from salaries and would have to save her money so that she would have her own benefits. It would be inconsistent with her agreement with Emmerson for claimant to have reaped the benefits of a higher salary without deductions and now receive unemployment insurance benefits.

Am Jur 2d, Unemployment Compensation §§ 25, 38.

Judge JOHNSON dissenting.

APPEAL by claimant from judgment entered 13 December 1989 by *Judge Gordon Battle* in ORANGE County Superior Court. Heard in the Court of Appeals 16 November 1990.

North State Legal Services, Inc., by Carlene McNulty, for appellant Thelma Paris.

C. Coleman Billingsley, Jr., for appellee Employment Security Commission; and Long & Long, by Dave Obringer and Lunsford Long, for appellee Mary D. Emmerson.

COZORT, Judge.

In this case the trial court held that a private nurse's assistant was an independent contractor and affirmed the denial of unemployment compensation benefits. We affirm.

Thelma Paris, claimant or appellant herein, is a nurse's assistant. From November 1986 until February 1988, she worked as a nurse's assistant to Mary Emmerson. Claimant negotiated the terms of her employment with Mrs. Emmerson's son. Claimant performed various services for Mrs. Emmerson, including bathing, personal grooming, administering medicine, dressing a surgical wound and some housekeeping. Claimant was relieved of her duties in February 1988 when Mrs. Emmerson and her husband required more skilled care than claimant was able to provide.

On 6 March 1988, Paris filed a claim with the Employment Security Commission [hereinafter ESC] for unemployment compensation. She was denied benefits on the grounds that she was not an employee of the Emmersons but an independent contractor. Claimant appealed. Deputy Commissioner T. S. Whitaker rendered an opinion on 14 March 1989 which affirmed the determination that Paris was an independent contractor and not an employee. Claimant appealed to Orange County Superior Court. Judge Gordon Battle affirmed the decision of the ESC. Claimant appeals to this Court.

Claimant assigns as error the court's entry of judgment affirming the final decision of the ESC finding that the claimant was an independent contractor and not an employee. The Deputy Commissioner found:

> 7. When Paris began this relationship with the Emmersons, she was interviewed by Fred B. Emmerson, Jr. She wanted to be paid without Social Security or taxes withheld. She understood that she would have to pay her own taxes and would have no benefits such as vacation, insurance, etc. She was responsible for arranging for other care givers to be there and was responsible for arranging for a replacement when she could not be there. She has, on occasion, submitted a time sheet and paid the replacement out of the money that she received.
>
> 8. This employment relationship began with the expressed understanding that Paris was an independent contractor and

not an employee. She acted in a supervisory type capacity for the other individuals who worked for the Emmersons. Mary Emmerson is unable to talk and both Fred B. Emmerson and Mary Emmerson require a great deal of help. Thelma Paris was replaced by a licensed practical nurse because an individual with more extensive training in health care was needed.

9. Fred Emmerson, Jr., retained the right to discharge or separate Thelma Paris for gross negligence and to insure that she properly cared for his parents. He did not retain the right nor did he supervise and control the daily activities of the claimant.

For the reasons we set forth below, we hold that the trial court did not err by affirming the findings and decision of the ESC.

Unemployment insurance benefits are not available to those who are not employees within the meaning of the unemployment insurance statute. N.C. Gen. Stat. § 96-8(6) defines employment as

> service performed . . . for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" . . . does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

In *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), the Supreme Court set forth the primary criteria to be considered in determining whether an individual is an employee or an independent contractor. While the court held that no one particular criteria must be present, the court held that an independent contractor:

> (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than

> another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 16, 29 S.E.2d at 140. In the case below, the Deputy Commissioner found that

> This case is one that does not easily lend itself to a decision. Certain criteria would indicate that this claimant was an employee and others would indicate that she was independent contractor. The undersigned reaches the result that is reached because he believes that the parties clearly intended for this to be a relationship of employer/independent contractor and not employer/employee.

We hold that this conclusion is proper.

The record on appeal reveals facts indicative of an employer and employee relationship as well as those of an employer and independent contractor relationship. While we recognize that the parties' intent may not always be so readily apparent as to be a criteria for the determination of whether an individual is an independent contractor, we find that in the case at bar it is helpful to consider the intent of the parties.

We find merit to Emmerson's argument that her son, who negotiated the hiring of Paris, and Paris intended the relationship to be one of employer and independent contractor. There is evidence in the record to show that at the time of contracting Paris knew that she would not be able to receive unemployment insurance benefits. There is testimony that the parties orally agreed that Paris would serve as an independent contractor. Emmerson's son testified that he and claimant expressly discussed the differences between being an independent contractor and the consequences which follow being an independent contractor. At the hearing before the Deputy Commissioner, Paris testified that she knew that she would not have any benefits as the job was set up. She recognized that she would make her money from the salaries and that she would save her money so that she would have her own benefits when she needed a "vacation or whatever." Further, claimant testified that "when the job came to an end for me, I said, well, I don't have any benefits, I know [*sic*] that I wouldn't." We find that it would be inconsistent with her agreement with Emmerson for

claimant to have reaped the benefits of a higher salary without deductions and now receive unemployment insurance benefits.

From the evidence in the record, it is apparent that the parties did not intend for claimant to receive the agreed upon salary free from deductions and also be eligible for unemployment compensation benefits. Considering both the intention of the parties and the *Hayes* factors present in this case, we hold that claimant was hired as an independent contractor.

Thus, we affirm the superior court's order affirming the ESC's denial of unemployment insurance benefits.

Affirmed.

Judge WELLS concurs in result.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent. While the majority opinion acknowledges that "[t]he record on appeal reveals facts indicative of an employer and employee relationship as well as those of an employer and independent contractor relationship," it nevertheless finds that the intent of the parties is the deciding factor in the disposition of this issue. I believe, however, that the evidence as to claimant Thelma Paris' relationship with appellee Emmerson strongly suggests that their relationship was one of employer and employee.

In taking this position, I find *Lloyd v. Jenkins*, 46 N.C. App. 817, 266 S.E.2d 35 (1980), to be analogous to the instant case. In *Lloyd*, this Court held that although the claimant was a skilled carpenter and required little supervision, he was considered an employee. Specifically, the Court found the following factors to be determinative: (1) the claimant was working for an hourly wage and not for a contract price for a completed job; (2) the defendant's foreman could instruct the claimant on how to do the work; (3) the claimant did not have an independent job in his trade; (4) the claimant worked full time for the defendant; (5) the defendant had the right to discharge the claimant at any time; and (6) the claimant did not have the right to employ people to assist him. In addition, the Court recognized and concluded that a failure to withhold taxes and/or social security from a claimant's paycheck

is not determinative. Rather, what is determinative is *what the evidence is as to the relationship not what the claimant thought it was. Id.* at 819, 266 S.E.2d at 37.

Both the majority and appellee Emmerson take the position that claimant and Mr. Emmerson *intended* to create an employer and independent contractor relationship and that such intent was evidenced by their negotiations during the time of contracting. In addition, the majority states that the parties did not *intend* for claimant to receive both the agreed upon salary, free from deductions and unemployment compensation benefits. The majority, in my opinion, places too much emphasis upon the alleged intent of the parties and not enough emphasis upon the evidence itself as required by case law. *See Lloyd*, 46 N.C. App. 817, 266 S.E.2d 35. Having applied the *Lloyd* standard to the instant facts, I find all six factors to be present.

The record reveals that from November 1986 until February 1988, claimant was hired by and worked solely for the Emmersons as a nurse's assistant and housekeeper. Her duties included cooking, cleaning, vacuuming, washing dishes, bathing, personal grooming, and administering oral medication according to label instructions. She usually worked from 7:00 a.m. until 3:00 p.m., five or six days per week at an hourly rate of $6.00. Bi-weekly time sheets submitted to Fred Emmerson were the basis upon which claimant was paid. In accordance with their initial agreement, neither taxes nor social security were withheld. Testimony elicited from Mr. Emmerson suggested that claimant exercised some supervision over the other home health aides, but had no authority to hire or fire them. In fact, no assistants worked with claimant on her shift. In addition, claimant frequently called Mr. Emmerson for instructions "when things got out of hand."

Despite the factual differences, a direct comparison of the determinative factors in *Lloyd* with the case *sub judice* unequivocally establishes an employer and employee relationship between the parties. First, claimant was working as a nurse's assistant and housekeeper for an hourly wage and not for a contract price for a completed job. Second, Mr. Emmerson could and did instruct claimant on how to do some of the work. He also prepared a list of approved replacements that claimant was to choose from if she could not work. Third, claimant did not have an independent job in her trade during the time she was employed by the Emmersons.

Fourth, claimant worked 8 hours a day, five or six days a week. Fifth, Mr. Emmerson had the right to discharge claimant at any time and did, in fact, when it became obvious to him that appellee Emmerson and her husband required more skilled care than claimant could provide. Finally, claimant did not have the authority to employ people to assist her. All aides and/or assistants were hired by Mr. Emmerson.

In light of the above facts and in keeping with our holding in *Lloyd*, I believe the relationship between appellee Emmerson and claimant was one of employer and employee rather than employer and independent contractor. Moreover, I believe claimant is entitled to unemployment compensation benefits. A finding to the contrary on these facts, in my opinion, is in opposition of *Lloyd*.

DIANE WIGGINS JARRETT, PETITIONER v. N.C. DEPT. OF CULTURAL RESOURCES, RESPONDENT

No. 9010SC362

(Filed 5 February 1991)

State § 12 (NCI3d)— Personnel Commission—political discrimination—determination of credibility

The trial court erred by reversing the State Personnel Commission in an action alleging political discrimination in the hiring of a State employee where the administrative law judge found that the testimony of the person who was hired (Ms. Legg) that she was registered Independent in Virginia and had never been a registered Republican was not credible; the Personnel Commission declined to accept the credibility decision of the administrative law judge and concluded that respondent had a nondiscriminatory business reason to justify its actions; and the trial court reinstated the decision of the administrative law judge. The Commission acted within its discretion in choosing to believe the witness; moreover, it was noted that there was no evidence to indicate that Ms. Legg was hired because of her political affiliation or that petitioner was not promoted because of her political affiliation. N.C.G.S. § 126-36 (1989).

Am Jur 2d, Public Officers and Employees § 53.

APPEAL by respondent from order entered 6 February 1990 by *Judge E. Lynn Johnson* in WAKE County Superior Court. Heard in the Court of Appeals 16 November 1990.

On or about 17 June 1986, Frances Legg submitted an application for employment with the State of North Carolina to the office of Wilma Sherrill, Director of Personnel Appointments, Boards and Commissions for the Governor's Office. Her application was forwarded to Patty Gamin, personnel officer for the Department of Cultural Resources, for consideration for a position as a secretary with Cultural Resources. Because Ms. Legg's salary requirements were higher than the salary budgeted for the position and no other suitable positions were available, the application was not considered.

Petitioner Diane Jarrett, who had been employed by the Department of Cultural Resources for over nine years, applied for the same position as a secretary prior to 27 June 1986. She was interviewed by Larry Misenheimer, Administrator of the Historic Sites Section of the Department of Cultural Resources, on 23 June 1986. On 3 July, Mr. Misenheimer told petitioner he was recommending her for the position and submitted the necessary forms to the personnel office. By 8 July, the Director of the Division of Archives and History and the Secretary's office had approved petitioner's promotion, and the Cultural Resources' personnel office prepared the form PD-105 promoting petitioner which was then sent to the State Personnel Office and the State Budget Office.

On or after 1 July, the amount available for the salary for this position was increased, and on 9 July a representative from Ms. Sherrill's office called Ms. Gamin to find out if Ms. Legg had been interviewed since the salary for the position had been increased. On 10 July, Ms. Gamin sent Ms. Legg's application to Mr. Misenheimer who informed petitioner that Ms. Legg was to be interviewed. On 14 July, Ms. Legg was interviewed. Even though by 15 July petitioner's promotion had been approved by both State Personnel and State Budget, on 15 July Mr. Misenheimer decided to hire Ms. Legg.

On 13 August, petitioner filed a Hearing Request Information Form with the Office of State Personnel. Petitioner alleged that after she had been selected, the necessary personnel papers had been approved, and after the advertised deadline, Ms. Legg was interviewed and got the job over petitioner. Petitioner contends

that she did not get the job because she is a Democrat and because Legg was referred by the Governor's Office and was a Republican.

Following a hearing, the administrative law judge filed her recommended decision on 22 September 1987 stating as a finding of fact that "[t]he testimony of Ms. Legg that she is registered independent in Virginia and has never been a registered republican is not accepted as credible." Further, the administrative law judge stated:

> Misenheimer's testimony, that he hired Legg because of affirmative action considerations due to her age, and because of her animation with the idea of an unstructured environment and her exceptional qualifications, and that he possibly would have looked for another candidate, anyway, after recommending the Petitioner, is not accepted as credible.

The administrative law judge concluded that respondent "intentionally discriminated against the Petitioner on account of political affiliation in violation of the First and Fourteenth Amendments and G.S. 126-36." She recommended that the State Personnel Commission order respondent to promote petitioner to the position at issue with back pay plus reasonable attorney's fees.

The State Personnel Commission considered the recommended decision of the administrative law judge, and on 3 May 1988 the Commission issued its decision and order declining to accept the recommended decision. The Full Commission "decline[d] to accept the credibility decision" of the administrative law judge and concluded that although petitioner "has made out a prima facie case of political affiliation discrimintion [sic]," respondent had a non-discriminatory business reason to justify its actions and petitioner failed to prove she was discriminated against on the basis of political affiliation. The Commission ordered that petitioner's claim be dismissed.

On 8 June 1988, petitioner filed this action petitioning for judicial review of the final decision of the State Personnel Commission. On 6 February 1990, the trial court ordered that the final decision of the State Personnel Commission be reversed and reinstated the recommended decision of the administrative law judge stating that:

> 4. The Order of the Full State Personnel Commission entered on May 3, 1988, in the above-referenced matter, should be

reversed, and the Recommended Decision of the Administrative Law Judge, Angela R. Bryant, entered on September 22, 1987, should be reinstated in this matter.

5. The issues in this matter were resolved by the Administrative Law Judge in her proposed findings. The Administrative Law Judge was the fact finder on the issue of credibility, and the State Personnel Commission was not in the position to determine same.

6. The issues in respect to the credibility of the witnesses had not been determined by the Commission, and therefore alternate findings are arbitrary and capricious.

From this order, the State appeals.

Robert S. Pierce for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles J. Murray, for the State.

ORR, Judge.

The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs judicial review of administrative agency decisions. In the present case, the standard of review for an appellate court is governed by N.C. Gen. Stat. § 150B-51(b) (1987), the same scope of review utilized by superior courts. *See* 2 C. Koch, Administrative Law and Practice § 8.54, at 82 (1985) (no deference given to superior court); *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 581-82, 281 S.E.2d 24, 29-30 (1981) (Supreme Court applied N.C. Gen. Stat. § 150A-51 (now § 150B-51) in reviewing decision of the North Carolina Safety and Health Review Board); *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 638-39, 362 S.E.2d 294, 296 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988); *contra Henderson v. North Carolina Dep't of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988) (applying the same standard of review of other civil cases). Section 150B-51(b) provides in part that a court in reviewing the final decision of an agency may reverse 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 and capricious.

The sole issue raised by this appeal is whether the agency's decision regarding the credibility of the witnesses was "arbitrary and capricious." In determining whether an agency decision is arbitrary and capricious, "the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." *Lewis v. North Carolina Dep't of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

> The "arbitrary and capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ." [citations omitted]

Id.

"The 'whole record' test is also applied when the court considers whether an agency decision is arbitrary and capricious." *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988); *High Rock Lake Ass'n v. North Carolina Envtl. Management Comm'n*, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

> [T]he "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Rebarco, 91 N.C. App. at 463, 372 S.E.2d at 344 (quoting *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)).

"While our review is limited to assignments of error to the superior court's order, this court is not required to accord any particular deference to the superior court's findings and conclusions concerning the Commission's actions." *Watson*, 87 N.C. App. at 640, 362 S.E.2d at 296.

The administrative law judge concluded that respondent intentionally discriminated against petitioner in violation of N.C. Gen. Stat. § 126-36 (1989), which provides that an employee of the State "who has reason to believe that employment, promotion, training, or transfer was denied him . . . because of his . . . political affiliation . . . shall have the right to appeal directly to the State Personnel Commission." In making its final decision, the State Personnel Commission declined to adopt the recommended decision of the administrative law judge. Regarding the final decision of an agency, the North Carolina Administrative Procedure Act in N.C. Gen. Stat. § 150B-36 (1987 & Supp. 1990) provides:

> (b) A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. If the agency does not adopt the administrative law judge's recommended decision as its final decision, the agency shall state in its decision or order the specific reasons why it did not adopt the administrative law judge's recommended decision. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final decision or order shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. . . .

Here the State Personnel Commission, which could consider only the official record in making its decision, was entitled to make its own findings of fact and conclusions of law. In declining to adopt the decision of the administrative law judge, the Commission stated specific reasons for not adopting the recommended decision and in addition stated its reasons for declining to adopt certain findings of fact such as those regarding credibility:

The Commission specifically declines to adopt that portion of finding #35 dealing with the credibility of Ms. Legg's assertion of her political party affiliation (or lack thereof). In the absence of specific evidence to the contrary, the Commission finds this testimony credible. The Commission specifically declines to adopt finding #37 in that it does not agree with the ALJ's assessment of the credibility of Mr. Misenheimer's testimony. In both these findings, the Commission does not accept the ALJ's assessment of credibility, which does not appear to be based on the demeanor of either witness, but rather the ALJ's reactions to the content of the testimony. As such, the Commission feels it is appropriate to decline to accept the credibility decision of the ALJ.

Ms. Legg testified regarding her political affiliation as follows:

Q. What party are you registered with?

A. There isn't anyone in North Carolina that knows that. Do I have to answer that question?

Ms. Bryant: I don't know of any reason why—

Witness: I am not a registered voter in the State of North Carolina.

Q. I didn't ask you that. I asked you what party you were registered with?

A. I feel like that is a violation of my—I could say anything, couldn't I?

Q. I would remind you that you are under oath.

A. I am a registered independent in the State of Virginia.

Q. Have you ever been a registered Republican?

A. No.

Mr. Misenheimer testified that he hired Ms. Legg because of her exceptional qualifications and experience including her previous employment at the State Department in Washington, D.C., and her advancement to various positions there, a "slight advantage" as far as her education, past experience involving much responsibility, her animation, her age, her maturity, and her writing ability. The administrative law judge found that Ms. Legg's testimony regarding her political affiliation and Misenheimer's testimony re-

garding his reasons for hiring her were not credible. "The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness." *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). The Commission chose to believe Ms. Legg, and that is within its discretion.

We note that the evidence reflects only that Ms. Legg's application was referred to Cultural Resources by the Governor's Office and that Ms. Legg had a friend who worked in the Governor's Office and suggested she send in her application. There is no evidence whatsoever to indicate that Ms. Legg was hired because of her political affiliation or that petitioner was not promoted because of her political affiliation. Further, there is no evidence in the record to suggest that the actions were the result of any requirement or suggestion by the Governor's Office that Ms. Legg be hired. At the most, the evidence reflects that the Governor's Office in referring Ms. Legg was merely recommending that she be interviewed.

Therefore, we reverse the decision of the trial court and reinstate the decision of the Commission.

Reversed.

Judges PHILLIPS and GREENE concur.

J. M. OWEN BUILDING CONTRACTORS, INC., PLAINTIFF v. COLLEGE WALK, LTD., A NORTH CAROLINA LIMITED PARTNERSHIP AND COMMERCE CONSTRUCTION CO., INC., A TENNESSEE CORPORATION, DEFENDANTS, AND COMMERCE CONSTRUCTION CO., INC., THIRD-PARTY PLAINTIFF v. BALBOA INSURANCE COMPANY, THIRD-PARTY DEFENDANT, AND COLLEGE WALK, LTD., THIRD-PARTY PLAINTIFF v. RELIANCE INSURANCE COMPANY, THIRD-PARTY DEFENDANT

No. 9029SC334

(Filed 5 February 1991)

1. Arbitration and Award § 40 (NCI4th)— motion to vacate award—timeliness

There was no merit to College Walk's contention that motions by two defendants to vacate or modify an award of arbitrators were untimely and therefore improperly accepted by the trial court, since service of the award of arbitrators was by regular mail; N.C.G.S. § 1-567.9 requires that service of the award must be by personal delivery or registered mail; and service by regular mail therefore did not commence the running of the 90-day period allowed for motions to vacate or modify an award. N.C.G.S. §§ 1-567.13(b) and 1-567.14(a).

Am Jur 2d, Arbitration and Award §§ 145, 184, 185.

2. Arbitration and Award § 34 (NCI4th)— attorney's fees—arbitrators' award properly deleted

The trial court did not err by deleting an arbitrators' award of attorney's fees, since attorney's fees are not a subject of arbitration even if the contract in dispute provides for such fees, as N.C.G.S. § 1-567.11 excludes attorney's fees from an award to be rendered by the arbitrators since such fees are only collectible under N.C.G.S. § 6-21.2.

Am Jur 2d, Arbitration and Award §§ 136, 137.

3. Arbitration and Award § 42 (NCI4th)— interest awarded per diem—modification to per annum

The trial court did not err in modifying an arbitrators' award by substituting interest of 8% per annum for the awarded amount of 8% per diem, since the arbitrators' decision was inconsistent with the parties' contract.

Am Jur 2d, Arbitration and Award § 139.7.

4. Arbitration and Award § 43 (NCI4th)— appeal of award— monies held by clerk of court—motion to release properly denied

The trial court did not err in denying College Walk's motion to release all monies held by the clerk of superior court, since College Walk's appeal of the entire arbitration award placed all funds, including the approximately $158,000 deposited with the clerk of court, at issue.

Am Jur 2d, Arbitration and Award § 145.

APPEAL by defendant College Walk, Ltd., third-party plaintiff Commerce Construction Co., Inc. and third-party defendant Reliance Insurance Company from order entered 1 November 1989 by *Judge Robert E. Gaines* in TRANSYLVANIA County Superior Court. Heard in the Court of Appeals 23 October 1990.

Plaintiff instituted a civil action against defendants for breach of contracts, unjust enrichment, enforcement of lien rights, unfair trade practices and attorney's fees. This action was subsequently referred to arbitration. With some modifications, the trial court confirmed the arbitrator's award. Defendant, third-party plaintiff and third-party defendant appeal.

Long, Parker, Hunt, Payne & Warren, P.A., by Jeffrey P. Hunt, for plaintiff-appellee.

Safran Law Offices, by Perry R. Safran and V. A. Anderson, Jr., for defendant-appellant College Walk.

Roberts Stevens & Cogburn, P.A., by Gregory D. Hutchins and William Clarke, for third-party defendant-appellant Reliance Insurance Company.

JOHNSON, Judge.

Commerce Construction Co., Inc. ("Commerce") and J. M. Owen Building Contractors, Inc. ("Owen") contracted for construction work on a certain adult community complex located in Transylvania County. The owner of the project is College Walk, Ltd. ("College Walk"). The project was composed of two principal parts, the Adult Congregate Living Facility ("ACLF") and the Cluster Homes. Commerce contracted with College Walk as the general contractor for the ACLF facility by a written contract dated 11 October 1985.

On 11 December 1985, Owen entered into a series of subcontracts with Commerce regarding construction and carpentry work to be performed on the ACLF facility. During 1985, 1986, and 1987, Owen entered into a series of contracts with College Walk regarding the construction of the Cluster Homes. Owen had a direct contract with College Walk as the general contractor for the Cluster Homes' portion of the project. According to their contractual agreement, Commerce and Owen obtained a surety for their work on the ACLF and Cluster Homes. Reliance was obtained as the surety by Commerce for the ACLF portion of the project. Balboa Insurance Company ("Balboa") was the surety for Owen on the Cluster Homes. Reliance issued a Performance and Payment Bond in favor of College Walk on the ACLF construction. Reliance also issued a Labor and Material Payment Bond for the ACLF construction.

On 16 June 1987, Owen filed a Claim of Lien against Commerce and College Walk for labor and materials provided for the ACLF facility in the amount of $116,687.44. Owen subsequently filed Claims of Lien against College Walk for work performed and services provided for the Cluster Homes' portion of the project on 8 July 1987 in the amount of $58,736.45. Owen perfected the Claim of Lien filed against Commerce and College Walk on 24 September 1987. In its complaint, Owen alleged nonpayment of labor, materials, and overhead for the carpentry and construction work performed on the ACLF and the Cluster Homes.

College Walk thereafter filed a Motion to Compel Arbitration on the dispute and moved to add Reliance as a party defendant. By order dated 23 March 1988, Reliance was added as a third-party defendant in the action.

The parties proceeded to arbitration through the American Arbitration Association and a hearing was conducted before a tribunal of arbitrators. On 12 April 1989, an Award of Arbitrators was rendered. The arbitrators determined that Commerce and Reliance should pay to College Walk $30,202.00 with interest at 8% per diem on the ACLF portion of the project. Commerce and Reliance were further ordered to pay College Walk's attorney's fees in the amount of $23,753.00 and to provide "as-built" mylars at no cost to College Walk. Commerce and Reliance were further ordered to pay Owen as the subcontractor on the ACLF portion of the project $116,687.00 with interest at 8% per diem. In addition,

Commerce and Reliance were ordered to pay Owen's attorney's fees in filing its lien action.

On the Cluster Homes project, the arbitrators determined that Owen should pay to College Walk $30,570.00 with interest at 8% per diem and attorney's fees of $4,375.00. The arbitrators also determined that the lien funds deposited with the Transylvania County Clerk of Superior Court in the amount of $53,036.45 were to be released and awarded to College Walk.

After the arbitrators' final decision, the parties made various motions to confirm or modify the arbitrators' award. All motions were heard on 23 October 1989. Owen, Commerce and Reliance argued that the interest stated in the arbitrators' award should be on a per annum basis rather than a per diem. Owen, Commerce and Reliance further argued that the arbitrators had no authority to award attorney's fees. College Walk, however, argued that the interest should remain as set out in the arbitrators' award and that the arbitrators did, in fact, have the authority to award attorney's fees.

For the most part, the arbitrators' award was confirmed by an order dated 1 November 1989. The trial court, however, struck the portion of the arbitrators' award granting attorney's fees and further ordered that all lien funds paid into the clerk of superior court be retained pending further orders.

The court on its own motion entered an order re-opening the issues of confirmation of the arbitrators' award with respect to the issues of the amount of interest awarded, attorney's fees and the amount of monies to be taken down pending any appeals from the judgment entered on 1 November 1989. After reviewing the record and considering arguments of counsel, the trial court entered an order reflecting the court's order of 1 November 1989 denying attorney's fees. The interest rate of 8% per diem was determined to be excessive and punitive and the trial court thereby substituted an interest rate of 8% per annum on the award made by the arbitrators. All funds deposited with the clerk of superior court were ordered retained pending appeal.

On appeal, defendant College Walk brings forth six questions for this Court's review and third-party defendant Reliance brings forth an additional two questions for review. Third-party plaintiff Commerce, however, has not advanced any arguments and therefore

has abandoned its entire appeal. *See* Rule 28 of the N.C. Rules of Appellate Procedure. For the sake of clarity, we will first address the questions brought forth by College Walk.

COLLEGE WALK'S APPEAL

[1] By Assignments of Error numbers one and two, College Walk contends that the motions made by Commerce and Reliance to vacate or modify the award of arbitrators were untimely and therefore improperly accepted by the trial court. We disagree.

"The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award." *Thomas v. Howard*, 51 N.C. App. 350, 352, 276 S.E.2d 743, 744 (1981). An award is ordinarily presumed to be valid and the party trying to set aside the award has the burden of demonstrating an objective basis which supports his allegation that one of the arbitrators acted improperly. *Id.* College Walk has not met this burden.

General Statutes § 1-567.13 provides the exclusive grounds and procedure for vacating an award while G.S. § 1-567.14 provides the exclusive grounds and procedure for modifying or correcting an award. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982). Both statutory provisions establish that an application for vacating or modifying an award must be made within 90 days after delivery of a copy of the award to the applicant. *See* G.S. §§ 1-567.13(b) and 1-567.14(a). Service of the award must be by either personal delivery or registered mail. G.S. § 1-567.9. Where, as here, "a statute prescribes a specific mode of notice that method must be strictly followed where notice must be relied upon to divest the recipient of a right." *Council v. Balfour Products Group*, 80 N.C. App. 157, 159, 341 S.E.2d 74, 75 (1986). As we firmly believe that G.S. § 1-567.9 is a prerequisite to the vacating or modifying of the arbitrators' award, service of the Award of Arbitrators, in the instant case, by regular mail did not commence the running of the 90-day period as prescribed by G.S. § 1-567.13. Therefore, we hold that neither Commerce nor Reliance were furnished with the applicable statutory notice. Thus, the trial court properly considered the issues of the interest rate and attorney's fees. Accordingly, we overrule College Walk's first two Assignments of Error.

[2] Next, College Walk contends that the trial court erred by deleting the arbitrators' award of attorney's fees. We disagree.

Initially, we note that attorney's fees are not a subject of arbitration even if the contract in dispute provides for such fees. *Wilson Building Co. v. Thorneburg Hosiery Co., Inc.*, 85 N.C. App. 684, 355 S.E.2d 815, *cert. denied*, 320 N.C. 798, 361 S.E.2d 75 (1987). G.S. § 1-567.11 excludes attorney's fees from an award to be rendered by the arbitrators since such fees are only collectible under G.S. § 6-21.2. The Award of Arbitration in the instant case specifically awarded attorney's fees to both College Walk and Owen. Such an award, however, exceeded the arbitrators' authority. *Id.* Therefore, the trial court properly denied College Walk's motion to confirm the arbitrators' award.

[3] By Assignment of Error number five, College Walk contends that the trial court erred in modifying the arbitrators' award by substituting 8% per annum for the awarded amount of 8% per diem. We disagree.

General Statutes § 1-567.14(a) provides that

> (a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
>
> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.
>
> (2) The arbitrators have awarded upon a matter not substituted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

An award is conclusive on matters of law and fact if decided in accordance with the legal construction of the contract in which the arbitrators derive their authority. 5 Am. Jur. 2d, Arbitration and Award, § 147 (1962).

While we recognize that the public policy of our State favors confirmation of arbitration awards, we also recognize that such awards are not infallible. *Wildwoods of Lake Johnson Assoc. v. L. P. Cox Company*, 88 N.C. App. 88, 362 S.E.2d 615 (1987), *disc.*

rev. denied, 322 N.C. 838, 371 S.E.2d 285 (1988). The contract between College Walk and Commerce for the ACLF portion of the project mentioned applicable interest rates in two specific provisions. Through each provision, the parties agreed that the rate of interest governing the contract was that of the legal rate at the place of the project. We find that the arbitrators' decision to award interest at 8% per diem is inconsistent with the parties' contract.

[4] Finally, College Walk contends that the trial court erred in denying its motion to release all monies held by the Transylvania County Clerk of Superior Court. College Walk's appeal of the entire arbitration award placed all funds, including approximately $158,000.00 deposited with the clerk of court, at issue. Thus, the trial court correctly ordered that these funds remain with the clerk of court pending appeal. This assignment is overruled.

RELIANCE'S APPEAL

By Assignment of Error number one, Reliance contends that the trial court erred in confirming the award of interest on the arbitrators' award at the rate of 8% per diem.

Initially, we note that Reliance filed notice of appeal from the 1 November 1989 order on 30 November 1989. The trial court in its 1 November 1989 order did not substitute the 8% per annum for the previously awarded 8% per diem. Such modification did not occur until the 4 December 1989 order. While Reliance filed an appeal from the first order, it did not file an appeal from the second order which resulted in the substitution of 8% per annum for the arbitrators' award of 8% per diem. The arguments brought forth by Reliance, however, are premised upon the trial court's order dated 4 December 1989. Pursuant to Rule 28 of the N.C. Rules of Appellate Procedure, any appeal by Reliance from the order dated 4 December 1989 has therefore been abandoned. (Inasmuch as Reliance's threshold issue is identical to the fifth question raised by College Walk's appeal, the substance of this issue, though abandoned by Reliance, has already been addressed. *See* discussion under the fifth issue of College Walk's appeal.)

We have considered the second issue raised by Reliance on appeal, but find it to be without merit. It is therefore overruled.

Accordingly, the order of the trial court eliminating attorney's fees and substituting an interest rate of 8% per annum for the 8% per diem is

Affirmed.

Judges EAGLES and PARKER concur.

WAKE STONE CORPORATION, PLAINTIFF v. NORWOOD O. HARGROVE AND WIFE, NANCY H. HARGROVE, DEFENDANTS

No. 8910SC1125

(Filed 5 February 1991)

1. **Vendor and Purchaser § 5.1 (NCI3d)— specific performance of contract to convey realty—route of highway—no mutual mistake**

In an action for specific performance of a contract to convey real property, the evidence was insufficient to support relief for defendants based on mutual mistake where defendants alleged that a condition prerequisite to their conveyance of property was written notice from the Town of Knightdale that the relocation of Highway 64 would not go through property on which their home was located; assuming that the legal authority of the Town of Knightdale rather than the Department of Transportation to determine the final location of Highway 64 was an assumption basic to the defendants' decision to contract, it was uncontroverted that plaintiff did not lead defendants into that assumption; if defendants' initial assumption about the authority of Knightdale over the street system within and around its boundaries was mistaken, defendants and plaintiff had equal and adequate means of correcting the mistake; and if defendants were mistaken about the legal authority of Knightdale to give the notice required by the contract, that mistake was not a basic assumption of plaintiff in entering the contract.

Am Jur 2d, Vendor and Purchaser §§ 54, 56, 483.

2. Brokers and Factors § 5 (NCI4th)— mistake of real estate agent—plaintiff not bound

In an action for specific performance of a contract to convey real property, plaintiff could not be bound by the mistake, if any, of its real estate agent regarding the operation of a condition in the contract between plaintiff and defendants, since the condition in question was inserted at defendants' insistence and was drafted by defendants and the agent in defendants' living room, and the real estate agent's contract with plaintiff contained no terms which could be construed as giving him authority to do more than convey offers to and from plaintiff.

Am Jur 2d, Brokers §§ 3, 30.

APPEAL by defendants from judgment entered 15 May 1989 by *Judge Orlando Hudson* in WAKE County Superior Court. Heard in the Court of Appeals 31 May 1990.

McMillan Kimzey & Smith, by James M. Kimzey and Katherine E. Jean, for plaintiff appellee.

Kirk, Gay, Kirk, Gwynn & Howell, by Clarence M. Kirk and Katherine M. McCraw, for defendant appellants.

COZORT, Judge.

Seeking specific performance of a contract to convey real estate, plaintiff sued defendants. After a jury found that defendants had breached the contract, the trial court ordered specific performance and defendants appealed. We find no error.

On 31 March 1987, plaintiff Wake Stone Corporation (Wake Stone) and defendants Norwood and Nancy Hargrove (the Hargroves) entered into a contract to exchange parcels of property. The contract consisted of two parts: the Hargroves would buy a tract of land, approximately 21.5 acres in size, owned by Wake Stone and pay for it by conveying a tract of land, approximately 31 acres in size, which they owned; simultaneously Wake Stone would purchase the 31-acre tract owned by the Hargroves by conveying to them the 21.5-acre tract owned by the corporation. The entire transaction was subject to a number of conditions, including condition "G," which provided that closing was contingent upon the Hargroves "receiving written notice from the Town of Knightdale

that the Highway 64 relocation will not take the northern route through the subject property being transferred or that [tract] owned by [the Hargroves] which is Parcel #1 on the Wake County Book of Maps #510." The tract identified in Condition G as Parcel #1 is adjacent to or nearby the 31 acres that the Hargroves contracted to convey. The contract set no time limit for the fulfillment of Condition G, providing only that closing "will take place within thirty (30) days after satisfaction of Condition G."

On 27 May 1987, the Hargroves wrote to John Bauchman (Bauchman), the realtor who was brokering the property exchange, to inform him and John Bratton (Bratton), president of Wake Stone, that

> [i]f section G in the contract is not satisfied to our satisfaction by May 31, 1987, you can consider the contract void.
>
> We think 60 days from the date the contract was signed is sufficient time to complete this.

At trial Norwood Hargrove testified that he wrote the letter shortly after learning that the North Carolina Department of Transportation, rather than the Town of Knightdale, had final authority over the relocation of Highway 64. On 11 June 1987, in reply to the Norwoods' letter, Bauchman wrote: "I have contacted John Bratton regarding your request to void the contract with him, on the basis that Section G in the contract has not been satisfied. Mr. Bratton indicated that he had accepted the contracts with the terms as proposed by you and has no interest in terminating the contract at this time."

On 7 January 1988, Dennis Gabriel, town manager of Knightdale, wrote to John Bratton: "Per your request, the Knightdale Town Council at its December 7, 1987 meeting removed the northern route of Highway 64, Alternate 3, from its Thoroughfare Plan. Presently under consideration are Alternates 1 and 2 which are south of U. S. 64." On 10 February 1988, the town manager sought to clarify his earlier letter and wrote to Bratton, stating that

> a final corridor choice was delayed until November, 1988 when further information will be available concerning the location of the proposed Outer Loop. As a result of this action the Council has not ruled out any potential corridor for the 64 bypass and therefore I would not have you misinformed as to the potential for a northern bypass corridor being accepted

> that could impact on the parcels referenced in that letter. Further, I do not feel that any definitive statement can be made as to the location of the 64 bypass . . . .

On 26 February 1988, the town manager again wrote to Bratton; he noted that

> [b]ecause of Parcel 1 of the Tax Map 501's proximity to U. S. 64 and its location opposite Raleigh Federal Savings and Loan development site, it will not be possible for any corridor of 64 bypass to bisect this property. This property is located opposite high density commercial development as well as being located to [*sic*] close to U.S. 64 to cause it to be impacted by any northern expressway that might parallel existing 64.
>
> Also, because of the Parcel 4 location next to the new Bolton subdivision and the fact that a northern bypass would have to be located north of Forestville Road to miss the existing quarry pit west of this Parcel, there is no way that any northern route could be locked [*sic*] on Parcel 4 Tax Map 501.
>
> Please accept my apologies for any inconvenience that I may have cause[d] by my mistake in identification of Parcel 1, Tax Map 501 and further please disregard the comments made in my February 10, 1988 letter.

In February and again in March 1988, Wake Stone informed the Hargroves that it considered Condition G satisfied, tendered performance of the contract, and requested the Hargroves to appear for a closing of the transaction. Before trial the parties stipulated, pursuant to Rule 16 of the North Carolina Rules of Civil Procedure, that the "defendants have refused to accept the tender and have refused to make conveyance of the land to be exchanged." At trial Bratton testified that Wake Stone remained ready, willing, and able to perform its part of the contract.

On 19 April 1988, Wake Stone filed a complaint alleging breach of contract by the Hargroves. The Hargroves answered, and after further pleading the case went to trial on 8 May 1989. The sole issue submitted to the jury was: "Did the defendant[s] breach the contract?" The jury answered "yes." On 15 May 1989, the trial court entered judgment for the plaintiff, decreeing specific performance of the contract.

[1] The issue dispositive of this appeal is whether the trial court erred in denying defendants' motion for a directed verdict based on mutual mistake. Defendants contend that both parties were mistaken as to the authority of the Town of Knightdale to determine the routing of Highway 64 and that such authority was a basic assumption on which the contract was made. Without reaching the issue of whether the town had the authority to give the notice contemplated by Condition G of the contract, we find that the facts presented by the case below do not support relief for the defendants based on mutual mistake.

Where mutual mistake is alleged, whether the nonaggrieved party participated, innocently or intentionally, in causing the mistake is one of the more important factors courts must examine. 3 A. Corbin, *Contracts* § 608 (1960). Our Supreme Court emphasized this consideration in *Marriott Financial Services v. Capitol Funds*:

> A unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to avoid a contract or conveyance. The following pertinent statement aptly summarizes the requirement of mutuality:
>
> > . . . [O]rdinarily[,] a mistake, in order to furnish ground for equitable relief, must be mutual; and as a general rule relief will be denied where the party against whom it is sought *was ignorant that the other party was acting under a mistake and the former's conduct in no way contributed thereto* . . . .

288 N.C. 122, 136, 217 S.E.2d 551, 560 (1975) (citations omitted) (emphasis in original).

Evidence in the case below shows that the condition (about the effect of which the defendants contend both parties were mistaken) was included in the contract by the defendants. At trial the chairman of the plaintiff corporation testified as follows:

> Q. When you received this contract, Plaintiff's Exhibit 7, was it already signed by Nancy and Norwood Hargrove?
>
> A. Yes, it was.
>
> Q. Did you see them sign it?
>
> A. No, I did not.
>
> Q. Did you persuade them to sign it?

A. No.

Q. Did you have any communication with them at all—

A. No.

Q. —concerning this transfer just prior to their signing it?

A. No, I did not.

* * * *

Q. Looking at Paragraph G it says: Closing is contingent upon seller receiving written notice from the Town of Knightdale that the Highway 64 relocation would not go through the subject property or the Hargroves' home place.

When you saw that, were you familiar with that condition prior to seeing that there?

A. No.

* * * *

Q. What was your reaction when you saw that condition? Tell me what you felt as a chairman of Wake Stone entering in this transaction? How did that affect you?

A. Well, it was just one of a number of conditions which Norwood required and we were agreeable to signing it with that condition on it.

Q. Did you feel that it might be proper for you to fulfill that condition in the future at the time you signed that?

A. Well, I—I don't think I had any knowledge or feeling one way or the other whether we could have. But we are willing to try.

Regarding Condition G, the realtor who brokered the property exchange testified as follows:

Q. Where did Condition G come from?

A. That was based on the desire on the part of the Hargroves to make certain that the Highway 64 relocation did not go through the home that they were living in. And that was inserted as a condition so that the transaction would not take place unless that road relocation through their property was eliminated.

Q. At whose initiative was that inserted, Hargroves[']' or Wake Stone's?

A. Hargroves'.

Assuming that the legal authority of the Town of Knightdale (rather than the Department of Transportation) to determine the final location of Highway 64 was an assumption basic to the defendants' decision to contract, it is uncontroverted that the plaintiff did not lead the defendants into that assumption. Moreover, if the defendants' initial assumption about the authority of Knightdale over the street system within and around its boundaries was mistaken, the defendants and the plaintiff had equal and adequate means of correcting the mistake. Finally, if the defendants were mistaken about the legal authority of Knightdale to give the notice contemplated by Condition G, that mistake was not a basic assumption of the plaintiff in entering into the contract.

[2] In their brief the defendants characterize John Bauchman as the plaintiff's agent. They contend that Bauchman "conducted negotiations for Mr. Bratton" and that Bauchman "believed at the signing of the contracts that the town had the right to make the decision where the road was going." Thus, they imply that Bauchman's alleged mistake must be attributed to Wake Stone as Bauchman's principal in the negotiations.

In North Carolina a real estate "agent's authority from his principal to sell real estate is not to be readily inferred, but exists only where the intention of the principal to give such authority is plainly manifest." *Forbis v. Honeycutt*, 301 N.C. 699, 703, 273 S.E.2d 240, 242 (1981). Offers vary as to price, financing, date of possession, and numerous other conditions, and a "decision on such matters would normally be for the owners of real estate, not their agents." *Id.* at 705, 273 S.E.2d at 243.

Applying these principles to the case below, we note that Norwood Hargrove testified that the property exchange had its origin in early 1987:

Q. All right. Tell us about the first approach you had from Mr. Bauchman about any land for any reason?

A. The first approach about land?

Q. Yes, sir.

A. Okay. He came to my house one morning. He had been before but he, like he said, you know, he came to introduce himself. But later he came back and he says, Mr. Hargrove, we've got some people that want to put a Bible College in the community. Do—Would you be interested in trading some land?

And I asked him which land and he explained to me that—that he had been to see Mr. Bratton and Mr.—and had tried to buy some land to put a Bible College on and Mr. Bratton was not interested but he told him that he would be interested in swapping some land.

While Hargrove testified that Bauchman persisted "constantly from then on" in promoting the exchange, it is uncontroverted that Condition G was inserted in the contract at the insistence of the Hargroves. Bauchman testified that the condition was drafted by the Hargroves and him in their living room and that, upon taking the Hargroves' offer to Bratton, he explained Condition G as "a critical aspect as far as [the Hargroves'] willingness to deal."

We note further that Bauchman entered into commission contracts with both the Hargroves and Wake Stone. Bauchman's commission contract with Wake Stone provides solely that Wake Stone will pay a $10,000 commission at closing to Bauchman's real estate firm; it contains no terms that can be construed as giving Bauchman authority to do more than convey offers to and from Wake Stone. On these facts we hold that Wake Stone cannot be bound by Bauchman's mistake, if any, regarding the operation of Condition G in the contract between the Hargroves and Wake Stone.

We have reviewed the defendants' two remaining assignments of error and have found them to be without merit.

In the case below, we find

No error.

Judges ARNOLD and PHILLIPS concur.

GRUBB PROPERTIES, INC., PLAINTIFF v. SIMMS INVESTMENT COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. COLDWELL BANKER COMMERCIAL GROUP, INC., D/B/A COLDWELL BANKER COMMERCIAL REAL ESTATE SERVICES, THIRD-PARTY DEFENDANT

No. 9026SC273

(Filed 5 February 1991)

Limitation of Actions § 8.1 (NCI3d)— reformation of deed—fraud or mutual mistake—statute of limitations

Summary judgment was correctly granted for defendant in an action to reform a deed for an apartment complex based on fraud or mutual mistake in that an adjacent undeveloped parcel was not included in a deed where the mistake or discrepancy in the deed should have been discovered by the exercise of diligence at least by 30 May 1984, when plaintiff filed its declaration converting the apartment complex to condominiums, and plaintiff's complaint was not filed within three years of that date.

Am Jur 2d, Reformation of Instruments §§ 90, 91.

What statute of limitations governs action to reform instrument. 36 ALR2d 687.

APPEAL by plaintiff from order entered 21 December 1989 by *Judge Chase B. Saunders* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 26 September 1990.

Plaintiff's action to reform, on the grounds of fraud or mutual mistake, a deed received from defendant on 2 May 1984 was dismissed by summary judgment following a hearing at which depositions, documents, and other materials were considered. The deed in controversy conveyed a 21.247 acre tract of Charlotte real estate upon which was situated an apartment complex consisting of a clubhouse, swimming pool, and twenty two-story buildings. The action was filed on 22 April 1988 and the reformation sought is to have the deed include an adjacent undeveloped 1.283 acre parcel that defendant also owns. Defendant denied the allegations of fraud and mutual mistake, averred that plaintiff received all the land that it bargained for, and pled various defenses, including the three-year statute of limitations. In pertinent part, the materials before the court, when viewed in the most favorable light to plaintiff, show the following:

In 1979 defendant became the owner of the Orchard Trace apartment complex which had been built in 1972 on a 21.247 acre tract of Mecklenburg County land according to a certain survey. In financing the transaction defendant encumbered the 21.247 acre tract with a deed of trust and conveyed to the trustee and future owners of the property the right to use a water main and pipeline that ran across and was situated on an adjacent 1.283 acre parcel of undeveloped land. In early 1984, the third-party defendant Coldwell Banker, a real estate broker, learned that defendant wanted to sell Orchard Trace complex and negotiated an agreement, not a listing, under which it would receive a commission if it obtained a buyer. In negotiating the brokerage agreement the 1.283 parcel was not mentioned, and defendant intended to sell only the larger tract upon which the apartment complex was situated. The broker, noting that the county tax maps showed that defendant's property at that location amounted to 22.53 acres, prepared a sales brochure which contained photographs of the apartment buildings and various informative statements, including the following: That the complex contained a clubhouse, swimming pool, tennis courts, playground and 252 apartments of specified sizes, which were furnished with drapes, carpets, and certain electric appliances; what the recent average rentals and expenses had been; that the land contained 22.53 acres; that prospective buyers should independently verify all information stated. Plaintiff, a Davidson County corporation operated largely by its vice-president, a Lexington, N. C. attorney, was looking for apartments that could be profitably converted to condominiums. On 27 March 1984, after its vice-president had seen the broker's sales brochure, looked the property over several times, and been told by the broker that the property offered included the undeveloped land adjacent to the entranceway to the complex—upon which a sign identifying the apartments was situated—plaintiff agreed to buy the property and close the transaction on 1 May 1984. The written contract described the land by metes and bounds and stated that it contained 21.247 acres according to an identified survey. In closing the transaction on 2 May 1984 defendant delivered to plaintiff the following documents, each of which contained the same metes and bounds description as the sales contract and stated that the property contained 21.247 acres: (a) The warranty deed; (b) an affidavit that there had been no recent construction on the property; (c) an assignment of defendant's interests in the apartment leases, equipment, plans and surveys; and (d) a bill of sale for the personal property situated on the premises. In the closing

plaintiff executed an assumption of defendant's existing deed of trust, a note for $4,270,000, and a new deed of trust, each of which described the property encumbered precisely as did the contract, deed, and other papers. Before the closing plaintiff did not have time to have the property surveyed and its vice-president did not check the legal description in the deed against the apparent boundaries of the property. If he had done so he would have discovered that the small undeveloped tract was not included, for one of its boundaries is along the complex entranceway, Orchard Trace Lane, for more than 300 feet, and another is adjacent to U.S. Highway 29 and N.C. Highway 49 for more than 150 feet, and the deed contains no similar calls. Before closing plaintiff did have a real estate lawyer do a title search, but whether the search discovered that the 1.283 acre parcel was not included in either the deed of trust then on the property or the deed to plaintiff does not appear. If plaintiff's vice-president noticed that the deed was for less acreage than that stated in the sales brochure it did not concern him, as plaintiff's main interest was not in acquiring a certain number of acres but the land he thought they were getting, and he thought the 1.283 acre parcel was included and was essential to their conversion of the property to condominiums. On 30 May 1984, after having the property surveyed, plaintiff converted the apartment complex to a condominium complex by executing and recording a Declaration of Orchard Trace Condominiums that described the land identically as the deed and other documents above mentioned. In preparing the Declaration plaintiff's vice-president did not compare the legal description of the property in the deed with the survey and, as he conceded, if he had done so he would certainly have detected that the 1.283 acre parcel was not included. In selling the condominiums plaintiff used a brochure that contained a map of the property that did not include the 1.283 acre parcel and its deeds to approximately 200 condominium buyers described the real estate precisely as did the deed and other documents mentioned. In April, 1988, by letter, defendant's lawyer notified plaintiff's lawyer that defendant had noticed that plaintiff's sign was still on the vacant parcel, that it had no right to so use the property, and asked that plaintiff either remove the sign or pay a monthly rental of $50. Before then, plaintiff's vice-president had not compared the description of the property in the deed with either the survey or the boundaries of the property he thought had been conveyed, and it was at that time that he discovered that the 1.283 parcel had not been included in the deed.

J. Rodwell Penry, Jr.; and Brinkley, Walser, McGirt, Miller, Smith & Coles, by D. Clark Smith, Jr. and Stephen W. Coles, for plaintiff appellant.

House & Blanco, P.A., by John S. Harrison, for defendant appellee Simms Investment Company.

PHILLIPS, Judge.

In seeking to reverse the dismissal of its action to reform defendant's deed to include an adjacent parcel of land allegedly left out because of fraud or mutual mistake, plaintiff appellant presents four questions, only one of which has to be resolved. For the materials of record establish as a matter of law that even if plaintiff's action is supportable by evidence, as to which no opinion is expressed, it is barred by G.S. 1-52(9), the applicable three-year statute of limitations.

Under G.S. 1-52(9), as plaintiff concedes, its cause of action accrued not when plaintiff discovered that the adjacent parcel of land was not included in the deed, but when that fact should have been discovered in the exercise of reasonable diligence. *Bennett v. The Anson Bank & Trust Company*, 265 N.C. 148, 143 S.E.2d 312 (1965). When a discrepancy or mistake in a deed or other document should be discovered in the exercise of reasonable diligence depends upon the circumstances of each case and is ordinarily a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E.2d 159 (1976). But where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so the absence of reasonable diligence is established as a matter of law. *Moore v. Fidelity and Casualty Company of New York*, 207 N.C. 433, 177 S.E. 406 (1934).

Applying these principles of law to the uncontradicted materials before the court, we hold that the mistake or discrepancy in the deed that plaintiff complains of should have been discovered through the exercise of due diligence, at least by 30 May 1984, when plaintiff filed its Declaration converting the apartment complex to condominiums, and that the action filed nearly four years later is barred. For at that time, if not before, plaintiff certainly had both the capacity and opportunity to discover that the 1.283 acre tract was not included in the deed by simply comparing the deed legal

description with the survey of the property that it had recently received, and under the rule laid down in *Moore* the action then accrued. And the action accrued on 30 May 1984, if not before, for another reason: In converting the property to condominiums preparatory to selling them to the public plaintiff had the positive duty to exercise reasonable care in describing the converted land, and its failure to take the simple steps that would have enabled it to ascertain that the 1.283 acre parcel had not been conveyed to it cannot be equated with reasonable care. Whether in the exercise of reasonable diligence plaintiff should have discovered the discrepancy or mistake at the closing, even though it had not received the survey—a question much argued in the briefs—need not be determined, and we express no opinion about it.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

DONNIE RAY GIBBONS, GERALDINE GIBBONS, PAULINE HILLIARD, AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS v. THE CIT GROUP/SALES FINANCING, INC., DEFENDANT

No. 9014SC177

(Filed 5 February 1991)

1. **Appeal and Error § 424 (NCI4th)— appendix to brief—copies of motion, order and transcript in similar case**

Rule 28 of the North Carolina Rules of Appellate Procedure does not prohibit a party from including in an appendix to a brief copies of a motion, order and portions of a transcript showing the court's reasoning in a similar case; however, such documents are of limited authoritative value.

Am Jur 2d, Appeal and Error §§ 691, 693, 700.

2. **Parties § 5 (NCI3d)— class action—discovery—pre-certification communication**

The trial court did not err in a class action arising from the financing of mobile home sales by allowing a pre-certification communication with class members where the trial court did

not allow unlimited, unsupervised communications with potential class members, but restricted contact to the level it deemed appropriate at that stage of the litigation and indicated that further orders would be issued as appropriate.

Am Jur 2d, Parties §§ 75, 89.

Absent or unnamed class members in class action in state court as subject to discovery. 28 ALR4th 986.

3. Parties § 5 (NCI3d) — class action — schedule or plan of discovery

The trial court did not err by not imposing a schedule or plan of discovery in a class action arising from the financing of mobile home sales where the trial court ruled on the advisability of holding a discovery or pretrial conference, not on what the results of such a conference should be. While N.C.G.S. § 1A-1, Rule 26(f) requires the court to impose a discovery plan if a discovery conference is held, this record contains no indication that such a conference was held and the court's order indicates to the contrary. The statutory language makes clear that the determination of whether and when to convene a discovery conference is a matter left to the discretion of the trial judge.

Am Jur 2d, Parties §§ 75, 89.

Absent or unnamed class members in class action in state court as subject to discovery. 28 ALR4th 986.

APPEAL by defendant from order entered 15 November 1989 in DURHAM County Superior Court by *Judge Joe Freeman Britt.* Heard in the Court of Appeals 10 December 1990.

Plaintiffs filed this purported class action against defendant on 2 June 1989 alleging that defendant had charged interest rates in financing the purchase of their mobile homes which violated the North Carolina Retail Installment Sales Act (G.S. § 25A-1 *et seq.*, hereinafter referred to as RISA). They alleged that these rates were memorialized in form contracts and that contracts similar to them had been used with the unnamed members of the class. They also alleged that these contracts were not subject to the preemptive effects of the Depository Institutions Deregulations and Monetary Control Act of 1980 (12 U.S.C. § 1735f-7, hereinafter referred to as DIDMCA).

Plaintiffs served discovery requests along with the complaint on 8 June 1989. In these requests, plaintiffs sought to learn, *inter alia*, the extent of defendant's involvement in the financing of mobile homes in North Carolina, particularly regarding Conner Mobile Homes, the number of financing agreements which charged interest rates in excess of that allowed by RISA, any foreclosures, repossessions or accelerations pursuant to these contracts, the basis for any claims that these contracts complied with DIDMCA, the methods by which payments were kept track of, the identity of other complainants, and information regarding interest rates charged in other states. Plaintiffs also requested extensive documentation, including copies of the contracts, which would necessarily have identified those persons with whom defendant had contracted.

Defendant objected to and declined to answer ten out of twelve of plaintiffs' interrogatories, agreed to respond in full to two and in part to one of plaintiffs' eleven requests for production of documents, and objected to plaintiffs' first request for admission. Plaintiffs then filed a motion to compel discovery. Defendant filed a motion for a protective order and a motion for a discovery conference and pretrial conference, requesting the court to impose a schedule for discovery and the hearing of "dispositive motions."

These motions came on for hearing on 11 October 1989, and the court directed the parties to prepare an order and entered its decision in the minutes. Defendant filed a second motion for protective order on 3 November 1989, and the trial court agreed to suspend its original order until such time as the motion was heard. The court entered its order on 15 November 1989 allowing in part and denying in part plaintiffs' motion to compel, declining to restrict or sequence discovery, deciding that a formal plan of discovery was unnecessary at the time, and requiring the parties to notify counsel for the opposing party within 24 hours if they contacted a potential member of the class, including the name and address of the class member and the time and date of the contact. Defendant appeals.

Maxwell & Hutson, P.A., by John C. Martin; and Gulley, Eakes, Volland & Calhoun, by Michael D. Calhoun, for plaintiffs-appellees.

Moore & Van Allen, by Charles R. Holton, Laura B. Luger, and John C. Browning, for defendant-appellant.

WELLS, Judge.

Defendant brings forward five assignments of error from the order of the trial court, contending that the court erred in allowing in part plaintiffs' motion to compel, denying its motions for protective orders, allowing pre-certification communications with potential class members, and refusing to impose a plan of discovery. We affirm.

[1] It is well settled that orders pertaining to discovery matters are interlocutory and ordinarily are not appealable. *Hale v. Leisure*, 100 N.C. App. 163, 394 S.E.2d 665 (1990). Since this case presents important questions of the degree of trial court control over class-action litigation, we choose to exercise our supervisory authority to "expedite decision in the public interest" pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and consider the merits. *See Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975). Plaintiffs' motion to dismiss is therefore denied. Plaintiffs' motion to strike the appendix to defendant's brief and impose sanctions is also denied. Rule 28 of the Rules of Appellate Procedure does not prohibit a party from including in an appendix to a brief copies of a motion, order and portions of a transcript showing the court's reasoning in a similar case. However, we are aware of the limited authoritative value of such documents, and will give them no more consideration than they are due.

Three of defendant's assignments of error deal with the trial court's order granting in part and denying in part plaintiffs' motion to compel responses to interrogatories and requests for production, and the trial court's denial of defendant's motion for a protective order. These decisions were within the discretion of the trial court, and we may only reverse on a clear showing of abuse of that discretion. *Alexvale Furniture, Inc. v. Alexander & Alexander of the Carolinas*, 93 N.C. App. 478, 385 S.E.2d 796, *disc. review denied*, 325 N.C. 228, 381 S.E.2d 783 (1989); *Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 312 S.E.2d 905 (1984). While we question the relevance of Interrogatory 12 (asking for information regarding financing agreements with people from other states), we note that plaintiffs did not mention this interrogatory in their motion, and the trial court did not compel defendant to answer it. Defendant's claims that the court abused its discretion in this case are subsumed in its remaining assignments of error, which we consider to be the two crucial questions for our review: (1)

Whether the trial court erred in allowing pre-certification communication with potential class members, and (2) Whether the trial court erred in failing to impose a more detailed plan for conduct of the litigation.

[2] Defendant relies primarily on *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 68 L.Ed.2d 693 (1981), in asserting that the trial court erred in allowing unsupervised communications with potential class members. We note initially that the Court's opinion in that case was based on Federal Rule of Civil Procedure 23(d), which is not a part of North Carolina's Rule 23. *See* N.C. Gen. Stat. § 1A-1, Rule 23. We find the logic of the case nevertheless persuasive. The Court acknowledged that a trial court has the *discretion* to limit communications with potential class members pursuant to its duty to exercise control over class actions, but indicated that such actions should be taken in limited circumstances. "[T]he mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules." *Gulf Oil Co., supra.* The Court further held that the district court had abused its discretion in imposing a broad restraint on communications with potential class members without a "clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.*

The trial court in this case noted that the parties had consented to confidentiality provisions, and issued the following order:

> Pending further Order of the Court, the plaintiffs and defendant shall notify counsel for the other party within twenty-four hours if either party or its counsel makes contact with a potential member of the class, as defined in the complaint. The notice shall include the name and address of the class member and the time and date of the contact; provided, this notification requirement shall not apply to communications by defendant in the ordinary course of business which do not relate to this litigation.

The court did not, then, allow unlimited, unsupervised communications with potential class members. It restricted contact to the level it deemed appropriate at that stage of the litigation. The trial court also indicated that further orders would be issued on this subject, as appropriate. This assignment of error is overruled.

[3] Defendant's contention that the court erred in not imposing a schedule or plan of discovery similarly must fail. While we agree that the importance of effective planning and control of discovery in complex litigation can hardly be overemphasized, *see* Manual for Complex Litigation 2d, § 21.41, p. 41 (1985), we cannot say that the trial court erred in proceeding as it did. Rule 26(f) of the North Carolina Rules of Civil Procedure provides:

> At any time after commencement of an action the court *may* direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court *may* do so upon motion by the attorney for any party (Emphasis added).
> . . .

Such permissive language makes it clear that the determination of whether and when to convene a discovery conference is a matter left to the discretion of the trial judge.

While Rule 26(f) requires the court to impose a discovery plan if a discovery conference is held, this record contains no indication that such a conference *was* held. The order indicates to the contrary:

> The Court has considered defendant's request for a pre-trial and discovery conference pursuant to Rules 16 and 26(f) and is of the opinion that discovery should not be restricted or sequenced as proposed by defendant and that a formal plan and schedule for discovery is unnecessary at this time.

The trial court ruled, then, on the advisability of holding a discovery or pre-trial conference, not on what the results of such a conference should be. This case was filed 2 June 1989, and plaintiffs' discovery requests were served on 8 June 1989. Arguments on the various motions were heard on 11 October and 13 November 1989, a relatively short time after commencement of the action. The trial court also denied several of plaintiffs' discovery requests, and ordered plaintiffs to conduct many of the record searches they were requesting at their own expense. This is not a case where the trial court abrogated its duty to maintain control over the litigation and gave plaintiffs license to conduct some form of fishing expedition. The trial court's order reflects its decision on how best to proceed with the litigation, and its recognition of its responsibility to control the way in which this case proceeds. This assignment of error is overruled.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

GLORIA HARRIS DUNN, EXECUTRIX OF THE ESTATE OF JERRY LEWIS DUNN, DECEASED, PLAINTIFF v. PACIFIC EMPLOYERS INSURANCE COMPANY; LOSS CONTROL SERVICES, INC.; DAVID A. FRASER, SC.D.; ENNIS, LUMSDEN, BOYLSTON & ASSOCIATES, INC.; MACDERMID, INC.; CIRCUIT SERVICES CORP.; MALLINCKRODT, INC., ENTHONE, INC.; ASHLAND INTERNATIONAL CORP.; PHOTO CHEMICAL SYSTEMS; AND CHEMTECH INDUSTRIES, INC., DEFENDANTS

No. 9010SC485

(Filed 5 February 1991)

Death § 4 (NCI3d)— wrongful death action—statute of limitations—interpretation of statute

Although plaintiff contended that the governing statute of limitations in a wrongful death action was two years from the date of decedent's death as provided in the first sentence of N.C.G.S. § 1-53(4), it is clear that the legislature intended for both sentences of N.C.G.S. § 1-53(4) to be construed together in determining the applicable period for instituting a wrongful death action. Plaintiff and decedent were made aware of his bodily harm, liver cancer, on 29 August 1985 and the undisputed evidence in the record indicates that had he lived decedent's claim would have accrued on 29 August 1985. Plaintiff did not file this action until 23 June 1989 and the claim is thus barred.

Am Jur 2d, Death §§ 68, 69, 73.

Time from which statute of limitations begins to run against cause of action for wrongful death. 97 ALR2d 1151.

Judge WELLS concurring.

Judge ORR joins in this concurring opinion.

APPEAL by plaintiff from *Hight (Henry W.), Judge*. Orders entered 14 October 1989 and 4 December 1989 in Superior Court, WAKE County. Heard in the Court of Appeals 22 January 1991.

This is a civil action wherein plaintiff seeks to recover from defendants damages for the wrongful death of her husband, Jerry Lewis Dunn, allegedly resulting from defendants' failure to "inspect, insure and safeguard" the deceased's place of employment from "undue hazards and risks."

The record discloses the following: Plaintiff's husband began working for the ITT Telecom Products Corporation subsidiary of International Telephone & Telegraph Corporation (hereinafter "ITT") at its manufacturing facility in Raleigh, North Carolina in 1982. While employed by ITT, plaintiff's husband was allegedly exposed to numerous hazardous and toxic chemicals.

Beginning in June 1985, plaintiff's husband began experiencing abdominal pain and vomiting every three to four days. He was hospitalized at Wake Memorial Hospital on 20 August 1985 and was preliminarily diagnosed as having cancer of the liver. On 23 August 1985, plaintiff's husband formally requested a medical leave of absence from his job at ITT indicating that he had been diagnosed as having a "liver mass" and estimating that he could return to work in October. On 29 August 1985, plaintiff's husband underwent an exploratory laparotomy at Duke University Medical Center which revealed extensive metastatic tumor masses in the abdominal cavity specifically involving the liver. Immediately following this procedure, doctors informed both plaintiff and her husband that a biopsy had confirmed that plaintiff's husband had primary hepatoma or liver cancer. On 2 October 1985, plaintiff's husband again requested a medical leave of absence from ITT citing "primary hepatoma" as his disease or injury and stating that the date he could return to work is "undetermined at this time."

Over the next several years, plaintiff's husband underwent vigorous chemotherapy, a bone marrow transplant and additional surgeries in an attempt to reduce the size of the tumor. He also requested four additional medical leaves from his job at ITT on 11 November 1985, 28 January 1986, 4 March 1986, and 29 July 1986 respectively indicating as his disease or injury "fibrolamellar liver cancer," or "hepatoma" and stating that the date of his first visit for this illness was August, 1985.

On 24 June 1987, plaintiff's husband died of "malignant fibrolamellar hepatoma" or liver cancer. Plaintiff instituted this action for wrongful death on 23 June 1989. On 3 August 1989, defendant Ennis, Lumsden, Boylston & Associates, Inc. filed a mo-

tion to dismiss plaintiff's claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure stating that "the complaint and summons, on its face, show that the statute of limitations expired prior to the filing of an action against this Defendant." On 14 October 1989, Judge Hight signed an order granting this motion and dismissing plaintiff's action with respect to defendant Ennis, Lumsden, Boylston & Associates, Inc. Plaintiff gave written notice of appeal to this order on 12 October 1989.

All other answering defendants in this action also filed motions to dismiss pursuant to Rule 12(b)(6) and/or motions for summary judgment pursuant to Rule 56. On 14 December 1989, these motions were consolidated for hearing before Judge Hight. Following the hearing, Judge Hight entered the following order:

1. Plaintiff's motion for continuance is denied;

2. Summary Judgment is granted in favor of Movants against Plaintiff;

3. This action is dismissed with prejudice as to Movants; and

4. Plaintiff's motion that the Court make Findings of Fact and Conclusions of Law is denied.

From this order, plaintiff gave written notice of appeal on 28 December 1989.

David H. Rogers for plaintiff, appellant.

Poyner & Spruill, by Beth R. Fleischman, for defendant, appellee, Photo Chemical Systems, Inc.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III, for defendants, appellees, Pacific Employers Insurance Company, Loss Control Services, Inc., and Chemtech Industries, Inc.

David V. Brooks for defendant, appellee, David A. Fraser, Sc.D.

Merriman, Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendant, appellee, Ennis, Lumsden, Boylston & Associates, Inc.

Bailey & Dixon, by Carson Carmichael, III, for defendant, appellee, MacDermid, Inc.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner, for defendant, appellee, Circuit Services Corp.

Manning, Fulton & Skinner, by Michael T. Medford, for defendant, appellee, Mallinckrodt, Inc.

Moore & Van Allen, by Elizabeth M. Powell, for defendant, appellee, Ashland Oil, Inc.

Haworth, Riggs, Kuhn & Haworth, by John Haworth, for defendant, appellee, Morton International, Inc. (Dynachem Division).

LeBoeuf, Lamb, Leiby & MacRae, by Margaret Madison Clarke, for defendant, appellee, OMI International Corp.

HEDRICK, Chief Judge.

Plaintiff's first assignment of error brought forward and argued on appeal is set out in her brief as follows:

> The presiding judge at the hearings erred and abused his discretion in granting Defendants' various motions to dismiss Plaintiff's claims based upon the assertions that Plaintiff's Complaint failed to state a claim upon which relief could be based or was filed after the expiration of the applicable statute of limitations, on the grounds that said Complaint did state a proper claim upon which relief could be granted and was filed within the applicable statute of limitations.

G.S. 1-15(a) provides that "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued . . . ." The applicable statute of limitations for bringing an action for wrongful death is set out in G.S. 1-53 which provides:

> Within two years—
>
> (4) Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought.

Plaintiff argues that the governing statute of limitations in this matter is two years from the date of decedent's death as provided in the first sentence of G.S. 1-53(4) and that her complaint was timely filed within this period. Plaintiff further argues that the

second sentence of G.S. 1-53 barring a wrongful death action if it is not filed within the period in which decedent could have brought the action "had he lived" should not apply in this case. We disagree.

Parts of the same statute, dealing with the same subject are to be considered and interpreted as a whole and every part of the law shall be given effect if this can be done by any fair and reasonable intendment. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E.2d 363 (1968). It is clear, on the face of the statute, that the legislature intended for both sentences of G.S. 1-53(4) to be construed together in determining the applicable limitation period for instituting a wrongful death action. Therefore, it is incumbent on this Court, as it was on the trial court, to apply the statute in full to determine whether plaintiff's claim was timely filed.

In the present case, if decedent had lived and had brought an action to recover damages for personal injuries allegedly resulting from the negligence of these defendants, the applicable statute of limitations would have been three years from the date the ". . . bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant . . ." as provided in G.S. 1-52(16). The evidence presented shows that, at the latest, plaintiff and the decedent were made aware of his bodily harm, namely liver cancer, on 29 August 1985, following a laparotomy and biopsy at Duke Medical Center. The decedent, in fact, acknowledges this fact on the forms requesting medical leave from his employment. Therefore, the undisputed evidence in the record indicates that "had he lived" decedent's claim would have accrued on 29 August 1985 and would have been barred if not instituted before 29 August 1988. Plaintiff did not file this action until 23 June 1989. Plaintiff's claim is thus barred since G.S. 1-53(4) makes it clear that a claim for wrongful death is barred if not instituted within the time period in which decedent could have brought the action "had he lived."

We have reviewed plaintiff's remaining assignments of error and find them to be meritless. The orders of the trial judge entering summary judgment in favor of defendants and dismissing plaintiff's action will be affirmed.

Affirmed.

Judge WELLS concurring.

It seems anomalous to me that this plaintiff's right to sue for the wrongful death of her husband—a right which did not accrue until his death—must be cut off by a limitations clock which started running well before his death; but that appears to be the law. I believe this problem merits legislative reconsideration.

Judge ORR joins in this concurring opinion.

ERNEST A. SHAW, PLAINTIFF v. PRESTON E. STRINGER, DEFENDANT

No. 8921SC226

(Filed 5 February 1991)

1. Husband and Wife § 24 (NCI3d)— alienation of affections—showing required

In an action for alienation of affections, plaintiff did not have to prove that his wife had no affection for anyone else or that their marriage was previously one of untroubled bliss; rather, he had to prove only that before defendant wrongfully interfered in their marriage, his wife had some genuine love and affection for him and that that love and affection was lost to him as a result of that wrongdoing, and plaintiff offered sufficient evidence to be presented to the jury.

Am Jur 2d, Husband and Wife §§ 467, 469.

2. Husband and Wife § 25 (NCI3d)— alienation of affections—husband's treatment of wife's children—admissibility of evidence

In an action for alienation of affections, evidence with regard to defendant's failure to support his children and plaintiff's helping his wife to do so and getting along well with them was admissible to show that plaintiff's wife had love and affection for him.

Am Jur 2d, Husband and Wife §§ 492, 500.

3. Husband and Wife § 26 (NCI3d)— alienation of affections—punitive damages—sufficiency of evidence

In an action for alienation of affections and criminal conversation, there was no merit to defendant's contention that

it was error to submit and charge upon the issue of punitive damages, since aggravation, malice, and willfulness were indicated by evidence to the effect that after being asked not to do so, defendant persisted in visiting plaintiff's wife in the marital household and violating plaintiff's conjugal rights and even laughed when plaintiff's wife told him that plaintiff had learned of their affair.

Am Jur 2d, Husband and Wife § 485.

4. **Husband and Wife §§ 26, 29 (NCI3d)— alienation of affections—criminal conversation—punitive damages—defendant's objections to instructions not timely**

In an action for alienation of affections and criminal conversation, there was no merit to defendant's contentions that it was error for the punitive damages issue to apply to the criminal conversation claim because the final pretrial order did not provide for it, and that the court erred in failing to instruct the jury that before they could award punitive damages for a cause of action, they first had to award actual damages for that action, since plaintiff did not make specific objections at the appropriate time.

Am Jur 2d, Husband and Wife § 485.

5. **Husband and Wife §§ 26, 29 (NCI3d)— alienation of affections—criminal conversation—award of punitive damages—verdict not contradictory on its face**

There was no merit to defendant's contention that the verdict was contradictory on its face because punitive damages may have been assessed for alienation of affections, for which no compensatory damages were awarded, since the record did not specifically show that any punitive damages were awarded for alienation of affections, and it was just as likely that all the punitive damages were awarded for criminal conversation.

Am Jur 2d, Husband and Wife § 485.

APPEAL by defendant from judgment entered 10 October 1988 by *Judge Thomas W. Ross* in FORSYTH County Superior Court. Heard in the Court of Appeals 12 July 1989.

In the trial of these causes of action for alienating the affections of and having criminal conversation with plaintiff's wife, five

issues were submitted to the jury: An offense and compensatory damages issue for each cause and one punitive damages issue applicable to both. The jury answered each offense issue "Yes," the compensatory damages issue for alienation of affections "0," the compensatory damages issue for criminal conversation "$125,000," and the punitive damages issue "for criminal conversation and/or for the alienation of affections of his wife" "$50,000." Judgment was entered on the verdict.

The circumstances that gave rise to the action include the following: The wife whose affections defendant is adjudged to have alienated was married to him for fifteen years and bore him three children. After defendant abandoned her in 1983 he introduced her to plaintiff, who married her in June of 1985. After the marriage: Plaintiff and his wife lived in her house along with the three children, who he helped look after and support; defendant often went to the house, sometimes to visit his children, sometimes to visit the couple, and after awhile sometimes to visit plaintiff's wife and have sexual intercourse with her. Several months after the illicit interludes began plaintiff learned about them and had his wife tell defendant that they were to stop, but defendant nevertheless continued the visits and affair until plaintiff moved out and separated from his wife.

David R. Tanis for plaintiff appellee.

Nelson, Boyles & Niblock, by H. David Niblock, for defendant appellant.

PHILLIPS, Judge.

The ten arguments defendant makes in his brief—none of which refer to the assignments of error that they are based on as Rule 28(b)(5) of our appellate rules requires—raise only three questions for determination; as some of the arguments address the same basic issue as others, some concern formal matters of no consequence to the appeal, and others are based on grounds either not asserted in the trial or properly assigned as error. The three questions that defendant effectively raises and which we will address in sequence are: Did the court err to defendant's prejudice in submitting the alienation of affections issue to the jury; in receiving evidence that defendant did not support his children and plaintiff helped do so and got along well with them; and in submitting

the punitive damages issue to the jury and instructing them with respect to it?

[1] Even if submitting the alienation of affections issue to the jury was error defendant suffered no prejudice, since no damages were assessed against defendant as a consequence. But submitting the issue was not error because the evidence, when viewed in its most favorable light for plaintiff, supported it. The evidence that plaintiff had to present for the issue to go to the jury was simply that before defendant's wrongful intervention in their marriage his wife had genuine love and affection for him and that because of defendant's wrongful conduct that love and affection was alienated. *Chappell v. Redding*, 67 N.C. App. 397, 313 S.E.2d 239, *disc. review denied*, 311 N.C. 399, 319 S.E.2d 268 (1984). Defendant's argument that such evidence was not presented is based upon the testimony of plaintiff's wife that before the illicit liaison began she loved defendant. This evidence, so defendant argues, establishes as a matter of law that plaintiff's wife had no love and affection for plaintiff that he could have alienated, and thus it was error to submit the issue. But that is not the only evidence on the issue. In substance, what plaintiff's wife testified to in that regard was that she loved defendant, as well as plaintiff, but in "a different way"; and both plaintiff and his wife testified that before defendant's wrongful intervention that each genuinely loved the other and an affectionate relationship existed between them, which defendant's wrongdoing terminated. Thus, whether his wife in fact had love and affection for plaintiff before defendant wrongfully intermeddled in their marriage was not for the court to say, but the jury. *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E.2d 104 (1969). That plaintiff's wife loved defendant "in a way" and willingly yielded to his advances may indicate that her affection for him was less than what it might have been; but it does not establish either in law or fact that she had no affection for plaintiff that could be alienated. For in this area of life, as in others, our law sensibly recognizes that people often differ in their feelings and reactions to the myriad circumstances that occur during life's changing course. To have the jury consider the issue plaintiff did not have to prove that his wife had no affection for anyone else, or that their marriage was previously one of untroubled bliss; he had to prove only that before defendant wrongfully interfered in their marriage his wife had some genuine love and affection for him, and that that love and affection was lost to him as a result of that wrongdoing.

[2] As to the evidence about defendant not supporting his children and plaintiff helping to do so and getting along well with them, defendant argues that receiving it was prejudicial error because it was not relevant to any of the issues being tried. We disagree. The evidence is quite relevant to the issue just discussed—whether plaintiff's wife had any love and affection for him. For she testified that she loved plaintiff "for all the things he was to the children," and some of the things that he was to the children, according to the evidence, was caretaker, companion and sometimes provider. Furthermore, since the children lived with them during the marriage, it is reasonable to infer that his relationship with the children had some effect upon his relationship with their mother.

[3] As to the punitive damages issue, defendant makes three arguments, one that is based upon a proper objection and two that are not. The argument based upon a proper objection is that it was error to submit and charge upon the issue because no evidence of aggravating conduct warranting punitive damages was presented. The argument has no merit. Aggravation, malice and willfulness were indicated by evidence to the effect that after being asked not to do so defendant persisted in visiting plaintiff's wife in the marital household and violating plaintiff's conjugal rights and even laughed when plaintiff's wife told him that plaintiff had learned of their affair.

[4] The two arguments on this issue that are not based upon proper objections are that (1) it was error for the punitive damages issue to apply to the criminal conversation claim because the final pre-trial order did not provide for it; and (2) that the court erred in failing to instruct the jury that before they could award punitive damages for a cause of action they had to first award actual damages for that action. Rule 10(b)(2) of our Rules of Appellate Procedure provides that 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, *stating distinctly that to which he objects and the grounds of his objection.*" (Emphasis added.) In our reading of the transcript we found no specific reference by defendant to either of the alleged defects in the charge that are now argued. Instead, the transcript indicates that defendant opposed applying the issue to the criminal conversation action only because he was of the opinion that punitive damages are not recoverable for criminal conversation, whereas *Powell v. Strickland*, 163 N.C. 393, 79 S.E. 872 (1913), holds otherwise; and

that defendant did not assert at any time that the issue conflicted with the pre-trial order—which the trial judge had the discretion to modify in any event and no abuse appears—or that anything necessary for a fair determination of the issue had been left out of the instruction.

The instruction that defendant now contends should have been given correctly states the law and no doubt would have been given, at least in substance, if timely request or objection had been made. Having failed to call the omission to the court's attention when it could have been corrected, defendant's argument now cannot be entertained. *Donavant v. Hudspeth*, 318 N.C. 1, 347 S.E.2d 797 (1986). Even so, it does not appear that defendant was legally prejudiced by the alleged omission from the charge. For the trial court instructed the jury that they were not to consider the punitive damages issue unless they found that defendant either alienated the affections of plaintiff's wife or had criminal conversation with her, and the record does not show that they awarded any punitive damages for alienation of affections.

[5] Still another argument involving the punitive damages issue is that the verdict is contradictory on its face because punitive damages may have been assessed for alienation of affections, for which no compensatory damages were awarded, and the court erred in signing the judgment based thereon. Inasmuch as the record does not show that any punitive damages were awarded for alienation of affections, a contradiction in the verdict is neither certain nor manifest. It is just as likely it seems to us—if not more likely since no compensatory damages were awarded for alienation of affections—that all the punitive damages were awarded for criminal conversation, and that the verdict is in harmony with the law. In any event on this question, as the others, defendant has failed to show, as the law requires, that any error prejudicial to him was committed.

No error.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. RUSTY BRESSE

No. 9016SC530

(Filed 5 February 1991)

1. **False Pretense § 3.1 (NCI3d)— sham business—worthless checks written—sufficiency of evidence of false pretense**

There was no merit to defendant's contention that the trial court erred in denying his motions to dismiss the charges of false pretense when the evidence showed only violations of writing worthless checks, since the evidence tended to show that defendant opened a business account in the name of Purisystems at Southern National Bank in Lumberton; defendant drew four checks against this account for which he knew there were insufficient funds in the account to cover the amounts of the checks; bank employees and the investigating officer were unable to locate Purisystems at the address printed on the check or at any other location; and there was no evidence in the record to suggest any legitimate business purpose for defendant's having opened an account in the name of Purisystems.

Am Jur 2d, False Pretenses §§ 77-80, 87.

2. **Criminal Law § 1085 (NCI4th)— sentence to presumptive term—sentences for four convictions to run consecutively—findings as to mitigating and aggravating factors not required**

The trial court was not required to find aggravating and mitigating factors where he entered four separate judgments, sentencing defendant to the presumptive three-year term of imprisonment for each offense, and ordered that defendant serve the sentences consecutively.

Am Jur 2d, Criminal Law §§ 527, 598.

APPEAL by defendant from *Britt (Joe F.), Judge*. Judgments entered 11 January 1990 in Superior Court, ROBESON County. Heard in the Court of Appeals 22 January 1991.

Defendant was charged in four separate bills of indictment with obtaining property by false pretenses in violation of G.S. 14-100. The evidence presented at trial tends to show the following: On 28 February 1989, defendant opened a business account in the

name of Purisystems at Southern National Bank in Lumberton, North Carolina with an initial deposit of $635.00. During the month of March 1989, deposits were made to this account totaling $1,348.00. Withdrawals were made from this account totaling $1,958.38, including $190.00 in return check charges. At the end of March 1989, the Purisystems account balance at Southern National Bank was $165.77 overdrawn.

On 17 March 1989, defendant drew a check for $225.00 on the Purisystems account at Southern National Bank made payable to himself. Defendant then deposited this check into his personal checking account at Progressive Savings & Loan. On 31 March 1989, this check was returned unpaid because of insufficient funds. Brenda Barker Phillips, an employee with Progressive Savings & Loan, who handles returned checks deposited to customer accounts, attempted to locate Purisystems at the address printed on the check, but instead found Tarheel Pools. She also attempted to contact defendant, but found that his home telephone had been disconnected.

On 27 March 1989, defendant drew a check on the Purisystems account at Southern National Bank in the amount of $525.00 made payable to Mark Droptiny. Defendant wrote a second check to Mark Droptiny on 30 March 1989 which was also drawn on the Purisystems account in the amount of $575.00. Droptiny deposited these two checks into his personal account at Wachovia Bank in Lumberton, North Carolina on 30 March 1989. On 31 March 1989, defendant wrote a third check to Droptiny drawn on the Purisystems account in the amount of $1,300.00 which Droptiny deposited into his account at Wachovia that same day. When these three checks were returned to Wachovia unpaid, the bank unsuccessfully attempted to locate Purisystems and contact defendant.

On 7 April 1989, Samuel L. Cox, a detective with the Lumberton Police Department, was dispatched to Wachovia Bank to begin an investigation. Detective Cox took possession of the three checks deposited to Droptiny's account and examined the account records. Based upon this information, Detective Cox obtained warrants for defendant's arrest for obtaining property by false pretenses. These warrants were served on defendant at his home where he consented to a search. During the search, Detective Cox recovered some checks and a checkbook for the Purisystems account at Southern National Bank. Following his arrest, defendant waived his rights

and made a statement admitting that he had written the checks knowing that he did not have money in the bank to cover the amounts, but that he expected to be able to cover the checks shortly. On 11 April 1989, defendant made payments to both Progressive Savings & Loan and Wachovia Bank to cover all amounts owed, including all service charges.

The jury found defendant guilty as charged. From four separate judgments sentencing defendant to four consecutive three-year terms of imprisonment, he appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jacob L. Safron, for the State.

Woodberry L. Bowen and Christopher L. Byerly for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred "in denying the defendant's motions to dismiss the charges of false pretense where the evidence showed only violations of writing worthless checks." We disagree.

Defendant was properly charged in four separate bills of indictment with obtaining property by false pretenses in violation of G.S. 14-100. G.S. 14-100 provides in pertinent part:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, and shall be punished as a Class H felon . . . .

In *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277 (1980), our Supreme Court held:

> . . . the crime of obtaining property by false pretenses pursuant to G.S. 14-100 should be defined as follows: (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3)

> which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.

Id. at 242, 262 S.E.2d at 286.

In the present case, defendant admitted that he signed four business checks knowing that there were insufficient funds in the account to cover those checks. His argument on appeal is that the State failed to show that he had made a "false representation" beyond writing the worthless checks. Defendant cites us to *State v. Freeman*, 308 N.C. 502, 302 S.E.2d 779 (1983). In that case, our Supreme Court upheld the indictment and conviction of a defendant pursuant to G.S. 14-100 for aiding and abetting in obtaining money by false pretenses where the evidence tended to show that defendant was instrumental in creating a fictional business with an account at a reputable bank for the purpose of inducing merchants to cash worthless checks purportedly issued to employees of the business. *Id.* Writing the majority opinion in that case, Justice Meyer stated:

> A defendant may obtain money or property by falsely representing his own identity . . . or he may do so by creating the identity of a 'business' calculated to engender confidence in the inherent worth of the check. The fact remains that behind the mere writing of a worthless check lies a cleverly devised plan to deceive. This is the very essence of a false pretense . . . .

Id. at 512-13, 302 S.E.2d at 785.

Defendant attempts to distinguish his case from *Freeman* by stating that there is no evidence in the present case that the business, Purisystems, was a sham established to write checks. We disagree. Taken in the light most favorable to the State, we find that competent evidence was presented tending to show that: (1) defendant opened a business account in the name of Purisystems at Southern National Bank in Lumberton, North Carolina; (2) defendant drew four checks against this account for which he knew there were insufficient funds in the account to cover the amounts of the checks; and (3) bank employees and the investigating officer were unable to locate Purisystems at the address printed on the check or at any other location. More importantly, there is no evidence in the record to suggest any legitimate business purpose for defendant's having opened an account in the name of Purisystems.

It is well settled that if there is substantial evidence to support the allegations of the indictment, it is the court's duty to submit the case to the jury, and the motion to dismiss should be denied. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed.2d 124 (1978). In the present case, we hold that there is substantial evidence of every element of the offense charged from which the jury could find that defendant had committed the crimes charged by "creating the identity of a business calculated to engender confidence in the inherent worth of the check[s]."

[2] Defendant next contends the trial judge committed prejudicial error when he sentenced the defendant to four consecutive three-year prison terms without consideration of aggravating or mitigating factors as required by G.S. 15A-1340.4.

Defendant was charged, convicted and sentenced for four separate violations of G.S. 14-100 which are Class H felonies. *See* G.S. 14-100. The presumptive prison term for an offense classified as a Class H felony is three years, and the maximum term of imprisonment for a Class H felony is ten years. G.S. 15A-1340.4(f)(6); G.S. 14-1.1(a)(8).

Defendant argues that Judge Britt was required to find aggravating and mitigating factors in sentencing defendant because the combined sentences, totaling twelve years, exceed the maximum ten-year term for the offense. This argument has no merit.

G.S. 15A-1340.4(b) provides in pertinent part:

> . . . a judge need not make any findings regarding aggravating and mitigating factors if he imposes a prison term pursuant to a plea arrangement . . ., or if he imposes the presumptive term, or if when two or more convictions are consolidated for judgment he imposes a prison term (i) that does not exceed the total of the presumptive terms for each felony so consolidated, (ii) that does not exceed the maximum term for the most serious felony so consolidated, and (iii) that is not shorter than the presumptive term for the most serious felony so consolidated.

The record in this case indicates that although the charges against defendant were consolidated for trial and for hearing on the judgments, defendant's convictions were not consolidated for judgment. Judge Britt entered four separate judgments, sentencing defendant to the presumptive three-year term of imprisonment

for each offense. Judge Britt then ordered defendant to serve the four sentences consecutively. Under these circumstances, Judge Britt was not required by the statute to make findings regarding aggravating and mitigating factors.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges WELLS and ORR concur.

THE NORTH CAROLINA STATE BAR v. J. BRUCE MULLIGAN

No. 9010NCSB553

(Filed 5 February 1991)

1. **Attorneys at Law § 87 (NCI4th)— disciplinary hearing— affidavit of psychiatrist excluded—defendant not prejudiced**

A hearing committee of the Disciplinary Hearing Commission of the State Bar did not err in excluding from evidence an affidavit of a psychiatrist, since defendant did not attempt to show that the witness was unavailable to testify at the hearing and the affidavit was thus inadmissible hearsay; defendant did not argue that the affidavit would be admissible under any exception to the hearsay rule; and plaintiff did not waive its objection to admission of the affidavit where defendant made no showing that the affidavit, containing the report of a psychological exam performed on defendant and conclusions drawn therefrom, was in any way similar and of like import to the nine affidavits reflecting on defendant's reputation and character which were admitted into evidence without objection.

Am Jur 2d, Attorneys at Law § 94.

2. **Attorneys at Law § 77 (NCI4th)— client's funds deposited to personal account—embezzlement—intent to return funds no defense**

Evidence tending to show that an attorney deposited funds belonging to his client into his own personal account rather than into his trust account was sufficient to support a charge

of embezzlement, and it was no defense that at all times he intended to return and did in fact return the transferred funds to his trust account; moreover, conduct sufficient to support a charge of embezzlement would also constitute conduct involving dishonesty and the hearing committee therefore properly determined that defendant violated Rules 1.2(B) and (C) of the Rules of Professional Conduct.

Am Jur 2d, Attorneys at Law § 51.

Attorney's commingling of client's funds with his own as ground for disciplinary action—modern cases. 94 ALR3d 846.

APPEAL by defendant from an order of the Disciplinary Hearing Committee of the North Carolina State Bar entered on 11 January 1990. Heard in the Court of Appeals 14 January 1991.

On 23 August 1989, plaintiff, The North Carolina State Bar, filed a complaint against defendant, a practicing attorney, based upon his alleged violations of Rules 1.2(B) and (C) and Rules 10.1(A) and (C) of the Rules of Professional Conduct.

On 15 November 1989, a hearing was held before a hearing committee of the Disciplinary Hearing Commission of the State Bar. Following the hearing, the committee made detailed findings of fact and concluded that:

> Defendant's foregoing actions constitute grounds for discipline pursuant to N.C. Gen. Stat. Sec. 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct as follows:
>
> (a) By removing funds belonging to his clients from his trust account and appropriating those funds to his own use, Defendant committe[d] criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 1.2(B) and engaged in conduct involving dishonesty, fraud, deceit in violation of Rule 1.2(C).
>
> (b) By failing to preserve his clients' funds received in a fiduciary capacity separately from his own funds in a trust account, Defendant violated Rules 10.1(A) and (C).

Based upon these conclusions of law, the committee entered an order of discipline on 11 January 1990, suspending defendant from the practice of law for a period of three years. Defendant appealed.

A. Root Edmonson for plaintiff, appellee.

Hendrick, Zotian, Cocklereece & Robinson, by Gray Robinson, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends "the Hearing Committee erred by refusing to consider the affidavit of Selwyn Rose upon objection by plaintiff when nine other affidavits were admitted without objection of plaintiff." We disagree.

The record discloses the following: The affidavit which defendant's counsel argues should have been admitted was that of Dr. Selwyn Rose, a psychiatrist in Winston-Salem, North Carolina who had conducted a psychological examination of defendant and interviewed him for approximately two hours on 10 November 1989, just five days prior to the hearing of this case. The affidavit itself indicates that it was signed and notarized on 14 November 1989, the day before the hearing. Defendant's counsel attempted to introduce the affidavit during his redirect examination of defendant. Plaintiff's counsel objected to the affidavit being admitted into evidence on the grounds that "[Dr. Rose] has . . . drawn a lot of conclusions about what precipitated the things that are in controversy here today, which obviously are conclusions that he's drawn in talking only to Mr. Mulligan and hearing just his version of what has happened." Defendant's counsel responded to plaintiff's objection as follows:

> MR. ROBINSON: Well, I realize that it is an affidavit rather than a deposition. It was something delivered quite late in the proceedings. However, I think that Mr. Edmonson's objections go more to the credibility of the document than to its truthfulness or admissibility.

The Chairman of the Hearing Committee sustained plaintiff's objection and refused to allow the affidavit to be admitted into evidence.

Rule 801(c) of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 of the North Carolina Rules of Evidence further provides: "[h]earsay is not admissible except as provided by statute or by these rules."

Defendant's counsel sought to introduce Dr. Rose's affidavit during defendant's testimony. At no time has defendant attempted to show that Dr. Rose was unavailable to testify at the hearing on 15 November 1989. Under these circumstances, Dr. Rose's affidavit was clearly inadmissible hearsay, and it was incumbent upon defendant to show that the affidavit could have been admitted under one of the exceptions to the general rule. Defendant, however, did not argue at the hearing nor does he argue in his brief on appeal that the affidavit would be admissible under any exception to the hearsay rule.

Instead, defendant argues that "[a]dministrative hearings are not subject to the same stringent eviden[t]iary rules as jury trials . . . ." We note, however, that Article IX, Section 14(17) of the Rules and Regulations of the North Carolina State Bar provides in pertinent part:

> In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the superior court of the State at the time of the hearing.

Thus, the Chairman of the Hearing Committee was bound to apply the Rules of Evidence, including the rules excluding hearsay statements, as in any other case.

Defendant further argues that the affidavit should have been admitted because "nine affidavits reflecting upon defendant's reputation and character were offered and admitted into evidence without objection" and "[b]y the admission of the other affidavits, plaintiffs [sic] objection was waived." Defendant cites us to *Fidelity Bank v. Garner*, 52 N.C. App. 60, 277 S.E.2d 811 (1981), and *Gaddy v. Bank*, 25 N.C. App. 169, 212 S.E.2d 561 (1975), for the proposition that "exceptions to admission of evidence should not be sustained when similar evidence of like import has already been introduced or thereafter introduced without objection." Defendant, however, fails to demonstrate how Dr. Rose's affidavit, containing his report of the psychological exam he performed on defendant and his conclusions drawn therefrom, is in any way "similar and of like import" to the nine affidavits reflecting on defendant's reputation and character which were admitted into evidence without objection. Furthermore, the fact that nine affidavits attesting to defendant's reputation and character were admitted into evidence and considered by the committee tends to show that defendant was not

prejudiced by the exclusion of the particular affidavit about which he now complains.

We find defendant's arguments with respect to this contention to be wholly frivolous and without basis in fact or law. We further note that defendant never attempted to depose Dr. Rose which would have afforded plaintiff an opportunity to cross-examine him with respect to this matter. *See N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482 (1985). For the foregoing reasons, we hold the Hearing Committee did not err in excluding Dr. Rose's affidavit from evidence.

Defendant next contends "the Committee erred in finding that defendant violated Rules 1.2(B) and (C) of the Rules of Professional Conduct." Again, we disagree.

[2] In the present case, defendant admitted that he had transferred funds from his trust account into his general account for office purposes and into his personal savings account, and the Hearing Committee made detailed findings of fact with respect to these transfers. The Hearing Committee then concluded as a matter of law that defendant had violated Rules 1.2(B) and (C) "[b]y removing funds belonging to his clients from his trust account and appropriating those funds to his own use." On appeal, defendant argues that although these transfers constitute violations of Rules 10.1(A) and (C), "the record is devoid of any evidence that defendant committed any acts constituting clear, cogent and convincing evidence that he violated [Rules 1.2(B) and (C)]."

Rules 1.2(B) and (C) of the Rules of Professional Conduct provide:

> It is professional misconduct for a lawyer to:
>
> (B) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (C) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Defendant first asserts that he has not committed "a criminal act" in violation of Rule 1.2(B). This Court has held, however, that evidence tending to show that an attorney deposited funds belonging to his client into his own personal account rather than into his trust account was sufficient to support a charge of embezzlement. *State v. Melvin*, 86 N.C. App. 291, 357 S.E.2d 379 (1987). Defendant tries to distinguish his case from *Melvin* by the fact

that at all times he intended to return and did in fact return the transferred funds to his trust account. "It is no defense to a prosecution for embezzlement, however, that the defendant intended to return the property obtained or was able and willing to do so at a later date." *State v. Agnew*, 294 N.C. 382, 390, 241 S.E.2d 684, 689, *cert. denied*, 439 U.S. 830, 58 L.Ed.2d 124 (1978).

Defendant further asserts that it was error for the Committee to conclude that he had violated Rule 1.2(C) because "[t]here is absolutely no evidence that [he] committed fraud, lied to clients or intended to deceive anyone." In making this argument, defendant disregards the language in Rule 1.2(C) which also prohibits lawyers from engaging in conduct involving "dishonesty." Certainly, conduct sufficient to support a charge of embezzlement would also constitute conduct involving dishonesty.

Therefore, we find the Hearing Committee's conclusion that defendant had violated Rules 1.2(B) and (C) of the Rules of Professional Conduct by removing his client's funds from his trust account and appropriating those funds to his own use was amply supported by the facts found, and that the Committee's detailed findings of fact were supported by clear, cogent and convincing evidence in the record. The Order of Discipline entered by the Hearing Committee based upon these findings and conclusions will be affirmed.

Affirmed.

Judges WELLS and ORR concur.

SHANNON LEE HAWKINS v. JAMES F. HAWKINS

No. 9025SC582

(Filed 5 February 1991)

Damages § 11 (NCI3d)— establishment of cause of action— entitlement to nominal damages—support for punitive damages

Once a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages. Therefore, where

the jury found that defendant committed an assault and battery upon plaintiff by sexual abuse, it could award punitive damages to plaintiff even though it refused to award compensatory damages and the court failed to submit an issue to the jury on nominal damages.

Am Jur 2d, Damages § 744.

Sufficiency of showing of actual damages to support award of punitive damages—modern cases. 40 ALR4th 11.

APPEAL by defendant from judgment entered 9 February 1990 in CALDWELL County Superior Court by *Judge Howard R. Greeson, Jr.* Heard in the Court of Appeals 5 December 1990.

McElwee, McElwee, Cannon & Warden, by William H. McElwee, III, for plaintiff-appellee.

Rudisill & Brackett, P.A., by Curtis R. Sharpe, Jr., for defendant-appellant.

GREENE, Judge.

Defendant appeals from the entry of a jury verdict awarding $25,000.00 in punitive damages to the plaintiff.

In her complaint the plaintiff seeks damages, compensatory and punitive, which she contends were the result of the defendant's assaults and batteries upon the plaintiff. The uncontradicted evidence at trial tended to show that the plaintiff was the adopted daughter of the defendant and that between plaintiff's ages of five and one-half years to fourteen years, the defendant sexually abused the plaintiff.

The following issues were submitted to and answered by the jury:

1. Did James F. Hawkins commit an assault(s) and battery(ies) on Shannon Lee Hawkins?

   ANSWER: Yes

2. If so, what amount, if any, is Shannon Lee Hawkins entitled to recover for:

   a. Medical expenses: None

b. Future medical expenses: None

c. Pain and suffering: None

3. In your discretion what amount of punitive damages, if any, should be awarded to Shannon Lee Hawkins?

ANSWER: $25,000.00

In charging the jury, the trial court gave the following instruction regarding the elements of assault and battery:

> [A]n assault is a threat or intent by force or violence to do some injury to another by one who apparently has the present ability to do so under circumstances creating a reasonable apprehension of injury. Now a battery is the willful touching of a person without their consent and in a rude or angry manner. It is the consummation of an assault. Now every person has the right to be let alone and freedom from harmful or offensive contact with any other person.

The trial court did not instruct the jury as to nominal damages. On the issue of punitive damages, the trial court instructed in pertinent part:

> Now this third issue as to punitive damages . . . in your discretion what amount of punitive damages, if any, should be awarded to Shannon Lee Hawkins? Of course, you won't answer this issue unless you have answered this first issue yes. . . . [Punitive damages] may be awarded only when the jury finds that the conduct of the defendant is so outrageous as to justify punishing him or making an example of him. Upon such a finding whether to award such damages and within reasonable limits the amount to be awarded are matters within the sound discretion of the jury.
>
> . . . .
>
> So I instruct you that if you find by the greater weight of the evidence that James Hawkins' conduct was accompanied by such aggravated circumstances, and under the instruction I have given you would permit an award of punitive damages, you may award Shannon Hawkins an amount which in your discretion will serve to punish James Hawkins and to deter others from committing like offenses.

After the jury verdict was rendered, the defendant moved that "notwithstanding the verdict, the court not award punitive damages." The trial court denied the motion and ordered that the "plaintiff have and recover of the defendant the sum of $25,000 together with the cost of this action as taxed by the Clerk of Superior Court for Caldwell County."

The sole issue presented is whether the lack of an award of at least nominal damages precludes an award of punitive damages.

As a general rule, "[p]unitive damages do not and cannot exist as an independent cause of action, but are mere incidents of the cause of action and can never constitute a basis for it. If the injured party has no cause of action independent of a supposed right to recover punitive damages, then he has no cause of action at all." J. Stein, *Damages and Recovery* § 195 at 389 (1972). North Carolina follows this general rule of law. "[Where] a right of action exists, though the loss is nominal, exemplary damages may be recovered in a proper case; for the plaintiff had a right to maintain his action apart from the privilege of recovering exemplary damages." *Sanders v. Gilbert*, 156 N.C. 463, 479, 72 S.E. 610, 616 (1911). Once a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages. *Worthy v. Knight*, 210 N.C. 498, 499, 187 S.E. 771, 772 (1936); *Hairston v. Greyhound Corp.*, 220 N.C. 642, 644, 18 S.E.2d 166, 168 (1942) (invasion of legal right entitles plaintiff to at least nominal damages). *See also Parris v. Fischer & Co.*, 221 N.C. 110, 19 S.E.2d 128 (1942); *Clemmons v. Life Insurance Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968); *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981); *Fagan v. Hazzard*, 29 N.C. App. 618, 225 S.E.2d 640 (1976); *Onslow v. Fisher*, 60 N.C. App. 55, 298 S.E.2d 718 (1982), *aff'd*, 308 N.C. 540, 302 S.E.2d 632 (1983); *Hewes v. Wolfe*, 74 N.C. App. 610, 330 S.E.2d 16 (1985). Therefore, the failure of the plaintiff to actually receive an *award* of either nominal or compensatory damages is immaterial. The question thus becomes one of whether plaintiff in this case has established her cause of action for assault and battery.

Certain torts require as an essential element to a cause of action that plaintiff incur actual damage. We define actual damage to mean some actual loss, hurt or harm resulting from the illegal invasion of a legal right. *See* 22 Am. Jur. 2d *Damages* § 2 (1988).

These torts include, among others, fraudulent misrepresentation, *Speller v. Speller*, 273 N.C. 340, 159 S.E.2d 894 (1968); interference with contractual relations, *United Laboratories v. Kuykendall*, 87 N.C. App. 296, 361 S.E.2d 292 (1987), *aff'd in part, rev'd in part*, 322 N.C. 643, 370 S.E.2d 375 (1988); institution of wrongful civil proceedings, 2 W. Haynes, North Carolina Tort Law § 30-3 (1989); nuisance, *Hanna v. Brady*, 73 N.C. App. 521, 327 S.E.2d 22, *disc. rev. denied*, 313 N.C. 600, 332 S.E.2d 179 (1985); and defamation per quod, 1 W. Haynes, North Carolina Tort Law § 8-11 (1989).

Other torts, however, do not include actual damage as an essential element. These torts include, among others, conversion, *Spinks v. Taylor & Richardson v. Taylor Co.*, 303 N.C. 256, 278 S.E.2d 501 (1981); defamation per se, 1 *Haynes* § 8-11; false imprisonment, *Lewis v. Clegg*, 120 N.C. 292, 26 S.E. 772 (1897); malicious prosecution, 1 *Haynes* § 14-3; invasion of privacy, *Barr v. Southern Bell Telephone & Telegraph Co.*, 13 N.C. App. 388, 185 S.E.2d 714 (1972); trespass to chattels (except by dispossession), 2 *Haynes* § 27-4; and trespass to land, *Suggs v. Carroll*, 76 N.C. App. 420, 333 S.E.2d 510 (1985).

The elements of assault are intent, offer of injury, reasonable apprehension, apparent ability, and imminent threat of injury. 1 *Haynes* § 3-3. Plaintiff establishes a cause of action for assault upon proof of these technical elements without proof of actual damage. 1 *Haynes* § 3-5. The elements of battery are intent, harmful or offensive contact, causation, and lack of privilege. 1 *Haynes* § 4-2. As with assault, a showing of actual damage is not an essential element of battery. 1 *Haynes* § 4-5.

The jurors in the present case were instructed, consistent with this opinion, on the elements of assault and battery and they decided this separate issue in favor of plaintiff, thereby establishing plaintiff's cause of action for assault and battery. In addition, defendant does not argue that plaintiff has not established the torts of assault and battery. Therefore, the failure of the jury to award nominal or compensatory damages is immaterial to plaintiff's award of punitive damages.

We reject defendant's argument that plaintiff must have actually *recovered* at least nominal damages, through a jury award, to be entitled to punitive damages. *See Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984) (jury "must *award* the plaintiff either compensatory or nominal damages") (emphasis added); *Scott*

v. Kiker, 59 N.C. App. 458, 462, 297 S.E.2d 142, 145 (1982) (compensatory damages must be *awarded*); *Kuykendall v. Turner*, 61 N.C. App. 638, 643, 301 S.E.2d 715, 719 (1983) (plaintiff must *recover* nominal or compensatory damages); *Lynch v. North Carolina Dept. of Justice*, 93 N.C. App. 57, 60, 376 S.E.2d 247, 249 (1989) (punitive damages cannot be awarded in the absence of compensatory damages). The issue presented to this court was not squarely presented to the courts in the cases cited by defendant since in those cases plaintiff was either awarded compensatory damages or no damages at all. Here, we are faced with an award of punitive damages where the jury refused to award compensatory damages and the trial court did not submit an issue to the jury on nominal damages. Furthermore, we read the language in those cases, as well as the authorities they cite, as stating only the well-recognized principle that plaintiff may not maintain a civil action merely to inflict punishment or to collect punitive damages, but that a cause of action must exist. *Worthy*.

Beyond establishing a cause of action, plaintiff must also show the presence of aggravating circumstances such as malicious, wanton and reckless injury before plaintiff is entitled to punitive damages. *Worthy* at 499, 187 S.E. at 772. The jury in this case was so instructed and defendant raises no issue regarding this prerequisite to an award of punitive damages.

Defendant argues in his brief that an award of punitive damages violates the eighth and fourteenth amendments to the Constitution of the United States and the related provisions of Sections 19 and 27 of Article I of the Constitution of North Carolina. As we see no evidence in the record that these constitutional issues were raised at trial, we do not consider them on appeal. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

Accordingly, we find no error in the failure of the trial court to set aside the verdict of the jury awarding punitive damages.

No error.

Judges PHILLIPS and ORR concur.

PIERSON v. BUYHER

[101 N.C. App. 535 (1991)]

VAL STEPHEN PIERSON, EXECUTOR OF THE ESTATE OF NORMA T. PIERSON, PLAINTIFF v. JOHN R. BUYHER AND JEFFERSON NATIONAL LIFE INSURANCE COMPANY, DEFENDANTS

No. 9030SC494

(Filed 5 February 1991)

Limitation of Actions § 4.2 (NCI3d)— negligence of insurance agent —accrual of action—statute of limitations

The trial court erred by concluding that plaintiff's case was barred by the statute of limitations where plaintiff brought an action for the negligence of an insurance agent on 22 August 1989; plaintiff alleged that Jefferson National and Buyher breached a duty to the insured and ultimately to the beneficiary which caused injury by increasing the tax liability of the insured's estate; the duty of the defendants was to provide a policy consistent with the desires of Ms. Pierson; defendant Buyher, as agent for defendant Jefferson National, could have changed the policy to remove Ms. Pierson as the owner of the policy up until the time of her death; the duty to do so existed to the date of her death; and defendants' last act or actionable admission occurred on the day Ms. Pierson died, 16 November 1987. Plaintiff filed his complaint well within the applicable three-year statute of limitations.

Am Jur 2d, Insurance §§ 138, 1876; Limitation of Actions § 105.

Judge WELLS dissenting.

APPEAL by plaintiff from order of *Judge John R. Friday* entered 6 March 1990 in MACON County Superior Court. Heard in the Court of Appeals 29 November 1990.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon and Michelle Rippon, for plaintiff appellant.

Samuel C. Briegel for John R. Buyher, defendant appellee.

Roberts Stevens & Cogburn, P.A., by Gwynn G. Radeker and Marjorie Rowe Mann, for Jefferson National Life Insurance Company, defendant appellee.

COZORT, Judge.

The sole issue presented on appeal is whether the trial court erred in dismissing plaintiff's action alleging negligent tax advice, as time barred by the applicable statute of limitations. For the reasons set forth below, we hold that the judge erred.

According to the complaint filed 22 August 1989, plaintiff is the beneficiary of a life insurance policy purchased by Norma T. Pierson from defendant Jefferson National Life Insurance Company (hereinafter Jefferson National). On 19 December 1985, Norma Pierson contracted with Jefferson National through its agent, defendant John R. Buyher, for a life insurance policy in the amount of $400,000.00. The purpose in purchasing the policy was to add $400,000.00 in liquidity to the estate of Ms. Pierson in the event of her death. Norma Pierson died on 16 November 1987, and plaintiff is her principal beneficiary under her will as well as beneficiary of the life insurance policy.

The policy designated Norma Pierson as the owner of the policy and plaintiff as the beneficiary. As a result of this designation, the proceeds of the policy were includable in Norma Pierson's gross estate and subject to state and federal taxes. Plaintiff brought this action to recover the $200,000.00 tax liability incurred due to the inclusion of the policy proceeds in the insured's estate. Both defendants pled the three-year statute of limitations in N.C. Gen. Stat. § 1-52 as barring this action, alleging Norma Pierson purchased the policy on 19 December 1985, while plaintiff did not bring this action until 22 August 1989. The trial court concluded that the action accrued on 19 December 1985, that N.C. Gen. Stat. § 1-52 was applicable to the action, and that plaintiff's action was time barred. Plaintiff appeals. We reverse.

We first note that plaintiff has alleged a cognizable legal action. In *Bradley Freight Lines, Inc. v. Pope, Flynn & Co.*, 42 N.C. App. 285, 256 S.E.2d 522, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 299 (1979), this Court recognized a cause of action for negligent advice of an insurance agent. We stated:

> As a general rule, an insurance agent who, with a view to compensation, undertakes to procure insurance for another owes the duty to his principal to exercise good faith and reasonable diligence, and any negligence or other breach of duty on his part which operates to defeat the insurance coverage procured

> or causes the principal to be underinsured will render the agent liable for the resulting loss.

Id. at 290, 256 S.E.2d at 525. We further stated that the insured's remedies against the insurer "are not limited to breach of contract, but can be based on actionable negligence as well." *Id.* at 291, 256 S.E.2d at 525.

We have held that a *beneficiary* may bring a cause of action against and recover from an insurance company with whom the insured alone has dealt. *Pearce v. American Defender Life Ins. Co.*, 62 N.C. App. 661, 303 S.E.2d 608 (1983). In *Pearce*, a panel of this Court held that it was error for the trial court to have dismissed claims made by a beneficiary under a life insurance policy where the beneficiary's complaint established "no insurmountable bar to [plaintiff's] claim." *Id.* at 665, 303 S.E.2d at 610. The beneficiary claimed that the insured purchased a policy that provided for the payment of $40,000.00 to the beneficiary in the event of the insured's accidental death and that after the insured's death in a plane accident, she received only $20,000.00. This Court held that the beneficiary set forth a valid claim and that resolution of the case depended upon the construction and effect given to communications exchanged by the insured and the insurance company. *Id.* at 667-68, 303 S.E.2d at 612.

Acknowledging that a cause of action exists for negligent advice of an insurance agent and that a policy beneficiary may bring a cause of action, the issue in this case is when the cause of action accrues, for the purposes of the statute of limitations, for the beneficiary who is not privy to the original transaction. Ordinarily, a cause of action for negligence accrues when the wrong is committed giving rise to the right to bring suit, even though the damages at that time be nominal and the injuries cannot be discovered until a later date. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957). We find the present case similar to a malpractice action. In actions for malpractice where there is no damage "readily apparent to the claimant at the time of its origin," a cause of action accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (1990); and *Nationwide Mutual Ins. Co. v. Winslow*, 95 N.C. App. 413, 382 S.E.2d 872 (1989).

In *Nationwide*, "[d]efendant's alleged negligence arose from his failure to file [an] answer, which resulted in a default judgment

being entered and plaintiff sustaining a $25,000 loss." *Id.* at 415, 382 S.E.2d at 873. Thus, the defendant's last act occurred on 8 March 1983, the date plaintiff discharged defendant. Defendant was unable to file an answer after that date. We held that the applicable statute of limitations began running on 8 March 1983, the last date defendant acted or failed to act. *Id.* at 416, 382 S.E.2d at 874.

The present case is analogous to *Nationwide*. Here the plaintiff alleges that Jefferson National and Buyher breached a duty to the insured and ultimately to the beneficiary which caused injury by increasing the tax liability of the insured's estate. The duty of the defendants was to provide a policy consistent with the desires of Ms. Pierson. Defendant Buyher, as agent for defendant Jefferson National, could have changed the policy to remove Ms. Pierson as the owner of the policy up until the time of her death. The duty to do so existed to the date of her death. Thus, the defendants' last act or actionable omission occurred on the day Norma Pierson died. We hold that the statute of limitations for this alleged negligent failure to act began to run on the day that Norma Pierson died, 16 November 1987.

The trial court erred in concluding that the plaintiff's case was barred by the statute of limitations. The plaintiff's cause of action accrued on 16 November 1987; plaintiff filed his complaint on 22 August 1989, well within the applicable three-year statute of limitations. The trial court's order of dismissal is reversed, and the cause of action is remanded for further proceedings.

Reversed and remanded.

Judge JOHNSON concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

It is my opinion that if any actionable wrong was committed by defendant Buyher, it was committed when the insurance policy was delivered to Ms. Pierson containing a provision that she was the owner of the policy, and I am therefore of the opinion that the trial court's order dismissing this action should be affirmed.

ROGER EDWIN FLORENCE v. WILLIAM S. HIATT, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 891SC1257

(Filed 5 February 1991)

Automobiles and Other Vehicles § 68 (NCI4th)— prayer for judgment continued—conditions—judgment not rendered appealable

The trial court's prayer for judgment continued for operating a vehicle without a license upon the condition that plaintiff not violate any motor vehicle laws and make a $75 contribution to the school board was a true prayer for judgment continued and not a final judgment which would allow DMV to revoke plaintiff's license pursuant to N.C.G.S. § 20-28.1 for a moving violation committed while his license was revoked, since plaintiff was already obligated to obey the motor vehicle laws and that condition thus was not a punishment, and the $75 "donation" was not restitution because the school board was not an aggrieved party, was not a fine because it was directed to an entity other than the county for use by the public schools, but was unenforceable surplusage.

Am Jur 2d, Automobiles and Highway Traffic §§ 134, 148; Forfeitures and Penalties § 68.

What amounts to conviction or adjudication of guilt for purposes of refusal, revocation, or suspension of automobile driver's license. 79 ALR2d 866.

APPEAL by defendant from judgment entered 12 July 1989 by *Judge Herbert Small* in DARE County Superior Court. Heard in the Court of Appeals 25 October 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for defendant-appellant.

Aycock, Spence & Butler, by W. Mark Spence, for plaintiff-appellee.

JOHNSON, Judge.

On 7 September 1988, plaintiff was cited for exceeding 35 m.p.h. in a 35 m.p.h. zone. He did not appear to answer the charge on the scheduled court date and the Dare County Clerk's Office

sent notice of failure to appear to the Division of Motor Vehicles (DMV), which, pursuant to G.S. § 20-24.1, revoked plaintiff's driving privilege for failure to appear and answer the charge. The revocation was effective as of 1 January 1989. Plaintiff complied with the revocation on 6 February 1989.

On 27 January 1989, plaintiff was cited for a safe movement violation and was also charged with driving while license revoked. On 9 May 1989, plaintiff appeared before the Dare County District Court and entered a plea of guilty to the offense of driving without being licensed as a driver by the Division of Motor Vehicles in violation of G.S. § 20-7, in lieu of driving while license revoked, and also entered a plea admitting liability to an unsafe movement violation. Judge Parker found plaintiff guilty of operating a motor vehicle without a license. The judgment of the court was: "Prayer for judgment continued upon the condition that he not violate any motor vehicle laws and make a $75.00 contribution to the school board." Upon receiving notice of Judge Parker's order, DMV revoked plaintiff's license for one year, pursuant to G.S. § 20-28.1 which mandates the revocation of a driver's license when he is convicted of a moving violation committed while driving during a period of revocation. The revocation was to be effective as of 18 June 1989. Plaintiff obtained a temporary restraining order against DMV on 21 June 1989. A permanent injunction enjoining DMV from suspending or revoking the plaintiff's driving privileges as a result of Judge Parker's order of 9 May 1989 was entered by Judge Herbert Small on 12 July 1989. Defendant DMV appeals.

The issue on appeal is whether the conditional language in Judge Parker's order renders the putative "prayer for judgment continued" a final conviction. If the order is construed as a final judgment from which appeal can be made, then DMV's revocation of plaintiff's license is valid under G.S. § 20-28.1. If Judge Parker's order is construed as a true prayer for judgment continued then there will have been no final judgment and DMV has no authority to revoke plaintiff's license.

Defendant's first argument on appeal is that the trial court lacked jurisdiction to review a mandatory revocation undertaken pursuant to G.S. § 20-28.1. This argument misses the issue. Here we are not concerned with whether the court has jurisdiction to review a mandatory revocation imposed when a driver is convicted of a moving violation while his license is suspended but

whether the order entered in this case is a final conviction which can support a mandatory revocation at all. Defendant properly states the relevant issue in its second argument when it contends that Judge Parker's judgment constitutes a final conviction for purposes of G.S. § 20-24(c) because the condition that plaintiff pay $75.00 to the school board imposed a condition amounting to punishment, making the order in the nature of a final judgment.

The Superior Courts of North Carolina have the inherent power to designate the manner by which their judgments shall be executed. *See State v. Griffin*, 246 N.C. 680, 100 S.E.2d 49 (1957). Following a conviction by verdict or plea the court may (1) pronounce judgment and place it in immediate execution, (2) pronounce judgment and suspend or stay its execution, (3) continue prayer for judgment. *Id.* at 682, 100 S.E.2d at 50. The effect of a prayer for judgment continued is that there is no judgment and the defendant has no right to appeal. *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962); *Barbour v. Scheidt, Comr. of Motor Vehicles*, 246 N.C. 169, 97 S.E.2d 855 (1957). Where a prayer for judgment continued is imposed with no terms or conditions, the judgment may be continued from session to session without defendant's consent. *State v. Graham*, 225 N.C. 217, 34 S.E.2d 146 (1945). But a prayer for judgment continued which contains conditions may not be imposed over defendant's objections. *State v. Jaynes*, 198 N.C. 728, 153 S.E.2d 410 (1930); *State v. Burgess*, 192 N.C. 668, 135 S.E. 771 (1926). If conditions are imposed and the defendant does not object, he waives his right to appeal on the grounds that it was not in accord with due process of law. *Griffin*, 246 N.C. 680, 100 S.E.2d 49. However, "when the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment (fine or imprisonment) the order is in the nature of a final judgment, from which the defendant may appeal." *Id.* at 683, 100 S.E.2d at 51.

Judge Parker's order granted a prayer for judgment continued on condition that plaintiff not violate any motor vehicle laws and that he make a $75.00 contribution to the school board. In *State v. Cheek*, 31 N.C. App. 379, 229 S.E.2d 227 (1976), a prayer for judgment was continued on an assault charge upon the condition that the defendant not attempt to escape from prison or break any state or federal law. This Court held that the condition did not amount to punishment because the defendant, as a citizen, was already obligated to obey the law, thus the judgment was

not a final judgment and the defendant had no right to appeal from it. We conclude that the condition in the case *sub judice*, that defendant not violate any motor vehicle laws, is not punishment and therefore does not make the judgment at issue a final judgment.

The question still remains whether the condition "that he make a $75.00 contribution to the school board" constitutes punishment that would render the judgment a final conviction. We hold that it is an invalid condition and is unenforceable.

Fines are a pecuniary punishment extracted by the State. They are a permitted form of punishment under the state constitution. N.C. Const. art. XI, § 1. *See Shore v. Edmisten, Atty. General*, 290 N.C. 628, 227 S.E.2d 553 (1976). Article IX, § 7 of the North Carolina Constitution provides that the fines collected for any breach of the penal laws shall be used exclusively for the benefit of the public schools. "[A]ny judgment of a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional." *Shore*, 290 N.C. at 633, 227 S.E.2d at 558. Restitution, on the other hand, is compensation to a specific aggrieved party. An aggrieved party is one who has been damaged or has sustained loss caused by the defendant arising out of the offense for which he has been convicted. *State v. Wilburn*, 57 N.C. App. 40, 290 S.E.2d 782 (1982).

We find that the condition in Judge Parker's order that plaintiff make a contribution to the school board is unenforceable surplusage. It is not restitution because the school board is not an aggrieved party. It is not a fine because it is directed to an entity other than the county for use by the public schools.

We therefore hold that Judge Parker's order of 9 May 1989 is a true prayer for judgment continued. As such it cannot operate as a final conviction which would require or allow DMV to revoke plaintiff's license under G.S. § 20-28.1. The order enjoining DMV from suspending or revoking plaintiff's driving privilege is

Affirmed.

Judges EAGLES and PARKER concur.

JOHNSON & LAUGHLIN, INC., PLAINTIFF v. HERBERT J. HOSTETLER, DEFENDANT

PELLA WINDOW & DOOR CO., PLAINTIFF v. HERBERT HOSTETLER, DARLENE HOSTETLER AND JOHNSON & LAUGHLIN, INC., DEFENDANTS

No. 9020SC352

(Filed 5 February 1991)

Trial § 42 (NCI3d)— failure of jury to follow instructions—verdict in conformity with evidence and law

Where plaintiff had two claims against defendant which were based upon different circumstances and legal theories, the jury's treatment of the claims separately, rather than together as the court directed if they found that plaintiff substantially performed the contract, did not establish that their vedict was unfair or invalid or that the jury was confused; rather, the verdict was in harmony with the pleadings, the evidence, and the law, and the court's refusal to set it aside, if error, was harmless.

Am Jur 2d, Trial §§ 1199, 1201.

APPEAL by defendant Herbert J. Hostetler from order entered 6 December 1989 by *Judge F. Fetzer Mills* in MOORE County Superior Court. Heard in the Court of Appeals 16 November 1990.

Plaintiff Johnson & Laughlin, Inc., a building contractor with a license limited to structures costing no more than $175,000, contracted in writing to build a house for defendant Hostetler at a cost of $207,231. Several months after construction was started and defendant had made progress payments amounting to $53,693, he became dissatisfied with plaintiff's performance and terminated the contract. Alleging by its complaint and amended complaint that defendant owed it $20,965.37 for labor and materials used in constructing the house and $22,907.67 for windows, brick and lumber placed on the site that defendant refused to surrender, plaintiff sued to recover those amounts and to obtain a lien on defendant's property. Defendant answered and counterclaimed for the return of payments made, alleging that plaintiff breached the contract by faulty construction and not having a license that authorized it to construct the building involved. In a separate action Pella Window & Door Co. sued to recover $14,110.32 from Johnson

& Laughlin, Inc. for windows delivered to the construction site and to obtain liens against the house and Hostetler's debt to the builder. Pella's action against Hostetler was consolidated for trial with that of plaintiff; its claim against Johnson & Laughlin was reduced to judgment and does not concern us. In the trial the jury found, in substance, that plaintiff did not breach the contract, and that Hostetler owed plaintiff $13,256 for construction done before the contract was terminated and $22,885 for building materials converted thereafter. Plaintiff's judgment for $36,111 also placed a builder's lien of $13,256 on Hostetler's property. A judgment establishing Pella's lien in the amount of $14,110.32 against the house and Hostetler's debt to plaintiff was also entered.

Defendant moved for a new trial under the provisions of Rule 59, N.C. Rules of Civil Procedure, based upon the ground that the jury disregarded the court's instructions as to the steps to follow in deciding the issues between plaintiff contractor and defendant homeowner. Though the court found that the jury did not proceed as instructed, it denied the motion. Defendant's appeal is from that ruling.

Douglas R. Gill for plaintiff appellee Johnson & Laughlin, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James R. Saintsing, for plaintiff appellee Pella Window & Door Co.

McCrann Law Firm, P.A., by Michael J. McCrann, for defendant appellant Herbert J. Hostetler.

PHILLIPS, Judge.

Defendant's appeal from the denial of his motion for a new trial raises only one question—was the jury's failure to follow the court's instructions as to the steps to follow in determining the issues prejudicial error? We agree with the trial judge that it was not.

Though plaintiff's two claims against defendant Hostetler were separately stated in the complaint and were based upon different circumstances and legal theories—one for construction done by plaintiff under the contract before it was terminated; the other for materials converted by defendant after the contract was terminated—in the charge the court treated the materials claim as special damages under the contract in one place and as a conversion claim in another, and instructed the jury to proceed as follows: To determine first if Johnson & Laughlin substantially performed

its contract before Hostetler terminated it; if substantial performance was found to then determine how much Hostetler owed under the contract, both for actual damages because of materials and labor furnished before cancellation and for special damages, including materials kept by defendant thereafter; if substantial performance was not found they were to pass over the issue as to plaintiff's contract damages, determine Hostetler's damages under his counterclaim, determine whether Hostetler had converted any of Johnson & Laughlin's materials, and if so their value. Contrary to these instructions the jury proceeded as follows: After finding substantial performance of the contract by plaintiff, they found that plaintiff was entitled to recover $13,256 under the contract; they ignored the counterclaim issue; they found that defendant did convert plaintiff's building materials and that those materials were worth $22,855.

In considering the jury's deviations from their instructions, the court found and concluded that the "contract damages" which the jury found consisted only of the cost of materials and labor that plaintiff used in constructing the house before the contract was terminated; that the conversion damages that the jury found consisted only of the value of the materials that defendant kept and used after he terminated the contract; that neither finding was based upon evidence that supported the other; that both findings were consistent with the evidence and the law; and that if the jury's deviation from their instructions was error, it was harmless. These findings and conclusions are well founded, in our opinion, and the denial of defendant's new trial motion was not an abuse of discretion. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). Since plaintiff's two claims are based upon different circumstances and legal theories, the jury could have been properly instructed to proceed somewhat as they did. That the jury treated the claims separately, rather than together as the court directed if they found that plaintiff substantially performed the contract, does not establish that their verdict is either unfair or invalid or that the jury was confused, as defendant argues. Whether treated separately or together the two claims are nevertheless quite distinct from each other, and the record does not indicate that the jury confused either claim or the evidence that supports it with the other one. The evidence indicates that when the contract was terminated plaintiff had applied labor and materials worth $13,264 to the house for which it had not been paid and the jury awarded

$13,256 on that claim. The evidence indicates that the converted materials were worth $22,846.94 and the jury awarded $22,855 on that claim. Thus, the verdict was not only in harmony with the evidence, it was in harmony with the pleadings and the law, and the refusal to set it aside, if error, was harmless, as the court ruled. *Nicholson v. Dean*, 267 N.C. 375, 148 S.E.2d 247 (1966).

Defendant's several other arguments concerning alleged errors during the course of the trial cannot be considered, as defendant did not appeal from the judgment. The notice of appeal states that his appeal was only from the denial of the new trial motion, and under our practice a notice of appeal to be effective must "designate the judgment or order from which appeal is taken." Rule 3(d), N.C. Rules of Appellate Procedure. This rule, except as qualified by statute, is jurisdictional and cannot be waived. *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E.2d 46 (1976). Even so, it does not appear that our decision would have been different if the judgment had been appealed; for the record indicates that the trial was fairly conducted in all respects.

Affirmed.

Judges ORR and GREENE concur.

ELIZABETH WALLACE DARCY v. STEVE OSBORNE AND ELLA MAE RUTHERFORD

No. 9022DC547

(Filed 5 February 1991)

Appeal and Error § 83 (NCI4th); Rules of Civil Procedure § 58 (NCI3d) — no entry of judgment — no jurisdiction on appeal — judgment not enforceable

Defendant's notice of appeal in an action to impose a constructive trust on real property was timely for the purposes of N. C. Rules of Appellate Procedure, Rule 3 where the notice was filed after rendition of judgment and the judgment was never entered, so that the 30-day period provided by the Rules of Appellate Procedure was not triggered. However, the appeal must be dismissed for lack of jurisdiction and the judg-

ment was unenforceable because entry of judgment did not occur under N.C.G.S. § 1A-1, Rule 58 in that the clerk did not prepare, sign, and file the judgment; the record did not indicate that the clerk made a notation of judgment in the clerk's minutes; and there is no evidence in the record on appeal that notice of filing was mailed to the parties, nor does the judgment exhibit a time of mailing constituting prima facie evidence of mailing notice.

Am Jur 2d, Appeal and Error §§ 301, 303.

APPEAL by defendant Rutherford from order filed 6 March 1990 in IREDELL County District Court by *Judge Robert W. Johnson.* Heard in the Court of Appeals 6 December 1990.

Mattox, Mallory & Simon, by J. Pressly Mattox, for plaintiff-appellee.

T. Michael Lassiter for defendant-appellant Rutherford.

GREENE, Judge.

Plaintiff, Elizabeth Wallace Darcy, filed a complaint against defendants, Steve Osborne and Ella Mae Rutherford, on 6 March 1989, requesting the court to impose a constructive trust on certain real property. The case was heard without a jury on 6 November 1989. The case against Steve Osborne was dismissed. An order filed 6 March 1990 indicates the court imposed a constructive trust on real property against defendant Rutherford, ordering her to pay plaintiff $7,000.00. Ella Mae Rutherford (defendant) appeals.

On appeal, plaintiff filed a motion to dismiss defendant's appeal upon the grounds that it was not timely under N.C.R. App. P. 3 (1990). Plaintiff contends the court rendered its decision in open court on 6 November 1989 and that defendant gave oral notice of appeal at that time. Plaintiff correctly notes that oral notice of appeal is no longer effective under Rule 3. *See* N.C.R. App. P. 3 (1990). Plaintiff further contends that if the time for appeal is to be measured from the time the written judgment was filed, that being 6 March 1990, defendant's appeal is still beyond the thirty days permitted under Rule 3 because defendant's written notice of appeal was not filed until 10 April 1990.

In response to plaintiff's motion, defendant agrees that the written judgment was filed 6 March 1990, but she contends neither

she nor her attorney were served with any notice or advised in any way that the judgment had been filed until 3 April 1990, despite repeated inquiries to the presiding judge and to plaintiff's counsel. Defendant's response suggests defendant was informally advised by counsel for the plaintiff on 3 April that the judgment had been filed on 6 March. Defendant points out that notice of appeal was filed on 10 April 1990, only seven days after defendant was advised that the written judgment had been filed.

The dispositive issue is whether entry of judgment has occurred in this case such that this Court has jurisdiction to address the merits.

Under Rule 3, a party entitled by law to appeal from a judgment *rendered* in a civil action may take appeal by filing written notice of appeal. N.C.R. App. P. 3(a) (1990). Rendition of judgment occurs when the court announces its decision in open court. *Kirby Building Systems v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990). However, appeal must be taken within the time provided by Rule 3(c), which provides that an "[a]ppeal from a judgment or order in a civil action . . . must be taken within 30 days after its *entry*." N.C.R. App. P. 3(c) (emphasis added). Thus, under Rule 3, notice of appeal is timely if filed after judgment is rendered in court, and before the expiration of the 30-day period after judgment is entered. The date of rendition and the date of entry are therefore critical to a determination of whether an appeal is timely.

Apart from the question of whether an appeal is timely is the question of whether this Court has jurisdiction over the case. Entry of judgment is the event which is necessary for this Court to obtain jurisdiction. *Searles v. Searles*, 100 N.C. App. 723, 398 S.E.2d 55 (1990).

Entry of judgment is governed by our Rules of Civil Procedure which provide:

> 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 (1990).

The record indicates the clerk did not "prepare, sign, and file the judgment," but that it was prepared by plaintiff's attorney and signed by the trial judge. Furthermore, the record does not indicate the clerk made a notation of judgment in the clerk's minutes. Therefore, entry did not occur under paragraph one or paragraph two of Rule 58.

Paragraph three of Rule 58 specifies three separate events which must occur before entry of judgment is 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. *See Searles* at 726, 398 S.E.2d at 56. While a judgment was prepared and filed in this case, there is no evidence in the record on appeal that notice of filing was mailed to the parties, nor does the judgment exhibit a time of mailing constituting prima facie evidence of mailing notice. N.C.R. Civ. P. 58. Accordingly, entry of judgment did not occur under paragraph three of Rule 58.

It follows that defendant's written notice of appeal is "timely" for purposes of N.C.R. App. P. 3. First, it was filed after rendition of judgment. Second, judgment has never been entered so the 30-day period provided by N.C.R. App. P. 3(c) has not been triggered, much less has it expired. However, in the absence of any evidence in the record that judgment was entered in accordance

with the provisions of N.C.R. Civ. P. 58, this appeal must be dismissed for lack of jurisdiction. *Searles*.

Furthermore, the judgment rendered by the court in this matter is presently unenforceable between the parties to this action as it has not been entered. *Id. See Logan v. Harris*, 90 N.C. 7 (1884). *See also* N.C.G.S. § 1-306 (1983) (execution on judgment proper only after entry).

Appeal dismissed.

Judges PHILLIPS and ORR concur.

IN THE MATTER OF: MELINDA ISENHOUR AND BRANDY ISENHOUR, MINOR CHILDREN

No. 9017DC594

(Filed 5 February 1991)

1. **Parent and Child § 6.3 (NCI3d)— child custody—court's consideration of matters in file—no error**

In a proceeding to determine custody of respondent's two children, the trial court could properly consider matters in respondent's file without either party having introduced the file, since the trial court could take judicial notice of earlier proceedings in the same cause.

Am Jur 2d, Parent and Child §§ 24-26.

2. **Parent and Child § 6.3 (NCI3d)— child custody—misstated findings—custody decree not abuse of discretion**

In a proceeding to determine custody of respondent's two children, misstated findings as to evidence of threats by respondent toward DSS workers and as to a DSS plan to reunite the minor children with their mother did not prejudice respondent, and the trial court did not abuse its discretion in maintaining the current custody arrangements before it which placed the children in the custody of their father, given the violent and uncooperative history of respondent, the relative

recency of respondent's compliance with the court's orders, and the children's stated desires to remain with their father.

Am Jur 2d, Parent and Child §§ 24-26.

APPEAL by respondent from order entered 30 November 1989 in ROCKINGHAM County District Court by *Judge Philip W. Allen.* Heard in the Court of Appeals 22 January 1991.

The minor children involved in this case were adjudged neglected and placed in the legal and physical custody of the Iredell County Department of Social Services on 28 July 1986. Their mother, respondent Lucy Isenhour, had been hospitalized suffering from acute psychosis, and a social worker had witnessed her exhibit violent tendencies. A further investigation revealed that respondent had no income and there was little food in the house. Physical custody was ultimately granted to the children's father, Jack Brown.

Periodic reviews have occurred since the initial disposition. Legal custody has been transferred to the Rockingham County Department of Social Services, and physical custody has remained with Mr. Brown. Various visitation schedules have been imposed by court orders or agreed to by the parties. Respondent has failed to comply with some of these schedules, and in April 1988 kept the children for eight days without notifying anyone as to their location.

The order before us resulted from a hearing held on 20 November 1989. The parties consented to a waiver of all notice requirements and agreed that the hearing would be the annual custody review disposition of the children required by N.C. Gen. Stat. § 7A-657. At the hearing, respondent offered evidence tending to show that she was taking medication and seeing a psychiatrist regularly, and this was improving her condition. She had complied with the court's most recent visitation schedule, and the visits went well. She had been regularly employed for approximately one year and lived with her six-year-old daughter in a two-bedroom mobile home. The court heard further evidence from a social worker, Brown, and the minor children, who testified that they wished to remain with their father.

The trial court entered an order finding facts and concluding that it was in the best interest of the children to remain in the

custody of the Rockingham County Department of Social Services, and physical placement to remain with Brown. Respondent appeals.

Phyllis P. Jones for petitioner-appellee Rockingham County Department of Social Services.

Maddrey & Medlin, by Thomas E. Medlin, Jr., for respondent-appellant Lucy Isenhour.

WELLS, Judge.

Respondent brings forward two assignments of error, contending that the evidence was insufficient to support the court's findings of fact and conclusions of law, and that the court's order is not in the best interests of the children. We affirm.

Though it is unclear from the record to which findings or conclusions respondent objects, she refers to findings four, five and six in her brief:

> 4. Since this matter was originally heard in Iredell County, respondent has exhibited a long history of failure to cooperate with the Iredell County Department of Social Services and the Rockingham County Department of Social Services. She has made threats to social workers in both counties and exhibited violent acts during visits with her children and visits by social workers.
>
> 5. . . . Dr. Kim was not aware of any of the violent threats and/or failures to cooperate with the various Departments of Social Services or any of respondent's failure[s] to obey court orders and repeated violations of the terms and conditions of previous visitation orders including her absconding with the children for over a week in April of 1988.
>
> 6. The Iredell County Department of Social Services and the Rockingham County Department of Social Services have made repeated efforts to counsel with and work with the respondent in attempts to reunite her with her minor children. Respondent has failed to respond to the repeated efforts of both departments to affect a gradual reunification of the respondent with her minor children.

[1] Respondent contends that these findings are based at least in part on matters present in the file which were not offered into evidence, and that the court erred by either not reviewing the

file at the hearing or by not notifying her that it had done so and that it would take judicial notice of the file's contents. We find clear evidence in the record that the trial court did make it plain that it had reviewed the file and was considering the history of the case in conducting the hearing. Neither party was required to offer the file into evidence. A trial court may take judicial notice of earlier proceedings in the same cause. *Matter of Byrd*, 72 N.C. App. 277, 324 S.E.2d 273 (1985). Respondent also contends that the court erred in basing these findings on evidence that was not "substantive" or was hearsay. Respondent failed to raise these objections at trial, however, and must be considered to have waived them. *Matter of Brenner*, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

[2] Findings of fact are conclusive if supported by any competent evidence. *Id.* We have reviewed the record and find no evidence of threats made by respondent to Rockingham County Department of Social Services' workers. The record also reveals that there has been no plan to reunite the minor children with their mother since 1987, with Department of Social Services recommending that legal custody be granted to Brown with respondent maintaining visitation privileges. Respondent has not demonstrated any prejudice from these misstated findings, however. She contends in her second assignment of error that the court's order is contrary to the children's best interests, but we find that the court's properly stated findings adequately support its conclusion of law and order. Trial courts are granted broad discretion in matters involving custody. *Glesner v. Dembrosky*, 73 N.C. App. 594, 327 S.E.2d 60 (1985). N.C. Gen. Stat. § 7A-657 contemplates that a child *may* be returned to the parent from whom custody was taken if the trial court finds sufficient facts to show that the child "will receive proper care and supervision" from the parent, and such placement is deemed in the best interest of the child. *Matter of Shue*, 311 N.C. 586, 319 S.E.2d 567 (1984). We cannot say that the trial court abused its discretion in maintaining the current custody arrangements before it, given the violent and uncooperative history of the respondent, the relative recency of respondent's compliance with the court's orders, and the children's stated desires to remain with their father. The trial court's order is therefore

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

REID H. DAVIS, PLAINTIFF v. VECARO DEVELOPMENT CORPORATION AND THE ERVIN COMPANY, D/B/A UNIVERSAL MORTGAGE COMPANY, DEFENDANTS

No. 9026SC486

(Filed 5 February 1991)

Mortgages and Deeds of Trust § 15 (NCI3d)— deed of trust—assumption rider—transfer between tenants in common

The trial court did not err in a declaratory judgment action to interpret an assumption rider in a deed of trust by concluding that the assumption rider governed a transfer of the interest of one tenant in common to another tenant in common. According to the clear language of the contract, such a transfer invokes the due on sale clause which in turn provides for an increased interest rate. While the law recognizes a distinction between deeds of trust assumed and property taken subject to an existing deed of trust, the due on sale language does not limit itself to assumption transfers and the court is prohibited from reading such limitation into the otherwise clear language.

Am Jur 2d, Mortgages § 379.5.

What transfers justify acceleration under "due-on-sale" clause of real-estate mortgage. 22 ALR4th 1266.

APPEAL by plaintiff from order entered 10 January 1990 in MECKLENBURG County Superior Court by *Judge Chase B. Saunders.* Heard in the Court of Appeals 29 November 1990.

In a general warranty deed dated 1 December 1982, plaintiff and Ralph A. Ector, Jr., as tenants in common, purchased a certain condominium unit from defendant Vecaro Development Corporation. On the same date plaintiff and Ralph A. Ector, Jr. also executed a promissory note for $42,702.00, a deed of trust securing the note, a condominium rider and an assumption rider. Section 17 of the deed of trust provides that if the borrowers transfer the property or an interest therein, excluding certain transfers not pertinent here, without the lender's prior written consent, the lender at its option can declare all sums secured by the deed of trust to be immediately due and payable. Following section 17, the deed of trust states "See Assumption Rider attached thereto."

The attached assumption rider provides that in the event of a transfer to a creditworthy transferee, the lender shall permit transfer provided, among other conditions, that the loan interest rate shall be increased to 12%.

By general warranty deed dated 6 January 1987, Ector conveyed his interest in the above condominium unit to plaintiff, subject to the above 1 December 1982 deed of trust. Appellee Universal Mortgage Company, Vecaro's servicing agent, notified plaintiff that the 12% interest rate became effective upon the transfer.

Plaintiff challenged Vecaro's interpretation of the deed of trust and assumption rider language and filed this declaratory action asking the court to determine the interest rate due. By order dated 10 January 1990, the trial court concluded that the deed of trust and assumption rider language governs the transfer interest rate terms and according to those terms, defendant is entitled to an interest of 12%. Plaintiff appeals.

W. Leon Davis for plaintiff-appellant.

Gerdes, Mason, Wilson, Tolbert & Simpson, by Robert W. Allen and James L. Mason, Jr., for defendants-appellees.

WELLS, Judge.

In his assignments of error, plaintiff contends that the trial court's conclusions are unsupported by the evidence, unsupported by the findings, contrary to law and seek to vary the terms of the written instruments. Defendant contends that the written language of the contract is clear and that the trial court properly concluded that the transfer entitled defendant to a 12% interest rate.

"When the language of a contract is plain and unambiguous, the construction thereof is a matter of law . . . and it is the duty of the court to construe the contract as written." *Ins. Co. of North America v. Aetna Life & Casualty Co.*, 88 N.C. App. 236, 362 S.E.2d 836 (1987) (citations omitted). The contract between plaintiff and defendant is unambiguous. The deed of trust clearly states in its due on sale clause:

> 17. Transfer of the Property: Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent,

> . . . Lender may at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable.
>
> *See ASSUMPTION RIDER attached hereto.

However, the assumption rider provides a means for the borrower to avoid the harsh reality of the due on sale clause by increasing the interest rate to 12% on the remaining balance:

> ASSUMPTION RIDER (Section 17 cont'd). Provided, however, that in the event the sale or other transfer on any interest in the Property . . . the Lender shall permit assumption of the obligations under the Note and this Deed of Trust under the following conditions:
>
> a) the interest rate shall be increased to . . . twelve percent (12%). . . .

In this case, while the transfer was between tenants in common, according to the clear language of the contract, such a transfer invokes the due on sale clause which in turn provides for an increased interest rate of 12%. Plaintiff does not argue and we find no authority supporting such argument that transfers between cotenants do not trigger due on sale clauses.

Instead, plaintiff contends that a distinction at law exists between property conveyances where the borrower "assumes" an existing deed of trust and where the borrower takes property "subject to" an existing deed of trust. Plaintiff further contends the due on sale clause is not triggered because he did not "assume" the deed of trust but only took the property "subject to" the existing deed of trust. We agree with plaintiff that the law recognizes a distinction between deeds of trust "assumed" and property taken "subject to" an existing deed of trust. *See Driftwood Manor Investors v. City Federal Savings & Loan Association*, 63 N.C. App. 459, 305 S.E.2d 204 (1983). However, the distinction is irrelevant to the issue at hand. The unambiguous deed of trust language states "If all or any part of the Property or an interest therein is sold or transferred by Borrower. . . ." The due on sale clause language does not limit itself to "assumption" transfers and this court is prohibited from reading such limitation into the otherwise clear language. *Isby v. Crews*, 55 N.C. App. 47, 284 S.E.2d 534 (1981).

Affirmed.

Judges JOHNSON and COZORT concur.

RUSSELL W. CHAPLAIN, JR., GLADYS G. CHAPLAIN, A. KAY CHAPLAIN AND PETER B. ROSENTHAL, PLAINTIFFS-RESPONDENTS v. ELSIE B. CHAPLAIN AND HOTEL ASSOCIATES, LTD., A DELAWARE CORPORATION, DEFENDANTS-PETITIONERS

No. 901SC653

(Filed 5 February 1991)

1. **Judgments § 37 (NCI3d); Pleadings § 1 (NCI3d)— voluntary dismissal with prejudice—inadvertent—subsequent action not dismissed**

The trial court did not err by refusing to dismiss an action to obtain stock and real property allegedly held by defendant Elsie Chaplain in trust for plaintiffs where plaintiffs began the action by filing an application and order to extend the time to file the complaint to 10 December 1987; plaintiffs took a voluntary dismissal on 11 December 1987, inadvertently stating that it was with prejudice; and plaintiff's counsel filed this action on the same day. Both collateral estoppel and res judicata depend on prior adjudication on the merits and nothing whatever was litigated or adjudicated in the first action. Furthermore, the initial action abated by operation of law when the complaint was not filed within the time specified and plaintiffs' notice of dismissal was without effect. Even so, the court would not have been required to dismiss the action since defendant was neither inconvenienced, misled, nor injured and the dismissal with prejudice was entirely due to counsel's inadvertence.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 84-86.

2. **Rules of Civil Procedure § 56 (NCI3d)— summary judgment hearing—affidavit admitted without notice—no error**

The trial court did not err in an action seeking stock and real property allegedly held by defendant Elsie Chaplain in trust for plaintiffs' benefit by receiving at a summary judg-

ment hearing an affidavit from plaintiffs' counsel stating that an earlier dismissal with prejudice had been inadvertent even though the affidavit had not been served on counsel before the hearing. Unserved materials are receivable in the court's discretion, and the purpose of requiring service of affidavits was not compromised because the record does not show and defendant does not contend that defendant could or would have contradicted the assertion that the dismissal was inadvertently awarded. In any event, any error in receiving the affidavit was not one that entitled defendant to relief because it was not received in opposition to defendant's motion, which was orally made during the course of the hearing, but in support of plaintiffs' motion for summary judgment, which was also denied.

Am Jur 2d, Summary Judgment §§ 16, 20.

Judge EAGLES concurs in the result.

APPEAL by defendant Elsie B. Chaplain from order entered 2 February 1990, *nunc pro tunc* 22 January 1990, by *Judge D. Marsh McLelland* in DARE County Superior Court. Heard in the Court of Appeals 13 December 1990.

Allen W. Powell and Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, for plaintiff appellees.

Aldridge, Seawell & Khoury, by Joe G. Adams, for defendant appellant Elsie B. Chaplain.

PHILLIPS, Judge.

On 20 November 1987 plaintiffs commenced an action styled as above by filing in the Superior Court of Dare County an Application and Order which extended the time to file the complaint until 10 December 1987. The purpose of the action, according to the application, was to obtain possession of and title to certain shares of stock in Hotel Associates, Ltd. and certain real property which defendant Elsie B. Chaplain held for the benefit of the plaintiffs. Unable to file the complaint by 10 December 1987, plaintiffs' counsel took a voluntary dismissal of the action on 11 December 1987, inadvertently stating that it was with prejudice. On that same day he filed this action to recover the same property described in the first action. After being served with process and a copy

of the complaint the individual defendant did nothing affirmatively in the case for approximately twenty months. In that period plaintiffs, *inter alia*, filed an amendment to the complaint that included claims for fraud and unfair trade practices and a prayer for $500,000 in actual damages and a million dollars in punitive damages; replaced that amendment with one asking for damages in excess of $10,000; and deposed the individual defendant and her daughter. On 12 September 1989 the individual defendant, in answering plaintiffs' pleadings, pled various defenses, including the dismissal with prejudice of the prior action. Later, she moved for summary judgment and when the motion was denied, recognizing that the order was not appealable under G.S. 1-277 and G.S. 7A-27 since it was interlocutory and of no permanent effect on the litigation, she petitioned this Court for *certiorari*. Another panel of this Court, for no good reason that we have been able to discern, granted the petition and we are obliged to review the appeal. Hotel Associates, Ltd. is no longer in the case, as the complaint did not even profess to state a claim against it, and its motion to dismiss the complaint was granted earlier.

[1] Defendant's principal arguments are that the court's refusal to dismiss this action was error because it is barred by plaintiffs' first action as a matter of law under the doctrines of *res judicata* and collateral estoppel. The arguments are not well-founded. Both of those doctrines depend, *inter alia*, upon a prior adjudication on the merits, *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986), and nothing whatever was litigated or adjudicated in the first action. Furthermore, under the express provisions of Rule 3(a), N.C. Rules of Civil Procedure, when the complaint in the first action was not filed within the time specified by the order extending time, that action abated by operation of law, and plaintiffs' subsequent Notice of Dismissal was without effect, legal or otherwise. But even if that was not the case, since defendant was neither inconvenienced, misled, nor injured by the first action and its dismissal with prejudice was entirely due to counsel's inadvertence, the court would not have been required to dismiss plaintiffs' action. For under our law unassailable bars to the enforcement of legal or equitable rights are not necessarily created by the inadvertent typographical errors of counsel.

[2] Defendant also argues, without merit, that the trial court erred in receiving the affidavit of plaintiffs' counsel stating that the dismissal with prejudice was inadvertent because it was not served

on counsel before the hearing. The provision requiring service of materials before a hearing for summary judgment is not inviolable. Unserved materials are receivable within the court's discretion. Rule 6(d), N.C. Rules of Civil Procedure. The main purpose of requiring service of affidavits before the hearing is, of course, to enable the other party to answer the matters sworn to. That purpose was not compromised or frustrated by receiving the unserved affidavit, since the record does not show, and defendant does not contend, that if she had been served before the hearing she could or would have contradicted the assertion that the dismissal was inadvertently worded. In any event, receiving the affidavit, if error, was not one that entitled defendant to relief; because it was not received in opposition to defendant's motion, which was orally made during the course of the hearing, but in support of plaintiffs' motion for summary judgment, which was also denied.

Incongruously defendant's final argument is that the denial of her motion was also erroneous because no such motion was made! Since defendant asked this Court by her petition for *certiorari* to waive the jurisdictional ban against fragmentary appeals and review the interlocutory order denying her motion for summary judgment, the argument requires no answer.

Affirmed.

Judge WYNN concurs.

Judge EAGLES concurs in the result.

THOMAS LOMAX AND WIFE, BETTY LOMAX, PLAINTIFFS v. WILLIAM JOYNER SHAW AND CHARLES FRANKLIN SHAW, D/B/A THE HORSESHOE LOUNGE, DEFENDANTS

No. 9018SC241

(Filed 5 February 1991)

Rules of Civil Procedure § 40 (NCI3d)— consent judgment announced but not filed—answer struck as sanction

The imposition of the sanction of striking defendant's answer was proper in a dram shop action where counsel for

both parties announced to the trial judge that the case was settled; a copy of the consent judgment was submitted to the judge and was signed by defense counsel, but no other party; the court removed the case from the trial calendar; the consent judgment was never filed; the court issued a show cause order; and the court struck defendants' answer after a hearing. Defendants were not found in contempt, and the Superior Court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendants' answer. N.C.G.S. § 1A-1, Rule 40.

Am Jur 2d, Judgments §§ 1084, 1088, 1089.

APPEAL by defendants from an order entered 5 December 1989 by *Judge W. Douglas Albright* in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 December 1990.

Gabriel, Berry & Weston, by M. Douglas Berry, for plaintiff/appellees.

Scott, Hill, Hovis and Lutz, by Frederick S. Lutz, for defendant/appellants.

LEWIS, Judge.

This appeal raises the issue of whether a Superior Court judge has the authority to impose sanctions striking the defendants' answer when the defendants renege on an agreement to settle the dispute. The case was removed from the trial calendar based upon counsels' representations in open court that the case had been settled.

Plaintiffs filed this dram shop action on 7 June 1988. Defendants filed an answer in response to plaintiffs' claims. The case was calendared for a trial on 23 October 1989.

On 23 October 1989, counsel for both parties announced to the trial judge that the case was settled. A copy of the consent judgment was submitted to the trial judge and was signed by counsel for the defendants, but was not signed by any other party. The consent judgment contained only the following two substantive paragraphs:

1. That the Plaintiffs, Thomas Lomax and wife, Betty Lomax shall have and recover of the Defendants, William Joyner Shaw

> and Charles Franklin Shaw . . . the sum of Eighteen Thousand Seven Hundred Fifty-Eight Dollars and 70/100 ($18,758.70).
>
> 2. That each side shall bear their own cost in this action.

Based upon the representations of counsel that the case was settled, the court removed the case from the trial calendar. The consent judgment was never filed with the court and on 6 November 1989, the trial judge issued an Order to Show Cause as to why the judgment had not been executed.

On 4 December 1989 the judge held a Show Cause hearing and thereafter entered an order striking the defendants' answer for "the contumacious refusal to execute the settlement papers in this case heretofore exhibited to the court. . . ." From the order striking their answer, defendants appeal.

Defendants first argue that the trial court found them in criminal contempt of court and that the sanctions imposed are not authorized by statute. *See* N.C.G.S. § 5A-11 (1977). We disagree. Nowhere in the order does the trial court find the defendants in contempt. Instead, the order is titled, "Order Imposing Sanctions for Willful Failure to Effect Settlement Agreement." The Show Cause order was worded so that defendants were required to show cause why they should not be held in contempt or "otherwise sanctioned."

Rule 40 of our Rules of Civil Procedure states that the senior Superior Court judge "may provide by rule for the calendaring of actions for trial in the superior court division. . . ." N.C.G.S. § 1A-1, Rule 40 (1988). In conformity with the directive of Rule 40, Rule 2 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure (hereinafter referred to as "General Rules of Practice") requires all attorneys of record to notify the court of settlement and by whom the settlement will be prepared and presented. The trial judge has the power to hold a party in contempt for willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court. N.C.G.S. § 5A-11 (1977). In this case, the senior resident Superior Court judge had made the following court-wide rule regarding calendaring and settlement of cases:

> When any case which appears on a trial calendar is settled, the attorneys of record should forthwith, and without unnecessary delay, take all steps necessary to close the file and

> are under an affirmative duty to file all necessary documents before the term expires. Failure to comply with this requirement may result in the imposition of sanctions.

We hold that the Superior Court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck the defendants' answer. The defendants offered no plausible excuse as to why they did not execute the consent judgment, saying only that they "did not understand it." With only two paragraphs in the consent order, this is not in the realm of belief. In order to maintain an efficient and orderly system for calendaring and hearing cases in an increasingly congested justice system, the court must have inherent authority to impose sanctions for willful failure to comply with the applicable rules, no less local than statewide.

> Local rules adopted pursuant to G.S. 1A-1, Rule 40, are rules of court which are adopted to promote the effective administration of justice by insuring efficient calendaring procedures are employed. Wide discretion should be afforded in their application so long as a proper regard is given to their purpose.

Forman and Zuckerman, P.A. v. Schupak, 38 N.C. App. 17, 21, 247 S.E.2d 266, 269 (1978). Here, the senior resident Superior Court judge put counsel on notice that failure to file a consent order after representing to the judge that the case was settled could result in the imposition of sanctions. The defendants failed, without excuse, to enter the consent order as agreed. We find that the imposition of sanctions was proper.

Affirmed.

Judges ARNOLD and JOHNSON concur.

ROBERT B. BARBER, EMPLOYEE, PLAINTIFF/APPELLANT v. BABCOCK & WILCOX CONSTRUCTION COMPANY, EMPLOYER, DEFENDANT/APPELLEE, AND INA/AETNA INSURANCE COMPANY, CARRIER, DEFENDANT/APPELLEE

No. 8910IC588

(Filed 5 February 1991)

Master and Servant § 68.2 (NCI3d)— asbestosis—application of "last injuriously exposed" standard—error—application of thirty-day presumption required

In an action for workers' compensation benefits where plaintiff claimed that he had contracted the occupational disease of asbestosis, the Industrial Commission erred in utilizing the "last injuriously exposed" standard rather than the applicable thirty-day presumption of N.C.G.S. § 97-57; therefore, in light of the irrebuttable legal presumption that the last thirty days of work subjecting the plaintiff to the hazards of asbestos is the period of last injurious exposure and the Commission's holding that plaintiff was exposed to the inhalation of asbestos during the forty-eight days he worked for defendant, such exposure must be deemed injurious, and plaintiff is entitled to workers' compensation benefits pursuant to N.C.G.S. § 97-53(24).

Am Jur 2d, Workmen's Compensation §§ 303, 409.

PETITION for rehearing allowed for consideration of plaintiff's second Assignment of Error regarding the issue of injurious exposure. Heard in the Court of Appeals 21 January 1991.

In this action, plaintiff seeks workers' compensation benefits for the alleged contraction of an occupational disease during the course of his employment with defendant-employer.

Leonard T. Jernigan, Jr., P.A., by Leonard T. Jernigan, Jr., for plaintiff-appellant.

Petree Stockton & Robinson, by Jane C. Jackson and Barbara E. Brady, for defendants-appellees.

JOHNSON, Judge.

We note at the outset that plaintiff filed this action for workers' compensation benefits alleging that he had contracted the occupa-

tional disease of asbestosis in his job as an insulation worker. After a hearing, a Deputy Commissioner of the Industrial Commission found that plaintiff does, in fact, suffer from asbestosis, but that the defendant-employer is not liable for payment of workers' compensation under the purview of G.S. § 97-53(24) since plaintiff was not exposed to the hazards of asbestos for as much as thirty working days or parts therof during the course of his employment with defendant-employer as required by G.S. § 97-57. The Full Commission (hereinafter "Commission") issued an Opinion and Award affirming the Deputy Commissioner's decision and plaintiff appealed. Upon review, this Court affirmed the entire decision of the Industrial Commission. Having misapplied the law as it relates to plaintiff's second Assignment of Error regarding the issue of injurious exposure, such decision was in error and is reversed. The opinion of this Court in *Barber v. Babcock*, 98 N.C. App. 203, 390 S.E.2d 341 (1990), is otherwise not disturbed and should be incorporated with our holding in the instant opinion.

By his second Assignment of Error, plaintiff contends that the Commission erred in applying an injurious exposure standard to his claim instead of the thirty-day presumption set out in G.S. § 97-57. We agree.

General Statutes § 97-57 provides in part that "[i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, is liable." G.S. § 97-57 also creates an irrebuttable legal presumption that the last thirty days of work is the period of last injurious exposure. *Fetner v. Granite Works*, 251 N.C. 296, 111 S.E.2d 324 (1959). Thus, "an exposure which proximately augmented the disease to any extent, however slight," is deemed the last injurious exposure. Therefore, plaintiff does not have to establish that the conditions of his employment with the defendant caused or significantly contributed to his disease. *Caulder v. Waverly Mills*, 314 N.C. 70, 73, 331 S.E.2d 646, 648 (1985); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983), *quoting Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 22 S.E.2d 275, 277-78 (1942). He need only show that: (1) he has an occupational disease and (2) he was "last injuriously exposed to the hazards of such disease" in the defendant's employment. *Id.*

Here, the Commission found as fact that plaintiff had last been exposed to the inhalation of asbestos in 1984, which was during the time of his employment with the defendant. The Commission further found that a negligible amount of asbestos existed in the air of defendant-employer's facility, but concluded that the plaintiff was not "injuriously exposed to the hazards of asbestos." Based upon the Commission's conclusion, it utilized the "last injuriously exposed" standard rather than the applicable thirty-day presumption set forth in G.S. § 97-57.

In light of the irrebuttable legal presumption that the last thirty days of work subjecting the plaintiff to the hazards of asbestos is the period of last injurious exposure and the Commission's holding that plaintiff was exposed to the inhalation during the forty-eight days he worked for the defendant, such exposure must be deemed injurious. Therefore, plaintiff has satisfied his burden of proof and is entitled to workers' compensation benefits pursuant to G.S. § 97-53(24).

Accordingly, the decision of the Industrial Commission as it relates to the issue of injurious exposure is

Reversed.

Judges COZORT and LEWIS concur.

SHIRLEY SMITH v. JACK ECKERD CORPORATION AND JAMES PEARSON

No. 9021SC270

(Filed 5 February 1991)

1. **Privacy § 1 (NCI3d)— unreasonable intrusion upon seclusion of another—invasion of privacy—claim not recognized in North Carolina—evidence insufficient anyway**

Even if North Carolina recognized an invasion of privacy claim based on an unreasonable intrusion upon the seclusion of another, the intrusion in this case was not so highly offensive to the reasonable person as to constitute an invasion of privacy where the evidence tended to show that defendant's store alarm went off as plaintiff left the store; the employee

asked plaintiff to step back inside which she did; plaintiff stepped through the door four times and each time the alarm went off; defendant's female employee searched plaintiff with a scanner and plaintiff did not object; the employee also searched under the coats of plaintiff's children and in plaintiff's purse; and the employee apologized for the inconvenience.

Am Jur 2d, Privacy §§ 62, 120, 124, 132.

2. Damages § 11.2 (NCI3d) — store customer searched — summary judgment for defendant on punitive damages claim

In an action for battery, invasion of privacy, and negligent infliction of emotional distress, the trial court properly granted summary judgment for defendants on plaintiff's claims for punitive damages, since defendant's employee searched plaintiff when a store alarm repeatedly sounded; defendant employee apologized; and there was no evidence that the actions taken were willful, wanton, or in malicious disregard of plaintiff's rights.

Am Jur 2d, Damages §§ 762-764; Privacy §§ 263, 264.

APPEAL by plaintiff from an order entered 20 November 1989 in FORSYTH County Superior Court by *Judge Howard R. Greeson, Jr.* Heard in the Court of Appeals 11 December 1990.

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

Bell, Davis & Pitt, P.A., by Stephen M. Russell, for defendants appellees.

LEWIS, Judge.

The questions on appeal are 1) whether the trial court erred in granting the defendants' motion for summary judgment as to the plaintiff's punitive damages claim and, 2) whether the trial court erred in granting the defendants' motion for summary judgment as to the plaintiff's invasion of privacy claim.

In her complaint, the plaintiff states that employees of the defendant Jack Eckerd Corporation searched the plaintiff and her child after an alarm went off when she was exiting the store with two children. The complaint alleges that the individuals rubbed a scanner over the plaintiff's body and under the children's clothing

while they were in public view. The complaint also alleges that the search was nonconsensual. The plaintiff alleged that such conduct constituted three separate and distinct causes of action: battery, an invasion of privacy into the "plaintiff's seclusion of solitude," and negligent infliction of emotional distress. The plaintiff alleged that the acts were willful, wanton, and intentional conduct so that the plaintiff should recover punitive damages as to the respective torts. After considering the pleadings, deposition of the plaintiff, and deposition of a witness in the store, the trial judge granted summary judgment only as to the plaintiff's punitive damages claim and as to the plaintiff's invasion of privacy claim.

"Where 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, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981). All reasonable inferences must be drawn in favor of the nonmovant. *Whitley v. Cubberly*, 24 N.C. App. 204, 207, 210 S.E.2d 289, 291 (1974).

Invasion of Privacy Claim

[1] The plaintiff alleges an invasion of privacy claim based on an unreasonable intrusion upon the seclusion of another. Restatement (second) of Torts § 652B states: "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." North Carolina courts have not yet addressed whether or not we would recognize this tort.

After reviewing the pleadings and depositions, which contain the only evidence that was before the trial judge, we hold that even if North Carolina did choose to recognize such a cause of action, this case does not present us with the opportunity to do so. In her deposition, the plaintiff testified that the Eckerd alarm went off as she left the store and that the cashier asked her to step back inside the store. The plaintiff stated that she did not say anything, and that she did what the Eckerd employee asked her to do. The plaintiff stepped through the door four times and each time the alarm went off. The plaintiff stated in her deposition that the female employee of Eckerd's searched her with a scanner

and that the plaintiff did not verbally object. The plaintiff stated that the employee searched under her coat, and touched her body outside her clothing with the scanner. The employee also searched under the children's coats. The employee put the scanner in the plaintiff's pocketbook located on the floor. The plaintiff also stated that the employee apologized for the inconvenience.

Although the incident may have been offensive to the plaintiff, we hold that under the circumstances the intrusion would not be so highly offensive to the reasonable person as to constitute an invasion of privacy action. The level of offensiveness for this tort is higher than the offensive touching required for battery. Thus, we hold that the trial court was correct in allowing summary judgment as to the plaintiff's invasion of privacy claim.

Punitive Damages Claim

[2] The plaintiff also contends that the trial judge erred in granting summary judgment for the defendants as to the plaintiff's claims for punitive damages. The plaintiff's complaint asked the court to award punitive damages with respect to the claims concerning battery, invasion of privacy, and negligent infliction of emotional distress. We find no evidence that the actions taken were either willful, wanton or in malicious disregard to the plaintiff's rights. We find no element of aggravation necessary to award punitive damages. *See Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981). The defendant's employees responded when the alarm repeatedly sounded. The defendant employee also apologized. Thus, the trial judge was correct in granting summary judgment for the defendants as to plaintiff's claims for punitive damages.

Affirmed.

Judges ARNOLD and JOHNSON concur.

BARBARA J. DAVIS v. TOWN OF SOUTHERN PINES

No. 9020SC246

(Filed 5 February 1991)

1. **Municipal Corporations § 4.4 (NCI3d)— tap-on charge for city sewer line—different amounts charged different customers—no discrimination**

The provision of a city ordinance requiring petitioner to pay $950 to tap onto a city sewer line was not discriminatory, though the town allowed some homeowners to tap onto the service for $200, since the provision was rationally related to the town's costs in providing the service involved.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 574.

2. **Municipal Corporations § 25 (NCI3d)— improper assessment—argument not made in trial court—stipulation controlling**

Petitioner could not argue on appeal that an ordinance of respondent town was invalid because it imposed an assessment and the procedures for imposing assessments were not followed, since that argument was not asserted in the trial court, and the case was adjudicated upon stipulated facts, one of which was that the tap-on charge petitioner paid was not an assessment.

Am Jur 2d, Appeal and Error §§ 566, 825.

APPEAL by petitioner from judgment entered 28 December 1989 by *Judge F. Fetzer Mills* in MOORE County Superior Court. Heard in the Court of Appeals 24 September 1990.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by S. Jon Fullenwider and Bruce T. Cunningham, Jr., for petitioner appellant.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by W. Lamont Brown, for respondent appellee.

PHILLIPS, Judge.

The judgment appealed from dismissed petitioner's declaratory judgment action to invalidate an ordinance of the Town of Southern

Pines under which she was charged $950 for tapping onto the Town's sewer line in front of her house. G.S. 160A-314(a) authorizes towns and cities to establish charges, fees and rates for their services and the ordinance involved was enacted pursuant thereto on 13 February 1979. It provides that "any property owner desiring to connect to the Town's wastewater (sewage) collection system, where that system has been extended at Town expense and where no assessment or other special connection charges have been established, shall pay a connection charge of $950.00." The Town by resolution has a normal charge of $200 for tapping onto sewer lines that have been extended without expense to the Town, or if extended at the Town's expense the property owners adjacent to the line have been assessed therefor. The $950 charge was exacted of petitioner because the sewer line was extended along her property in 1980 at the Town's expense, and no assessment or other special connection charge had been established for it.

[1] The only question presented is whether the provision requiring petitioner to pay $950 to tap onto the sewer line is discriminatory since the Town permits some homeowners to tap onto the service for $200. The provision is not discriminatory because it is rationally related to the Town's costs in providing the service involved. *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 280 S.E.2d 490 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982).

[2] Petitioner further argues that the ordinance is invalid because it imposes an assessment and the procedures for imposing assessments were not followed. The argument cannot be entertained because that position was not asserted in the trial court. The case was adjudicated upon stipulated facts, one of which is that the tap-on charge that plaintiff paid is not an assessment, and the facts agreed to in the trial court cannot be contradicted here. *Thomas v. Poole*, 54 N.C. App. 239, 282 S.E.2d 515 (1981), *disc. review denied*, 304 N.C. 733, 287 S.E.2d 902 (1982). Furthermore, it has been generally held that sewer charges are not assessments, but tolls or rents for using the facilities involved. *Covington v. City of Rockingham*, 266 N.C. 507, 146 S.E.2d 420 (1966).

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

WILLIAM CHARLES PALMER, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY, RESPONDENT-APPELLANT

No. 9010SC50

(Filed 5 February 1991)

State § 12 (NCI3d)— State Personnel Commission—award of costs and attorneys fees—increased by trial court

The trial court did not err by modifying an award of costs and attorneys fees by the State Personnel Commission without findings of fact. The Commission's award of costs and attorneys fees was reviewable under N.C.G.S. § 126-41, and it is enough that the record, which contains an itemization of counsel's various services, supports the determination that the Commission's award was inadequate.

Am Jur 2d, Costs §§ 52, 78, 79, 94.

APPEAL by respondent from order entered 21 September 1989 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 28 August 1990.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons, Jr., for petitioner appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for respondent appellant.

PHILLIPS, Judge.

Following proceedings through the proper administrative channels the State Personnel Commission affirmed the dismissal of petitioner from his employment with the North Carolina State Highway Patrol, but awarded him back pay for a certain period and costs, including attorneys fees, in the total amount of $8,037.03. Petitioner appealed the costs and attorneys fees award to the Superior Court of Wake County, which increased the allowance to $17,000. Respondent's appeal questions only the increase.

Respondent contends that the court's modification of the award is erroneous because no findings of fact were made and the costs and fees allowed are excessive. Neither contention has merit. Under the express provisions of G.S. 126-41 the Commission's award of

costs and attorneys fees was reviewable, the court had the authority to reverse or modify the award if found to be inadequate, and appellate tribunals with the authority to modify administrative decisions are not required to make findings of fact. *Shepherd v. Consolidated Judicial Retirement System*, 89 N.C. App. 560, 366 S.E.2d 604 (1988). In this instance the court determined that the Commission's award was inadequate and it is enough that the record, which contains an itemization of counsel's various services, supports that determination.

Affirmed.

Judges JOHNSON and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 FEBRUARY 1991

BIVINS v. MIZELLE No. 8926SC1346	Mecklenburg (88CVS439)	Reversed & Remanded
BOGGS v. WEBER No. 9010IC546	Ind. Comm. (976675)	Affirmed
BROWN v. BROWN No. 9018DC310	Guilford (89CVD3462)	Affirmed
DAVIS v. DENNIS LILLY CO. No. 9018SC406	Guilford (88CVS447)	Affirmed in part; reversed in part & remanded
DENTON v. PEACOCK No. 8911SC882	Harnett (86CVS1118)	Affirmed
FINE v. FINE No. 9018DC29	Guilford (87CVD1095)	Dismissed
GUILFORD COUNTY v. MORRIS No. 9018SC778	Guilford (90CVS02963)	Affirmed
HARGETT v. HARGETT No. 9020SC588	Union (89CVS638)	Affirmed in part & reversed in part
IN RE ANSEL v. COMR. OF MOTOR VEHICLES No. 9010SC684	Wake (89CRS5212)	Affirmed
KING v. KING No. 9028DC355	Buncombe (83CVD1180)	Reversed & Remanded
LACKAWANNA LEATHER CO. v. MONTGOMERY FURNITURE CO. No. 9025SC793	Catawba (89CVS2573)	Affirmed
MARTIN CO. DEPT. OF SOCIAL SERVICES v. PARKER No. 902DC503	Martin (88CVD228)	Dismissed
PHIPPS v. TOWN OF TURKEY No. 904DC640	Sampson (89CVD337)	Affirmed in part & reversed in part
PILLOW v. CITY OF MOUNT HOLLY No. 9027SC550	Gaston (89CVS1853)	Affirmed

RAMSEY v. HARTFORD TWEED LUMBER CO. No. 9010IC504	Ind. Comm. (023621)	Affirmed
ROSS v. ROSS No. 9026DC719	Mecklenburg (86CVD11251)	Affirmed
SILVERS v. AMERICAN & EFIRD MILLS No. 9010IC256	Ind. Comm. (720991)	Affirmed
SPOON v. GRAHAM No. 9018SC607	Guilford (88CVS9766)	Affirmed
STATE v. BANKHEAD No. 8916SC1353	Robeson (89CRS199)	No error in the trial; remanded for modification of judgment
STATE v. BOWLES No. 9021SC222	Forsyth (89CRS6167) (89CRS6168)	No Error
STATE v. BROCKMAN No. 9018SC628	Guilford (89CRS6293) (89CRS6294) (89CRS6295)	No Error
STATE v. CLAYTON No. 9030SC608	Cherokee (88CRS2536)	No Error
STATE v. ESTES No. 9010SC495	Wake (89CRS45931)	No Error
STATE v. GUNN No. 9020SC903	Union (89CRS001350)	Affirmed
STATE v. HASKINS No. 909SC806	Granville (89CRS875) (89CRS876)	No Error
STATE v. HENDERSON No. 9026SC853	Mecklenburg (89CRS66737)	Affirmed
STATE v. HOLLEY No. 901SC459	Chowan (88CRS1409) (88CRS150)	No Error
STATE v. LEWIS No. 9030SC606	Cherokee (89CRS1134)	No Error
STATE v. LITTLE No. 9018SC604	Guilford (89CRS18649)	No Error
STATE v. PATTON No. 9025SC498	Caldwell (88CRS7290)	No Error

STATE v. PENDRY No. 9026SC880	Mecklenburg (89CRS45231)	No Error
STATE v. PICKETT No. 905SC117	New Hanover (89CRS16109)	No Error
STATE v. PIERCE No. 901SC373	Currituck (88CRS1429)	No Error
STATE v. QUINN No. 9027SC820	Gaston (89CRS16690) (89CRS16691) (89CRS16692) (89CRS16693) (89CRS16694) (89CRS16695)	No Error
STATE v. RODMAN No. 902SC803	Beaufort (86CRS8815) (88CRS8818)	No Error
STATE v. RUTLEDGE No. 9010SC1028	Wake (85CRS78958) (85CRS78959) (89CRS80779) (89CRS80780)	Affirmed
STATE v. SIMPSON No. 9015SC735	Alamance (89CRS11672)	No Error
STATE v. TRAMMELL No. 9030SC807	Haywood (89CRS3229)	No Error
STATE v. VEGA No. 9018SC507	Guilford (88CRS57276) (88CRS57277) (89CRS57278)	No Error
STATE v. YOUNG No. 9026SC799	Mecklenburg (89CRS27799)	No Error
TABANO v. MIDGETT No. 901SC826	Dare (87CVS446)	Dismissed
VANNOY v. HIATT No. 8923SC1211	Ashe (88CVS210)	Affirmed
VINSON v. SUMMERLIN No. 903DC186	Carteret (88CVD1069)	Affirmed
WARD v. ROY H. PARK BROADCASTING CO. No. 903SC179	Pitt (86CVS2243)	Affirmed

WATKINS, INC. v. SALEM CYCLES, INC. No. 9021SC469	Forsyth (89CVS3491)	Appeal Dismissed
WATSON v. JOHNSON No. 9010DC367	Wake (87CVD7870)	Affirmed

ALTON RAY MOZINGO, JR., BY HIS GUARDIAN AD LITEM, ALLEN G. THOMAS; AND ALTON RAY MOZINGO v. PITT COUNTY MEMORIAL HOSPITAL, INC., MELINDA WARREN, RICHARD JOHN KAZIOR

No. 903SC438

(Filed 19 February 1991)

1. **Appeal and Error § 329 (NCI4th); Rules of Civil Procedure § 56.3 (NCI3d) — malpractice action — contract between medical school and doctor's employer — consideration by court on appeal proper**

There was no merit to plaintiffs' argument that the court on appeal should not consider the terms of the contract between East Carolina Medical School and defendant doctor's employer because the contract was not made a part of the record on appeal and because the defendant had no knowledge of the terms of the contract since the terms of the contract were a part of the record because defendant testified to them in an affidavit which was made a part of the record, and there were no timely objections to defendant's affidavit on the ground of a lack of personal knowledge or upon the possible ground that the defendant's affidavit violated the best evidence rule.

Am Jur 2d, Appeal and Error §§ 429, 528.

2. **Physicians, Surgeons, and Allied Professions § 11 (NCI3d) — malpractice action — no physician-patient relationship — consensual relationship requirement not waived**

In an action to recover for medical malpractice where plaintiff alleged that defendant was negligent in his care and case management of plaintiff's wife's labor and delivery, plaintiff failed to show a physician-patient relationship from which a duty of care arose where the evidence tended to show that defendant was employed by a company to provide supervision for residents in the East Carolina Medical School; defendant, plaintiff, and plaintiff's wife had no contact prior to delivery of the minor plaintiff; the only contact they had took place after any negligence was alleged to have occurred; and the circumstances of this case were not such that the consensual

relationship requirement was deemed to have been waived by defendant.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 158.

3. Physicians, Surgeons, and Allied Professions § 11 (NCI3d)—malpractice action—consensual physician-patient relationship absent—duty of defendant doctor to injured plaintiff

Defendant doctor failed to prove that he did not owe a duty of care to the minor plaintiff in the absence of a consensual physician-patient relationship where the evidence tended to show that defendant was responsible for the supervision of the residents in the hospital where the minor plaintiff was born; he had undertaken a responsibility as an employee of a private medical practice group to render supervisory medical services to the Medical School's residency program and thereby to the residents training under it and, at least indirectly, to the patients under the residents' care; such supervision was necessary for the protection of patients receiving care under the Medical School's residency program; defendant was in such a position that if a person of "ordinary sense" were to think about the circumstances, the person would at once recognize that if the defendant were to fail to use the amount of care required of him for the proper supervision of the residents, he would cause danger of injury to the patients under the care of the residents; and although the imposition of a duty upon physicians such as the defendant may have negative consequences for the community, these potential consequences do not outweigh the policy of preventing harm to patients arising from supervision of residents by physicians like defendant.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286, 299.

4. Physicians, Surgeons, and Allied Professions § 17 (NCI3d)—malpractice—failure to show standard of care—failure to demonstrate standard not breached

In a medical malpractice action defendant failed to demonstrate the applicable standard of care owed to the minor plaintiff and failed to demonstrate that defendant did not breach that standard, though defendant offered affidavits of doctors

who averred that they were familiar with standards for supervision of interns and residents at three hospitals other than the one in which the alleged injury occurred, but none of the doctors averred that they were familiar with the standards of practice among members of the same health care profession with similar training and experience to that of the defendant situated in Pitt County or a similar community at the time of the alleged negligence giving rise to this suit; furthermore, while defendant averred that he acted according to his contractual duty with his employer, none of the affiants averred that defendant acted in accordance with the appropriate standard of care.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 354, 356.

Malpractice testimony: Competency of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality. 37 ALR3d 420.

Judge ORR dissenting.

APPEAL by plaintiffs from order filed 27 March 1990 in PITT County Superior Court by *Judge William C. Griffin, Jr.* Heard in the Court of Appeals 28 November 1990.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford and Elizabeth B. McKinney, for plaintiff-appellants.

Young, Moore, Henderson & Alvis, P.A., by Jerry S. Alvis, for defendant-appellee Kazior.

GREENE, Judge.

The plaintiffs appeal the trial court's order filed 27 March 1990 granting the defendant's motion for summary judgment.

Viewed in the light most favorable to the plaintiffs, Alton Ray Mozingo, Jr. [Mozingo, Jr.] and his father, the evidence tends to show the following: At some time before 2:00 p.m. on 5 December 1984, Sandra Dee Mozingo [Mozingo] was admitted to Pitt County Memorial Hospital [Hospital] for the delivery of her second child, Mozingo, Jr. She received medical care from the residents and

nurses at the Hospital. At the time of her admission Mozingo did not have a private physician.

The Hospital was the teaching hospital for the East Carolina University Medical School [Medical School]. The residents who rendered care to Mozingo were licensed physicians undergoing post-graduate specialty training in obstetrics at the Hospital under the Medical School's residency program. This residency program at the Hospital under which the residents trained was conducted by the Medical School. To provide supervision for the residents, the Medical School contracted with Eastern OB/GYN Associates [Eastern], a private medical practice group in Greenville, North Carolina. Under their contract, Eastern agreed to provide its own physicians for "on call" supervision of the residents training under the residency program. The contract stated that Eastern's employee-physicians could provide supervision by remaining at home during "on call" hours so long as the physicians were immediately available by telephone to respond to the chief resident's requests for assistance regarding obstetric patients admitted to the Hospital. Eastern and the Medical School entered into this contract before Eastern hired Dr. Richard Kazior [defendant] as one of its physicians.

On 5 December 1984, the defendant was a physician employed by Eastern. While the defendant had unrestricted privileges at the Hospital as a "staff physician," he was not employed by either the Hospital or the Medical School. As one of Eastern's physicians, the defendant supervised residents at the Hospital pursuant to Eastern's contract with the Medical School. At 5:00 p.m. on 5 December 1984, the defendant came "on call." By stipulation, the defendant admitted that "he was the Attending Physician on Call for the OB/GYN Service of Pitt County Memorial Hospital with the responsibility for supervision of the OB/GYN residents and interns at the time of the birth of Alton Ray Mozingo, Jr."

After coming "on call," the defendant remained at his home with an open telephone line. The defendant lived approximately two miles from the Hospital. At some time in the early evening, the residents providing care to Mozingo began experiencing difficulties in Mozingo's delivery. One of the residents, Dr. Melinda Warren, telephoned the defendant and informed him that they had encountered a birthing problem called shoulder dystocia. According to the defendant, a shoulder dystocia occurs when "a shoulder of the infant in process of delivery becomes wedged or stuck in

the pelvic cavity and constitutes an obstacle to the completion of the delivery." Upon receiving the call, the defendant immediately went to the Hospital. However, by the time he arrived, Mozingo had completed her delivery. The defendant's first contact of any kind with Mozingo and the plaintiffs occurred after the delivery. The defendant talked to the Mozingos, observed Mozingo, Jr., and ordered a hemoglobin A one C. The defendant never billed Mozingo or the plaintiffs for any services. The record is silent as to whether Eastern ever billed Mozingo or the plaintiffs for any services.

According to the plaintiffs' expert, Dr. William Dillon, Mozingo "was a known gestational diabetic with extreme obesity and no established estimated fetal weight notwithstanding sonography. As such, there was a known significant risk of a macrosomic baby [a very large baby, weighing over 4,000 grams at birth]. Therefore, there were very significant known risk factors for this pregnancy which included a known significant risk factor of shoulder dystocia." As stated previously, the residents encountered a shoulder dystocia in Mozingo's delivery. Dr. Dillon testified that "this was an extremely severe shoulder dystocia," and that as a result of it, Mozingo, Jr. was born with many disabilities, including but not limited to Erb's palsy and phrenic nerve paralysis.

On 3 December 1987, the plaintiffs filed a complaint against the defendant alleging that the defendant's medical malpractice caused the damages suffered by Mozingo, Jr. *See Bolkhir v. North Carolina State Univ.*, 321 N.C. 706, 713, 365 S.E.2d 898, 902 (1988) (when unemancipated minor is injured by another's negligence, parent has claim for loss of child's services during minority and for medical expenses reasonably necessary to treat minor's injuries). More particularly, the plaintiffs allege that the defendant "was negligent in that he deviated from the legally acceptable standards of practice in his lack of supervision of Defendant Melinda Warren and in that his care and case management of Mrs. Mozingo's labor and delivery failed to meet legally acceptable standards of practice." The defendant answered the complaint and filed a motion for summary judgment on 6 October 1989 supported by four affidavits, the pleadings, and other material obtained during discovery. The plaintiffs responded with a sworn affidavit and the transcript of Dr. Dillon's deposition. The trial court granted summary judgment for the defendant on 29 December 1989 and the plaintiffs filed a notice of appeal. However, the trial court later rescinded its prior order, received into evidence the defendant's stipulation dis-

cussed above, and granted summary judgment in favor of the defendant, which judgment was filed 27 March 1990.

The issues are (I) whether the defendant met his burden of proving that he did not owe Mozingo, Jr. a duty of care (A) arising from a physician-patient relationship or (B) arising absent a physician-patient relationship; and (II) whether the defendant met his burden of proving the applicable standard of care and that his supervision of the residents administering care to Mozingo conformed to the applicable standard of care.

As we have recently stated,

> [s]ummary judgment is proper where there is no genuine issue of any material fact and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c). '[A]n issue is genuine if it can be maintained by substantial evidence. . . . A fact is material if it would establish any material element of a claim or defense.' . . . 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . 'In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party.' . . . The movant 'has the burden of showing at least one of the three grounds justifying summary judgment in his favor: (1) "an essential element of plaintiff's claim is nonexistent . . . (2) plaintiff cannot produce evidence to support an essential element of his claim, or . . . (3) plaintiff cannot surmount an affirmative defense which would bar the claim." '

Raritan River Steel Co. v. Cherry, Bekaert & Holland, 101 N.C. App. 1, 3-4, 398 S.E.2d 889, 890 (1990) (citations omitted). "The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence." *Virginia Elec. and 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). "Once the moving party meets this burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. . . . If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper." *White v. Hunsinger*, 88 N.C. App. 382, 383, 363 S.E.2d 203, 204 (1988) (citation omitted). Summary judgment is such a drastic remedy that it should rarely be granted in negligence cases. *Southern Watch Supply Co. v.*

Regal Chrysler-Plymouth, 69 N.C. App. 164, 165, 316 S.E.2d 318, 319, *disc. rev. denied*, 312 N.C. 496, 322 S.E.2d 560 (1984). This is true because " '[e]ven where there is no substantial dispute as to what occurred, it *usually* remains for the jury to apply the . . . [appropriate standard of care] to the facts of the case.' " *Id.* at 166, 316 S.E.2d at 319 (citation omitted) (emphasis added).

[1] We note initially that the plaintiffs argue in their reply brief that this Court should not consider the terms of the contract between the Medical School and Eastern as testified to by the defendant because the contract was not made a part of the record on appeal and because the defendant has no knowledge of the terms of the contract. We disagree. First, the terms of the contract are a part of the record because the defendant testified to them in an affidavit which has been made a part of the record. Second, although N.C.G.S. § 1A-1, Rule 56(e) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," the "[f]ailure to make a timely objection to the form of affidavits supporting a motion for summary judgment is deemed a waiver of any objections. . . . Technical objections based on G.S. 1A-1, Rule 56(e) are not timely made when they are first raised on appeal." *North Carolina Nat. Bank v. Harwell*, 38 N.C. App. 190, 192, 247 S.E.2d 720, 722 (1978), *disc. rev. denied*, 296 N.C. 410, 267 S.E.2d 656 (1979) (citations omitted). *See also Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729-30 (1988). The record discloses no prior objection to the defendant's affidavit on the grounds of a lack of personal knowledge or upon the possible grounds that the defendant's affidavit testimony violated the best evidence rule. Therefore, because the plaintiffs did not make a timely objection to the defendant's affidavit, they have waived any objection they may have had regarding it.

I

In a medical malpractice case, the plaintiff must prove "that defendant was negligent in his care of plaintiff and that such negligence was the proximate cause of plaintiff's injuries and damage. . . . The defendant physician's negligence must be established by showing the standard of care *owed* to plaintiff and that defendant violated that standard of care." *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985) (citation omitted) (emphasis

added). *See also Wall v. Stout*, 310 N.C. 184, 199, 311 S.E.2d 571, 580 (1984). The proper standard of care is found in N.C.G.S. § 90-21.12 (1990). *See also Wall* at 192-93, 311 S.E.2d at 576-77 ("G.S. 90-21.12 did not abrogate the common law standards of care required of a physician" as set forth "most succinctly" in *Hunt v. Bradshaw*, 242 N.C. 517, 521-22, 88 S.E.2d 762, 765 (1955)).

(A)

Duty Arising From A Physician-Patient Relationship

[2] When a physician and a patient enter into a consensual physician-patient relationship for the provision of medical services, a duty arises requiring the physician to conform to the statutory standard of care. *Galloway v. Lawrence*, 266 N.C. 245, 247, 145 S.E.2d 861, 864 (1966) (duty physician owes patient determined by contract by which physician's services are engaged); *Kennedy v. Parrott*, 243 N.C. 355, 360, 90 S.E.2d 754, 757 (1956) (when person consults physician for treatment, a "status" or "relation" is created as opposed to a contract in the ordinary sense of the term "contract"; nevertheless, the agreement between physician and patient imposes upon physician a duty of care); *Ledford v. Martin*, 87 N.C. App. 88, 91, 359 S.E.2d 505, 507 (1987), *disc. rev. denied*, 321 N.C. 473, 365 S.E.2d 1 (1988), *overruled on other grounds*, 327 N.C. 283, 300-01, 395 S.E.2d 85, 95 (1990) (when obstetrician agrees to treat pregnant woman, obstetrician owes duties to both woman and baby); *Willoughby v. Wilkins*, 65 N.C. App. 626, 631-32, 310 S.E.2d 90, 94 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E.2d 698 (1984) (stating that a physician-patient relationship between physician and patient "must be shown before any duty of care may be imputed to" the physician, Court held that there was sufficient evidence of such relationship where physician "evaluated plaintiff's physical condition and rendered medical advice to her"); 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 158 (1981) (physician-patient relation is consensual; person knowingly seeks physician's assistance and physician knowingly accepts person as patient; relation may result from express or implied contract; relation exists "between the person actually giving the treatment and the patient receiving it"); 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 202 (duty of physician to patient "is predicated by the law on the relation which exists between physician and patient, which, . . . is the result of a consensual transaction, and not necessarily one of contract, and the existence of which is a

question of fact"); *see also* Annotation, *What Constitutes Physician-Patient Relationship For Malpractice Purposes*, 17 A.L.R.4th 132 (1982); *cf. Hiser v. Randolph*, 126 Ariz. 608, 610-12, 617 P.2d 774, 776-78 (Ct. App. 1980), *overruled on other grounds*, 141 Ariz. 597, 688 P.2d 605 (1984) (where physician assented to hospital's bylaws and was paid by the hospital to be an "on call" physician in charge of the hospital's emergency room, "the lack of a consensual physician-patient relationship [between the 'on call' physician and the emergency room patient] before a duty to treat can arise" was waived). Whether the defendant and Mozingo or Mozingo, Jr. established a physician-patient relationship depends upon whether the defendant actually accepted Mozingo or Mozingo, Jr. as patients and undertook to treat them. *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931) ("ultimate test of liability would depend upon whether the physician actually accepted [a] . . . person as a patient and undertook to treat him").

The defendant's evidence shows that the defendant never accepted Mozingo or Mozingo, Jr. as patients or undertook to treat them, and therefore there was no consensual relationship between the defendant and Mozingo or Mozingo, Jr. In his affidavit, the defendant stated that "[a]t no time prior to or during the delivery of Alton Ray Mozingo, Jr., did a physician/patient relationship exist between this affiant and Alton Ray Mozingo, Jr., or either of his parents." The defendant, Mozingo, and the plaintiffs had no contact whatsoever prior to 5 December 1984. In fact, the only contact they had took place *after* any negligence was alleged to have occurred. Furthermore, this case does not present the special circumstances of *Hiser* such that the consensual relationship requirement is deemed to have been waived by the defendant. Because the defendant has shown an absence of a physician-patient relationship, the defendant has shown that an essential element of the plaintiffs' claim does not exist, thereby shifting the burden to the plaintiffs to come forward with evidence establishing the physician-patient relationship. The plaintiffs produced no additional evidence on this issue and therefore have failed to meet their burden in this regard. Accordingly, summary judgment on this issue was appropriate.

(B)

Duty Arising Absent A Physician-Patient Relationship

[3] A duty to meet the statutory standard of care may arise absent a consensual physician-patient relationship. *Cf. Olympic*

Prod. Co. v. Roof Sys., Inc., 88 N.C. App. 315, 322, 363 S.E.2d 367, 371-72, *disc. rev. denied*, 321 N.C. 744, 366 S.E.2d 862 (1988) (negligence action "for failing to exercise reasonable care in inspecting the installation of" a rubber membrane roof). In *Olympic*, this Court stated that while "[a] duty of care may arise out of a contractual relationship," " '[i]t is well settled in North Carolina that privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party.' " *Id.* (quoting *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E.2d 391 (1985)). "The duty of vigilance to prevent injury has its source in the law applicable to human relations rather than in a narrow conception of privity." 57A Am. Jur. 2d *Negligence* § 93 (1989).

"As a general proposition of the law of torts, it is settled that, under certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking." *Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 522, 268 S.E.2d 12, 15, *disc. rev. denied*, 301 N.C. 527, 273 S.E.2d 454 (1980) (citing Restatement (Second) of Torts § 324A (1965)). "This duty to protect third parties from harm arises under circumstances where the party is in a position so that 'anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other.' " *Olympic*, 88 N.C. App. at 323, 363 S.E.2d at 372 (quoting *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 911 (1979)); *see also* Annotation, *Liability of Physician or Surgeon for Injury to Child in Pregnancy and Childbirth Cases*, 99 A.L.R.2d 1398, 1400-03 (1965) (physician's negligence in "[p]redelivery diagnosis and treatment" and during delivery); 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 279 (physician's predelivery negligence and negligence during childbirth may render physician liable to child).

Whether the defendant has placed himself in the position where his supervision of the residents at the Hospital pursuant to his contract with Eastern may be expected to affect the interest of

patients receiving care from the residents, such that tort law will impose upon him the duty to act in such a way that the patients will not be injured by the residents, requires a balancing of various factors by the court. *Ingle*, 71 N.C. App. at 27, 321 S.E.2d at 594. This Court recognized six factors in *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). They include:

> (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

Id. at 406-07, 263 S.E.2d at 318. Another factor in the nonexclusive list of factors is the "extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach . . . ." W. Prosser & W. Keeton, The Law of Torts § 53 at 359 n. 24 (5th ed. 1984); *see also* 57A Am. Jur. 2d *Negligence* § 87 (other factors). Additionally, a duty of care on physicians like the defendant must be consistent with the purpose and spirit of N.C.G.S. §§ 90-21.11 to -21.14 (1990), the medical malpractice act, which is "to decrease the number and severity of medical malpractice claims in an effort to decrease the cost of medical malpractice insurance." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985).

When there is no dispute as to the facts or when only a single inference can be drawn from the evidence, the issue of whether a duty exists is a question of law for the court. *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955) (duty may arise by statute or by operation of law); Restatement (Second) of Torts § 328B(b) (1965) (in negligence action the court must determine whether the facts "give rise to any legal duty"); 57A Am. Jur. 2d *Negligence* § 86 (question of duty is "an issue of law for the court rather than for the jury"). However, when the facts are in dispute or when more than a single inference can be drawn from the evidence, the issue of whether a duty exists is a mixed question of law and fact. The issues of fact must first be resolved by the fact finder, and then whether such facts as found by the fact finder give rise to any legal duty must be resolved by the court. *See* Restatement (Second) of Torts § 328B(b) comment e.

As the facts regarding the issue of duty are not in dispute at this point in the litigation, we conclude from the evidence presented to the trial court with regard to the defendant's motion for summary judgment that the defendant failed to prove that he did not owe a duty of care to Mozingo, Jr. The defendant was responsible on 5 December 1984 for the supervision of the residents at the Hospital. He had undertaken a responsibility as an employee of Eastern to render supervisory medical services to the Medical School's residency program and thereby to the residents training under it and, at least indirectly, to the patients under the residents' care. These residents, though licensed physicians, were still undergoing training in obstetrics, and therefore the Medical School provided these residents with experienced supervision for difficult or problematic cases. Such supervision was thus necessary for the protection of patients, like Mozingo and Mozingo, Jr., receiving care under the Medical School's residency program. On the facts as presented to the trial court, the defendant was in such a position that if a person of "ordinary sense" were to think about the circumstances, the person would at once recognize that if the defendant were to fail to use the amount of care required of him for the proper supervision of the residents, he would cause danger of injury to the patients under the care of the residents. Finally, although the imposition of a duty upon physicians such as the defendant *may* have negative consequences for the community, such as increased medical costs, we are not convinced that these potential consequences outweigh the policy of preventing harm to patients like Mozingo and Mozingo, Jr. arising from the supervision of residents by physicians like the defendant. Because the defendant failed to prove on the evidence presented to the trial court that he did not owe a duty of care to Mozingo, Jr., summary judgment was not appropriate on this issue.

II

[4] The second issue concerns the appropriate standard of care owed, if any, to Mozingo, Jr. by the defendant. In support of his summary judgment motion, the defendant submitted his own affidavit and deposition transcript, and the affidavits of three physicians, Doctors Frank C. Greiss, Robert C. Cefalo, and Charles Hammond. The defendant argues that the affidavits demonstrate the applicable standard of care owed to Mozingo, Jr. and that the defendant did not breach that standard.

When ruling on a motion for summary judgment, a court must "carefully scrutinize" the movant's papers and "resolve all inferences against him." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). For the defendant to prove that essential elements of the plaintiffs' claim do not exist, namely, the standard of care owed to Mozingo, Jr. and its breach, the defendant's affidavits must conclusively show the standard of care and that the defendant did not breach it. To prove this by affidavit, in addition to the requirements of N.C.G.S. § 1A-1, Rule 56(e), an affiant must aver that he is familiar "with the standards of practice among members of the same health care profession with similar training and experience [to that of the defendant] situated in the same or similar communities at the time of the alleged act giving rise to the cause of action," and that the "defendant acted in accordance with those standards . . . ." *See Hunsinger*, 88 N.C. App. at 383-84, 363 S.E.2d at 204 (affiants in support of defendant's motion "averred that they were familiar with the standards of practice" and that defendant acted accordingly); N.C.G.S. § 90-21.12; *see also Wall*, 310 N.C. at 192-93, 311 S.E.2d at 576-77 (applicable standard of care which fully explains "[t]he scope of a physician's duty to his patient" combines "in *one test* the exercise of 'best judgment,' 'reasonable care and diligence' *and* compliance with the 'standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities' ") (emphases in text).

Here, the defendant has not met his burden. Dr. Greiss averred that he was familiar with "the protocol of Bowman Gray School of Medicine in December of 1984 which applied to the supervision of interns and residents in obstetrics at the Bowman Gray School of Medicine . . . ." Dr. Cefalo averred that he was familiar with "the protocol of The North Carolina Memorial Hospital in December of 1984 which applied to the supervision of interns and residents in obstetrics at The North Carolina Memorial Hospital . . . ." Dr. Hammond averred that he was familiar with "the protocol of Duke University Medical Center in December of 1984 which applied to the supervision of interns and residents in obstetrics at Duke University Medical University. . . ." The defendant's affidavit set forth the protocol of the Medical School and Hospital in Pitt County, North Carolina. However, neither the defendant nor the doctors averred that they were familiar with the standards of practice among members of the same health care profession

with similar training and experience to that of the defendant situated in Pitt County or a similar community at the time of the alleged negligence giving rise to this suit. Furthermore, while the defendant averred that he acted according to his contractual duty with Eastern, none of the affiants averred that the defendant acted in accordance with the appropriate standard of care. *See* Annotation, *Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient*, 6 A.L.R.3d 704, 705 (1966) (as a general rule, physicians "may not contract against the effect of their own negligence"). Therefore, because the defendant failed to meet his burden with regard to his motion for summary judgment, genuine issues of material fact exist as to the appropriate standard of care and as to whether the defendant acted in accordance with that standard. Accordingly, the trial court's entry of summary judgment for the defendant is

Reversed and remanded.

Judge PHILLIPS concurs.

Judge ORR dissents.

Judge ORR dissenting.

I respectfully dissent solely on the grounds that my review of the evidence before this Court indicates that defendant did not owe Mozingo, Jr. a duty of care in the absence of a physician-patient relationship. Without establishing a duty of care, there can be no negligence, and therefore, summary judgment in defendant's favor was proper.

While the majority's recitation of the law on this issue is correct, I do not agree that "defendant failed to prove that he did not owe a duty of care to Mozingo, Jr." I find that defendant provided sufficient evidence that he did not owe such duty to Mozingo, Jr., and further find that Mozingo, Jr. did nothing to rebut defendant's evidence on this issue.

> The determination of any question of duty—that is, whether the defendant stands in such a relation to the plaintiff that the law will impose upon him an obligation of reasonable conduct for the benefit of the plaintiff—has been held to be an issue of law for the court rather than for the jury, to be

> determined by reference to the body of statutes, rules, principles, and precedents which make up the law. . . . the evidence and scope or range of the duty . . . . [O]nce a duty has been found to exist, the question of whether the duty was properly performed is ordinarily a question to be decided by the trier of fact, ...

57A Am. Jur. 2d *Negligence* § 86.

The undisputed evidence of record regarding defendant's alleged duty establishes that defendant, as an employee of Eastern, met all of his contractual obligations to provide supervision to the Medical School's residency program. Defendant began his "on call" supervision duties pursuant to the contract at 5:00 p.m. on 5 December 1984. He remained at home (as he was permitted to do under the contract) with an open telephone line. Immediately upon receiving the request for assistance from Dr. Melinda Warren, defendant went to the hospital to assist the resident physicians in Mozingo, Jr.'s delivery. By the time he arrived, the baby had been delivered.

Dr. William Dillon, M.D., an expert physician, testifying for plaintiff, stated in his deposition that "it was incumbent upon the chief resident to inform the staff physician of the presence of this patient." Dr. Dillon was speaking in terms of informing the staff physician (defendant) at the time the patient was admitted to the hospital. It is undisputed that the patient was admitted to the hospital before 5:00 p.m., but that defendant was not notified of such until he received the call at his home later in the evening.

Dr. Dillon later contradicted himself on this point when he stated:

> Therefore, I think in at least a minimum sense a supervising physician needs to make contact sometimes, preferably at the beginning [of his on call service], and maybe a few times in between, as to what is occurring on his service.

Dr. Dillon testified as to his opinion on what the supervising physician should do. However, the defendant was not required by the contract under which he worked nor was the accepted practice at *all* of the teaching hospitals in North Carolina any different from what he in fact did. We find no evidence that defendant in any way breached his contract for providing on call services on 5 December 1984, or acted or failed to act in a manner which would establish a duty of care under the facts of this case. While

defendant could have called the residents on duty at the hospital at the beginning of his on call service, he was under no obligation to do so, pursuant to the contract or otherwise, and as such no duty existed as a matter of law to the plaintiff Mozingo, Jr.

I therefore dissent, and would hold that the trial court did not err in granting summary judgment in defendants' favor.

STATE OF NORTH CAROLINA v. ALVIN WESLEY WHITE

No. 9018SC471

(Filed 19 February 1991)

1. **Rape and Allied Offenses § 4.1 (NCI3d)— rape and first degree sexual offense—evidence of prior rape—admissible as to identity**

The trial court did not err in a prosecution for rape, first degree sexual offense, and robbery with a dangerous weapon by admitting evidence of a prior rape of another victim as evidence of identity where defendant remarked in his opening statement that the evidence would show that this was a case of mistaken identification and also indicated during cross-examination of the victim that he was establishing a defense of mistaken identification; the trial court's conclusion that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice was supported by the order in which defendant committed the various acts in each case, the manner in which he committed them, his order to both victims to "put it in," the duration of actual intercourse, defendant's preoccupation with removing his fingerprints in both cases, and the temporal proximity of the offenses; and, although defendant did not raise a constitutional issue of fairness at trial, the Supreme Court has held in *State v. Shamsid-Deen*, 324 N.C. 437, that such constitutional claims are the rationale behind N.C.G.S. § 8C-1, Rule 404, and that if the evidence is properly admitted under that rule, there has been no constitutional violation. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Rape § 71.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

2. **Rape and Allied Offenses § 6 (NCI3d)— rape and first degree sexual offense—use of deadly weapon—instructions**

The trial court did not err in a prosecution for rape and first degree sexual offense by instructing the jury that "a weapon has been employed within the meaning of the law when defendant has it in his possession at the time of the crime . . . ." As construed by the Supreme Court in *State v. Langford*, 319 N.C. 332, 340, a defendant has employed a knife as that term is used in N.C.G.S. § 14-27.2 when he possessed a knife during the commission of a rape. The Supreme Court did not create a presumption, but rather established a definition for a statutory term; furthermore, there was no error in the trial court's instruction as to either first degree rape or first degree sexual offense since the language regarding display or employment of a deadly weapon is identical in both statutes. N.C.G.S. § 14-27.4.

Am Jur 2d, Rape §§ 2, 4.

3. **Rape and Allied Offenses § 1 (NCI3d)— first degree sexual offense—analingus—elements of offense**

The trial court did not err by denying defendant's motion to dismiss a first degree sexual offense count based on analingus. A penetration by the penis is not an element of analingus, and analingus does not require penetration by the tongue, but requires only the stimulation of the anal opening by the tongue or lips. N.C.G.S. § 14-27.1(4).

Am Jur 2d, Sodomy § 23.

Judge PHILLIPS concurs in the result only.

APPEAL by defendant from judgments entered 30 November 1989 in GUILFORD County Superior Court by *Judge Thomas W. Ross*. Heard in the Court of Appeals 14 November 1990.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

GREENE, Judge.

Defendant was indicted on 7 August 1989 for one count of rape, one count of robbery with a dangerous weapon, and two counts of first-degree sex offense. Trial before a jury was held 27 November 1989, and defendant was found guilty of all charges. Defendant appeals from judgments entered 30 November 1989, sentencing him to a life sentence for the two sex offenses, a concurrent life sentence for rape, and a consecutive forty-year sentence for armed robbery.

The State's evidence introduced at trial tends to show that the victim in this case, Ms. Byrd, was alone in her apartment on 6 July 1989. At approximately 3:30 p.m. there was a knock at her door. At her door, she found an individual she identified at trial as the defendant.

The victim testified that the defendant represented himself as a person who had been assigned to inspect a recent repainting of the victim's apartment. Defendant went from room to room in the apartment, followed by the victim, allegedly to inspect the paint. When they reached the bathroom, the defendant closed the door and told the victim to remove her clothes. The victim told defendant to stop playing, and he told her that he wasn't playing and that if she didn't take her clothes off he would kill her. At the same time, defendant was unzipping his pants. Defendant then produced a brown-handled steak knife from his pocket. The victim tried to get by defendant and he put the knife to her neck and told her to shut up. The victim screamed, and defendant put down the knife. He placed his right hand over the victim's mouth and nose, and put his left arm around her neck. Unable to breathe, the victim lost consciousness.

When the victim regained consciousness, she was on her knees at the bathtub. She noticed that her clothes were partially unbuttoned. Defendant again told her to take off her clothes. He then grabbed the victim's clothes and pulled her up from the floor. Defendant then dragged the victim through the apartment, closing and locking the doors. The victim was held facing away from the defendant during this time, and each time she tried to look at him he struck her.

After locking the back and front doors to the apartment, defendant dragged the victim back to one of the bedrooms, again

instructing her to take off her clothes. When the victim refused, defendant removed the victim's clothes himself. During this time, the victim began struggling with defendant again. Defendant knocked her to her knees and again told her to shut up. The victim began to get up and defendant told her to stay on her knees. Defendant then "told me to feel him, and I wouldn't feel him." The victim tried to look at the defendant and he told her to turn around and to not look at him. Defendant had by this time unzipped his pants again and pulled them down, "and then he told me to put it in." The victim refused and again tried to look at the defendant. Defendant then struck the victim in the back of the head. They began struggling, the victim trying to get up and the defendant trying to keep her on her knees. The victim stopped fighting back, "and he told me to suck his dick." The victim refused and the defendant "started having oral sex with me from the back, because I was on my knees." The defendant "licked my rectum, my anus, and then went down to my vagina." The victim then noticed a dumbbell on the floor nearby, and was able to gain control of it. Defendant noticed this move and said, "Bitch, you think you're smart. I ought to kill you right now." Defendant then struck the victim in her head and back. He again placed the knife to the victim's neck and began dragging her down the hall to another bedroom.

As they entered the second bedroom, defendant closed the door and tried to get the victim on her knees again. She refused, and the defendant made the victim lie on the floor on her back. The defendant again had oral sex with the victim. He then raped the victim, and had intercourse for a period of approximately two minutes.

Afterward, defendant went to the victim's dresser there in the bedroom and removed a number of pieces of jewelry. Defendant then forced the victim to walk with him back through the apartment. The victim's purse was on the sofa, and the defendant removed the victim's cash from the purse. He then told the victim he wanted a drink of water. They went into the kitchen and the victim put some ice and water into a glass and tried to hand it to the defendant. Defendant said, "No, you hold the glass." When the victim refused, defendant took a dishtowel from the handle of the refrigerator, placed it around the glass, then drank the water. After drinking the water, he took the towel from around

the glass and walked to the front door and wiped the doorknob with the towel. He did the same to the back door, then left.

On cross-examination of the victim, the defendant elicited the following:

> Q And your assailant, you said, you testified was behind you most of the time, correct?
>
> A Yes.
>
> Q And you said the person told you not to look at you (sic), correct?
>
> A Right.
>
> Q So you didn't look at the person did you?
>
> A No, not when the act was taking place.
>
> Q And once you say you were assaulted, you were highly upset, correct?
>
> A Yes.
>
> Q And you were under a lot of stress, right?
>
> A Yes.

The State offered the testimony of a witness, Ms. Coleman, who would testify that the defendant had raped her on 3 July 1989. Upon objection to this evidence by defendant, the State argued the evidence was admissible under Rule 404(b) of the North Carolina Rules of Evidence as proof of identity, *modus operandi*, and intent. After a *voir dire* examination, the trial court announced in open court its findings of fact and conclusions of law. The court ordered the evidence was admissible to prove identity under Rule 404(b), and that the evidence was also admissible under the balancing test of Rule 403. Ms. Coleman was allowed to testify.

Ms. Coleman testified that she was working alone in the basement of a college library on 3 July 1989 when, at approximately 3:00 p.m., she heard a loud thump. She looked up toward the door to her office and saw a man running into the office. She identified this man as the defendant at trial.

Ms. Coleman testified that she jumped up from her desk and started running and screaming. The defendant caught her, and, while standing behind her, put a hand over her mouth and his

other arm around her chest and neck. When Ms. Coleman attempted to scream, the defendant told her to "shut up" and said, "See, I have this knife. I don't want to hurt you." The defendant then ordered Ms. Coleman to get on the floor, face down. He then sat on top of her and after a couple of minutes he said, "Take off your panties and your stockings." When Ms. Coleman made no effort to comply, the defendant began removing her clothes. The defendant then sat on top of her again, and "less than a minute later, I felt him trying to penetrate me anally." When he was unsuccessful, the defendant ordered Ms. Coleman to get on her knees and perform fellatio on the defendant. He then "took my hand and put it around his penis and put it in my mouth." After a few seconds, the defendant told Ms. Coleman to get back on the floor face down. He made another unsuccessful attempt at penetration, then said, "Turn over on your back." When Ms. Coleman turned over, the defendant said, "And you put it in." He then "took my hand and put it around his penis and he told me, 'You put it in.' " Ms. Coleman complied, and defendant "moved around on top of me for a minute or so." Then the defendant said, "I don't want anything to go in you, so I'm going to get up now." The defendant got up, pulled up his pants, picked up his knife from the floor, and told Ms. Coleman to put her clothes back on. The defendant, referring to a bag on the floor beside Ms. Coleman's desk, asked her if the bag was hers. She said that it was and the defendant began searching through it. He asked Ms. Coleman where her money was and she told him she didn't have any. The defendant then produced a piece of cloth, from somewhere, and wiped off the bag. He again asked Ms. Coleman where she kept her money and she pointed to her pocketbook on the other side of the room. The defendant searched the pocketbook and did not find any money. He then said, "Give me your rings." Ms. Coleman gave her rings to the defendant, then "he again wiped off my bag, and he was just wiping off anything—apparently anything that looked like he touched." He made Ms. Coleman escort him to the door to the office and said, "Don't do anything. I don't want to blow my way out of here." He then left.

At the close of the State's case, the defendant's motion to dismiss all charges was denied. No evidence was offered by the defendant.

The charge of sex offense and rape, both in the first degree, went to the jury on the theory that the defendant had employed

or displayed a deadly weapon. In its instructions to the jury, the trial court stated:

> The state must prove beyond a reasonable doubt that the defendant employed or displayed a dangerous or deadly weapon, in that connection, with respect to the employment and/or display of a deadly weapon, I instruct you that the law does not require a showing that the dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape. Further, I instruct you that a weapon has been employed within the meaning of the law when the defendant has it in his possession at the time of the crime. . . .

The issues are: (I) whether the trial court erred in admitting the evidence of defendant's prior act of sexual misconduct; (II) whether the trial court committed plain error in its instruction to the jury regarding the use or employment of a deadly weapon for purposes of first-degree sex offense and first-degree rape; and (III) whether the trial court erred in denying defendant's motion to dismiss one count of sex offense due to insufficient evidence.

I

[1] After a *voir dire* examination of Ms. Coleman, the trial court found sufficient similarities between the events concerning her and those concerning Ms. Byrd in the present case to allow Ms. Coleman's testimony under Rule 404(b) of the North Carolina Rules of Evidence as evidence of the defendant's identity, a material fact in issue. Defendant first argues this admission was made in error.

Rule 404(b)

Rule 404(b) provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.R. Evid. 404(b) (1988).

The preliminary issue to be addressed by the trial court when determining the admissibility of evidence under Rule 404(b) is whether the evidence is in fact being offered pursuant to that rule. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). Here, the State was clear in informing the trial court that Ms. Coleman's testimony was being offered pursuant to Rule 404(b). Specifically, the State offered during the direct examination of Ms. Coleman extrinsic evidence of prior conduct of the defendant to prove identity, *modus operandi*, and intent. Thus, the trial court properly concluded the admissibility of the evidence was to be analyzed initially under Rule 404(b).

After determining the evidence is offered pursuant to Rule 404(b), the court must then determine the relevancy of the evidence, if any. *Morgan* at 637, 340 S.E.2d at 91. Extrinsic evidence of conduct is admissible under Rule 404(b) so long as it is relevant for a purpose other than to show the defendant has the propensity to engage in the type of conduct charged. *Id.*

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.C.R. Evid. 401 (1988).

Here, the trial court admitted the evidence as proof of identity of the perpetrator. When evidence reasonably tends to prove a material fact in issue in the crime charged, it will not be rejected merely because it also proves defendant guilty of another crime. *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). "In a criminal case, the identity of the perpetrator of the crime charged is always a material fact." *Jeter* at 458, 389 S.E.2d at 806; *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1990). However, identity is not always in issue. *Johnson* at 425, 347 S.E.2d at 12. Therefore, before identity evidence is admissible under Rule 404(b), there must be a determination of whether the identity of the perpetrator is at issue. *See State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied, Bagley v. North Carolina*, 485 U.S. 1036, 108 S. Ct. 1598 (1988) (evidence of subsequent offense not admissible to prove identity where identity is not at issue); *State v. Thomas*, 310 N.C. 369, 312 S.E.2d 458 (1984) (identity put in issue, as required, where defendant relied upon alibi defense); *State v. McKoy*, 78 N.C. App. 531, 337 S.E.2d 666 (1985), *rev'd on other grounds*, 317 N.C. 519,

347 S.E.2d 374 (1986) ("issue on which the evidence of other crimes is said to bear should be subject of genuine controversy"); *Lovely v. U.S.*, 169 F.2d 386 (4th Cir. 1948) (evidence of another rape not admissible where defendant admitted intercourse and based defense solely on consent); Weinstein's Evidence § 404[15] ("[i]f there is no issue as to defendant's identity because defendant admits committing the act, then the other crime evidence should not be admissible on this theory").

Though Ms. Byrd positively identified the defendant as the perpetrator at trial, the defendant, in his opening statement, remarked that "the evidence will show that this is a case of mistaken identification." This remark is sufficient to make identity a material fact in issue, which meets the relevancy requirements of Rule 404(b). *See* Weinstein's Evidence § 404[09] ("[c]ertainly, where it is apparent, e.g. from the opening statement . . . that a certain consequential fact will be in issue, the appellate courts have refused to find error in the admission of other crimes evidence as part of the government's direct case"). Furthermore, the defendant's cross-examination of the victim regarding the fact the defendant was behind the victim most of the time during the commission of the offenses, and regarding the fact the victim was upset and under stress, also indicate the defendant was establishing a defense of mistaken identification. Thus, based on defendant's theory of defense, as manifested at trial by defendant's opening statement and cross-examination of Ms. Byrd, the identity of the perpetrator was at the heart of this case. Ms. Coleman's testimony therefore qualifies under Rule 404(b) since it is relevant to a material fact in issue. *See State v. Freeman*, 303 N.C. 299, 302, 278 S.E.2d 207, 208-09 (1981) (though victim identified defendant at trial, defendant's alibi defense made identity principal issue of case).

Rule 403

After establishing identity is in issue, and therefore relevant under Rule 404(b), the determinative question is whether the evidence meets the mandate of Rule 403. *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990). In part, Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .

N.C.R. Evid. 403 (1988). The defendant argues that the slight probative value of the evidence in this case is substantially outweighed by the unfair prejudice to the defendant.

The question of whether evidence is to be excluded under Rule 403 is a matter left to the sound discretion of the trial court. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). "When the incidents are offered for a proper purpose, the ultimate test of admissibility is 'whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.' " *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385, *disc. rev. denied*, 325 N.C. 435, 384 S.E.2d 545 (1989) (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)). *See also State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987); *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990); *State v. Faircloth*, 99 N.C. App. 685, 394 S.E.2d 198 (1990).

Here, in both offenses the act was committed in the early afternoon, between 3:00 and 4:00 p.m. The victims were found alone in both instances. The defendant held both victims in the same manner, with one hand over the mouth and nose and the other arm over the chest and neck. The defendant repeatedly told both victims to "shut up." Both victims were threatened with a knife. In both instances, the defendant ordered the victim to remove her clothes, and then the defendant removed them when the victim refused to do so. The defendant told both victims to not look at him. The defendant directed both victims to get on their knees facing away from the defendant, and he attempted to penetrate each from a position behind the victim. Immediately after the defendant was unsuccessful in his attempt at penetration, he successfully forced one victim to perform fellatio, and unsuccessfully ordered the other victim to do the same. The defendant ultimately positioned both victims on their back. He ordered both victims to "put it in." The actual intercourse in both instances lasted under two minutes. In both offenses, the defendant searched the victim's pocketbook for cash afterward. He took jewelry from both victims. In both instances, the defendant used a cloth to wipe away any fingerprints he may have left. Finally, both offenses occurred in the city of Greensboro within a three-day period.

The order in which the defendant committed the various acts in each case, the manner in which he committed them, and, par-

ticularly, his order to both victims to "put it in," the duration of actual intercourse, defendant's preoccupation with removing his fingerprints in both cases, and the temporal proximity of the offenses all support the trial court's conclusion that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant. Therefore, the evidence was properly admitted under Rule 403.

Finally, the defendant argues that even if the evidence is admissible under Rules 404(b) and 403, it rendered defendant's trial fundamentally unfair in violation of his state and federal due process rights. We first note that we do not find from the record that the defendant presented this constitutionally based argument at trial. Therefore, the issue may not be raised on appeal. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). *See also State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal"). In any event, our Supreme Court has held that such constitutional claims are the rationale behind Rule 404, and that if the evidence is properly admitted under it, there has been no constitutional violation. *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989).

II

[2] The defendant next argues that the trial court erred in its jury instructions regarding the employment or display of a deadly weapon as it pertains to the offenses of first-degree rape and first-degree sex offense.

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. *Employs* or displays a dangerous or deadly weapon. . . .

N.C.G.S. § 14-27.2(a)(2)a (1986) (emphasis added).

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> . . . .

(2) With another person by force and against the will of the other person, and:

a. *Employs* or displays a dangerous or deadly weapon. . . .

N.C.G.S. § 14-27.4(a)(2)a (1986) (emphasis added).

Specifically, the defendant contends the erroneous portion of the instruction provided that "a weapon has been employed within the meaning of the law when the defendant has it in his possession at the time of the crime . . . ." Defendant contends this instruction reduced the State's burden of proof, and therefore violated his state and federal due process rights, because it created a mandatory conclusive presumption such that if the jury found that defendant possessed a weapon, it must conclude that the weapon was used or employed, an element necessary to prove the offenses. We disagree.

Our Supreme Court has held as follows:

> The statute, N.C.G.S. § 14-27.2, does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape. Instead it requires a showing only that such a weapon was "employed or displayed." Further, such a weapon has been "employed" within the meaning of N.C.G.S. § 14-27.2 when the defendant has it in his possession at the time of the rape.

State v. Langford, 319 N.C. 332, 344, 354 S.E.2d 525-26 (1987) (citations omitted).

Under N.C.G.S. § 14-27.2, as it has been construed by the Supreme Court, when a defendant possesses a knife during the commission of a rape, he has "employed" the knife as that term is used in the statute. The Supreme Court did not create a presumption, but rather established a definition for a statutory term. Furthermore, since the language regarding the employment or display of a deadly weapon during the commission of first-degree sex offense under N.C.G.S. § 14-27.4 is identical to the same language in N.C.G.S. § 14-27.2, pertaining to first-degree rape, we find no error in the trial court's instruction as to either offense.

III

[3] Defendant finally argues the trial court erred in denying his motion to dismiss the count of first-degree sex offense based on the commission of analingus. One of the elements of first-degree sex offense is that the defendant engage in a "sexual act." N.C.G.S. § 14-27.4 (1986). A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse . . . [or] the penetration, however slight, by any object into the genital or anal opening of another person's body. . . ." N.C.G.S. § 14-27.1(4) (1986). Defendant notes that analingus is not defined by statute and argues that the offense requires evidence of penetration, which was not established by the State at trial. Defendant is not clear in his argument as to whether he contends that analingus requires penetration by the penis or by the tongue.

In interpreting and construing statutes the Court must seek the legislative intent behind the statute. *State v. Lucas*, 302 N.C. 342, 275 S.E.2d 433 (1981). The legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant. *State v. Williams*, 286 N.C. 422, 212 S.E.2d 113 (1975).

The term "anal intercourse," as it is used in N.C.G.S. § 14-27.1(4), has been construed as requiring "penetration of the anal opening of the victim by the penis of the male." *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986). To require the same for "analingus" would make that term ineffective and redundant within the statutory scheme of N.C.G.S. § 14-27.1(4). We determine that penetration by the penis is not an element of "analingus."

In *State v. Ludlum*, 303 N.C. 666, 672, 281 S.E.2d 159, 162 (1981), our Supreme Court noted that N.C.G.S. § 14-27.1(4) also includes as a sexual act "the penetration, however slight, by any object into the genital or anal opening. . . ." The Court then stated:

> If the legislature intended cunnilingus to require penetration by the lips or tongue, then its inclusion in the statute as a form of sexual act would have been superfluous because, the lips or tongue being themselves objects, the act would have been prohibited under the clause dealing specifically with penetrations.

Id. The Court concluded that the legislature intended cunnilingus to mean "stimulation by the tongue or lips of any part of a woman's genitalia." *Id.*

We find the *Ludlum* Court's analysis applicable to "analingus" as well because the portion of N.C.G.S. § 14-27.1(4) relied upon by the Court includes "the penetration . . . by any object into the . . . anal opening . . . ." Accordingly, "analingus" does not require penetration by the tongue, but requires only the stimulation of the anal opening by the tongue or lips.

The trial court therefore properly denied the defendant's motion to dismiss the count of first-degree sexual offense based on the commission of analingus.

No error.

Judge ORR concurs.

Judge PHILLIPS concurs in the result only.

CUSTOM MOLDERS, INC. v. ROPER CORPORATION

No. 8814SC1423

(Filed 19 February 1991)

1. Appeal and Error § 205 (NCI4th)— appeal filed same day written judgment filed—timeliness

Defendant's appeal, filed the same day the written judgment was filed, was timely, since no judgment had been entered in open court when the verdict was received because the court had to first determine whether judgment was going to be entered on the breach of contract or the unfair trade practices verdict; the parties stipulated that judgment could be entered later "out of session" and out of county and a hearing therefor was scheduled; at the hearing the court allowed plaintiff's motion for judgment on the unfair trade practices claim, but the parties and the court agreed that there had been no entry of judgment and there would be none until the attorneys' fee question was resolved; the judge subsequently mailed the

parties a letter stating that he had determined to assess attorneys' fees against defendant in a stated amount; and approximately five weeks later, the judge was again in the Durham Superior Court and signed the judgment at that time.

Am Jur 2d, Appeal and Error §§ 302, 303.

2. Contracts § 142 (NCI4th); Uniform Commercial Code § 8 (NCI3d)— oral contract to purchase parts from plaintiff— sufficiency of evidence of existence of contract

The jury's finding that defendant lawn mower manufacturer contracted to purchase all its requirements for specially designed footrest pads from plaintiff as long as quality parts were delivered at competitive prices was supported by competent evidence, including an admission taken from an answer to plaintiff's amended complaint that defendant filed in U.S. District Court while the case was temporarily there, testimony as to oral agreements, and testimony as to the course of conduct between the parties; none of the evidence was barred by the parol evidence rule because the evidence did not show that any document or documents signed by the parties contained all the terms that were agreed to; and none of the evidence was barred by the U.C.C. because under it a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct which indicates the existence of such a contract.

Am Jur 2d, Sales §§ 74-77, 317, 319.

3. Unfair Competition § 1 (NCI3d)— contract to purchase specially designed part from plaintiff—business given to another supplier—unfair and deceptive trade practice

Evidence of defendant's deceit in promising to buy all its requirements for specially designed footrest pads from plaintiff and then secretly giving its business to another supplier was sufficient to support the trial court's conclusion that defendant committed an unfair and deceptive trade practice.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

4. **Attorneys at Law § 64 (NCI4th)— unfair and deceptive trade practice—award of attorney fees proper**

There was no merit to defendant's contention that the trial court erred in awarding plaintiff attorney fees because there was no showing that defendant willfully engaged in the forbidden practice and that its refusal to settle the case was unwarranted.

Am Jur 2d, Damages § 616.

Judge WELLS concurring.

Judge PARKER dissenting.

APPEAL by defendant from judgment and order entered 26 May 1988 and by plaintiff from order entered 8 December 1988 by *Judge J. Milton Read, Jr.* in DURHAM County Superior Court. Heard in the Court of Appeals 24 August 1989.

Defendant's appeal is from the judgment entered against it following the trial of this action for breach of contract and unfair trade practices. Plaintiff's appeal is from the denial of its motion to dismiss defendant's appeal.

In pertinent part, when viewed in its most favorable light for plaintiff, the evidence presented at trial tends to show the following: At its Orangeburg, S. C. plant defendant, an Illinois corporation, was manufacturing riding lawn mowers which Sears Roebuck & Company marketed under its Craftsman label. For several years at its Durham, N. C. manufacturing and research facility plaintiff, a North Carolina corporation, had been producing high quality plastic parts of various kinds for IBM, Ford Motor Company, General Motors and other large corporations. In the spring of 1984 defendant was redesigning its riding lawn mower and was under pressure from Sears to get it into production in time for the approaching winter retail shopping season. One holdup to production was that defendant had been trying without success to develop a plastic footrest pad for the machine that looked like rubber and would stick to the metal surface of the lawn mower. After learning of plaintiff's extensive experience in developing and producing plastic parts and adhesives one of defendant's executives in Chicago contacted plaintiff in Durham about developing and producing such a pad for it in time for deliveries to be made to Sears in the fall. Before plaintiff or any other plastics manufacturer could

produce plastic parts of the same dimensions and fitness by injection molding, a process used by the industry, a mold to manufacture the parts had to be designed and manufactured at considerable cost in both time and money; and plaintiff indicated that it could and would develop and produce the pads defendant desired within Sears' deadline if defendant agreed, in pertinent part, to buy from it all the pads so designed that it thereafter needed if plaintiff timely delivered pads of good quality and met the price of competitors after receiving notice of lower bids. Following additional discussions, correspondence and telephone conversations between executives for the parties, plaintiff's terms were orally agreed to, and plaintiff designed and manufactured the mold and footrest pads needed to get defendant's lawn mower in production that fall and continued to provide defendant with high quality parts for its lawn mowers until October, 1985. At that time, without giving plaintiff an opportunity to meet a competitor's lower bid, defendant terminated the agreement and began buying pads from another supplier at a lower price.

Plaintiff sued for breach of contract, and based upon information elicited during discovery was later permitted to file an amended complaint alleging, *inter alia*, a claim for unfair and deceptive trade practices under G.S. 75-1.1 in that defendant deceitfully induced plaintiff to meet its emergent needs by agreeing to buy all its requirements for footpads so developed from plaintiff when it intended not to abide by the agreement. No answer to these allegations by defendant is in the record that defendant filed here. In the trial, following their consideration of evidence that supported all the issues submitted, the jury found as follows:

> Defendant contracted to purchase its total requirements for footrest pads from the plaintiff.
>
> Defendant breached that contract.
>
> Because of the breach plaintiff has been damaged in the amount of $249,016.
>
> None of the damages so sustained could have been avoided by plaintiff.
>
> Defendant, by and through its employees and agents, represented to plaintiff that it would purchase its total requirements for footrest pads from plaintiff in order to obtain research and development labor and timely production of parts

from plaintiff when it did not intend to be bound by its representation.

Defendant, by and through its employees and agents, acted in bad faith in ending its contract with plaintiff.

Plaintiff was injured as a proximate result of defendant's conduct in the amount of $249,016.

None of plaintiff's damages could have been avoided by plaintiff.

Plaintiff elected to forego recovery on the breach of contract claim and moved for judgment on the unfair and deceptive practices claim. Following a hearing and other developments mentioned below, the court, after finding and concluding that defendant's actions were unfair and deceptive under G.S. 75-1.1, trebled plaintiff's damages, and entered judgment against defendant for $747,048 together with interest as allowed by law and attorneys' fees in the amount of $49,000.

Michael D. Calhoun; Glenn, Bentley & Fisher, P.A., by Charles A. Bentley, Jr. and Robert B. Glenn, Jr.; and General Counsel Susie R. Powell, for plaintiff appellant-appellee.

Poyner & Spruill, by J. Phil Carlton and Mary Beth Johnston; and Faison & Brown, by Charles Gordon Brown and M. LeAnn Nease, for defendant appellee-appellant.

PHILLIPS, Judge.

PLAINTIFF'S APPEAL

[1] Since plaintiff's appeal challenges the validity of defendant's appeal, we determine it first. Plaintiff's contention that defendant's notice of appeal, filed the same day the written judgment was filed, was not timely is based upon the premise that entry of judgment was made "in open court" several weeks earlier. The existence or absence of the premise determines the appeal; for under the provisions of Rule 58, N.C. Rules of Civil Procedure, and our Appellate Rule 3 the time for appealing a judgment entered "in open court" starts when the entry is made, whereas, the time for appealing judgments not entered in open court does not begin until the written judgment is filed and the parties are notified. The record establishes that the judgment was not entered in open court and defendant's appeal was timely.

The record shows, in pertinent part, the following: On 1 March 1988 when the verdict was received in open court judgment was not entered since the court had to first determine whether judgment was going to be entered on the breach of contract or the unfair trade practices verdict, and the parties stipulated that judgment could be entered later "out of session" and out of county, and a hearing therefor was scheduled for 21 March 1988. At the scheduled hearing the court allowed plaintiff's motion for judgment on the unfair trade practices verdict and trebled the damages found by the jury, but the court did not rule on plaintiff's motion for attorneys' fees because the hearing ended before defendant's evidence on that issue was completed. The judge had to be elsewhere during the next few weeks and the parties and court agreed that: The issue would be resolved without a further hearing, defendant had until 30 March 1988 within which to mail affidavits and a brief to the judge, and when he determined the matter he would notify the parties either by mail or telephone. During the interchange between counsel and the court it was expressly stated that there had been no entry of judgment and there would be none before the attorneys' fee question was resolved, lest the issue be left in limbo pending the appeal. On 18 April 1988, after defendant's affidavits and brief had been received and considered, the trial judge mailed the parties a letter stating that he had determined to assess attorneys' fees against defendant in the amount of $49,000, and the original of the letter, received by the clerk that day, was filed in the case file. On 26 May 1988 the trial judge was again in the Durham County Superior Court, and signed the judgment at that time.

The foregoing circumstances establish quite plainly that judgment was not entered in the case until the written judgment was filed and that defendant's notice of appeal was not untimely. The argument that entry of judgment was made at the 21 March hearing when the judge determined to enter judgment on the unfair trade practices claim overlooks the court's statement and actions to the contrary. The further argument that entry was made upon the clerk receiving the judge's letter stating that the attorneys' fee issue had been decided is irrelevant; for even if the receipt of the letter by the clerk constituted an entry of judgment, and we do not hold that it was, it was not an entry made in "open court." Under the rules referred to, an "open court" is a court presided over by an authorized member of the judiciary and that, in the

words of the crier, "is open for the dispatch of business." The court that had jurisdiction of this matter was not in session; no judge authorized to preside over it and supervise the dispatch of its business was present. Thus, the order denying plaintiff's motion to dismiss the appeal was correct and we affirm it.

DEFENDANT'S APPEAL

[2] The main question raised by this appeal is whether the jury's finding that defendant contracted to purchase all its requirements for the specially designed footrest pads from plaintiff as long as quality parts were delivered at competitive prices is supported by competent evidence. In overruling defendant's argument that the finding is not so supported, it is unnecessary to state all of the supporting evidence that the 1,500 transcript pages contain. One thing contained is the following admission, taken from an answer to plaintiff's amended complaint that defendant filed in the United States District Court for the Middle District of North Carolina while the case was temporarily there:

> Defendant admits that in 1984 the parties entered into a contract pursuant to terms which the Plaintiff agreed to manufacture, sell, and ship to the Defendant all of the requirements of the Defendant for various goods (including "pad-footrests") and that the Defendant agreed that it would accept delivery of all conforming parts required by it and that the Defendant would pay to the Plaintiff for each part required by the Defendant as shipped to it in a conforming manner . . . .

Much other evidence indicates that the parties orally agreed to a life of the part contract and did not agree to written provisions to the contrary, including the fine print provisions on the back of defendant's purchase order form that purported to authorize defendant to cancel the contract at will and without penalty. Included is evidence that indicates, *inter alia*, that: From the outset plaintiff made plain to defendant both orally and in writing that before undertaking to design and produce the footrest pads, defendant's commitment to buy the parts so designed and produced from it as long as quality parts were timely delivered at competitive prices had to be received; that defendant knew that the conditions insisted upon by plaintiff were customarily required by other plastics manufacturers and defendant gave the manufacturer it got to replace plaintiff substantially the same parts contract that plaintiff demanded; that on several occasions defendant's executives assured plain-

tiff that its conditions would be met if plaintiff proceeded with the project and when a form committing defendant to the terms discussed was not signed and returned as plaintiff requested, defendant's executives assured plaintiff that the form was being reviewed by defendant's legal department and it would be signed in due course; defendant's negotiations with plaintiff as to tooling costs, parts specifications and prices were conducted mostly by telephone and the terms were often complied with before written confirmation was received; and after the arrangement between the parties had continued for a year or more and defendant had secretly transferred the business to a competing supplier, its executive told plaintiff that it would have to reduce its prices if it was to keep the business.

Contrary to defendant's arguments, none of the foregoing evidence was barred by either the parol evidence rule or the Uniform Commercial Code. None of it was barred by the parol evidence rule because the evidence does not show that any document or documents signed by the parties contained all the terms that were agreed to. None of it was barred by the Code because under it a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct that indicates the existence of such a contract. G.S. 25-2-204(1); *Carolina Builders Corporation v. Howard-Veasey Homes, Inc.*, 72 N.C.App. 224, 324 S.E.2d 626, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). Conduct that indicates the existence of their oral contract includes plaintiff's development and manufacture of the mold for defendant's parts after repeatedly saying it would do so only upon defendant's assurance that it would not take the business from plaintiff as long as quality parts were timely delivered at competitive prices; defendant's request that plaintiff devote time and money to its needs knowing plaintiff's expectation that defendant would not summarily and without reason drop plaintiff as a supplier and knowing also that other plastic manufacturers would have the same expectation; defendant's payment of $20,000 for tooling costs that plaintiff required; defendant's telephone requests for quotations and its continued orders for and acceptance of parts; that neither party stood idle awaiting written confirmation of what had been orally stated, but continued to produce, deliver, accept and pay without any signed agreement; and pretending to seek a cost reduction under the contract after having secretly given the business to another supplier.

Nor, as defendant argues, was the contract invalid because it was for all of defendant's footrest pad requirements and not in writing. For the pads, with Sears' "Craftsman" label on them, were specially made for defendant and could not be sold to anyone else, and G.S. 25-2-201(3)(a) provides that contracts for the sale of such specially manufactured goods do not have to be in writing.

[3] Defendant's other major arguments are that the evidence and the jury's findings do not support the court's conclusion that defendant committed an unfair and deceptive trade practice in violation of G.S. 75-1, *et seq.* The arguments for the most part do not address the real issue presented. For their thrust is that a mere promissory representation, a mere breach of contract, a mere change of suppliers, etc., is not an unfair or deceptive trade practice under the law, whereas the judgment is based upon deceit which is universally regarded as an unfair and deceptive trade practice. In *Process Components, Inc. v. Baltimore Aircoil Co., Inc.*, 89 N.C. App. 649, 366 S.E.2d 907, *aff'd per curiam*, 323 N.C. 620, 374 S.E.2d 116 (1988), we held that falsely promising to give plaintiff all of its parts business in the Carolinas and an exclusive distributorship was an unfair and deceptive trade practice in violation of Chapter 75. Defendant's deceit in this case, as found by the jury, was just as unfair and deceptive as that of the defendant in that case.

[4] Nor, as defendant argues, did the court err in awarding plaintiff attorney fees. G.S. 75-16.1 authorized the court to award attorney fees upon findings that defendant willfully engaged in the forbidden practice and that its refusal to settle the case was unwarranted. Despite the jury's finding that defendant deceitfully induced plaintiff into doing research and development for it when it did not intend to keep the promises made, defendant vainly argues that its willfulness has not been shown. As to the finding that its refusal to settle was unwarranted, defendant argues that it has no evidentiary support because plaintiff's only settlement offers were for $324,000 and $275,000, whereas the jury awarded only $249,016, and refusing to settle for more than the jury awarded is not an unwarranted refusal. This argument overlooks two things: First, that on 4 October 1985 before litigation was begun plaintiff offered to settle the entire matter if defendant would merely permit it to manufacture the 74,145 pieces of defendant's part that were ordered on 28 August 1985; second, that the jury's findings of calculated, intentional deceit and bad faith on defendant's part established that defendant knew from the beginning, even if plain-

tiff did not, that it was sitting on or defending an unfair and deceptive trade practice case in which the damages could be trebled. Under the circumstances we cannot say that the court's finding that defendant's refusal to settle was unwarranted is without evidentiary support.

Defendant's other arguments as to the admissibility of evidence, the issues submitted, and the court's instructions have been considered and also found to be without merit.

As to plaintiff's appeal—affirmed.

As to defendant's appeal—no error.

Judge WELLS concurs with separate opinion.

Judge PARKER dissents.

Judge WELLS concurring.

In the breach of contract context, the dispositive issue in this case is whether plaintiff should have been allowed to rely on the oral representations of defendant's employees pertaining to an all-requirements, life-of-the-part commitment, or, whether plaintiff was limited to the written terms of defendant's purchase orders. I am of the opinion that under the provisions of our Uniform Commercial Code, G.S. 25-2-202, plaintiff was not confined to the written terms of the purchase orders.

As to the Unfair Trade Practices claim, if there was evidence from which the jury could reasonably infer that defendant represented to plaintiff that it would give plaintiff all of its footpad business for the Craftsman mower, but never intended to abide by that promise, then this issue was correctly resolved in plaintiff's favor. Although the evidence on this point was only circumstantial, it appears to me that the dealings between these parties over the course of their relationship would allow that inference.

Judge PARKER dissenting.

I respectfully dissent. In my view the trial court should have directed verdict for defendant on the unfair and deceptive trade practices claim. The majority opinion points to no evidence to support a finding that defendant did not intend to purchase all its

footrests requirements from plaintiff at the time the agreement was made. To the contrary the evidence is undisputed that defendant in fact placed orders for August 1984 through September 1985 with plaintiff, and there is no evidence that these orders were not the full requirements for this period. During this period plaintiff implemented a price increase to which defendant agreed. Defendant cancelled the purchase order for the period 1 August 1985 through 31 July 1986 because it had found another supplier who could sell the footrests for $.30 less per pad.

Moreover, the purchase orders are the only paper writings in this record which can satisfy a written contract for purposes of N.C.G.S. § 75-4 requiring that all contracts which limit "the rights of any person to do business anywhere in the State of North Carolina" be in writing. These purchase orders were for the periods 1 August 1984 through 31 July 1985 and 1 August 1985 through 31 July 1986. The purchase orders are sufficient to satisfy the requirements under the Uniform Commercial Code for a contract for the sale of goods, N.C.G.S. §§ 25-2-204 and -207, and to satisfy the requirement for a written contract under N.C.G.S. § 75-4 for a period of one year, but not for the life of the part. Plaintiff's contention is that defendant entered into an oral requirements contract for the life of the part with no intention of fulfilling the contract as evidenced by defendant's contracting with a different supplier after plaintiff increased the price per unit. Plaintiff, therefore, is in essence seeking the benefit of an invalid oral requirements contract for the life of the part to sustain an unfair and deceptive trade practice.

Finally, under N.C.G.S. § 75-1.1, an act is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), and it is deceptive if it "has the capacity or tendency to deceive," *id.* at 265, 266 S.E.2d at 622. Not every breach of contract constitutes an unfair or deceptive trade practice. *See, e.g., Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) ("A simple breach of contract, even if intentional, does not amount to a violation of [N.C.G.S. § 75-1.1]; a plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act . . . ."). Plaintiff's evidence showed that custom and practice in the plastics industry was to demand a life of the part requirements contract so long as the price remained competitive. This life of the part requirement has the potential

to chill the ability to obtain a competitive bid. Under this circumstance I cannot conclude as a matter of law that a purchaser is deceptive, unscrupulous, unethical, or oppressive for looking elsewhere for a more cost efficient supplier when the existing one has raised prices.

Under the evidence in this case, defendant is at most liable for breaching the 1 August 1985 through 31 July 1986 contract. Accordingly, I vote to vacate the judgment for unfair and deceptive trade practices including attorney's fees and to remand for a determination of damages for breach of the 1 August 1985 through 31 July 1986 contract.

JO PERRY BROWNE v. JOSEPH M. BROWNE, JR.

No. 906DC750

(Filed 19 February 1991)

1. **Divorce and Alimony § 24.1 (NCI3d)— child support—hearing on reasonable needs of children and ability of parent to pay—findings**

Any failure by defendant in a child support action to give proper notice of his request that a hearing be conducted was waived because both parties introduced evidence without objection and the trial court heard the evidence. The trial court was required to find facts and enter conclusions on the evidence since a hearing was conducted and evidence was offered, and the court was also required to make findings as to the criteria that justified varying from the guidelines. N.C.G.S. § 50-13.4(c).

Am Jur 2d, Divorce and Separation § 1054.

2. **Divorce and Alimony § 24.1 (NCI3d)— child support—estate of children not considered—no error**

The trial court did not err by refusing to diminish or relieve the father of his obligation to provide for his children in a child support action simply because the children had their own separate estates. The supporting parent who can do so

remains obligated to support his or her minor children, even though they may have property of their own.

Am Jur 2d, Divorce and Separation §§ 1039, 1040.

3. **Divorce and Alimony § 24.1 (NCI3d)— child support—guidelines—health insurance**

The trial court did not enter a child support order consistent with the applicable presumptive guideline then in effect where the guideline at that time was twenty-five percent of defendant's gross income; the trial court correctly calculated that application of the twenty-five percent guideline would require defendant to pay $778 per month as child support; the trial court varied the guideline amount by giving defendant a credit of $182.69 for health insurance maintained by defendant upon the plaintiff and the two children; and a credit for health insurance was not consistent with the guidelines. N.C.G.S. § 50-13.4(c).

Am Jur 2d, Divorce and Separation § 1044.

4. **Appeal and Error § 106 (NCI4th)— alimony pendente lite—interlocutory decree—not appealable**

An appeal of an award of alimony pendente lite was dismissed as interlocutory.

Am Jur 2d, Appeal and Error §§ 137, 138.

Judge COZORT concurring.

APPEAL by defendant from order filed 22 May 1990 in BERTIE County District Court by *Judge J. D. Riddick, III.* Heard in the Court of Appeals 25 January 1991.

Smith, Daly & Skinner, P.A., by Lloyd C. Smith, Jr. and Roswald B. Daly, Jr., for plaintiff-appellee.

Josey, Josey & Hanudel, by C. Kitchin Josey, for defendant-appellant.

GREENE, Judge.

In this civil action, the trial court on 27 March 1990 awarded custody of two children to plaintiff, ordered the defendant to pay child support, and granted alimony *pendente lite* to the plaintiff.

The defendant appeals the awards of child support and alimony *pendente lite*.

After conducting a hearing considering the evidence offered by the parties, the trial court entered the following pertinent findings of fact, conclusions of law and order:

FINDINGS OF FACT:

. . . .

9. The Defendant's gross income from his employment with the Bertie County School System is $23,360.00 per year, which is paid in 10 monthly payments of $2,336.00 per month.

The Defendant is the beneficiary of the testamentary trust known as the 'James A. Browne Trust' which is presently administered by Planters National Bank and Trust Company. The Defendant is an income beneficiary of this trust only. The Defendant has received annual income distributions from this trust, approximately one-third of which is tax free income, as follows: for the year 1987, $11,850.00; for the year 1988, $14,250.00; for the year 1989, $13,750.00; and for the year 1990, from January through March 1, 1990, $4,200.00 which indicates that the Defendant will again receive an annual income of approximately $14,000.00 per year from this trust.

10. The aforesaid two minor children were beneficiaries under the Will of the father of the Defendant; the mother of the Defendant died intestate shortly after the death of the father of the Defendant leaving as her sole heir the Defendant who renounced his right to take as such sole heir leaving the two minor children herein the sole heirs of the Defendant's mother which resulted in the children receiving substantial assets, including the home in which the parties lived at the time of the separation; each child has an estate in excess of $300,000.00 consisting of real and personal property. From September 1987, through September 1988, John M. Perry, the Guardian of said children reimbursed the Defendant for $4,184.97 in living expenses for said children and from September 1988, through September 1989, said Guardian reimbursed the Defendant for $7,495.61 in living expenses for said children.

Since September 1989, the Clerk of the Superior Court of Bertie County, the judicial official overseeing said Guardian,

has allowed the Guardian to pay to the mother for each child the sum of $250.00 per month for each child as well as to pay dental bills of the oldest child in the amount of $75.00 per month instead of reimbursing the Defendant for their living expenses.

. . . .

13. . . . The Defendant has also maintained medical insurance upon his wife and his children with Blue Cross and Blue Shield through his employment at a cost of $182.69 per month since the separation of the parties.

. . . .

CONCLUSIONS OF LAW:

. . . .

8. The Defendant has adequate income and resources available to him whereby he should be required to pay child support in a reasonable amount and alimony *pendente lite*, as he earns $23,360.00 per year from his employment as a teacher and receives not less than $14,000.00 per year as trust income approximately one-third of which is not taxable for State and Federal purposes so that the Defendant has an income in excess of $37,000.00 per year. The Court has given additional consideration to his failure to make debt service payments, his actual income, and the needs of the minor children and wife.

The fact that the children have separate incomes and estates does not diminish or relieve the obligation of the Defendant to support his minor children.

. . . .

NOW THEREFORE, based upon the foregoing findings of fact, [and] conclusions of law . . . it is ordered, adjudged, and decreed that:

. . . .

3. The Defendant is ordered to pay the sum of $595.00 per month as child support, with the first such payment being due and payable into the Office of the Clerk of the Superior Court of Bertie County, on April 15, 1990, and with a like

payment on the fifteenth day of each successive month. The Defendant is also to maintain in full force and effect the present hospitalization and medical insurance coverage which the Defendant has and pays for with his present employer. If the Defendant should change employers, he is to maintain substantially similar coverage on the aforesaid children without any lapse in coverage. The Court finds that twenty-five percent (25%) of the Defendant's gross annual income of $37,360.00 is a fair percentage for the Defendant to pay for the support of his two minor children which means that he is being required to pay $778.00 per month for the support of said children. When given credit for the cost of the medical and hospitalization insurance in the amount of $182.69 per month, he is required to pay $595.00 in cash which is $297.50 per child per month.

. . . .

4. . . .

a. The Defendant will pay the sum of $700.00 per month as alimony *pendente lite* to the Plaintiff until the entry of an Order on permanent alimony, the death of the Plaintiff, or her remarriage, whichever occurs first. The first such payment will be paid into the Office of the Clerk of the Superior Court of Bertie County on April 15, 1990, with a like payment of alimony *pendente lite* on the 15th day of each successive month.

The issues presented are: (I) whether the amount of child support was determined consistent with N.C.G.S. § 50-13.4; and (II) whether an award of alimony *pendente lite* is appealable.

I

The method for determining the amount of child support has undergone substantial modification in the last several years, moving away from discretionary awards towards the use of presumptive guidelines. *See Greer v. Greer*, 101 N.C. App. 351, 399 S.E.2d 399 (1991). Several reasons prompted the changes, including for example the large volume of child support cases litigated in the district courts and the desire for uniformity in the amount of the child support for similarly situated children.

Pre 1 October 1987

Prior to 1 October 1987, the trial court was required to set child support

> 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.

N.C.G.S. § 50-13.4(c) (1987). This statute did not establish any formula for determining the amount of child support. Instead, the statute left computation of the amount of support to the sound discretion of the trial judge. *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 867 (1985). However, the trial court was required to make conclusions of law and specific findings of fact. *Id.* Specifically, conclusions were required "as to the amount of support necessary 'to meet the reasonable needs of the child' and the relative ability of the parties to provide that amount." *Id.* at 68-69, 326 S.E.2d at 867. Findings were required "so that an appellate court . . . [could] ascertain whether the judge below gave '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.' " *Id.* at 69, 326 S.E.2d at 867.

1 October 1987—30 September 1989

On 1 October 1987, "uniform statewide advisory guidelines for the computation of child support obligations" were enacted. N.C.G.S. § 50-13.4(c1) (1987). Variations from the advisory guidelines were permitted upon a showing of one or more of eight criteria specifically listed in subsection (c1). *Id.* Precise guidelines were to be established by the "Conference of Chief District [Court] Judges." *Id.* Under these advisory guidelines, the trial court continued to be required to make conclusions and findings on the reasonable needs of the children and the relative abilities of the parents to pay support. *Id.* This was so even when the trial court set support consistent with the guidelines.

1 October 1989—30 September 1990

On 1 October 1989, the child support guidelines became presumptive, and the requirement that the trial court in every in-

stance hear evidence and make findings and conclusions regarding the "reasonable needs of the child" and the "relative ability of each parent to pay support" was deleted. N.C.G.S. § 50-13.4(c1) (1987 & Supp. 1989). The trial court was required to hear evidence "relating to the reasonable needs of the child for support and the relative ability of each parent to pay support" *only* "when requested by a party . . . ." N.C.G.S. § 50-13.4(c) (1987 & Supp. 1989). If such a request was made and such evidence was taken, the trial court was required to make findings and conclusions relating to this evidence. *Id.* The eight criteria of the previous version of the statute continued to represent grounds for deviating from the presumptive guidelines until 1 July 1990. N.C.G.S. § 50-13.4(c1). The trial court was permitted to deviate from the presumptive guidelines *only* if evidence was taken on "the reasonable needs of the child for support and the relative ability of each parent to pay support," and then *only* "if, after considering evidence regarding one or more of the [eight] criteria," the trial court found "that application of the guidelines would not meet the reasonable needs of the child . . . ." N.C.G.S. § 50-13.4(c). After hearing the evidence, if the trial court deviated from the presumptive guidelines, the trial court was required to "make findings of fact as to . . . [any of the eight] criteria that . . . [justified] varing [sic] from the guidelines and the basis for the amount ordered." *Id.*

1 October 1990—Present

On 1 October 1990, Section 50-13.4(c) was again amended, continuing in place the presumptive nature of the guidelines. N.C.G.S. § 50-13.4(c) (Supp. 1990). However, effective 1 July 1990, the eight criteria previously representing grounds for deviating from the presumptive guidelines were deleted. The trial court instead is permitted to deviate from the presumptive guidelines *only* "upon request of any party" that the trial court hear evidence "relating to the reasonable needs of the child for support and the relative ability of each parent to provide support," and then *only* if the trial court determines that "the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate . . . ." *Id.* In the event a request is made and such evidence is taken, the trial court is required to make findings of fact and enter conclusions of law "relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." *Id.* Finally, if after hearing

evidence the trial court determines that some amount other than the presumptive amount of support should be awarded, the trial court "shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." *Id.*

Under both the 1 October 1989 and the 1 October 1990 versions of the presumptive guidelines, the trial court is not, absent a request by a party, required to take any evidence, make any findings of fact, or enter any conclusions of law "relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support." This requirement for advance notice eliminates needless evidentiary hearings and needless fact finding and conclusion making. The party required to give the advance notice is the party requesting a variance from the guidelines. The statute does not identify any time restrictions for making the request for a hearing. However, to effectuate the purpose of the statute, any party in a pending action requesting a variance from the guidelines must, unless the request is made in the original pleadings, give at least ten days written notice as required in N.C.G.S. § 50-13.5(d)(1) (Supp. 1990). In the absence of such a timely notice, the trial court will hear only such evidence as may be necessary for a determination of a proper application of the relevant child support formula as from time to time the Conference of Chief District Court Judges adopts. Absent a timely and proper request for a variance of the guidelines, support set consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance.

[1] Because the order of child support presently before this Court was entered in March of 1990, we review the correctness of that order in accordance with the presumptive guidelines in effect at that time. Our review of the record does not reveal any motion by either party requesting the trial court to conduct a hearing to determine the reasonable needs of the children or the relative ability of each parent to pay support for the children. However, when the case was called for trial, both parties introduced evidence on these relevant issues without objection and the trial court heard the evidence. Therefore, any failure by this defendant to give proper notice of his request that a hearing be conducted was waived. *Cf. J. D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 66, 376 S.E.2d 254, 256 (1989) (party entitled to notice of motion may waive notice); *see also Brandon v. Brandon*, 10 N.C. App.

457, 460, 179 S.E.2d 177, 179 (1971) ("party entitled to notice of a motion may waive such notice"). Since a hearing was conducted and evidence "relating to the reasonable needs of the . . . [children] for support and the relative ability of each parent to pay support" was offered, the trial court was required to find facts and enter conclusions on this evidence. N.C.G.S. § 50-13.4(c) (1987 & Supp. 1989). The court was also required, if it deviated from the application of the guidelines, to "make findings of fact as to the criteria that . . . [justified] varing [sic] from the guidelines and the basis of the amount ordered." *Id.*

[2] Here, the trial court entered findings of fact and made conclusions of law on the reasonable needs of the children for support and the relative ability of each parent to pay support. The defendant argues that the trial court's findings and conclusions relating to the reasonable needs of the children are deficient because they reflect that the trial court did not give due consideration to the "separate income and estates of each of the children in establishing the amount of child support to be paid by the defendant." We reject this argument. The trial court specifically found as a fact that each child had an estate "in excess of $300,000.00 consisting of real and personal property." The fact that the trial court concluded that the "separate incomes and estates" of the children did "not diminish or relieve the obligation of the Defendant to support his minor children" is in this case immaterial. The supporting parent who can do so remains obligated to support his or her minor children, even though they may have property of their own. *Lee v. Coffield*, 245 N.C. 570, 573, 96 S.E.2d 726, 728-29 (1957). In this case there are ample findings of fact supported by the evidence that the defendant father was able to support his children. Therefore, the trial court was correct in refusing to "diminish or relieve" the father of his obligation to provide for his children simply because the children had their own separate estates.

[3] Notwithstanding the above, the trial court did not enter the support order consistent with the applicable presumptive guideline in this case which, at that time, was twenty-five percent of the defendant's gross income. The trial court correctly calculated that application of the twenty-five percent guideline would require the defendant to pay $778.00 per month as child support. However, the trial court varied the guideline amount by giving the defendant a credit in the amount of $182.69 per month for health insurance maintained by the defendant upon the plaintiff and the two children.

According to the eight criteria, the trial court was not allowed to vary the presumptive amount of child support based upon the "provision of health insurance coverage." A.O.C., Child Support Guidelines, AOC-A-162, B(6) (New 10/89). By varying the presumptive guideline amount because of the defendant's maintenance of health insurance on the plaintiff and the children, the trial court acted in violation of N.C.G.S. § 50-13.4(c) (1987 & Supp. 1989). A credit for the health insurance should not have been given because such credit was not consistent with the guidelines. Accordingly, we remand this case to the trial court to set support consistent with the presumptive guidelines in effect in March of 1990. We note that under the present guidelines "[i]f either parent . . . [carries] health insurance for the child(ren) [who are] due support, the cost of that coverage for that parent and . . . [child(ren)] should be deducted form [sic] that parent's gross income" in computing monthly adjusted gross income pursuant to the current worksheets. A.O.C., Child Support Guidelines, AOC-A-162, C (Rev. 7/90).

II

[4] "[A]wards *pendente lite* are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d)." *Stephenson v. Stephenson*, 55 N.C. App. 250, 252, 285 S.E.2d 281, 282 (1981) (italics added). Accordingly, the defendant's appeal of the *pendente lite* award of alimony is dismissed as interlocutory.

Vacated and remanded in part and dismissed in part.

Judge PARKER concurs.

Judge COZORT concurs by separate opinion.

Judge COZORT concurring by separate opinion.

I concur with both ultimate conclusions reached by the majority: (1) that the case must be remanded to set support consistent with the applicable statutes; and (2) that the *pendente lite* alimony award is not immediately appealable. On the first issue, however, I cannot agree with all of the issues discussed and opinions expressed by the majority.

I note initially that neither party raised at trial or on appeal the issue of whether a timely request was made for hearing evidence

and making findings pursuant to N.C. Gen. Stat. § 50-13.4(c) (1987 & Cum. Supp. 1990). Any discussion of that issue is thus unnecessary to the resolution of this case, especially in light of the majority's holding that the notice requirement was waived. Furthermore, I am compelled to comment on the majority's interpretation of N.C. Gen. Stat. § 50-13.4(c) that "upon request of any party" means ten days' advance notice. I must disagree. The statute clearly states only "upon request" and makes no provision for advance notice of any duration. If the General Assembly had intended the statute to require advance notice, it could have specified such notice and the length thereof. Thus, on the first issue, I vote simply to reverse the trial court's order which sets support at a level which varied from the guidelines and to remand the case to the trial court for entry of a new order.

LEVATA ODUM, ADMINISTRATRIX OF THE ESTATE OF ARNETTA McPHAUL, DECEASED, AND BETTY O. MANGUM, AND JERRY CLIFFORD OXENDINE, CO-EXECUTORS OF THE ESTATE OF CLIFTON OXENDINE, PLAINTIFFS v. NATIONWIDE MUTUAL INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANTS

No. 9016SC290

(Filed 19 February 1991)

1. **Insurance § 108 (NCI3d)— automobile liability insurance— fraud in application—no defense to liability after accident occurs**

Fraud in an application for motor vehicle liability insurance is not a defense to the insurer's liability once injury has occurred, but this holding applies only to the statutory minimum amount. As to any coverage in excess of the statutory minimum, the insurer is not precluded by statute or public policy from asserting the defense of fraud, and such a defense, if successful, would insulate the insurer against liability as to both the insured and the injured third party. N.C.G.S. § 20-279.21(f)(1) and (g).

Am Jur 2d, Automobile Insurance §§ 28, 52.

Rescission or avoidance, for fraud or misrepresentation, of compulsory, financial responsibility, or assigned risk automobile insurance. 83 ALR2d 1104.

2. Insurance § 108 (NCI3d)— insurer's tender of funds—no waiver of defenses as to liability

Defendant insurer's tender of funds did not constitute a waiver or estoppel of its defense as to liability under the policy in question, since estoppel to assert noncoverage occurs when the insurer's action results in some detriment to the insured or to someone else having rights under the policy, and neither plaintiff in this case showed detriment resulting from defendant's tender of payment.

Am Jur 2d, Automobile Insurance §§ 381, 382.

APPEAL by defendant Nationwide Mutual Insurance Company from judgment entered 8 December 1989 by *Judge Robert L. Farmer* in ROBESON County Superior Court. Heard in the Court of Appeals 27 September 1990.

Musselwhite, Musselwhite & McIntyre, by James W. Musselwhite and David F. Branch, Jr., for plaintiff-appellee Levata Odum.

H. Mitchell Baker, III and William S. Britt for plaintiff-appellee Estate of Clifton Oxendine.

LeBoeuf, Lamb, Leiby & MacRae, by Kurt E. Lindquist II, for defendant-appellant.

JOHNSON, Judge.

This action arises out of an auto accident which occurred on 16 June 1987 when a car driven by Robert McPhaul, husband of the insured, Arnetta McPhaul, crossed the center line and collided with a car driven by Clifton Oxendine. Mrs. McPhaul was a passenger in the car driven by Robert. Both Arnetta McPhaul and Clifton Oxendine died of injuries sustained in the wreck. Following Nationwide's denial of coverage, plaintiffs brought suit to collect under a motor vehicle liability insurance policy issued to Arnetta McPhaul.

State Farm Mutual Automobile Insurance Company insured Clifton Oxendine under a policy which provided, *inter alia*, uninsured motorist coverage. By order dated 1 June 1989, defendant State Farm was joined in the action as a necessary party. State Farm timely answered and moved for summary judgment. By order dated 18 September 1989, the motion was granted and the action

was dismissed as to State Farm. State Farm is not a party to this appeal.

Nationwide answered plaintiffs' complaint and counterclaimed, alleging that Arnetta McPhaul made fraudulent and intentional misrepresentations on her insurance application which rendered the policy void *ab initio*. Nationwide moved for summary judgment on the ground that there was no genuine issue of material fact and the insurance policy was void *ab initio* as a matter of law. By judgment dated 8 December 1989, Judge Farmer denied Nationwide's motion for summary judgment and decreed that the insurance policy was in full effect and that defendant Nationwide was bound by the terms and conditions of the policy. Nationwide appeals.

The parties stipulate to the following facts:

Nationwide issued a motor vehicle liability insurance policy to Arnetta McPhaul for a 1979 Datsun owned by her. The stated policy limits for bodily injury liability were $50,000 each person and $100,000 each accident. As of the day of the accident, 16 June 1987, the premium charged on that policy was paid current. On that day, at about 6:30 a.m., Arnetta McPhaul was riding as a passenger in the Datsun which was driven by her husband, Robert. The Datsun collided with a vehicle operated by Clifton Oxendine. Both Arnetta McPhaul and Clifton Oxendine died as a result of their injuries.

In her application for insurance, Mrs. McPhaul represented that she was divorced, that she was the sole driver in her household and that no driver in her household had any convictions or motor vehicle offenses in the last five years. Her signature was witnessed by the Nationwide agent taking the application, who informed her that by law she was required to list her husband on the application if she was married and that her signature on the application was an attestation that the information on the application was true.

It is further stipulated that Vonzell McPhaul, Robert's brother, knew that as of 5 August 1986, Robert and Arnetta had been married for about nine years and that on 16 June 1987, the day of the accident, they were living together as man and wife; that the vehicle registered in Arnetta's name was a family vehicle which was often driven by Robert and that on the morning of the accident Robert was driving himself and Arnetta to work, as he regularly

did. It is further stipulated that on 25 March 1985 Robert McPhaul was convicted of driving while impaired.

The parties stipulate that it is Nationwide's customary practice when writing automobile insurance policies to order driving records for all drivers listed on a new application and if the record should reveal a conviction for driving while impaired within five years of the date of the application, Nationwide automatically and without exception cedes the insurance risk to the reinsurance facility. Had Mrs. McPhaul listed Robert as her husband, Nationwide would have discovered his conviction and automatically ceded the insurance.

Finally, the parties stipulate that Nationwide was notified of the accident and subsequently conducted an investigation during which it became aware that the vehicle was operated by Robert McPhaul, husband of Arnetta McPhaul, and that having such knowledge, Nationwide tendered payment of $939.00 pursuant to the collision coverage provided to Arnetta McPhaul.

In support of its motion for summary judgment, Nationwide submitted the sworn affidavit of Vonzell McPhaul, Robert's brother, who stated that at the time of the accident Robert and Arnetta had been married for about nine years, that they had been separated on several occasions, that on the day of the accident and for some time prior to that they were living together as man and wife and that Robert often drove his wife and then himself to work in the family car which was registered in Arnetta's name. Nationwide also submitted automobile insurance application form #61H-992123, signed by Arnetta McPhaul, with an effective date of 8 August 1986. The appropriate blocks on the application form were marked to indicate that (1) Arnetta was divorced, (2) no driver in the household had had any accidents during the last 5 years, (3) neither Arnetta nor any driver in the household had any violations in the last 5 years for which there has been a conviction or forfeiture of bail for any motor vehicle offense, (4) that no driver had been convicted of a criminal offense.

Defendant Nationwide contends that the trial court erred in ruling that, despite Mrs. McPhaul's deliberate and material misrepresentations, the policy was not void *ab initio* but was in full effect. Nationwide argues in the alternative that the misrepresentations render the policy void as to Mrs. McPhaul even though it is valid as to the injured third party. Finally, Nationwide argues

that its tender of funds to Mrs. McPhaul's estate in no way constitutes a waiver or estoppel of its defenses as to the liability claims.

[1] The issue on appeal is whether the insurer on an automobile liability policy can avoid liability after an injury has occurred on the ground that the policy was procured by the insured's deliberate and material misrepresentations on the application.

Neither party made a distinction in its arguments between the minimum mandatory coverage required by G.S. § 20-279.21(b)(2) (bodily injury: $25,000 per person, $50,000 per accident) and the larger amount of coverage under the liability policy at issue in this case ($50,000 per person, $100,000 per accident). Such a distinction is important to a proper resolution of this appeal.

First, Nationwide argues that G.S. § 58-3-10 applies to the automobile liability policy at issue and thus a material misrepresentation on an application form constitutes a defense to recovery under the policy. As to the statutory amount of coverage required by G.S. § 20-279.21, we disagree.

General Statutes § 58-3-10, adopted in 1901, falls within Chapter 58, Insurance, article 3, General Regulations for Insurance. As an earlier and more general statement of insurance law, it is superseded with respect to automobile liability insurance by Chapter 20, Motor Vehicles, specifically by article 9A, The Motor Vehicle Safety and Financial Responsibility Act of 1953, and article 13, The Vehicle Financial Responsibility Act of 1957. Chapter 20 represents a complete and comprehensive legislative scheme for the regulation of motor vehicles and, as such, its insurance provisions regarding automobiles prevail over the more general insurance regulations of Chapter 58. The 1953 Act, found at G.S. §§ 20-279.1 to 20-279.39, applies to drivers whose licenses have been suspended and relates to the restoration of driver's licenses while the 1957 Act, found at G.S. §§ 20-309 to 20-319, applies to all motor vehicle owners and relates to vehicle registration. The two Acts are complementary and are to be construed in *pari materia* so as to harmonize them and give effect to both. *See Faizan v. Grain Dealers Mut. Ins. Co.*, 254 N.C. 47, 118 S.E.2d 303 (1961).

Chapter 20 requires, *inter alia*, the following with regard to liability insurance. No self-propelled motor vehicle shall be registered in this state unless the owner has financial responsibility as provided in article 13. G.S. § 20-309(a). Financial responsibility shall

be a liability insurance policy or other approved form as defined in Chapter 20, article 9A. G.S. § 20-309(b). An owner's policy of liability insurance shall insure against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the vehicle because of bodily injury, in the amounts of $25,000 per person, and $50,000 per accident, because of injury to or death of two or more persons in any one accident. G.S. § 20-279.21(b)(2). General Statutes § 20-279.21(f) expressly provides:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein: (1) Except as hereinafter provided, the liability of the insurance carrier *with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs*; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; *no statement made by the insured* or on his behalf and no violation of said policy *shall defeat or void said policy* (emphasis added).

Although we can find no North Carolina case which deals specifically with the effect of G.S. § 20-279.21(f)(1) in a situation involving a misrepresentation made in the application for insurance (*but see Ferguson v. Employers Mut. Cas. Co.*, 254 S.C. 235, 174 S.E.2d 768 (1970) (interpreting N.C.G.S. § 20-279.21(f)(1)), there are several North Carolina cases which have interpreted the impact of G.S. § 20-279.21(f)(1) on the liability of insurance carriers when an insured violates a provision of the policy. The seminal case is *Swain v. Ins. Co.*, 253 N.C. 120, 116 S.E.2d 482 (1960), where the insurance contract provided that the insured, in the event of suit against him, must forward immediately to the insurer "every demand, notice, summons or other process received by him" and must cooperate with the insurer in defending the suit. *Swain*, 253 N.C. at 127, 116 S.E.2d at 487. The insured violated this provision and the insurance company pleaded this violation as a defense to recovery under the policy by an injured third party who had obtained a default judgment against the insured. The Court found:

> The manifest purpose of the 1957 Act [is] to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and, in respect of a "motor vehicle liability policy," to provide such protection

> notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claim.

Swain, 253 N.C. at 126, 116 S.E.2d at 487. The Court further found that "to bar recovery from an insurer on account of such a policy violation would 'practically nullify the statute by making the enforcement of the rights of the person intended to be protected dependent upon the acts of the very person who caused the injury.' " *Id.*, *quoting*, *Ott v. American Fidelity & Cas. Co.*, 161 S.C. 314, 159 S.E. 635 (1931). *Accord*, *Jones v. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967) (failure of insured to give notice of suit to insurer as required by policy is no defense against default judgment in favor of injured third party); *see also Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964) (primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims, therefore no reason why injured third party's rights to recover from insurance carrier should depend upon whether the conduct of its insured was intentional or negligent). The *Swain* and *Jones* decisions specifically concerned violations of insurance policy provisions with regard to notice, the violation of which occurred after the injury had occurred and after the liability of the insurer had become absolute. These decisions were based upon the legislative purpose for mandatory vehicle liability insurance (to protect innocent victims) and the words of the statute ("the liability of the [ ] carrier . . . shall become absolute whenever injury . . . occurs . . . and no violation of said policy shall defeat or void said policy," G.S. § 20-279.21(f)(1)). We find that this analysis demands a similar result when the defense asserted is fraud in the application for insurance. Subsection (f)(1) of G.S. § 20-279.21, quoted above in part, provides that the insurer's liability becomes absolute whenever injury occurs, and "no statement made by the insured . . . shall defeat or void said policy." Every policy is subject to this provision whether it is expressly stated in the contract or not. G.S. § 20-279.21(f) ("Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein[.]"). This result is strengthened by the recognition that the legislature included at subsection (h) a provision by which insurers could recoup losses for which they became obligated solely by operation of the statute. Subsection (h) of G.S. § 20-279.21 states:

> Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the

> insurance carrier would not have been obligated to make under the terms of the policy except for the provision of this Article.

See Insurance Co. v. Webb, 10 N.C. App. 672, 179 S.E.2d 803 (1971). We note that the insurance policy at issue in this case was not included in the record and defendant Nationwide has not pleaded this clause in any counterclaim for recoupment.

We find, however, that the holding above, that fraud in an application for motor vehicle liability insurance is not a defense to the insurer's liability once injury has occurred, applies only to the statutory minimum amount. In the case *sub judice*, the stated policy limit was greater than the statutory minimum and as to that amount, the above analysis does not apply.

The distinction between the mandatory amount of coverage required by statute (*see* G.S. § 20-279.21(b)(2)) and any amount in excess of that is found in G.S. § 20-279.21(g):

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provision of this Article. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

The effect of this distinction was recognized in *Swain*, 253 N.C. at 127, 116 S.E.2d at 487-88. As explained in *Swain*, the 1957 Act changed the law with respect to the compulsory amount such that a violation of a policy provision was not a defense to liability of the insurer, but as to any amount in excess of that, a policy provision requiring notice to the insurer would be enforced as written and a violation was a valid and complete defense. The *Swain* Court pointed to *Muncie v. Ins. Co*, 253 N.C. 74, 116 S.E.2d 474 (1960), as being a statement of the applicable law as to coverage "in excess of or in addition to the coverage specified for a motor vehicle liability policy." *Muncie* involved an accident which occurred prior to the effective date of the 1957 Act. An injured third party sued the insurer to collect on a judgment against the insured. The insurer pled as a defense the violation of a policy provision

requiring the insured to give the insurer timely notice of the accident. The Court held that the constitutional guaranty of freedom of contract required that the policy provision be enforced as written. Thus, the violation of the notice provision in the policy by the insured was a complete defense both as to the insured and the injured third party. *Accord, Clemmons v. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966); *Woodruff v. Ins. Co.*, 260 N.C. 723, 133 S.E.2d 704 (1963) (assigned risk policy); *Insurance Co. v. Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973) (coverage which is in addition to the mandatory statutory requirements is voluntary and as to that amount G.S. § 20-279.21 does not apply); *Insurance Co. v. Hale*, 270 N.C. 195, 154 S.E.2d 79 (1967); *Jones v. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967); *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).

We therefore hold that as to any coverage in *excess* of the statutory minimum, the insurer is not precluded by statute or public policy from asserting the defense of fraud. Such a defense, if successful, would insulate the insurer against liability as to both the insured, Arnetta McPhaul, and the injured third party, Mr. Oxendine. *Muncie*, 253 N.C. 74, 116 S.E.2d 474.

[2] Defendant lastly contends that its tender of funds did not constitute a waiver or estoppel of its defenses as to liability under the policy at issue. We agree.

"Estoppel to assert noncoverage occurs when the insurer's action results in some detriment to the insured or to someone else having rights under the policy." *Insurance Co. v. Surety Co.*, 1 N.C. App. 9, 11, 159 S.E.2d 268, 272 (1968). Neither plaintiff in the case *sub judice* has shown detriment to them resulting from Nationwide's payment.

In summary, we find that as to the *mandatory amount* of motor vehicle liability insurance coverage required by G.S. § 20-279.21, fraud in an application for insurance is not a defense to the insurer's liability once injury has occurred, but as to any amount of coverage in *excess* of the statutory minimum, fraud is a defense under common law or contract law principles.

Therefore, we modify the decision of the court below in that we affirm summary judgment for plaintiffs, finding the insurance policy valid, but only to the extent of the mandatory amount of

coverage. As to the amount in excess, we find that there exist genuine issues of material fact.

We modify and affirm in part the judgment below, and remand for further proceedings not inconsistent with this opinion.

Modified and affirmed in part and remanded.

Judges EAGLES and PARKER concur.

LYNDA S. HERNDON, PLAINTIFF v. ACTING CHIEF JACKIE BARRETT; CAPTAIN BOB HAYES; SERGEANT JAMES CAMP AND THE CITY OF KINGS MOUNTAIN, A MUNICIPAL CORPORATION, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. DON JOHNSON AND GRAYTON BOLLINGER, THIRD-PARTY DEFENDANTS

No. 8927SC1397

(Filed 19 February 1991)

1. **Municipal Corporations § 12.3 (NCI3d)— claim of sovereign immunity—denied—immediately appealable**

The denial of a motion for summary judgment on the ground of sovereign immunity was immediately appealable in an action for negligent supervision arising from a fight between two police officers. N.C.G.S. § 1-277.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 651.

2. **Municipal Corporations § 12.3 (NCI3d)— sovereign immunity—determination of insurance coverage**

The trial court correctly determined that there was insurance coverage and denied defendants' motion for summary judgment on the sovereign immunity issue in an action by a plaintiff injured in a fight between two policemen where defendants had submitted supporting affidavits to the trial court which showed that their carrier had written them stating that there was no insurance coverage; neither the Court of Appeals nor the trial court was bound by the insurance company's interpretation of its policy's coverage; the policy's exclusions for willful, intentional or malicious conduct under the

section which applied to law enforcement employees did not apply here because plaintiff alleged that these defendants were negligent in their supervision of police officers; the exclusions for bodily injury or injury arising from false arrest, assault or battery, detention, imprisonment, malicious prosecution or abuse of process in the portion of the policy applicable to other public employees or officials also did not apply because this claim was based on negligent supervision; and, as to a defendant's counterclaim, the defendant conceded that there was no insurance coverage for punitive damages and the trial judge correctly denied summary judgment as to compensatory damages because defendants have not shown as a matter of law that coverage as to the compensatory damages claim did not exist under the policy.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 59, 60, 694.

3. **Municipal Corporations § 9.1 (NCI3d)— police officers—negligent supervision—summary judgment properly denied**

The trial court properly denied defendants' motion to dismiss an alternative motion for summary judgment in an action in which a plaintiff injured in a fight between two police officers alleged negligent supervision in that defendants had been informed about the hostility between the two officers in an earlier formal complaint and a Sergeant informed Officer Bollinger that his son had been taken by Officer Johnson to the Magistrate's Office and, at the same time, informed Johnson that Bollinger was on his way to the Magistrate's Office without taking any corrective action to defuse the situation or avoid the confrontation.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 428, 429, 440.

APPEAL by defendants from an order entered 28 August 1989 by *Judge Charles C. Lamm, Jr.* in CLEVELAND County Superior Court. Heard in the Court of Appeals 23 August 1990.

This action is based on injuries sustained by plaintiff on 27 January 1987 in a fight between Kings Mountain police officers Don Johnson and Grayton Bollinger, third-party defendants. Plaintiff is a Cleveland County Magistrate.

Plaintiff's complaint alleged that the original defendants were negligent in failing to properly supervise the third-party defendant police officers. Plaintiff alleged that the City of Kings Mountain and the three supervising officers, acting Police Chief Jackie Barrett, Police Shift Captain Bob Hayes, and Police Shift Sergeant James Camp, were placed on notice of the likelihood of physical confrontation between Johnson and Bollinger by a formal complaint filed prior to 27 January 1987 and by their knowledge that Johnson had arrested Bollinger's son for allegedly running a red light and had handcuffed Bollinger's son after tussling with him over the incident. Sergeant Camp allegedly told Bollinger that his son, Phillip Bollinger, had been arrested and told Officer Johnson that Bollinger was on his way to the Magistrate's Office. Plaintiff alleged that defendants were negligent in that they failed to take any corrective action to "defuse the situation" between the two officers. Plaintiff alleged "[t]hat as a direct and proximate result of the joint and concurring negligence of the defendants as aforesaid the plaintiff was knocked back into a chair and severely and permanently injured, primarily in the area of her neck, back, arm, shoulder and hand" causing plaintiff to incur medical expenses, permanent injury and damages.

Defendants answered denying any negligence and asserting several affirmative defenses and brought a third-party complaint against Bollinger and Johnson. All counterclaims and cross-claims were subsequently answered by the appropriate parties. From defendants' brief we note that the City's liability insurance carrier, National Union Fire Insurance Company, was not a party to this action. On 8 March 1989 defendants filed a motion to dismiss plaintiff's claims and Bollinger's counterclaims with the exception of Bollinger's eleventh claim for wrongful discharge. Alternatively, defendants moved for summary judgment based on their contentions that defendants were exempted from liability by the doctrine of sovereign immunity, that sovereign immunity is waived only to the extent that the municipality is indemnified from tort liability by a liability insurance contract, and that insurance coverage had been denied by the City's carrier as to all causes of action with the exception of Bollinger's claim for wrongful discharge from employment. At the conclusion of the hearing on defendants' motion to dismiss and alternative motion for summary judgment, the trial court denied defendants' motion. Defendants appeal.

Horn, West & Horn, P.A., by C. A. Horn, for plaintiff-appellee.

Malcolm B. McSpadden for third-party defendant-appellee, Grayton Bollinger.

Sumrell, Sugg, Carmichael & Ashton, P.A., by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellants Acting Chief Jackie Barrett, Captain Bob Hayes, Sergeant James Camp and the City of Kings Mountain, and Corry, Cerwin & Coleman, by Clayward C. Corry, Jr., for defendant-appellant City of Kings Mountain.

EAGLES, Judge.

[1] At the outset, we note that "G.S. 1-277, in effect, provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a *substantial right* which he would lose if the ruling or order is not reviewed before final judgment." *Pruitt v. Williams*, 288 N.C. 368, 371, 218 S.E.2d 348, 350 (1975). "Generally, the denial of summary judgment does not affect a substantial right and is not appealable." *Corum v. University of North Carolina*, 97 N.C. App. 527, 531, 389 S.E.2d 596, 598, *temporary stay allowed*, 326 N.C. 595, 394 S.E.2d 453, *disc. rev. and writ of supersedeas allowed, motion to dismiss denied*, 327 N.C. 137, 394 S.E.2d 170 (1990). However, the denial of a motion for summary judgment "on the grounds of sovereign and qualified immunity is immediately appealable." *Id.* at 532, 389 S.E.2d at 599; *see also Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). "In *Mitchell*, the Supreme Court held that 'denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.' " *Id.* quoting *Mitchell*, 472 U.S. at 525, 105 S.Ct. at 2815, 86 L.Ed.2d at 424.

Here, defendants assert that the trial court denied defendants' motion to dismiss and alternative motion for summary judgment based on defendants' assertion of its sovereign immunity. Accordingly, defendants argue that they may immediately appeal the order and the adverse determination of the sovereign immunity issue.

[2] Defendants assign as error the trial court's determination that there was insurance coverage. Defendants contend that the deter-

mination was premature and erroneous. Defendants further contend that the trial court's ruling that there was insurance coverage was fundamentally unfair since National Union Fire Insurance Company (hereinafter National Union) was not before the court. Defendants also contend that the trial court could not affirmatively decide the jurisdiction issue of insurance coverage at this stage of the proceeding and as a result the trial court's decision affects a substantial right. Defendants argue that at the very most the trial court "should have found that a factual dispute existed as to insurance coverage, and then set the case on for further hearing at the trial or after the trial." We disagree.

> [U]nder the common law, a municipality is immune from liability for the torts of its officers committed while they were performing a governmental function. However, N.C. Gen. Stat. Sec. 160A-485(a) (1982) establishes an exception to the common-law rule: [Citations omitted.]
>
> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance. [Citations omitted.]

Wiggins v. City of Monroe, 73 N.C. App. 44, 49-50, 326 S.E.2d 39, 43 (1985).

This court has previously decided that a trial court's consideration of the existence or nonexistence of insurance coverage as it relates to the issue of sovereign immunity is not inappropriate at this stage in the trial proceeding. *Id.* at 44, 326 S.E.2d at 39. In *Wiggins* the trial court granted summary judgment in favor of municipal defendants. On appeal one issue was whether the insurance policy purchased by the City of Monroe indemnified the City from liability for the torts alleged in that action. The fact that the City of Monroe's insurance carrier was not a party to that particular suit did not deter the *Wiggins* court from addressing whether there was in fact liability coverage under the policy in question.

Here, like *Wiggins*, defendants' motion to dismiss and alternative motion for summary judgment were based upon governmental immunity. Here, defendants submitted supporting affidavits to the trial court which showed that their carrier had written them stating that there was no insurance coverage. Defendants contended in their motion that governmental immunity was not waived since it could only be waived to the extent that the municipality was indemnified from tort liability by the insurance contract. After careful review of the record, the trial court denied the defendant City's motion for summary judgment. The legal significance of the trial court's ruling is that defendants had not carried their burden of proving that there was no genuine issue of material fact as to the nonexistence of insurance coverage.

In *Wiggins*, the City of Monroe, in support of its motion for summary judgment, included a letter from its insurance carrier which denied insurance coverage for the damages sustained as a result of the City's demolition of the plaintiff's home. The *Wiggins* court stated that it was "not bound by the insurance company's interpretation of its own policy's coverage." *Wiggins*, 73 N.C. App. at 50, 326 S.E.2d at 44.

Likewise, neither we nor the trial court are bound by National Union's interpretation of its policy's coverage. The National Union policy contains the following pertinent provisions: Coverage A, which applies to law enforcement employees only, provides that "[t]he company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as money damages because of any claim against the Insured, arising out of any Wrongful Act of the Insured acting in the Insured's capacity as a Law Enforcement Employee of the Employer, named in the Declarations, and caused by the Insured, while acting in their regular course of duty." Coverage B of the policy applies to all public employees/officials except for law enforcement employees and provides essentially the same coverage. The policy further provides in the exclusions applicable to Coverage A that it "applies to all Wrongful Acts, which shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty including misfeasance, malfeasance and nonfeasance by an insured while acting within the scope of his professional duties for the employer . . . ." In the exclusions applicable to Coverage B the policy provides that it does not apply to any claim related to injury arising from "bodily injury," "false arrest, assault or

battery, detention, imprisonment, malicious prosecution or abuse of process," and "willful violation of any statute, ordinance, or regulation committed by or with the knowledge or consent of any Insured."

In the instant case the policy provides coverage for all "Wrongful Acts" which includes negligence and breach of duty. Plaintiff has alleged that defendants were negligent in failing "to take any corrective action to defuse the situation between Officers Johnson and Bollinger" after being aware that the two officers were hostile toward one another and that a confrontation was likely to occur after Officer Johnson's arrest of Phillip Bollinger. While defendants' liability to plaintiff arose from the actions of Officers Johnson and Bollinger, plaintiff sued defendants based on their negligent performance of their supervisory duties.

With respect to defendants Barrett, Hayes, and Camp, their negligence, if any, was insured under Coverage A of the policy. The exclusions applicable to Coverage A of the policy would involve "claims or injury arising out of the willful, intentional or malicious conduct of any Insured." Here plaintiff's allegations against these defendants did not relate to any "willful, intentional or malicious conduct" by them. Here plaintiff alleged that these defendants were negligent in their supervision of Officers Johnson and Bollinger. With respect to the City of Kings Mountain, its negligence, if any, was insured under Coverage B of the policy. The exclusions applicable would apply to claims for "bodily injury" or injury arising from "false arrest, assault or battery, detention, imprisonment, malicious prosecution or abuse of process." Plaintiff's cause of action against the City of Kings Mountain is also based on negligent supervision. Contrary to defendants' argument, plaintiff's claim does not arise from assault or battery. With respect to the "bodily injury" exclusion, plaintiff's claim is for money damages suffered as a result of defendant City's negligent supervision of the two officers.

We also note that the trial court denied defendants' motion with respect to third-party defendant Bollinger's counterclaims. In his brief, third-party defendant Bollinger concedes that there is no cause of action and no insurance coverage for punitive damages against the City of Kings Mountain. However, with respect to Bollinger's counterclaim for compensatory damages, the trial court did not err in denying defendants' motion for summary judgment.

Here at the summary judgment hearing, defendants have not shown as a matter of law that coverage as to Bollinger's compensatory damages claim did not exist under the policy. Accordingly, this assignment of error is overruled.

[3] Defendants next assign as error the trial court's denial of their motion to dismiss and alternative motion for summary judgment. In their brief, defendants argue that "[a] review of the Plaintiff's complaint indicates that there are no allegations that the Defendants knew or should have known that a personal fight would actually occur between Officer Johnson and Officer Bollinger; nor are there any allegations that the Defendants knew or should have known that the Plaintiff might intervene; nor are there any allegations that the Defendants knew or should have known that the Plaintiff might have been injured as a result of an apparent feud between Officers Johnson and Bollinger." Defendants also contend that a review of the record discloses that Johnson and Bollinger were not acting within their regular course of duty as required for coverage under the insurance policy when the fight ensued. Defendants argue that *Edwards v. Akion*, 52 N.C. App. 688, 279 S.E.2d 894, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981), is distinguishable. We disagree.

"A complaint should be dismissed for failure to state a claim where it is apparent that plaintiff (cross and counterclaimant under our facts) is entitled to no relief under any statement of facts which could be proven, more specifically, when there is an absence of law to support the claim asserted, a want of facts sufficient to establish a good claim, or some defense which will necessarily defeat the claim." *Brawley v. Brawley*, 87 N.C. App. 545, 552, 361 S.E.2d 759, 763 (1987), *disc. rev. denied*, 321 N.C. 471, 364 S.E.2d 918 (1988).

"Strictly speaking, the concept of negligence is composed of two elements: legal duty and a failure to exercise due care in the performance of that legal duty. Due care always means the care an ordinarily prudent person would exercise under the same or similar circumstances when charged with a legal duty. What is meant by legal duty, however, varies according to subject matter and relationships." *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 181, 352 S.E.2d 267, 270 (1987). [Citations omitted.]

Here, in her complaint plaintiff alleged that defendants had knowledge of the hostility between Bollinger and Johnson but

neglected to take any action to avoid confrontation between them. Given the evidence of alleged prior threats by Johnson against Bollinger in the formal complaint that was filed, defendants may have had a duty as supervisors to defuse the situation between the two officers. Plaintiffs have alleged sufficient facts to withstand a motion to dismiss. With respect to Bollinger's counterclaims, we believe that there are sufficient facts alleged to withstand third-party plaintiffs' motion to dismiss.

In *Edwards*, 52 N.C. App. 688, 279 S.E.2d 894, plaintiff brought an action seeking compensatory and punitive damages for personal injuries sustained during an altercation with a City of Raleigh employee. Plaintiff and defendant Akion argued about defendant Akion's method of refuse collection from plaintiff's residence. Plaintiff was knocked to the ground twice and was injured. Plaintiff sought to recover against the City on two theories. First, she sought to recover based upon the theory that defendant Akion committed an assault and battery upon her while acting within the scope of his employment. Second, plaintiff sought to recover on the grounds that the City negligently supervised defendant Akion which proximately caused her injuries. The trial court granted summary judgment in favor of the City.

In *Edwards*, this court stated that

> [w]hen there is a dispute as to what the employee was actually doing at the time the tort was committed, all doubt must be resolved in favor of liability and the facts must be determined by the jury. The doctrine should be applied liberally, especially where the business involves a duty to the public, and the courts should be slow to assume a deviation from the duties of employment. In this case, the facts surrounding the incident are not unequivocal, and a jury should determine whether the alleged assault arose out of personal animosity or an effort by Akion to accomplish the duties assigned him.

Id. at 698, 279 S.E.2d at 900.

In the instant case, in Bollinger's response to defendants' motion to dismiss and alternative motion for summary judgment, Bollinger submitted an excerpt from Johnson's deposition taken on 7 April 1988. Johnson testified that he was waiting in the lobby outside the Magistrate's Office with Bollinger's son when he was approached by Bollinger. Johnson also testified that before Bollinger

struck him Bollinger shook some papers in his face and said "that I had stepped over the line and went too far this time and that he had the evidence right there on paper that was going to cost me my job." He stated that Bollinger then "took his knee and kicked me (Johnson) in the groin." Johnson testified that he then began to defend himself. While there is evidence of personal animosity between Johnson and Bollinger, whether the altercation arose out of personal animosity or while Johnson was acting within the scope of his duty is a jury question. Defendants' contention otherwise is unpersuasive here.

Similarly, the question of defendants' negligence in preventing the altercation is also a jury question. *See Edwards*, 52 N.C. App. 688, 279 S.E.2d 894. Defendants argue that *Edwards* is inapplicable because Akion's supervisor was present during the *Edwards* altercation. We are not persuaded.

Here, plaintiff alleged in her complaint that defendants had been informed about the hostility between Johnson and Bollinger in an earlier formal complaint. On the day in question Sergeant Camp informed Bollinger that his son had been taken by Johnson to the Magistrate's Office and at the same time informed Johnson that Bollinger was on his way to the Magistrate's Office without taking any corrective action to defuse the situation or avoid confrontation between the two officers. In its answer, the City denied these allegations. Defendants failed to show that they are entitled to summary judgment since a genuine issue of material fact exists with respect to their liability.

Accordingly, the trial court's decision is affirmed.

Affirmed.

Judges WELLS and LEWIS concur.

TERESA P. WHITE, PLAINTIFF v. CHARLIE RAY BOWERS, DEFENDANT

No. 9018DC335

(Filed 19 February 1991)

Husband and Wife § 11.2 (NCI3d)— separation agreement—provisions for child support and education expenses—provisions independent—intent of parties—genuine issue of material fact

In an action for specific performance of provisions of a separation agreement with regard to child support and college education expenses, the trial court erred in holding that plaintiff breached the separation agreement by seeking an increase in child support after the older child reached the age of majority, that such breach was material, and that defendant was entitled to summary judgment, all based on the court's finding that the child support limitation and the payment of college expenses were integrated parts of the agreement; however, the court was required to look to the intent of the parties to determine whether the specific parts of the agreement were integrated and dependent of each other or nonintegrated and independent of each other, and there were thus genuine issues of material fact making summary judgment inappropriate.

Am Jur 2d, Divorce and Separation § 857.

Judge GREENE concurring.

APPEAL by plaintiff from order entered 16 February 1990 by *Judge W. Edmund Lowe* in GUILFORD County District Court. Heard in the Court of Appeals 16 November 1990.

Plaintiff and defendant executed a Separation and Property Settlement Agreement on 15 September 1983. Under section 4 of the Separation Agreement entitled "Child Support," defendant agreed to pay monthly child support payments of $1200 to plaintiff for the support of the couple's two minor children, Heather Elizabeth Bowers and Holly Ann Bowers. The Separation Agreement provided for a 50 percent reduction in these child support payments when the older child reached age 18. In the same section, defendant also agreed to provide the children with education beyond high school as long as each child had the ability and desire to continue and defendant agreed to the chosen school. However, if defendant did not agree to the chosen school, he agreed to pay only the

equivalent of the cost per year of a resident student attending the University of North Carolina at Chapel Hill.

The parties divorced, and in August 1985 defendant was ordered to pay $1200 per month in child support pursuant to a motion for child support by plaintiff. On 15 August 1985, the parties executed an amendment to the Separation Agreement in which the parties agreed the original agreement would remain in effect except as modified by the court in its August 1985 order.

Support obligations for Heather were terminated 31 May 1989. Plaintiff filed another motion seeking an increase in child support for the one minor child which was granted raising defendant's child support payments for the one minor child to $1000 per month. The court denied a motion for enforcement of the post high school education provisions on the grounds that they had not been incorporated into the orders of the court of 20 August 1983.

On 10 July 1989, plaintiff filed this action for specific performance of the post high school education provisions of the Separation Agreement to require defendant to pay for Heather's education at Gardner-Webb College. Defendant filed an answer alleging in part that plaintiff is not entitled to enforce the Separation Agreement on the grounds that she chose to seek an increase in child support by court action. On 20 November 1989, defendant moved for partial summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure asking that the court declare the most plaintiff is entitled to recover is the cost per year of a resident student at the University of North Carolina at Chapel Hill and that defendant is entitled to an offset against any college expenses for any child support he is required to pay above the $600 per month paid to plaintiff.

On 16 February 1990, the court granted summary judgment in favor of defendant. The trial court stated in its findings of fact that:

> 14. The terms of the Separation Agreement set out in the preceeding [sic] finding of fact [regarding the 50 percent reduction in child support] are in the same section with and directly preceed [sic] the terms and provisions setting forth the husband's agreement to provide his children with post high school education; and, the Court finds that the terms providing for a fifty percent (50%) reduction in child support when the older child reached the [sic] eighteen (18) was an integrated part

of the agreement for support of the children by the husband and part of the consideration for said agreement, including consideration for the husband's agreement to provide for post high school education of the children.

. . .

16. The plaintiff breached the terms of the Separation Agreement by failing to accept a fifty percent (50%) reduction in child support when the husband's obligation to support the older child of the parties ceased, and by seeking and obtaining a Court Order increasing the support to be required of defendant for the one remaining minor child to the sum of $1,000.00 per month.

17. Breach of the plaintiff in refusing to accept the fifty percent (50%) reduction in child support and obtaining an increase in child support in violation of the terms of the Separation Agreement was a material breach of the Agreement and, thereby, plaintiff is not entitled to seek enforcement of the provisions requiring the defendant to provide post high school education for the children of the parties.

The court concluded that because plaintiff breached the Separation Agreement by seeking and obtaining an increase in child support and because the breach was a material breach of the agreement, there was no genuine issue as to any material fact, and summary judgment for defendant was granted.

From this order, plaintiff appeals.

Wyatt Early Harris Wheeler & Hauser, by A. Doyle Early, Jr., and Lee M. Cecil, for plaintiff-appellant.

Kathleen E. Nix for defendant-appellee.

ORR, Judge.

The issue on appeal is whether the trial court erred in granting defendant's motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (1990). For the reasons set forth below, we conclude that the trial court erred in granting summary judgment in favor of defendant.

"Review of summary judgment on appeal is limited to whether the trial court's conclusions are correct as to the questions of whether

there is a genuine issue of material fact and whether the movant is entitled to judgment." *Vernon v. Barrow*, 95 N.C. App. 642, 643, 383 S.E.2d 441, 442 (1989). In *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), we stated:

> If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact. Although findings of fact are not necessary on a motion for summary judgment, it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment. The "Findings of Fact" entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on this appeal and are irrelevant to our decisions.

Therefore, the trial court's findings of facts are not binding in this appeal.

Plaintiff contends that there were genuine issues of material fact regarding 1) whether the child support provisions and the provisions regarding post high school education in the separation agreement were separable or interdependent; 2) whether plaintiff breached these provisions by obtaining an increase in child support, thereby refusing the 50 percent reduction in child support as provided in the agreement; and 3) whether such a breach was material so that the post high school education provisions were voided, thereby removing plaintiff's right to seek enforcement of this provision.

In determining whether a wife's breach of provisions in a separation agreement regarding visitation rights constituted a defense to the husband's failure to make support payments pursuant to the separation agreement, we stated:

> "These authorities are to the effect (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability from the latter's covenants, the respective covenants must be interdependent rather than

> independent; and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith."

Williford v. Williford, 10 N.C. App. 451, 455, 179 S.E.2d 114, 117, *cert. denied*, 278 N.C. 301, 180 S.E.2d 177 (1971) (quoting *Smith v. Smith*, 225 N.C. 189, 197-98, 34 S.E.2d 148, 153 (1945)).

Thus, a critical issue in deciding whether a spouse's breach of a provision of a separation agreement is a defense is determining whether the provisions are interdependent or dependent. In *Williford*, the Court held that provisions for custody and visitation in the separation agreement were independent of the provisions for support and maintenance such that the wife's breach of the visitation provisions was not a defense to the husband's obligation to pay for plaintiff's support and maintenance. 10 N.C. App. at 456, 179 S.E.2d at 117.

In determining whether support provisions and property division provisions of a consent judgment were interdependent, our Supreme Court stated:

> The answer depends on the construction of the consent judgment as a contract between the parties. "The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed."

White v. White, 296 N.C. 661, 667-68, 252 S.E.2d 698, 702 (1979) (quoting *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 190, 196 (1975)).

In *White*, the provisions were not "clearly separable," the parties' intent regarding whether the two provisions were independent was not clear from the language of the contract, and the parties did not "express an intent that the provisions be considered reciprocal consideration for each other and thus inseparable." *White*, 296 N.C. at 668, 252 S.E.2d at 702. The Court stated that "[t]he record is devoid of any facts bearing on the negotiations between the parties, their financial situations before and at the time they consented to the judgment, and their motivation for entering into an agreement with these particular terms." *Id.* at 669, 252 S.E.2d at 703. Therefore, the Court stated that "[e]vidence of the situation of the parties at the time they consented to the judgment is therefore

essential to resolution of the issue." *Id.* In "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," the *White* Court held that "in such cases there is a presumption that provisions in a separation agreement or consent judgment made a part of the court's order are separable . . . ." *Id.* at 671-72, 252 S.E.2d at 704. The Court concluded that an evidentiary hearing was necessary. *Id.* at 672, 252 S.E.2d at 704.

In *Hayes v. Hayes*, 100 N.C. App. 138, 147-48, 394 S.E.2d 675, 680 (1990), we stated:

> The effect of this presumption [in *White*] is to place the burden of proof on the issue of separability on the party claiming that the agreement is integrated . . . . 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. However, where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs. In those cases where no such explicit clauses exist, an evidentiary hearing to determine the parties' intent is required. [citations omitted]

In the case before us, there is no clause in the Separation Agreement in question stating whether the terms of the document are integrated or nonintegrated (independent or interdependent). Therefore, the Court must look to the intent of the parties, and determine whether the specific parts of the agreement are integrated and dependent of each other or nonintegrated and independent of each other. *See White*, 296 N.C. at 668-69, 252 S.E.2d at 702-03. If there is evidence raising a genuine issue of material fact, then the trier of fact must decide the issue. Here the trial court made findings of fact that the child support limitation and the payment of college expenses were integrated parts of the agreement. If fact finding was necessary, then summary judgment was inappropriate, and we so hold although we note that the trial court references in its order certain "stipulation of facts" which are not included in the record.

We reject, as inconsistent with *White* and *Hayes*, any argument that the terms of a separation agreement and/or property

settlement agreement in the absence of clear language in the agreement(s) are as a matter of law either independent or interdependent.

In the present case it is not clear whether or not the provisions of the separation agreement are integrated. Since genuine issues of material fact exist, summary judgment was inappropriate. Therefore, we conclude that the trial court erred in granting summary judgment.

The order of the trial court is therefore reversed and remanded for a hearing on the merits and issues raised.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge GREENE concurs with a separate opinion.

Judge GREENE concurring.

In determining the intent of the parties regarding the issue of whether the terms of an agreement are integrated or non-integrated, the central issue is whether the provisions were negotiated in reciprocal consideration for each other. If in reciprocal consideration, the provisions are deemed integrated. If not in reciprocal consideration, the provisions are deemed separate or nonintegrated. Just as provisions of a separation agreement may or may not constitute reciprocal consideration for a property settlement agreement and therefore be integrated or nonintegrated, *see Stegall v. Stegall*, 100 N.C. App. 398, 410-11, 397 S.E.2d 306, 312-13 (1990) (evidence that property settlement and separation agreements were reciprocal); *In re Tucci*, 94 N.C. App. 428, 437, 380 S.E.2d 782, 787 (1989), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990) (no evidence that property settlement and separation agreements were reciprocal); *Small v. Small*, 93 N.C. App. 614, 626, 379 S.E.2d 273, 280, *disc. rev. denied*, 325 N.C. 273, 384 S.E.2d 519 (1989) (no evidence that property settlement and separation agreements were reciprocal), separate provisions of a separation agreement may also be either integrated or nonintegrated.

STATE OF NORTH CAROLINA v. JANICE TERESA BLAIR, DEFENDANT

No. 9026SC536

(Filed 19 February 1991)

1. Robbery § 5.2 (NCI3d)— robbery with firearm—appearance of firearm—mandatory presumption—instruction correct

In a prosecution for robbery with a firearm the trial court properly instructed on the mandatory presumption that a victim's life is endangered or threatened when there is evidence that defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon, and the mandatory presumption does not violate due process of law by failing to require the State to prove beyond a reasonable doubt every essential element of the charge. Such a mandatory presumption is constitutional because (1) the mandatory presumption disappears when the defendant comes forward with some evidence to rebut the presumption, or takes advantage of evidence offered by the prosecution in order to rebut the presumption, (2) there is a logical connection between the basic and elemental facts such that "upon proof of the basic facts, the elemental facts are more likely than not to exist," and (3) "there is other evidence in the case which, taken together with the inference of presumption, is sufficient for a jury to find the elemental facts beyond a reasonable doubt."

Am Jur 2d, Robbery § 5.

2. Robbery § 5.2 (NCI3d)— robbery with firearm—appearance of firearm—instructions—burden unconstitutionally shifted to defendant

When a mandatory presumption arises where there appears to be a firearm, the defendant has the burden to come forth with some evidence that it was not a firearm or to take advantage of evidence that the prosecution has offered, but the trial judge was incorrect when he referred to the effect of the mandatory presumption on the defendant as giving rise to an affirmative defense, and the judge's statements unconstitutionally shifted the burden of proof to defendant.

Am Jur 2d, Robbery §§ 5, 52.

3. Robbery § 5.2 (NCI3d)— robbery with firearm—defense of duress or coercion—instruction not required

In a prosecution for robbery with a firearm, the evidence was insufficient to require an instruction on the defense of duress or coercion where the testimony of defendant only indicated that she did not in any way participate in the crime, but she did testify that the principal in some way forced her to participate in the robbery.

Am Jur 2d, Robbery § 74.

APPEAL by defendant from a judgment entered 15 February 1990 in Superior Court, MECKLENBURG County, by *Judge Kenneth A. Griffin.* Heard in the Court of Appeals 17 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard G. Sowerby, Jr., for the State.

Assistant Public Defender Robert L. Ward for defendant appellant.

LEWIS, Judge.

The questions addressed on appeal in this case are: whether the trial judge erred in his instructions to the jury relating to robbery with a firearm, and whether the trial judge erred in refusing to instruct the jury on the defense of coercion or duress.

The State's evidence presented at trial tended to show that on 11 April 1989 the defendant was a passenger in a car driven by Nathaniel Weatherman. Weatherman drove to a convenience store with the defendant. The defendant and Weatherman walked into the convenience store where one customer stood at the register. Weatherman held what appeared to be a gun wrapped in a cloth and proceeded to rob the store. The State's witnesses testified that the defendant stood in the store with her hands in her pocket and said words to the effect that Weatherman meant what he said. However, the defendant testified that she put her hands up in the air when he began robbing the store and that she did not know that Weatherman had planned to rob the store. Weatherman took the money from the cash register and left the store at approximately the same time as the defendant. The defendant also testified that she tried to slip away but Weatherman threatened her after the robbery and forced her into the car. The cashier read the

license plate number on the car as it drove away and immediately notified the police. Shortly thereafter, a police officer apprehended the defendant and Weatherman who were found in the car. The officer found money lying in the front of the car and a rifle scope wrapped in a towel.

The defendant was charged with robbery with a dangerous weapon. After a trial before a jury, the trial judge instructed the jury on robbery with a dangerous weapon and common law robbery. The judge refused to allow the instruction on compulsion, duress, or coercion. The jury returned a verdict of guilty of robbery with a dangerous weapon. The defendant was sentenced to fourteen years in prison.

The first issue that the defendant addresses in defendant's brief is whether the trial judge should have dismissed the charge of robbery with a dangerous weapon due to insufficiency of the evidence. The defendant failed to assign error to this issue and we find no "plain error." We dismiss this issue under Rule 10 of the North Carolina Rules of Appellate Procedure.

The defendant also appeals the issue of whether the trial judge erred in his jury instructions relating to robbery with a dangerous weapon. In response to the jury's question as to whether there is a requirement that an actual gun be found to convict the defendant of robbery with a firearm, the trial judge gave the following instructions to the jury:

> The law presumes in the absence of any evidence to the contrary that the instrument is what his conduct represents it to be, an implement endangering or threatening the life of the person being robbed. Where there is evidence that defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. The mandatory presumption under consideration here, however, is of the type which merely requires the defendant to come forward with some evidence or take advantage of evidence already offered by the prosecution to rebut the connection between the basic and elemental facts. Therefore, when any evidence is introduced tending to show the life of the victim was not endangered or threatened, the mandatory presumption disappears, leaving only a mere permissive inference. The per-

> missive inference which survives permits but does not require the jury to infer the elemental fact, that is danger or threat to life from the basic fact proven, that is robbery with what appeared to the victim to be a firearm or other dangerous weapon.

After the jury left the courtroom, the defendant objected to the judge's instructions. The defendant argued that the judge's statement about requiring the defendant to come forward may have misled the jury so that they thought the burden of proof had shifted to the defendant. The judge then requested that the jury return. The judge added the following instructions:

> It's been brought to my attention that I may have misled you when I said the mandatory presumption under consideration here, however, is the type which merely requires the defendant to come forward with some evidence or take advantage of evidence already offered by the prosecution. The burden of proof never shifts to the defendant. The burden of proof stays with the State beyond a reasonable doubt on all elements. But in this particular case there is what is known as an affirmative defense which requires some evidence on the part of the defendant, either by direct evidence or taking advantage of evidence already offered by the prosecution. But you are not to interpret that as meaning that the burden shifts to the defendant to convince you beyond a reasonable doubt that it wasn't or was. The burden never shifts on that. Don't misinterpret what I'm saying. It's an affirmative defense that you need to be persuaded but it doesn't shift the burden in any way to the defendant. But it's for you, the jury, to determine, based on all the evidence, as I have told you. I just wanted to make that point.

The jury then left the courtroom and later returned with a verdict of guilty of robbery with a firearm.

[1] The Fourteenth Amendment requires that the State prove every element of a crime beyond a reasonable doubt. In *State v. Joyner*, 312 N.C. 779, 783, 324 S.E.2d 841, 844 (1985), this Court found that the mandatory presumption used in that robbery case where there appeared to be a firearm was constitutional.

> The mandatory presumption under consideration . . . is of the type which merely requires the defendant "to come for-

> ward with *some evidence* (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts. . . ." *State v. White*, 300 N.C. at 507, 268 S.E.2d at 489. Therefore, when *any evidence* is introduced tending to show that the life of the victim was not endangered or threatened, "the mandatory presumption disappears leaving only a permissive inference. . . ." *Id.*

State v. Joyner, 312 N.C. at 783, 324 S.E.2d at 844 (emphasis added). The initial part of the trial judge's instructions to the jury was correct. We hold that the mandatory presumption referred to in the trial, as in *Joyner*, does not violate due process of law by failing to require the State to prove beyond a reasonable doubt every essential element of the charge. Such a mandatory presumption is constitutional because 1) the mandatory presumption disappears when the defendant comes forward with some evidence to rebut the presumption, or takes advantage of evidence offered by the prosecution in order to rebut the presumption, 2) there is a logical connection between the basic and elemental facts such that "upon proof of the basic facts, the elemental facts are more likely than not to exist," and 3) "there is other evidence in the case which, taken together with the inference of presumption, is sufficient for a jury to find the elemental facts beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 506, 268 S.E.2d 481, 489, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 443 (1980). Here, the basic fact, the fact from which the inference is made, is that the victim testified that Weatherman appeared to have a weapon. The elemental fact, the fact inferred, is the danger or threat to life. We hold that the three requirements for a constitutional mandatory presumption stated by the North Carolina Supreme Court in *White* are present in this case.

[2] The only area we find questionable is where the court twice stated that there was an "affirmative defense" involved in the case. Although the judge repeatedly stated that the burden does not shift to the defendant, he also stated that "it's an affirmative defense that you need to be persuaded. . . ."

The trial judge was incorrect when he referred to the effect of the mandatory presumption on the defendant as giving rise to an affirmative defense. In cases involving an affirmative defense in criminal law in North Carolina, the defendant has the burden of proof. For example, the defendant has the burden of proof on

the issue of insanity. *See State v. Weeks*, 322 N.C. 152, 175, 367 S.E.2d 895, 909 (1988). In cases, as here, when a mandatory presumption arises where there appears to be a firearm, the defendant has a burden to come forth with some evidence that it was not a firearm or to take advantage of evidence that the prosecution has offered. *State v. Joyner*, 312 N.C. at 783, 324 S.E.2d at 844. The defendant does not have the burden of persuasion.

The trial judge's statement was contradictory. Although the judge stated that the defendant did not have the burden of proof, he stated that there was an affirmative defense involved that the jury need to be "persuaded." The trial judge in effect stated on one hand that the defendant did not have the burden of proof, but on the other hand that she had the burden of persuasion. We hold that the judge's statements unconstitutionally shifted the burden of proof to the defendant. The shifting of the burden of proof as to an essential element of the crime is a violation of the Due Process Clause of the United States Constitution and unless the State can show that the error was harmless beyond a reasonable doubt, the error is prejudicial. *See Rose v. Clark*, 478 U.S. 570, 92 L.Ed.2d 460 (1986). The State has not shown the error is harmless beyond a reasonable doubt.

[3] Lastly, the defendant argues that the trial court erred by refusing to instruct the jury on the defense of duress or coercion.

> [T]he general rule [is] that in order to constitute a defense to a criminal charge . . . the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Furthermore, the doctrine of coercion cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or bodily harm.

State v. Henderson, 64 N.C. App. 536, 540, 307 S.E.2d 846, 849 (1983) (citation omitted).

The defendant testified that she did not know that Weatherman was going to rob the store. She also testified that she took her hands out of her pockets and held her hands up in the air when he held what appeared to her to be a gun and said, "don't nobody move." She testified that she eventually got down on the floor as though she was a victim of the robbery. The defendant stated

that she left the store during the robbery and crossed the road. Shortly thereafter, Weatherman drove his car beside her and said, "Bitch, get in the car. . . . Just shut your mouth." She got in the car. As he drove the car with the police following him, he "cursed" her. She pleaded with him to let her out of the car but he refused.

In order to have the court instruct the jury on the defense of duress or coercion, the defendant must present some credible evidence on every element of the defense. *State v. Henderson*, 64 N.C. App. 536, 540, 307 S.E.2d 846, 849 (1983) (citation omitted).

The testimony of the defendant only indicated that she did not in any way participate in the crime. She did not testify that Weatherman in some way forced her to participate in the robbery. We hold that there was not sufficient evidence to merit an instruction on duress.

New trial.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. ROBERT JOSEPH DRDAK

No. 9021SC384

(Filed 19 February 1991)

Automobiles and Other Vehicles § 813 (NCI4th)— driving while impaired—blood test analysis—erroneously admitted

A blood test analysis was erroneously admitted and a new trial for driving while impaired was granted where defendant was involved in a one-car accident after consuming alcohol; he was found unconscious in his car; those who came to his aid noticed an odor of alcohol on his breath; the investigating officer did not order a blood sample to be analyzed pursuant to the appropriate statutes; the treating physician ordered a routine series of laboratory tests, including a request for blood ethanol level, which he considered necessary for treatment; a phlebotomist at the hospital took blood samples and a medical technician analyzed the blood sample; defend-

ant's blood alcohol concentration was .178; the results were recorded and the blood sample destroyed; and defendant was charged after the local newspaper obtained defendant's confidential medical records and reported defendant's blood alcohol content. The State stipulated that statutory procedures for chemical analysis of blood alcohol content were not followed and, even though the State contended that the evidence was admissible as an "other chemical test" rather than a chemical analysis, the purpose of defendant's blood test was to determine the alcohol contentration of his blood. Under these facts, the analysis of defendant's blood did not meet the statutory requirements for chemical analysis and should not have been admitted. N.C.G.S. § 20-139.1 (1983); N.C.G.S. § 20-4.01(3a) (1983).

Am Jur 2d, Automobiles and Highway Traffic §§ 305, 306, 375, 377, 378.

APPEAL by defendant from judgment entered 15 November 1989 by *Judge W. Steven Allen, Sr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 14 January 1991.

On 15 March 1989, defendant was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 in connection with a single car accident which occurred on 14 February 1989. Defendant was convicted on 15 June 1989 and appealed to Superior Court. A jury convicted defendant on 15 November 1989. Defendant received a 24-hour jail term, suspended, and unsupervised probation for three years. As a condition of probation, defendant agreed to perform 24 hours of community service and complete Alcohol, Drug Education and Traffic School.

From the judgment of 15 November 1989, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

D. Blake Yokley and Donald K. Tisdale for defendant-appellant.

ORR, Judge.

The dispositive issue on appeal is whether the trial court erred in denying defendant's motions to suppress the admission into evidence of defendant's medical records including the results of a blood alcohol test on the ground that the test was not in accordance with the provisions of N.C. Gen. Stat. §§ 20-16.2 and 20-139.1.

For the following reasons, we hold that the trial court erred and reverse the judgment of 15 November 1989.

The following facts are pertinent to this case on appeal. On 14 February 1989, defendant, an agent for the Federal Bureau of Investigation, met with another agent to discuss a case. Over the course of the evening, defendant consumed one beer, two mixed drinks, less than one glass of wine and a glass of cognac between the hours of 5:00 p.m. and 10:00 p.m. Defendant then left his fellow agent's house and drove onto Staffordshire Road. The evidence of record indicates that defendant lost control of his car and struck a tree.

Terry Austin, who was inside a house across the street, arrived on the scene within a few minutes. When she opened the passenger door of defendant's car, she found defendant unconscious and lying on his right side on the front seat. Ms. Austin testified that she supported defendant's head until help arrived approximately 20 minutes later. Judith Kay, who was with Ms. Austin, notified the police immediately and assisted Ms. Austin. Both witnesses testified that they noticed a moderate odor of alcohol on defendant's breath.

Scott Emerson, emergency medical services technician, testified that he arrived on the accident scene at 10:18 p.m. and examined defendant for injuries. During this examination, Mr. Emerson detected a moderate odor of alcohol on defendant's breath.

Defendant was then transported to Forsyth Memorial Hospital before the investigating officer, Officer Lichtenhan, arrived at the accident scene. When Officer Lichtenhan arrived at the hospital at 11:40 p.m., he detected a slight odor of alcohol on defendant. Officer Lichtenhan stated in his police report that defendant had been drinking, but that he was unable to form an opinion that defendant was impaired in any way. Officer Lichtenhan did not order a blood sample to be analyzed for blood alcohol content pursuant to the appropriate statutes.

Dr. Daniel Sayers treated defendant at the emergency room and ordered a routine series of laboratory tests including a request for blood ethanol level, which he considered necessary for treatment purposes. A phlebotomist at the hospital, Jo Annette Matthews, drew blood samples from defendant between 10:50 p.m. and 11:00 p.m., using an iodine prep containing no ethanol alcohol, and then delivered the samples to the lab for testing.

Kathleen Thore, medical technologist, analyzed defendant's blood sample on 14 February 1989 and determined that his blood alcohol concentration result was 0.178 grams per milliliter of blood. The results were recorded and the blood samples destroyed in seven days pursuant to hospital procedure.

On 22 February 1989, the Winston-Salem Journal reported that it had obtained defendant's confidential medical records and then reported the above information concerning defendant's blood alcohol content. Based upon the news report, the district attorney filed a motion to compel disclosure of defendant's medical records. The court ordered such disclosure on 9 March 1989. On 15 March 1989, defendant was charged with driving while impaired on 14 February 1989.

Prior to trial, defendant moved to suppress the admission of the results of the blood test analysis performed on 14 February 1989 and offered the following stipulated facts:

> 1. Cathy Thore, the Hospital employee performing the blood-alcohol test, is *not* licensed by and *does not possess* a permit from the Department of Human Resources to be a "Chemical Analyst" pursuant to G.S. 20-139.1. The hospital blood test which the State offers to prove Defendant's blood-alcohol concentration *was not done* according to the methods and procedures required of a Chemical Analysis authorized by G.S. 20-16.2 and G.S. 20-139.1. Defendant was not offered a chance to submit or refuse to submit to a chemical analysis of his breath or blood and was not advised of his rights concerning same. (Emphasis in the original).

The trial court denied defendant's motion and admitted the evidence.

Under N.C. Gen. Stat. § 20-139.1 (1983),

> (a) Chemical Analysis Admissible.—In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to defendant's alcohol concentration, including other chemical tests.

The remaining subsections of the statute provide detailed instructions concerning the procedures for chemical analysis of

blood alcohol content, and the above stipulations indicate that the State did not comply with these procedures. Therefore, if the analysis of defendant's blood alcohol content is admissible at all, it must be admissible as "other competent evidence . . ., including other chemical tests[.]" under subsection (a). The State maintains that the evidence of defendant's blood alcohol content was an "other chemical test" and not a chemical analysis subject to the rigid requirements for analysis under § 139.1. The State concedes, however, that the purpose of defendant's blood test was to *determine the alcohol concentration of his blood* so that the physicians and nurses treating defendant on 14 February 1989 could provide appropriate medical care.

Defendant argues that the evidence was, in fact, an "analysis" of his blood and therefore subject to the statutory requirements. We agree with defendant that under the facts in the present case, the evidence admitted was an analysis of defendant's blood and did not meet the statutory requirements for chemical analysis. Therefore, the evidence should not have been admitted at trial.

Chemical analysis is defined in N.C. Gen. Stat. § 20-4.01(3a) (1983) as "[a] chemical test of the breath or blood of a person to determine his alcohol concentration, performed in accordance with G.S. 20-139.1[,] . . . includ[ing] duplicate or sequential analyses when necessary or desirable to insure the integrity of test results."

This Court has considered blood samples drawn for purposes of medical treatment subject to the statutory requirements of § 20-139.1 for analysis when the analyses of the blood alcohol content of the blood samples were later used as a basis for criminal charges of driving under the influence. Therefore, the State's argument that this kind of analysis as "other competent evidence" of defendant's alcohol concentration is without merit.

The present case is very similar to that of *State v. Bailey*, 76 N.C. App. 610, 334 S.E.2d 266 (1985), in which a defendant involved in an automobile collision was injured and unconscious upon arrival at the hospital. For medical treatment purposes, a medical laboratory technologist drew two vials of blood from the defendant and placed the blood in a refrigerator. A law enforcement officer picked up one of the blood vials from another trooper two weeks after it was drawn and transported it to the SBI lab for analysis in accordance with § 20-139.1. *Id.* at 612, 334 S.E.2d at 268. In rejecting the defendant's argument that the evidence was

insufficient to establish the integrity or identity of the sample, this Court stated, "[t]he State is not required to negate every possible flaw in the testing procedure in order for the results of the chemical analysis to be admissible, *it is only required that the State show compliance with the provisions of G.S. 20-139.1.*" *Id.* at 613, 334 S.E.2d at 269 (emphasis added). *See also State v. Gray*, 28 N.C. App. 506, 221 S.E.2d 765 (1976) (defendant charged with driving under the influence of alcohol entitled to a new trial because the State failed to carry its burden of proving that the breathalyzer test met the statutorily prescribed methods under N.C. Gen. Stat. § 20-139.1); 96 ALR3d 745 § 6 (1979).

We are aware that in *State v. Miller*, 80 N.C. App. 425, 342 S.E.2d 553, *appeal dismissed and disc. review denied*, 317 N.C. 711, 347 S.E.2d 448 (1986), this Court permitted admission of blood alcohol concentration tests performed by hospital personnel under similar circumstances and entered into hospital records as a medical records exception to the hearsay rule. The *Miller* court, however, did not address the issue before us of whether the blood analysis must comply with the requirements of § 20-139.1 before it can be admitted into evidence to support a criminal charge of driving under the influence.

In the present case, the State stipulated that the blood test analysis offered and admitted into evidence was not performed according to the methods and procedures required under N.C. Gen. Stat. § 20-16.2 and § 20-139.1. Because the analysis did not comply with the statute, we hold that the evidence was inadmissible; and by its erroneous admission, it so prejudiced defendant as to require a new trial. It is well-settled law in this jurisdiction that evidence of a blood alcohol content of 0.10 or more is sufficient evidence, standing alone, for conviction of driving while impaired. *State v. Smith*, 312 N.C. 361, 374, 323 S.E.2d 316, 323 (1984). In the case *sub judice*, the erroneously admitted evidence indicated that defendant's blood alcohol concentration was 0.178.

For the above reasons, we reverse defendant's conviction and order a new trial. Because we order a new trial on the above issue, we decline to address defendant's remaining assignments of error.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. DWIGHT ANTHONY GOODSON, DEFENDANT

No. 9010SC573

(Filed 19 February 1991)

1. **Homicide § 30 (NCI3d)— second degree murder—no error in submitting**

The trial court did not err in a homicide prosecution by submitting second degree murder as a possible verdict where testimony that defendant Goodson was in the back seat holding a woman down while another defendant pummeled her and then confronted her with a knife, in conjunction with testimony that the woman's inert body was dragged to the side of the road, permits an inference beyond any reasonable doubt that defendant Goodson acted with malice and in concert in the unlawful killing of the victim.

Am Jur 2d, Homicide § 525.

2. **Criminal Law § 58 (NCI4th)— second degree murder—first degree murder charge dismissed—not final dismissal**

The trial court's dismissal of a first degree murder charge was not a final dismissal of the criminal proceeding pursuant to N.C.G.S. § 15A-931(a) (1983) where the prosecutor requested a dismissal of the first degree murder charge before requesting a charge on second degree murder. The record clearly shows that the State's request for a dismissal on the charge of first degree murder was predicated on its request for a charge of second degree murder.

Am Jur 2d, Criminal Law §§ 512, 513; Homicide § 211.

3. **Constitutional Law § 338 (NCI4th)— second degree murder—death qualified jury—no error**

The trial court did not err by allowing the State to seek a conviction of second degree murder with a death qualified jury. The death qualification of a jury does not deprive a defendant of his constitutional right to a trial by a jury representing a cross-section of the community, and there is no reason a jury qualified to reach a verdict on a charge of first degree murder would not be qualified to reach a verdict on second degree murder.

Am Jur 2d, Homicide § 466.

4. **Criminal Law § 89.4 (NCI3d)— impeachment of witnesses—prior inconsistent statements—admissible**

The trial court did not err in a murder prosecution by allowing the State to impeach a witness with his own prior inconsistent statements because the prior statements used to impeach the witness were not collateral but related directly to the connection between defendant and the victim on the day in question.

Am Jur 2d, Witnesses § 527.

5. **Criminal Law § 89 (NCI3d)— conflicting and incredible testimony—issue of credibility rather than competence**

The trial court did not err in a murder prosecution by admitting testimony which defendant contended was conflicting and incredulous. Conflicts in the testimony of a witness affect his credibility and not his competence.

Am Jur 2d, Witnesses §§ 658, 659.

6. **Criminal Law § 319 (NCI4th)— murder—defendants joined—no error**

The trial court did not err by allowing the State's motion for joinder of defendants in a murder prosecution where there was a sufficient basis to support a conviction of this defendant apart from the testimony of his codefendant. This defendant would have received a fair trial even if he had presented a defense adverse to the testimony of his codefendant.

Am Jur 2d, Homicide § 461.

7. **Criminal Law § 66.9 (NCI3d)— murder—photographic identification—not impermissibly suggestive**

The trial court did not err in a murder prosecution by denying defendant's motion to suppress a photographic identification of defendant where the evidence showed that the attending officers were suggestive with respect to the name of the defendant but not at all suggestive with respect to the photographic image.

Am Jur 2d, Criminal Law § 798.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures. 39 ALR3d 1000.

APPEAL by defendant from judgment entered 6 September 1989 in Superior Court, WAKE County by *Judge J.B. Allen, Jr.* Heard in the Court of Appeals 17 January 1991.

Defendant was charged with first degree rape and first degree murder and was tried by a death-qualified jury. At the close of State's evidence, the prosecution requested a dismissal on the charge of first degree murder and jury instruction on the charge of second degree murder. Defendant was found guilty of second degree murder and was sentenced to a term of not less than 25 years nor more than 35 years. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Lars F. Nance, for the State.

John T. Hall for defendant-appellant.

LEWIS, Judge.

On 9 July 1979 a passerby discovered the victim's body in the woods off a cul-de-sac on Turf Grass Road off Highway 64 East in Wake County. Forensic examination revealed injuries to the head, to both thighs, as well as to the skull and cheek, indicating a blunt force trauma to the head, which was cited as the cause of death. In the fall of 1987, Phillip Price called the Wake County Sheriff's Office to report that on 29 or 30 June 1979 he had been walking along a path by Turf Grass Road toward his nearby residence when he heard noise indicating a struggle coming from a mid-70's burgundy and white Plymouth Fury below. He observed three black males and one black female in the car and recognized the men as three individuals he had known since fourth grade. Defendant Spivey was in the driver's seat, defendant Holden was in the passenger's seat, and the victim, undressed from the waist down, was in the back seat with defendant Goodson. Defendant Holden turned around on his knees and pummeled the victim while defendant Goodson held her. Defendant Holden reached into the glove compartment and pulled out a knife, handing the knife to defendant Spivey, who turned around to face the victim. Spivey and Goodson then dumped the body out of the car and all defendants drove off.

At trial Sylvester Holden testified for the State that he had been riding with Spivey in Spivey's car one day in the summer of 1979 when they picked up Goodson and a black female. Holden testified that Spivey and Goodson, separately, had sexual inter-

course with the woman in the back seat. Goodson got out of the car and stood beside the front right passenger door. Spivey took the female out of the car, slapped her, got a knife and argued with her at the back of the car. Holden did not see Goodson hit the woman and said neither he nor Goodson was involved in the argument. Spivey, leaving the woman behind, entered the car. Goodson sat down in the rear seat and Spivey drove off.

[1] Defendant's first assignment of error is that the trial court erred in that the submission of second degree murder as a possible jury verdict resulted in unfair prejudice to the defendant. We disagree. Murder in the second degree is a lesser included offense of first degree murder. *State v. Benton*, 276 N.C. 641, 657-58, 174 S.E.2d 793, 804 (1970). With the exception of the element of premeditation and deliberation, the elements of the two charges are the same and any defendant preparing a defense for first degree murder is *ipso facto* preparing a defense for second degree murder. While it is possible that a given set of facts would support a jury instruction on first degree murder but not on second degree murder, this is not such a case. *See State v. Arnold*, 98 N.C. App. 518, 532, 392 S.E.2d 140, 149 (1990), *cert. granted*, 327 N.C. 484, 397 S.E.2d 223 (1990). Price's testimony that Goodson was in the back seat holding the woman down while the other defendant pummeled her and then confronted her with a knife, in conjunction with his testimony that the woman's inert body was then dragged to the side of the road, permits an inference beyond any reasonable doubt that defendant Goodson acted with malice and in concert in the unlawful killing of the victim. N.C.G.S. § 14-17 (1979). *State v. Smith*, 221 N.C. 278, 290, 20 S.E.2d 313, 321 (1942). The trial court's submission of a lesser charge is here supported by the evidence and is not prejudicial to the defendant. *See State v. Vestal*, 283 N.C. 249, 252, 195 S.E.2d 297, 299, *cert. denied*, 194 U.S. 874, 38 L.Ed.2d 114 (1973).

[2] Defendant argues in his second and seventh assignments of error that the trial court lacked jurisdiction over the charge of second degree murder because the prosecution requested a dismissal on the charge of first degree murder before requesting a charge of second degree murder, effectively dismissing the indictment. We reject this assignment of error. The record clearly shows that the State's request for a dismissal on the charge of first degree murder was predicated on its request for a charge of second degree murder. We note that defendant's attorney, upon the court's dismissal

of the more serious charge, failed to challenge the jurisdiction of the court. The court's dismissal of the charge of first degree murder was not a final dismissal of the criminal proceeding pursuant to N.C.G.S. § 15A-931(a) (1983).

[3] Defendant's third assignment of error is that the trial court erred in allowing the State to seek a conviction on second degree murder with a "death qualified" jury, because a "death-qualified" jury excludes a cross-section of the community. In *State v. Pinch*, 306 N.C. 1, 9, 292 S.E.2d 203, 213 (1982), the North Carolina Supreme Court decided that the death qualification of a jury does not deprive a defendant of his constitutional right to trial by a jury representing a cross-section of the community. We see no reason why a jury qualified to reach a verdict on a charge of first degree murder would not be qualified to reach a verdict on second degree murder. We therefore overrule this assignment of error.

[4] Defendant's fourth assignment of error is that the trial court erred in allowing the State to impeach Sylvester Holden by his own prior inconsistent statements because this impeachment did not relate to the issues of the case and served merely as subterfuge by which the State could admit otherwise inadmissible evidence. It is well known that the Rules of Evidence allow a witness to be impeached by his own prior inconsistent statements. N.C.G.S. § 8C-1, Rule 607 (1983). *State v. Ayudka*, 96 N.C. App. 606, 610, 386 S.E.2d 604, 607 (1989). The prior statements used by the State to impeach the witness were not collateral to the case but related directly to the connection between defendant Goodson and the victim on the day in question. This case is clearly distinguishable from *State v. Jerrels*, 98 N.C. App. 318, 390 S.E.2d 722 (1990), on which defendant relies, in that the present case does not involve the impeachment of one witness by the testimony of another on a collateral issue, but the impeachment of a witness by virtue of his own testimony on an issue critical to the trial. *See State v. Younger*, 306 N.C. 692, 697, 295 S.E.2d 453, 456 (1982). We therefore hold that the trial court's admission of this testimony was not in error.

[5] Defendant argues in his fifth assignment of error that the trial court committed plain error in allowing the jury to consider the testimony of witness Price. Defendant argues that Price's testimony is conflicting and incredulous. Conflicts in the testimony of a witness affect his credibility and not his competence. *Ward*

v. Smith, 223 N.C. 141, 143, 25 S.E.2d 463, 464 (1943). The issue of Price's credibility is a matter for the jury and does not affect the competency of the witness to testify. *Id.*

[6] In his sixth assignment of error the defendant argues that the trial court erred in allowing the State's motions for joinder of the defendants. Antagonism between two defendants' defenses does not necessarily warrant severance. *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979), *cert. denied, Jolly v. North Carolina*, 446 U.S. 929, 64 L.Ed.2d 282 (1980). The test is whether the conflict in defendants' positions at trial is of such nature that, considering all the evidence in the case, defendants were denied a fair trial. *Id.* In *State v. Cook* each defendant testified as to his own innocence as well as to the guilt or complicity of the other defendant in a murder. 48 N.C. App. 685, 686, 269 S.E.2d 743, 744 (1980). The Court concluded that although these defenses were antagonistic, both defendants still received a fair trial because the State had presented "ample evidence to support a conviction of either or both defendants." *Id.* at 688, 269 S.E.2d at 745. Joinder of defendants in the case before us did not prevent defendant Goodson from receiving a fair trial. Taking all the evidence into account, we note that there was a sufficient basis to support a conviction of defendant Goodson apart from the testimony of his codefendant. Defendant Goodson would have received a fair trial even if he had presented a defense adverse to the testimony of his codefendant. *See State v. Winslow*, 97 N.C. App. 555, 389 S.E.2d 435, 439 (1990). We therefore overrule this assignment of error and conclude that the trial court's joinder did not deprive defendant Goodson of a fair trial.

[7] In his ninth assignment of error defendant argues that the trial court erred in denying the defendant's motion to suppress the identification of defendant Goodson by Price. Defendant argues that the photographic identification of defendant Goodson by witness Price violated the standard of *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401 (1972), in that it was so suggestive as to deny due process. While the evidence does tend to show that the attending officers were suggestive with respect to the name of the defendant, the evidence also shows that the officers were not at all suggestive with respect to the photographic image of the man Price had seen in the back seat of the car, which he picked out of eleven such photographs. Evidence from the identification of a defendant out of a photographic lineup is inadmissible where the procedure, "was

so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Cobb*, 295 N.C. 1, 8, 243 S.E.2d 759, 764 (1978) (citing *Simmons v. U.S.*, 390 U.S. 377, 384, 19 L.Ed.2d 1247 (1968)). The officer's suggestiveness with respect to the name of the defendant could in no way affect Price's choice of the photograph bearing defendant Goodson's image. We therefore reject the contention that defendant Goodson was deprived of due process by this photographic identification.

No error.

Judges ARNOLD and JOHNSON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF-APPELLANT v. LOUISE HOOKS STOX AND GORDON OWENS, DEFENDANTS-APPELLEES

No. 903SC516

(Filed 19 February 1991)

Insurance § 149 (NCI3d)— homeowner's policy—exclusion for bodily injury intended by insured—intentional act

The trial court erred in concluding that a homeowner's insurance policy provided coverage to an insured who intentionally pushed a co-worker who fell and sustained injury, since the policy specifically excluded "bodily injury . . . which is expected or intended by the insured," and that means that the policy excludes from coverage bodily injury caused by the insured's intentional acts, whether insured actually intended injury.

Am Jur 2d, Insurance §§ 708, 709.

Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured. 31 ALR4th 957.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from order entered 3 April 1990 and signed 9 April 1990 by *Judge Thomas S. Watts* in PITT County Superior Court. Heard in the Court of Appeals 30 November 1990.

On 20 May 1989 while defendant Owens and defendant Stox were at work at Roscoe Griffin Shoe Store, Owens pushed Stox, who fell and was injured. At the time, Owens had in full force and effect a homeowners insurance policy which provided liability coverage. The relevant portions of the policy provide:

> Coverage E—Personal Liability
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. . . .
>
> "Occurrence" is defined as:
>
> 5. "occurrence" means an accident, including exposure to conditions, which results, during the policy period, in:
>
> a. bodily injury; or
>
> b. property damage.
>
> The policy provides for certain exclusions:
>
> Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> a. which is expected or intended by the insured;
>
> b. arising out of business pursuits of an insured or the rental or holding for rental of any part of any premises by an insured.
>
> This exclusion does not apply to:
>
> (1) activities which are usual to non-business pursuits; . . .

Business is defined in the policy as "trade, profession or occupation."

Plaintiff brought this declaratory action seeking a declaration regarding the rights of the parties pursuant to the homeowners insurance policy. The trial court, sitting without a jury, stated its findings of fact:

2. On May 20, 1989, Gordon Owens intentionally pushed Louise Stox, causing her to fall and receive injury.

3. The pushing of Louise Stox by Gordon Owens involved foreseeable consequences of significant bodily injury.

4. At the time Gordon Owens pushed Louise Stox, he had no specific intent to cause bodily injury to Louise Stox, and the injuries sustained by Louise Stox were the unintended result of an intentional act by Gordon Owens.

5. Although the pushing incident occurred in an employment setting, the pushing incident did not occur as a result of Gordon Owens engaging in a business pursuit.

6. The "business pursuit" exclusion in Plaintiff's insurance policy and the exception to the exclusion are ambiguous.

The trial court stated its conclusions of law:

1. The pushing incident constituted an "occurrence" under the terms of the homeowners insurance policy issued by Plaintiff to Gordon Owens.

2. The "expected or intended injury" exclusion contained in the policy is inapplicable.

3. The "business pursuit" exclusion contained in the policy is inapplicable.

4. In the alternative, if the pushing incident occurred as a result of Gordon Owens engaging in a business pursuit, the act of pushing Ms. Stox constituted an activity which was usual to a non-business pursuit under the exception to the "business pursuit" exclusion.

5. The policy of insurance issued by Plaintiff to Gordon Owens affords liability coverage to Gordon Owens for damages for which he becomes legally responsible because of the pushing incident involving Louise Stox, and which forms the basis of Pitt County Case. . . .

The trial court ordered plaintiff to pay any amount Owens becomes liable to pay to Stox up to the limit of liability of the homeowners insurance policy. From this order, plaintiff appeals.

Speight, Watson and Brewer, by James M. Stanley, Jr., for plaintiff-appellant.

Ward and Smith, P.A., by A. Charles Ellis, for defendant-appellee.

ORR, Judge.

The issue on appeal is whether the trial court erred in concluding that Owens' homeowners insurance policy provides coverage for the injury to Stox for which defendant Owens may become liable. Plaintiff first contends that the policy's exclusion of "bodily injury . . . which is expected or intended by the insured" does not cover liability for any injury in the present case. We agree.

In a declaratory judgment action, a trial court's "findings of fact are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed, even though there is evidence which might sustain findings to the contrary, and even though incompetent evidence may have been admitted." *Nationwide Mut. Ins. Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475, *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981).

"[E]xclusions of liability in insurance contracts are not favored and any ambiguities in exclusionary provisions must be construed in favor of the insured." *Wilkins v. American Motorists Ins. Co.*, 97 N.C. App. 266, 272, 388 S.E.2d 191, 195, *disc. review denied*, 327 N.C. 145, 394 S.E.2d 189 (1990). "This principle cannot be invoked, however, to impose liability that is clearly excluded by unambiguous contract terms." *Id.*

In construing an almost identical clause in an insurance policy, this Court concluded that

> [t]here is no ambiguity in the sentence "[This policy does not apply] to bodily injury or property damage which is either expected or intended from the standpoint of the insured." The sentence obviously means that the policy is excluding from coverage bodily injury caused by the insured's intentional acts,

determining whether the act is intentional from the insured's point of view.

Commercial Union Ins. Co. v. Mauldin, 62 N.C. App. 461, 463, 303 S.E.2d 214, 216 (1983).

"If the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Id.*

Defendant argues that *Commercial Union* is not controlling; however, we conclude otherwise. In *Commercial Union*, one of the defendants, Tommy Joe Wilmoth, entered a guilty plea to second-degree murder arising out of his firing a pistol into a car occupied by his wife and another person named Pugh. Wilmoth stipulated that he had intended to shoot his wife but not Pugh who was killed in the incident.

Our Court, in an opinion authored by Chief Judge Vaughn, determined that insurance coverage did not apply since by virtue of Wilmoth's plea of guilty to second-degree murder the "general intent to do the act" was present. *Id.* at 464, 303 S.E.2d at 217. The Court focused on the intent to do the act—in that case firing a pistol into the occupied car. It was pointed out in a quote from an opinion of our Supreme Court that "*[s]uch an act will always be accompanied by the general intent to do the act itself* but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing." *Id.* (quoting *State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 917 (1978).

In the case *sub judice*, the trial court found that Owens "intentionally pushed Louise Stox," and the trial court's findings are supported by competent evidence. While there might well have been no specific intent to injure her, the focus must be on the intentional *act* not the resulting consequence. Bodily injury occurred because of the intentional act of pushing Stox, and therefore the policy language excludes coverage. The other assignments of error raised by the plaintiff need not be addressed as the judgment of the trial court is reversed.

Reversed.

Judge GREENE concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In focusing upon the intentional nature of the push that the insured Owens gave Stox the majority overlooks the other policy requisite for the exclusion involved—that the injury was "expected or intended by the insured." I think the trial judge correctly ruled that the exclusion does not apply since the record does not show that Owens either expected or intended Stox to be injured. The holding in *Commercial Union Insurance Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983)—that intentionally firing a pistol into an occupied car established that the resulting homicide was both intended and expected—deemed controlling by the majority, has no bearing on this case. If the insured's push had been by an open stairwell or edge of a rooftop or precipice, the case would have some relevance; since it was on a level floor of the store where he was showing merchandise to a customer it has none.

HAZEL R. OGLESBY v. S. E. NICHOLS, INC. BY RICHARD NOECKER, REGISTERED AGENT

No. 903SC221

(Filed 19 February 1991)

1. **Negligence § 47 (NCI3d)— violation of State Building Code—absence of knowledge—no negligence per se**

Defendant store owner could not be found negligent per se for a State Building Code violation where plaintiff failed to show that defendant knew or should have known of the possible Code violation.

Am Jur 2d, Premises Liability § 53.

2. **Negligence § 57.11 (NCI3d)— fall on curb at store entrance—insufficient forecast of negligence**

Plaintiff invitee's forecast of evidence was insufficient to establish actionable negligence by defendant store owner in plaintiff's action to recover for injuries sustained when she

slipped and fell as she stepped onto a curb joining the parking lot and sidewalk at the entrance to defendant's store where plaintiff's deposition tended to show that she had previously visited defendant's store; she had no difficulty seeing the sidewalk and the store entrance; she did not see any slippery or foreign material where she fell; and she had no idea what caused her to fall.

Am Jur 2d, Premises Liability § 650.

Liability of operator of business premises to patron injured by condition of adjacent property. 39 ALR3d 579.

3. **Rules of Civil Procedure § 56.5 (NCI3d) — summary judgment — denial of motion for findings**

The trial court properly denied plaintiff's motion for findings of fact and conclusions of law in deciding a motion for summary judgment.

Am Jur 2d, Summary Judgment § 26.

4. **Rules of Civil Procedure § 11 (NCI3d) — summary judgment — motion for findings and conclusions — sanctions against attorney**

The trial court did not err in requiring plaintiff's counsel to pay $500.00 in attorney fees as a Rule 11(a) sanction for signing and filing a motion requesting findings of fact and conclusions of law under Rule 52(a) following the court's allowance of defendant's motion for summary judgment since plaintiff's counsel should have known that Rule 52(a) does not apply when summary judgment is involved.

Am Jur 2d, Damages § 616.

APPEAL by plaintiff from judgment entered 14 November 1989 by *Judge William C. Griffin, Jr.* in PITT County Superior Court. Heard in the Court of Appeals 11 December 1990.

Plaintiff slipped and fell, sustaining an injury, at the entrance of defendant's store on 13 September 1985 at 8:00 p.m. The day was fair, clear, and without rainfall. Plaintiff was familiar with the premises and testified at deposition that she had no difficulty seeing the store's entrance. As she stepped onto a curb cut joining the parking lot and sidewalk, her left foot slipped from under her and she fell.

Plaintiff testified she had no idea what caused her fall. She did not see any slippery or foreign material on the sidewalk before falling that might have made her foot slip. During her deposition she testified she knew of no defects in design or construction of the premises, or of anything that an inspection would have revealed. The trial court granted defendant's motion for summary judgment. Plaintiff's counsel then made a motion for findings of fact and was sanctioned for doing so by the trial court. From this judgment plaintiff appeals.

Hugh D. Cox for plaintiff-appellant.

Rodman, Holscher, Francisco & Peck, P.A., by Edward N. Rodman, for defendant-appellee.

ARNOLD, Judge.

Plaintiff alleges the trial court erred in granting defendant's motion for summary judgment. A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c); *Stoltz v. Burton*, 69 N.C. App. 231, 316 S.E.2d 646 (1984). "Summary judgment is proper even in a negligence case where the forecast of evidence fails to show defendant's negligence or establishes plaintiff's contributory negligence as a matter of law or where it is established that defendant's alleged negligence was not the proximate cause of plaintiff's injury." *Bailey v. Jack Pickard Imports, Inc.*, 93 N.C. App. 506, 507, 378 S.E.2d 193, 193 (1989).

Plaintiff alleged in her complaint that defendant's premises were in noncompliance with recognized standards for construction, design, and safety. An unverified letter from an architect to plaintiff's counsel listed violations of the State Building Code. "The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence *per se*, unless the statute, itself, otherwise provides, and such negligence is actionable if it is the proximate cause of injury to the plaintiff." *Ratliff v. Duke Power Co.*, 268 N.C. 605, 610, 151 S.E.2d 641, 645 (1966).

[1] A building's owner may not be found negligent *per se* for a Code violation "unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990). Plaintiff made no showing that defendant knew or should have known of the possible Code violation, therefore defendant may not be found negligent *per se*.

To survive defendant's motion for summary judgment, plaintiff must allege a *prima facie* case of negligence. Plaintiff must show that "defendant owed [her] a duty of care; defendant's conduct breached that duty; the breach was the actual and proximate cause of [her] injury; and damages resulted from the injury." *Lamm v. Bissette Realty, Inc.*, 94 N.C. App. 145, 146, 379 S.E.2d 719, 721 (1989), *modified and aff'd*, 327 N.C. 412, 395 S.E.2d 112 (1990).

Plaintiff was entering defendant's place of business to make a purchase from defendant, and therefore occupied the status of an invitee. *Morgan v. Great Atlantic & Pac. Tea Co.*, 266 N.C. 221, 145 S.E.2d 877 (1966). A storekeeper owes business invitees the duty to exercise reasonable care in maintaining the approaches and entrances to his store in a reasonably safe condition and to warn customers of any unsafe condition or hidden danger of which he knows or should have known in the exercise of reasonable supervision. *Frendlich v. Vaughan's Foods of Henderson, Inc.*, 64 N.C. App. 332, 307 S.E.2d 412 (1983).

[2] Plaintiff's testimony in the deposition established several key points: (1) she had previously visited defendant's store; (2) she had no difficulty seeing the entranceway and sidewalk; (3) she did not see any slippery or foreign material where she fell; (4) she knew of no design or construction defects of the premises; and (5) she had "no idea" why she fell. "The doctrine of *res ipsa loquitur* has no application to a case in which recovery is sought for injuries received in a fall upon or from the entryway of a shop or store." *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 155, 108 S.E.2d 461, 464 (1959). A storekeeper is not an insurer of his customers' safety and is only liable for injuries which result from negligence on his part. *Frendlich*, 64 N.C. App. 332, 307 S.E.2d 412.

"As a general rule, issues of negligence are not susceptible of summary adjudication." *Jacobson v. J.C. Penney Co., Inc.*, 40 N.C. App. 551, 557, 253 S.E.2d 293, 295, *disc. review denied*, 297

N.C. 454, 256 S.E.2d 807 (1979). But taking all of plaintiff's allegations as true, plaintiff's forecast of evidence failed to establish actionable negligence on defendant's part. We find no error in the trial court's grant of summary judgment for defendant.

[3] Plaintiff next alleges the trial court erred in denying her motion under N.C.R. Civ. P. 52(a) for findings of fact and conclusions of law. Rule 52(a)(1) provides that it is applicable "[i]n all actions *tried upon the facts* . . . ." N.C.R. Civ. P. 52(a) (emphasis added). "A motion for summary judgment is not an action tried upon the facts since this motion can only lie where there is no necessity for trying the action upon the facts." *Garrison v. Blakeney*, 37 N.C. App. 73, 76, 246 S.E.2d 144, 146, *cert. denied*, 295 N.C. 646, 248 S.E.2d 251 (1978).

This rule does not require the trial court to make findings of fact when requested by a party in deciding a motion for summary judgment. *Id.* "The making of additional specific findings and separate conclusions on a motion for summary judgment is ill advised since it would carry an unwarranted implication that a fact question was presented." *Id.*, at 77, 246 S.E.2d at 146-47 (quoting *General Teamsters, Chauffeurs and Helpers Union, Local No. 782 of Maywood and Vicinity, of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Blue Cab Co.*, 353 F.2d 687, 689 (7th Cir. 1965)). Plaintiff's assignment of error is without merit.

[4] In plaintiff's third assignment of error, she alleges the trial court erred in finding a violation of N.C.R. Civ. P. 11(a) and levying a $500.00 sanction of attorney's fees against plaintiff's counsel. The standard under Rule 11(a) is objective reasonableness under the circumstances. *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989).

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold

the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Id., at 165, 381 S.E.2d at 714.

Plaintiff's counsel signed the motion requesting findings of fact and conclusions of law under Rule 52(a) following the grant of summary judgment. This signature was a certificate that he had read the motion and "that to the best of his knowledge, information, and belief formed after reasonable inquiry it [was] well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, ..." N.C.R. Civ. P. 11(a). A brief examination of the annotations following Rule 52 in the General Statutes would have shown that the rule does not apply when summary judgment is involved.

The trial court found as a fact that there was no showing or good faith argument for the extension, modification or reversal of existing law. Additional findings clearly show the motion was unwarranted and a violation of Rule 11(a). These findings support the trial court's conclusions of law requiring plaintiff's counsel to pay expenses incurred by defendant's attorney in responding to this motion.

An abuse of discretion standard is to be used when reviewing the appropriateness of the sanction imposed. *Turner*, 325 N.C. 152, 381 S.E.2d 706. The trial court ordered plaintiff's counsel to pay $500.00 to the clerk of superior court for the use and benefit of defendant's counsel. We conclude the trial court did not abuse its discretion in imposing this particular sanction. We have considered plaintiff's final issue on appeal and find it to be without merit.

The trial court's entry of summary judgment and its order imposing a sanction for violation of Rule 11(a) are affirmed.

Affirmed.

Judges JOHNSON and LEWIS concur.

GEORGIA ANDERSON, PLAINTIFF v. WILLIAM LEE ANDERSON, JR., WILLIAM LEE ANDERSON, SR., AND KATHERINE W. ANDERSON, DEFENDANTS

No. 9026DC148

(Filed 19 February 1991)

1. **Trusts § 19 (NCI3d)— marital home—parol resulting trust—existence of agreement properly considered—insufficient evidence**

In an action by plaintiff wife to establish a parol resulting trust in the marital home which was titled in the names of the husband's parents, the trial court did not err in considering whether the parties had an agreement since plaintiff could establish a resulting trust by showing that a promise to pay the mortgage and other expenses served as consideration when the parents took title. However, plaintiff's evidence that, after she and her husband moved into the house, they made monthly payments in the amount of the mortgage payments to the husband's father and paid taxes, insurance, and maintenance expenses for the property was insufficient to establish a resulting trust in the property since all of plaintiff's evidence related to money transactions that occurred after title had passed to the husband's parents.

Am Jur 2d, Trusts §§ 196, 198, 628, 639.

2. **Landlord and Tenant § 2 (NCI3d)— agreement between husband and wife and husband's parents—no parol resulting trust—lease arrangement**

Evidence was sufficient to support the trial court's finding that the agreement between plaintiff wife, defendant husband, and defendant parents of the husband, if at all, was a "lease arrangement" where defendant father testified that his son and plaintiff were to pay him rent and that he allowed them to live in the house as long as it cost him no out-of-pocket expenses; he testified that he never agreed with them that the house would be theirs once his mortgage was paid; plaintiff testified that the checks she wrote for the mortgage and taxes were payable directly to defendant father and not to the bank or taxing authority; she also testified that she had on occasion written the word "rent" on the check she sent to defendant father; and plaintiff acknowledged that she had previously con-

sented to the entry of a court order reciting that she was renting the house from defendant father.

Am Jur 2d, Landlord and Tenant § 11; Trusts §§ 196, 198, 639.

APPEAL by plaintiff from order entered 14 November 1989 by *Judge Richard D. Boner* in MECKLENBURG County District Court. Heard in the Court of Appeals 18 September 1990.

Plaintiff commenced this civil action on 9 February 1989 against her husband, William Lee Anderson Jr., seeking, among other things, a divorce from bed and board and an emergency order under G.S. 50B-2. Plaintiff and William Lee Anderson Jr. were married on 5 May 1977, and during their marriage had three daughters. Defendant William Anderson Jr. adopted plaintiff's two sons by a former marriage.

Sometime before July 1978, defendant William Anderson Sr. paid to move a house to an empty lot he owned in Charlotte. He also took out a mortgage to improve the house after it was moved to the new location. Mr. Anderson Sr. testified that he had put the lot in his son's name for "tax purposes." He also testified that when he bought the house to move on the lot, his son deeded the land back to him. The parties presented no evidence about when they obtained the lot and the evidence is conflicting as to whether it was titled in the name of Mr. Anderson Jr. or Mr. Anderson Sr. when Mr. and Mrs. Anderson Jr. were first married.

In July 1978 Mr. and Mrs. Anderson Jr. moved into this house and lived there with their children until they separated on 5 February 1989. The parties agreed that Mr. and Mrs. Anderson Jr. would pay $126 to Mr. Anderson Sr. each month to cover the mortgage payments Mr. Anderson Sr. had to make on the property. Mr. and Mrs. Anderson Jr. also agreed to pay taxes and insurance and to make some repairs. The evidence is conflicting as to whether the parties agreed that Mr. and Mrs. Anderson Jr. would own the house once the mortgage was paid.

In her complaint filed 9 February 1989, plaintiff requested that the court order Mr. Anderson Jr. to vacate the parties' marital home under G.S. 50B-2. By consent order entered 27 February 1989 the court allowed plaintiff and the children to continue to

occupy the residence. On 1 May 1989 the court entered a revised consent order which allowed plaintiff to remain in the home with the children if she paid $126 per month to Mr. Anderson Sr. Mr. and Mrs. Anderson Sr. then filed a motion requesting that the court order plaintiff and the children to vacate the marital home. At the hearing on the motion, plaintiff claimed for the first time to have an equitable interest in the home through a parol resulting trust. The trial court granted defendants' motion because there was no written lease, no "commitment" in prior orders that required allowing the plaintiff to remain in the house, and no resulting trust. Plaintiff appeals.

Grandy & Martin, by Kenneth C. Martin, for plaintiff-appellant.

Wishart, Norris, Henninger & Pittman, P.A., by William H. Elam, for defendant-appellees.

EAGLES, Judge.

[1] We first consider plaintiff's contention that the trial court erred in restricting its findings of fact to the existence or non-existence of an agreement. We hold that the trial court did not improperly restrict its findings of fact and did not err in considering whether the parties had an agreement.

At the end of the hearing the trial judge made the following statement:

> [T]he arrangement, if any, was in the nature of a lease of the property. I cannot find from the evidence that there was—by preponderance of the evidence that there was any agreement either implied or otherwise or expressed that title of the property or any interest in the property would lie in the plaintiff and the defendant husband.

In its order the trial court found:

> [T]he title to the real estate is in the name of William Anderson, Sr. and wife Katherine W. Anderson; that William Anderson, Sr. caused a residence to be moved to a vacate [sic] lot which he purchased with his own funds; that he and other members of his family made certain repairs on the home; and that a lease arrangement was allowed whereby the Plaintiff and William Anderson, Jr. lived in said home for a lease payment, consisting of, among other items, $126.00 per month, payment

of the taxes and insurance and making some of the repairs. Mr. Anderson Sr. has made a number of payments and a number of repairs himself. The Plaintiff has only made rental payments of $126.00 since the time that this lawsuit was instituted and has failed, since February of 1989, to make any payment or contribution toward taxes, insurance or repairs and maintenance. The Court finds that there is no resulting trust. The relationship between the parties was a "pass through" relationship; that is, the Plaintiff and the younger Mr. Anderson were permitted to reside in the residence in return for their payment of most expenses incurred by Mr. Anderson Sr. as owner of the property. The Court finds this arrangement was a lease arrangement.

Plaintiff objects to the trial court's findings on the grounds that an agreement is not a necessary element of a parol resulting trust. We agree that a resulting trust does not require an agreement. "A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another." *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938). While an agreement is not necessary to create a resulting trust, "the resulting trust must arise *in the same transaction in which legal title passes*. Consideration to support the resulting trust must have been paid *before or at the time legal title passes*, and not after legal title has passed." P. Hetrick & J. McLaughlin, Webster's Real Estate Law in North Carolina § 522 (3d ed. 1988) (emphasis in original). Additionally, we note that a promise to pay may serve as adequate consideration to support a resulting trust. *Cline v. Cline*, 297 N.C. 336, 346, 255 S.E.2d 399, 406 (1979).

Here, Mr. and Mrs. Anderson Sr. hold title to the property. Accordingly, to establish a resulting trust, plaintiff needed to show that she and Mr. Anderson Jr. paid the consideration to support the trust before or at the time legal title passed to Mr. and Mrs. Anderson Sr. Since plaintiff could establish a resulting trust by showing that a promise to pay the expenses served as consideration when Mr. and Mrs. Anderson Sr. took title, the trial court properly considered whether there was an agreement.

We disagree with appellant's argument that the evidence supports the existence of a resulting trust. Plaintiff offered the follow-

ing evidence to support her claim: After moving into the house, she and her husband made monthly payments in the amount of the mortgage payment to Mr. Anderson Sr., paid taxes and insurance, and paid for maintenance and improvements. Here, all of plaintiff's evidence related to money transactions that occurred *after* title passed to Mr. and Mrs. Anderson Sr. Subsequent agreements and transactions between the parties after title has transferred are not relevant to the question of whether a resulting trust was established. P. Hetrick & J. McLaughlin, Webster's Real Estate Law in North Carolina § 522 (3d ed. 1988).

[2] Plaintiff next contends that the trial court's finding that the arrangement between the parties was a lease is contrary to the weight of the evidence. We disagree.

The testimony at the hearing was conflicting as to whether the parties had agreed that Mr. and Mrs. Anderson Jr. would get title to the house once the mortgage was paid. After hearing all of the evidence, the trial judge concluded that the agreement, if any, was a lease and not a contract by which Mr. and Mrs. Anderson Jr. would obtain any ownership interest in the property. "Where the trial court sits without a jury, its findings of fact have the force and effect of a jury verdict and are conclusive on appeal if supported by competent evidence, even though there may be evidence to support contrary findings." *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987).

There was sufficient evidence to support a finding that the relationship between the parties was a lease arrangement. Mr. Anderson Sr. testified that his son and plaintiff were to pay him rent and that he allowed them to live in the house as long as it cost him no out-of-pocket expenses. He also testified that he never agreed with them that the house would be theirs once his mortgage was paid. When the court inquired, plaintiff testified that the checks she wrote for the mortgage and taxes were payable directly to Mr. Anderson Sr. and not to the bank or the taxing authority. She also testified that she had on occasion written the word "rent" on the checks she sent to Mr. Anderson Sr. Additionally, plaintiff acknowledged that although she did not know why, she previously had consented to the entry of court orders reciting that she was renting the house from Mr. Anderson Sr. The testimony constituted sufficient evidence to support the trial court's finding

that the agreement, if any, was a "lease arrangement." Accordingly, we conclude that the judgment of the trial court should be affirmed.

Affirmed.

Judges JOHNSON and PARKER concur.

VERNON RICHARDSON, AND PEARLINE RICHARDSON, PLAINTIFFS v. WILLIAM ROOSEVELT BINGHAM, DEFENDANT AND THIRD-PARTY PLAINTIFF v. LONNIE SNEED, JR., THIRD-PARTY DEFENDANT

No. 9014SC364

(Filed 19 February 1991)

1. **Appeal and Error § 372 (NCI4th)— proposed record on appeal— extension of time to serve ineffective**

The trial court's order extending the time during which plaintiffs could serve the proposed record on appeal was ineffective in that it was made after the expiration of the thirty-five day period during which plaintiffs were required by Rule 11(a) to serve the proposed record on appeal; it was made upon plaintiffs' oral motion in violation of Rule 27(c)(1); and the record did not reflect that the other parties were given notice or an opportunity to be heard as required by Rule 27(c)(1).

Am Jur 2d, Appeal and Error §§ 293, 295.

2. **Appeal and Error § 384 (NCI4th)— record on appeal—filing not timely**

Plaintiffs' appeal is dismissed for failure to file the record on appeal within fifteen days after the record was settled. N.C.R. App. P. 12(a).

Am Jur 2d, Appeal and Error §§ 293, 295.

APPEAL by plaintiffs from order entered 3 November 1989 in DURHAM County Superior Court by *Judge Orlando F. Hudson.* Heard in the Court of Appeals 16 November 1990.

Albert L. Willis for plaintiff-appellants.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Robert H. Griffin, for defendant-appellee.

GREENE, Judge.

Plaintiffs, Vernon and Pearline Richardson, appeal from the trial court's order of 3 November 1989, allowing the motion of William Roosevelt Bingham (defendant), and dismissing this case for insufficiency of process and insufficiency of service of process. Third-party defendant, Lonnie Sneed, Jr., is not a party to this appeal.

In pertinent part, the trial court's order provides:

> [I]t appearing to the Court that the Plaintiff attempted service on the Defendant by means of publication pursuant to Rule 4(j1) of the North Carolina Rules of Civil Procedure, that the Plaintiff was aware of and had knowledge of the Defendant's current address, to wit 2410 Oakridge Boulevard, Durham, North Carolina, that the Defendant was in fact residing at 2410 Oakridge Boulevard, Durham, North Carolina, at the time of and prior to the first publication, and that the Plaintiff failed to mail to the Defendant at or immediately prior to the first publication a copy of the notice of service of process by publication; and it therefore appearing [defendant's motion to dismiss] should be allowed;
>
> IT IS THEREFORE ORDERED that the Defendant's Motion is granted, and that this action is hereby DISMISSED.

On appeal, defendant moves this Court to dismiss plaintiffs' appeal upon the grounds that, among other things, plaintiffs did not timely serve the proposed record on appeal to all parties as required by N.C.R. App. P. 11 (1990), nor did plaintiffs make a timely motion to extend the time to do so; plaintiffs, after the expiration of the time for serving the proposed record on appeal, obtained an *ex parte* order upon plaintiffs' oral motion for an extension of time in violation of N.C.R. App. P. 27(c)(1) (1990); and plaintiffs failed to file with this Court the final record on appeal within the time provided by N.C.R. App. P. 11 and 12 (1990).

The record indicates plaintiffs filed notice of appeal on 9 November 1989. On 12 January 1990, the trial court granted plaintiffs' oral motion for an extension of time, allowing plaintiffs until 31 January 1990 to serve the record on appeal. Plaintiffs served the proposed record on appeal on 25 January 1990. The final record on appeal was filed in this Court on 6 April 1990.

The dispositive issue is whether this appeal should be dismissed because plaintiffs failed to comply with the North Carolina Rules of Appellate Procedure.

Rule 11

Rule 11(a) of the Rules of Appellate Procedure provides that where no transcript is ordered, as is the case here, the parties may by agreement settle a proposed record on appeal within thirty-five days of filing notice of appeal. Rule 11(b) provides that if the record on appeal is not settled under Rule 11(a), appellant shall within the same time, i.e., within thirty-five days after filing notice of appeal, serve upon all parties a proposed record on appeal. Here, the proposed record on appeal was not settled by agreement of the parties as provided by Rule 11(a), and plaintiffs' proposed record on appeal was served 25 January 1990, more than thirty-five days after notice of appeal, filed 9 November 1989.

Rule 27

[1] With exceptions not relevant to this appeal, the times prescribed by the Rules of Appellate Procedure for doing acts required or allowed by the rules may be extended. Rule 27 provides in part:

> The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 for the service of the proposed record on appeal.
>
> Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state. Such motions may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. *Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.*

N.C.R. App. P. 27(c)(1) (1990) (emphasis added).

Here, the trial court's order of 12 January 1990 extending the time during which plaintiffs could serve the proposed record on appeal was ineffective in that it was made after the expiration of the thirty-five day period during which plaintiffs were required by Rule 11(b) to serve the proposed record on appeal, it was made

upon plaintiffs' oral motion in violation of Rule 27(c)(1), and the record does not reflect the other parties, here the defendant and third-party defendant, were given notice or an opportunity to be heard as required by 27(c)(1).

Rule 12(a)

[2] Finally, N.C.R. App. P. 12(a) (1990) provides that the record on appeal is to be filed with the appellate court to which appeal is taken within fifteen days after the record is settled by any of the procedures in Rule 11. Rule 11(c) provides that within fifteen days after the proposed record on appeal is served the appellee may serve upon all other parties objections or amendments to the proposed record, or an alternative proposed record. N.C.R. App. P. 11(c) (1990). The appellant then has ten days from the expiration of this fifteen-day period to request a judicial settlement of the record on appeal. *Id.* If a timely request for judicial settlement is not made, "the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal." *Id.*

Even assuming the trial court's order extending plaintiffs' time to serve the proposed record on appeal was effective, then under Rule 11(c) defendant had fifteen days from 25 January 1990, or until 9 February 1990, to file objections, amendments or an alternative proposed record on appeal. While defendant actually filed objections and amendments on 6 February 1990, under Rule 11(c) plaintiffs had ten days from 9 February 1990, or until 19 February 1990, to request judicial settlement. Plaintiffs concede no such request for a judicial settlement was made and that the record on appeal was therefore settled in accordance with defendant's objections and amendments on 19 February 1990. Accordingly, under Rule 12(a), the final record on appeal was to be filed with this Court within fifteen days after the record was settled on 19 February 1990, or by 6 March 1990. The record was not filed until 6 April 1990.

Conclusion

The Rules of Appellate Procedure are mandatory, and since plaintiffs failed in several respects to comply with the applicable rules, particularly Rules 11, 12(a) and 27, and upon defendant's motion, plaintiffs' appeal is dismissed. N.C.R. App. P. 25 (1990) (appeal may be dismissed upon motion of party upon failure to timely comply with rules); *Craver v. Craver*, 298 N.C. 231, 258

S.E.2d 357 (1979) (appellate rules are mandatory and failure to comply works a loss of right to appeal).

Dismissed.

Judges PHILLIPS and ORR concur.

STATE OF NORTH CAROLINA v. KIM CARROLL, DEFENDANT-APPELLANT

No. 9014SC417

(Filed 19 February 1991)

1. **Criminal Law § 34.6 (NCI3d)— insurance fraud—prior false claims—admissibility to show intent**

In a prosecution for making a fraudulent insurance claim, evidence concerning two previous insurance claims made by defendant within the past five years at other stores owned by her was relevant to show intent, absence of mistake and a pattern by which defendant made and then exaggerated insurance claims resulting from commercial burglary. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 324.

2. **Insurance § 138 (NCI3d)— insurance fraud—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for making a fraudulent insurance claim where it tended to show that defendant claimed $46,461.00 in losses from 700-800 items from the showroom floor when the showroom floor still appeared stocked to near capacity; that defendant could not produce invoices for these items; and that defendant had made exaggerated insurance claims for the loss of items at two other stores.

Am Jur 2d, Evidence §§ 1124, 1125; Fraud and Deceit § 11.

3. **Insurance § 138 (NCI3d)— insurance fraud—instruction on filing "false or fraudulent" claim**

The trial court did not commit plain error in instructing the jury to decide whether defendant had filed a "false or

fraudulent" insurance claim and in submitting a verdict sheet which used only the word "false" when the indictment used only the word "fraudulent" where the court specifically instructed the jury that defendant must have "willfully and knowingly" made a false claim in order to be guilty under N.C.G.S. § 14-214, since a false claim is tantamount to a fraudulent claim when it is coupled with a knowing intent.

Am Jur 2d, Fraud and Deceit § 11; Trial §§ 701, 705.

4. **Insurance § 138 (NCI3d) — making fraudulent insurance claim — indictment — failure to allege insurance contract**

The failure of an indictment for making a fraudulent insurance claim to assert the existence of a contract of insurance could not have prejudiced defendant where she was clearly notified by the terms of the indictment of the particular insurance claim at issue.

Am Jur 2d, Fraud and Deceit § 11; Indictments and Informations §§ 143, 144.

APPEAL by defendant from judgment entered 23 October 1989 by *Judge Robert H. Hobgood* in Superior Court, DURHAM County. Heard in the Court of Appeals 15 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General P. Bly Hall, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for defendant-appellant.

LEWIS, Judge.

Defendant was indicted under N.C.G.S. § 14-214 for making a fraudulent statement to an insurance company. She was tried and convicted 20 September 1989. On 23 October 1989 the court entered judgment sentencing defendant to the presumptive term of two years, with said sentence being suspended for a period of five years and defendant placed on supervised probation for five years. The court also imposed on defendant a fine of $2,000 and ordered that she pay the court costs. From this judgment defendant appeals.

Defendant's clothing store at North Duke Mall was broken into on 11 May 1988. Defendant reported that $172.54 in cash had been stolen, as well as an uncertain quantity of merchandise. On

the next day the defendant listed as missing between 700 and 800 items, including large pocketbooks, briefcases, coats, jackets, warm-up suits, pants and other similar items, with a cash value of $46,461.00. Officer Baker testified that upon his arrival at the scene, the racks and floor space were still packed with merchandise. Defendant was unable to provide invoices for the missing merchandise, claiming that her accountant had her papers, but she refused to provide her accountant's name.

[1] Defendant assigns as error the trial court's admission of evidence concerning two previous insurance claims made by defendant at other stores owned by her. In the early part of 1983, soon after purchasing a theft policy, the defendant made a claim for $17,000. According to the testimony of her insurance agent, she had at first claimed that the damages were only several hundred dollars. On 8 or 9 January 1984 she increased the theft coverage on this policy. On 11 January 1984 she reported a break-in at that store, claiming the theft of $22,000 in cash and $39,556 in an undetermined amount of merchandise. The reporting police officer noted that upon his arrival at the scene after the break-in there were no noticeable gaps in inventory. The trial court admitted the evidence over defendant's objections under N.C. Rule of Evidence 404(b) to show "motive, opportunity, intent, preparation, plan, knowledge . . . or absence of mistake. . . ."

Defendant argues that the ruling was in error because the earlier incidents are not sufficiently similar and because they are too remote in time. We disagree. The earlier incidents are relevant insofar as they tend to show intent, absence of mistake and a pattern by which defendant made and then exaggerated claims resulting from commercial burglary. These prior instances are within five years of the present claim, exhibit a distinctive modus operandi, and are relevant under Rule 404(b) apart from what they suggest about the defendant's character. *State v. Freeman*, 79 N.C. App. 177, 181, 339 S.E.2d 56, 58 (1986).

[2] Defendant also argues that the trial court erred in denying her motion to dismiss. In ruling on a motion to dismiss, the trial judge must determine whether there is substantial evidence of each essential element and of the defendant's identity as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652-53 (1982). The elements of the crime with which the defendant is charged are (1) that a contract of insurance existed, (2) that

defendant presented a claim for payment of a loss upon that contract, (3) that the claim was false or fraudulent, and (4) that the defendant acted willfully and knowingly. *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940). We conclude that there was sufficient evidence to support the elements of the charge. That the defendant claimed $46,461.00 in losses from 700-800 items from the showroom floor when the showroom floor still appeared stocked to near capacity and that the defendant could not produce invoices for these items, in conjunction with the prior instances of defendant's claims, provides adequate support to sustain the charges in the face of a motion to dismiss for insufficiency of evidence. *State v. Earnhardt*, 307 N.C. at 66, 296 S.E.2d at 652-53.

[3] The defendant argues that the judge committed plain error when, in his instructions to the jury he asked them to decide whether the defendant had filed a "false or fraudulent" claim, and submitted a verdict sheet which uses only the word "false," whereas the indictment uses only the word "fraudulent." Defendant argues that because a fraudulent claim involves elements additional to that of a "false" claim, that the judge's action amounts to plain error. We disagree. A trial court's action rises to the level of plain error only where the appellate court "is convinced that the jury (otherwise) probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). While "false" and "fraudulent" do in this context have different, though overlapping, meanings, N.C.G.S. § 14-214 states clearly that either is sufficient for conviction under the statute. The North Carolina Supreme Court has stated that conviction under the statute always requires an element of "willful" and "knowing" submission of a false claim. *State v. Stephenson*, 218 N.C. at 264, 10 S.E.2d at 823. Where the filing of a false claim is coupled with a knowing intent for the purposes of conviction under the statute, the filing of a "false" claim is tantamount to the filing of a "fraudulent" claim. We note that the trial court specifically instructed the jury that it must find that the defendant "willfully and knowingly" made a false claim. We conclude that the action of the trial court was not prejudicial.

The defendant also assigns plain error to the trial judge's failure to instruct the jury in the mandate portion of his charge that it must find beyond a reasonable doubt specific facts to support the essential elements of the charge. We overrule this assignment of error. While every element of a charge must be proven beyond

a reasonable doubt, "it is not necessary that every circumstance relied upon for conviction be (so) established." *State v. Davis*, 25 N.C. App. 181, 184, 212 S.E.2d 516, 518 (1975). We therefore do not find plain error in the trial court's instructions.

[4] Finally, defendant argues that the indictment is fatally vague because it fails to specifically assert the existence of a contract of insurance upon which a false claim was made. An indictment must be sufficiently clear to notify the defendant of the particular offense with which she is being charged and to allow the accused to prepare for her defense. *State v. Barnes*, 253 N.C. 711, 717-18, 117 S.E.2d 849, 853 (1960). While the indictment does not specifically assert the existence of a contract of insurance, it does allege that a fraudulent claim was made by the accused to the North Carolina Farm Bureau Insurance Company. The failure of the indictment to assert the existence of a contract of insurance could in no way prejudice the defendant where she was clearly notified by the terms of the indictment of the particular insurance claim at issue. In the absence of any prejudice to the defendant, we conclude that the language of the indictment was sufficient.

We find no prejudicial error.

No error.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA EX REL. S. THOMAS RHODES, SECRETARY, DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT AND DAVID W. OWENS, DIRECTOR, DIVISION OF COASTAL MANAGEMENT v. R. O. GIVENS, SR. AND R. O. GIVENS SIGNS, INC.

No. 901SC562

(Filed 19 February 1991)

Jury § 1 (NCI3d)— removal of sign—compliance with CAMA—no right of signowner to jury trial

The trial court did not err in denying defendants a trial by jury in a proceeding to require them to remove a sign and to comply with the Coastal Area Management Act, since the provisions of Article I, § 25 of the N.C. Constitution did

not apply; defendants did not raise any counterclaims which existed prior to adoption of the 1868 Constitution; and defendants did not proceed pursuant to N.C.G.S. § 113A-123(b) which does provide a trial by jury.

Am Jur 2d, Jury §§ 7, 10.

APPEAL by defendants from order entered 22 January 1990 by *Judge D. M. McLelland* in DARE County Superior Court. Heard in the Court of Appeals 6 December 1990.

On or about 17 April 1987, defendants obtained a Dare County building permit and were informed that no Coastal Area Management Act (CAMA) permit was necessary. On or about 27 April 1987, defendants began constructing a 600 square foot "V" sign on Langley Island. On the same day, the Dare County CAMA Officer issued a stop work order to defendants and informed them that a CAMA permit was required. Defendants stopped construction and applied for a CAMA permit. On 7 May 1987, defendants' application was transferred to the Town of Nags Head CAMA permit officer for processing. On 13 May 1987, defendants resumed construction of the sign without having obtained a CAMA permit. On the same day, the permit application was denied, and a Town of Nags Head building inspector allegedly attempted to deliver a notice of violation and stop order to defendant. Defendants continued construction on the sign and completed it on or about 26 June 1987.

The State brought this action seeking a preliminary injunction to require defendants to remove the sign and comply with CAMA. On 9 February 1988, defendants filed an answer and on 10 March 1988 filed an amended answer, raised several affirmative defenses, and demanded trial by jury. On 23 February 1988, the trial court granted the State's motion for a preliminary injunction prohibiting defendant from improving the sign or extending or entering new contracts for lease of advertising space. On 12 April 1988, the State filed a motion seeking to strike insufficient defenses, and on 13 June 1988 filed a motion seeking to deny defendants' demand for trial by jury. On 1 September 1988, the State filed a motion for summary judgment, which the trial court denied on 27 September 1988. On 16 January 1990, the State filed an amended motion to strike insufficient defenses. On 12 February 1990, the trial court granted the State's motion to strike defendants' fourth and tenth

defenses alleging a taking without just compensation and entered an order denying defendants' request for trial by jury.

From the order denying trial by jury, defendants appeal.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith, for the State.

Shearin & Archbell, by Roy A. Archbell, Jr., and Norman W. Shearin, Jr., for defendant-appellants.

ORR, Judge.

The issue on appeal is whether the trial court erred in denying defendants' request for trial by jury. For the reasons set forth below, we affirm the order of the trial court denying defendants' request for trial by jury.

"An interlocutory order that denies a motion to deny a demand for jury trial affects a substantial right and is immediately appealable." *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 517, 385 S.E.2d 329, 331 (1989). Thus, defendants' appeal is properly before the Court.

Regarding the right to trial by jury, the North Carolina Constitution provides:

> In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

N.C. Const. art. I, § 25.

In *Simpson*, our Supreme Court stated:

> This Court has construed the predecessor to section 25 to apply only to actions respecting property in which the right to jury trial existed either at common law or by statute at the time of the adoption of the 1868 Constitution. For causes of action created since 1868, the right to a jury trial depends upon statutory authority. In the absence of statutory authority, there is no right to the trial of a case before a jury where the legislature created the cause of action after adoption of the 1868 Constitution. [citations omitted]

325 N.C. at 517, 385 S.E.2d at 331.

In *Simpson*, the State brought an action to enjoin the dredge and fill activity pursuant to CAMA and the Dredge and Fill Act of 1969. There the State sought to require the defendant to comply with the permit requirements and restore marshlands. The Court held that "CAMA and the Dredge and Fill Act are recent creations of the Legislature such that the provisions of article I, section 25 of the state Constitution do not apply." *Id.* at 515-16, 385 S.E.2d at 330. The Court also noted that neither at common law nor by statute by 1868 would the State's allegations have supported actions for damage to real estate or for nuisance. *Id.* at 519, 385 S.E.2d at 332. Therefore, the defendant was not entitled to trial by jury.

Defendants first contend that *Simpson* is distinguishable since here defendants have raised several affirmative defenses which existed in 1868 and thus defendants are not "exert[ing] any rights arising by virtue of CAMA." However, defendants cite no authority for this contention. The right to a trial by jury is determined by whether the "right and remedy" existed in 1868 and here defendants have not raised any counterclaims. *See Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921).

Defendants further rely on the *Simpson* Court's statement that there the defendant "might have had a right to a jury trial upon proper allegation that the final order of the Commission constituted a taking." 325 N.C. at 520, 385 S.E.2d at 333. However, in *Simpson* the Court was referring to the takings remedy of N.C. Gen. Stat. § 113A-123(b) (1989), which does provide a trial by jury. Under the statute, any person owning land in an area affected by an order of the Commission may petition the Superior Court within 90 days for a determination as to whether he is the owner of the land and whether the order constitutes a taking without compensation. The statute provides for a jury trial on all issues of fact. However, defendants here did not proceed pursuant to the statute, and although they received notice 13 May 1987, they did not allege a taking until filing their answer 9 February 1988.

In summary, we conclude that the trial court did not err in denying the defendants a trial by jury.

Affirmed.

Judges PHILLIPS and GREENE concur.

JOHN W. SCROGGS, PETITIONER-APPELLEE v. NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT-APPELLANT

No. 9023SC642

(Filed 19 February 1991)

1. **Administrative Law § 31 (NCI4th)— revocation of certification as law enforcement officer—agency action in contested case**

Petitioner's substantial rights were prejudiced by the revocation procedure by which his certification as a law enforcement officer was revoked where he did not receive an opportunity for a hearing prior to the revocation of his license and did not receive proper notice. Respondent exercised an adjudicatory function in revoking petitioner's license and therein affected his rights. Respondent's action constituted agency action on a contested case and petitioner was entitled to both notice and an opportunity to be heard prior to the revocation.

Am Jur 2d, Administrative Law § 398; Sheriffs, Police, and Constables § 38.

2. **Administrative Law § 48 (NCI4th)— revocation of law enforcement certification—arbitrary and capricious**

The superior court did not err when reviewing the revocation of a law enforcement officer's certification by concluding that respondent commission's decision was arbitrary and capricious where the record indicates that the respondent commission had received a memorandum detailing the extent of petitioner's drug use in November of 1982; had had access if not actual possession of all other necessary documents from 1982; petitioner has since passed review both for probationary certification and general certification; and petitioner's files have since been subject to periodic review by appellant's representatives. N.C.G.S. § 150B-51.

Am Jur 2d, Administrative Law § 620.

3. **Administrative Law § 70 (NCI4th)— revocation of law enforcement certification—findings by reviewing court—within scope of authority**

The reviewing court acted entirely within the scope of its authority under N.C.G.S. § 150B-51 where it made findings at variance with the findings of respondent commission. The

court may make findings at variance with those of the agency when it determines that the findings of the agency are not supported by substantial evidence, and the findings upon which the reviewing court reached its conclusions were supported by substantial evidence.

Am Jur 2d, Administrative Law §§ 623, 632, 706, 762; Sheriffs, Police, and Constables §§ 42, 43.

APPEAL by respondent from judgment entered 15 November 1989 in Superior Court, WILKES County by *Judge Julius A. Rousseau, Jr.* Heard in the Court of Appeals 22 January 1991.

Petitioner appealed to Superior Court on a petition for Judicial Review of the Final Agency Decision revoking petitioner's certification as a law enforcement officer for five years. The case was heard at the 2 October 1989 Civil Session of Superior Court, where Judge Julius Rousseau reversed the Agency Decision, concluding that the respondent North Carolina Criminal Justice Education and Training Standards Commission did not afford the petitioner an opportunity for a hearing prior to the revocation of his certification, had predetermined its intent to revoke the certification without notice to the petitioner, had acted arbitrarily and capriciously and had prejudiced the substantial rights of the petitioner. Respondent appeals.

Vannoy, Colvard, Triplett, Freeman & McLean, by Howard C. Colvard, Jr., and Anthony R. Triplett, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin Perkins Pendergraft, for respondent-appellant.

LEWIS, Judge.

On 18 December 1987 respondent sent a letter to petitioner notifying him that his law enforcement certification had been revoked because of alleged material misrepresentations in a Personal History Statement submitted on 31 December 1982 in his application for certification regarding his prior use of marijuana and other narcotics. The record shows that on 2 November 1982 petitioner had admitted to an investigating officer that he used drugs periodically during the course of four years from the age of 17 to the age of 21 and that he occasionally exchanged drugs for money with his friends, but had not used drugs for at least one year. In the

Personal History summary submitted by the petitioner on 31 December 1982, petitioner wrote, in response to the question of whether he ever used marijuana or non-prescription drugs, that he did so on a "teenage experimental basis." The record shows that respondent agency has had this information available to it since those dates in 1982 and that petitioner has an exemplary record as a police officer since his certification.

[1] Appellant argues that the trial court erred in concluding that petitioner's substantial rights had been prejudiced by the revocation procedure because he did not receive opportunity for a hearing prior to the revocation of his license and hence did not receive proper notice. Appellant argues that the administrative hearing requirement of N.C.G.S. § 150B-38(b) is not triggered until after petitioner receives notice of revocation. We note that the statute states specifically that the agency shall give the parties an opportunity for hearing and notice "[p]rior to any agency action in a contested case." N.C.G.S. § 150B-38(b) (1986). In *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979), the North Carolina Supreme Court defined a "contested case" as (1) an agency proceeding that (2) determines the rights of a party. *Id.* at 296 N.C. 424-25, 251 S.E.2d 850. In that case the Court held that a meeting of the state Board of Elections did not constitute a contested case because the Board did not, at the meeting in question, exercise any adjudicatory powers which affected the rights of the parties. Unlike the action of the State Board of Elections in *Lloyd v. Babb, supra*, the action of the respondent in the present case both exercised an adjudicatory function in revoking the petitioner's license, and therein affected his rights. We hold that respondent's action constituted agency action on a contested case which affected the substantive rights of the petitioner. The petitioner was entitled to both notice and an opportunity to be heard prior to the revocation of his license.

[2] Appellant argues that the reviewing court erred in concluding that respondent-commission's decision was arbitrary and capricious and thus prejudiced petitioner's substantial rights. The reviewing court's scope of review is set out in N.C.G.S. § 150B-51, which states in relevant part that the court may:

> [r]everse 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 . . . in review of the entire record as submitted; or;

(6) Arbitrary and capricious.

(1987). Our review of the Superior Court's determination under N.C.G.S. § 150B-52 is limited to whether the Superior Court made any errors in law in light of the record as a whole. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887, 890 (1988). The reviewing court concluded as a matter of law that the final revocation action was arbitrary and capricious because the respondent "had notice of the conduct complained of by it [for] approximately six years before taking action, in spite of the fact that the petitioner had an exemplary record during this period." Appellant argues that respondent was not, in fact, aware of the relevant information until 1987, at which time action was taken. The record, however, indicates that the respondent commission had received a memorandum detailing the extent of petitioner's drug use in November of 1982, and had access if not actual possession of all other necessary documents from 1982, since which petitioner has passed review both for probationary certification and general certification, and since which time petitioner's files have been subject to periodic review by appellant's representatives. In light of the passage of time since petitioner's original application, respondent's long-term access to the information, petitioner's exemplary service, and the fact that petitioner volunteered to the commission the extent of his drug use near the beginning of the process and prior to the submission of the 30 December 1982 personal history statement, we agree with the reviewing court that the agency's decision was "arbitrary and capricious." *Lewis v. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

[3] Appellant argues that the reviewing court exceeded its authority by making erroneous findings at variance with the findings of the respondent, and by substituting its own judgment for that of the agency. Where the reviewing court determines that the findings

of the agency are not supported by substantial evidence, the court may make findings at variance with those of the agency. *Appeal of A.M.P. Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975). Our review of the record as a whole reveals that those findings of the reviewing court upon which the reviewing court reached its conclusions are supported by substantial evidence even where they are at variance with the findings of respondent agency. We hold that the reviewing court acted entirely within the scope of its authority as outlined by N.C.G.S. § 150B-51.

Affirmed.

Judges ARNOLD and JOHNSON concur.

DONALD RAY ROUTH, AND PENNY C. ROUTH, APPELLEES v. SNAP-ON TOOLS CORPORATION, TRACE S. DENGLER, III, INDIVIDUALLY AND AS A BRANCH MANAGER OF SNAP-ON TOOLS CORPORATION; MARK TROMBLEY, INDIVIDUALLY AND AS A FIELD MANAGER OF SNAP-ON TOOLS CORPORATION; AND ED BONGE, JR., INDIVIDUALLY AND AS A SALES MANAGER OF SNAP-ON TOOLS CORPORATION, APPELLANTS

No. 9021SC371

(Filed 19 February 1991)

1. **Arbitration and Award § 2 (NCI4th)— arbitration—validity of agreement—standard to be applied**

In an action arising from the termination of a Snap-On Tools dealership in which defendants raised an arbitration agreement as a defense, the trial court failed to comply with N.C.G.S. § 1-567.3(a) in that the judge applied a summary judgment standard to the validity and enforceability of the agreement rather than summarily determining as a matter of law whether a valid arbitration agreement existed.

Am Jur 2d, Arbitration and Award § 20.

2. **Appeal and Error § 418 (NCI4th)— arbitration agreement—judgment on pleadings denied—no assignment of error—dismissed**

Defendants' claim that a trial court erred by not entering judgment on the pleadings on the basis of arbitration language

in a termination agreement was dismissed where defendants did not assign error to the issue. N. C. Rules of Appellate Procedure, Rule 10.

Am Jur 2d, Appeal and Review § 649.

APPEAL by defendants from an order rendered 12 February 1990 by *Judge Samuel T. Currin* in FORSYTH County Civil Superior Court. Heard in the Court of Appeals 3 December 1990.

Blanchard, Twiggs, Abrams & Strickland, by Howard F. Twiggs and Donald R. Strickland, for plaintiff-appellees.

Petree, Stockton & Robinson, by Thomas E. Graham and Rodrick J. Enns, for defendant-appellants.

LEWIS, Judge.

The issues addressed on appeal in this case are whether the trial judge erred: 1) in failing to determine whether a valid arbitration agreement exists pursuant to N.C.G.S. § 1-567.3(a), and 2) in failing to conclude as a matter of law that there is a valid agreement requiring the case to be sent to arbitration.

In January of 1986 plaintiff Donald Routh (hereinafter "plaintiff") contracted with the defendant Snap-On Tools Corporation (hereinafter "Snap-On Tools") to become a Snap-On Tools dealer. Plaintiff invested thousands of dollars and incurred large debts for his dealership. Defendant Dengler was the branch manager of the office for Snap-On Tools in Charlotte, North Carolina. Defendant Trombley was a field manager for Snap-On Tools working out of the Charlotte office. Defendant Bonge was a sales manager for Snap-On Tools also working out of the Charlotte office. Plaintiff operated as a dealer for Snap-On Tools and communicated primarily with defendants Dengler, Trombley and Bonge. Plaintiff's dealership was not profitable and he contacted defendants to end his relationship.

In November of 1987, when the plaintiff terminated his dealership, he signed a "termination agreement." The termination agreement provides in part:

> This Agreement extends to: agents, heirs, employees and officers of either party to this Agreement. It is effective as of the above date and it supersedes any and all prior agreements,

which are now cancelled. If any dispute arises over the terms of this Agreement, the parties will submit to final and binding arbitration as the sole method of resolving the controversy. The request for arbitration must be filed in writing within one (1) year of the above date or all claims, known or unknown, are forever waived. The rules of the American Arbitration Association shall apply, and the terms of this Agreement shall govern. The prevailing party shall be awarded reasonable costs and fees.

Except as above, both parties to this Agreement freely waive any and all claims they may have against each other arising out of the Dealership terminated by this Agreement. The Dealer agrees that fair consideration has been given by the Company for this Agreement and fully understands this complete release of claims and the negotiated terms of this Agreement. Both parties to this Agreement understand that each might have present claims against the other which are at this time still unknown. In the joint interest of achieving a complete and final resolution as to the Dealership, any such unknown claims are also extinguished by this Agreement.

Plaintiff signed the form on a line drawn at the bottom of the agreement after an additional sentence referring to how the plaintiffs were to pay the balance they owed Snap-On Tools. Defendant Dengler signed the agreement as a branch manager of Snap-On Tools.

On 7 March 1989, the plaintiff and his wife filed a complaint against the defendants alleging: 1) fraudulent misrepresentation and concealments in inducing the plaintiff to become a Snap-On Tools dealer, 2) unfair and deceptive trade practices, 3) negligent misrepresentation, 4) intentional infliction of emotional distress, 5) negligent infliction of emotional distress, 6) breach of contract, 7) breach of covenant of good faith and fair dealing, and 8) loss of consortium. In their answer, defendants denied the allegations and claimed affirmative defenses including the following: 1) the termination agreement by its terms releases all claims arising out of the dealership, and 2) the plaintiff did not request arbitration within one year as required by the agreement.

After initial discovery, the defendants made a motion for judgment on the pleadings and an alternative motion to compel arbitration. The trial judge denied both motions. The order provides in pertinent part:

> Upon defendants' Motion for Judgment on the Pleadings and Alternative Motion to Compel Arbitration, and after reviewing written briefs on behalf of all parties and depositions and other evidence of the record, and after hearing oral arguments in support of and in opposition to the motions, the Court concludes *that it cannot say at this stage of the proceedings that there is no genuine issue of material fact with regard to the validity and enforceability of the Termination Agreement* relied upon by defendants including the release and the arbitration clause contained therein.

(Emphasis added).

[1] The first issue before this Court is whether the trial court erred in failing to determine whether a valid arbitration agreement exists. North Carolina General Statute § 1-567.3(a) provides:

> On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, *the court shall proceed summarily to the determination of the issue so raised* and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

N.C.G.S. § 1-567.3(a). (Emphasis added). The defendants argue that by the plain terms of the statute the judge is required to summarily determine whether a valid arbitration agreement exists. We agree. *See Blow v. Shaughnessy*, 68 N.C. App. 1, 18, 313 S.E.2d 868, 877, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 127 (1984). Here the judge failed to comply with the statute. The trial judge applied a summary judgment standard of whether there was a "genuine issue of material fact with regard to the validity and enforceability of the Termination Agreement." Instead, the judge is required to summarily determine whether, as a matter of law, a valid arbitration agreement exists. Therefore, we remand this case for the trial judge to proceed summarily to the determination of the issue of whether a valid arbitration agreement exists.

[2] The defendants also claim that the trial court erred in failing to enter judgment on the pleadings on the grounds that the termination agreement is valid as a matter of law and bars the plaintiffs' claim. The defendants did not assign error to this issue. We

dismiss this claim under Rule 10 of the North Carolina Rules of Appellate Procedure.

Reversed and remanded.

Chief Judge HEDRICK and Judge WYNN concur.

HOWARD R. WILLIAMS, PLAINTIFF-APPELLANT v. P. S. INVESTMENT COMPANY, INC. AND P. S. PRASAD AND INDRANI PRASAD, DEFENDANTS-APPELLEES

No. 903SC669

(Filed 19 February 1991)

Bills and Notes § 20 (NCI3d)— payment of note conditional—undisputed evidence that condition not met—summary judgment proper

In an action to recover on a promissory note the trial court properly entered summary judgment for defendants where defendants' obligation to plaintiff was conditioned upon their receipt of payments under a note from third parties; the receipt of such payments was a condition precedent to defendants' obligation to make payments to plaintiff under the note in question; and there was no dispute that defendants were no longer receiving payments under the third party note.

Am Jur 2d, Bills and Notes §§ 175, 206.

APPEAL by plaintiff from order entered 10 May 1990 in PITT County Superior Court by *Judge Frank R. Brown* granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment. Heard in the Court of Appeals 6 December 1990.

On 30 December 1980 defendant P. S. Prasad assigned to plaintiff Howard R. Williams a promissory note in the amount of $75,000.00 payable in unconditional monthly payments of $991.14. On 11 April 1983 a $200,000.00 promissory note was executed in favor of defendant P. S. Prasad by Rajni and Dinesh Bhagat as partners in R & D Development Co. Subsequently, in an assignment agreement dated 1 August 1983, Howard R. Williams, Inc. assigned its right,

title and interest in the $75,000.00 promissory note to defendant P. S. Prasad in exchange for a partial interest in Prasad's $200,000.00 note. The assignment agreement in paragraph 3 provided that plaintiff's right to receive monthly payments was conditioned on the receipt by defendant of payments due on the $200,000.00 note:

> . . . That this Assignment shall be effective and the first payment of the said $991.14 shall be made commencing with the August payment to be made on August 1, 1983, and shall continue thereafter as and when said payments are received from the maker of said $200,000.00 Promissory Note. . . .

The assignment further provided in paragraph 7 that defendant P. S. Prasad had the right to subsequently purchase the interest in the $200,000.00 note assigned to Howard Williams, Inc. by issuing a promissory note signed by defendants P. S. and Indrani Prasad and payable in monthly installments of $991.14.

Pursuant to this option to purchase provision, on 30 December 1984, defendants P. S. and Indrani Prasad executed and delivered a promissory note in the amount of $53,499.90 whereby defendants promised to pay plaintiff seventy-two (72) equal monthly installments of principal and interest in the amount of $991.14 beginning on 30 January 1985. The second paragraph in the body of the $53,499.90 note reads:

> This note is executed pursuant to the term of a contract between Howard R. Williams and P. S. Prasad and the payments under this note will be paid on and when payments are received from the Dinesh Bhagat and Rajni Bhagat note of $200,000.00.

In January 1987 Rajni Bhagat and Dinesh Bhagat filed Chapter 11 Bankruptcy in the Middle District of North Carolina. From this time, the Bhagats made no payments to defendant P. S. Prasad on the $200,000.00 note and, in turn, defendants have made no payments to plaintiff on the $53,499.90 note.

On 28 August 1989 plaintiff brought this action to collect the remaining balance of the $53,499.90 note. Both plaintiff and defendants filed motions for summary judgment. In an order dated 10 May 1990 the trial court granted defendants' motion and denied plaintiff's motion. Plaintiff appeals.

Ward and Smith, P.A., by Michael P. Flanagan, for plaintiff-appellant.

White and Allen, P.A., by John P. Marshall, for defendants-appellees.

[Subsequent to oral argument of this case, White and Allen were allowed to withdraw as counsel of record for defendants-appellees.]

WELLS, Judge.

Plaintiff contends (1) that the $53,499.90 note was an unconditional promise to pay; or (2) if not, there remains a dispute of fact as to whether the parties to that note intended it to be conditioned on the receipt by defendants of payments under the $200,000.00 note. We cannot agree with either argument and therefore affirm the trial court's entry of summary judgment for defendants.

If the terms of a contract are plain and unambiguous, there is no room for construction and the contract will be enforced according to its terms. *Jones v. Realty Company*, 226 N.C. 303, 37 S.E.2d 906 (1946); *accord Parks v. Oil Co.*, 255 N.C. 498, 121 S.E.2d 850 (1961); *Olive v. Williams*, 42 N.C. App. 380, 257 S.E.2d 90 (1979). Defendants P. S. and Indrani Prasad did not agree to pay the $53,499.90 note unconditionally. Under the clear and unambiguous terms of that note, their obligation to plaintiff was conditioned upon their receipt of payments under the $200,000.00 note. The receipt of such payments by the Prasads became a condition precedent to their obligation to make the payments to plaintiff under the $53,499.90 note.

A condition precedent is a fact or event that must exist or occur before there is a right of performance and before there is a breach of contract duty. *Tire Co. v. Morefield*, 35 N.C. App. 385, 241 S.E.2d 353 (1978). The use of such words as "when," "after," "as soon as" and the like give clear indication that a promise is not to be performed except upon the happening of the stated event. *Jones, supra.* The use of the words "payment under this note will be paid on and when payments are received" [from the $200,000.00 note] give clear indication of a condition precedent.

There being no dispute that P. S. Prasad was no longer receiving payments under the $200,000.00 note, there remains no genuine

issue of material fact and defendants were entitled to judgment as a matter of law.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. DOMINIC THOMAS SANTON

No. 8926SC1286

(Filed 19 February 1991)

1. **Criminal Law § 1185 (NCI4th)— conviction of driving while impaired—level of punishment irrelevant—prior conviction for sentencing under Fair Sentencing Act**

A conviction of driving while impaired under N.C.G.S. § 20-138.1, irrespective of the level of punishment imposed, constitutes a prior conviction of an offense punishable by more than sixty days' imprisonment for purposes of sentencing under the Fair Sentencing Act.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 14-15.5.

2. **Criminal Law § 1214 (NCI4th)— defendant's attempt to get treatment for alcoholism—insufficiency of evidence—no mitigating factor**

In a prosecution of defendant for manslaughter, driving while impaired, felony death by vehicle, and driving while license revoked, the trial court did not err in refusing to find as a nonstatutory mitigating factor that defendant sought treatment for his alcoholism, since evidence of that factor was not uncontradicted, substantial, and manifestly credible.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from judgment entered 20 July 1989 by *Judge John M. Gardner* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 7 June 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant-appellant.

PARKER, Judge.

Indicted for manslaughter, driving while impaired, felony death by vehicle, and driving while license revoked, defendant pleaded guilty to involuntary manslaughter, driving while impaired, and driving while license revoked. In sentencing defendant for involuntary manslaughter, the trial court found no mitigating factors and found as aggravating factors that defendant (i) had a prior conviction for driving while impaired and (ii) committed the offense for which he was sentenced while on probation. On appeal defendant's two assignments of error relate to the sentencing phase of his case; we affirm the action of the trial court.

[1] Defendant first contends the trial court erred in finding that his previous conviction for driving while impaired constituted a prior conviction under the Fair Sentencing Act.

Upon his prior conviction of driving while impaired, defendant received Level Five Punishment, the lightest punishment possible under the statute, consisting of a maximum term of sixty days. *See* G.S. 20-179(k). Defendant argues that because his actual punishment could not exceed sixty days, this conviction cannot constitute a prior conviction for purposes of sentencing under the Fair Sentencing Act. We disagree.

A statutory aggravating factor may be found under General Statutes Chapter 15A if "[t]he defendant has a prior conviction . . . for [a criminal offense] punishable by more than 60 days' confinement." G.S. 15A-1340.4(a)(1)o. Under the Motor Vehicle Act of 1937 as amended, the offense of driving while impaired is a misdemeanor punishable by a maximum term of two years. G.S. 20-138.1(d); G.S. 20-179(g).

The level of punishment to be imposed under G.S. 20-179 depends upon the finding of grossly aggravating factors under subsection (c) or the finding of aggravating and mitigating factors under subsections (d) and (e) and the weighing of such factors under subsection (f). Only if mitigating factors are found to apply and substantially to outweigh aggravating factors will a defendant receive Level

Five Punishment. G.S. 20-179(f)(3). If mitigating factors and aggravating factors are in equipoise, Level Four Punishment, which permits a maximum term of 120 days, is to be imposed. G.S. 20-179(f)(2); G.S. 20-179(j). In determining whether factors in aggravation and factors in mitigation substantially outweigh each other, the trial court acts within its sound discretion. *State v. Weaver*, 91 N.C. App. 413, 417, 371 S.E.2d 759, 761 (1988).

The plain language of the Fair Sentencing Act speaks in terms of potential, not actual, punishment. The word "punishable" means "capable of being punished by law." Webster's Third New International Dictionary 1843 (1971). The Motor Vehicle Act establishes the offense of driving while impaired, not the offenses of Level One, Level Two, or Level Five driving while impaired. We hold, therefore, that a conviction of driving while impaired under G.S. 20-138.1, irrespective of the level of punishment imposed, constitutes a prior conviction of an offense punishable by more than sixty days' imprisonment for purposes of sentencing under the Fair Sentencing Act.

[2] Defendant also contends the court erred in refusing to find as a nonstatutory mitigating factor that defendant sought treatment for his alcoholism.

Failure of a trial court to find a nonstatutory mitigating factor, even when it is supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent an abuse of discretion. *State v. Holden*, 321 N.C. 689, 697, 365 S.E.2d 626, 630 (1988).

Defendant argued he had sought treatment for his alcoholism. He completed a program at Mercy Hospital and was forced to leave a different treatment program at the time he was charged with manslaughter. He had called several rehabilitation centers, but these were too expensive or would not accept him while his court cases were pending. At the beginning of the sentencing hearing the following exchange took place:

> Q. [By the Court] Are you now under the influence of alcohol, drugs, narcotics, medicines, pills or any other intoxicant?
>
> A. [By Defendant] No, sir.

Q. When was the last time you used or consumed any [such] substance?

A. Last weekend, I had a few beers.

We conclude the trial court could have found from all the evidence that evidence of defendant's requested nonstatutory mitigating factor was not uncontradicted, substantial, and manifestly credible. Denial of the request was, therefore, clearly not manifestly or inherently unjust, and the trial court did not abuse its discretion in refusing to find defendant's requested nonstatutory factor in mitigation.

For the reasons foregoing, the action of the trial court is affirmed.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

THOMAS TYLER, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. 9010DC617

(Filed 19 February 1991)

Insurance § 68.8 (NCI3d)— automobile insurance—intrapolicy stacking of medical payments—denied

The trial court correctly granted defendant's motion for summary judgment in an action in which plaintiff attempted to stack intrapolicy medical payments coverage in an automobile policy. The natural construction of the policy language is that the defendant's liability is limited to the amount shown in the policy declarations and that the liability is the same regardless of how many additional vehicles plaintiff has insured with defendant or how many premiums plaintiff has paid. There was consideration for the premium paid for the second vehicle because the coverage of the two vehicles is not identical and the premium for the second vehicle fills that gap in coverage.

Am Jur 2d, Automobile Insurance § 292.

Combining or "stacking" medical payment provisions of automobile liability policy or policies issued by one or more insurers to one insured. 29 ALR4th 49.

APPEAL by plaintiff from order entered 16 April 1990 by *Judge L. W. Payne* in WAKE County District Court. Heard in the Court of Appeals 13 December 1990.

On 27 November 1987 plaintiff was involved in an automobile accident which resulted in medical expenses in excess of $4,000.00. At that time plaintiff had in effect a personal automobile liability insurance policy issued by defendant. This policy provided medical payments coverage with a limit of $2,000.00 for the two covered vehicles. Defendant paid plaintiff $2,000.00 pursuant to this coverage.

Plaintiff sought to aggregate his medical payments coverage for both of his insured vehicles (intrapolicy stacking) to recover a total of $4,000.00 under his policy with defendant. Defendant made a motion for summary judgment, arguing the policy language prohibited intrapolicy stacking of medical payments coverage. From the order granting defendant's motion plaintiff appeals.

Kirk, Gay, Kirk, Gwynn & Howell, by Philip G. Kirk, for plaintiff-appellant.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Margaret Madison Clarke, for defendant-appellee.

ARNOLD, Judge.

Plaintiff contends the trial court erred in granting defendant's motion for summary judgment. Neither party disputes the material facts alleged by plaintiff's complaint. The dispute involves the availability of intrapolicy stacking of medical payments coverage.

Determining the meaning of the language used in an insurance policy is a question of law. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970); *Woods v. Nationwide Mutual Ins. Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978). Since the insurance company selected the words used in the policy, any ambiguity or uncertainty as to their meaning must be resolved against the company and in the policyholder's favor. *Wachovia*, 276 N.C. 348, 172 S.E.2d 518. However, "[n]o am-

biguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* at 354, 172 S.E.2d at 522.

"The test in construing the language of the contract is not what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean." *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 143, 217 S.E.2d 551, 565 (1975). As the insured, plaintiff was entitled under Part C—Medical Payments Coverage to medical payments for bodily injury "[c]aused by accident . . . while occupying . . . a motor vehicle designed for use mainly on public roads or a trailer of any type." This coverage was limited by the policy's express language, which stated:

> LIMIT OF LIABILITY. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for each person injured in any one accident regardless of the number of:
>
> 1. Claims made;
> 2. *Vehicles or premiums shown in the Declarations* (emphasis added); or
> 3. Vehicles involved in the accident.

The natural construction of this policy's language is that when the insured is injured in an automobile accident, the defendant's liability is limited to the amount shown in the policy declarations. This liability is the same regardless of how many additional vehicles plaintiff has insured with defendant or how many premiums plaintiff has paid. The plaintiff is not entitled to stack the medical payments coverage for each car for which he has paid a premium.

Plaintiff further contends that the medical payments coverage provided for each of his two vehicles overlaps completely and is identical. He concludes that unless he is allowed to stack medical payments coverage intrapolicy, he has received no consideration for the premium paid for the second policy.

While there is some overlap in each vehicle's coverage, the coverage is not identical. One example of their differing coverage is found in Part C—Medical Coverage, Exclusions: "We do not provide Medical Payments Coverage for any person for **bodily in-**

jury: . . . 4. Sustained while **occupying**, or when struck by, any vehicle (other than **your covered auto**) which is: a. owned by you[.]" Coverage of a single vehicle extends protection to the covered auto and non-owned vehicles, but not to owned, non-covered vehicles. Plaintiff's second premium for the second vehicle fills this gap in coverage, and is consideration for the premium.

We find nothing in this policy's language which plaintiff could have reasonably interpreted at the time he received the policy as allowing him to stack medical payments coverage intrapolicy. *See Wachovia*, 276 N.C. 348, 172 S.E.2d 518. The trial court's order granting defendant's motion for summary judgment is affirmed.

Affirmed.

Judges JOHNSON and LEWIS concur.

DANA G. ESTRIDGE, PLAINTIFF v. FORD MOTOR COMPANY, DEFENDANT

No. 9026SC444

(Filed 19 February 1991)

Automobiles and Other Vehicles § 253 (NCI4th)— automobile sale— lemon law—not retroactive

The trial judge correctly dismissed plaintiff's cause of action for failure to state a claim upon which relief could be granted where plaintiff leased an automobile on 14 September 1987, subsequently made several unsuccessful attempts to have the car repaired, and then filed an action alleging that the car was a lemon under N.C.G.S. § 20-351 *et seq.* The rights and obligations involved in the plaintiff's claim arise out of a lease contract which was executed in September of 1987, prior to the time when the statute became effective in October of 1987, and the legislature did not express the intent that this statute be applied retroactively.

Am Jur 2d, Consumer Products Warranty Acts § 67.

Validity, construction, and effect of state motor vehicle warranty legislation (Lemon Law). 51 ALR4th 872.

APPEAL by plaintiff from an order entered 17 January 1990 by *Judge Shirley L. Fulton* in the Civil Session of the Superior Court of MECKLENBURG County. Heard in the Court of Appeals 3 December 1990.

Weaver, Bennett & Bland, P.A., by Bill G. Whittaker and Michael David Bland, for the plaintiff-appellant.

Office of General Counsel, Ford Motor Company, by Gary L. Hayden; Maupin, Taylor, Ellis & Adams, P.A., by M. Keith Kapp, Jay A. Gervasi, and Daniel K. Bryson, for the defendant-appellee.

LEWIS, Judge.

This case presents the Court with one main issue: whether the trial court erred in granting the defendant's motion to dismiss the plaintiff's claim, which was based on the New Motor Vehicles Warranties Act, pursuant to North Carolina Rules of Civil Procedure 12(b)(6) and 41(b).

On 14 September 1987, the plaintiff leased an automobile from an authorized dealer of the defendant's products. The plaintiff alleged that the car began to malfunction about one week after the lease began. The plaintiff also alleged that she took the car for repair to an authorized dealer, but the attempted repairs failed. She returned the car for repairs at least four times. On 18 July 1989, the plaintiff notified the defendant in writing that the defendant had fifteen days in which to repair the car. The defendant requested that the car be taken to a local dealer for repair and the plaintiff complied. However, the repairs were again unavailing.

On 8 September 1989, the plaintiff wrote the defendant that all efforts to fix the car had failed. Further, she wrote pursuant to North Carolina's Motor Vehicle Warranty Act, the defendant had ten days in which to refund certain monies including the full contract price. The defendant refunded nothing.

On 23 October 1989, the plaintiff filed an action alleging that the car she had leased was a "lemon" under the North Carolina "Lemon Law." The plaintiff asked the court to: 1) enter "judgment against the defendant in the sum of $20,796.90," 2) award the plaintiff treble damages under N.C.G.S. § 20-351.2, and 3) award the plaintiff attorney fees under N.C.G.S. § 20-351.3. The defendant's

motion to dismiss was based on the plaintiff's failure to state a claim upon which relief can be granted in that N.C.G.S. §§ 20-351 to 351.10 was not intended to apply retroactively. The defendant also argued that if the statute were applied retroactively, it would be unconstitutional. Defendant also moved for the dismissal of the plaintiff's action based on North Carolina Rule of Civil Procedure 41(b) for failure of the plaintiff to comply with Rule 8(a)(2) of the North Carolina Rules of Civil Procedure. The trial judge granted the defendant's motion to dismiss the plaintiff's action on both grounds.

A motion to dismiss for failure to state a claim upon which relief can be granted should not be allowed unless the complaint affirmatively shows that plaintiff has no cause of action. *Gatlin v. Bray*, 81 N.C. App. 639, 344 S.E.2d 814 (1986). Upon such a motion, all allegations of fact in the complaint are taken as true. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986).

Here the trial judge found that the plaintiff did not state a claim upon which relief can be granted because the legislature did not intend N.C.G.S. §§ 20-351 to 351.10 to apply retroactively. The plaintiff argues that she is not attempting to use the statute in her cause of action for defects or conditions which existed prior to the enactment of the statute. Therefore, the plaintiff argues that she is not asking the court to apply the statute retroactively.

The 1987 change in the statutes which created the Act under which the plaintiff seeks to recover was entitled "AN ACT TO PROVIDE REMEDIES FOR CONSUMERS OF NEW MOTOR VEHICLES THAT DO NOT CONFORM TO EXPRESS WARRANTIES." (1987 N.C. Sess. Laws ch. 285.) As the language indicates, the remedies provided under the statute are based on the express warranties which arise at the time the contract is formed. Therefore, the rights and obligations involved in the plaintiff's claim arise out of the lease contract which was executed in September of 1987, prior to the time when the statute came into effect in North Carolina.

"The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). To apply the law to the plaintiff would require us to apply the law retroactively. Unless contrary intent is expressed by the legislature or clearly implied by the terms of the statute, we must apply the

statute prospectively from its effective date. *In Re Will of Mitchell*, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974) (citations omitted). The legislature did not express the intent that N.C.G.S. §§ 20-351 to 351.10 be applied retroactively; nor is there any clear implication from the statute that the legislature intended to apply the statute retroactively. Instead, the legislature passed the statute in June of 1987 and made its intention clear that the statute become effective in October of 1987.

The trial judge was correct in dismissing the plaintiff's cause of action under N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted in that the legislature did not intend N.C.G.S. §§ 20-351 to 351.10 to apply retroactively. We need not address whether the judge was correct with respect to the dismissal based on N.C.G.S. § 1A-1, Rule 41(b), as we found the dismissal correct on other grounds.

Affirmed.

Chief Judge HEDRICK and Judge WYNN concur.

SAMPSON COUNTY CHILD SUPPORT ENFORCEMENT AGENCY EX REL. CORA McNEILL v. TOMMY LEE STEVENS

No. 904DC676

(Filed 19 February 1991)

Bastards § 10 (NCI3d)— support of illegitimate child—paternity established twelve years earlier—no relitigation of issue

Pursuant to N.C.G.S. §§ 110-132 and 133 the actions of plaintiff in filing an "Affirmation of Paternity" and defendant in executing and filing with the court an acknowledgment of paternity and agreement to pay a stated amount of child support judicially established that defendant was the father of the child involved, and defendant could not, twelve years later, move for a blood test to determine if he were the biological father, since to allow the motion would permit an issue long since adjudicated and set at rest to be relitigated.

Am Jur 2d, Bastards §§ 29, 94, 98, 126.

APPEAL by plaintiff from order entered 7 May 1990, *nunc pro tunc* 25 April 1990, by *Judge Stephen M. Williamson* in SAMPSON County District Court. Heard in the Court of Appeals 4 February 1991.

Benjamin R. Warrick for plaintiff appellant.

No brief filed for defendant appellee.

PHILLIPS, Judge.

During the spring of 1978, pursuant to the provisions of G.S. 110-132 and G.S. 110-133: Plaintiff Cora McNeill filed with the Clerk of Superior Court for Sampson County an "Affirmation of Paternity" affirming that defendant was the natural father of her child, Danill Marshill Goings, born on 30 December 1977; defendant acknowledged that he was the natural father of the child by executing and filing with the court an acknowledgment of paternity form, and also executed and filed an agreement to pay $65.00 per month for the care and benefit of the child; on 8 June 1978 all of these documents were approved by District Court Judge E. Alex Erwin who entered two orders; one directed defendant to make the payments agreed to, and the other, an "Order of Paternity," declared that defendant was the natural father of the child and that the order had the same force and effect as a judgment of paternity. On 14 February 1979 defendant was adjudged in contempt for failing to make the payments ordered by Judge Erwin and apparently purged himself by meeting the conditions stated in the order. On 25 April 1990 in a hearing to determine whether defendant was again in contempt for failing to make the support payments ordered, defendant moved for a blood test to determine whether he was the biological father of the child, the trial court entered an order allowing it, and the plaintiff appealed.

The order appealed from is a nullity, for it would permit an issue long since adjudicated and set at rest to be relitigated. Under the provisions of Chapter 110 of the General Statutes above referred to, the steps taken by the parties and the court in 1978 judicially established that defendant is the father of the child involved. *Person County ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985); *Beaufort County v. Hopkins*, 62 N.C. App. 321, 302 S.E.2d 662 (1983). Since the validity of that adjudication has never been challenged and cannot be successfully challenged at this late date upon any grounds known to us,

permitting defendant to becloud the adjudication would be a disservice to the opposing party, a needless burden on our court system, and contrary to fundamental principles of jurisprudence.

Reversed.

Judges JOHNSON and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 FEBRUARY 1991

ADVANCE TEXTILE PRODUCTS, INC. v. HOLLIFIELD No. 9027SC291	Gaston (89CVS2695)	Affirmed
BOWMAN v. WILLIAMSON No. 8919SC1315	Randolph (88CVS250)	On plaintiff's appeal no error. On defendant's appeal no error.
BRAREN v. BRAREN No. 9028DC638	Buncombe (88CVD2344) (89CVD2566)	Affirmed
CATES v. WILSON No. 8918SC627	Guilford (81CVS6664)	New Trial
GAINES v. N.C. DEPT. OF TRANSPORTATION No. 9010IC707	Ind. Comm. (TA-9261) (TA-9262)	Affirmed
IN RE BEYER No. 9024DC685	Watauga (85J42)	Affirmed
IN RE FORNEY No. 9019DC704	Cabarrus (86J19)	Affirmed
LINEBURG v. WATSON No. 9010SC708	Wake (88CVS3862)	No Error
SANTORO v. DENNING No. 908SC602	Wayne (89CVS484)	Appeal Dismissed
STATE v. BARRETT No. 9021SC961	Forsyth (89CRS33657)	No Error
STATE v. BARRETT No. 9021SC580	Forsyth (89CRS17738)	No Error
STATE v. BUSH No. 9020SC614	Union (89CRS8552)	No Error
STATE v. CLEMONTS No. 906SC666	Northampton (89CRS2111) (89CRS2111A)	Affirmed
STATE v. COPELAND No. 9019SC740	Rowan (89CRS012601) (89CRS012603) (89CRS012605) (89CRS012466)	Affirmed

STATE v. GREGORY No. 901SC755	Currituck (89CRS631)	Affirmed
STATE v. IPOCK No. 903SC761	Craven (89CRS6473)	No Error
STATE v. JARRETT No. 9029SC909	Transylvania (88CRS2092) (88CRS2314)	No Error
STATE v. LIGHTSEY No. 9026SC851	Mecklenburg (89CRS80777)	No Error
STATE v. LOCKLEAR No. 9022SC1037	Davidson (88CRS15831) (88CRS15833)	No Error
STATE v. LYONS No. 9010SC701	Wake (89CRS66984) (89CRS66985) (89CRS66986) (89CRS66987) (90CRS00006)	No Error
STATE v. McNEILL No. 9029SC560	Transylvania (88CRS1736) (88CRS2097)	No Error
STATE v. MONROE No. 9012SC591	Cumberland (89CRS7665)	No Error
STATE v. PARKER No. 9021SC645	Forsyth (89CRS31321)	No Error
STATE v. POTTS No. 9026SC611	Mecklenburg (88CRS74741)	No Error
STATE v. STRAUGHAN No. 9029SC955	McDowell (89CRS4013) (89CRS4014) (89CRS4022)	No Error
THOMASON v. LONGLEY No. 905SC245	New Hanover (87CVS2984)	Affirmed
WARBURTON v. INTERSTATE MILLING CO. No. 8910IC1388	Ind. Comm. (069559) (727683) (727744)	Affirmed
WILLIAMS v. SHORE No. 9021DC700	Forsyth (89CVD1635)	Affirmed
WRIGHT v. CLEMENTS No. 906SC702	Northampton (87CVS250)	No Error

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

§ 31 (NCI4th). Adjudication of contested case; notice and hearing

Petitioner's substantial rights were prejudiced by the revocation procedure by which his certification as a law enforcement officer was revoked where he did not receive an opportunity for a hearing prior to the revocation of his license and did not receive proper notice. *Scroggs v. N.C. Criminal Justice Standards Comm.*, 699.

§ 48 (NCI4th). Proceedings for suspension, revocation, amendment or related action on license

The superior court did not err when reviewing the revocation of a law enforcement officer's certification by concluding that the commission's decision was arbitrary and capricious. *Scroggs v. N.C. Criminal Justice Standards Comm.*, 699.

§ 70 (NCI4th). Evidence taking and fact finding by reviewing court

The reviewing court acted entirely within the scope of its authority where it made findings at variance with findings of respondent commission. *Scroggs v. N.C. Criminal Justice Standards Comm.*, 699.

ANIMALS, LIVESTOCK, OR POULTRY

§ 1 (NCI4th). Protection of animals

Information in applications to the IACUC for approval of research experiments using animals is not required to be protected because of researchers' fears of violence and harassment. *S.E.T.A. UNC-CH v. Huffines*, 292.

Information in applications to the IACUC for approval of research experiments using animals did not constitute confidential trade secrets protected from disclosure by G.S. 66-152 and was not protected from public disclosure by principles of academic freedom under the First Amendment. *Ibid.*

The IACUC is required by G.S. 132-9 to disclose to petitioners information in applications for approval of animal research experiments except for information relating to the department name and the names, telephone numbers, addresses and experience of the applicants and any other staff members participating in the experiments. *Ibid.*

APPEAL AND ERROR

§ 83 (NCI4th). Final judgments or orders generally

Defendant's notice of appeal in an action to impose a constructive trust on real property was timely where the notice was filed after rendition of judgment and the judgment was never entered, so that the 30-day period provided by the Rules of Appellate Procedure was not triggered; however, the appeal was dismissed for lack of jurisdiction because entry of judgment did not occur. *Darcy v. Osborne*, 546.

§ 105 (NCI4th). Orders relating to domestic matters generally

An appeal was dismissed as interlocutory where defendant attempted to appeal from orders awarding plaintiff attorney's fees arising from discovery matters and from a ruling by partial summary judgment that a separation agreement was valid but that damages would be left for later determination. *Bromhal v. Stott*, 428.

§ 106 (NCI4th). Appealability of orders relating to alimony and child support

An appeal of an award of alimony pendente lite was dismissed as interlocutory. *Browne v. Browne*, 617.

APPEAL AND ERROR – Continued

§ 118 (NCI4th). Summary judgment denied

The denial of defendant hospital's motion for summary judgment was interlocutory and not immediately appealable. *Henderson v. LeBauer*, 255.

An appeal on the merits of the denial of a motion for summary judgment was not considered because it was interlocutory. *Pate v. Eastern Insulation Service of New Bern*, 415.

§ 121 (NCI4th). Summary judgment orders involving multiple claims or parties; appeal dismissed

An order granting partial summary judgment for plaintiff on his claim for an access easement across defendants' land and leaving other claims unresolved did not affect a substantial right and was thus not immediately appealable. *Miller v. Swann Plantation Development Co.*, 394.

An order granting one plaintiff's motion for partial summary judgment in an action for breach of an employment contract was interlocutory and not immediately appealable. *Pitt v. Williams*, 402.

§ 122 (NCI4th). Danger of inconsistent verdicts; right to trial before same trier of fact

An order granting summary judgment only for defendant psychiatric hospital in plaintiff's medical malpractice action against the hospital, treating physicians and anesthesiologists did not affect a substantial right and was not immediately appealable. *Myers v. Barringer*, 168.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection or motion

The State's contention that an appeal in a homicide prosecution should be dismissed because the record does not contain the court reporter's certification was not addressed since the State raised the issue for the first time in its brief on appeal and not by filing a motion for dismissal. *S. v. Easter*, 36.

The trial court's denial of defendant's motion for attorney fees pursuant to G.S. 6-21.5 was not reviewable on appeal where this question was never argued before the trial court. *Tittle v. Case*, 346.

§ 178 (NCI4th). Effect of appeals from interlocutory orders on power of trial court

Plaintiff's notice of appeal from an order granting summary judgment for defendant psychiatric hospital in his medical malpractice action did not stay plaintiff's remaining malpractice claims against his treating physicians and anesthesiologists, and the trial court thus could properly dismiss the remaining claims for failure to prosecute. *Myers v. Barringer*, 168.

§ 205 (NCI4th). Time for appeal

Judgment was not entered in open court when the verdict was received but was entered when the written judgment was filed, and defendant's notice of appeal given the same day was timely. *Custom Molders, Inc. v. Roper Corp.*, 606.

§ 330 (NCI4th). Transcript generally

The Court of Appeals declined to disturb a trial court ruling that plaintiff had substantially complied with the requirement that an appellant in a civil case make a formal request for a copy of the trial transcript within ten days of filing notice of appeal. *Ferguson v. Williams*, 265.

APPEAL AND ERROR — Continued

§ 359 (NCI4th). Omission of necessary part of record; matters relating to evidence, witnesses

Although a contract was not made a part of the record on appeal, the terms of the contract were a part of the record where defendant testified to them in an affidavit which was made a part of the record. *Mozingo v. Pitt County Memorial Hospital*, 578.

§ 362 (NCI4th). Indictment, verdict, and judgment

An appeal from a conviction for taking indecent liberties with a minor was dismissed where defendant failed to include the judgment as a part of the record on appeal. *S. v. McMillian*, 425.

§ 372 (NCI4th). Extension of time for settling record on appeal

The trial court's order extending the time during which plaintiffs could serve the proposed record on appeal was ineffective where it was made after the 35 day period required by Rule 11(a) for serving the proposed record on appeal, it was made upon an oral motion in violation of Rule 27(c)(1), and the other parties were not given notice or an opportunity to be heard as required by Rule 27(c)(1). *Richardson v. Bingham*, 687.

§ 384 (NCI4th). Filing, docketing, and service of record on appeal generally

Plaintiffs' appeal is dismissed for failure to file the record on appeal within fifteen days after the record was settled. *Richardson v. Bingham*, 687.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

An argument not supported by an assignment of error and an assignment not argued in the brief will not be considered on appeal. *Roberts v. ABR Associates, Inc.*, 135.

Defendant's claim that a trial court erred by not entering judgment on the pleadings in an arbitration action was dismissed where defendant did not assign error to the issue. *Routh v. Snap-On Tools Corp.*, 703.

§ 424 (NCI4th). Incorporating material from other case by reference

Rule 28 of the North Carolina Rules of Appellate Procedure does not prohibit a party from including in an appendix to a brief copies of a motion, order and portions of a transcript showing the court's reasoning in a similar case. *Gibbons v. CIT Group/Sales Financing*, 502.

§ 453 (NCI4th). Review of constitutional issues generally

The appellate court will not pass upon the constitutionality of the statutory authority of the Environmental Management Commission to impose civil penalties where this issue was not presented to and passed upon by the trial court. *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 433.

§ 504 (NCI4th). Invited error

There was no prejudicial error in a prosecution for rape and first degree sexual offense where defendant was allowed to call a witness over his counsel's objections and the court failed to inform defendant of the gravity of his decision. *S. v. Davis*, 12.

APPEAL AND ERROR — Continued

§ 510 (NCI4th). Frivolous appeals in appellate division

A motion for sanctions against an automobile surety company for a frivolous appeal was denied where the appeal lacks substantial merit but was not frivolous. *Tomlinson v. Camel City Motors*, 419.

ARBITRATION AND AWARD

§ 2 (NCI4th). Requirement that agreement to arbitrate exist

The trial court failed to comply with G.S. 1-567.3(a) in applying a summary judgment standard to the validity and enforceability of an arbitration agreement rather than determining as a matter of law whether a valid arbitration agreement existed. *Routh v. Snap-On Tools Corp.*, 703.

§ 34 (NCI4th). Fees and expenses of arbitration

The trial court properly deleted an arbitration award of attorney fees since attorney fees are not a subject of arbitration even if the contract in dispute provides for such fees. *J. M. Owen Bldg. Contractors v. College Walk, Ltd.*, 483.

§ 40 (NCI4th). Vacation of award

Service of an arbitration award by regular mail did not commence the running of the 90-day period allowed for motions to vacate or modify the award, and motions by two defendants to vacate or modify an award were not untimely. *J. M. Owen Bldg. Contractors v. College Walk, Ltd.*, 483.

§ 42 (NCI4th). Modification or correction of award

The trial court properly modified an arbitration award by substituting interest of 8% per annum for the awarded amount of 8% per diem. *J. M. Owen Bldg. Contractors v. College Walk, Ltd.*, 483.

§ 43 (NCI4th). Appeals generally

Defendant's appeal of an entire arbitration award placed all funds deposited with the clerk of court at issue, and the trial court correctly ordered that these funds remain with the clerk of court pending the appeal. *J. M. Owen Bldg. Contractors v. College Walk, Ltd.*, 483.

ASSAULT AND BATTERY

§ 85 (NCI4th). Sufficiency of evidence of secret assault

The State's evidence was sufficient to be submitted to the jury in a prosecution for secret assault. *S. v. Green*, 317.

ASSIGNMENTS

§ 2 (NCI4th). Validity of assignment; rights and interests assignable

An action for fraud and unfair trade practices arising from a breach of contract was assignable. *Investors Title Ins. Co. v. Herzig*, 127.

ATTORNEYS AT LAW

§ 31 (NCI4th). Scope of authority in litigation

There was no prejudicial error in a prosecution for rape and first degree sexual offense where defendant was allowed to call a witness over his counsel's

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 595 (NCI4th). Contributory negligence in collisions involving following vehicles

Evidence that defendant gave a left turn signal for only 150 feet rather than the statutorily required 200 feet before stopping in the highway to make a left turn was sufficient for submission to the jury of an issue of plaintiff's contributory negligence. *Blankley v. Martin*, 175.

§ 614 (NCI4th). Contributory negligence of person crossing at place other than crosswalk

The evidence failed to show contributory negligence by plaintiff pedestrian as a matter of law in failing to yield the right of way to defendant's oncoming vehicle when crossing the roadway at a place other than a crosswalk. *Wolfe v. Burke*, 181.

§ 638 (NCI4th). Contributory negligence of vehicle operator; collision involving oncoming vehicle

The trial court correctly granted a directed verdict for plaintiff on defendants' contention of contributory negligence in an action arising from an automobile accident in which defendant turned in front of plaintiff. *Snead v. Holloman*, 462.

§ 813 (NCI4th). Requirement of alcohol test

A blood test analysis was erroneously admitted and a new trial for driving while impaired was granted where a medical technician analyzed defendant's blood sample for alcohol content in a hospital following an automobile accident and the State stipulated that statutory procedures for chemical analysis of blood alcohol content were not followed. *S. v. Drdak*, 659.

BASTARDS

§ 5.1 (NCI3d). Blood tests

The actions of plaintiff in filing an "Affirmation of Paternity" and defendant in executing and filing with the court an acknowledgment of paternity and agreement to pay a stated amount of child support judicially established defendant's paternity, and defendant could not, twelve years later, move for a blood test to determine if he were the biological father. *Sampson Co. Child Sup. Enf. Agency ex rel. McNeill v. Stevens*, 719.

BILLS AND NOTES

§ 20 (NCI3d). Presumptions and burden of proof, sufficiency of evidence and nonsuit

The trial court properly entered summary judgment for defendants in an action to recover on a promissory note where defendants' obligation to plaintiff was conditioned upon their receipt of payments under a note from third parties, and there was no dispute that defendants were no longer receiving payments under the third party note. *Williams v. P. S. Investment Co.*, 707.

BILLS OF DISCOVERY

§ 6 (NCI3d). Compelling discovery; sanctions available

The trial court did not abuse its discretion in refusing to exclude statements made by defendant to a fellow inmate because the State failed to provide these statements to defense counsel within the time required by G.S. 15A-903(a)(2) where

BILLS OF DISCOVERY — Continued

the trial court offered defense counsel the choice either to continue the case until the next session or to recess until the following morning. *S. v. Lopez*, 217.

BROKERS AND FACTORS

§ 5 (NCI4th). Powers of brokers; real estate brokers

Plaintiff could not be bound by the mistake, if any, of its real estate agent regarding the operation of a condition in the contract between plaintiff and defendants where the condition was inserted at defendants' insistence and was drafted by defendants and the agent, and the agent's contract with plaintiff contained no terms which could be construed as giving him authority to do more than convey offers to and from plaintiff. *Wake Stone Corp. v. Hargrove*, 490.

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 16 (NCI3d). Default and repossession for sale

The trial court did not err by granting plaintiff's motion for summary judgment on the issue of default in an action for a deficiency judgment on purchase notes for a Rolls Royce and a Bentley. *Triad Bank v. Elliott*, 188.

CONSPIRACY

§ 2.1 (NCI3d). Actions for civil conspiracy; sufficiency of evidence

Plaintiff's evidence was insufficient to show a conspiracy among defendants in a medical malpractice action to cover up and misrepresent the cause of decedent's death. *Henderson v. LeBauer*, 255.

CONSTITUTIONAL LAW

§ 34 (NCI3d). Double jeopardy

Although possession of one gram or more of cocaine is not a lesser included offense of possession of cocaine with intent to sell or deliver, double jeopardy principles bar punishment for both offenses for possession of the same cocaine. *S. v. Mebane*, 119.

Double jeopardy principles bar defendant's punishment for possession with intent to sell and deliver cocaine and trafficking in the same cocaine by possession. *Ibid.*

Where defendant was convicted of armed robbery and larceny from the person arising out of a single transaction, the sentence for larceny must be arrested. *S. v. Wilfong*, 221.

§ 67 (NCI3d). Right of confrontation; identity of informants

Defendant had no right to complain on appeal that his right of confrontation was violated when the trial court permitted an officer to give an in-camera answer to a question as to whether an informant was a competitor or an employee of defendant where defense counsel stated he had no objection to an in-camera response to that question. *S. v. Moose*, 59.

A defendant charged with trafficking in cocaine by possession failed to show that the circumstances of his case mandated disclosure of an informant's identity. *Ibid.*

CONSTITUTIONAL LAW — Continued

§ 338 (NCI4th). Jury selection

The trial court did not err by allowing the State to seek a conviction of second degree murder with a death qualified jury. *S. v. Goodson*, 665.

CONSUMER AND BORROWER PROTECTION

§ 13 (NCI4th). Generally; penalties

The trial court erred in an action to collect amounts due on a note by granting judgment for plaintiff and dismissing defendant's counterclaims for violation of the Unfair and Deceptive Trade Practices Act and the North Carolina Consumer Finance Act. *Provident Finance Co. of N.C. v. Rowe*, 367.

CONTRACTS

§ 27 (NCI3d). Sufficiency of evidence generally

The evidence in an action to recover the balance due on a contract for the sale of plaintiff's house to defendants supported the court's findings with regard to the sales price, defendants' assumption of mortgages on the property, plaintiff's renting of the premises, unpaid rent and late charges, and lack of defendants' entitlement to recovery for repairs. *Durham v. Hale*, 204.

§ 120 (NCI4th). Other miscellaneous contracts

Summary judgment was improperly allowed for defendants in an action against an accounting firm for breach of a third-party beneficiary contract arising from an audited financial statement. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 1.

§ 142 (NCI4th). Sufficiency of evidence of other miscellaneous contracts

The jury's finding that defendant lawn mower manufacturer contracted to purchase all its requirements for specially designed footrest pads from plaintiff as long as quality parts were delivered at competitive prices was supported by competent evidence, including an admission taken from an answer filed by defendant in federal court while the case was temporarily there, testimony as to oral agreements, and testimony as to the course of conduct between the parties. *Custom Molders, Inc. v. Roper Corp.*, 606.

CORPORATIONS

§ 6 (NCI4th). Factors indicative of alter ego or instrumentality

The Supreme Court in expanding on the mere instrumentality rule for piercing the corporate veil has relied on the definition set forth in *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1 (1966). *Atlantic Tobacco Co. v. Honeycutt*, 160.

Directed verdict was properly granted for defendant Barbara Honeycutt in an action for accounts due in which plaintiff attempted to pierce the corporate veil because it was apparent that she did not exercise the requisite degree of control over the activities of either corporation to justify piercing the corporate veil. *Ibid.*

There was sufficient evidence against Joseph Honeycutt to take the case against him to the jury in an action on accounts due in which plaintiffs attempted to pierce the corporate veil. *Ibid.*

CORPORATIONS — *Continued*

§ 12 (NCI3d). Transactions between corporation and its officers or agents

Plaintiff's evidence was insufficient to show that the individual defendant converted or misappropriated any of the funds or other property of a corporation formed by the parties to operate a fried chicken restaurant, and the individual defendant was under no duty to turn over to the corporation a new fried chicken franchise which she obtained while the corporation was in the process of liquidation. *Penley v. Penley*, 225.

COUNTIES

§ 36 (NCI4th). Liability

A complaint alleging that an agent of defendant county made fraudulent representations to plaintiff failed to state a claim upon which relief could be granted because there is no authority for the proposition that a county is liable for fraud in the actions of its employees. *Cincinnati Thermal Spray, Inc. v. Pender County*, 405.

§ 52 (NCI4th). Contracts generally

A complaint alleging that Pender County breached an oral contract to cooperate with plaintiff in the provision of adequate water and sewer systems for plaintiff's proposed facility failed to state a claim upon which relief could be granted. *Cincinnati Thermal Spray, Inc. v. Pender County*, 405.

CRIMINAL LAW

§ 33.2 (NCI3d). Facts in issue and relevant to issues in general; evidence as to motive, knowledge, or intent

The trial court did not err in a prosecution for driving with a revoked license by admitting as exhibits a motion to dismiss an appeal and an order dismissing an appeal of defendant's prior revocation because those exhibits are evidence of the finality of the judgment and of defendant's knowledge of the revocation of his license. *S. v. Davis*, 409.

§ 34 (NCI4th). Compulsion and government authorization; particular circumstances

The evidence in an armed robbery case did not require an instruction on the defense of duress or coercion where defendant's testimony indicated that she did not in any way participate in the crime. *S. v. Blair*, 653.

§ 42.6 (NCI3d). Chain of custody or possession

The State was not required to establish a detailed chain of custody of cocaine seized from defendant's residence where the cocaine was identified as the same evidence involved in the incident and there was no allegation at trial that it had undergone any material change. *S. v. Brown*, 71.

§ 58 (NCI4th). Valid warrant or indictment required

The trial court's dismissal of a first degree murder charge was not a final dismissal of the criminal proceeding where the prosecutor requested a dismissal of a first degree murder charge before requesting a charge on second degree murder. *S. v. Goodson*, 665.

§ 66.9 (NCI3d). Identification from photographs; suggestiveness of procedure

The trial court did not err in a murder prosecution by denying defendant's motion to suppress a photographic identification of defendant where the attending

officers were suggestive as to defendant's name but not with respect to the photographic image. *S. v. Goodson*, 665.

§ 74.2 (NCI3d). Confession by, or implicating, codefendant; incompetency of confession

A codefendant's statements to the police which primarily implicated himself and did not refer to defendant were not inadmissible under the *Bruton* rule because defendant was tried under the theory of acting in concert. *S. v. Holmes*, 229.

The trial court correctly prevented a witness from testifying about what defendant said he had seen the night the victim was shot since, following the purpose of the *Bruton* rule, a codefendant had the right to demand protection from being incriminated by defendant's admissions, and since the testimony was hearsay. *Ibid.*

§ 74.3 (NCI3d). When confession implicating codefendant is competent

A defendant charged with murder was not prejudiced when the trial court sanitized his statements to a witness under the *Bruton* rule by deleting a statement that a codefendant fired the first two shots and admitting only the statement that defendant fired the third shot because he did not want the victim to suffer. *S. v. Holmes*, 229.

§ 75.7 (NCI3d). Requirement that defendant be warned of constitutional rights; what constitutes "custodial interrogation"

Defendant's statements to an officer executing a search warrant that "the cocaine you're looking for is in there" was not the result of custodial interrogation. *S. v. Moose*, 59.

§ 83 (NCI3d). Competency of husband or wife to testify for or against spouse

Statements made by defendant to his wife that he was going to shoot and kill the victim because he had messed up his money and defendant's actions in taking a gun from a kitchen cabinet in his wife's presence constituted confidential communications within the meaning of G.S. 8-57(c), and defendant had the right to prohibit his wife from testifying both about his statements to her and his actions in procuring the gun. *S. v. Holmes*, 229.

The privilege of a confidential communication between marriage partners is not removed because the communication shows the intention of one spouse to commit a crime or because a similar communication was made to third persons on other occasions. *Ibid.*

§ 86.3 (NCI3d). Prior convictions; effect of defendant's answer; further cross-examination of defendant

The trial court erred in finding that a fourteen-year-old conviction of defendant for incest involving his natural daughters demonstrated a "pattern of behavior" which was probative for impeachment purposes, but defendant was not prejudiced by the court's ruling where he did not take the stand and the State did not use the stale conviction to impeach him. *S. v. Norris*, 144.

§ 88.1 (NCI3d). Conduct and scope of cross-examination

Where defendant indicated that if certain medical testimony were allowed, he would seek to cross-examine the child rape victim about specific sexual behavior to show that the condition of the victim's vagina was caused by someone other than defendant, defendant had the burden of establishing the admissibility of such evidence, and failure of the court to initiate the process outlined in Rule of Evidence 412 was not plain error. *S. v. Norris*, 144.

CRIMINAL LAW — Continued

§ 88.2 (NCI3d). Questions and conduct impermissible on cross-examination

Cross-examination of defendant in a rape case with regard to prior crimes which went beyond the time and place of defendant's convictions and the punishment imposed was improper and unfairly prejudiced defendant. *S. v. Gallagher*, 208.

§ 89 (NCI3d). Credibility of witnesses; corroboration and impeachment

The trial court did not err in a murder prosecution by admitting testimony which defendant contended was conflicting and incredulous. *S. v. Goodson*, 665.

§ 89.4 (NCI3d). Prior statements of witness; inconsistent statements

The trial court did not err in a murder prosecution by allowing the State to impeach a witness with his own prior inconsistent statements. *S. v. Goodson*, 665.

§ 97.1 (NCI3d). Introduction of additional evidence; particular cases; no abuse of discretion in permitting additional evidence

There was no merit to defendant's assignment of error to admitting State's exhibits into evidence after the State rested and defendant had moved for dismissal based upon insufficient evidence. *S. v. Davis*, 409.

§ 133 (NCI4th). Acceptance of guilty plea

The trial court did not err in refusing to accept defendant's tender of a guilty plea to a lesser offense where the State opposed defendant's offer to plead guilty to the lesser offense. *S. v. Brown*, 71.

§ 260 (NCI4th). Continuance for substitution of counsel

The trial court did not err in refusing to grant defendant a continuance on the day of trial to seek and retain private counsel to replace his appointed counsel. *S. v. Wilfong*, 221.

§ 273 (NCI4th). Grounds for continuance; absence of witness generally; identity and location of witness; nature of testimony

The trial court did not err in denying defendant's motion for a continuance and for a mistrial at the close of all the evidence based on his inability to ascertain the whereabouts and secure the attendance of witnesses where his attorney waited until five days before trial to issue subpoenas. *S. v. Wilfong*, 221.

§ 319 (NCI4th). Joinder or consolidation of charges against multiple defendants; homicide

The trial court did not err by allowing the State's motion for joinder of defendants in a murder prosecution where there was a sufficient basis to support a conviction of this defendant apart from the testimony of his codefendant. *S. v. Goodson*, 665.

§ 374 (NCI4th). Expression of opinion on evidence; comments regarding admission of particular evidence

The trial judge did not express an opinion on the evidence when he instructed the jury that testimony by a forensic chemist concerning cocaine found by officers on a downstairs kitchen table could only be considered in determining the guilt or innocence of defendant and could not be considered in determining the guilt or innocence of two codefendants who were upstairs at the time of the search. *S. v. Autry*, 245.

CRIMINAL LAW — Continued

§ 434 (NCI4th). Comment on defendant's prior convictions or criminal record

A statement by the prosecutor in a rape case that "the law was written so that he will never ever do this to anybody's daughter or to his own daughter again" did not impermissibly comment on defendant's prior incest conviction and did not require a mistrial. *S. v. Norris*, 144.

§ 648 (NCI4th). Timing of motion for dismissal or nonsuit; waiver of right to make motion

Defendant in a prosecution for driving with a revoked license waived his right to appeal the denial of his motion to dismiss at the close of the State's evidence where the trial court admitted exhibits over defendant's objection after defendant had rested and moved for dismissal, and defendant then withdrew his decision not to present any evidence and testified. *S. v. Davis*, 409.

§ 793 (NCI4th). Instruction as to acting in concert generally

The trial court did not err by refusing defendant's request for a special instruction regarding the issue of causation on the theory of acting in concert. *S. v. Holmes*, 229.

§ 823 (NCI4th). Interested witness instructions for police officers or undercover agents

Defendant was not entitled to an undercover agent or an informant interested witness instruction. *S. v. Moose*, 59.

§ 861 (NCI4th). Instructions on mandatory life sentence

Defendant was not entitled to an instruction to the jury regarding the mandatory life sentence for first degree rape. *S. v. Norris*, 144.

§ 1081 (NCI4th). Where mitigating factors outnumber aggravating factors

The trial court did not err in finding that the aggravating factor of premeditation and deliberation for second degree murder outweighed the mitigating factors of no criminal record, voluntary acknowledgment of wrongdoing, honorable discharge from the armed services, good reputation in the community, and mental condition which was insufficient to cause the offense but which may have contributed to defendant's actions. *S. v. Foster*, 153.

§ 1085 (NCI4th). Required findings where presumptive term imposed

The trial judge was not required to find aggravating and mitigating factors where he entered four separate judgments sentencing defendant to the presumptive term of imprisonment for each offense and ordered that defendant serve the sentences consecutively. *S. v. Bresse*, 519.

§ 1086 (NCI4th). Consideration of aggravating and mitigating factors; required findings where two or more convictions are consolidated for hearing or judgment

The trial court could properly sentence defendant on all charges by finding the same mitigating and aggravating factor in each case. *S. v. Green*, 317.

§ 1123 (NCI4th). Premeditation as aggravating factor under Fair Sentencing Act

The evidence was sufficient to support the trial court's finding of premeditation and deliberation as an aggravating factor for second degree murder to which defendant pled guilty. *S. v. Foster*, 153.

There was sufficient evidence to find premeditation and deliberation as an aggravating factor when sentencing defendant for voluntary manslaughter. *S. v. Easter*, 36.

Premeditation and deliberation are appropriate nonstatutory aggravating factors when defendant pleads guilty to voluntary manslaughter. *Ibid.*

§ 1185 (NCI4th). What constitutes a prior conviction

A conviction of driving while impaired under G.S. 20-138.1, irrespective of the level of punishment imposed, constitutes a prior conviction of an offense punishable by more than sixty days' imprisonment for purposes of sentencing under the Fair Sentencing Act. *S. v. Santon*, 710.

§ 1214 (NCI4th). Miscellaneous nonstatutory mitigating factors

The trial court did not err in refusing to find as a nonstatutory mitigating factor that defendant sought treatment for his alcoholism where evidence of that factor was not uncontradicted, substantial, and manifestly credible. *S. v. Santon*, 710.

§ 1238 (NCI4th). Strong provocation or extenuating relationship with victim generally

Strong provocation may be found to mitigate the offense where defendant acted in the "heat of passion" other than that arising as a result of a direct challenge or threat by the victim, but defendant failed to show strong provocation where the evidence showed that he did not confront and shoot the victim until the morning after he was told that the victim had molested his daughter. *S. v. Foster*, 153.

§ 1239 (NCI4th). Strong provocation as mitigating factor

The trial court did not err when sentencing defendant for voluntary manslaughter by failing to find that the offense was committed under strong provocation where the evidence was conflicting. *S. v. Easter*, 36.

§ 1240 (NCI4th). Threat or challenge as provocation

The trial court did not err when sentencing defendant for voluntary manslaughter by failing to find that the offense was committed under a threat where the evidence was conflicting. *S. v. Easter*, 36.

§ 1242 (NCI4th). Antagonistic relationship between defendant and victim, generally

The trial court did not err by failing to find as a mitigating factor when sentencing defendant for voluntary manslaughter that there was an extenuating relationship between defendant and the victim based on the alleged adulterous relationship between the victim and defendant's wife. *S. v. Easter*, 36.

§ 1600 (NCI4th). Restitution recommended as condition of prisoner work release

The trial court was without authority when sentencing defendant for voluntary manslaughter to order that defendant pay one-third of his income for disbursement to the minor children of the victim as a condition of work release. *S. v. Easter*, 36.

§ 1666 (NCI4th). Grounds for denial or reduction of victims compensation award; misconduct

The claimant's own misconduct must have been a proximate cause of his injuries in order for the Crime Victims Compensation Commission to deny or reduce an award for those injuries under G.S. 15B-11(b). *Evans v. N.C. Dept. of Crime Control*, 108.

EVIDENCE — Continued

§ 47 (NCI3d). Expert testimony in general as invasion of province of jury

The Court of Appeals rejected defendants' contention that the plaintiffs' experts were not qualified and that their opinions were without sufficient factual basis in an action arising from an explosion at a paper plant. *Federal Paper Board Co. v. Kamyr, Inc.*, 329.

EXECUTORS AND ADMINISTRATORS

§ 23 (NCI3d). Widow's year's support

The decision of the trial court finding that a wife was barred from receiving the surviving spouse's year's allowance was reversed where there was no evidence of adultery aside from extended cohabitation. *In re Estate of Trogdon*, 323.

FALSE IMPRISONMENT

§ 1 (NCI3d). Nature and essentials of right of action

A merchant who detained plaintiff customer was not immune from liability for false imprisonment under G.S. 14-72.1(c) where the jury could find that the detention was unreasonable. *Rogers v. T.J.X. Companies*, 99.

§ 2.1 (NCI3d). Sufficiency of evidence

The evidence at a summary judgment hearing raised genuine issues of material fact sufficient to support plaintiff's claim of false imprisonment by a store security officer. *Rogers v. T.J.X. Companies*, 99.

FALSE PRETENSE

§ 3.1 (NCI3d). Sufficiency of evidence and nonsuit

Charges of false pretense were properly submitted to the jury based upon evidence that defendant opened a bank account for a nonexistent business and drew four checks against this account with knowledge that there were insufficient funds in the account to cover the amounts of the checks. *S. v. Bresse*, 519.

FORNICATION AND ADULTERY

§ 4 (NCI3d). Sufficiency of evidence and nonsuit

There was insufficient evidence of adultery in an action to bar a wife from the surviving spouse's year's allowance where there was no evidence of inclination aside from extended cohabitation. *In re Estate of Trogdon*, 323.

FRAUD

§ 12.1 (NCI3d). Nonsuit

Summary judgment was properly granted for plaintiff on defendant Long Leaf's claim that its president's signature was obtained on a guaranty of a lease of a logging skidder by fraud. *Spartan Leasing v. Pollard*, 450.

GUARANTY

§ 1 (NCI3d). Generally

An addendum letter was a modification of the original lease and not a guaranty in an action to enforce a guaranty of a lease for a logging skidder. *Spartan Leasing v. Pollard*, 450.

GUARANTY — Continued

§ 2 (NCI3d). Actions to enforce guaranty

The trial court erred in an action to hold a guarantor liable on the lease of a logging skidder by granting summary judgment for plaintiff-lessor on the issue of the guarantor's entitlement to a setoff for plaintiff's negligent repair of the skidder. *Spartan Leasing v. Pollard*, 450.

HIGHWAYS AND CARTWAYS

§ 9 (NCI3d). Action against the Highway Commission, generally

A highway improvement project was not required to be "let to contract" in order for the Department of Transportation to be required by G.S. 136-27.1 to pay for nonbetterment costs due to relocation of sewer and water lines by nonprofit corporations as a result of the project. *Bell Arthur Water Corp. v. N.C. Dept. of Transportation*, 305.

The trial court erred in entering summary judgment for defendant since a material issue of fact remained as to whether work performed on a highway to replace a "blown out" storm drain pipe was an improvement so as to require the Department of Transportation to pay plaintiff's claim for reimbursement of the costs for relocation of water and sewer lines along the highway. *Ibid.*

The trial court erred in ordering that the Department of Transportation determine the nonbetterment costs relating to two roads where plaintiff submitted an uncontradicted affidavit as to the costs. *Ibid.*

The doctrine of sovereign immunity did not bar plaintiff from suing the Department of Transportation under G.S. 136-27.1 for reimbursement of costs incurred in relocating water and sewer lines during improvements to several roads. *Ibid.*

HOMICIDE

§ 21.7 (NCI3d). Sufficiency of evidence of guilt of second degree murder

The State's evidence was sufficient to support defendant's conviction of second degree murder either under the theory that defendant acted alone or under the theory that he acted in concert with a codefendant. *S. v. Holmes*, 229.

§ 30 (NCI3d). Submission of guilt of lesser degrees of the crime generally; guilt of second degree murder on charge of premeditated and deliberate murder

The trial court did not err in a homicide prosecution by submitting second degree murder as a possible verdict. *S. v. Goodson*, 665.

HOSPITALS

§ 3.2 (NCI3d). Liability of hospital for negligence of employees

Plaintiff's forecast of evidence was insufficient to show that the failure of defendant psychiatric hospital's staff to record plaintiff's complaints about hip and thigh pain after receiving ECT treatments and to report those complaints to the treating physicians was a proximate cause of plaintiff's injuries. *Myers v. Barringer*, 168.

HUSBAND AND WIFE

§ 11.2 (NCI3d). Construction of separation agreements

The trial court erred in holding as a matter of law that plaintiff breached a separation agreement by seeking an increase in child support after the older child reached the age of majority based upon the court's finding that the child support limitation and the payment of college expenses were integrated and dependent parts of the agreement. *White v. Bowers*, 646.

§ 24 (NCI3d). Alienation in general; elements of action

Plaintiff did not have to prove that his wife had no affection for anyone else or that their marriage was previously one of untroubled bliss but had to prove only that before defendant wrongfully interfered with their marriage, his wife had some genuine love and affection for him and that such love and affection were lost to him as a result of defendant's wrongdoing. *Shaw v. Stringer*, 513.

§ 25 (NCI3d). Competency and relevancy of evidence of alienation of affections

Evidence of defendant's failure to support his children and plaintiff's helping his wife to do so and getting along well with them was admissible to show that plaintiff's wife had love and affection for him. *Shaw v. Stringer*, 513.

§ 26 (NCI3d). Damages and instructions in alienation of affections case

The trial court properly submitted an issue as to punitive damages in an alienation of affections case where plaintiff's evidence tended to show that defendant persisted in visiting plaintiff's wife in the marital household and violating plaintiff's conjugal rights after being asked not to do so and even laughed when plaintiff's wife told him that plaintiff had learned of their affair. *Shaw v. Stringer*, 513.

§ 29 (NCI3d). Damages and instructions for criminal conversation

Punitive damages were not assessed for alienation of affections, for which no compensatory damages were awarded, but were properly awarded for criminal conversation. *Shaw v. Stringer*, 513.

INSURANCE

§ 68.8 (NCI3d). Policies covering more than one vehicle

The trial court correctly granted defendant's motion for summary judgment in an action in which plaintiff attempted to stack intrapolicy medical payments coverage in an automobile policy. *Tyler v. Nationwide Mut. Ins. Co.*, 713.

§ 108 (NCI3d). Defenses available to automobile liability insurer; coverage and risks assumed

Fraud in an application for automobile liability insurance is not a defense to the insurer's liability once injury has occurred, but this holding applies only to the statutory minimum amount. *Odum v. Nationwide Mutual Ins. Co.*, 627.

Defendant insurer's tender of funds pursuant to collision coverage did not constitute a waiver or estoppel of its defenses as to liability under the policy. *Ibid.*

§ 149 (NCI3d). Liability insurance

A homeowner's insurance policy did not provide coverage to an insured who intentionally pushed a co-worker who fell and sustained injury because of a provision of the policy excluding coverage for bodily injury "which is expected or intended by the insured." *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 671.

JUDGMENTS

§ 21 (NCI3d). Attack on consent judgments generally

The trial court erred in modifying a consent judgment by substituting a schedule of less stringent interim effluent pollution limits where plaintiff Environmental Management Commission did not consent to the modification and there was no evidence that the effluent limits in the original consent order were obtained by fraud or mutual mistake. *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 433.

Defendants' inability to bring their effluent pollution levels under control because of their underestimation of the problems, the weather, and continuing deterioration of defendants' facilities did not constitute a change of condition which, under the terms of the consent judgment, would permit a modification of the provisions of the consent judgment. *Ibid.*

§ 21.2 (NCI3d). Fraud or mutual mistake

Defendants' erroneous belief that they could stay within the interim effluent pollution limits required by a consent judgment did not constitute a mutual mistake of fact which would entitle them to a modification of the interim limits. *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 433.

§ 37 (NCI3d). Requisites of res judicata; finality and validity of judgment; determination of merits

The trial court did not err by refusing to dismiss an action to obtain stock in real property allegedly held in trust where plaintiffs inadvertently took a voluntary dismissal with prejudice but collateral estoppel and res judicata did not apply because both depend on prior adjudication on the merits. *Chaplain v. Chaplain*, 557.

§ 37.5 (NCI3d). Res judicata in proceedings involving real property rights

Judgment in a summary ejectment proceeding in which plaintiff claimed both past rent and damages was res judicata in a breach of contract action for past due rents and damages under the lease. *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 81.

JURY

§ 1 (NCI3d). Nature and extent of right to jury trial

Defendants did not have a right to a trial by jury in a proceeding to require them to remove a sign and to comply with the Coastal Area Management Act. *State ex rel. Rhodes v. Givens*, 695.

LANDLORD AND TENANT

§ 2 (NCI3d). Requisites and validity of lease

Evidence that plaintiff and her husband lived on property titled in the names of the husband's parents, made monthly payments in the amount of the mortgage payments to the husband's father, and paid taxes, insurance and maintenance expenses for the property established a lease arrangement and not a parol resulting trust. *Anderson v. Anderson*, 682.

§ 19 (NCI3d). Rent and actions therefor

The trial court erred in granting plaintiffs' motion for forfeiture of defendant's security deposit after default judgment was entered in plaintiffs' action to recover

LANDLORD AND TENANT — Continued

rent since the motion was in essence an attempt to amend the complaint after judgment had been entered. *Gallbronner v. Mason*, 362.

LARCENY

§ 1 (NCI3d). Definition; elements of the crime generally

Defendant's sentence for larceny from the person must be arrested where defendant was also convicted of armed robbery arising out of the same transaction. *S. v. Wilfong*, 221.

MASTER AND SERVANT

§ 10.2 (NCI3d). Actions for wrongful discharge

The evidence supported the jury's verdict finding that plaintiff was not terminated from his employment because he instituted a claim under the Workers' Compensation Act where it showed that the employer terminated plaintiff for misrepresentations about the extent of his disability. *Shaffner v. Westinghouse Electric Corp.*, 213.

Plaintiff's action for retaliatory discharge for filing a workers' compensation claim was barred by the one-year statute of limitations where plaintiff admitted that he knew more than a year before he filed the action that defendant no longer planned to employ him. *Morgan v. Musselwhite*, 390.

Plaintiff's forecast of evidence was insufficient to support his claim that his discharge was in retaliation for his filing of a workers' compensation claim. *Ibid.*

§ 11.1 (NCI3d). Competition with former employer; covenants not to compete

A covenant in defendant's employment contract which prohibited him from practicing medicine in Mecklenburg County for two years after his employment with plaintiff ended was unenforceable as against public policy where defendant was the only full-time pediatric endocrinologist in Mecklenburg County. *Nalle Clinic Co. v. Parker*, 341.

§ 36 (NCI3d). Federal Employers' Liability Act generally

The Industrial Commission did not have subject matter jurisdiction under the Tort Claims Act of a claim instituted by an injured railroad worker employed by the State Ports Authority since the Federal Employers' Liability Act preempts State laws covering injuries to railway employees engaged in interstate commerce. *Laughinghouse v. State ex rel. Ports Railway Comm.*, 375.

§ 55.1 (NCI3d). Necessity for, and what constitutes, "accident"

The Industrial Commission should have addressed a conflict between the opinions of two hearing officers as to whether plaintiff sustained a second compensable injury by accident or whether his new injury was related to a change of condition of his prior injury by accident. *Ivey v. Fasco Industries*, 371.

§ 68.2 (NCI3d). Evidence of existence of asbestosis and silicosis

The Industrial Commission erred in utilizing the "last injuriously exposed" standard rather than the applicable thirty-day presumption of G.S. 97-57 in a claim for asbestosis. *Barber v. Babcock & Wilcox Construction Co.*, 564.

§ 75 (NCI3d). Medical and hospital expenses

The requirement of Industrial Commission approval pursuant to G.S. 97-90(a) does not apply to the costs of rehabilitation services provided under G.S. 97-25. *Roberts v. ABR Associates, Inc.*, 135.

§ 86 (NCI3d). Employment in this and other states as affecting jurisdiction

The "last act" test will be applied to determine whether a contract of employment was made in North Carolina within the meaning of the provision of G.S. 97-36 giving the Industrial Commission jurisdiction over a workers' compensation claim arising from an out-of-state accident when the contract of employment was made in North Carolina, and the Commission thus did not have jurisdiction over a claim for an injury sustained by an employee in Florida where the final act necessary to make a binding contract of employment occurred in Indiana. *Thomas v. Overland Express, Inc.*, 90.

A minimum contacts test will not be used to determine the applicability of the provision of G.S. 97-36 giving the Industrial Commission jurisdiction over a workers' compensation claim arising from an accident in another state if the employer's principal place of business is in North Carolina, and the Commission did not have jurisdiction over plaintiff's claim for an injury sustained in Florida where the evidence showed that, although defendant employer conducted substantial business in North Carolina, its principal place of business was in Indiana. *Ibid.*

§ 89.4 (NCI3d). Distribution of recovery of damages at common law

The Industrial Commission made insufficient findings to support its conclusion that an expense incurred by defendant insurance carrier for a rehabilitation specialist constituted a lien pursuant to G.S. 97-10.2 on third-party settlement funds collected by plaintiff where the Commission made no findings as to whether the services were reasonably required either to effect a cure, give relief, or lessen the period of disability. *Roberts v. ABR Associates, Inc.*, 135.

Defendant carrier did not need the Commission's approval for expenses incurred for rehabilitation services provided to plaintiff in order to obtain reimbursement for those services from settlement funds collected by plaintiff. *Ibid.*

§ 93.1 (NCI3d). Burden of proof and presumptions

The Industrial Commission in a workers' compensation claim did not act under a misapprehension of law in placing the burden of proving wage-earning capacity upon defendant under these facts. *Kennedy v. Duke Univ. Med. Center*, 24.

§ 94 (NCI3d). Findings of Commission; necessity for specific findings of fact

There was ample competent evidence upon which the Industrial Commission could properly rely in support of its findings that plaintiff did not have the capacity to earn wages from the date of the accident through the date of the hearing. *Kennedy v. Duke Univ. Med. Center*, 24.

The Industrial Commission's findings of fact in a workers' compensation claim were sufficiently definite to determine the rights of the parties even though the Commission failed to make necessary findings regarding the extent and permanency of plaintiff's disability. *Ibid.*

§ 94.1 (NCI3d). Sufficiency of findings of fact; specific instances where findings are incomplete

The Industrial Commission's findings in a workers' compensation claim were sufficient to support the conclusion that plaintiff was entitled to temporary total

NARCOTICS

NEGLIGENCE

NEGLIGENCE — Continued

§ 35.2 (NCI3d). Cases where contributory negligence is not shown as a matter of law

Summary judgment should not have been granted for defendant on the basis of contributory negligence in an action arising from the explosion of a flash tank in a continuous digester system in a paper mill. *Federal Paper Board Co. v. Kamyr, Inc.*, 329.

PARENT AND CHILD

§ 6.3 (NCI3d). Proceedings to determine custody; evidence; effect of custody decree

The trial court in a custody proceeding could properly consider matters in respondent's file without either party having introduced the file. *In re Isenhour*, 550.

The trial court did not abuse its discretion in continuing physical custody in the father given the violent and uncooperative history of respondent mother, the relative recency of respondent's compliance with the court's orders, and the children's stated desires to remain with their father. *Ibid.*

PARTIES

§ 5 (NCI3d). Representation by members of a class

The trial court did not err by not imposing a schedule or plan of discovery in a class action arising from the financing of mobile home sales. *Gibbons v. CIT Group/Sales Financing*, 502.

The trial court did not err in a class action arising from the financing of mobile home sales by allowing pre-certification communication with class members. *Ibid.*

PARTNERSHIP

§ 1.1 (NCI3d). Formation and existence of partnership; tests or indicia of partnership

No partnership existed between owners of taxis displaying a "Safety Taxi" sign and telephone number, and the negligence of one owner was thus not imputed to other owners under general agency or partnership law, where "Safety Taxi" was merely a taxicab telephone dispatch service to which each defendant contributed a small monthly fee in order to receive dispatch services. *Wilder v. Hobson*, 199.

§ 5 (NCI3d). Liabilities of partners for torts committed by one partner

The trial court properly directed verdict against defendant law partnership on the issue of apparent authority of a lawyer in the firm to certify title to property in which he had an interest. *Investors Title Ins. Co. v. Herzig*, 127.

§ 8 (NCI3d). Death of a partner

A partnership between plaintiff's father and defendant dissolved upon the former's death and an item of the father's will constituted a settlement and disposition of his partnership interest within the meaning of G.S. 59-84. *Cole v. Graves*, 396.

PENSIONS

§ 1 (NCI3d). Generally

The Retirement Equity Act requires that an employee pension plan administrator make the initial determination as to whether a domestic relations order issued by the district court meets the requirements of a "qualified domestic relations order" so as to permit garnishment of an employee's benefits to enforce an alimony obligation. *Sippe v. Sippe*, 194.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 11 (NCI3d). Malpractice generally; duty and liability of physician

The forecast of evidence of a physician who provided "on call" supervision of residents training in obstetrics at a teaching hospital was sufficient to show that no physician-patient relationship existed between the physician and a child who sustained injuries during birth at the hospital. However, the physician's forecast of evidence was insufficient to show that he did not owe a duty of care to the child in the absence of a consensual physician-patient relationship. *Mozingo v. Pitt County Memorial Hospital*, 578.

§ 12.2 (NCI3d). Liability of pharmacist

The trial court erred by granting defendants' motion for a directed verdict in an action against a pharmacist and a pharmacy arising from a fatal anaphylactic reaction where the pharmacist's duty owed to decedent depended on what was said during the conversation that occurred while she filled the prescription, the only testimony of that conversation was from defendant herself, and witness credibility is a determination made by a jury. *Ferguson v. Williams*, 265.

A directed verdict for defendants on the basis of decedent's contributory negligence was improper in an action against a pharmacist and pharmacy arising from a fatal anaphylactic reaction. *Ibid.*

A directed verdict for defendants on the grounds of causation in an action against a pharmacy and pharmacist arising from a fatal anaphylactic reaction was inappropriate. *Ibid.*

§ 16.1 (NCI3d). Sufficiency of evidence generally

The trial court in a medical malpractice case properly entered summary judgment for the defendant who performed the autopsy on plaintiff's decedent where plaintiff's claims against him focused solely on the existence of a conspiracy and plaintiff's forecast of evidence was insufficient to support that theory. *Henderson v. LeBauer*, 255.

§ 17 (NCI3d). Sufficiency of evidence of departing from approved methods or standard of care

The trial court erred in entering summary judgment for defendants on plaintiff's claims for punitive damages arising from defendants' allegedly gross negligence in their medical treatment of plaintiff's husband. *Henderson v. LeBauer*, 255.

The forecast of evidence of a physician who provided "on call" supervision of residents training in obstetrics at a teaching hospital failed to demonstrate the applicable standard of care owed to a child born in the hospital and failed to demonstrate that the physician did not breach that standard. *Mozingo v. Pitt County Memorial Hospital*, 578.

PLEADINGS

§ 1 (NCI3d). Generally; extension of time to plead

The trial court did not err by refusing to dismiss an action to obtain stock and real property allegedly held in trust where plaintiffs inadvertently took a voluntary dismissal with prejudice. *Chaplain v. Chaplain*, 557.

PRINCIPAL AND SURETY

§ 1.1 (NCI3d). Liability of surety generally

The trial court did not err by granting summary judgment against Lawyers Surety Corporation, the surety for defendant Camel City Motors, in an action in which plaintiff claimed that defendants had promised to assume the payments on her trade-in vehicle and failed to do so, because Lawyers Surety did not appeal from the judgment against the principal and the limit of liability in the statute was not exceeded. *Tomlinson v. Camel City Motors*, 419.

PRIVACY

§ 1 (NCI3d). Generally

Even if North Carolina recognized an invasion of privacy claim based on an unreasonable intrusion upon the seclusion of another, a search of plaintiff and her children with a scanner by defendant's employee after a store alarm repeatedly sounded when plaintiff attempted to leave the store did not constitute an invasion of privacy. *Smith v. Jack Eckerd Corp.*, 566.

RAPE AND ALLIED OFFENSES

§ 1 (NCI3d). Nature and elements of offense

The trial court did not err by denying defendant's motion to dismiss a first degree sexual offense based on analingus. *S. v. White*, 593.

§ 3 (NCI3d). Indictment

Defendant was not deprived of an opportunity to present a defense by an allegation in the indictment that an alleged rape of his stepdaughter occurred in June or July of 1986 and the three-year time lapse between the date of the alleged offense and the date of trial. *S. v. Norris*, 144.

A variance of one to two years between the time stated in the indictment and the time established by the victim's testimony was not fatal. *Ibid.*

§ 4 (NCI3d). Relevancy and competency of evidence

The trial court did not err in admitting testimony by the victim's mother that the victim was defendant's favorite of the children and that he purchased fancy lace underwear for the child. *S. v. Norris*, 144.

§ 4.1 (NCI3d). Improper acts, solicitations, and threats; proof of other acts and crimes

The trial court properly admitted the evidence of defendant's prior sex offenses in a prosecution for first degree rape and first degree sexual offense to show plan, scheme, system, or design. *S. v. Davis*, 12.

The trial court did not err in a prosecution for rape, first degree sexual offense, and robbery with a dangerous weapon by admitting evidence of a prior rape of another victim as evidence of identity. *S. v. White*, 593.

RAPE AND ALLIED OFFENSES — Continued

§ 4.2 (NCI3d). Articles of clothing; physical condition of prosecutrix

Testimony by a physician who examined the alleged rape victim two years after the offense was properly admitted to corroborate the victim's testimony that she was sexually abused over a long period of time. *S. v. Norris*, 144.

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The trial court did not err by accepting guilty verdicts in a first degree rape and first degree sexual offense prosecution where the verdict did not reflect the theory upon which defendant's convictions were based but there was sufficient evidence to support a conviction based upon serious injury. *S. v. Davis*, 12.

§ 6 (NCI3d). Instructions

The trial court was not required to instruct the jury about allegations in an earlier first degree sexual offense case in which defendant was acquitted and the relationship between the earlier acquittal and the current rape charge against defendant. *S. v. Norris*, 144.

The trial court did not err in a prosecution for rape and first degree sexual offense by instructing the jury that "a weapon has been employed within the meaning of the law when defendant has it in his possession at the time of the crime." *S. v. White*, 593.

§ 7 (NCI3d). Verdict; sentence and punishment

Mandatory life sentences for first degree rape and first degree sexual offense do not constitute cruel and unusual punishment. *S. v. Davis*, 12.

ROBBERY

§ 5.2 (NCI3d). Instructions relating to armed robbery

The trial court properly instructed on the mandatory presumption that a victim's life is endangered or threatened when there is evidence that defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon, and the mandatory presumption does not violate due process. *S. v. Blair*, 653.

The trial judge's reference to the effect of the mandatory presumption as giving rise to an affirmative defense unconstitutionally shifted the burden of proof to defendant. *Ibid.*

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court in a medical malpractice case did not abuse its discretion in striking a doctor's deposition as a Rule 11(a) sanction, and the fact that defendant's counsel and not defendant itself committed the acts giving rise to the sanction was not a bar to its imposition. *Turner v. Duke University*, 276.

The trial court in a medical malpractice case did not err in ordering a new trial as a Rule 11(a) sanction because improperly noticed deposition testimony was prejudicial to plaintiff. *Ibid.*

Plaintiff's objection at trial to the use of an improperly noticed deposition was not essential to the imposition of sanctions. *Ibid.*

While failure to dismiss a case when irrefutable evidence has come to an attorney's attention that the case is meritless may require Rule 11(a) sanctions,

RULES OF CIVIL PROCEDURE — Continued

§ 58 (NCI3d). Entry of judgment

Defendant's appeal was dismissed for lack of jurisdiction and the judgment was unenforceable because entry of judgment did not occur. *Chaplain v. Chaplain*, 557.

§ 60 (NCI3d). Relief from judgment or order

A judgment may not be amended pursuant to a motion under Rule 60(b)(6) for relief from the judgment. *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 433.

§ 60.2 (NCI3d). Grounds for relief from judgment

The trial court properly denied defendant's Rule 60(b) motion for relief from a default judgment where defendant took no measures to defend himself even though his attorney informed defendant verbally and in writing that he no longer represented defendant. *Gallbronner v. Mason*, 362.

SCHOOLS

§ 11.1 (NCI3d). Liability for negligence in operation of school buses

Plaintiff's evidence was insufficient to show that a school bus driver was negligent where it tended to show that an acquaintance of the driver ran onto the bus, began shoving the driver, and bumped against the emergency brake, causing it to release and the bus to roll forward and pin plaintiff between that bus and another one. *McEachin v. Wake County Bd. of Education*, 399.

SEARCHES AND SEIZURES

§ 24 (NCI3d). Cases where evidence is sufficient to show probable cause; information from informers

An officer's affidavit based on information from a confidential informant who had not previously furnished information to the police was sufficient to provide probable cause for a warrant to search defendant's business premises for cocaine seen there by the informant. *S. v. Moose*, 59.

§ 41 (NCI3d). Conduct of officers; knock and announce requirements

Officers executing a search warrant sufficiently gave notice of their identity and purpose where they wore jackets which identified them as police officers, they entered defendant's business yelling that they were police officers with a search warrant, and an officer entered defendant's office and told defendant, "Hang up, we have a search warrant." *S. v. Moose*, 59.

§ 42 (NCI3d). Exhibiting or delivering warrant

An officer sufficiently complied with the statutory requirement that a search warrant be read to the person in control of the premises to be searched prior to its execution where the officer told defendant to hang up the telephone and that he had a search warrant; defendant stated, "You don't need that," and told the officer where cocaine could be found; and the officer followed defendant's direction to locate a metal box, read the warrant to defendant, and then opened the box and discovered cocaine therein. *S. v. Moose*, 59.

SEARCHES AND SEIZURES — *Continued*

§ 43 (NCI3d). Motions to suppress evidence

Defendant was not prejudiced when the trial judge announced in a newspaper interview that he would deny defendant's motion to suppress a few weeks prior to entering a formal ruling in court. *S. v. Moose*, 59.

§ 45 (NCI3d). Necessity for hearing on motion to suppress; particular cases

Defendant was not entitled to a hearing under G.S. 15A-975(c) on his renewed motion at trial to suppress the fruits of a search after a pretrial motion had been denied where defendant did not allege the discovery of new facts but alleged that cases decided by the Court of Appeals had changed the requirements of an affidavit for a search warrant. *S. v. Moose*, 59.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1 (NCI3d). Generally

The trial court erred by refusing to combine overpayments to reach the felony threshold in an action for food stamp fraud. *S. v. Williams*, 412.

The trial court erred in an action for Medicaid benefits by reversing the hearing officer's affirmation of the Department of Social Services' denial of petitioner's application for benefits because her countable reserve funds were over the applicable statutory limit, despite her contention that a portion of this was a burial fund accepted by the Social Security Administration. *McKoy v. N.C. Dept. of Human Resources*, 356.

STATE

§ 7.1 (NCI3d). Affidavit and filing of claim under Tort Claims Act

A claim under the Tort Claims Act was properly dismissed where plaintiff alleged negligence by employees of the Ports Authority Railway Commission but the Industrial Commission found that the negligent employees were employees of the State Ports Authority. *Laughinghouse v. State ex rel. Ports Railway Comm.*, 375.

§ 8.4 (NCI3d). Negligence of State employee; particular actions; school buses

Plaintiff's evidence was insufficient to show that a school bus driver was negligent where it tended to show that an acquaintance of the driver ran onto the bus, began shoving the driver, and bumped against the emergency brake, causing it to release and the bus to roll forward and pin plaintiff between that bus and another one. *McEachin v. Wake County Bd. of Education*, 399.

§ 12 (NCI3d). State Personnel Commission authority and actions

The trial court erred by reversing the State Personnel Commission in an action alleging political discrimination in the hiring of a State employee. *Jarrett v. N.C. Dept. of Cultural Resources*, 475.

STATUTES

§ 5.1 (NCI3d). Legislative intent as controlling factor

An affidavit of a legislator was not admissible to show the intent of the legislature in passing a statute. *Bell Arthur Water Corp. v. N.C. Dept. of Transportation*, 305.

TAXATION

§ 29 (NCI3d). Corporate income tax generally; deduction of expenses and contributions

The taxpayer has the right to elect the inventory method used in the computation of the inventory tax credit. *In re Proposed Assessment of Additional Tax*, 382.

TRESPASS

§ 2 (NCI3d). Trespass to the person

Plaintiff's forecast of evidence was sufficient to support her claim for intentional infliction of emotional distress by a store security officer who accused her of stealing merchandise from the store. *Rogers v. T.J.X. Companies*, 99.

TRIAL

§ 42 (NCI3d). Form and sufficiency of verdict

Where plaintiff had two claims against defendant which were based upon different circumstances and legal theories, the jury's treatment of the claims separately, rather than together as the court directed if they found that plaintiff substantially performed the contract, did not establish that their verdict was unfair or invalid or that the jury was confused, and the court's refusal to set aside the verdict, if error, was harmless. *Johnson & Laughlin, Inc. v. Hostetler*, 543.

§ 53 (NCI3d). New trial for error of law during the trial

The trial court properly reconsidered its oral decision and possessed jurisdiction to deny defendant's motion for summary judgment where plaintiff's attorney showed the trial court a recent appellate opinion after summary judgment had been granted and the court scheduled a new hearing on its own motion. *Pate v. Eastern Insulation Service of New Bern*, 415.

TRUSTS

§ 19 (NCI3d). Sufficiency of evidence in actions to establish resulting and constructive trusts

Plaintiff's evidence that, after she and her husband moved into a home titled in the names of the husband's parents, they made monthly payments in the amount of the mortgage payments to the husband's father and paid taxes, insurance, and maintenance expenses for the property was insufficient to establish a resulting trust. *Anderson v. Anderson*, 682.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

The trial court properly granted summary judgment for plaintiff on a guarantor's claim for an unfair and deceptive trade practice arising from the signing of a guaranty. *Spartan Leasing v. Pollard*, 450.

Evidence of defendant's deceit in promising to buy all its requirements for specially designed footrest pads from plaintiff and then secretly giving its business to another supplier was sufficient to support the trial court's conclusion that defendant committed an unfair trade practice. *Custom Molders, Inc. v. Roper Corp.*, 606.

UNIFORM COMMERCIAL CODE

§ 8 (NCI3d). Sales; statute of frauds

A contract for the sale of goods could be made in any manner sufficient to show agreement, including conduct which indicated the existence of such a contract. *Custom Molders, Inc. v. Roper Corp.*, 606.

§ 46 (NCI3d). Public sale of collateral; requirement of commercial reasonableness

Summary judgment was properly granted for plaintiff on the issue of commercially reasonable sale in an action for deficiency judgment on purchase notes for a Rolls Royce and a Bentley. *Triad Bank v. Elliott*, 188.

VENDOR AND PURCHASER

§ 5.1 (NCI3d). Matters precluding specific performance

The evidence in an action for specific performance of a contract to convey real property was insufficient to support relief for defendants based on mutual mistake where a condition placed in the contract by defendants made their conveyance contingent upon written notice from the Town of Knightdale that the relocation of Highway 64 would not go through property on which their home was located, and the Department of Transportation rather than the Town of Knightdale had the authority to determine the final location of Highway 64. *Wake Stone Corp. v. Hargrove*, 490.

WATERS AND WATERCOURSES

§ 3.2 (NCI3d). Water pollution

The superior court had no jurisdiction to review civil penalties assessed by the Environmental Management Commission for violations of interim effluent pollution limits set forth in a consent judgment and NPDES permit because defendants failed to exhaust their administrative remedies under G.S. Ch. 150B. *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 433.

WILLS

§ 36.1 (NCI3d). Defeasible fees, possibilities of reverter, executory interests

Where the will of a testator who died in 1951 devised a life estate to his wife with the remainder to his daughter "and the heirs of her body" and further provided that "in the event of the death of my said daughter without bodily heirs, then and in that event I give and devise said properties to my heirs-at-law" in fee simple, the will vested a life estate in the wife with an estate tail in remainder to the daughter which was converted by G.S. 41-1 into a fee simple defeasible upon her death without bodily heirs. *Russell v. Russell*, 284.

§ 43 (NCI3d). "Heirs" and "children"

The wife of a testator who died in 1951 was not an "heir-at-law" under his will. *Russell v. Russell*, 284.

§ 48 (NCI3d). Whether adopted children take as members of class

Where testator's will devised a remainder to his daughter "and the heirs of her body" and further provided that "in the event of the death of my said daughter without bodily heirs, then and in that event I give and devise said properties to my heirs-at-law," any child adopted by the daughter could inherit as a bodily heir. *Russell v. Russell*, 284.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina