NORTH CAROLINA COURT OF APPEALS REPORTS

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OF

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1. Appointed 1 August 1991 to replace H. Horton Rountree who retired 31 May 1991.
2. Appointed Chief Judge 1 August 1991 to replace Gilbert H. Burnett who retired 31 July 1991.
3. Appointed Chief Judge 25 April 1991 to replace Robert E. Williford who retired 31 March 1991.
4. Appointed 10 May 1991 to replace Alfred W. Kwasikpui who became Chief Judge.
5. Appointed 7 July 1991 to replace Floyd B. McKissick, Sr. who died 28 April 1991.
6. Appointed Chief Judge 1 September 1991 to replace George F. Bason who retired 31 August 1991.
7. Appointed Chief Judge 1 September 1991 to replace Abner Alexander who retired 31 August 1991.
8. Resigned 31 March 1991.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JAMES M. BRYSON, II, AND LOIS I. BRYSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JAMES P. BRYSON, DECEASED v. RACHEL B. SULLIVAN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MILLIE P. BRYSON, DECEASED

No. 9019SC739

(Filed 5 March 1991)

1. **Rules of Civil Procedure § 11 (NCI3d)— sanctions—attorney fees—voluntary dismissal with prejudice**

The trial court was not deprived of jurisdiction to determine the appropriateness of attorney fees under N.C.G.S. § 1A-1, Rule 11 or N.C.G.S. § 6-21.5 because the plaintiffs filed a voluntary dismissal with prejudice. Attorney fee requests under Rule 11 and N.C.G.S. § 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal does not deprive the court of jurisdiction to determine those collateral issues. N.C.G.S. § 1A-1, Rule 41(a)(1).

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 39.

2. **Rules of Civil Procedure § 11 (NCI3d)— sanctions—general principles**

The discretionary decision of whom to sanction generally depends upon the type of sanctionable conduct which has oc-

curred, namely law, fact, or improper purpose. In the absence of proof that a reasonable person in the client's position would have been aware of Rule 11 legal deficiencies, the attorney should bear the sole responsibility for submitting a pleading or motion not warranted by law in violation of Rule 11. When a client provides material facts to his lawyer that he should have known were false or incomplete, and these facts are used as a basis for the filing of a pleading, motion, or other paper, the client is subject to sanctions. Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer. Whether the pleading was filed for an improper purpose must be reviewed under an objective standard and, when a complaint satisfies the law and fact prongs of a Rule 11 analysis, the complaint cannot be deemed to have been interposed for an improper purpose.

Am Jur 2d, Damages § 616.

3. **Rules of Civil Procedure § 11 (NCI3d)— sanctions against attorney—never requested**

Defendants were not entitled to sanctions against plaintiffs' attorney where the defendants never requested that the trial court impose sanctions on the plaintiffs' attorney nor did the trial court upon its own initiative seek sanctions against the plaintiffs' attorney.

Am Jur 2d, Damages § 616.

4. **Rules of Civil Procedure § 11 (NCI3d)— sanctions against client—legal bars to claims**

The denial of sanctions against plaintiffs (the clients) based upon knowledge of legal bars to the claims asserted was remanded for determination of whether plaintiffs undertook a reasonable inquiry into the law and, based upon the results of the inquiry, whether plaintiffs reasonably believed that their complaint was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Reliance on counsel by non-lawyers as to issues of law is relevant, but not conclusive evidence on the issue of reasonable inquiry.

Am Jur 2d, Damages § 616.

5. Rules of Civil Procedure § 11 (NCI3d)— sanctions—against client—improper purpose

A trial court order denying Rule 11 sanctions against the client for filing a pleading for an improper purpose was vacated and remanded where the trial court apparently determined that reliance on counsel precluded an order of sanctions based upon improper purpose. While reliance on counsel is relevant to the issue of purpose, it is not dispositive.

Am Jur 2d, Damages § 616.

6. Costs § 36 (NCI4th)— nonjusticiable case—attorney fees

The imposition of attorney fees under N.C.G.S. § 6-21.5 was remanded for determination of whether plaintiffs should reasonably have been aware that their complaint contained no justiciable issue of law where it was determined that the complaint, when read in conjunction with the answer, does not facially present any justiciable issue of law. The fact that plaintiffs acted in good faith and upon advice of counsel is insufficient.

Am Jur 2d, Damages § 616.

APPEAL by defendants from order filed 24 May 1990 in RANDOLPH County Superior Court by *Judge W. Steven Allen.* Heard in the Court of Appeals 16 January 1991.

Moser, Ogburn, Heafner, Schmidly & Wells, by John N. Ogburn, Jr., and Stephen S. Schmidly, for plaintiff-appellees.

Wyatt Early Harris Wheeler & Hauser, by William E. Wheeler, for defendant-appellants.

GREENE, Judge.

In this civil action, defendants appeal the denial of their request for attorney fees which they sought under both N.C.G.S. § 1A-1, Rule 11 (Rule 11) and N.C.G.S. § 6-21.5 (1986).

The evidence before the trial court revealed these relevant facts: Defendant Rachel B. Sullivan (Rachel) is the daughter of Millie P. Bryson (Millie). Plaintiff James M. Bryson, II (Marc) is the grandson of Millie and the son of James P. Bryson (James) and Lois I. Bryson (Lois). James died in December 1986 and Lois was appointed administratrix of his estate. Millie suffered a stroke

in August 1983 and from September 1983 to February 1987 she lived with and was cared for by James (until his death), Lois and Marc. From February 1987 to May 1989 Millie was cared for by Rachel.

On 26 June 1987, Millie filed a claim against Marc, Lois, individually and as administratrix of the estate of James, and others alleging that they had misappropriated and converted her property. Millie was declared incompetent on 16 December 1987, and Rachel was appointed her general guardian. This claim filed by Millie was eventually settled on 24 April 1989 with the execution of a consent decree. The parties executing the consent decree were Rachel, as guardian for Millie, Lois, individually and as administratrix of the estate of James, and Marc. McNeill Smith was the attorney for Marc and Lois in her individual capacity and in her capacity as administratrix of the estate of James.

The consent decree provided in pertinent part:

> Any and all other claims, actions or causes of action which any of the parties might have had or might have against any of the other parties have been fully compromised, adjusted and settled; no party has admitted or been adjudged of any wrongdoing or fault on account of any matters alleged or which might have been alleged in the Complaint or Answer; and neither the plaintiff, her guardian or successor guardian, her representative or estate, nor any of the defendants, his or her representatives, successors or assigns, individually or in any capacity, shall recover anything further of any other party on account of anything occurring before the date of this judgment.

Millie died intestate on 10 May 1989 and Rachel was appointed administratrix of her estate. On 2 June 1989 Rachel sought and received from the Clerk of Superior Court of Randolph County an order allowing $14,400.00 as reimbursement to her for "room, board and transportation" provided by Rachel to Millie from December 1987 through May 1989. On 5 October 1989, Lois, as administratrix of the estate of James, and Marc petitioned the Clerk of Superior Court of Randolph County to set aside the award to Rachel. The clerk denied the petition. On 22 November 1989, Marc and Lois, in her individual capacity and in her capacity as administratrix of the estate of James, filed a claim against Millie's estate for services rendered to Millie from September 1983 through

February 1987. Rachel in her capacity as administratrix of the estate for Millie denied this claim.

Some short time before 22 February 1990, McNeill Smith advised Lois that "there was [sic] elements in . . . [the 24 April 1989 consent order] which [had been] breached on the other side. One of the principal ones being the . . . [petition filed by Rachel seeking reimbursement for room, board and transportation provided for Millie]. . . ." McNeill Smith further advised Lois that "if you're going to do anything, though . . . you've got to file it within the three months because the statute is very clear that the Superior Court is the place to consider the validity of the claim and you've got some guidance, take it and you ought to do it and you ought not to let the 3 months go by. But I might very well be a witness." McNeill Smith called Jack Ogburn, an attorney in Randolph County, who agreed to file this complaint and did so on 22 February 1990. The complaint sought to recover: (1) For services allegedly rendered to Millie; (2) for alleged self-dealing on the part of Rachel; and (3) breach of fiduciary duty on the part of Rachel. The lawsuit was filed by Marc and Lois in her individual capacity and in her capacity as administratrix of the estate of James.

On 12 March 1990, Rachel in her individual capacity and in her capacity as administratrix of the estate of Millie filed an answer and among other things pled the statute of limitations, the release contained in the 24 April 1989 consent decree, and *res judicata.* Rachel's answer also included a motion for "sanctions pursuant to Rule 11." Specifically, Rachel alleged:

> Plaintiffs' complaint was signed and verified in violation of Rule 11 . . . in that it was knowingly filed and served in the face of obvious defenses in bar of plaintiffs' claims of which plaintiffs and their counsel had prior actual notice and which notice was a matter of public record. . . .
>
> Plaintiffs' complaint . . . was interposed for no other purpose than to harass defendant, cause unnecessary delay in the administration of the estate of Millie P. Bryson . . . and [has] needlessly increased the cost of the administration of the estate of Millie P. Bryson, deceased, resulting in loss to the estate and its beneficiaries.

> Defendant is entitled to have the Court impose sanctions upon plaintiffs for violation of Rule 11 . . . by way of expenses incurred in defending this action and matters related thereto.

Rachel further requested in her answer an award for reasonable attorney fees pursuant to N.C.G.S. § 6-21.5. Specifically, she alleged:

> Plaintiffs' complaint completely fails to raise any justiciable issue of law or fact. As a result defendant is entitled to an award of reasonable attorney fees assessed against plaintiffs pursuant to N.C. Gen. Stat. § 6-21.5.

On 30 April 1990, the plaintiffs voluntarily dismissed their "action pursuant to Rule 41(a) of the Rules of Civil Procedure with prejudice." On 10 May 1990, the defendants' motion for sanctions and for attorney fees came on for hearing. At that hearing the attorney for the defendants stated in open court:

> I want that clear. We are not asking of Mr. Ogburn's firm to be assessed with any legal fees. The Plaintiffs have had three lawyers that I know of and so perhaps Mr. Ogburn's firm could have by more diligence found out more things about this before they got into it, but that occurs sometimes. But the Plaintiff[s] certainly knew what the situation was. So we asked that the Plaintiff[s] be taxed because they have failed to comply with the standard of objective reasonableness as to whether or not there was a valid claim, and likewise, with G.S. 6-21.5 as to whether or not there are . . . [justiciable issues of law or fact]. . . .

In denying the defendants' request for sanctions and attorney fees, the trial court entered thirty-eight separate findings of fact, only two of which the defendants contend are not supported by the evidence. They include:

> 36. At the hearing, Defendant's counsel admitted that the Defendants sought sanctions upon and attorneys fees from the Brysons and not their attorneys.
>
> . . . .
>
> 38. The Brysons filed this lawsuit in good faith and after diligent inquiry of counsel.

The trial court entered the following pertinent conclusions of law:

1. Plaintiffs voluntary dismissal of their action does not relieve this Court of its duty to consider the Rule 11 and attorneys fees Motions on the merits.

. . . .

14. Plaintiffs have at all times relied on the advice of competent counsel in pursuing their claims and their causes have been well grounded in fact and law.

The defendants now contend that they are entitled to attorney fees against either plaintiffs or their attorney under both Rule 11 and N.C.G.S. § 6-21.5.

The issues presented are (I) whether under Rule 11 the defendants (A) were entitled to attorney fees from plaintiffs' attorney, and (B) were entitled to attorney fees from plaintiffs; and (II) whether under N.C.G.S. § 6-21.5 the defendants (A) were entitled to attorney fees from plaintiffs' attorney, and (B) were entitled to attorney fees from plaintiffs.

[1] We first address the question of whether the trial court was deprived of jurisdiction to determine the appropriateness of attorney fees under Rule 11 or N.C.G.S. § 6-21.5 because the plaintiffs filed a voluntary dismissal with prejudice pursuant to Rule 41(a)(1). The trial court concluded that it was not deprived of such jurisdiction and we agree.

As a general rule, "where plaintiff takes a voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1), no suit is pending thereafter on which the court could make a final order." *Ward v. Taylor*, 68 N.C. App. 74, 78, 314 S.E.2d 814, 818, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984). However, the trial court retains authority to apportion and tax court costs. *Id.* at 79, 314 S.E.2d at 819. Attorney fees under Rule 11 and N.C.G.S. § 6-21.5 are not taxed as part of the costs of court. *See* Rule 11; N.C.G.S. § 6-21.5; *compare* N.C.G.S. § 6-21.1 (1986) (attorney fees included as part of costs) *and* N.C.G.S. § 75-16.1 (1988) (attorney fees taxed as part of court costs). Nonetheless, attorney fee requests under Rule 11 and N.C.G.S. § 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ---, ---, 110 L.Ed.2d

359, 376 (1990) (Rule 11 sanction is collateral issue and may be addressed "after the principal suit has been terminated"). To hold otherwise would allow a litigant or attorney to "purge his violation of Rule 11 [or N.C.G.S. § 6-21.5] merely by taking a dismissal, . . . [and thereby lose] all incentive to 'stop, think and investigate more carefully before serving and filing papers.' " *Id.* at ---, 110 L.Ed.2d at 377 (citation omitted).

I

RULE 11

[2] "Rule 11 raises three interconnected interpretive issues for the court: (1) *When* has sanctionable conduct occurred? (2) *Who* should be sanctioned—attorney, client, or both? (3) *What* sanction is appropriate?" Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901, 905 (1988) (emphases in text). This appeal raises only issues related to when and whom to sanction.

WHEN

The central feature of Rule 11 is a certification established by the signature of the person signing the pleadings, motions, or other papers. This certification includes:

> (1) that the signer has conducted a reasonable inquiry into the facts that support the pleading, motion or other paper; (2) that the signer has conducted a reasonable inquiry into the law such that the paper embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing legal principles; and (3) that the paper is not interposed for any improper purpose.

G. Joseph, Sanctions: The Federal Law of Litigation Abuse § 6(C), at 85 (1989). Rule 11 should "not have the effect of chilling creative advocacy," *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir. 1989), and therefore, in determining compliance with Rule 11, "courts should avoid hindsight and resolve all doubts in favor of the signer." *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1469-70 (2d Cir. 1988), *rev'd in part on other grounds*, 493 U.S. 120, 107 L.Ed.2d 438 (1989). Furthermore, whether the certification requirements have been met requires an objective determination. *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (*Turner I*); *see also Hays v.*

Sony Corp. of America, 847 F.2d 412, 418 (7th Cir. 1988) (Rule 11 establishes negligence standard).

WHO

"Sanctions may be imposed on the signer of the offending pleading, motion or other paper; on the signer's client; or both." G. Joseph, *supra*, app. at 627; Rule 11 (sanctions may be entered against "represented party"). "Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability." G. Joseph, *supra*, § 16(E)(1), at 262. However, whether the Rule 11 violation is one of law, fact, or improper purpose, if the prejudice caused by the violation can only be remedied by entry of sanctions against the client, such sanctions are appropriate. *Turner v. Duke Univ.*, 101 N.C. App. 276, 280-81, 399 S.E.2d 402, 405 (1991) (*Turner II*) (client innocent of Rule 11 violations forced to undergo new trial because of misconduct of attorney); *see also* G. Joseph, *supra*, § 16(C)(1), at 235 (listing five purposes for which a court may impose Rule 11 sanctions, including the alleviation of prejudice to an offended person). The discretionary decision of whom to sanction generally depends upon the type of sanctionable conduct which has occurred, namely law, fact, or improper purpose.

Law: In the absence of proof that a reasonable person in the client's position would have been aware of the Rule 11 legal deficiencies, "the attorney should bear sole responsibility for submitting a pleading or motion not warranted by law in violation of Rule 11. Normally a [non-lawyer] client will not be in a position to judge the validity of, or to urge her lawyer to make, unwarranted legal claims." Note, *supra*, at 914; *see* G. Joseph, *supra*, § 16(E)(1), at 262-63; *see also Turner*, 325 N.C. at 164, 381 S.E.2d at 713 (standard under Rule 11 is "one of objective reasonableness"); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 305 (7th Cir. 1988) ("[C]ourts generally impose sanctions entirely on counsel when the attorney has failed to research the law or is responsible for sharp practice. . . . The rationale behind this is that the attorney and not the client should bear the sanction for filing papers which violate Rule 11 by being unsupported by existing law, or as an attempt to modify well-settled law") (citations omitted).

Facts: When a client provides material facts to his lawyer that he should have known were false or incomplete, and these facts are used as a basis for the filing of a pleading, motion, or

other paper, the client is subject to sanctions. *See Turner*, 325 N.C. at 164, 381 S.E.2d at 713 (standard under Rule 11 is "one of objective reasonableness"). However,

> [c]lients should not be sanctioned . . . when the attorney fails to ask the right questions to elicit legally relevant facts. In addition, the attorney should be sanctioned for failure to take minimal steps to confirm the client's facts, when these facts could be verified easily by reference to the public record or to accessible documents.

Note, *supra*, at 915-16; *see* G. Joseph, *supra*, § 16(E)(1), at 263-64. "Where a party misleads an attorney as to facts or the purpose of the lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate." *Calloway*, 854 F.2d at 1475.

Improper purpose: Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer. However, "the sanction may fall in equal or greater proportion upon the client as well" as this "allocation serves punitive and deterrent purposes. . . ." G. Joseph, *supra*, § 16(E)(1), at 264; *see also* Note, *supra*, at 916-17 (sanctions against the client appropriate where improper purpose exists because client "is moving force" and "to impose sanctions on attorneys would not deter the client"); *United States v. Allen L. Wright Dev. Corp.*, 667 F. Supp. 1218, 1221 (N.D. Ill. 1987) (attorney and client sanctioned on ground of improper purpose).

There is some dispute about whether an objective or a subjective standard is to be used in determining improper purpose, and "about the extent, if any, to which the alleged offender's subjective state of mind should be considered" in the inquiry. G. Joseph, *supra*, § 13(A), at 180. This dispute has arisen primarily because the "reasonable inquiry" language of Rule 11, which language gives rise to the objective reasonableness standard under Rule 11, is not specifically a part of Rule 11's "improper purpose" prong. *See* G. Joseph, *supra*, § 12(A), at 172. Nevertheless, "[t]his dispute is largely semantic. When a court is called upon to determine whether a signer has violated the improper purpose clause, the court can do so only by inferring the signer's intent from his or her objective behavior." *Id.* § 13(A), at 181. Accordingly, whether the pleading was filed for an improper purpose must be reviewed under an

objective standard. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713; G. Joseph, *supra*, § 13(A), at 179.

Furthermore, when a complaint satisfies the law and fact prongs of a Rule 11 analysis, the complaint cannot be deemed to have been interposed for an improper purpose. *Jennings v. Joshua Indep. School Dist.*, 877 F.2d 313, 320 (5th Cir. 1989), *cert. denied*, --- U.S. ---, 110 L.Ed.2d 660 (1990); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986); *see also* G. Joseph, *supra*, § 14(A), at 187; *compare Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470, 1476 (9th Cir. 1988) (though "non-frivolous *complaint* can never violate Rule 11, even if it was filed for an improper purpose," a non-frivolous *motion* which is filed for an improper purpose may violate Rule 11) (emphasis in text); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1130 (5th Cir. 1987) ("the filing of successive *motions*, each of which is individually well founded in fact and law, could under various circumstances constitute an improper purpose under Rule 11") (emphasis added); G. Joseph, Sanctions: The Federal Law of Litigation Abuse § 13(C), at 36 (1989 & Supp. 1990).

A

Sanctions Against Attorney

[3] On the issue of whether defendants are entitled to sanctions against plaintiffs' attorney, the trial court specifically found as a fact that at the sanctions hearing the defendants' counsel admitted that the defendants sought sanctions only against the "Brysons and not their attorneys." This finding is supported by competent evidence in the record, and we are bound by the finding. *Hinson v. Jefferson*, 287 N.C. 422, 429, 215 S.E.2d 102, 107 (1975). Furthermore, the written motion for sanctions only requested the court "impose sanctions upon plaintiffs for violations of Rule 11." The defendants never requested the trial court impose sanctions on the plaintiffs' attorney nor did the trial court "upon its own initiative" seek sanctions against the plaintiffs' attorney. *See* Rule 11. Therefore, this Court will not now entertain such sanctions.

B

Sanctions Against Client

[4] Defendants do not claim that plaintiffs provided any false or incomplete facts to their attorneys. Instead, defendants claim that

plaintiffs knew that there existed legal bars to the claims asserted, namely, that "the three-year statute of limitations had run," "that [plaintiffs] had signed a release" which released their claims against these defendants, and that the court "had no jurisdiction over [the] matters" asserted in this lawsuit.

When a motion is made for sanctions pursuant to Rule 11 and "the nature of the alleged violation is legal, rather than factual," Rule 11 requires a two-part analysis. G. Joseph, *supra*, § 17(B)(1), at 63 (Supp. 1990). In such cases,

> [1] the court should first scrutinize the challenged paper. If, on its face, the paper states a plausible legal theory (either under existing law or a good faith argument for a change in the law), there is no need for further inquiry. [2] Only if the court concludes that the paper is not facially plausible in its legal analysis is there a need for further scrutiny into the actual conduct of the signer in researching or otherwise gathering the law.

Id. The movant bears the burden of persuasion on the first prong of the two-part analysis and the burdens of proof and persuasion on the second prong. G. Joseph, *supra*, § 17(B)(1), at 276.

Under the first prong of the required analysis, we determine whether the complaint, when read in conjunction with the answer, states a plausible legal argument either under existing law or a good faith argument for a change in the law. *Cf. Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991) (complaint read with responsive pleadings in determining whether attorney fees should be awarded under N.C.G.S. § 6-21.5). A legal argument is plausible if "it is likely to succeed on the merits or if reasonable persons could differ as to the likelihood of its success on the merits." G. Joseph, *supra*, § 11, at 161.

Here, plaintiffs' complaint, read alone, states a plausible legal argument for recovery. However, defendants' answer pled twenty-four defenses, many of which are affirmative defenses which would create an absolute bar to plaintiffs' claims, such as real party in interest, *res judicata*, compromise and settlement, absence of subject matter jurisdiction, accord and satisfaction, release, statute of limitations, and others. Therefore, the complaint, when read in conjunction with the answer, does not state a legal argument which is "likely to succeed on the merits," nor one as to which

"reasonable persons could differ" regarding the "likelihood of its success on the merits." Accordingly, plaintiffs' complaint does not advance a "facially plausible" legal argument.

Having determined that this complaint, when read in conjunction with the answer, is not facially plausible in its legal basis, we next determine whether "to the best of [plaintiffs'] . . . knowledge, information and belief, after reasonable inquiry . . . [the complaint was] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *See* Rule 11. Therefore, even if plaintiffs sincerely believed in the merits of their claim, sanctions nonetheless may be appropriate.

The plaintiffs argue that their conduct was reasonable as a matter of law because they received and relied on the advice of counsel in filing their complaint. We disagree. Reliance on counsel by non-lawyers as to issues of law, is relevant, but not conclusive evidence on the issue of "reasonable inquiry." *Cf. Bassinov v. Finkle*, 261 N.C. 109, 112, 134 S.E.2d 130, 132 (1964) (advice of counsel in malicious prosecution action is evidence on the "issues of probable cause and malice"). The reasonableness of the reliance would depend upon the surrounding circumstances including the extent of knowledge possessed by the lawyer about the facts of the controversy, the history and duration of the relationship between the attorney and client, and the relative expertise of the attorney relating to the legal issues involved. It is appropriate, however, to consider in evaluating the reasonableness of the inquiry that non-lawyers are not expected to appreciate the nuances of subtle legal issues.

The fact that we have determined the plaintiffs' claims in the face of the answer are not facially plausible does not give rise to a presumption that an insufficient legal inquiry was undertaken by the plaintiffs. Claims that lack "any semblance of plausibility may give rise to the inference that no adequate legal inquiry was undertaken. . . . However, courts should not be too quick to infer inadequate inquiry based on conclusions of implausibility." G. Joseph, *supra*, § 10(A)(4), at 143-44.

Here the trial court found as a fact that the plaintiffs acted in good faith and upon the advice of counsel. These findings are insufficient, and this issue must be remanded for determination of whether (1) the plaintiffs undertook a reasonable inquiry into the law, and (2) based upon the results of the inquiry, they reasonably believed that their complaint was "warranted by existing law or

a good faith argument for the extension, modification, or reversal of existing law." *See* Rule 11.

[5] The defendants also argue that plaintiffs are subject to sanctions because the pleadings were filed for an improper purpose, namely "to harass defendant, cause unnecessary delay in the administration of the estate of Millie P. Bryson . . . and . . . [increase] needlessly . . . the cost of the administration of the estate of Millie P. Bryson. . . . " Here the trial court entered no specific conclusions of law on improper purpose, concluding only that "plaintiffs at all times relied on advice of counsel." The trial court apparently determined that reliance on counsel precluded an order of sanctions based upon improper purpose. This was an incorrect assumption. While reliance on counsel is relevant on the issue of purpose, it is not dispositive. Therefore, as this conclusion is inadequate to support the order that defendants were not entitled to sanctions for improper purpose, we vacate the trial court's order. Because the defendants do not claim a "fact" basis for Rule 11 sanctions, if on remand the trial court determines that plaintiffs made a reasonable inquiry into the law and based upon the inquiry reasonably believed that the complaint was legally sufficient, the filing of this complaint cannot be for an improper purpose. If on remand the trial court concludes otherwise, the trial court should then address the issue of whether the complaint was filed for an improper purpose, such purpose to be ascertained from the plaintiffs' objective behavior. The burden of proof for this issue is on the defendants.

II

N.C.G.S. § 6-21.5

N.C.G.S. § 6-21.5 raises two issues for the Court: (1) *When* is an award of attorney fees authorized? (2) *Who* should pay the attorney fees—attorney, client, or both?

WHEN

[6] To recover attorney fees under N.C.G.S. § 6-21.5, the party claiming attorney fees must be the "prevailing party," and there must be "a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." The dismissal of a claim with prejudice "is tantamount to a judgment on the merits for the defendants," and thus renders the defendants the prevailing parties. *Sheets v. Yamaha Motors Corp., U.S.A.*, 891

F.2d 533, 539 (5th Cir. 1990); *see also* Annotation, *Dismissal Of Plaintiff's Action As Entitling Defendant To Recover Attorneys' Fees or Costs As "Prevailing Party" or "Successful Party,"* 66 A.L.R.3d 1087, 1090 (1975). Here, the defendants were the prevailing parties for purposes of N.C.G.S. § 6-21.5 because the plaintiffs dismissed their complaint with prejudice.

The statute provides an exception from attorney fee liability which states that one "who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees." *Id.* This same phraseology exists in Rule 11, and "[w]hether a pleading, motion or other paper is warranted by a good faith argument for the extension, modification, or reversal of existing law [under Rule 11] is judged under a standard of objective reasonableness." G. Joseph, *supra*, § 12(A), at 172; *Turner*, 325 N.C. at 164, 381 S.E.2d at 713. "[T]he objective standard is derived from the 'reasonable inquiry' language" of Rule 11. G. Joseph, *supra*, § 12(A), at 172. However, N.C.G.S. § 6-21.5 does not contain the "reasonable inquiry" language which gives rise to the objective standard under Rule 11. Nonetheless, consistent with *Sunamerica*, application of the N.C.G.S. § 6-21.5 exception requires the use of an objective reasonableness standard. *See Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438 (applying objective reasonableness standard to N.C.G.S. § 6-21.5).

WHO

N.C.G.S. § 6-21.5 does not specify whether it is the losing party or his attorney or both who may be ordered to pay the attorney fees. Since the fee ordered under N.C.G.S. § 6-21.5 is not considered a part of the court costs, the trial court is not limited to ordering the losing party to pay any fee awarded. *See* 20 Am. Jur. 2d *Costs* § 30 (1965) (court costs generally taxed only against parties). Where appropriate, the trial court may assess the awarded attorney fees against the losing party's attorney. This construction of N.C.G.S. § 6-21.5 is consistent with the common law which recognized the right of the trial court to assess attorney fees against the party or his attorney when the suit was frivolous. *See* 1 M. Derfner & A. Wolf, Court Awarded Attorney Fees §§ 4.01[1], 4.02[3][b] (rev. 1990); *see generally* Annotation, *Attorney's Liability Under State Law For Opposing Party's Counsel Fees*, 56 A.L.R.4th 486 (1987).

The assessment of attorney fees between the losing party and his attorney, as in Rule 11, depends upon their relative culpability and whether the absence of a justiciable issue relates to a question of law or fact. Just as in Rule 11 sanctions, in the absence of proof that a reasonable person in the position of the losing party would have been aware of the legal deficiencies, the attorney should bear the primary responsibility for submitting pleadings containing justiciable issues of law. *See Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438 (applying objective reasonableness standard to N.C.G.S. § 6-21.5). Therefore, before a court may tax attorney fees against a losing party under N.C.G.S. § 6-21.5 based upon the complete absence of a justiciable *legal* issue, the prevailing party must provide proof that the losing party should reasonably have been aware of the complaint's legal deficiencies.

A

Attorney Fees Against Attorney

The trial court specifically found as a fact that the defendants' counsel admitted in oral arguments that the defendants sought attorney fees only against the "Brysons and not their attorneys." This finding is supported by competent evidence in the record and we are bound by it. *Hinson*, 287 N.C. at 429, 215 S.E.2d at 107. Furthermore, the written motion for attorney fees pursuant to N.C.G.S. § 6-21.5 only requested that attorney fees be "assessed against plaintiffs."

B

Attorney Fees Against Client

Defendants do not claim that the plaintiffs provided any false or incomplete facts to their attorney. Instead, defendants claim the plaintiffs knew that the complaint raised no justiciable issue of law.

When a motion is made for attorney fees pursuant to N.C.G.S. § 6-21.5, a two-part analysis is required before awarding attorney fees. Similar to Rule 11, the court must first determine whether the pleadings raise justiciable issues of law or fact. If the pleadings contain justiciable issues of both law and fact when considered in light of all the responsive pleadings, then the inquiry is at an end. However, if the pleadings present a complete absence of justiciable issues of either law or fact, then the court must evaluate

whether the losing party should reasonably have been aware that the pleading he filed contained no justiciable issues. *See Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438. A complaint contains a justiciable issue of law or fact if it presents "an issue that is 'real and present as opposed to imagined or fanciful.' " *K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989) (citations omitted); *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437.

We first determine whether the complaint, when read in conjunction with the answer, presents a justiciable issue. Here, the complaint alone does present a "real and present" issue as opposed to one "imagined or fanciful." However, when read in conjunction with the answer, containing affirmative defenses which would create an absolute bar to plaintiffs' claims, the complaint no longer presents a justiciable issue of law.

Having determined that the complaint, when read in conjunction with the answer, does not facially present any justiciable issue of law, it next must be determined whether the plaintiffs reasonably should have been aware that the pleading was frivolous. As in our Rule 11 analysis, the fact that the plaintiffs acted in good faith and upon advice of counsel is insufficient. The matter must be remanded to the trial court for determination of whether the plaintiffs should reasonably have been aware that the complaint contained no justiciable issue of law. On remand, the parties will be permitted to present new evidence relating to the imposition of sanctions and attorney fees against the plaintiffs.

Reversed and remanded.

Judges PARKER and COZORT concur.

SANDRA KING LONG v. PHILLIP ARTHUR LONG

No. 9020DC679

(Filed 5 March 1991)

1. **Judgments § 2 (NCI3d)— nunc pro tunc order ineffective**

The trial court's attempt on 6 April 1990 to enter an order *nunc pro tunc* to 17 October 1988 was ineffective where judgment was not rendered on 17 October 1988 in that the trial court did not announce its judgment in open court, and there was nothing in the record to indicate that the delay of nearly eighteen months in entering the order was in consequence of accident or mistake or neglect of the clerk.

Am Jur 2d, Judgments §§ 187, 196.

2. **Bankruptcy and Insolvency § 12 (NCI4th)— contractual alimony—discharge in bankruptcy—jurisdiction of trial court**

The trial court had jurisdiction to decide whether defendant's bankruptcy discharged his contractual obligation to pay alimony where the parties have neither sought a determination of dischargeability in the bankruptcy proceeding nor acted to have the alimony enforcement proceeding removed to the bankruptcy court.

Am Jur 2d, Bankruptcy § 801.

3. **Bankruptcy and Insolvency § 12 (NCI4th)— debts in nature of alimony or support—discharge in bankruptcy precluded**

11 U.S.C. § 523(a)(5) precludes a discharge in bankruptcy of debts to a spouse or child which are actually "in the nature of alimony, maintenance or support."

Bankruptcy §§ 72, 801, 802.

Debts for alimony, maintenance, and support as exceptions to bankruptcy discharge, under sec. 523(a)(5) of Bankruptcy Code of 1978 (11 USCS sec. 523(a)(5)). 69 ALR Fed 403.

4. **Bankruptcy and Insolvency § 12 (NCI4th)— support or alimony obligation—federal bankruptcy question**

Whether an obligation is in the nature of support or alimony is a federal bankruptcy rather than a state law question whether the court hearing the matter is a federal or a state court.

Am Jur 2d, Bankruptcy § 802.

5. Bankruptcy and Insolvency § 12 (NCI4th)— divorce settlement—obligation in nature of alimony or support—intent of parties

Whether an obligation contained in a divorce settlement agreement is actually in the nature of alimony, maintenance or support depends on the intent of the parties at the time the agreement was executed. If the parties intended that an obligation in the agreement was to be in the nature of alimony, maintenance or support rather than a property settlement, the debtor's obligation under the agreement is a nondischargeable debt pursuant to 11 U.S.C. § 523(a)(5).

Am Jur 2d, Bankruptcy § 802.

6. Bankruptcy and Insolvency § 12 (NCI4th)— nondischargeable debt—burden of proof

The party seeking to have an obligation in a divorce settlement agreement declared a nondischargeable debt in bankruptcy has the burden of proving the intent of the parties by a preponderance of the evidence.

Am Jur 2d, Bankruptcy § 802.

7. Bankruptcy and Insolvency § 12 (NCI4th)— contractual alimony—discharge in bankruptcy—intent of parties—remand for evidentiary hearing

Plaintiff's action for specific performance of the alimony provision of a separation and property settlement agreement is remanded for an evidentiary hearing to determine whether the parties intended for this obligation to be "in the nature of alimony, maintenance or support" rather than a property settlement and thus whether defendant husband's Chapter 7 bankruptcy discharged this obligation.

Am Jur 2d, Bankruptcy § 802.

8. Divorce and Separation § 185 (NCI4th)— contractual alimony—failure to file claim before divorce

Plaintiff's failure to file a claim for alimony before divorce did not bar enforcement of a contractual alimony obligation contained in a separation agreement.

Am Jur 2d, Divorce and Separation §§ 856, 858.

Judge COZORT concurring in part and dissenting in part.

APPEAL by plaintiff from order filed 6 April 1990 in UNION County District Court by *Judge Donald R. Huffman*. Heard in the Court of Appeals 23 January 1991.

A. Marshall Basinger, II, for plaintiff-appellant.

No brief filed for defendant-appellee.

GREENE, Judge.

Plaintiff appeals the granting of defendant's motion to dismiss the complaint, which order was filed 6 April 1990, and the trial court's denial of the plaintiff's motion for summary judgment.

In this civil action, plaintiff seeks to specifically enforce a provision of a "SEPARATION AGREEMENT AND PROPERTY SETTLEMENT" (Agreement) dated 2 April 1987 labelled "ALIMONY" which required defendant to pay plaintiff the sum of $500.00 each month beginning 15 March 1987 and continuing "for each month thereafter. . . ." The Agreement provided for monthly payments to the wife of $500.00 each month, settled the plaintiff's interest in the defendant's business, distributed the personal properties and the debts between the parties, and disposed of all equitable distribution claims. The complaint alleges that the defendant paid the "ALIMONY" through February 1988 but that "such payments do not appear to be forthcoming in the future."

The evidence before the trial court by virtue of attachments to pleadings or motions included the parties' Agreement, a divorce judgment filed 1 March 1988 dissolving the marriage of the plaintiff and defendant, the answer of this plaintiff (this plaintiff was the defendant in the divorce action) to the divorce complaint which did not include a claim for alimony, the plaintiff's affidavit submitted along with her summary judgment motion, and a bankruptcy order filed 4 February 1988 discharging the defendant. The bankruptcy order provided in pertinent part:

> It appearing from the record that . . . [Phillip Arthur Long] is entitled to a discharge [under Chapter 7], IT IS ORDERED:
>
> 1. . . . [Phillip Arthur Long] is released from all personal liability for debts existing on . . . [27 October 1987], or deemed to have existed on such date pursuant to Section 348(d) of the Bankruptcy Code (Title 11, United States Code).

2. Any existing judgment or any judgment which may be obtained in any court with respect to debts described in paragraph 1 is null and void as a determination of personal liability of the debtor, except:

a. Debts determined nondischargeable by the Bankruptcy Court pursuant to Section 523(a)(2), (4), and (6) of the Bankruptcy Code; and

b. Debts which are nondischargeable pursuant to Section 523(1), (3), (5), (7), (8), and (9) of the Bankruptcy Code.

The defendant's motion to dismiss was heard by the trial court on 17 October 1988, at which time no ruling was announced by the court. On 6 April 1990, an order was filed which provided in pertinent part:

. . . .

2. Defendant's Motion to Dismiss should be granted on the grounds that: (a.) At the time of the parties [sic] divorce in file #88 CVD 20, the defendant had failed to file a counterclaim for alimony and failed to file sufficient allegations to constitute a claim for the same relief demanded herein; . . . (d) Phillip Arthur Long was discharged in bankruptcy from any and all contractual agreements, but would have continued to be liable for alimony had a proper claim been filed before the divorce; (e) The current action is barred by statute in that no claim for alimony was properly filed . . .

. . . .

IT IS, THEREFORE, ORDERED that:

. . . .

2. Defendant's Motion to Dismiss Plaintiff's Complaint shall be and hereby is granted.

3. Plaintiff's Complaint is hereby dismissed with prejudice.

THIS 6 day of APRIL, 1990, *nunc pro tunc.*

[1] The plaintiff gave timely written notice of appeal on 3 May 1990 since the trial court's order was entered on 6 April 1990. N.C.R. App. P. 3(c). The trial court's attempt to enter the order *nunc pro tunc* to 17 October 1988 was ineffective. *Nunc pro tunc* orders are allowed only when " 'a judgment has been actually

rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk . . . provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced.' " *State Trust Co. v. Toms*, 244 N.C. 645, 650, 94 S.E.2d 806, 810 (1956) (citation omitted). Because the trial court did not announce its order in open court on 17 October 1988, it was not rendered at that time. *Kirby Bldg. Sys. v. McNiel*, 327 N.C. 234, 240, 393 S.E.2d 827, 830 (1990) (judgment rendered when decision " 'officially announced, either orally in open court or by memorandum filed' " with clerk) (citation omitted). Even if the order was rendered on 17 October 1988, there is nothing in the record to indicate that the delay of nearly eighteen months in entering the order was " 'in consequence of accident or mistake or the neglect of the clerk . . . .' " *Toms*, 244 N.C. at 650, 94 S.E.2d at 810 (citation omitted).

The issues presented are (I) whether the Chapter 7 bankruptcy order relieved the defendant of his pre-bankruptcy petition contractual obligation to pay support to the plaintiff; and (II) whether the failure to file a claim for alimony before divorce bars the enforcement of a contractual alimony obligation contained in a separation agreement.

I

[2] The trial court concluded that defendant's Chapter 7 bankruptcy discharged him from any further liability under the Agreement for the payment of "ALIMONY." Though the issue has not been raised, we note at the outset that the trial court had jurisdiction to decide this case. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979) (appellate court may always raise question of subject matter jurisdiction).

The Federal Bankruptcy Act provides in pertinent part:

§ 523. Exceptions to discharge

(a) A discharge under sections 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, deter-

> mination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that . . . (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support . . .

11 U.S.C.S. § 523 (Law. Co-op. 1986 & Supp. 1990).

"The state court's jurisdiction to determine dischargeability of debts under [11 U.S.C.S.] § 523 depends on the nature of the debt in question." *In re Galbreath*, 83 B.R. 549, 550 (Bankr. S.D. Ill. 1988). While the Bankruptcy Courts have exclusive jurisdiction to decide issues of dischargeability under §§ 523(a)(2), (4), and (6), the Bankruptcy Courts and any "appropriate nonbankruptcy forum" have concurrent jurisdiction on issues of dischargeability under §§ 523(a)(1), (3), (5), (7), (8), (9), and (10). *Id.* at 551; *In re Orr*, 99 B.R. 109, 110 (Bankr. S.D. Fla. 1989); Bankr. R. 4007 advisory committee's note; *see also* 3 Collier, Collier on Bankruptcy ¶ 523.15[6] (15th ed. 1990); 1 Cowans, Cowans Bankruptcy Law and Practice § 6.10 (1989 ed.).

This concurrent jurisdiction functions as the court in *Galbreath* explained:

> Under Bankruptcy Rule 4007(a), the debtor, as well as any creditor, may file a complaint in the bankruptcy court to obtain a determination of dischargeability. Thus, the debtor may seek a determination that a particular debt is dischargeable to avoid the possibility of an enforcement action in the state court following the bankruptcy proceeding. In addition, since, under Bankruptcy Rule 4007(b), there is no time limit for seeking a determination of dischargeability as to debts other than those of § 523(a)(2), (4) and (6), the debtor retains the right to remove a subsequent proceeding brought in a nonbankruptcy court, if no determination of dischargeability has been made in the previous bankruptcy proceeding. . . . If, however, the debtor has neither sought a determination of dischargeability in the bankruptcy proceeding nor acted to have the subsequent enforcement proceeding removed to bankruptcy court, the nonbankruptcy court has jurisdiction to decide the dischargeability of such debts at the creditor's behest once the automatic stay has terminated upon conclusion of the bankruptcy proceeding.

Id. at 551 (citation omitted). *See also In re Crowder*, 37 B.R. 53, 55 (Bankr. S.D. Fla. 1984) (where debtor received discharge, bankruptcy case closed, and thus automatic stay at an end, state court judgment could not be set aside as nullity); 28 U.S.C.S. § 1441 (Law. Co-op. 1988 & Supp. 1990) ("Actions removable generally"); 28 U.S.C.S. § 1446 (Law. Co-op. 1989) ("Procedure for removal"); 28 U.S.C.S. § 1452 (Law. Co-op. 1989) ("Removal of claims related to bankruptcy cases"). "Bankruptcy Rules 4007 and 7001(6) specifically require that any request [by the debtor or creditor] to determine dischargeability [in a bankruptcy court] take the form of an adversary proceeding." *Galbreath*, 83 B.R. at 551.

Here, neither the plaintiff nor the defendant filed a complaint in the bankruptcy court for a determination of the dischargeability of the contractual "ALIMONY" obligation. The bankruptcy court's order specifically left the issue open for future determination. Additionally, the record is silent as to whether either party sought to remove this case from the state court to the bankruptcy court. Therefore, because the parties have "neither sought a determination of dischargeability in the bankruptcy proceeding nor acted to have the subsequent enforcement proceeding removed to bankruptcy court," the state trial court had jurisdiction to decide the issue of dischargeability, and this Court has jurisdiction to review the trial court's decision. *Id.*

[3] "Pursuant to 11 U.S.C. § 727(a), a Chapter 7 debtor who complies with the Bankruptcy Code requirements receives a discharge of all pre-petition debts other than certain specified exceptions. Among those exceptions is 11 U.S.C. § 523(a)(5), which precludes discharge of debts to a spouse or child for alimony, maintenance or support if that debt is actually 'in the nature of alimony, maintenance or support.' " *In re McCauley*, 105 B.R. 315, 318 (E.D. Va. 1989); *see* Annotation, *Debts for Alimony, Maintenance, and Support as Exceptions to Bankruptcy Discharge, Under § 523(a)(5) of Bankruptcy Code of 1978 (11 USCS § 523(a)(5))*, 69 A.L.R. Fed. 403 (1984). According to one commentator, the reason for this exception is that the "obligations [covered by § 523(a)(5)] are regarded as having greater social importance than . . . [the debtor's] obligations to ordinary creditors." 2 Clark, The Law of Domestic Relations in the United States § 17.7 (2d ed. 1987).

In determining whether a debt to a spouse or a child is excepted from discharge, the analysis "must begin with the assump-

tion that dischargeability is favored under the Code unless the complaining spouse, *who has the burden of proof*, demonstrates that the obligation at issue is 'actually in the nature of alimony, maintenance or support.' " *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986); *see also In re Long*, 794 F.2d 928, 930 (4th Cir. 1986); *McCauley*, 105 B.R. at 318; Bankr. R. 4005. The complaining spouse "has the burden to prove by a preponderance of the evidence that the debtor's liability should be excepted from discharge under § 523(a)(5)." *In re Macys*, 115 B.R. 883, 890 (Bankr. E.D. Va. 1990); *see also Combs v. Richardson*, 838 F.2d 112, 116 (4th Cir. 1988) (case involving § 523(a)(6)); *In re Quinn*, 97 B.R. 837, 839 (Bankr. W.D.N.C. 1988).

[4] "[T]he legislative history [of § 523(a)(5)] makes clear that whether an obligation is in the nature of support or alimony is a federal bankruptcy rather than state law question." *In re Jenkins*, 94 B.R. 355, 359 (Bankr. E.D. Pa. 1988); H.R. Rep. No. 595, 95th Cong., 1st Sess. 364, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6320; S. Rep. No. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5865; *In re Summer*, 20 B.R. 24, 25 (Bankr. D.S.C. 1982). This is true whether the court hearing the matter is a federal court or a state court. *See In re Marriage of Rowden*, 163 Ill. App. 3d 869, 872, 516 N.E.2d 1041, 1044 (1987); *Nuellen v. Lawson*, 123 Ill. App. 3d 202, 204, 462 N.E.2d 738, 740 (1984) ("State law may be used to develop Federal standards"); *Loyko v. Loyko*, 200 N.J. Super. 152, 156, 490 A.2d 802, 804 (App. Div. 1985) (state law "may provide valuable guidance and need not be ignored"); *Benavidez v. Benavidez*, 99 N.M. 535, 537, 660 P.2d 1017, 1019 (1983); *Hopkins v. Hopkins*, 109 N.M. 233, 238, 784 P.2d 420, 425 (Ct. App. 1989); *Zimmerman v. Zimmerman*, 322 Pa. Super. 121, 126, 469 A.2d 212, 214 (1983); *but see In re Knight*, 29 B.R. 748, 751 (W.D.N.C. 1983) ("state domestic relations law . . . governs 'the nature of alimony, maintenance, or support' "); *Barker v. Barker*, 271 Ark. 956, 958, 611 S.W.2d 787, 789 (Ark. Ct. App. 1981).

[5] Under the federal law as developed by the Fourth Circuit courts, the test for determining whether an "obligation contained in a divorce settlement" agreement "is 'actually in the nature of alimony, maintenance or support' " and thus non-dischargeable "turns principally on the [mutual] intent of the parties at the time the agreement was executed." *Tilley*, 789 F.2d at 1077-78; *Long*, 794 F.2d at 931 (test lies in proof of whether parties intended payments

in settlement agreement to "be for support rather than as a property settlement"); *Quinn*, 97 B.R. at 840. "[T]he determination of intention underlying . . . the parties' agreement is essentially one of fact." *McCauley*, 105 B.R. at 319. If the parties intended that the obligation contained in the Agreement was to be in the nature of alimony, maintenance, or support rather than a property settlement, then the defendant's obligation under the Agreement is a non-dischargeable debt pursuant to § 523(a)(5). *Tilley*, 789 F.2d at 1077; *Long*, 794 F.2d at 931.

Having set forth the proper test, the question becomes how does a court determine the parties' mutual intent. If a divorce settlement agreement "contains elements of both a property settlement and alimony payments, the court must look beyond that agreement and determine the intent of the parties at the time the agreement was made." *Quinn*, 97 B.R. at 840. Although "the true intent of the parties rather than the labels attached to an agreement or the application of state law" controls the inquiry, a court is not precluded from examining the "agreement as persuasive evidence of intent." *Tilley*, 789 F.2d at 1077. A court is "required to confine its determination of the parties' intent to the terms of the parties' final written agreement" when the terms of the agreement "conclusively show that the parties intended that the payments be" either for support or a property settlement. *Quinn*, 97 B.R. at 838-41; *cf. Hayes v. Hayes*, 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990) (unequivocal integration or non-integration clause in agreement governs).

Furthermore, the courts of the Fourth Circuit have provided numerous factors to aid the courts in determining the parties' intent. *See In re Coffman*, 52 B.R. 667, 674-75 (Bankr. D. Md. 1985). *Coffman* lists eighteen factors for consideration including "[w]hether there was an alimony award entered by the state court," "[w]hether debtor's obligation terminated upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a change in circumstances," and "[t]he express terms of the debt characterization under state law." *Id.* The fact-finder is not required "to hear and assess evidence on every one of . . . [the eighteen] factors." *McCauley*, 105 B.R. at 319. There is no "fixed hierarchy of importance for these factors," nor is there any "precise weight assigned to any of them. Circumstances vary too widely to require this. Instead, the choice of factors to consider

and the weight they should be accorded, is uniquely a function committed to the discretion of the trier of fact." *Id.*

[6, 7] In this case, the plaintiff, as the party seeking to have the obligation declared a non-dischargeable debt, had the burden of proving the same by a preponderance of the evidence. The terms of the parties' Agreement, though suggesting that the "ALIMONY" payments may have been given in consideration of a property settlement, do not conclusively show the parties' mutual intent. Because the Agreement does not contain an explicit integration or non-integration clause, an evidentiary hearing was required to determine the intent of the parties. *In re Vaughn*, 462 F. Supp. 1040, 1046 (N.D. Tex. 1978) (when disputed issues of material fact exist, trial court required to hold evidentiary hearing); *cf. Hayes*, 100 N.C. App. at 148, 394 S.E.2d at 680. The trial court did not hold such a hearing. Accordingly, we remand this case to the trial court for an evidentiary hearing to determine the parties' intent based upon a consideration of the relevant factors. *Hayes*, 100 N.C. App. at 148, 394 S.E.2d at 680.

II

[8] The second issue is whether the plaintiff's failure to file a claim for alimony before divorce bars enforcement of a contractual alimony obligation contained in a separation agreement. The simple answer is no.

> Our courts have recognized the validity of a separation agreement by which the husband agrees to support his wife even after a decree of divorce has been entered which, under G.S. 50-11, would otherwise terminate his obligation. . . . In such a case, the wife's right to continued support does not arise out of the marriage, but arises out of contract and survives the judgment of absolute divorce.

Haynes v. Haynes, 45 N.C. App. 376, 381-82, 263 S.E.2d 783, 786 (1980) (citations omitted); *see also Taylor v. Taylor*, 321 N.C. 244, 248, 362 S.E.2d 542, 545 (1987). Therefore, the trial court erroneously granted the defendant's motion to dismiss the plaintiff's complaint on this ground. Furthermore, this Court refuses to consider the plaintiff's appeal of the trial court's denial of her motion for summary judgment because "the denial of a motion for summary judgment is a non-appealable interlocutory order." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 230 (1985).

On remand, if it is determined that the parties intended the obligation in their Agreement to be "in the nature of alimony, maintenance, or support" and thus non-dischargeable, then the enforceability of the Agreement creating the obligation must be determined. This determination will turn on an application of North Carolina law. Accordingly, the order of the trial court is

Vacated and remanded.

Judge PARKER concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part, with separate opinion.

I concur with the majority's opinion insofar as it (1) dismisses the plaintiff's appeal of the trial court's denial of plaintiff's motion for summary judgment, and (2) holds that the trial court erred by dismissing plaintiff's contractual alimony action on the ground that plaintiff failed to file an alimony claim before the divorce was granted in the previous action. However, on the issue of whether the trial court erred by dismissing plaintiff's action on the ground that defendant's bankruptcy discharged his liability for alimony payments, I cannot agree with all the issues discussed and opinions expressed by the majority.

First, the majority acknowledges that jurisdiction has not been raised. Since the issue of jurisdiction has not been raised and has no bearing on our decision, I find any discussion of jurisdiction inappropriate.

Second, the majority orders that the case be remanded to the trial court for an evidentiary hearing to determine the parties' intent in signing the Separation Agreement dated 2 April 1987. I strongly disagree with that result.

The defendant filed a motion to dismiss, without filing an answer. The issue of the parties' intent in signing the Agreement was not raised in any pleading, order, or brief. Thus, the majority errs in raising that issue. The only issue before us on appeal is straightforward and simple: does defendant's bankruptcy automatically discharge his obligation to pay contractual alimony? The answer is a simple "No," under 11 U.S.C.S. § 523(a)(5) (1978 & Cum. Supp.

1990). The majority's discussion of intent and all the related matters is inappropriate and potentially confusing.

This Court should do no more than reverse the trial court's order of dismissal. When the case returns to trial court for further actions, the issues discussed by the majority may or may not be raised.

I vote simply to reverse.

STATE OF NORTH CAROLINA v. JIMMIE ELIJAH HINSON

No. 9025SC31

(Filed 5 March 1991)

1. **Rape and Allied Offenses § 5 (NCI3d)— sexual offense—fellatio on minor child—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of first degree sexual offense on the ground that he performed fellatio on the seven-year-old victim where the victim testified that defendant sucked on his "middle part" or "middle section" which he indicated was his crotch area; the victim testified that defendant "stuck his middle section in my butt" and demonstrated that he meant his buttocks area; the victim's mother testified that her son told her that defendant had "sucked his thing a bunch of times" and had "done it to him in the butt"; and an investigating officer testified that the victim told him that defendant "had performed oral sex on him."

Am Jur 2d, Sodomy § 45.

2. **Criminal Law § 89.5 (NCI3d)— testimony admissible for corroboration**

An officer's testimony that a child victim told him that defendant "had performed oral sex on him" was properly admitted to corroborate testimony by the victim that defendant sucked on his "middle part" or "middle section," which he indicated was his crotch area, and testimony by the victim's mother that the victim said defendant sucked his "thing."

Am Jur 2d, Infants § 17.5; Sodomy §§ 70, 71.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 ALR4th 120.

3. Criminal Law §§ 34, 34.7 (NCI3d)— cross-examination of defendant—catalogue of condoms—sexual devices and books

A defendant charged with first degree sexual offense against a minor child was properly cross-examined about a catalogue of condoms found in his home to show proof of intent, preparation, plan, knowledge and absence of mistake. However, the trial court erred in permitting defendant to be cross-examined about photographs depicting him in women's clothing, a dildo, lubricants, vibrators, and books entitled *Sexual Intercourse* and *The Sex Book* which were found in his home, but objection to this evidence was waived by defendant's failure to object to evidence of similar import, and admission of this evidence was not plain error. N.C.G.S. § 8C-1, Rule 404.

Am Jur 2d, Witnesses §§ 467, 468, 492, 497.

4. Constitutional Law § 374 (NCI4th); Rape and Allied Offenses § 7 (NCI3d)— first degree sexual offense—life sentence not cruel and unusual punishment

A sentence of life imprisonment imposed upon defendant for first degree sexual offense against a child did not constitute cruel and unusual punishment.

Am Jur 2d, Criminal Law §§ 625-627; Sodomy §§ 97, 98.

APPEAL by defendant from judgment entered 9 October 1989 by *Judge James U. Downs* in CATAWBA County Superior Court. Heard in the Court of Appeals 25 September 1990.

On 17 January 1989 defendant was indicted for one count of first degree sexual offense and one count of taking indecent liberties with a minor. During trial, the State presented evidence that the victim, a seven-year-old boy, visited defendant, a fifty-three-year-old man, at defendant's house four times during the summer of 1988. Defendant and the victim's mother had arranged for these visits.

The victim testified about each visit. He testified that nothing unusual happened during his first visit. The victim testified that during his second visit, defendant began "doing things to [him]"

and "talking dirty." He testified that defendant began "sucking on [his] middle part," which he indicated was his crotch area. The victim testified that he did not tell his mother because defendant told him not to. The victim further testified that during the third visit, the defendant also "sucked on [his] middle section" and "stuck his [defendant's] middle section in his [victim's] butt." The victim testified that nothing happened to him during his fourth visit.

The victim's brother, who was eleven in September 1988, testified that he also stayed with defendant during the victim's fourth visit. He testified that he, along with his brother, defendant and another male youth slept in defendant's bed during that visit. The victim's brother testified that during the course of the night defendant put his arm around him and threw his leg over him. The victim's brother testified that after this incident he slept somewhere else. The victim's brother further testified that defendant discussed sexual matters with him during his visit. He testified that defendant showed him some condoms and said that they "were for whenever we were gong [sic] to make love." The victim's brother further testified that he had to ask defendant to leave after he observed defendant watching him and the victim change clothes in a department store's dressing room. The victim's brother testified that defendant hugged him and sucked on his ear. He stated that defendant's actions made him feel uncomfortable. The victim's brother stated that he told his mother what had happened as soon as defendant left after taking them back home. The victim's mother then called the police. The victim's mother and the investigating officers testified for the purpose of corroborating the victim's testimony.

Defendant offered the testimony of several witnesses who testified about his reputation and the alleged incidents. Defendant testified that he offered to let the children stay with him because their mother was having problems with her boyfriend. He admitted that they all slept in the same bed, but denied any sexual misconduct. Defendant testified that he never saw either of the boys nude. On cross-examination, the State questioned defendant about the following items which were found in his home: photographs depicting him in women's clothing; dildos; a catalogue of condoms; lubricants; vibrators; a book entitled *Sexual Intercourse*; and a book entitled *The Sex Book*.

At the end of the State's evidence, the trial court granted defendant's motion to dismiss the indecent liberties charge, but denied defendant's motion to dismiss the first degree sexual offense charge. The jury found defendant guilty of first degree sexual offense based upon fellatio. The trial court imposed the mandatory life sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William F. Briley, for the State.

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

EAGLES, Judge.

[1] Defendant initially assigns as error the trial court's failure to dismiss the charges against him. Defendant argues that the evidence was insufficient to convict him of first degree sexual offense on the grounds that he performed fellatio on the victim. We disagree.

> On a motion to dismiss, the trial court must determine from all the evidence, taken in the light most favorable to the State, whether there is substantial evidence that the crime charged has been committed and that the accused is the one who did it. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In judging the sufficiency of the State's evidence, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom.

State v. Watkins, 318 N.C. 498, 501-02, 349 S.E.2d 564, 566 (1986). (Citations omitted.)

G.S. 14-27.4 provides that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" "A sexual act is defined as 'cunnilingus, fellatio, analingus, or anal intercourse . . . [or] the penetration, however slight, by an object into the genital or anal opening of another body . . . [except for] accepted medical purposes.' " 318 N.C. at 501, 349 S.E.2d at 565. (Citations omitted.)

Here, the jury convicted defendant of first degree sexual offense based upon testimony that defendant performed oral sex on the victim. The victim's testimony with all reasonable inferences drawn in favor of the State is sufficient to support the finding that defendant committed first degree sexual offense on the victim. The victim testified during direct that defendant sucked him on his "middle part" or "middle section" which he indicated was his crotch area. We note that during cross-examination, the victim stated that he did not know what a penis was. However, there was other testimony by the victim which was sufficient for the jury to conclude that the victim meant penis when he referred to "middle part" or "middle section." The victim testified that defendant "stuck his middle section in [his] butt." The victim demonstrated that by "butt" he meant his buttocks area.

Convictions have been upheld in cases where proof included testimony of a child victim even though the victim did not use the precise terms set out in G.S. 14-27.4. *See State v. Ludlum*, 303 N.C. 666, 667, 281 S.E.2d 159 (1981) ("defendant 'touched me with his tongue . . . between my legs' "); *State v. Watkins*, 318 N.C. 498, 499, 349 S.E.2d 564 (1986) (defendant stuck his finger in my "coodie cat"); *State v. Britt*, 93 N.C. App. 126, 129, 377 S.E.2d 79, 81, *appeal dismissed, disc. rev. denied, and cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989), *overruled on other grounds, State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) (defendant used to touch me with his "weewee" and stuck it into my "peepee"); *State v. Griffin*, 319 N.C. 429, 431, 355 S.E.2d 474, 475 (1987) (defendant touched my "private parts"); *State v. Smith*, 315 N.C. 76, 79-80, 337 S.E.2d 833, 837 (1985) (defendant touched my "project" with his "worm" and victim pointed to her vaginal area).

Here, the victim's testimony was further corroborated by his mother who testified that her son told her that defendant had "sucked his thing a bunch of times" and had "done it to him in the butt." Sergeant Brewer, an investigating officer, testified that the victim told him that defendant "had performed oral sex on him." We find the evidence here sufficient to withstand the motion to dismiss and this assignment of error is overruled.

[2] Defendant next assigns as error the trial court's introduction of evidence under the guise of corroboration. Defendant argues that the statements made by the victim to Sergeant Brewer were inadmissible hearsay. Defendant argues that Sergeant Brewer's

testimony not only "extend[ed] the testimony of the prosecuting witness, it *interpreted* it for the jury." Defendant contends that since this testimony was offered to show that defendant touched the victim's sex organ, the Rules of Evidence and the Confrontation Clauses of both state and federal Constitutions were violated and defendant was manifestly prejudiced. We disagree.

> Corroboration is "the process of persuading the trier of the facts that a witness is credible." We have defined "corroborate" as "to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." Prior consistent statements of a witness are admissible as corroborative evidence when the witness has not been impeached. However, the prior statement must in fact corroborate the witness' testimony. Slight variations between the corroborating statement and the witness' testimony will not render the statement inadmissible.

State v. Riddle, 316 N.C. 152, 156-57, 340 S.E.2d 75, 77-78 (1986) (citations omitted). "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986).

In *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985), the defendant there objected to the testimony of the child victim's mother on the grounds that the testimony went beyond the scope of corroboration. The victim testified about sexual acts which the defendant performed on her. The mother later testified that the victim told her that the acts were "yucky." *Id.* at 768, 324 S.E.2d at 840. The defendant objected on the grounds that the victim did not describe the acts as being "yucky" during her testimony and therefore the mother's statement was not admissible as corroborative evidence. Our Supreme Court stated that while the mother's statement did not precisely track the victim's testimony, "it tended to confirm and strengthen her testimony." *Id.* at 769, 324 S.E.2d at 840. The court further stated that "[w]hether or not the statement was corroborative was a matter for the jury to decide, as the court correctly instructed." *Id.* The *Higginbottom* court further stated that even if the statement was not admissible, "[t]he statement provided insignificant embellishment to other

testimony which established ample evidence that defendant had committed the crime charged." *Id.* at 769, 324 S.E.2d 840-41.

After careful review of the record, we note that defendant did not object to Sergeant Brewer's statement that defendant had performed oral sex on the victim. Defendant merely objected and moved to strike the statement that defendant had placed his penis in the victim's face and the victim walked away. At that time, the trial court instructed the jury that it was to consider the evidence only for corroborative purposes. Defendant's other objections related to statements made by the victim's brother. Defendant did not object to Sergeant Brewer's use of the words "oral sex." Defense counsel even used the term "oral sex" while cross-examining Sergeant Brewer on how many times the victim said the "instant (sic) of oral sex" occurred. While the witness's testimony did not precisely track the testimony of the victim, it did in fact confirm and strengthen the victim's testimony as well as other corroborative testimony from other witnesses. The victim testified that defendant "sucked me on my my [sic] middle section." The victim's mother further testified that the victim said defendant sucked his "thing." Another investigating officer stated that the victim told him that defendant sucked his "mid section." Since this is ample evidence that defendant committed the crime charged, this assignment of error must be overruled.

[3] Defendant next contends that the trial court erred in allowing the State to cross-examine defendant concerning the following items on cross-examination: photographs, a dildo, a catalogue of condoms, lubricant, and two books entitled *Sexual Intercourse* and *The Sex Book*. Defendant contends that the cross-examination placed before the jury inflammatory material that was irrelevant. Defendant argues that the cross-examination denied him his "fundamental right to a fair trial," and that it was plain error for the trial court not to have intervened *ex mero motu*. We disagree.

"[E]vidence of 'other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.' " *State v. Rael*, 321 N.C. 528, 534, 364 S.E.2d 125, 129 (1988). "It is equally clear, however, that evidence of other crimes or acts by a defendant is admissible so long as it is *relevant to any fact or issue* other than the character of the defendant." *Id.* "Under Rule 401, '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.' " *Id.*

"We have held in several recent cases that evidence of prior sex acts may have some relevance to the question of 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 deemed admissible and not violative of the general rule prohibiting character evidence." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). "Nevertheless, the ultimate test for determining whether such evidence is admissible 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." *Id.*

Here, the State argues that the evidence was offered as "proof of intent, preparation, plan, knowledge and absence of mistake." The State further asserts that this conclusion is evident in view of the fact that defendant showed the victim's brother condoms to be used "whenever [they] were going to make love." After careful review of the record, we find that the questions concerning the condoms were admissible to show "proof of intent, preparation, plan, knowledge and absence of mistake." However, it was error for the trial court to allow questions concerning the other evidence; but, we note that defendant entered a general objection at the beginning of cross-examination and failed to renew his objection when evidence of similar import was admitted. " 'It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.' " *State v. Bruce*, 315 N.C. 273, 282, 337 S.E.2d 510, 516 (1985).

Defendant argues that even if he did not properly object to the introduction of the evidence it was plain error for the trial court to allow its admission. We disagree.

In *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983), our State's Supreme Court stated that

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its

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

Id. at 740-41, 303 S.E.2d at 806-07.

In view of the overwhelming evidence of defendant's guilt, we find that the admission of the complained of evidence did not have a probable impact on the jury's guilty verdict. Accordingly, this assignment of error is overruled.

[4] Finally, defendant contends that the trial court erred in sentencing him to life imprisonment because it denied him of his state and federal constitutional right to be free from cruel or unusual punishment. We disagree.

G.S. 14-27.4(b) provides that "[a]ny person who commits an offense defined in this section is guilty of a Class B felony." "Clearly the legislature determined that whether or not accompanied by violence or force, acts of a sexual nature when performed upon a child are sufficiently serious to warrant the punishment mandated for Class B Felonies. Since it is the function of the legislature and not the judiciary to determine the extent of punishment to be imposed, we accord substantial deference to the wisdom of that body." 312 N.C. at 763-64, 324 S.E.2d at 837. "The imposition of a mandatory sentence of life imprisonment for first-degree sexual offense is not so disproportionate as to constitute a violation of the eighth amendment of the Constitution of the United States." *Id.* at 764, 324 S.E.2d at 837. In *State v. Cook*, 318 N.C. 674, 351 S.E.2d 290 (1987), defendant argued that the imposition of the mandatory life sentence for first degree sexual offense was unconstitutional. The *Cook* court declined to re-examine that question since it had previously determined that the mandatory life sentence for first degree sexual offense was constitutional in *Higginbottom*, *supra*.

After careful review of this record, we hold that defendant has failed to prove that the mandatory sentence violates his con-

stitutional right to be free from cruel and unusual punishment. This assignment of error is overruled.

Accordingly, we find no error.

No error.

Judges JOHNSON and PARKER concur.

IN THE MATTER OF: THE APPEAL OF GENERAL TIRE, INC., FROM THE APPRAISAL OF CERTAIN PERSONAL PROPERTY BY THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1987

No. 9010PTC576

(Filed 5 March 1991)

Taxation § 25.11 (NCI3d)— appeal from Property Tax Commission— controlling statute—timely notice

The County's notice of appeal from a decision of the Property Tax Commission was not timely where the last day the County could have filed timely notice was Monday, 8 January 1990, and the notice of appeal was filed on 10 January 1990. The appropriate analysis for the time for taking such appeal lies in N.C.G.S. § 105-345, which clearly establishes that the appealing party has 30 days after the entry of the final order or decision to file its notice of appeal and exceptions. Rule 27(b) of the North Carolina Rules of Appellate Procedure, which allows an additional three days in which to appeal after a party is served by mail, is inapplicable because the time limitations in N.C.G.S. § 105-345 are triggered by the entry of the final order or decision, and service is not required by the statute.

Am Jur 2d, Appeal and Error §§ 293, 316.

APPEAL by Mecklenburg County from the final decision entered 8 December 1989 and the order of 2 March 1990 by Chairman William P. Pinna, North Carolina Property Tax Commission. Heard in the Court of Appeals 5 December 1990.

On 25 April through 28 April 1989, the Property Tax Commission conducted a hearing concerning the ad valorem tax valuation

of certain property owned by General Tire, Inc. The Property Tax Commission issued its final decision dated 8 December 1989. Counsel for General Tire received the final decision by certified mail on 11 December 1989, and counsel for Mecklenburg County (hereinafter the County) received the decision on 12 December 1989.

The County filed notice of appeal on 10 January 1990. General Tire subsequently filed a request for a ruling on whether the County's notice of appeal was filed in a timely fashion. The Property Tax Commission heard oral arguments on 1 February 1990. On 2 March 1990, the Property Tax Commission issued its order dismissing the appeal on the ground that it was not timely filed.

From the decision of 8 December 1989 and the order of 2 March 1990, the County appeals.

Ruff, Bond, Cobb, Wade & McNair, by Hamlin L. Wade, for Mecklenburg County-appellant.

Blakeney, Alexander & Machen, by Ernest W. Machen, Jr. and David L. Terry, for General Tire-appellee.

ORR, Judge.

The County argues four errors on appeal. For the following reasons, we hold that the Property Tax Commission (hereinafter the Commission) did not err in dismissing the County's appeal and therefore affirm its order of 2 March 1990.

The standard of review of a decision of the Property Tax Commission is under N.C. Gen. Stat. § 105-345.2 (1989). *In re McElwee*, 304 N.C. 68, 74, 283 S.E.2d 115, 119 (1981). This procedure for review is the same as that under the Administrative Procedure Act, Chapter 150B (formerly Chapter 150A). *Id.* Under § 105-345.2,

> The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> . . . .

> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; . . . .

N.C. Gen. Stat. § 105-345.2(b) (1989).

On appeal, our review is limited to a determination of whether the decision is supported by substantial evidence, in view of the "entire record" as submitted. N.C. Gen. Stat. § 105-345.2(b) (1989); *see* N.C. Gen. Stat. § 150B-51 (1987); *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). This Court is not permitted to replace the Commission's judgment with its own when there are two reasonably conflicting views, although it could have reached a different decision upon *de novo* review. 292 N.C. at 410, 233 S.E.2d at 541. Further, the credibility of the witnesses and resolution of conflicting testimony is a matter for the administrative agency to determine. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300-01 (1980). In this context, substantial evidence is more than a scintilla or permissible inference; it is relevant evidence adequate to support a conclusion. *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citations omitted).

With these general principles in mind, we now turn to the case *sub judice*. The dispositive issue on appeal is whether there is substantial evidence to support the Commission's findings and conclusions that under the applicable statutes the County was not entitled to more than 30 days to file its notice of appeal to the Commission. We hold that the evidence supports the Commission's findings and conclusions.

We note at the outset that there is no inherent right to an appeal from an administrative agency's decision unless a statute grants the right to appeal. *In re Vandiford*, 56 N.C. App. 224, 227, 287 S.E.2d 912, 914 (1982). Such appeal must conform to the statutes granting the right of appeal and regulating the procedures. *In re Employment Security Com.*, 234 N.C. 651, 68 S.E.2d 311 (1951).

Generally, the method and time allowances for direct appeals from administrative agencies to the appellate division are found in Rule 18 of the N.C. Rules of Appellate Procedure. Under this rule:

> (a) General. Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right

from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) Time and Method for Taking Appeals.

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 *unless the statutes governing the agency provide otherwise, in which case those statutes shall control.*

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency.

N.C. App. R. 18 (emphasis added).

The County argues that it should have 30 days plus three days to file its appeal under two theories: Rule 18(b)(2) allows 30 days from its receipt of the decision (12 December 1989) because there are no statutes which "provide otherwise" under Rule 18(b)(1), and secondly Rule 27(b) of the N.C. Rules of Appellate Procedure allows additional time when notice is served by mail. We disagree.

First, under Rule 18(b)(1), there are "statutes governing the agency [which] provide otherwise." The method and time allowances for appeals from the Property Tax Commission are found under N.C. Gen. Stat. § 105-345 (1985). Under this statute:

(a) No party to a proceeding before the Property Tax Commission may appeal from any final order or decision of the Commission unless within 30 days after the entry of such final order or decision the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

. . . .

> (d) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

N.C. Gen. Stat. § 105-345 (1985).

Pursuant to subsection (d) above, N.C. Gen. Stat. § 7A-29 (1986) provides that "appeal as of right lies directly to the Court of Appeals" from a final decision or order by the Property Tax Commission under G.S. § 105-290 and § 105-342. This subsection, however, does not permit a party to circumvent the manner in which appeals are taken under subsection (a) of § 105-345 by relying on Rule 18(b)(2) of the N.C. Rules of Appellate Procedure or other state or federal rules of civil procedure. Therefore, we find that the appropriate analysis for the time for taking such appeal lies in § 105-345.

The above language in subsection (a) clearly establishes the time for filing an appeal from the final order or decision of the Commission: the appealing party has 30 days after the *entry* of the final order or decision to file its notice of appeal and exceptions. This is the language which "provide[s] otherwise" under Rule 18(b)(1) and therefore "shall control." Under Rule 18(b)(2), the time to file notice of appeal runs from a party's *receipt* of a copy of the final order, not *entry* of judgment as specified in § 105-345.

Second, the County argues that Rule 27(b) of the N.C. Rules of Appellate Procedure allows an additional three days in which to appeal after a party is served by mail. Under the rule:

> Whenever a party has the right to do some act or take some proceedings within the prescribed period after the *service* of a notice or other paper upon him, and the notice or paper is served by mail, three days shall be added to the prescribed period.

N.C. App. R. 27(b). (Emphasis added.)

The County is correct in its analysis of this rule to the extent that what triggers a three-day extension is the *service* of a notice or other paper whenever a party has the *right* to do some act. Under § 105-345, the controlling statute, what triggers the time limitations for giving notice of appeal is the *entry* of the final order or decision. Service is not required by the statute. Therefore, Rule 27(b) is inapplicable in the present case.

Likewise, Rule 58 of the N.C. Rules of Civil Procedure is inapplicable. Under Rule 58, when judgment is not rendered in open court, entry occurs when "an order for the entry of judgment is received by the clerk . . . , the judgment is filed, and the clerk mails notice of its filing to all parties." In the present case, N.C. Gen. Stat. § 105-290 controls appeals to the Property Tax Commission, including entry of judgment. Under this statute:

> (b) Appeals from Appraisal and Listing Decisions.—It shall be the duty of the Property Tax Commission to hear and to adjudicate appeals from decisions made by county boards . . . , whether the decisions be made by such a board upon appeal from the tax supervisor or upon such a board's own motion.
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> . . . .
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> (3) On the basis of the findings of fact and conclusions of law . . . , the Property Tax Commission *shall enter an order* (incorporating the findings and conclusions) . . . . A certified copy of the order shall be delivered to the appellant . . . .

N.C. Gen. Stat. § 105-290(b)(3) (1985) (emphasis added).

In the case *sub judice*, the Commission followed § 105-290(b)(3). In its order dated 2 March 1990, the Commission made the following findings and conclusions to which the County excepts:

> 1. The Final Decision of the Commission in this matter was entered on 8 December 1989.
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> 2. Copies of the said Final Decision were placed in the care of the United States Postal Service, properly addressed to counsel for the Taxpayer and counsel for Mecklenburg County, on 8 December 1989.
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> . . .
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> Based upon its findings of fact set forth above, the Commission makes the following conclusions of law:
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> . . .
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> 5. The Commission concludes as a matter of law that the time for taking appeal from a final decision of the Commission is governed by North Carolina Rules of Appellate Procedure 18,

and by G.S. 105-345. In this particular instance, the time of taking such an appeal is also affected by the provisions of G.S. 105-395.1.

. . .

7. The Commission concludes as a matter of law that the time and method for taking an appeal from any decision of the Commission is set forth in G.S. 105-345. G.S. 105-345(a) provides: "[n]o party to a proceeding before the Property Tax Commission may appeal from any final order or decision of the Commission unless within *30 days after the entry* of such final order or decision the party aggrieved by such decision shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission." Emphasis added.

There is evidence to support these findings and conclusions. At the hearing, Bartley McLean, Jr., counsel for the Commission, testified that in accordance with normal procedure, the final decision was signed by the Chairman prior to 8 December; the decision was dated and mailed on 8 December to ensure that the date shown is the date of entry; and he (McLean) signed a transmittal letter to the parties dated 8 December and personally observed the decision and letter placed "in the place where we generally put mail for pickup by the Department of Revenue's mail carriers [who routinely pick up mail, take it back to the mail room at Revenue and place it in the United States mail service]." McLean further testified that the Commission does not stamp orders and decisions with a date stamp the same as it does other correspondence, and that a "decision is not considered filed and entered until it is dated [which is] . . . the last act prior to it being copied and mailed." We note that 8 December 1989 was a Friday, and that no other action could have been taken by the Commission after placing the order in the mail on that date. Otherwise, respondent would not have received its copy of the order on Monday, 11 December 1989.

Further, the decision states, "*Entered* this the 8th day of December, 1989." (Emphasis added.) Based upon the evidence, we hold that the Commission entered its decision on 8 December 1989.

The 30-day period in which to file an appeal under § 105-345 must then be calculated from 8 December 1989. Such calendar period runs to 7 January 1990, a Sunday. Under § 105-395.1, which applies to the prescribed time period in § 105-345, "When the last day for doing an act required or permitted by this Subchapter falls on a Saturday, Sunday, or holiday, the act is considered to be done within the prescribed time limit if it is done on the next business day." The next business day was Monday, 8 January 1990. This was the last day under the statute that the County could have filed timely notice of appeal.

It is undisputed that the County filed notice of appeal on 10 January 1990. Therefore, we hold that under § 105-345, the County's notice of appeal was not timely, and that the Commission did not err in dismissing the County's appeal. Our holding in the present case is consistent with other cases in this jurisdiction concerning the timeliness of filing notice of appeal of administrative decisions. *In re Browning*, 51 N.C. App. 161, 275 S.E.2d 520 (1981) (appeal from decision of the Employment Security Commission); *Fisher v. E. I. Du Pont De Nemours*, 54 N.C. App. 176, 282 S.E.2d 543 (1981) (Industrial Commission appeal). Further, we are required to resolve any conflicts between the controlling statute and the Rules of Civil Procedure in favor of the statute. *See In re Smith v. Daniels International*, 64 N.C. App. 381, 307 S.E.2d 434 (1983).

For the above reasons, we hold that there is substantial evidence to support the Commission's findings and conclusions and affirm the Commission's order dismissing the County's appeal.

Affirmed.

Judges PHILLIPS and GREENE concur.

IRVIN FRANK HILL v. HANES CORPORATION AND AETNA LIFE AND CASUALTY INSURANCE COMPANY

No. 8910IC1118

(Filed 5 March 1991)

Master and Servant § 77.1 (NCI3d)— disabling depression—change of condition—modification of award proper

Pursuant to N.C.G.S. § 97-47 the Industrial Commission could modify its previous award for total disability, which had been made on the basis of findings and conclusions that plaintiff suffered a fall resulting in permanent partial disability to both legs and ultimately resulting in depression which rendered him totally disabled, since the earlier award was limited to the period of plaintiff's disabling depression, and subsequently, evidence indicated that plaintiff's depression was no longer of disabling severity in that he was able to mow his lawn, fix his car, seed a lawn, shop for and carry groceries, perform certain home repairs, maintain an extramarital affair, wash his car, drive on a regular basis, and perform other activities inconsistent with his statements with regard to depression.

Am Jur 2d, Workmen's Compensation §§ 340, 591, 597.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from the Opinion and Award of the Industrial Commission entered 24 July 1989. Heard in the Court of Appeals 1 May 1990.

William Z. Wood, Jr., for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by Nancy R. Hatch, for defendant appellees.

COZORT, Judge.

Plaintiff appeals from the Industrial Commission's 24 July 1989 award modifying an award entered 23 October 1984. We affirm.

"Appellate review of opinions and awards of the Industrial Commission is strictly limited to the discovery and correction of *legal* errors." *Godley v. County of Pitt*, 306 N.C. 357, 359, 293 S.E.2d 167, 169 (1982) (emphasis in original). With this standard

of review in mind, we turn to the pertinent procedural history of the case below.

In the Opinion and Award filed 2 December 1983, Deputy Commissioner William L. Haigh of the North Carolina Industrial Commission found that the plaintiff was injured by a fall on 12 March 1979 and was first treated by Dr. Gunn, the medical director of plaintiff's employer. The Opinion and Award also made the following findings of fact:

> 4. He was also seen by Dr. Griffin who referred him to Dr. Jackson for evaluation of lower extremity weakness. Dr. Jackson examined him on 10-9-79 and hospitalized him on October 11 for myelogram. On October 12, he was seen by Dr. Ernesto Le [*sic*] La Torre on referral from Dr. Jackson. On myelogram, plaintiff had complete obstruction at T9-T10 and he thereafter underwent bilateral exploratory laminectomy with decompression of arachonodial adhesions and blockage by Dr. Le [*sic*] La Torre. He was thereafter seen in follow-up by Drs. Jackson and De La Torre and has been evaluated by other physicians for complaints related to his lower extremities.
>
> 5. As of 11-1-80, plaintiff's physical condition stabilized and by said date, he reached maximum medical improvement physically. His physical condition has remained essentially unchanged since that date. As a result of the injury by accident giving rise hereto, he sustained 20% permanent partial disability of each leg upon the basis of numbness, sensory deficit, absence of reflexes and weakness thereof. He did not sustain any permanent partial disability of the back as a result of said injury by accident.
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> * * * *
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> 8. On 11-8-82, he came under the care of Dr. Branham, a psychiatrist, and has since then remained under his treatment, including anti-depressant medications, for depression. As a result of the injury by accident giving rise hereto and the attendant residuals in his lower extremities and his inability to work, he experienced stress which at least by 11-8-82 resulted in depression and rendered him totally disabled. Although he has improved on treatment, he continues to experience sleep disturbance, difficulty in concentration, accentuation of pain, psychomotor slowing, sexual dysfunction, and

> con[s]triction of interest by reason of said stress induced depression and he remained totally disabled thereby through 9-16-83 when last examined by Dr. Branham. The credible evidence of record fails to establish that said depression was of disabling severity prior to 11-8-82.

Based on those findings, Deputy Commissioner Haigh concluded that the "plaintiff has experienced stress induced depression which rendered him totally disabled from 11-8-82 up through and including 9-16-83 and he is entitled to compensation therefor at the rate of $156.79 per week for said period and thereafter for so long as he remains so disabled. G.S. 97-29." The award included the following principal component:

> 1. Subject to counsel fee hereinafter allowed and subject to any credit to which defendants are entitled by reason of compen[s]ation benefits already paid to him, defendants shall pay compensation to plaintiff at the rate of $156.79 per week for the following periods: from 3-27-79 to 4-11-79; from 7-10-79 to 11-1-80; from 11-1-80 for a period of 80 weeks; and from 11-8-82 up through 9-16-83 and thereafter for so long as he remains totally disabled.

The defendants appealed, and on 23 October 1984 the Full Commission affirmed the Opinion and Award.

The defendants then appealed to this Court. While that appeal was pending, the defendants filed a motion pursuant to Rule 60(b)(2) and (6) of the North Carolina Rules of Civil Procedure for relief from the Commission's award. The defendants also filed a motion pursuant to N.C. Gen. Stat. § 97-47 (1985) requesting that the Commission schedule "further hearings to determine the change in condition." This Court affirmed the Commission and denied the defendants' Rule 60(b) motion. *Hill v. Hanes Corp.*, 79 N.C. App. 67, 79, 339 S.E.2d 1, 8, *disc. review allowed*, 316 N.C. 376 (1986), *aff'd in part and vacated in part*, 319 N.C. 167, 353 S.E.2d 392 (1987). The defendants appealed.

On the merits of the appeal, the Supreme Court affirmed the Court of Appeals, holding that the "Commission's findings support its conclusions which, in turn, support its award. There are no double payments for the same injury and no inconsistencies in its order." *Hill v. Hanes Corp.*, 319 N.C. 167, 177, 353 S.E.2d 392, 398 (1987). As to the Rule 60(b) motion, the Court vacated this

Court's denial of that motion and remanded it "to the Industrial Commission for initial determination." *Id.* at 169, 353 S.E.2d at 394. On 14 December 1987, the Commission denied the defendants' Rule 60(b) motion and allowed their motion "for a new hearing concerning a change in the condition of the plaintiff" pursuant to N.C. Gen. Stat. § 97-47.

On 12 September 1988, after a hearing the previous June, Deputy Commissioner Morgan S. Chapman entered an Opinion and Award containing the following pertinent findings of fact:

> 3. Since the original Opinion and Award was filed, plaintiff alleges that he has remained extremely depressed and that his condition has not improved. His allegations are not accepted as credible. As of April 19, 1985 his observed activities were contrary to his testimony and his statements to Dr. Branham, the psychiatrist who had been treating him. In that the doctor's opinions regarding plaintiff's condition were based upon misrepresentations made to him by plaintiff, the opinions are not credible. Plaintiff was able to mow his lawn, fix his car, seed a lawn, shop for and carry groceries, perform certain home repairs, maintain an extramarital affair, wash his car, drive on a regular basis and perform other activities inconsistent with his statements.
>
> 4. As of April 19, 1985 plaintiff reached maximum medical improvement. He was no longer disabled by reason of the depression from which he had previously suffered. Defendants did not prove that his condition had improved prior to that date to the extent that he was no longer disabled.
>
> * * * *
>
> 6. Defendants were ordered to continue payments to plaintiff for temporary total disability following September 16, 1983 for so long as his disability continued, but the period of such disability was not determined prior to this Opinion and Award.

Based on those findings, Deputy Commissioner Chapman concluded that the plaintiff was "entitled to recover compensation in the amount of $156.79 per week for 82 and 6/7 weeks for the additional temporary total disability he sustained as the result of this injury by accident for the period from September 17, 1982 through April 18, 1985." Item No. 3 in the award ordered payment of compensation in accordance with that conclusion. On 24 July 1989, the Full

Commission affirmed and adopted as its own the Opinion and Award of September 1988.

On appeal the plaintiff brings forth seven assignments of error. We elect to discuss only the third by which plaintiff contends that, based on the evidence before it, the Commission was not authorized under N.C. Gen. Stat. § 97-47 to modify its previous award of 23 October 1984. We disagree.

N.C. Gen. Stat. § 97-47 provides in pertinent part that "[u]pon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . ." A change " 'in the degree of permanent disability is a change in condition within the meaning of G.S. 97-47.' " *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 103, 296 S.E.2d 456, 458 (1982) (quoting *West v. Stevens Co.*, 12 N.C. App. 456, 461, 183 S.E.2d 876, 879 (1971)).

In its original Opinion and Award of October 1984 the Commission found that the plaintiff had "sustained 20% permanent partial disability of each leg" and that, as an ultimate result of his physical injuries, "he experienced stress which at least by 11-8-82 resulted in depression [which] rendered him totally disabled." The Commission concluded that the plaintiff's "stress induced depression" entitled him to total disability compensation "*for so long as he remains so disabled.*" (Emphasis added.) Thus, the Commission's award for total disability was limited to the period of plaintiff's disabling depression.

In September 1988, the Commission found that, at least by 19 April 1985, plaintiff's depression was no longer of disabling severity. Specifically, as noted above, the Commission found that the plaintiff "was able to mow his lawn, fix his car, seed a lawn, shop for and carry groceries, perform certain home repairs, maintain an extramarital affair, wash his car, drive on a regular basis and perform other activities inconsistent with his statements" to both his psychiatrist, Dr. Branham, and the Commission and that the severity of his depression was unchanged. In the testimony of four witnesses heard by the Commission on 8 June 1988, as well as plaintiff's responses to defendants' interrogatories there is ample evidence to support the Commission's findings; therefore,

they must be sustained on appeal. *Hill v. Hanes Corp.*, 319 N.C. 167, 172, 353 S.E.2d 392, 395.

Plaintiff correctly observes that Dr. Branham testified upon oral deposition in March 1988 that, in his opinion, the severity of plaintiff's depression is substantially unchanged and that Dr. Branham does not "feel that [the plaintiff] is able to function well enough emotionally to work." Dr. Branham conceded that his opinion of the plaintiff's condition is based almost exclusively on the plaintiff's statements and that, although he perceived the plaintiff as truthful, "if the person were lying then there may be—you might be less accurate in what's going on with the person." Although Dr. Branham's testimony could support findings contrary to those made by the Commission, the Commission's findings are supported by competent evidence and must be sustained. " '[C]ourts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached.' " *Hill v. Hanes Corp.*, 319 N.C. at 172, 353 S.E.2d at 395 (quoting *Rewis v. Insurance Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946)).

Plaintiff notes that defendants did not introduce any medical evidence concerning a change in plaintiff's psychological condition. He implies that such evidence is required in order for the Commission to find a change in condition pursuant to N.C. Gen. Stat. § 97-47. However, plaintiff cites no authority for that proposition, and we decline to adopt it. Accordingly, plaintiff's assignment of error is overruled.

We have reviewed plaintiff's remaining assignments of error and find them to be without merit.

The Commission's Opinion and Award of 24 July 1989 is

Affirmed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the evidence of record does not support the Commission's findings that plaintiff's condition has changed and

he is no longer totally disabled as earlier determined. The Commission apparently proceeded under the impression that it was incumbent upon plaintiff to show that his condition had not changed and he was still totally disabled, whereas defendant had the burden of showing that plaintiff's condition had changed and he was not totally disabled. No evidence was presented either as to any change in plaintiff's condition or his employability. The random activities that the Commission found plaintiff had engaged in do not support its conclusion that plaintiff is able to obtain a job and work regularly at it.

The only change that the record reveals is in the Commission's appraisal of plaintiff's credibility, which is not the kind of change that permits the Commission to modify a previous adjudication under the provisions of G.S. 97-47.

AMOS A. ESTES v. NORTH CAROLINA STATE UNIVERSITY

No. 8910IC767

(Filed 5 March 1991)

Master and Servant § 69 (NCI3d)— workers' compensation— temporary total disability—no setoff for vacation and sick leave benefits

Defendant employer was not entitled under N.C.G.S. § 97-42 to a credit or setoff against a temporary total disability award for accumulated compensatory time, vacation and sick leave benefits paid to plaintiff during the period of his disability since defendant had accepted plaintiff's injury as compensable and the benefit payments were thus due and payable when made; the benefits did not constitute a wage replacement program tantamount to workers' compensation; and the benefits were not duplicative of workers' compensation.

Am Jur 2d, Workmen's Compensation §§ 364, 365.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 3 May 1989. Heard in the Court of Appeals 7 December 1989.

Gene Collinson Smith for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by George W. Lennon of Monroe, Wyne, Atkins & Lennon, P.A., for defendant-appellant.

PARKER, Judge.

On the first appeal of this case, this Court affirmed the award of workers' compensation benefits to plaintiff but remanded for determination of the issue now before the Court on this appeal, namely, whether defendant is entitled pursuant to N.C.G.S. § 97-42 to a credit against the award for benefits paid to plaintiff from his accrued vacation and sick leave benefits. *Estes v. N.C. State University*, 89 N.C. App. 55, 365 S.E.2d 160 (1988). At the initial hearing before the Industrial Commission, the Commission awarded plaintiff temporary total disability benefits in the amount of $262.00 per week for the period from the date of the accident, 21 September 1984, through 15 August 1985. The Commission awarded permanent partial disability benefits in the amount of $262.00 per week for ninety-five weeks commencing 15 August 1985.

Defendant is self-insured and follows the policies in the Personnel Manual of the Office of State Personnel in paying workers' compensation benefits. As stated in the Personnel Manual, the policies in effect at the time of plaintiff's injury gave injured employees three options in receiving such benefits:

> (a) When an employee is injured on the job . . . . One of the following options may be chosen:
>
> (1) Option 1—Take accumulated sick and vacation leave, or any portion of either, and then go on workers' compensation leave and begin drawing workers' compensation.
>
> (2) Option 2—Take sick or vacation [leave] during the seven-day waiting period and then go on workers' compensation leave and begin drawing workers' compensation.
>
> (3) Option 3—Go immediately on workers' compensation leave and begin drawing workers' compensation after the seven-day waiting period. In this case, if the injury results in disability of more than 28 days, the compensation shall be allowed from the date of disability.

(b) In all cases, unused leave may be retained for future use.

Note: If an employee has over 240 hours of vacation leave at the time an injury occurs, depending on the nature and time of the injury and the anticipated time out of work, he/she should be advised to exhaust leave in excess of the 240 hours—particularly if the injury occurs late in the year when it would possibl[y] cause a loss of vacation at the end of the year.

N.C. Admin. Code tit. 25, r. 01E.0700 (Mar. 1984). The evidence is conflicting as to whether plaintiff was fully aware of the above options and whether he specifically elected to take Option 1. The facts are undisputed, however, that plaintiff requested that his overtime and vacation time in excess of 240 hours be used first; that he did not request workers' compensation; and that he received his full salary, based entirely on his accumulated vacation and sick leave, until he retired on 30 November 1985. Defendant has paid plaintiff's injury-related medical bills, and defendant does not claim a credit or setoff against the permanent partial disability award.

On remand the full Commission concluded that pursuant to N.C.G.S. § 97-42 and in accordance with *Foster v. Western Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), and *Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E.2d 844 (1986), defendant was entitled to a setoff or credit, against temporary total disability benefits claimed, for the vacation and sick leave benefits paid. Based on its findings of fact and conclusions of law, the Commission held plaintiff was not entitled to be paid any temporary total disability benefits, as the benefits already paid him exceeded the benefits he claimed.

N.C.G.S. § 97-42 reads as follows:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment.

The Commission found as facts, *inter alia*, that

1. Plaintiff was injured by accident in the course and scope of his employment on September 21, 1984. The injury was accepted as compensable by the self-insured employer, North Carolina State University[,] and a Form 19 was filed with the Industrial Commission.

. . . .

6. The regulation at issue in the State Personnel Manual operated as a wage-replacement program tantamount to Workers' Compensation providing a much-needed continuity of income to injured employees at the time of their greatest need.

7. The amount paid Plaintiff, at his election, by N.C. State University during the period of Plaintiff's temporary total disability considerably exceeded the Workers' Compensation temporary total disability benefits Plaintiff would have received in the absence of the regulation at issue. The payments made by the employer to the employee during the period of his disability by the terms of the Act were not due and payable when made.

The Commission concluded as a matter of law that

1. Payments made by N.C. State University to Plaintiff during the period of his temporary total disability by the terms of Article 97 of the General Statutes of North Carolina were not due and payable when made and may, subject to the approval of the Industrial Commission, be deducted from the amount to be paid as compensation.

2. The regulation at issue and payments made pursuant to Plaintiff's election during the period of his temporary total disability served as a wage-replacement program tantamount to Workers' Compensation to provide Plaintiff wage-replacement benefits at the time of his greatest need and exceeded the amount determined by statute as compensation to Plaintiff for his temporary total disability.

3. Pursuant to G.S. 97-42, in the discretion of the Full Industrial Commission, and in accordance with the decisions of the North Carolina Supreme Court in *Foster v. Western Electric Company*, 320 N.C. 113, 357 S.E.2d 670 (1987) and *Moretz v. Richards & Associates, Inc.*, 316 N.C. 539, 342 S.E.2d

844 (1986), the self-insured Defendant is entitled to a set-off or credit of the wage-replacement benefits paid pursuant to regulation and the election of Plaintiff against any amount of temporary total disability benefits Plaintiff now claims.

4. The benefits already paid to Plaintiff by North Carolina State University exceed the benefits claimed and Defendant therefore owes Plaintiff no additional compensation. Plaintiff is not entitled to a double recovery for the same disability.

Plaintiff excepted to findings six and seven and to all four conclusions of law.

We agree with plaintiff's contentions that there is no competent evidence to support the Commission's finding that Option 1 operated as a wage-replacement program tantamount to workers' compensation and that the Commission erred in concluding as a matter of law that the payments were not due and payable under the Workers' Compensation Act when paid for purposes of a setoff or credit pursuant to N.C.G.S. § 97-42. Guided by *Foster* and *Moretz*, we hold the Commission erred in concluding benefits paid to plaintiff exceeded benefits claimed.

The issue in *Foster* was whether an employer was entitled to a credit or setoff under N.C.G.S. § 97-42 for payments made to employees under a disability and sickness plan. *Moretz* dealt with payments by the workers' compensation carrier before liability was determined which resulted in overpayment of workers' compensation benefits. Under the reasoning of both cases, an employer's entitlement to a credit is governed in the first instance by the determination of whether the payments for which the employer seeks credit were due and payable when made. *Foster*, 320 N.C. at 115, 357 S.E.2d at 672; *Moretz*, 316 N.C. at 541, 342 S.E.2d at 846.

In *Foster*, the employer contended from the date of injury that plaintiff's injury was not compensable under the Workers' Compensation Act. Instead, the employer paid the plaintiff benefits for his injury from a private disability and sickness benefit plan. All payments were made to the plaintiff prior to any determination by the Commission of whether the injury was in fact compensable under the Workers' Compensation Act. After the Commission determined plaintiff was entitled to be compensated for his injury, the employer moved that the Commission allow, as against the award of workers' compensation benefits, a credit for payments made

under the disability and sickness benefit plan. *Foster*, 320 N.C. at 114, 357 S.E.2d at 671-72.

In allowing a credit, the Supreme Court reasoned that the defendant employer contested compensability at the time payments were made to the employee under the sickness and disability plan; and the Industrial Commission had not determined plaintiff's injury to be compensable. *Id.* at 115, 357 S.E.2d at 672. "Under the analysis of *Moretz*, then, payments made by defendant pursuant to the plan [could not] be characterized as due and payable. Because they were not due and payable when made, the payments remain[ed] within the purview of 97-42." *Id.* at 115-16, 357 S.E.2d at 672. Hence, the Court held a credit should be awarded. *Id.* at 118, 357 S.E.2d at 673.

Under *Moretz*, however, even where it is determined that payments were due and payable when made and no credit should be awarded, an employer will not be required to make duplicative payments of benefits payable under the Workers' Compensation Act. In *Moretz*, the employer paid the employee temporary total disability for 362 weeks. Subsequently, the Commission determined that the plaintiff employee was also entitled to 180 additional weeks of permanent partial disability. The employer appealed to the Commission, arguing that the award of 180 additional weeks of benefits effectively gave plaintiff a double payment and that the Commissioner's refusal of a credit for benefits already paid was in error. *Moretz*, 316 N.C. at 540, 342 S.E.2d at 845-46. On appeal, our Supreme Court held that since the employer accepted plaintiff's claim as compensable and began paying benefits, those benefits were due and payable within the meaning of N.C.G.S. § 97-42 and thus no credit should be allowed. *Id.* at 542, 342 S.E.2d at 846. However, the Court went on to say that since plaintiff was entitled to only 180 weeks of permanent partial disability payments but had received nearly 255 weeks of disability payments, plaintiff had already received more than he was entitled by statute to receive. *Id.* Therefore, the court reasoned, plaintiff had been fully compensated for his injury, and the defendants owed him no additional compensation. *Id.*

In the present case, the Commission found as a fact that defendant had accepted the injury as compensable. Plaintiff was offered the option of receiving workers' compensation benefits or utilizing his accumulated compensatory time, vacation, and sick

leave. Thus it was clearly established that defendant did not dispute plaintiff's injury was work-related and compensability was not contested.

Under *Foster* and *Moretz*, "due and payable" in N.C.G.S. § 97-42 asks only whether the employer has accepted the employee's injury as compensable under the Workers' Compensation Act at the time the benefits were paid to him. Under this analysis, the payments made to plaintiff in the instant case were due and payable when made. Thus they do not fall within the purview of N.C.G.S. § 97-42, and no credit should be allowed.

Nevertheless, where a credit is not allowed, *Moretz* requires an additional determination as to whether an employee would thereby receive more than he is entitled by statute to receive. The case at bar is distinguishable from *Moretz*, wherein the payments were workers' compensation benefits paid by the workers' compensation insurance carrier. The real question in the case now before the Court is whether the accumulated sick and vacation leave paid to plaintiff may lawfully be used by defendant to offset any amount of temporary total disability determined by the Industrial Commission to be owing to plaintiff under the Workers' Compensation Act. We hold defendant is not entitled to use such leave to offset its obligations as determined by the Commission. Under N.C.G.S. §§ 97-6 and -7, employers including the State are prohibited from providing benefits in lieu of paying workers' compensation. *Estes v. N.C. State University*, 89 N.C. App. at 59, 365 S.E.2d at 162.

In the instant case, plaintiff received benefits based on his accumulated compensatory time, vacation and sick leave. Compensatory time was something plaintiff had earned but had not been paid for. His vacation time was also a benefit that he had earned. *See* N.C. Admin. Code tit. 25, r. 01E.0203 (1984) (vacation is based on length of total permanent state service). Unlike workers' compensation benefits, vacation leave can be taken to renew physical and mental capabilities, for personal reasons, for absences due to adverse weather conditions, and for personal illness or illnesses in the immediate family. N.C. Admin. Code tit. 25, r. 01E.0201 (1984). Workers' compensation, however, is available only for a work-related injury.

Sick leave for state employees may be used for illness or injury which prevents an employee from performing usual duties or may be used for family illness or death in the family. *See* N.C.

Admin. Code tit. 25, r. 01E.0304 and .0305 (1984). Thus using sick leave is not tantamount to a workers' compensation claim and not tantamount to receiving workers' compensation benefits.

Such benefits have nothing to do with the Workers' Compensation Act and are not analogous to payments under a disability and sickness plan. Unlike the employee in *Moretz*, plaintiff in the instant case cannot be held to have received duplicative payments for his injury or to have received more than he was entitled by the Workers' Compensation Act to receive.

For the reasons set forth herein, the decision of the Commission is reversed and the matter remanded for reinstatement of plaintiff's claim for temporary total disability benefits.

Reversed and remanded.

Judges EAGLES and ORR concur.

METRIC CONSTRUCTORS, INC. v. INDUSTRIAL RISK INSURERS AND CAPITAL STOCK COMPANIES

No. 9021SC429

(Filed 5 March 1991)

1. **Insurance § 6 (NCI3d)— action to determine beneficiary— failure to list plaintiff in policy**

The trial court erred by granting summary judgment for plaintiff in an action to determine the beneficiary under an insurance policy where, although plaintiff argued that the failure to list it on the policy was an oversight, the policy is not ambiguous and does not include plaintiff on the list of insureds. Any other construction would amount to an impermissible judicial revision of the insurance policy.

Am Jur 2d, Insurance § 1701.

2. **Contracts § 118 (NCI4th)— action to determine insurance beneficiary—third party beneficiary**

Plaintiff failed to allege sufficient facts to support one of the required elements of a third party beneficiary claim

in an action to determine an insurance beneficiary where plaintiff's allegation in the complaint that the defendants provided insurance for the protection of North Carolina Baptist Hospital/Bowman Gray School of Medicine, the general contractor, and the subcontractors, and the plaintiff's allegation in its amended complaint that it was otherwise entitled to protection under said insurance policies, were not sufficient factual allegations that the policy was entered into for the plaintiff's direct, and not incidental, benefit.

Am Jur 2d, Contracts §§ 441-448.

3. **Pleadings § 10.1 (NCI3d)— action to determine insurance beneficiary—affirmative defense—failure to raise**

Defendants did not waive their right to argue that the plaintiff was not an insured or a beneficiary in an action to determine an insurance beneficiary by failing to raise the matter as an affirmative defense in their answer because the defense that plaintiff is not an insured or beneficiary under the insurance policy does not assume or admit the original cause of action, rather it challenges the validity of the action itself.

Am Jur 2d, Insurance §§ 1916, 1917; Pleading § 153.

Judge PHILLIPS dissenting.

APPEAL by defendants from judgment filed 21 February 1990 in FORSYTH County Superior Court by *Judge James J. Booker.* Heard in the Court of Appeals 28 November 1990.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers, for plaintiff-appellee.

Rodney A. Dean, by Rodney Dean and Michael G. Gibson, for defendant-appellants.

GREENE, Judge.

The defendants appeal the trial court's judgment filed 21 February 1990 granting the plaintiff's motion for summary judgment and denying the defendants' motion for summary judgment.

The dispositive facts of this case are as follows: In July 1983, the defendants issued a comprehensive all risk insurance policy to North Carolina Baptist Hospitals [NCBH]. The insurance policy

does not list the plaintiff by name or otherwise as an insured or a beneficiary.

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[1] The issue is whether the trial court erred in granting summary judgment for the plaintiff where the plaintiff failed to show it was an insured or a beneficiary under the insurance policy.

"Summary judgment is proper where pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law." *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 4, 367 S.E.2d 372, 374 (1988), *modified*, 324 N.C. 289, 378 S.E.2d 21 (1989). "[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). When the plaintiff moves for summary judgment,

> he must establish that all of the facts on all of the essential elements of his claim are in his favor and that there is no genuine issue of material fact with respect to any one of the essential elements of his claim. In other words, the party must establish his claim beyond any genuine dispute with respect to any of the material facts.

Steel Creek Dev. Corp. v. James, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). "[T]he party with the burden of proof on the claim . . . must have evidence on each and every one of the essential elements of his claim . . . before he can get to the jury. If his proof is lacking on any one of those essential elements then he has not made out his claim . . . ." *Id.* at 638, 268 S.E.2d at 210. "If the movant fails to carry his burden, the opposing party does not have to respond and summary judgment is not proper regardless of whether he responds or not." *Id.* at 637, 268 S.E.2d at 210.

In actions for benefits arising from an insurance policy, "the burden is on the insured to show coverage." *Nationwide Mut. Ins.*

Co. v. McAbee, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966). By implication, the plaintiff who claims to be an insured or a beneficiary under the policy has the burden of showing that he is an insured or a beneficiary. According to our Supreme Court, it is a

> well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto. . . . It follows from this rule that those persons entitled to the proceeds of a life insurance policy must be determined in accordance with the contract. . . .
>
> In making such a determination, the intention of the parties controls any interpretation or construction of the contract, and intention must be derived from the language employed. . . . This Court has long recognized its duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used. . . . The duty is a solemn one, for it seeks to preserve the fundamental right of freedom of contract . . . . Only when the contract is ambiguous does strict construction become inappropriate.

Fidelity Bankers Life Ins. Co. v. Dortch, 318 N.C. 378, 380-81, 348 S.E.2d 794, 796 (1986) (citations omitted).

Here, the defendants argue that the plaintiff did not meet its initial burden of showing that it is an insured or a beneficiary under the policy. Though the plaintiff is not mentioned by name or otherwise in the insurance policy, the plaintiff argues that "[t]he failure to list Metric as an additional insured was apparently an oversight," and that both the defendants and NCBH intended the plaintiff to be covered by the policy. The plaintiff refers this Court to extrinsic evidence to support its position on intent, not to the language of the policy. However, the plaintiff does not argue that the policy is ambiguous as to the identity of the insured or of any beneficiary. Indeed, the policy is not ambiguous on who the insured is or on who is entitled to proceeds under it. The policy defines who is an insured under the policy, and the plaintiff is not included in the list. Likewise, the policy provides that "[u]nless otherwise provided herein, loss, if any, is to be adjusted with and payable to the Insured." Because the policy is not ambiguous, this Court must strictly construe the policy without resort to extrinsic evidence. Accordingly, we conclude from the insurance policy that the plaintiff has not shown itself to be an insured or a beneficiary

under the language of the policy. Any other construction would amount to an impermissible judicial revision of the insurance policy.

[2] As an alternate method of establishing a right to make a claim under the policy, the plaintiff argues that it "is entitled to make a claim as a third-party beneficiary of the policy." We do not reach the merits of this argument because the plaintiff failed to allege sufficient facts to support at least one of the required elements of a third-party beneficiary claim in its complaint.

> Under the 'notice theory' of pleading contemplated by Rule 8(a)(1) [of the North Carolina Rules of Civil Procedure], detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.
>
> . . . .
>
> However, . . . 'the claim for relief and the basis for defense must still satisfy the requirements of the substantive law which give rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim or of his defense.'

Sutton v. Duke, 277 N.C. 94, 104-05, 176 S.E.2d 161, 167 (1970) (citation omitted).

A plaintiff bringing suit on a third-party beneficiary theory states enough to give the substantive elements of the claim when the allegations in his complaint "show: '(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 River Steel Co. v. Cherry, Bekaert & Holland*, 79 N.C. App. 81, 86, 339 S.E.2d 62, 65 (1986), *rev'd on other grounds*, 322 N.C. 200, 367 S.E.2d 609 (1988) (quoting *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980)). Plaintiff's allegation in its complaint that the defendants provided insurance "for the protection of NCBH/BGSM, the general contractor, and subcontractors" and the plaintiff's allegation in its amended complaint that it "was other-

wise entitled to protection under said insurance policies" are not sufficient factual allegations that the policy was entered into for the plaintiff's direct, and not incidental, benefit.

[3] The plaintiff further argues that the defendants have waived any right to argue that the plaintiff is not an insured or a beneficiary because the defendants failed to raise the matter as an affirmative defense in their answer. This argument erroneously assumes that the absence of an element of the plaintiff's cause of action is an affirmative defense. "Defenses which assume or admit the original cause of the action alleged, but are based upon subsequent facts or transactions which go to qualify or defeat it, must be pleaded and proved by the insurer." 18A G. Couch, Couch Cyclopedia of Insurance Law § 76:158 (2d ed. 1983). Such defenses are affirmative defenses. The defense that the plaintiff is not an insured or a beneficiary under the insurance policy does not assume or admit the original cause of action, rather, it challenges the validity of the action itself. Therefore, whether the plaintiff is an insured or a beneficiary under the policy is not an affirmative defense and it need not have been pleaded as such.

Finally, the plaintiff argues that it may nonetheless make a claim under the policy because it "can recover as trustee for NCBH." Because the appellee cites no authority for this argument, it is deemed abandoned. N.C.R. App. P. 28(b)(5).

Having concluded that the plaintiff failed to meet its burden of showing an essential element of its claim, summary judgment in its favor was improper. Furthermore, the defendants' appeal of the denial of its summary judgment motion is dismissed because "the denial of a motion for summary judgment is a non-appealable interlocutory order." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 230 (1985); *see also Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983). Accordingly, the judgment of the trial court is

Vacated and remanded.

Judge ORR concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I do not agree that the record shows that plaintiff's claim is not covered by the policy involved. The policy in question is a builder's risk policy obtained for the manifest and stated purpose of protecting the owner and its builders against all risks to the properties affected by the owner's construction project. That plaintiff, an admitted subcontractor on the construction, is not named as an additional insured in the policy is immaterial. Naming the general contractor as an additional insured included by implication the subcontractors that the general contractor employed to do its work. That defendant understood this is shown by *inter alia* the testimony of their broker that the cost of the policy was the same whether a subcontractor was listed or not; the testimony of their adjuster, Snyder, that "we're saying that Metric's interests are covered"; by defendant paying the owner for a loss of plaintiff's that had the same standing under the policy as the one still disputed; and by defendant stating in its answer that it "was agreeable to paying" what it deemed the loss was upon "submission of a proof in proper form." The statement was a judicial admission that plaintiff's claim was covered by the policy, and that fact having been admitted, plaintiff did not have to prove it, though it did.

Nor do I agree that plaintiff's complaint does not adequately allege that it is a third-party beneficiary under the policy. Having alleged that the builder's risk policy was obtained for the protection of the owner, "the general contractor and subcontractors," and that it was a subcontractor on the construction project involved, any further allegation that it was a third-party beneficiary of the policy would have been a pointless redundancy. In my view the pleadings and the stipulated facts established plaintiff's claim as a matter of law and I would affirm the judgment.

ANTHONY GENE YATES, PLAINTIFF v. NEW SOUTH PIZZA, LTD., D/B/A DOMINOS PIZZA, DEFENDANT

No. 8921SC1014

(Filed 5 March 1991)

Torts § 3.1 (NCI3d)— negligent employee—settlement with employee—no right of action against employer—Uniform Contribution among Tort-Feasors Act inapplicable

Plaintiff who was injured in an automobile accident allegedly arising from the negligence of defendant's employee during the course of his employment was not entitled to recover against defendant employer under the Uniform Contribution among Tort-Feasors Act, since plaintiff settled his claim against the employee; he then brought this action against the employer under the theory of respondeat superior; an employer who is held liable under the doctrine of respondeat superior has the right to indemnity from his employee whose negligent acts gave rise to the employer's liability in the first instance; and pursuant to the Act, indemnification is not contribution, and indemnification rights are not affected by the Act. N.C.G.S. §§ 1B-1 through 1B-7.

Am Jur 2d, Master and Servant §§ 408, 409.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa. 92 ALR2d 533.

APPEAL by plaintiff from judgment entered 15 May 1989 by *Judge James A. Beaty, Jr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 4 April 1990.

Bruce C. Fraser for plaintiff-appellant.

David F. Tamer for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and James R. Morgan, Jr., for defendant-appellee.

PARKER, Judge.

Plaintiff appeals from a summary judgment entered for defendant. In this civil action arising out of the alleged negligent operation of an automobile, plaintiff seeks damages for personal injuries he

suffered in September 1985 when an automobile driven by defendant's employee, allegedly in the course of his employment, collided with the automobile in which plaintiff was a passenger. Plaintiff settled his claim against the employee on 26 August 1987 and instituted this action in August 1988. The written settlement agreement, entitled "Covenant Not to Sue," expressly purported to reserve plaintiff's right to proceed against defendant under the doctrine of respondeat superior. Defendant's answer to plaintiff's complaint denied negligence and asserted that plaintiff's settlement with the employee operated to release defendant from liability as a matter of law. Defendant moved for summary judgment on this same basis. In response to the motion plaintiff asserted in the trial court, as he does on appeal, that a release or covenant not to sue does not, under the Uniform Contribution among Tort-Feasors Act, N.C.G.S. §§ 1B-1 through 1B-7 (herein "the Act"), discharge other tort-feasors unless the terms of the agreement so provide. We disagree and affirm the judgment of the trial court.

At the outset, we note that our statute instructs that the Act should be interpreted and construed so as to make uniform the law of those states that have enacted the legislation. N.C.G.S. § 1B-5 (1983). Our research discloses, however, that among the states that have enacted either the 1939 or the 1955 version of the Act, no uniform position exists as to whether the release of an employee, agent or party primarily liable for a negligent act discharges the liability of the employer, principal or party secondarily liable for the negligent act. *See, e.g., Kinetics, Inc. v. El Paso Products Co.*, 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982) (release of party with direct liability discharges parties with vicarious liability because not joint tort-feasors within the Act); *Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524, 706 P.2d 845 (1985) (holding that a vicariously liable employer is a "tort-feasor" under the Act and that the provisions of the Act governing release agreements apply); *Mamalis v. Atlas Van Lines, Inc.*, 364 Pa. Super. 360, 528 A.2d 198 (1987), *aff'd*, 522 Pa. 214, 560 A.2d 1380 (1989) (holding that the concept of "joint tort-feasor" under the 1939 version of the Act does not apply to the vicarious liability of a principal based on the negligence of the agent); *Smith v. Raparot*, 101 R.I. 565, 225 A.2d 666 (1967) (master and servant are "joint tort-feasors" within the 1939 version of the Act); *Craven v. Lawson*, 534 S.W.2d 653 (Tenn. 1976) (holding that where indemnity governs the apportionment of loss between the tort-feasors, the release provisions

of the Act do not apply). A uniform application of the law in this area is further complicated by the adoption of comparative negligence in some of the states which have adopted the Act. In these jurisdictions the cases applying the Act reflect comparative negligence doctrines and considerations which are not a part of North Carolina's contributory negligence law. *See, e.g., Hoerr v. Northfield Foundry and Mach. Co.*, 376 N.W.2d 323 (N.D. 1985); *Horejsi by Anton v. Anderson*, 353 N.W.2d 316 (N.D. 1984).

In view of this split in authority, we decide the case before us on appeal solely on the basis of our case law and the construction of our contribution statute. The North Carolina Act states in pertinent part:

> (a) *Except as otherwise provided in this Article*, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, *there is a right of contribution* among them even though judgment has not been recovered against all or any of them.

N.C.G.S. § 1B-1(a) (emphasis added). Immediately following the above-stated provision acknowledging the right to contribution are provisions that more clearly define the limits of the right to contribution. Specifically, the statute provides that (i) the right to contribution exists only when a tort-feasor has paid more than his pro rata share; (ii) no right to contribution exists when the act of the tort-feasor was intentional; (iii) a tort-feasor who settles with a claimant is not entitled to contribution; and (iv) an insurer may, under certain conditions, succeed to the tort-feasor's right to contribution. N.C.G.S. § 1B-1(b), (c), (d), (e). This same section contains the following language:

> (f) This Article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

N.C.G.S. § 1B-1(f). Thus, when there is a right to indemnity from another tort-feasor, the Uniform Contribution among Tort-Feasors Act is inapplicable as there is no right to contribution. *Accord Craven v. Lawson*, 534 S.W.2d 653 (Tenn. 1976); *see also Edwards v. Hamill*, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964) (holding that the rights of contribution and indemnity are mutually incon-

sistent since the former assumes joint fault and the latter derivative fault).

Although it appears that the legislature intended the phrase in N.C.G.S. § 1B-1(f) to mean "where one tort-feasor is entitled to indemnity from another tort-feasor," the language of the statute is simply "where one tort-feasor is entitled to indemnity from another." Since the term "another" as used in the statute is ambiguous, we must apply principles of statutory construction "to ascertain the legislative will." *Young v. Whitehall Co.*, 229 N.C. 360, 367, 49 S.E.2d 797, 801 (1948). Where the meaning of a statute is in doubt, references may be had to the title and context of the act as legislative declarations of its purpose. *Sykes v. Clayton, Comr. of Revenue*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968). The title of the Act makes clear that the statute applies to "tort-feasors" and the context of the legislation indicates that it is concerned only with the apportionment of loss as between "tort-feasors"; therefore, the Act should not be read to speak to apportionment of loss by contract between a tort-feasor and a third party. *See also In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978) (holding that "[w]ords and phrases of a statute may not be interpreted out of context" and individual expressions should be construed as a part of the composite whole in accord with the clear intent and purpose of the act).

The release provisions of the contribution statute provide:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide . . . [.]

N.C.G.S. § 1B-4. Plaintiff argues that regardless of whether contribution or indemnity is available to apportion loss among the tort-feasors, the complainant's right to proceed against all tort-feasors arises under and is controlled by this statute and, thus, the release provisions of the statute allow him to proceed against defendant in the present case even though he settled with defendant's employee.

Chapter 1B of the General Statutes does not, however, create any new causes of action, but merely establishes a framework for

distributing loss among tort-feasors. Plaintiff's cause of action against defendant under the doctrine of respondeat superior for the alleged negligence of defendant's employee acting in the course of his employment arises under the common law. *See MacFarlane v. Wildlife Resources Com.*, 244 N.C. 385, 387, 93 S.E.2d 557, 559 (1956), *overruled on other grounds sub nom. Barney v. Highway Comm.*, 282 N.C. 278, 192 S.E.2d 273 (1972). Under this doctrine the master is liable derivatively for the employee's negligent actions. "If the act of the . . . employee is not negligent, or does not proximately cause the injury complained of, the master is not liable." *Hudson v. Oil Co.*, 215 N.C. 422, 427, 2 S.E.2d 26, 29 (1939). An employer who is held liable under the doctrine of respondeat superior has the right to indemnity from his employee, whose negligent acts gave rise to the employer's liability in the first instance. *Hendricks v. Fay, Inc.*, 273 N.C. 59, 159 S.E.2d 362 (1968). A third party who obtains a judgment against the employee may not bring a separate action against the employer liable solely under respondeat superior. *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E.2d 366, 141 A.L.R. 1164 (1942). Similarly, as plaintiff concedes, the common law of this State provides that the release of an employee also releases the employer from liability under the doctrine of respondeat superior. *Smith v. R.R.*, 151 N.C. 479, 66 S.E. 435 (1909) (master not a joint tort-feasor because not active participant in injury; hence released by servant's release); *see also MacFarlane v. Wildlife Resources Com.*, 244 N.C. at 387, 93 S.E.2d at 560 (where an injured person reached a settlement with the employee, he could not thereafter recover against the employer).

In *Bristow v. Griffitts Construction Co.*, 140 Ill. App. 3d 191, 94 Ill. Dec. 506, 488 N.E.2d 332 (4th Dist. 1986), the Court construed language in section 2(c) of the Illinois "Act in relation to contribution among joint tortfeasors," which is almost identical to that in N.C.G.S. § 1B-4(1) and concluded

> Section 2(c) was designed to encourage settlements. Because we find an action for indemnity remains viable in cases involving vicarious liability, the employee in this case would gain nothing in return for his $20,000 and relinquishing his right to defend unless the covenant not to sue also extinguished the employer's vicarious liability. We, therefore, find a party whose liability is solely derivative is not "any of the other tortfeasors" within the meaning of section 2(c).

Id. at 198, 94 Ill. Dec. at 512, 488 N.E.2d at 338. We find the logic of this analysis persuasive as to both the public policy of the Act to encourage settlement and the plain language of the Act that indemnification is not contribution and that indemnification rights are not affected by the Act. N.C.G.S. § 1B-1(f). In construing a statute a court reads all sections *in pari materia* so as to give effect to each if possible. *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854-55 (1980). An interpretation that the release provision of the Act allows an action against the vicariously liable employer when the negligent employee has been released ignores the indemnification provision. Inasmuch as we have held that the Act does not apply when there is a right to indemnity, the judgment of the trial court granting summary judgment in favor of defendant is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. MARY ANNA BARLOW

No. 904SC255

(Filed 5 March 1991)

1. Criminal Law § 82.2 (NCI3d) — statement to hospital employee — privilege — statement not suppressed — proper exercise of discretion by trial court

The trial court did not err in failing to suppress statements made by defendant to a hospital employee concerning a murder allegedly committed by defendant where comments by the judge in rendering his decision indicated that the court recognized its discretionary authority to allow disclosure of the statements and exercised that authority, and there was no evidence of abuse of that discretion. N.C.G.S. § 8-53.

Am Jur 2d, Witnesses § 251.

2. Criminal Law § 76.5 (NCI3d)— confessions without Miranda warnings—subsequent confession—fruit of poisonous tree—insufficiency of trial court's findings

The trial court erred in failing to suppress a videotaped confession of defendant as the "fruit of the poisonous tree" without making findings and conclusions as to whether a prior confession was voluntary, and, if involuntary, whether the videotaped confession was made under same prior influence.

Am Jur 2d, Evidence §§ 531, 555.

The progeny of Miranda v. Arizona in the Supreme Court. 46 L.Ed.2d 903.

APPEAL by defendant from judgment entered 17 November 1989 in ONSLOW County Superior Court by *Judge Henry L. Stevens, III.* Heard in the Court of Appeals 16 January 1991.

Defendant was arrested and charged with murder. She made a pretrial motion to suppress various "statements, admissions, and confessions." At the suppression hearing, the State's evidence tended to show that defendant brought her sister to Brynn Marr Hospital, a psychiatric facility, on 14 April 1989. She took her sister to a treatment facility recommended by Pamela Chance, a registered nurse and helpline worker who performed intake duties, and then returned to speak about her own problems. She complained of depression, lack of motivation, and financial problems, and claimed to have killed a man. Chance then called the police. Defendant did not attempt to leave.

Officer Kirk Newkirk was dispatched to the hospital. He asked defendant whether she would come to the police station to talk about what she had told Chance, and she agreed. He handcuffed her outside of the hospital, and drove her to the police station. He informed her that she was not under arrest, and that she was being handcuffed because of a department policy regarding transporting persons in police cars. He removed the handcuffs once they got inside the station. He did not inform her of her rights pursuant to *Miranda*, but he did not take any statement from her.

Defendant was then brought into Detective June Gelling's office. She was informed that she was not under arrest and could leave at any time. One of the doors leading into the office was open. Defendant was asked to discuss what she had spoken of

at the hospital, and she responded that she wished to talk about it because she could no longer live with the guilt. Defendant then spoke with the detective for over one hour, and wrote out a statement which included the following language:

> I do hereby make this voluntary statement of my own free will and accord to Det. J. Gelling of the Jacksonville Police Department.
>
> I make this statement in a sound and sober mind. No threats have been made to me nor any promises of a reward to obtain this statement. I have been informed that this statement can be used against me in the Court of Law.

Detective Gelling did not, however, give her the *Miranda* warnings. After the interview, defendant was allowed to leave, and Detective Gelling informed her that she would be in touch.

At approximately 2:00 p.m. on 17 April 1989, Detective Gelling and another officer drove to defendant's residence. Defendant agreed to come back to the police department. She rode in the police car, but was not told that she was under arrest. She agreed to be interviewed by Deputy Chief Delma Collins. Deputy Chief Collins also informed her that at that moment she was not under arrest, and they talked generally about the killing. Defendant agreed to have a statement videotaped. She was then given the *Miranda* warnings, arrested, and made the videotaped confession.

Defendant presented evidence tending to show that Chance did not tell her she was going to call the police until after she had done so, and that defendant knew that the front door was locked and someone would have to let her out if she wished to leave. Officer Kirk Newkirk arrived in his police uniform, and she agreed to go with him to the police station. He then handcuffed her in the lobby and took her to the police station in a patrol car. Officer Newkirk explained that police policy required him to handcuff anyone who rode in the police car. She waited for Detective Gelling in an interview room for 45 minutes with Officer Newkirk, and was escorted by a policewoman when she asked to go to the restroom.

While Detective Gelling interviewed defendant, she was never informed that she was free to go or that she wasn't under arrest. When Detective Gelling returned on 17 April 1989, she did not answer defendant's question about whether she would be returning

soon, but defendant agreed to go with the officers. She answered questions about the killing, and then gave the videotaped confession. She was informed of and understood her rights under *Miranda* at the time she was videotaped, but was not informed that previous statements could not be used against her.

The trial court entered an order granting in part defendant's motion to suppress, but refusing to suppress the videotaped confession or the statements made to the intake person at Brynn Marr Hospital. Defendant then pled no contest to the lesser included offense of second degree murder and was sentenced to twelve years in prison. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James Wallace, Jr., for the State.

Joseph E. Stroud, Jr. for defendant-appellant.

WELLS, Judge.

Defendant brings forward seventeen assignments of error from the order of the trial court. We have reviewed these assignments and view the two crucial questions for our consideration to be whether the trial court erred in failing to suppress the statements made by defendant to the hospital employee, and whether the trial court erred in failing to suppress the videotaped confession. We reverse.

[1] N.C. Gen. Stat. § 8-53 provides, in pertinent part:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records. . . . Any resident or presiding judge in the district, either at the trial or prior thereto . . . may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

Pam Chance was a registered nurse working at the hospital. Defendant contends that the trial court erred in making findings and concluding that her statements to Chance were not privileged. Assuming *arguendo* that these statements were privileged, this

privilege is qualified. N.C. Gen. Stat. § 8-53 affords trial courts wide discretion in compelling disclosure if there is a finding that such disclosure is necessary for the proper administration of justice. *State v. Efird*, 309 N.C. 802, 309 S.E.2d 228 (1983); *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962). Trial courts should not hesitate to require disclosure where it appears to them to be necessary in order that truth be known and justice done. *Sims, supra.* N.C. Gen. Stat. § 8-53.3, creating a psychologist-patient privilege, grants the same discretion to the trial court.

The trial court stated in its order that it "concludes as a matter of law that the proper administration of justice requires the disclosure of this statement and that any privilege should be waived by the Court in accordance with N.C.G.S. 8-53 *et seq.*" The general rule is that where a court is given discretion, but "rules as a matter of law, without the exercise of discretion, the offended party is entitled to have the proposition reconsidered and passed upon as a discretionary matter." *Capps v. Lynch*, 253 N.C. 18, 116 S.E.2d 137 (1960). Despite the language of the order, the record indicates that the trial court was not under any mistaken impression that it was required to rule a particular way as a matter of law. *See Lemons v. Old Hickory Council, Boy Scouts of America*, 322 N.C. 271, 367 S.E.2d 655, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). The judge made the following comments in rendering his decision:

> I don't see how that's a privilege. She wasn't a patient, wasn't being treated, and just came out there. But even if there was one, in 1983, under the statutes of the legislature, this state determined what privileges or alleged privileges that the superior court judge could, in the interest of the administration of justice, and those are the words, could dissolve whenever the court thought that justice would be served in doing so.
>
> And so, this court holds that it does not feel that in relationship on this first phase in her conversation to this lady, Nurse Chance, that there was a privilege. But if it is, the court's going to dissolve it because it finds in the interest of justice to do so. There would be no reason not to.

We hold that this language indicates that the trial court recognized its discretionary authority, and exercised it. Defendant has demonstrated no abuse of this discretion, and we perceive none.

[2] Defendant next contends that the trial court erred in failing to suppress the videotaped confession as the "fruit of the poisonous tree." The trial court concluded that the doctrine did not apply since defendant had already confessed the crime to Chance. We disagree. Regardless of whether an individual has confessed to a third party, a previous confession to a police officer may have some effect on a decision regarding whether to confess again. The proper analysis is set out in *State v. Edgerton*, 86 N.C. App. 329, 357 S.E.2d 399 (1987):

> When evidence before the court tends to show a defendant made a confession prior to the confession to which he objects, the court is required to determine whether the defendant made a prior confession and whether it was voluntary. *State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975). If the court finds there was a prior confession and it was not voluntary, then the court must determine whether the second confession was made under the "same prior influence" which made the first confession involuntary. *State v. Edwards*, 284 N.C. 76, 199 S.E.2d 459 (1973); *State v. Edwards*, 282 N.C. 201, 192 S.E.2d 304 (1972); *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968). The State must overcome the presumption of "same prior influence" by showing something akin to surrendering the signed written confession to the defendant or informing him that his prior confession will not be used against him. *State v. Edwards*, 284 N.C. at 79, 199 S.E.2d at 461. When there is conflicting evidence on any of the issues, the trial court is required to make findings; although the better practice is to always make findings. *State v. Biggs*, 289 N.C. 522, 529-30, 223 S.E.2d 371, 376 (1976).

This analysis is consistent with the principles set out in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed.2d 222 (1985). The fruit of the poisonous tree analysis presupposes the existence of a constitutional violation. *Id.* A failure to Mirandaize an individual is not, in and of itself such a violation. *Id.* The trial court failed to make the necessary findings and conclusions for us to determine whether the three separate statements to the police officers were simply not properly Mirandaized, or whether any of defendant's constitutional rights were violated. With regard to defendant's statements to Deputy Chief Collins, we are unable to determine adequately whether they in fact constituted a confession. Therefore, we must reverse.

The defendant's plea of no contest is stricken, the judgment entered is vacated, and the cause is remanded to the superior court for further proceedings consistent with this opinion. *See State v. Forrest*, 41 N.C. App. 160, 254 S.E.2d 194 (1979).

Reversed and remanded.

Chief Judge HEDRICK and Judge ORR concur.

KELLY BRAMLETT, INDIVIDUALLY; KELLY BRAMLETT, ADMINISTRATOR OF THE ESTATE OF WILLIAM ROBERT BRAMLETT, DECEASED; AND EUGENE M. CARR III, ANCILLARY ADMINISTRATOR OF THE ESTATE OF WILLIAM ROBERT BRAMLETT, DECEASED, PLAINTIFFS v. OVERNITE TRANSPORT, IVAN HERRON; CABLE PLANT MANAGEMENT, INC.; ESSEX COMMUNICATION CORP., D/B/A ESSEX CABLE CATV, AND COAST TO COAST CATV, INC., DEFENDANTS

No. 9029SC775

(Filed 5 March 1991)

1. **Negligence § 30.1 (NCI3d)— wrongful death—installation of cable by subcontractor—summary judgment for contractor**

The trial court did not err by granting defendant Coast to Coast's motion for summary judgment in a wrongful death action arising from the severing of a cable being installed across a highway. The relationship between Coast to Coast and Wilson Construction, the deceased's employer, was one of contractor and subcontractor; Coast to Coast neither exercised dominion and control of decedent's workplace nor controlled the manner in which Wilson Construction performed the project, and plaintiff's argument for a nondelegable duty to ensure a safe workplace must therefore fail.

Am Jur 2d, Plant and Job Safety § 137.

2. **Bailment § 20 (NCI4th)— wrongful death—loan of equipment by contractor to subcontractor—no liability as bailor**

The trial court did not err by granting summary judgment for defendant Coast to Coast in a wrongful death action arising from the severing of a cable being installed across a highway where plaintiff contended that Coast to Coast was liable as a bailor for defects in the equipment but deceased was an

employee of the subcontractor; Coast to Coast loaned the equipment to the subcontractor without charge; the subcontractor's possession of the equipment was that of a bailee under bailment for the sole benefit of the bailee; and Coast to Coast is not liable under a bailment theory for the subcontractor's failure to exercise due care in the use of the bailed equipment. Moreover, even assuming that the bailment relationship was one of mutual benefit, the forecast of evidence suggests that the proximate cause of the accident was the improper stringing of cable rather than the loaned equipment.

Am Jur 2d, Bailment § 275.

APPEAL by plaintiffs from order entered 25 April 1990 by *Judge Julius Rousseau* in HENDERSON County Superior Court. Heard in the Court of Appeals 12 February 1991.

Plaintiff Kelly Bramlett, individually and as Administrator of the Estate of William Robert Bramlett, and Eugene M. Carr, III, as Ancillary Administrator of said estate sought damages for the wrongful death of the deceased. Defendant Coast to Coast CATV, Inc. (hereinafter "Coast to Coast") was added to the action by amended complaint. Following substantial discovery, plaintiffs dismissed without prejudice defendants Cable Plant Management, Inc., Essex Communication Corp., Overnite Transport and Ivan Herron. Defendant Coast to Coast thereafter moved for and was granted summary judgment. Plaintiffs appeal.

Toms & Bazzle, P.A., by Ervin W. Bazzle, for plaintiffs-appellants.

Roberts Stevens & Cogburn, P.A., by Frank P. Graham, for defendant-appellee Coast to Coast CATV, Inc.

JOHNSON, Judge.

On 21 October 1987, William Robert Bramlett was killed in an accident at or near the intersection of Highway 191 and North Mills River Road in Henderson County, North Carolina, when an Overnite tractor-trailer operated by Ivan Herron struck a cable wire which was being installed across the highway. Mr. Bramlett was hanging cable for Wilson Construction Company (hereinafter "Wilson Construction") on a project that was being undertaken for Essex Communication, a local cable franchise. In 1987 Essex

Communication was engaged in placing cable lines throughout the county. Essex Communication contracted with Cable Plant Management to have this work done and Cable Plant Management in turn accepted a bid from Coast to Coast to hang the cable lines. Coast to Coast then subcontracted the work to Wilson Construction pursuant to a verbal contract. Approximately one week prior to the accident, Wilson Construction hired Mr. Bramlett.

Wilson Construction was owned by Clinton Wilson and he arranged the Henderson County project with Rick LaBarron, vice-president of Coast to Coast. Under the contract, Wilson Construction was paid based upon the number of feet of line it installed and was required to hire its own employees, pay their taxes, social security, workers' compensation insurance, provide most of the equipment needed and comply with all state and federal regulations. Wilson Construction was allowed to hire whomever it wanted to assist in stringing the cable and to employ whatever means it felt were necessary to complete the job.

Wilson Construction borrowed cable trucks from Coast to Coast wherein Coast to Coast provided the insurance and the license tags. No rental or leasing fee was charged and Wilson Construction was responsible for the borrowed equipment. If any equipment had been lost or stolen, Wilson Construction was required to replace it.

On the jobsite on the day of the accident, Russell Wilson, Obie Bilyeu and Robert Bramlett were stringing cable. The truck they were using was pulled onto the shoulder near the intersection of Highway 191 and North Mills River Road. Bilyeu and Bramlett climbed two poles to stretch the cable across the two roads while Wilson placed cones in the road and flagged traffic. Bilyeu and Bramlett pulled the cable tight manually. Wilson then left the highway and got into the truck to "suck up" the cable, pulling it tight so that it could be clamped with a three bolt clamp. This was done by advancing the truck forward with the free end of the cable line attached to it. Once the cable was tightened, Bilyeu and Bramlett clamped it down to the poles. To check to see if it was securely fastened, Bilyeu struck the line with a wrench. Upon being asked three times by Wilson if the cable was properly clamped and tightened, Bramlett responded in the affirmative. Wilson then backed up the truck.

At the same time that Wilson backed the cable truck up, an Overnite tractor-trailer approached the work site travelling down Highway 191 in a path perpendicular to the recently strung cable. The tractor-trailer caught the cable and pulled it through the clamp which Bramlett had fastened. The cable snapped and the stress and rupture of the cable fractured Bilyeu's arm and severed Bramlett's head.

[1] On appeal, plaintiffs first contend that the trial court improvidently granted defendant Coast to Coast's motion for summary judgment. Specifically, plaintiffs contend that Coast to Coast is liable since it had a nondelegable duty to maintain a safe workplace for Wilson Construction and its employees. Relying upon *Cathey v. Southeastern Construction Co.*, 218 N.C. 525, 11 S.E.2d 571 (1940), plaintiffs argue that Coast to Coast knew or should have known that the equipment used by Wilson Construction was insufficient to meet state and federal safety standards and is therefore liable. We disagree.

Summary judgment should be granted when the moving party can show that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law. G.S. § 1A-1, Rule 56. In ruling on a motion for summary judgment, the trial court must consider the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, in the light most favorable to the nonmoving party. *Carter v. Poole*, 66 N.C. App. 143, 310 S.E.2d 617, *rev. denied*, 310 N.C. 624, 315 S.E.2d 689 (1984). "While summary judgment is generally not appropriate in negligence cases, it may be appropriate when it appears that there can be no recovery for plaintiff, even if the facts presented by the plaintiff are taken as true." *Frendlich v. Vaughan's Food*, 64 N.C. App. 332, 335, 307 S.E.2d 412, 414 (1983). Where the evidence clearly indicates that: (1) the plaintiff failed to use ordinary care; (2) want of due care was at least one of the proximate causes of the injury; and (3) the plaintiff was contributorily negligent as a matter of law, summary judgment is appropriate. *Carter*, 66 N.C. App. 143, 310 S.E.2d 617.

Initially, it is important to note that the relationship between Coast to Coast and Wilson Construction was one of contractor and subcontractor. And more importantly, absent a showing that the contractor participated in the negligent act, a contractor is not liable for injuries sustained by the subcontractor's employee.

See Rivenbark v. Atlantic States Construction Co., 14 N.C. App. 609, 188 S.E.2d 747, *cert. denied*, 281 N.C. 623, 190 S.E.2d 471 (1972) (plaintiff sued for injuries arising from the failure of the contractor to provide a safe workplace; held contractor not liable since it did not participate in the negligent act). Pursuant to the nondelegable duty exception, liability will be found where the contractor exercises dominion and control over the workplace. *Spivey v. Babcock & Wilcox Co.*, 264 N.C. 387, 141 S.E.2d 808 (1965). With this stated exception comes the realization that where the contractor does not own or exercise dominion and control over the land on which the work is being done, and does not control the actions of the subcontractor, no liability for an injury to the subcontractor's employee will exist. *Id.*

This Court recently addressed the same issue in *Britt v. American Hoist & Derrick Co.*, 97 N.C. App. 442, 388 S.E.2d 613 (1990). In *Britt*, defendant American Hoist entered into a contract with Miller Building Corporation to convert a building into an American Hoist manufacturing facility. Plaintiff was employed by Goodyear Mechanical Contracting Company, Inc. to work at the American Hoist facility being converted by Miller. Plaintiff and another Goodyear employee were operating a manlift while another Goodyear employee served as a lookout from the ground nearby. In the same area where the plaintiff was elevated in the manlift, an American Hoist employee, defendant Ray Alden, was operating a pendant crane which subsequently struck plaintiff's manlift. Plaintiff brought a civil action seeking damages from defendants American Hoist and Alden for personal injuries allegedly sustained by their negligence. In affirming summary judgment for defendant on the issue of negligence, we stated that:

> As a matter of law, Miller cannot be held liable for the negligence of an employee of its subcontractor Goodyear, if there is no evidence of Miller's control of Goodyear's operations.

Id. at 446, 388 S.E.2d at 616.

Likewise, Coast to Coast neither exercised dominion and control over the decedent's workplace, the highway where the cable operation was taking place, nor controlled the manner in which Wilson Construction performed the project. Therefore, the nondelegable duty to ensure a safe workplace argument put forth by plaintiffs must fail.

[2] Last, plaintiffs contend that as a bailor for mutual benefit, Coast to Coast is liable for injuries caused by defects in the equipment. Again, we disagree.

A bailment is created when a third person accepts the sole custody of some property given from another. *U. S. Helicopters, Inc. v. Black*, 318 N.C. 268, 347 S.E.2d 431 (1986). North Carolina recognizes three types of bailments: (1) bailments for the sole benefit of the bailor; (2) bailments for the sole benefit of the bailee-gratuitous bailments; and (3) bailments for the mutual benefit of both parties. *Clott v. Greyhound Lines, Inc.*, 278 N.C. 378, 180 S.E.2d 102 (1971). Where both parties have an immediate pecuniary interest served by the creation of the bailment, such bailment is for mutual benefit. *Norwood v. Cox Armature Works*, 22 N.C. App. 288, 206 S.E.2d 340 (1974). Where, however, only the bailee acquires a benefit from the bailment, such bailment is gratuitous; and in such case the bailor of the equipment is not liable to third parties where the bailee negligently used the bailed equipment to which he had all control. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 325 S.E.2d 223 (1985).

The foreseeable evidence suggests that Coast to Coast loaned nine cones and two stop signs to Wilson Construction without a rental or leasing fee being charged and that Wilson Construction accepted sole custody of the equipment to use as a subcontractor of Coast to Coast. Coast to Coast derived no economic advantage as a result of the bailment. In fact, the only party which received a benefit from the bailment was Wilson Construction. Therefore, Wilson Construction's possession of Coast to Coast's equipment was that of a bailee under a bailment for the sole benefit of the bailee. As such, Coast to Coast is not liable under a bailment theory for Wilson Construction's failure to exercise due care in the use of the bailed equipment.

Taking the present facts as they exist, but assuming that the bailment relationship between Coast to Coast and Wilson Construction was one of mutual benefit, the forecasted evidence nevertheless suggests that the proximate cause of the accident was not the number of stop signs and cones provided by Coast to Coast, or lack thereof as asserted by plaintiffs. Rather, the forecasted evidence suggests that the proximate cause of the accident was the improper stringing of cable wire to wit the decedent had control.

Accordingly, the order below granting defendant Coast to Coast's motion for summary judgment is

Affirmed.

Judges PARKER and ORR concur.

PATRICIA A. REINHARDT, EMPLOYEE-PLAINTIFF v. WOMEN'S PAVILION, INC., EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 9010IC869

(Filed 5 March 1991)

1. **Master and Servant § 91.1 (NCI3d)— workers' compensation— claim not timely filed**

The Industrial Commission did not err in finding that no claim for workers' compensation benefits was filed within the two-year period after the accident giving rise to the claim as required by N.C.G.S. § 97-24, and a letter from defendant insurance carrier to the Industrial Commission did not constitute the filing of a claim because it made no demand for compensation and did not request a hearing on the matter.

Am Jur 2d, Workmen's Compensation §§ 482, 484.

2. **Master and Servant § 91 (NCI3d)— workers' compensation— claim not timely filed—equitable estoppel not applicable**

Dismissal of a workers' compensation claim is proper where there is an absence of evidence that the Industrial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement to the Commission, and consent by the parties, waiver, and estoppel are ordinarily insufficient to overcome a jurisdictional bar. In this case, where plaintiff was at all times represented by counsel of her choice, and defendants neither directly nor indirectly told plaintiff that they would take care of her claim, the facts did not support the application of the doctrine of equitable estoppel.

Am Jur 2d, Workmen's Compensation § 485.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission. Heard in the Court of Appeals 19 February 1991.

Defendants filed a motion to dismiss, for lack of subject matter jurisdiction, plaintiff's claim for workers' compensation benefits. From an Opinion and Award of the Full Industrial Commission allowing defendants' motion to dismiss, plaintiff appeals.

Carruthers & Roth, P.A., by Kenneth L. Jones, for plaintiff-appellant.

Hutchins, Tyndall, Doughton & Moore, by Thomas W. Moore, Jr. and David L. Hall, for defendants-appellees.

JOHNSON, Judge.

Plaintiff injured her back on 15 December 1984 in an accident which arose out of and during the course of her employment with defendant Women's Pavilion, Inc. She filed an employee injury report on that date and defendant Women's Pavilion submitted a Form 19 dated 18 January 1985 to the North Carolina Industrial Commission. Defendant Travelers Insurance Company made voluntary medical payments in connection with plaintiff's medical bills in the amount of $150. No claim for compensation was filed with the Industrial Commission until 11 November 1987, in excess of the two-year period prescribed by G.S. § 97-24. No payment of compensation has ever been made by defendants. The last medical payment was made in March 1986. Plaintiff now seeks payment of compensation and medical bills.

[1] By Assignment of Error number one, plaintiff contends that the Industrial Commission erred in its findings of fact that no claim was filed within the two-year period as required by G.S. § 97-24. We disagree.

General Statutes § 97-24(a) provides that "[t]he right to compensation under this Article shall be forever barred unless a claim be [sic] filed with the Industrial Commission within two years after the accident." "The requirement of filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation." *Perdue v. Daniel International, Inc.*, 59 N.C. App. 517, 518, 296 S.E.2d 845, 846 (1982), *cert. denied*, 307 N.C. 577, 299 S.E.2d 647 (1983), *citing Barham v. Kaysar-Roth Hosiery Co., Inc.*, 15 N.C. App. 519, 190 S.E.2d 306 (1972).

Plaintiff contends that a letter dated 6 March 1986 from Travelers Insurance Company to the Industrial Commission constitutes the filing of a claim within the meaning of G.S. § 97-24. To support her contention, plaintiff mistakenly cites *Hanks v. Southern Pacific Utilities Company*, 210 N.C. 312, 186 S.E. 252 (1936), and *Smith v. Allied Exterminators, Inc.*, 11 N.C. App. 76, 180 S.E.2d 390, *reversed on other grounds*, 279 N.C. 583, 184 S.E.2d 296 (1971), as stating that letters of correspondence sent by an employer to the Industrial Commission can satisfy the claim requirements of G.S. § 97-24.

In *Hanks*, 210 N.C. 312, 186 S.E. 252, the employee was killed in the course of employment. The employer subsequently admitted liability for compensation to the employee's survivors and the Industrial Commission thereafter wrote to the survivors on the employee's behalf suggesting a timely hearing on the issue of compensation. As a result of the employee's survivors electing to pursue their action in superior court, the employer withdrew its offer of voluntary compensation and a written claim for compensation was not filed with the Industrial Commission until five years after the accident. Litigation, however, over the claim for compensation continued during the interim period. Since the employer admitted liability for compensation and had requested a hearing on the issue of compensation within the statutory period, the Supreme Court held that a "claim" had been timely filed thereby invoking the Industrial Commission's jurisdiction.

In *Smith*, 11 N.C. App. 76, 180 S.E.2d 390, the plaintiffs contended that the victim's father was time barred from recovery since he did not file a claim within one year of the accident. The proceedings were initiated by the insurance carrier when it filed application for a hearing on the father's rights.

This Court was presented with a nearly identical set of facts in *Gantt v. Edmos Corp.*, 56 N.C. App. 408, 289 S.E.2d 75 (1982). There, the claimant sustained a severe injury to her hand on 9 July 1976 during the course of employment with the employer. Certain medical payments were made by the employer until November 1979. The employer provided temporary total disability compensation until the claimant returned to work. On 20 January 1978, claimant's attorney wrote a letter to the carrier with a copy being sent to the Industrial Commission, requesting that an additional medical bill be paid. In July of 1979, claimant's attorney

wrote a similar letter stating that claimant was unwilling to accept the amount offered to her for disability and recommending that the matter be set for hearing. In March of 1980, the claimant's attorney wrote to the Industrial Commission requesting that the matter be set for hearing at the next session. The employer moved for dismissal of the action on grounds that the Industrial Commission had no jurisdiction over the matter pursuant to G.S. § 97-24 on 21 November 1980.

On appeal, claimant contended that her attorney's letter of 20 January 1978 constituted the filing of a claim in compliance with G.S. § 97-24. This Court held that

> [T]here are instances where an informal letter may serve as the filing of a claim for compensation. *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E.2d 627 (1976). One such instance occurred in the case of *Cross v. Fieldcrest Mills*, 19 N.C. App. 29, 198 S.E.2d 110 (1973). The letter in that case specifically requested a hearing before the Commission on the alleged injury. We held this to be "minimal compliance" with G.S. 97-24. We cannot reach the same conclusion regarding the letter in the present case. Not only does it contain no request for a hearing, it fails to assert in any way that the claimant is demanding compensation or that action by the Commission is necessary to settle the question.

Gantt, 56 N.C. App. at 410, 289 S.E.2d at 77.

Similarly, in the instant case, the 6 March 1986 letter plaintiff refers to makes no demand for compensation nor does it request a hearing on the matter. Thus, in accordance with established law, the Industrial Commission's dismissal of plaintiff's claim for workers' compensation for failure to timely file a claim pursuant to G.S. § 97-24 was appropriate. This assignment is overruled.

[2] Next, plaintiff contends that the opinion of the Full Commission that the defendants were not estopped from invoking the jurisdictional bar of G.S. § 97-24 was in error. We disagree. As previously stated, the timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission. G.S. § 97-24; *see also Montgomery v. Horneytown Fire Dept.*, 265 N.C. 553, 144 S.E.2d 586 (1965). Dismissal of a claim is proper where there is an absence of evidence that the Indus-

trial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement to the Commission. *Barham*, 15 N.C. App. 519, 190 S.E.2d 306. Ordinarily, consent by the parties, waiver or estoppel are insufficient to overcome a jurisdictional bar. *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 309 S.E.2d 273 (1983) (no estoppel could be raised since the employer only told the claimant that it would take care of the claim and claimant independently consulted an attorney but waited nine years to file claim). Where, however, the circumstances are deemed egregious, the doctrine of estoppel will be employed and will prevent a party from raising the time limitation of G.S. § 97-24. *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985) (employer was equitably estopped from pleading the jurisdictional bar of G.S. § 97-24 as his agent repeatedly assured the illiterate claimant that the paper work would be taken care of, and the lawyer that the claimant saw was one suggested and retained by the employer).

Comparing the facts here with those in *Belfield*, plaintiff at all times relevant in this matter was represented by counsel of her choice. Defendants neither directly nor indirectly told her that they would take care of her claim. And, the 6 March 1986 letter plaintiff relies upon simply makes no mention of a hearing on the matter nor mentions compensation, rather, it merely inquires as to plaintiff's physical progress and medical charges. We conclude that the instant facts do not support the application of the doctrine of equitable estoppel. Thus, defendants are not barred from challenging the Industrial Commission's jurisdiction to hear plaintiff's claim.

We have carefully reviewed plaintiff's last Assignment of Error and find it to be without merit. The Opinion and Award appealed from is

Affirmed.

Judges PARKER and ORR concur.

WITTEN PRODUCTIONS, INC., PLAINTIFF v. REPUBLIC BANK AND TRUST COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF, AND BRANCH BANKING AND TRUST COMPANY, DEFENDANT v. BERNARD A. BAILEY, INDIVIDUALLY, AND D/B/A THE ENTERTAINERS AND ENTERTAINERS OF AMERICA, INC., AND ENTERTAINMENT PROMOTIONS AND PRODUCTION, INC., AND NATHANIEL B. SMITH, III, INDIVIDUALLY, AND D/B/A SUPERSTAR CONCERTS, THIRD PARTY DEFENDANTS

No. 9027SC476

(Filed 5 March 1991)

Uniform Commercial Code § 36 (NCI3d)— indorsements on checks —effectiveness

In plaintiff's action against defendant bank alleging liability for its handling of twenty checks indorsed in some form of the payee's name and five checks indorsed "For Deposit Only" by the intended payee, the trial court properly entered summary judgment for defendant since an indorsement by any person in the name of a named payee is effective if an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest; plaintiff and third party defendant Bailey had entered a joint venture in which third party defendant would promote concerts and plaintiff would provide a majority of the financial backing; members of a joint venture are agents for one another so that third party defendant was an agent for plaintiff; the twenty checks indorsed in some form of the named payee's name had effective indorsements pursuant to N.C.G.S. § 25-3-401(2); and the five checks indorsed "For Deposit Only" had payees whose names were supplied by third party defendant; third party defendant intended that the named payees would have no interest in the checks; and third party defendant was the intended payee in each instance, and he received the payment. N.C.G.S. § 25-3-405.

Am Jur 2d, Bills and Notes §§ 331, 362.

APPEAL by plaintiff from order entered 11 January 1990 by *Judge C. Walter Allen* in GASTON County Superior Court. Heard in the Court of Appeals 29 November 1990.

Plaintiff (Witten Productions, Inc.) entered into a joint venture agreement with third party defendant (Bailey). Bailey was to produce various shows and concerts while plaintiff provided

most of the financial backing for the productions. A separate contract was entered for each event promoted, and profits and losses were to be allocated on a pro rata basis. Bailey would inform plaintiff of expenses incurred and receive a check for this amount. Next Bailey would deposit the check into an account from which creditors were to be paid. Finally, Bailey would calculate plaintiff's share of the profits and pay plaintiff this amount.

Plaintiff drew and delivered twenty-five checks totaling $953,251.00 to Bailey's company, Entertainers of America, Inc., for payment of expenses arising from the productions. All twenty-five checks were deposited into accounts controlled by Bailey in defendant's bank (Republic Bank and Trust Company). Eighteen of the checks were made payable to either "Republic Nat'l Bank & Ent. of America Escrow Acct." or "Republic Bank and Trust & Ent. of America Escrow Acct." The indorsement on these checks was a stamped "Entertainers." The remaining seven checks were made out to third parties. Two of these checks were indorsed by a stamped name similar to the named payee's name. Five of the checks accepted for deposit by defendant were stamped "For Deposit Only."

Plaintiff brought an action against defendant alleging liability for its handling of these checks. The trial court heard defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment on 4 December 1989. From the trial court's order granting defendant's motion and denying plaintiff's cross-motion, plaintiff appeals.

Don H. Bumgardner for plaintiff-appellant.

Rayburn, Moon & Smith, by Travis W. Moon and Matthew R. Joyner, for defendant-appellee, Republic Bank and Trust Company.

ARNOLD, Judge.

Plaintiff first contends the trial court erred in granting defendant's motion for summary judgment. The test for granting summary judgment is "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).

We first look to North Carolina General Statutes Chapter 25, Article 3, the Uniform Commercial Code—Commercial Paper, which

governs checks and their validity. The Uniform Commercial Code allocates the parties' losses by their relative responsibility for the loss. *See* McDonnell, *Bank Liability for Fraudulent Checks: The Clash of the Utilitarian and Paternalist Creeds Under the Uniform Commercial Code*, 73 Geo. L.J. 1399 (1985). Generally a forged indorsement on a check is inoperative as the payee's indorsement, and the drawer is not liable for an unauthorized indorsement. N.C. Gen. Stat. § 25-3-404 (1986). The payee's indorsement is needed to negotiate the check and pass good title. N.C. Gen. Stat. § 25-3-417(2) (1986). The initial depository bank which presents a check with a forged indorsement to a collecting or a drawee bank breaches its warranty of good title and becomes liable for the check. *North Carolina Nat'l Bank v. Hammond*, 298 N.C. 703, 260 S.E.2d 617 (1979).

There is an exception to this general principle that a forged indorsement is inoperative to pass good title.

> (1) An indorsement by any person in the name of a named payee is effective if . . . (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

N.C. Gen. Stat. § 25-3-405(1)(c) (1986). A collecting bank does not breach its warranty of good title by presenting a check with a forged, but "effective," indorsement to a drawee bank. *See id.* As a result the drawee is allowed to pass the resulting loss on to the drawer-employer.

There are three policy reasons for placing the risk of loss upon the drawer or maker: (1) the risk, or the cost of insuring against it, is more properly the drawer's business risk; (2) the drawer can prevent losses by careful hiring and supervision of employees in sensitive positions; and (3) the drawer can obtain fidelity insurance. G.S. § 25-3-405 (Official Comment 4). This rule seems "a banker's provision intended to narrow the liability of banks and broaden the responsibility of their customers." White and Summers, *Uniform Commercial Code* § 16-8, 639 (2nd ed. 1980). For the loss to be placed on the drawer, three conditions must be satisfied: (1) an agent or employee must supply the name of the payee to the drawer, (2) intending that the payee have no interest in the check, and (3) forge an indorsement in the name of the intended payee. G.S. § 25-3-405(1)(c).

The plaintiff argues there was disputed evidence as to whether an agent supplied the names of the payees on the checks in question. Plaintiff and Bailey entered a joint venture in which Bailey would promote concerts and plaintiff would provide a majority of the financial backing. Members of a joint venture are agents for one another. *Pike v. Wachovia Bank and Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968). Bailey, as a member of the joint venture with plaintiff, was an agent for plaintiff. It is the existence of this agency, not the scope of the agency, which is required for G.S. § 25-3-405(1)(c) to apply. Even assuming that Bailey exceeded his authority, his indorsement would still be "effective" as against plaintiff, the drawer-employer. Plaintiff has failed to produce a forecast of evidence showing a genuine issue of a material fact as to the agency of Bailey.

Plaintiff next contends there was disputed evidence as to the effectiveness of the indorsements on the checks, and the defendant's negligence in accepting those indorsements is a bar to the application of G.S. § 25-3-405(1)(c). The Uniform Commercial Code is "remarkably lenient in favor of operative indorsements . . . ." Triantis, *Allocation of Losses From Forged Indorsements on Checks and the Application of § 3-405 of the Uniform Commercial Code*, 39 Okla. L. Rev. 669, 682 (1986). Signatures may take several forms and still be effective. "A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature." N.C. Gen. Stat. § 25-3-401(2) (1986).

Eighteen checks were indorsed by a stamped "Entertainers" while the payee listed was either "Republic Nat'l Bank & Ent. of America Escrow Acct." or "Republic Bank and Trust & Ent. of America Escrow Acct." Two checks were indorsed with a stamp similar to the listed third party payee's name. The twenty checks indorsed in some form of the named payee's name have effective indorsements.

No reference is made to a bank's negligence as an exception to the application of G.S. § 25-3-405, while adjacent sections do acknowledge a bank's standard of care as a relevant factor in their application. Most courts have ruled that a bank's negligence is immaterial to the application of U.C.C. § 3-405(1)(c). *See Northbrook Property & Cas. Ins. v. Citizens & Southern Nat'l Bank*, 184 Ga. App. 326, 361 S.E.2d 531 (1987); *Merrill Lynch, Pierce, Fenner*

& Smith, Inc. v. Chemical Bank, 57 N.Y.2d 439, 456 N.Y.S.2d 742, 442 N.E.2d 1253 (1982); White and Summers, *Uniform Commercial Code* § 16-8 (2nd ed. 1980). Accordingly, plaintiff's assignment of error as to these checks must fail.

Defendant accepted five checks for deposit into accounts controlled by Bailey. These checks bore only a stamped "For Deposit Only." Plaintiff testified that none of the payees listed on these five checks have appeared to demand payment. When Bailey provided defendant with the payees' names, Bailey intended that the named payees would have no interest in the checks. Rather, Bailey was the intended payee in each instance, and he received the payment.

"Numerous cases under the Code and earlier law recognize that a party who transfers or pays a check bearing an incomplete indorsement incurs no liability if the proceeds of the check reach the intended payee." *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398, 412, *reh'g denied*, 557 F.2d 823 (5th Cir. 1977). The rationale for this holding is that a bank will only be held accountable for losses which occur because the payee named on the check, who possesses a superior claim to the check's proceeds, appears to demand payment. "As far as this litigation is concerned, the proceeds of the checks went to the payees designated on the face of the instruments." *Id.*

Had Bailey or anyone else indorsed the checks in the payees' names, G.S. § 25-3-405 would have applied. *See* G.S. § 25-3-405 (North Carolina Comment (2): "A purportedly regular indorsement is required."). The three policy reasons which support G.S. § 25-3-405 are equally applicable here. This risk is more properly allocated to the business than to the bank. Plaintiff could have prevented the losses by better supervision of his agent or by obtaining fidelity insurance. Plaintiff has failed to show a genuine issue as to a material fact involving these five checks.

Summary judgment for defendant as to the twenty checks indorsed in some form of the payee's name and the five checks indorsed "For Deposit Only" by the intended payee is

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. VADNEY BRUTON COTTON

No. 9015SC554

(Filed 5 March 1991)

1. Criminal Law § 73.2 (NCI3d)— sale of cocaine—hearsay—co-conspirator exception

The trial court did not err in a prosecution for possession with intent to sell and deliver cocaine and sale and delivery of cocaine by admitting statements from a witness which defendant contended were inadmissible hearsay but the State contended fell within the co-conspirator hearsay exception. The independent evidence presented on voir dire was sufficient to allow a jury to conclude that the witness and defendant came to an agreement to sell cocaine to an SBI agent, and then acted on the agreement. N.C.G.S. § 8C-1, Rule 801(d)(E).

Am Jur 2d, Conspiracy § 46.

Comment Note: Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of co-conspirators. 46 ALR3d 1148.

2. Criminal Law § 73.2 (NCI3d)— cocaine—label on substance analyzed by laboratory—defendant identified as suspect—admissible

The trial court did not err in a prosecution for possession and sale of cocaine by allowing the SBI agent who analyzed the substance sold to another SBI agent to testify that the package sent to her identified defendant as the suspect. Counsel stipulated chain of custody and the name on the label was admissible to establish that the substance tested was the substance sent to the laboratory. Also, there was no harm in admitting the testimony as evidence of the truth of the matter asserted in that the objected to testimony merely stated that defendant was a suspect in a case involving the substance tested.

Am Jur 2d, Drugs, Narcotics, and Poisons § 42; Evidence § 774.

3. Indictment and Warrant § 17.3 (NCI3d)— cocaine—variance between indictment and evidence—identity of purchaser

The trial court did not err in not dismissing a case for possession and sale of cocaine due to a fatal variance between

the crime charged and the evidence presented where the indictment charged a sale to an SBI agent, Todd, and the evidence showed at most a sale to one Morrow. The State produced substantial evidence that defendant knew that Morrow was acting as a middleman and that the cocaine was actually being sold to Todd.

Am Jur 2d, Indictments and Informations §§ 261, 262, 264.

4. **Criminal Law § 794 (NCI4th)— possession and sale of cocaine— instruction on acting in concert—evidence sufficient**

The trial court did not err by instructing the jury that defendant could be convicted of possession with intent to sell and deliver cocaine and sale and delivery of cocaine if it found that defendant had committed both offenses either individually or in concert where there was ample evidence to support acting in concert for the sale and delivery of cocaine and the State not only produced evidence that both defendant and one Morrow were present at the scene of the possession crime, but also produced evidence leading to a reasonable inference that defendant in fact possessed the cocaine. There was also evidence that defendant and Morrow acted together pursuant to a common plan to sell the cocaine.

Am Jur 2d, Drugs, Narcotics, and Poisons § 40.

APPEAL by defendant from judgment entered 22 February 1990 in ORANGE County Superior Court by *Judge Dexter Brooks*. Heard in the Court of Appeals 22 January 1991.

Defendant was arrested and charged with possession with intent to sell and deliver cocaine, and sale and delivery of cocaine, both in violation of N.C. Gen. Stat. § 90-95. At trial, the State's evidence tended to show that Marian Angela Todd, an agent with the State Bureau of Investigation, met with Thomas Morrow in a house for about five minutes. The two then left that house and walked to defendant's home. Morrow introduced her to defendant, then he and defendant went into a hallway for a brief time. Morrow then returned and told her to follow them. The three of them then went upstairs into a bedroom. Morrow and defendant then went into an adjoining bathroom, and Todd remained on a couch. Morrow came out of the bathroom and told Todd to give him money because defendant was paranoid. Morrow then went

back into the bathroom and shut the door. He came out a few seconds later and handed her a small plastic bag containing white powder, which was subsequently identified as cocaine. Defendant remained in the bathroom. Morrow and Todd then left. Morrow returned to defendant's house sometime later and asked if he "had anything." He said that he did not, but might have something later on.

Defendant put on no evidence. The jury returned a verdict of guilty on both counts, and defendant was sentenced to ten years in prison. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James Wallace, Jr., for the State.

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

WELLS, Judge.

Defendant has not addressed his second assignment in his brief. It is therefore deemed abandoned. N.C. R. App. P., Rule 28. In his remaining assignments, defendant contends that the court erred in admitting certain testimony, in failing to dismiss the charges against him based on a variance between the indictment and the evidence, and in its charge to the jury. We find no error.

[1] In his first assignment of error, defendant contends that the trial court erred in permitting a witness to testify to statements made by Thomas Morrow. The trial court conducted a *voir dire* hearing and concluded that these statements fell within the co-conspirator hearsay exception codified in N.C. Gen. Stat. § 8C-1, Rule 801(d)(E). The excepted-to testimony reads as follows:

> Mr. Morrow came out of the bathroom and walked towards me and informed me to give him the money because Mr. Cotton was paranoid. . . .

When attempting to rely on the co-conspirator exception to the hearsay rule, the State's burden is to produce evidence independent of the statements themselves sufficient to permit the jury to find the existence of a conspiracy. *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977); *State v. Turner*, 98 N.C. App. 442, 391 S.E.2d 524 (1990). A conspiracy is an unlawful agreement between two or more persons to do an unlawful act or to do a lawful act in

an unlawful way or by unlawful means, and may be shown by circumstantial evidence. *Turner, supra.*

The independent evidence presented on *voir dire* tended to show that Todd approached Morrow to purchase cocaine. They then went to defendant's house, and Morrow and defendant had a discussion while Todd waited in the den. The three of them went upstairs, and Morrow and defendant went into the bathroom while Todd waited on the couch. Morrow then came out of the bathroom, took the money from Todd, went back into the bathroom, and returned with the cocaine. We hold that this evidence is sufficient to allow a jury to conclude that Morrow and defendant came to an agreement to sell cocaine to Todd, and acted on it. The statement was properly admitted.

[2] The agent who analyzed the substance sold to Todd testified that the package sent to her identified defendant as the suspect. Defendant contends that this testimony was hearsay and should not have been admitted. We disagree. As defendant points out, counsel stipulated to the chain of custody of the substance given to Todd from Morrow. This stipulation stated only that "Mr. Austin got possession of whatever that was from Mr. Frick; and then he mailed it off to the SBI laboratory; and then in the due course of events, they mailed it back to them. . . ." There was no stipulation regarding what was actually tested by the agent, and where she got it from. The name on the label was admissible, then, to establish that the substance she had tested and was testifying about was the substance sent to the laboratory by Austin. We also fail to see any possible harm in admitting the testimony as evidence of the truth of the matter asserted. In *State v. Jackson*, 287 N.C. 470, 215 S.E.2d 123 (1975), the trial court admitted a complaint for arrest consisting of a police officer's affidavit stating that defendant had committed an armed robbery and describing the events. The Court reversed the conviction, holding that the affidavit was hearsay which improperly buttressed the testimony of two eyewitnesses. The objected-to evidence here merely states that defendant was the suspect in a case involving the substance tested. This fact—that defendant was the suspect in the case being tried—surely could not have strengthened the State's case.

[3] Defendant next contends that the trial court erred in not dismissing the case due to a fatal variance between the crime charged and the evidence presented. He claims that the evidence shows

at most a sale from defendant to Morrow rather than to Todd as charged in the indictment. "The law is settled in this state that an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known." *State v. Wall*, 96 N.C. App. 45, 384 S.E.2d 581 (1989). (Citations omitted.)

The State can overcome a motion to dismiss based on a variance claim by producing substantial evidence that defendant knew the cocaine was being sold to a third party, and that the person named in the indictment was the third party. *Id.* This guilty knowledge may be shown by circumstantial evidence. *Id.* In this case, the State produced evidence tending to show that Todd accompanied Morrow to defendant's house and was allowed to stay in the house while Morrow and defendant held a discussion. She was brought upstairs with them and waited in the bedroom when they went into the bathroom. Morrow came out and told her to give him the money because defendant was paranoid, went back into the bathroom, and came out with the cocaine. This was substantial evidence that defendant knew that Morrow was acting as a middleman, and that the cocaine was actually being sold to Todd.

[4] Finally, defendant contends that the trial court erred in instructing the jury that he could be convicted of both offenses if they found that he committed them either individually or in concert with Morrow. To determine whether an instruction should be given, the court must consider whether there is any evidence to support a conviction for the offense. *State v. Smart*, 99 N.C. App. 730, 394 S.E.2d 475 (1990). To secure a conviction based on acting in concert, the State must show that defendant was present at the scene of the crime and that he acted together with another individual who does the acts necessary to constitute the crime pursuant to a common plan to commit the offense. *Id.*

There was ample evidence to support the instruction on acting in concert for the sale and delivery of cocaine. Morrow brought Todd to defendant's house, Morrow and defendant engaged in two private discussions, Todd was brought upstairs with them before they engaged in their second discussion, Morrow came out of the bathroom to get the money because defendant was "paranoid," and returned with the drugs.

The acting in concert instruction for the possession with intent to sell and deliver is more troublesome. An acting in concert theory

is not generally applied to possession offenses, as it tends to confuse the issues. *State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986). In *State v. Lovelace*, 272 N.C. 496, 158 S.E.2d 624 (1968), two defendants were convicted of the felonious possession of implements of housebreaking. The State's evidence tended to show that only Dixon was seen in actual possession. Both men were seen at the entrance to a restaurant at 1:45 a.m., however, and there were tool marks around the locks. The Court held that if "the men were acting together in the attempt to use them to force entry into the restaurant, both in law would be equally guilty of the unlawful possession." In this case, the State not only produced evidence that both defendant and Morrow were present at the scene of the possession crime, it also produced evidence leading to a reasonable inference that defendant in fact possessed the cocaine. There was also evidence that defendant and Morrow acted together pursuant to a common plan to sell the cocaine. We hold that on these facts the trial court did not err in instructing on acting in concert for the possession offense. This assignment of error is overruled.

No error.

Chief Judge HEDRICK and Judge ORR concur.

WILLIAM DURWOOD METTS, PLAINTIFF v. DOCTOR JAMES D. PIVER AND DOCTOR CHARLES T. STREETER, SR., DEFENDANTS

Nos. 904SC770
904SC837

(Filed 5 March 1991)

Appeal and Error § 559 (NCI4th)— medical malpractice—summary judgment for defendants—remanded for trial—second summary judgment—error

The trial court erred by granting summary judgment for defendants in a medical malpractice action where summary judgment had previously been entered and the Court of Appeals had held that the evidence presented genuine issues of material fact and remanded for trial. While an appellate directive remanding a case for trial does not render the Rules

of Civil Procedure inapplicable to the further proceedings in the case, in this case the trial court's second ruling on the existence of genuine issues of material fact is directly contrary to the earlier Court of Appeals holding. It is the rule in North Carolina that an additional forecast of evidence does not entitle a party to a second chance at summary judgment on the same issues, and defendants' contention that the second summary judgment motion dealt with new issues was also unavailing.

Am Jur 2d, Appeal and Error §§ 962, 963.

Judge GREENE concurring in the result.

APPEAL by plaintiff from orders entered 5 March 1990 and 30 April 1990 in ONSLOW County Superior Court by *Judge Herbert O. Phillips*. Heard in the Court of Appeals 12 February 1991.

Plaintiff filed this medical malpractice action on 7 April 1986 alleging negligence, fraud, and battery claims. Defendants moved for summary judgment on 11 July 1986. Summary judgment on all claims was entered on 29 July 1986. On appeal, this Court, in an unpublished opinion, held that the forecast of evidence presented to the trial court revealed that genuine issues of material fact remained as to whether either or both defendants had been negligent in their diagnoses of plaintiff's condition. We reversed as to that claim.

The case was remanded to the trial court, where defendants again moved for summary judgment. In support of this motion, they produced affidavits from each of them, and an affidavit from a doctor stating that the defendants had adhered to the standard of care in their diagnoses of plaintiff's ailments. Summary judgment was again entered in defendants' favor on 5 March 1990.

Plaintiff filed a motion to reconsider and a motion for "appropriate relief" on 15 March 1990. Plaintiff then noticed their appeal from the summary judgment order. The trial court ruled that it retained limited jurisdiction to hear plaintiff's 60(b) motion, and indicated that the motion would have been denied had the case not been appealed. Plaintiff appeals from this order as well. On plaintiff's motion, these cases have been consolidated for review.

Braswell & Taylor, Attorneys, by Roland C. Braswell, Shelby Duffy Albertson, and Lisa G. Corbett, for plaintiff-appellant.

Marshall, Williams & Gorham, by Lonnie B. Williams and Charles D. Meier, for defendants-appellees.

WELLS, Judge.

This case is before this Court for the second time after a trial court has entered an order granting summary judgment for defendants. In our unpublished opinion filed 3 November 1987, we held that the evidence presented to the court evidenced genuine issues of material fact as to the negligence of each defendant in failing to diagnose plaintiff's condition and remanded the case for trial on this issue. Defendants again moved for and were granted summary judgment on this issue and no trial was ever held. We hold that these proceedings violated our mandate, and reverse.

The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure. *D & W Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966). However, an appellate directive remanding a case for trial does not render the Rules of Civil Procedure inapplicable to the further proceedings in the case. *Britt v. Allen*, 37 N.C. App. 732, 247 S.E.2d 17 (1978). In *Britt*, we affirmed the entry of an order of summary judgment following a Supreme Court remand for trial *de novo*. *See Britt v. Allen*, 291 N.C. 630, 231 S.E.2d 607 (1977). The Supreme Court did not rule, however, on the existence of a genuine issue of material fact, or the sufficiency of the evidence to take the case to a jury. It affirmed the trial court's discretionary authority to set aside a jury verdict as being contrary to the evidence and order a new trial, and in fact reversed this Court's holding passing on the sufficiency of this evidence as improper. *See Britt v. Allen*, 27 N.C. App. 122, 218 S.E.2d 218 (1975). The law of the case doctrine applies only to those questions actually passed on by the appellate court which were necessary to its opinion. *See Southland Associates Realtors, Inc. v. Miner*, 73 N.C. App. 319, 326 S.E.2d 107 (1985).

In this case, the trial court's ruling on the existence of a genuine issue of material fact is directly contrary to our earlier holding. While defendants claim that they forecast new evidence, we do not perceive this to be determinative. It is the rule in this State that an additional forecast of evidence does not entitle

a party to a second chance at summary judgment on the same issues. *See Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988). Were it otherwise, an "unending series of motions for summary judgment could ensue so long as the moving party presented some additional evidence at the hearing on each successive motion." *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981).

Defendants' contention that this summary judgment motion dealt with new issues is also unavailing. In the amended complaint, plaintiff alleged that defendants were negligent in that "they incorrectly diagnosed the plaintiff's gallbladder problem during the 'time period' as being pancreatitis." Defendants moved for and were granted summary judgment in part on the grounds that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law as to *all* of plaintiff's claims. The trial court necessarily had the issue of defendants' possible negligence in diagnoses before it then, and we reversed its determination. The trial court's order now before us passes on this same question and is contrary to the decision and mandate of this Court. It is thus reversed.

Plaintiff has also appealed from the trial court's ruling on his motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Given our disposition of the appeal from the order of summary judgment, we dismiss this appeal as moot.

In case No. 904SC770, the appeal is

Dismissed.

In case No. 904SC837, the order of the trial court is

Reversed.

Judge WYNN concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

I agree with the majority that in North Carolina, after a party moves for summary judgment on an issue, and the motion is al-

lowed but subsequently reversed on appeal, the party is precluded on remand from making a second motion for summary judgment on the same issue. I disagree, however, with the majority's conclusion that the issue of the defendants' alleged negligent diagnoses was before the trial court at the hearing on the defendants' first motion for summary judgment. At the first hearing, the defendants did not present any evidence in support of its summary judgment motion relating to the issue of the defendants' alleged negligent diagnoses. Therefore, the negligent diagnoses issue was not before the trial court at the first hearing, and on remand the defendants were entitled to raise that issue as a basis for supporting their new motion for summary judgment.

Nonetheless, I would reverse the trial court's entry of summary judgment. The defendants produced affidavits at the second summary judgment hearing which stated that they had "adhered to the standard of care in their diagnoses of plaintiff's ailments." The plaintiff responded with the affidavits of Dr. George Podgorny wherein he testified that the defendants had failed to meet the applicable standard of care. Accordingly, a genuine issue of material fact exists on the issue thereby rendering summary judgment improper.

However, the defendants nonetheless contend that summary judgment was appropriate because the plaintiff did not introduce evidence that the defendants' negligent diagnoses were the proximate causes of his injuries. The defendants rely on *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986), as support for this argument. *Celotex* appears to stand for the proposition that the mere motion for summary judgment unsupported by evidence negating the non-movant's claim is sufficient to shift the burden to the non-movant to provide evidence of each element of his claim. *Id.* at 322-24, 91 L.Ed.2d at 273-74. North Carolina is not bound by *Celotex*. North Carolina has chosen instead to require the non-movant to produce evidence demonstrating the existence of a genuine issue of material fact only with respect to issues raised by the movant and supported by the movant's evidence. *See Rorrer v. Cooke*, 313 N.C. 338, 350, 329 S.E.2d 355, 363 (1985); *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). I furthermore do not find, as the defendants contend, that *Evans v. Appert*, 91 N.C. App. 362, 372 S.E.2d 94, *disc. rev. denied*, 323 N.C. 623, 374 S.E.2d 584 (1988), is consistent with *Celotex*. Instead, I read *Evans* as

consistent with *Rorrer*, and to the extent that *Evans* is inconsistent with *Rorrer*, *Rorrer* controls. Here, the defendants did not present evidence in support of their motion for summary judgment regarding the issue of proximate cause, and therefore, the plaintiff, as non-movant, was not required to address the issue. Accordingly, I would reverse the trial court's order of summary judgment.

GUILFORD COUNTY, PETITIONER/APPELLANT v. LUNA R. HOLMES, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS/APPELLEES

No. 9018SC855

(Filed 5 March 1991)

Master and Servant § 108.1 (NCI3d) — unemployment compensation — employee leaving work station — no misconduct or fault connected with work — right to benefits

Respondent was not disqualified from receiving unemployment benefits where the evidence before the Employment Security Commission showed that she was not discharged for misconduct or substantial fault connected with her work, but instead was discharged for unsatisfactory job performance where she continued to leave her work station after being requested not to do so; she left to deliver phone messages and was in pursuit of her job duties when she did deliver messages; and she was not aware that her job was jeopardized by this conduct.

Am Jur 2d, Unemployment Compensation §§ 53, 54, 61.

APPEAL by petitioner from judgment entered 14 May 1990 in GUILFORD County Superior Court by *Judge James A. Beaty*. Heard in the Court of Appeals 19 February 1991.

Respondent Holmes (Holmes) was terminated from her position as a receptionist with Guilford County Emergency Services on 13 September 1989, and filed a claim for unemployment benefits. Petitioner initially listed the reason for discharge as unsatisfactory job performance. Petitioner's eligibility for benefits came on for hearing, and an adjudicator with respondent Employment Security Commission (ESC) held that Holmes was not disqualified, since

she was not discharged for misconduct or substantial fault connected with her work.

Petitioner appealed, and the case was heard by a referee, who found the following facts and concluded that respondent was not disqualified:

> 1. Claimant last worked for Guilford County Emergency Services on September 13, 1989 as a receptionist. From October 29, 1989 until November 11, 1989, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a). The claimant filed a New Initial Claim effective October 29, 1989. The claimant's weekly benefit amount is $128.00. The claimant's maximum benefit amount is $3,328.00.
>
> 2. The Adjudicator, Peggy Dixon, issued a conclusion under Docket No. 12461-2 holding claimant is not disqualified from receiving benefits under Section 96-14(2) or (2a). Employer appealed. Pursuant to G.S. 96-15(c), this matter came on before the undersigned Appeals Referee for hearing. Present for the hearing were: claimant, Susan Shields, administrative assistant, and Alice Burkholder, employee relations officer for observation purposes only. The employer was represented by attorney J. Edwin Pons.
>
> 3. The claimant was discharged from this job because of alleged unsatisfactory job performance.
>
> 4. The claimant was employed from April 3, 1989 until September 13, 1989. The claimant's primary duty required her to answer the telephone, to greet customers and to locate information for the account receivable billing system.
>
> 5. The claimant received an appraisal after three months of employment and was deemed to have performed in a satisfactory manner. The problem area at that time that were [sic] brought to claimant's attention were [sic] her frequent habit of leaving the workarea [sic] to personally give messages to employees.
>
> 6. Despite the employer's request for claimant to remain in her workarea [sic], claimant continued to leave the workarea [sic] to give messages to employees. Claimant, however, personally delivered messages only when she was informed by

the caller that the message was an emergency and claimant knew that the employee was in the building, though away from his telephone.

7. On September 13, 1989, claimant received a second appraisal and at that time [was] terminated. The employer alleged that during the first and second appraisals that claimant's performance declined and that claimant was periodically advised of her decline. The claimant denied the allegations. The claimant was not informed that her job performance declined during the interval of the two appraisals. Therefore, claimant was unaware that her job performance jeopardized her job.

Petitioner then appealed to ESC. ESC affirmed the decision and adopted it as the decision of the Commission, after further finding that respondent was in pursuit of her work duties when away from her work station, let others know where she was going when she left her desk, and performed her job duties regarding accounts receivable as best she could. Petitioner appealed to superior court, and the court affirmed the decision, holding that competent evidence in the record supported the findings of fact, and that ESC properly applied the law to these facts. Petitioner appeals.

J. Edwin Pons for petitioner-appellant.

Thomas S. Whitaker and C. Coleman Billingsley, Jr. for respondent-appellee Employment Security Commission of North Carolina.

No brief for respondent-appellee Luna R. Holmes.

WELLS, Judge.

Petitioner brings forward two assignments of error, contending that the trial court erred in holding that competent evidence supported ESC's findings of fact and that ESC had properly applied the law to these facts. We affirm.

Findings of fact in an appeal from a decision of the Employment Security Commission are conclusive if supported by any competent evidence. *Celis v. N.C. Employment Security Comm.*, 97 N.C. App. 636, 389 S.E.2d 434 (1990). Petitioner contends that finding of fact 6 is erroneous in stating that Holmes personally delivered messages only when informed by the caller that the message was an emergency. While Holmes did testify that she delivered messages

personally under such circumstances, she also testified that she delivered messages when she felt it was important or when the call sounded particularly urgent. Based on our holding below, however, we do not perceive this misstatement to be of any consequence.

Petitioner also contends that the trial court erred in holding that finding of fact 7 is supported by competent evidence in the record. This finding of fact was not challenged at the trial court level, however, and is therefore not properly before us. *See Matter of Vinson*, 42 N.C. App. 28, 255 S.E.2d 644 (1979). We note that petitioner's argument is that its agent's testimony, rather than Holmes', should be believed on this point. It is not our province to determine the credibility of witnesses. *See Dunlap v. Clarke Checks, Inc.*, 92 N.C. App. 581, 375 S.E.2d 171 (1989).

In its second assignment of error, petitioner contends that ESC did not properly apply the law to the facts found. Holmes may be disqualified from receiving any benefits if she was fired for misconduct connected with her work. N.C. Gen. Stat. § 96-14(2). She may be disqualified for a period ranging from four to 13 weeks if she was fired for substantial fault connected with her work. N.C. Gen. Stat. § 96-14(2A). The employer has the burden of establishing disqualification. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982).

Petitioner bases its arguments that Holmes should have been disqualified at least partially from receiving benefits on its position that she left her work area to deliver *routine* phone messages after being told not to do so. A violation of a reasonable work rule may constitute misconduct. *Id.* The crucial inquiry is whether the employee's actions were reasonable and undertaken with good cause. *Id.* Good cause is a reason which would be deemed valid by reasonable men and women. *Helmandollar v. M.A.N. Truck & Bus Corp.*, 74 N.C. App. 314, 328 S.E.2d 43 (1985).

It is apparent from the properly supported findings of fact that ESC believed Holmes behaved in a reasonable fashion, delivering messages when it was necessary in pursuit of her job duties and informing others when she left. There is nothing in these findings which would mandate a conclusion that Holmes showed a "wilful or wanton disregard of the employer's interest." *See Walter Kidde & Co., Inc. v. Bradshaw*, 56 N.C. App. 718, 289 S.E.2d 571 (1982). Finally, ESC adopted the finding of fact stating that Holmes

was fired for alleged inadequate job performance. Inadequate job performance does not amount to misconduct. *See Douglas v. J.C. Penney Co.*, 67 N.C. App. 344, 313 S.E.2d 176 (1984).

There is also nothing in these findings which would compel the conclusion that respondent should have been partially disqualified from receiving benefits. N.C. Gen. Stat. § 96-14(2A) defines substantial fault as "those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received. . . ." The findings state that Holmes continued to leave her work station after being requested not to do so. They also state that she was not aware that her job was jeopardized by this conduct, and she was in pursuit of her job duties when she did deliver messages. It does not appear from these findings that ESC believed Holmes to have done anything which she was forbidden to do, or which harmed petitioner. *See Baxter v. Bowman Gray School of Medicine*, 87 N.C. App. 409, 361 S.E.2d 109 (1987). This dispute centers on the frequency with which Holmes delivered messages. If, as petitioner suggests in its brief, its request amounted to the spelling out of a rule that Holmes was *never* to leave her work station, the findings of fact call into question the reasonableness of such a requirement. ESC was not required, therefore, to apply the substantial fault level disqualification to this case. This assignment of error is overruled.

Affirmed.

Judges GREENE and WYNN concur.

SAMUEL W. DUNCAN, PETITIONER v. TREACY DUNCAN, MARVIN CURTIS, AND DUNCAN REALTY, INC., RESPONDENTS

No. 9030SC633

(Filed 5 March 1991)

1. Rules of Civil Procedure § 55 (NCI3d)— entry of default— interlocutory order—no review on appeal

The trial court's order that the clerk should sign and file the entry of default if that had not already been done

and then setting for hearing a determination as to the money and property taken, damages caused, and "all other things" taken was not a final order or final judgment but was an interlocutory entry of default not subject to review by the Court of Appeals. N.C.G.S. § 1A-1, Rule 55.

Am Jur 2d, Appeal and Error § 115.

2. Rules of Civil Procedure § 4 (NCI3d)— summons not issued in time allowed—second summons issued—new action commenced

Even if summons did not issue within five days of filing of the complaint, the second summons commenced a new action on the date it was issued. N.C.G.S. § 1A-1, Rule 4(a).

Am Jur 2d, Process §§ 63, 64.

APPEAL by respondent Marvin Curtis from order entered 2 April 1990 by *Judge Hollis M. Owens, Jr.*, in CHEROKEE County Superior Court. Heard in the Court of Appeals 22 January 1991.

On 8 July 1988, petitioner filed a "Petition for Dissolution" naming Treacy Duncan, Marvin Curtis, and Duncan Realty, Inc., as respondents and requesting in part that the court dissolve Duncan Realty, Inc., that respondents be removed as officers, and that respondents reimburse the corporation for monies taken or for damages caused by them. A civil summons was issued and served on Treacy Duncan on 6 July 1988. On 28 September 1988, Treacy Duncan filed an answer and counterclaims. On 1 August 1989, Treacy Duncan moved for imposition of sanctions, and on 4 August she moved for a continuance. Following a hearing in which Treacy Duncan made a motion *ore tenus* to complete service upon Marvin Curtis and Duncan Realty, Inc., the trial court filed an order for a summons to be issued against Marvin Curtis and Duncan Realty, Inc. on 30 August 1989.

On 26 January 1990, a civil summons was issued and on 1 February 1990 was served on Marvin Curtis. On 21 March 1990, attorneys for petitioner and Treacy Duncan executed a "Motion for Entry of Default" moving the court for entry of default and judgment by default and executed a notice of hearing on entry of default. On 28 March 1990, Curtis filed a motion to dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure and later the same day filed a motion for enlargement

of time. On 29 March 1990, Curtis filed a notice of hearing on 11 June 1990.

Following a hearing, on 2 April 1990 at 3:05 p.m., the trial judge filed an order which stated in part:

CONCLUSIONS OF LAW AND FACTS

That the Clerk shall sign and file the Entry of Default, if not already signed and filed.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That this matter be set for hearing to determine:

(a) what monies and properties were taken from Duncan Realty, Inc., what reimbursement shall be made to Duncan Realty, Inc. by Marvin Curtis, what amount of damages were caused by the acts of the Respondent, Marvin Curtis, to said corporation, that should be paid;

(b) To determine the amount of money that has been collected by Marvin Curtis under the notes and deeds of trust and should, therefore, be returned to the corporation;

(c) To determine all other things that Marvin Curtis has taken that rightfully belong to the corporation and enter an order requiring they be returned to the corporation;

2. That Marvin Curtis be and he is hereby removed as an officer and director of the corporation, Duncan Realty, Inc.

Also, at 3:05 p.m., the clerk of court filed an entry of default. Later the same day Curtis filed a motion to set aside the entry of default.

From the order filed 2 April 1990, respondent Marvin Curtis appeals.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for petitioner-appellee Samuel W. Duncan.

Gerald R. Collins, Jr., for respondent-appellant Marvin Curtis.

Coward, Sossomon, Hicks & Beck, P.A., by Orville D. Coward, for respondent-appellant Treacy Duncan.

ORR, Judge.

[1] Respondent puts forth several assignments of error contesting the validity of the trial court's order. However, for the reasons below, we conclude that the order entered by the trial court was not a final judgment but, instead, was an entry of default not subject to review here.

N.C. Gen. Stat. § 1A-1, Rule 55 (1990) provides:

> (a) *Entry.*—When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.
>
> (b) *Judgment.*—Judgment by default may be entered as follows:
>
> (1) By the Clerk.—. . . .
>
> (2) By the Judge.—In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary. . . .

The official comment to Rule 55 states:

> [W]hen in order to enter final judgment something further must be done after entry of default, e.g. when an account must be taken or a jury trial had on an issue of damages or any other, the judge orders that done which is necessary. Thus, there is no intermediate judgment by "default and in-

> quiry," but an entry of default in all cases and a final judgment by default entered only after everything required to its entry has been done.

Where a trial court ordered a trial on the issue of damages in its "judgment by default," this Court stated that the trial court "clearly intended only entry of default." *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984). In *Stone* we stated:

> Generally, there is first an interlocutory entry of default, and then a final judgment by default only after the requisites to its entry, including a jury trial on damages, have occurred. *See* G.S. 1A-1, Rule 55 comment. In *Pendley v. Ayers*, 45 N.C. App. 692, 263 S.E.2d 833 (1980), as here, the trial court had ordered a default judgment and a trial on damages. This Court held: "The purported judgment entered herein was an entry of default. An entry of default is not a final order or a final judgment." *Id.* at 694, 263 S.E.2d at 834.

Id. at 652-53, 318 S.E.2d at 110.

Here the trial court in its findings of fact referred to petitioner's "Motion for Entry of Default" and concluded that "the Clerk shall sign and file the Entry of Default, if not already signed and filed." The trial court then set for hearing a determination as to the money and property taken, damages caused, and "all other things" taken. We conclude that here the order entered by the trial court was not a final order or final judgment but was an interlocutory entry of default and not subject to review here.

[2] We also note respondent's contention regarding a possible violation of N.C. Gen. Stat. § 1A-1, Rule 4(a) (1990), which provides that "[u]pon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." In *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 111, 323 S.E.2d 470, 474 (1984), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985), we stated that

> [a]lthough N.C. Gen. Stat. § 1A-1, Rule 4(a) (1983) is clear and unambiguous in its requirement that "upon the filing of the complaint, summons shall be issued forthwith, and in any event, within five days," our Court has recognized that a properly issued and served second summons can revive and commence a new action on the date of its issuance.

Thus, here the second summons commenced a new action on 26 January 1990, the date it was issued.

Appeal dismissed.

Chief Judge HEDRICK and Judge WELLS concur.

IN THE MATTER OF: JOHN MICHAEL KRAUSS, JR. AND GENEVA FRANSICA KRAUSS

No. 908DC211

(Filed 5 March 1991)

1. **Evidence § 33 (NCI3d)— abused and neglected children— hearsay testimony—admissibility**

In a proceeding to adjudicate two children neglected and abused, there was no merit to respondent's contention that the trial court erred in admitting the hearsay testimony of his children's statements to child abuse experts under Rule 803(24), since petitioner gave respondent the names and addresses of the expert witnesses; respondent had copies of some of the notes made during the sessions with the children; and respondent therefore had adequate notice of the content of the hearsay testimony to prepare to meet the statements.

Am Jur 2d, Infants §§ 16, 42; Juvenile Courts and Delinquent and Dependent Children §§ 43, 52, 62.

2. **Parent and Child § 2.2 (NCI3d)— abused and neglected children—sufficiency of evidence**

Evidence was sufficient to support the trial court's findings that respondent's two children were abused and neglected where it consisted of testimony by expert witnesses and the children's foster mother that the children told them that respondent had tied the children up and had sexually abused them.

Am Jur 2d, Infants §§ 16, 42; Juvenile Courts and Delinquent and Dependent Children § 54.

3. Parent and Child § 2.2 (NCI3d)— abused and neglected children—custody in DSS—best interest of children—finding not required in subsequent orders

There was no merit to respondent's contention that the trial court erred in placing his children with the DSS because the court made no findings of fact that DSS was fit to maintain custody and that it was in the best interests of the children to remain with the Department, since the court had made such findings in earlier proceedings, and once the court has found that a certain custody arrangement is in a child's best interest, it is unnecessary for the court to repeat the same finding in every subsequent order.

Am Jur 2d, Infants §§ 16, 42; Juvenile Courts and Delinquent and Dependent Children § 55.

4. Parent and Child § 2.2 (NCI3d)— child abuse and neglect—removal from parent's home—amendment of petition properly allowed

The trial court did not err in allowing DSS to amend its petition to allege that both children were neglected within the meaning of N.C.G.S. § 7A-517(21) and that both children were abused within the meaning of N.C.G.S. § 7A-517(1), since the original petition alleged that respondent neglected both children and sexually abused his daughter, and respondent did not show that he was denied notice of the substance of DSS's allegations or a chance to be heard.

Am Jur 2d, Infants §§ 16, 42; Juvenile Courts and Delinquent and Dependent Children §§ 43, 62.

APPEAL by respondent from order entered 8 September 1989 by *Judge Joseph E. Setzer, Jr.* in WAYNE County District Court. Heard in the Court of Appeals 20 September 1990.

This case arises from the adjudication of two children as neglected and abused and their subsequent placement with the Wayne County Department of Social Services.

The Wayne County Department of Social Services received a complaint alleging that John Krauss Sr. was abusing his son, John Michael Krauss Jr., and his daughter, Geneva Fransica Krauss. At the time of the complaint, the children were four-and-a-half and three-and-a-half years old respectively. Department of Social

Services workers investigated the complaint and the father agreed to place the children in the custody of the Department. The father then took the children to Georgia without the permission of the Department of Social Services. The Department obtained a non-secure custody order and the children were placed with the Department of Social Services with physical placement with their paternal grandparents. On 13 June 1989, the children were put in foster care on the recommendation of a doctor at North Carolina Memorial Hospital's Clinical Program for the Study of Childhood Maltreatment. The parties also agreed that the professionals at the Clinical Program would evaluate the children.

At trial, the Department of Social Services presented testimony from members of the evaluation team and the children's foster mother. The trial court allowed the witnesses to testify about statements that the children had made to them. At the conclusion of the hearing, the court determined that the children had been abused and neglected by their father and placed the children in the custody of the Wayne County Department of Social Services. Respondent father appeals.

E.B. Borden Parker for petitioner-appellee.

Shelby Duffy Albertson for respondent-appellant.

EAGLES, Judge.

[1] Respondent contends that the trial court erred in admitting the hearsay testimony of his children's statements to child abuse experts under Rule 803(24). We disagree.

In *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), the Supreme Court set out a six-pronged analysis that the trial court must apply to admit hearsay under Rule 803(24). Respondent objects to the admission of this testimony solely on the grounds that he was not given the particulars of the hearsay testimony. He argues that he was not provided with notes about some interviews that the expert witnesses had with the children. The petitioner gave respondent the names and addresses of the witnesses. Respondent had copies of some of the notes made during the sessions with the children. On this record we hold that the respondent had adequate notice of the content of the hearsay testimony to adequately prepare to meet the statements.

[2] Respondent also argues that the evidence was insufficient to support the following findings of the trial court: (1) that respondent terrorized his children and emotionally damaged them; (2) that respondent committed sexual acts upon both his children; (3) that respondent did not provide proper care, supervision, or discipline for his children; and (4) that the children were neglected and abused within the meaning of G.S. 7A-517(1)(c) and (d). Additionally, the respondent objects to the court's conclusion of law that the children were neglected and abused within the meaning of G.S. 7A-517. After a careful review of the record, we hold that respondent's arguments are without merit.

At the hearing two expert witnesses from the Clinical Program for the Study of Childhood Maltreatment and the children's foster mother testified about statements the children made to them. Three-and-a-half-year-old Geneva told the interviewers that her father wore a vampire costume to scare her and had tied her up. As part of the interview process, the evaluation team worked with Geneva using anatomical dolls. Dr. Mark Everson, an expert in child psychology, testified that Geneva made the following statements during the session with the dolls:

> She said they are laying in my closet and she pulled the daddy doll pants down and then she began squeezing the penis of the daddy doll like this as she kind of looked away and she said I feel his penis and I squeeze it real hard til pee pee comes out and it felt hard and it was very dramatic that she turned her head away like it was distasteful and she was doing this. What did it look like. Her answer was I can't see it because I look like this and she talked about turning her head away as she is doing that. What happened next was the next question. Her answer was John comes in and says he is going to call the police. He says daddy don't touch Genny private parts. What happens next. My daddy pulls up his pants. I pull down my dress and put my panties on. They were inside out. So when she put her panties back on they were inside out and that was an interesting observation on her part and kind of attesting to the validity of what she is saying. Who took your panties off she was asked. My daddy. She was also asked about what daddy was wearing and she described her dad having paint on his face. She said it looked like a mask. It looked like blood. He said it was blood, but it was really just paint. Does your daddy touch you with anything else.

> His hair and then she was asked well show what you mean and she showed the daddy doll with it's [sic] head next to the genitals of the little girl doll and then she said he is doing this with his mouth. She opened and closed her mouth of daddy doll face to the genitals of the little girl doll.

Dr. Everson also testified that John said that his father wore a mask to scare him and that his father tied him up when he was bad. As part of the interview, John was taken to his father's house. At his father's house John took a vampire mask and costume, which were consistent with the one he had described, from the closet. Dr. Everson also testified that John talked about his father tickling him with his tongue and John said that his father tickled him on his neck, arm, and genital area.

The children's foster mother testified that Geneva said that her father had touched her vagina and that she had touched his penis. The foster mother also testified that both children said that their father tied them up. The children also engaged in "tongue kissing" with each other and said that their father "tongue kissed" them. Additionally, John said that his father had touched his private parts.

This court has noted that a substantive difference exists between the quantum of proof of neglect and dependency necessary for purposes of termination and for purposes of removal. *In re Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986). "The most significant difference is that while parental rights may not be terminated for threatened future harm, the DSS may obtain temporary custody of a child when there is a *risk of neglect* in the future." *Id.* (Emphasis in original.) Here, the petitioner has the burden of proving abuse and neglect by clear and convincing evidence. G.S. 7A-635. The testimony of the experts who interviewed the children and the testimony of the children's foster mother support the trial court's findings. These findings support the conclusion of law that the children were neglected and abused within the meaning of G.S. 7A-517.

[3] Respondent argues that the trial court erred in placing the children with the Department of Social Services because the court made no findings of fact that the Department was fit to maintain custody and that it was in the best interests of the children to remain with the Department. This argument is without merit. The court entered an order on 13 June 1989 where it found that it

was in the best interests of the children to remain in the custody of the Department. Once the trial court has found that a certain custody arrangement is in a child's best interest, it is unnecessary for the court to repeat the same finding in every subsequent order.

[4] Finally, we address respondent's contention that the trial court erred when it allowed the Department of Social Services' motion to amend the petition to allege that both children were neglected within the meaning of G.S. 7A-517(21) and that both children were abused within the meaning of G.S. 7A-517(1). Respondent contends that he did not have notice and a chance to be heard on the amendments to the petition. We disagree. The original petition alleged that respondent neglected both children and sexually abused Geneva. The decision to allow amendments to the pleadings is within the discretion of the trial judge. *Auman v. Easter*, 36 N.C. App. 551, 555, 244 S.E.2d 728, 730 (1978). Respondent has not shown an abuse of discretion, nor has he established that he was denied notice of the substance of the Department's allegations or a chance to be heard.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

Judges JOHNSON and PARKER concur.

GARL JUNIOR TUCKER, PLAINTIFF v. MICA ELISE BRUTON, AND DORIS SANDERS BRUTON, DEFENDANTS

No. 9019SC734

(Filed 5 March 1991)

Automobiles and Other Vehicles § 613 (NCI4th)— pedestrian crossing at unmarked crosswalk—instruction not required

In an action to recover for injuries sustained when plaintiff pedestrian was struck by defendant driver, the trial court did not err by concluding as a matter of law that the place where plaintiff stepped onto the highway was neither a marked nor an unmarked crosswalk and refusing to charge the jury

on the right-of-way of a pedestrian in an unmarked crosswalk, since the evidence tended to show that plaintiff crossed at an intersection where there were no traffic signals and no sidewalks on either side of the street, and plaintiff produced no evidence that there was a "sidewalk like area" on either side of the intersection or evidence that the area at which plaintiff crossed was used as a sidewalk.

Am Jur 2d, Automobiles and Highway Traffic §§ 477, 478, 480.

APPEAL by plaintiff and cross-appeal by defendant from judgment entered 5 March 1990 by *Judge W. Steven Allen* in MONTGOMERY County Superior Court. Heard in the Court of Appeals 16 January 1991.

Donaldson & Horsley, P.A., by William F. Horsley and Arthur J. Donaldson, for plaintiff appellant, cross appellee.

Teague and Rotenstreich, by Stephen G. Teague and Kenneth B. Rotenstreich, for defendant appellees, cross appellants.

COZORT, Judge.

Plaintiff was hit by a car driven by defendant Mica Bruton as plaintiff was crossing at the unmarked intersection of N.C. Highway 24-27 and Courthouse Square Avenue in Troy. Plaintiff filed suit against the driver of the automobile, Mica Bruton, and the owner of the auto, her mother, Doris Bruton. Plaintiff alleged that Mica Bruton was negligent in that she failed to yield the right-of-way to a pedestrian in violation of N.C. Gen. Stat. § 20-173(a) (1989). Plaintiff claimed that Mica's negligence should be imputed to Doris Bruton by virtue of the family purpose doctrine. A jury found that defendant Mica Bruton was not negligent. Plaintiff appeals, alleging that he was crossing at an unmarked crosswalk and that the trial court erred by not instructing that plaintiff pedestrian, if within an unmarked crosswalk, had the right-of-way. We find no evidence to support plaintiff's contention that he was crossing at an unmarked crosswalk, and we find no error.

The evidence at trial tended to show that plaintiff was hit by a car driven by defendant Mica Bruton on 16 May 1987 at approximately 9:00 p.m. Plaintiff was hit while attempting to cross N.C. Highway 24-27. N.C. Highway 24-27 has three lanes, one for

westbound traffic, one for eastbound traffic, and one for eastbound traffic turning left at a traffic signal at the next intersection. Plaintiff had successfully crossed the two eastbound lanes and was almost across the westbound lane when he was hit by defendant. Plaintiff was injured and transported to a hospital in Asheboro where he received treatment for the injuries to his right leg.

Both parties presented diagrams of the accident scene. It is uncontradicted that the intersection at which plaintiff was crossing was unmarked and that the area within which plaintiff was walking was not a marked crosswalk. At trial, the trial court denied plaintiff's request that the court give the following instruction:

> The motor vehicle law provides that when a pedestrian is crossing a roadway within an unmarked crosswalk at an intersection—that is, within the area that would be included if the lines of a sidewalk were projected across the intersection or near the intersection, the driver of any vehicle on the roadway must yield the right-of-way to the pedestrian. This means that the driver must slow down or, if necessary, stop, in order to avoid injury to the pedestrian.

The jury found that the defendants were not negligent. Plaintiff appeals.

The issue presented on appeal is whether the trial court erred by concluding as a matter of law that the place where plaintiff stepped onto N.C. Highway 24-27 was neither a marked nor an unmarked crosswalk and thus refusing to charge the jury as requested by the plaintiff. For the following reasons, we find the court did not err.

N.C. Gen. Stat. § 20-173(a) provides:

> (a) Where traffic-control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at or near an intersection . . . .

Furthermore, N.C. Gen. Stat. § 20-174(a) (1989) provides:

> (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

The determination of whether plaintiff or defendant had the right-of-way depends upon whether plaintiff was crossing at an "unmarked crosswalk." Simply stated, the rule is:

> If [plaintiff] was crossing in an unmarked crosswalk at an intersection, [plaintiff] was not required to anticipate negligence on the part of others. In the absence of anything which gave or should have given notice to the contrary, [plaintiff] was entitled to assume and to act upon the assumption, even to the last moment, that others would observe and obey the statute which required them to yield the right of way.

Bowen v. Gardner, 275 N.C. 363, 368-69, 168 S.E.2d 47, 51 (1969). The Motor Vehicle Act does not define "unmarked crosswalk." In *Anderson v. Carter*, 272 N.C. 426, 430, 158 S.E.2d 607, 610 (1968), the North Carolina Supreme Court defined an "unmarked crosswalk" as "that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection." Under this definition, the plaintiff must show that he was crossing at an area which was the projected extension of the sidewalk from one side of the street to the other. In the present case, the plaintiff was not crossing at such an area. He crossed at an intersection where there were no traffic signals and no sidewalks on either side of the street he was crossing.

Plaintiff contends nonetheless that *Bowen v. Gardner* supports the proposition that, regardless of the nonexistence of a sidewalk, the area where he crossed is an unmarked crosswalk. We disagree. In *Bowen* the plaintiff was crossing at an intersection where one side of the street had paved sidewalks and the other side (the side from which plaintiff was crossing) had no pavement. There was testimony that plaintiff was crossing from a place where the sidewalk would have been had there been one and that before stepping into the street plaintiff was on "what you would call the sidewalk going to the corner." *Id.* at 367, 168 S.E.2d at 50. In the present case, however, plaintiff produced no evidence that there was a "sidewalk like area" on either side of the intersection, or evidence that the area at which plaintiff crossed was used as a sidewalk. There is no evidence in the record which would support a conclusion that the plaintiff was crossing at an unmarked crosswalk. We hold the trial court properly refused to instruct that the jury may find plaintiff was crossing at an unmarked crosswalk.

Defendants filed a cross-appeal, contending the trial court erred by refusing to direct a verdict in defendants' favor. Since we find that the trial court did not err by refusing to give the instruction requested by plaintiff, we do not need to address defendants' cross-appeal.

No error.

Judges PARKER and GREENE concur.

LEE GARVIN AND PHIL TAYLOR D/B/A G & T INVESTMENTS, PLAINTIFF-APPELLANTS v. CITY OF FAYETTEVILLE, NORTH CAROLINA; CITY COUNCIL OF THE CITY OF FAYETTEVILLE; J. L. DAWKINS IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF FAYETTEVILLE; MILDRED EVANS, MILO MCBRYDE, NAT ROBERTSON, JR., TOMMY BOLTON, IDA ROSS, JOSEPH L. PILLOW, THELBERT TORREY, SUZAN CHEEK, MARK KENDRICK, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE FAYETTEVILLE CITY COUNCIL; JOHN SMITH IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF FAYETTEVILLE; BEN WATSON, THORNTON W. ROSE, BETH FINCH, ALBERT E. RUMMANS, MONROE EVANS, THOMAS BRADFORD, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE FAYETTEVILLE AIRPORT COMMISSION; AND TOM RAY, IN HIS OFFICIAL CAPACITY AS MANAGER OF THE FAYETTEVILLE MUNICIPAL AIRPORT, DEFENDANT-APPELLEES

No. 9012SC805

(Filed 5 March 1991)

Conversion § 6 (NCI4th)— conversion of portable aircraft hangars —12(b)(6) motion granted—error

The trial court erred by granting defendants' motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of plaintiffs' action for conversion of portable aircraft hangars where plaintiffs alleged that defendants converted the plaintiffs' two portable aircraft hangars to their own use, alleged that their contract with Flight Unlimited, Inc. provided that plaintiffs would retain ownership of the hangars if the lease was terminated, and the lease was terminated pursuant to a bankruptcy clause in the agreement. Plaintiffs' recovery depends considerably on whether the hangars were in fact trade fixtures and thus personalty, or became improvements affixed to the realty, and that question is yet to be resolved. Nothing in the complaint discloses an insurmountable bar to plaintiff's right to recover.

Am Jur 2d, Fixtures §§ 35, 36, 39, 40; Landlord and Tenant § 929.

APPEAL by plaintiff from *Barnette (Henry V.), Judge.* Order entered 22 May 1990 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 February 1991.

This is a civil proceeding wherein plaintiffs seek to recover certain property allegedly belonging to the plaintiffs and converted by the defendants for their own use.

The critical allegations in plaintiffs' complaint are summarized as follows: the plaintiffs were the owners of two portable aircraft hangars. The plaintiffs entered into a lease agreement with Flight Unlimited, Inc. to lease the hangars for use at the defendants' Fayetteville Municipal Airport. Flight Unlimited, Inc. was also involved in a lease with defendants to conduct a fixed base operation at the defendants' Fayetteville Municipal Airport. Flight Unlimited, Inc. defaulted on the lease with the plaintiffs and pursuant to that lease, plaintiffs were entitled to recover their two portable aircraft hangars.

Flight Unlimited, Inc. also defaulted on the lease with the defendants. Upon default, defendants took control of the hangars. Plaintiffs allege an unlawful annexation and conversion of the personal property for defendants' own use. On or about May 19, 1987 the defendants, plaintiffs allege, wrongfully annexed the hangars to their realty. Plaintiffs demanded return of the personal property and defendants refused.

Plaintiffs appeal from an order allowing defendants' 12(b)(6) motion dismissing plaintiffs' complaint for failure to state a claim upon which relief could be granted.

Barrington, Herndon & Raisig, P.A., by Carl A. Barrington, Jr., and Paul J. Raisig, Jr., for plaintiff, appellants.

Reid, Lewis, Deese & Nance, by Marland C. Reid, for defendant, appellee.

City of Fayetteville, by Robert C. Cogswell, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

We consider only whether the trial court erred in allowing defendants' 12(b)(6) motion dismissing plaintiffs' complaint pursuant to N.C.R. Civ. P. 12(b)(6).

Defendants cite and rely on *Williams v. Wallace*, 260 N.C. 537, 133 S.E.2d 178 (1963), wherein the Supreme Court affirmed the trial court's order allowing defendant's demurrer on the grounds that the allegations in plaintiff's complaint were insufficient to state a *good cause of action* (emphasis added) against the defendant. The cited case and the case now before us, while similar with respect to the facts and substantive law, are procedurally distinguishable, and the cited case affords no support for defendants' contention that the trial court did not err in dismissing plaintiffs' complaint for failure to state a claim upon which relief could be granted pursuant to G.S. 1A-1 12(b)(6). For a comparison of a demurrer under the former practice with the present Rule 12(b)(6), *see Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

A claim should not be dismissed for failure to state a claim upon which relief could be granted unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E.2d 693, *disc. review denied*, 297 N.C. 176, 254 S.E.2d 39 (1979). A complaint should not be dismissed for failure to state a claim upon which relief could be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979). A claim should be dismissed under Rule 12(b)(6) where it appears that plaintiff is entitled to no relief under any statement of facts which could be proven; this will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Orange County v. Department of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890, *disc. review denied*, 301 N.C. 94 (1980).

Our Supreme Court defined conversion as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights. *Spinks v. Taylor and Richardson v. Taylor Co.*, 303 N.C. 256, 278 S.E.2d 501 (1981). The owner of personalty may maintain an action to recover posses-

sion of the property against anyone who is in wrongful possession of it. *Mica Industries v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

In the present case, plaintiffs have alleged that the defendants converted the plaintiffs' two Port-a-Port portable aircraft hangars to their own use. Plaintiffs have alleged that their contract with Flight Unlimited, Inc. provided that the plaintiffs would retain ownership of the hangars if the lease was terminated. The lease here was terminated pursuant to an *ipso facto* bankruptcy clause in the agreement.

Whether the plaintiffs can recover against the defendants depends considerably on whether the hangars were in fact "trade fixtures" and thus personalty, or became improvements affixed to the realty. That question is yet to be resolved. Nothing in plaintiffs' complaint discloses an insurmountable bar to their right to recover. Thus, we hold the trial court erred in dismissing plaintiffs' complaint for failure to state a claim upon which relief could be granted, and the order appealed from will be reversed and the cause remanded to the Superior Court for further proceedings.

Reversed and remanded.

Judges COZORT and LEWIS concur.

BRENDA HALL THOMAS, PLAINTIFF v. JOHN L. THOMAS, DEFENDANT

No. 9011DC603

(Filed 5 March 1991)

Quasi Contracts and Restitution § 2.1 (NCI3d)— quantum meruit— no mutual understanding that compensation was expected— statute of limitations applicable—failure to prove value of services

Where the evidence tended to show that the parties cohabited for fourteen years, holding themselves out as married, jointly remodeled defendant's mobile home, and began a mobile home park on land defendant owned prior to cohabitation, the trial court erred in awarding plaintiff $25,200.00 quantum meruit for breach of an implied contract, since plaintiff

did not show by the greater weight of the evidence that the services were rendered and accepted by both parties with the mutual understanding that plaintiff would be compensated for her services; even if plaintiff's evidence were sufficient to support such an inference, her claim would be subject to the three year statute of limitations applicable to contract actions; and to recover more than nominal damages, plaintiff would have to prove the value of the services rendered, which she failed to do. However, this holding might not bar plaintiff from recovery in an action in equity for unjust enrichment.

Am Jur 2d, Restitution and Implied Contracts §§ 5, 16, 54.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation. 94 ALR3d 552.

APPEAL by defendant from judgment entered 16 December 1989 by *Judge T. Yates Dobson* in HARNETT County District Court. Heard in the Court of Appeals 13 December 1990.

Defendant and plaintiff began cohabitation on 6 April 1973. They separated on 10 December 1987. During those fourteen years defendant and plaintiff held themselves out as married. A daughter was born on 19 June 1984. Both parties worked outside of the home. They jointly remodeled defendant's mobile home and began a mobile home park on land defendant owned prior to cohabitation.

The trial court awarded plaintiff $600.00 for property damage, recovery of specified personal property, and $25,200.00 for defendant's breach of implied contract. From this judgment defendant appeals.

Bain & Marshall, by Elaine F. Marshall and Alton D. Bain, for plaintiff-appellee.

Donald E. Harrop, Jr. for defendant-appellant.

ARNOLD, Judge.

Defendant argues the trial court erred in awarding plaintiff $25,200.00 *quantum meruit* for breach of an implied contract. We agree.

Recovery on *quantum meruit* must rest upon implied contract. *Lindley v. Frazier*, 231 N.C. 44, 55 S.E.2d 815 (1949). This theory

requires the plaintiff to show by the greater weight of the evidence that the services were rendered and accepted by both parties with the mutual understanding that plaintiff would be compensated for her services. *Twiford v. Waterfield*, 240 N.C. 582, 83 S.E.2d 548, (1954).

In *Suggs v. Norris*, 88 N.C. App. 539, 364 S.E.2d 159, *cert. denied*, 322 N.C. 486, 370 S.E.2d 236 (1988), the plaintiff was an employee of the deceased defendant prior to cohabitation, and she continued to perform services in defendant's business during the cohabitation. Unlike *Suggs*, plaintiff began cohabitating with defendant prior to rendering services. The inference of mutual understanding as to compensation was much stronger in *Suggs* than in the case *sub judice*. The evidence presented and the trial court's findings do not warrant such an inference.

Assuming plaintiff's evidence was sufficient to support such an inference, plaintiff's claim would be subject to the three year statute of limitations applicable to contract actions. *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971). When indefinite and continuous services are rendered without a definite time for payment having been arranged, payment becomes due as the services are rendered. *Doub v. Hauser*, 256 N.C. 331, 123 S.E.2d 821 (1962). As a result the cause of action for recovery of compensation under either implied contract or *quantum meruit* accrues as the services are rendered. *Id.* Plaintiff's recovery would be limited by N.C. Gen. Stat. § 1-52(1) (1983) to the three year period preceding this action, rather than the entire fourteen years.

To recover more than nominal damages, "plaintiff must prove the value of the services rendered." *Johnson v. Sanders*, 260 N.C. 291, 295, 132 S.E.2d 582, 586 (1963). Plaintiff failed to offer any evidence as to the value of the personal services rendered. The trial court erred in finding the value of plaintiff's services to be $25,200.00 under either implied contract or *quantum meruit*. However, this holding may not bar plaintiff from recovery in an action in equity for unjust enrichment.

"No contract, oral or written, enforceable or not, is necessary to support a recovery based upon unjust enrichment." *Parslow v. Parslow*, 47 N.C. App. 84, 88-9, 266 S.E.2d 746, 749 (1980). "The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without

the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761, *aff'd*, 312 N.C. 324, 321 S.E.2d 892 (1984). It may arise "where one's property is improved or paid for in reliance upon the owner's unenforceable promise to convey the land or some interest in it to the contributor." *Id.* But the contributor must prove the promise. *Wright v. Wright*, 305 N.C. 345, 289 S.E.2d 347 (1982).

Defendant failed to discuss the remainder of his exceptions on appeal, and they are deemed abandoned. N.C.R. App. P. 28(b)(5). The portion of the judgment awarding plaintiff $600.00 for property damage and recovery of specified personal property is affirmed. The portion of the judgment which awarded plaintiff $25,200.00 as compensation for breach of implied contract is reversed.

Affirmed in part, reversed in part.

Judges JOHNSON and LEWIS concur.

WOODROW LEON THOMAS, PLAINTIFF v. RUTH OAKLEY THOMAS, DEFENDANT

No. 9011DC797

(Filed 5 March 1991)

Divorce and Separation § 135 (NCI4th)— equitable distribution— order that commissioners sell property and divide proceeds —error

The trial court erred in an equitable distribution action by appointing commissioners to sell the property and divide the net proceeds after paying expenses and costs. The trial judge did not satisfy the requirement of N.C.G.S. § 50-20(a) that the judge place a value on the property.

Am Jur 2d, Divorce and Separation § 937.

Necessity that divorce court value property before distributing it. 51 ALR4th 11.

APPEAL by plaintiff from *Stephenson (Samuel S.), Judge*. Judgment entered 16 February 1990 in District Court, LEE County. Heard in the Court of Appeals 13 February 1991.

Plaintiff husband appeals from an order purporting to equitably distribute marital property pursuant to G.S. 50-20.

The equitable distribution order in pertinent part provides:

> 1. G. Hugh Moore and A.B. Harrington, III are appointed as Commissioners to make private and/or public sale of all marital real and personal property; that after the payment of all outstanding liens against the marital property and payment of court costs, cost of sales, trial transcripts and costs of advertising, the net proceeds . . . shall be divided equally between the plaintiff, Woodrow Thomas, and defendant, Ruth Thomas.
>
> 2. That the plaintiff shall be credited with the amount by which he decreased the principal owed on the marital home . . . and the marital workshop . . . .
>
> 3. That from the said sales proceeds, the defendant . . . shall receive an additional $700.00 on her equal share, a credit on . . . (sale of blue Ford truck).
>
> 4. That from the said sales proceeds of the marital property, the plaintiff . . . shall receive an additional $1,100.00 on his equal share, a credit on . . . (sale of Dutchcraft Trailer).
>
> 5. That both parties are hereby enjoined . . . from transferring, conveying, and secreting, or disposing of any marital property . . . pending sale of said marital properties.

G. Hugh Moore for plaintiff, appellant.

A. B. Harrington, III, for defendant, appellee.

HEDRICK, Chief Judge.

G.S. 50-20(c) requires the trial court to determine what is marital property, then to find the net value of the property and finally to make an equitable distribution of that property. *Turner v. Turner*, 64 N.C. App. 342, 307 S.E.2d 407 (1983); *Soares v. Soares*, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

The parties agree on appeal that the trial judge "does not even list all of those items which appear on both defendant's . . . and plaintiff's equitable distribution affidavit, items which both parties agreed should be included as marital property." This simply

means the parties agree that the trial judge did not determine what property was or is all of the marital property.

We held in *Little v. Little* that G.S. 50-20(a) makes it incumbent upon the court to determine what is marital property. "Thus, the Act mandates a complete listing of marital property, and an order that fails to do so is fatally defective." *Little v. Little*, 74 N.C. App. 12, 17, 327 S.E.2d 283, 288 (1985).

By appointing commissioners to sell the property and divide the net proceeds after paying expenses and costs, the trial judge did not satisfy the requirement of the statute that the judge must place a value on the property. In *Soares*, we said "[o]nly the court can place a value upon the property from the evidence." *Soares v. Soares*, 86 N.C. App. 369, 372, 357 S.E.2d 418, 419 (1987).

Thus, we hold the order in the present case is fatally defective and must be vacated and the cause will be remanded to the District Court for further proceedings.

Vacated and remanded.

Judges COZORT and LEWIS concur.

TELERENT LEASING CORPORATION, PLAINTIFF v. ALLEN C. BARBEE, AND SHONOCA, INC., TRADING AS THE SHERATON HOTEL, ORIGINAL DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. H. WILLIAM HULL, PARTNER; AND WESTRIDGE HOMES, A GENERAL PARTNERSHIP; AND LUMINA AVENUE CORPORATION, THIRD-PARTY DEFENDANTS

No. 907SC151

(Filed 5 March 1991)

Appeal and Error § 119 (NCI4th)— pending contract action—summary judgment in third party indemnity action—premature appeal

The third party plaintiffs' appeal from an order of summary judgment dismissing their claim that, in buying their hotel, third party defendants agreed to assume their obligations under a lease with plaintiff is premature, since third party plaintiffs' liability to plaintiff for lease of television sets

for use in their hotel has not been established, and third party plaintiffs therefore have no need of third party defendants' indemnity and may never need it.

Am Jur 2d, Appeal and Error § 92.

APPEAL by original defendants/third-party plaintiffs from order entered 28 September 1989 by *Judge Richard B. Allsbrook* in NASH County Superior Court. Heard in the Court of Appeals 6 December 1990.

Robert G. Bowers for plaintiff appellee.

Valentine, Adams, Lamar, Etheridge & Sykes, by William D. Etheridge and Sharon Rose Britt, for original defendants/third-party plaintiffs appellants.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for third-party defendants appellees.

PHILLIPS, Judge.

This appeal does not involve the plaintiff, whose claim for rents allegedly owed by the original defendants for leasing 147 of plaintiff's television sets for use in their hotel at Wrightsville Beach is still pending. The appellants' appeal is from an order of summary judgment dismissing their claim that in buying their hotel on 22 January 1987 the third-party defendants agreed to assume their obligations under the lease with plaintiff.

Though not raised by the parties, the appeal is unauthorized and we dismiss it upon our own motion. The appeal is premature because it is from an interlocutory order that does not affect a substantial right that may suffer injury if appeal is delayed until final judgment is entered. G.S. 1-277; G.S. 7A-27; *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Since the appellants' liability to the plaintiff has not been established, they have no need of the appellees' indemnity now and may never need it. The time to pursue their appeal from the order denying their claim for indemnity is not now, but after the need for such indemnity has been established. Our function as an appellate court is not to determine idle, speculative questions of no immediate benefit to anyone.

Appeal dismissed.

Judges ORR and GREENE concur.

WILLIAM J. TOWNSEND, PLAINTIFF v. ARLENE R. T. HARRIS, DEFENDANT

No. 9012SC763

(Filed 5 March 1991)

Attorneys at Law § 54 (NCI4th)— alimony and child support—contingent fee contract—void

The trial court did not err by declaring void a contingent fee contract between plaintiff attorney and his client in an action for alimony and child support. *Thompson v. Thompson*, 70 N.C. App. 147, was appealed to the N.C. Supreme Court because of a dissent and the Supreme Court noted that review of the decision as to whether the contingent fee contract was void had not been sought and was not before it.

Am Jur 2d, Attorneys at Law § 257; Divorce and Separation § 603.

APPEAL by plaintiff from *Johnson (E. Lynn), Judge*. Judgment entered 2 April 1990 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 February 1991.

William J. Townsend, plaintiff, appellant, pro se.

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

The plaintiff, an attorney, has appealed from a judgment declaring his contract with his client, the defendant, void.

In her counterclaim, the defendant sought a declaratory judgment, pursuant to G.S. 1-254, declaring that her contract with the plaintiff was void as being against public policy.

The record before us discloses that on 2 November 1979, the parties entered into a contract whereby the plaintiff agreed to

represent the defendant in an action to recover alimony and child support. The plaintiff's fee for this representation was to be twenty per cent (20%) of the total amount recovered.

The trial court allowed defendant's motion for summary judgment and entered a judgment declaring that the contract entered into between the plaintiff and the defendant was void.

The only question presented on this appeal is whether the trial court erred in declaring the contract in this case void.

In *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984), we held that a contract for the payment of a contingent fee upon an attorney procuring a divorce for his client, or contingent in amount upon the amount of alimony and/or property awarded is void as against public policy. *Thompson* was appealed to the Supreme Court because one of the judges on the Court of Appeals dissented, but not because of the holding that the contingent fee contract was void as being against public policy. On appeal, our Supreme Court, speaking through Justice Vaughn, noted that review of the decision as to whether the contingent fee contract was void had not been sought and was not before them, and that "[t]he opinion of the Court of Appeals on that point is the law of this case as it now stands before us." *Thompson v. Thompson*, 313 N.C. 313, 314, 328 S.E.2d 288, 290 (1985).

Thus, we are bound by our decision in *Thompson* and we affirm the judgment dated 2 April 1990 declaring the contingent fee contract between the plaintiff and his client to be void.

Affirmed.

Judges COZORT and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 MARCH 1991

CIPHER CORP. v. SPECTRUM FURNITURE CO., INC. No. 9018SC753	Guilford (88CVS6144)	No Error
CONNECTICUT BANK & TRUST CO. v. GARDNER No. 9026SC967	Mecklenburg (88CVS11426)	Affirmed
GITTER v. GITTER No. 9021DC787	Forsyth (87CVD2748)	Affirmed
IN RE FORECLOSURE OF WHITE No. 9021SC1142	Forsyth (90SP230)	Affirmed
IN RE GRIFFIN No. 9023DC668	Wilkes (87J71) (87J72)	Affirmed
IN RE HOPKINS No. 905DC545	New Hanover (88J0157)	Affirmed
IN RE VITZA v. VITZA No. 9025DC767	Catawba (89J50) (89J51)	Affirmed
ISENHOUR v. ISENHOUR No. 9025DC835	Catawba (88CVD2213)	Affirmed
NOLAN v. GLEASON No. 9027SC216	Cleveland (88CVS534)	No Error
STATE v. ANDREWS No. 9022SC480	Davidson (89CRS6456) (89CRS6457) (89CRS6458) (89CRS6460) (89CRS6461) (89CRS6462) (89CRS6463)	No Error
STATE v. ARNETTE No. 9027SC508	Gaston (88CRS20136) (88CRS20137)	Affirmed
STATE v. BENJAMIN No. 903SC703	Craven (90CRS722) (90CRS723) (90CRS724)	No Error
STATE v. BROGDEN No. 9014SC525	Durham (89CRS26843)	No Error

STATE v. BRYANT No. 904SC777	Sampson (89CRS5668) (89CRS5669) (89CRS5670) (89CRS5671) (89CRS5672)	No Error
STATE v. GARY No. 9021SC892	Forsyth (89CRS21986)	No Error
STATE v. GERALD No. 9014SC639	Durham (87CRS8616)	Vacated & Remanded
STATE v. HANEY No. 9026SC1018	Mecklenburg (89CRS40691) (89CRS61098)	Affirmed
STATE v. HICKS No. 9017SC502	Caswell (89CRS1040) (89CRS1043)	No Error
STATE v. HUDSON No. 901SC912	Pasquotank (89CRS3933)	No Error
STATE v. HUGHES No. 9019SC878	Randolph (89CRS6757)	No Error
STATE v. LANDY No. 9026SC1043	Mecklenburg (90CRS14274)	No error in the trial; remanded for correction of judgment
STATE v. LEWIS No. 9021SC1058	Forsyth (89CRS43129)	No Error
STATE v. LOCKLEAR No. 9016SC1016	Robeson (89CRS17575)	No Error
STATE v. LYDE No. 9014SC925	Durham (88CRS32540) (88CRS32541)	No Error
STATE v. MARSH No. 9012SC1035	Cumberland (89CRS44638)	No Error
STATE v. MILLER No. 9021SC798	Forsyth (89CRS16580)	No Error
STATE v. MURDOCK No. 9022SC533	Iredell (89CRS2002)	No Error
STATE v. PATTERSON No. 9026SC1090	Mecklenburg (89CRS91334)	No Error

STATE v. REID No. 9021SC790	Forsyth (89CRS22498)	No Error
STATE v. SPEARS No. 9011SC856	Johnston (89CRS6429) (89CRS6451) (89CRS6452) (89CRS7748)	No Error
STATE v. SPELL No. 903SC1099	Carteret (89CRS10420)	No Error
STATE v. WHITFIELD No. 9014SC847	Durham (81CRS19177) (81CRS30285) (81CRS30286)	Dismissed
WILLETT v. TCB LEASING OF FORT MILLS, INC. No. 9026SC635	Mecklenburg (88CVS9609)	No Error
WILLIAMSON v. GEORGIA-PACIFIC CORP. No. 9019SC1064	Montgomery (90CVS152)	Affirmed

THE TRUSTEES OF THE L. C. WAGNER TRUST, PLAINTIFFS v. BARIUM SPRINGS HOME FOR CHILDREN, INC.; DAVIS HOSPITAL FOUNDATION, INC.; MITCHELL COMMUNITY COLLEGE; GARDNER-WEBB COLLEGE; JOSEPH FORESTER DAVIS; JOHN C. DAVIS; LOUIS M. DAVIS; PATRICIA DAVIS HINTON; MARY DAVIS BROYHILL (CRAIG); NELL DAVIS McCOY; GEORGE C. DAVIS; DAVIS HOSPITAL, INC.; OLIVIA BROWN THOMAS; H. BROWN KIMBALL AND JOHN H. GRAY III, DEFENDANTS

No. 9022SC402

(Filed 19 March 1991)

1. Trusts § 4 (NCI3d)— charitable trust—determination of beneficiary

The trial court erred in a declaratory judgment action to determine the appropriate distribution of the trust funds by failing to find and conclude that Barium Springs is the proper beneficiary where L. C. Wagner executed a will setting up a trust the income of which was to be used in promoting Davis Hospital, Inc. following the death of his wife; should Davis Hospital, Inc. cease to operate as a hospital or should two-thirds of the trustees deem it inadvisable to supply further funds, the trust funds were to be used in the trustees' discretion for the promotion of the Barium Springs Orphanage; Davis Hospital ceased to operate in 1983; the proceeds of the sale of its assets were paid over to the Davis Hospital Foundation, a nonprofit corporation which included in its purposes the promotion of nursing education; the trustees of the Wagner Trust passed a resolution stating that Davis Hospital was no longer operating a hospital, that the Barium Springs Orphanage was no longer operating as an orphanage, and that the trust income should be paid to the Davis Hospital Foundation; and the court erroneously applied the *cy pres* doctrine, concluding that the intention of L. C. Wagner could best be preserved by directing the trustees to apply the income in their discretion for the Nursing Education Programs of Mitchell Community College and Garner-Webb College. The testator's intention was clearly that the funds were to go to Barium Springs in the event the hospital ceased to operate and the will does not specify any condition requiring the institution to continue to function in the identical capacity in which it operated as of the death of the testator.

Am Jur 2d, Charities § 160.

2. Trusts § 4.1 (NCI3d)— charitable trust—cy pres doctrine —inapplicable

The trial court erred in a declaratory judgment action to determine the proper beneficiary of a trust by finding and concluding that the testator manifested a general charitable intent and by applying the *cy pres* doctrine. Although it was contended that item 5 of the will evidenced a general charitable intent to aid sick, injured and suffering humanity, the testator states in item 5 his intention to aid the Davis Hospital specifically and his motive that the promoting of the hospital will aid sick, injured and suffering humanity, not any general charitable intent. Nothing in the will indicates more than that the testator wanted to promote Davis Hospital, and in addition, the testator provided for the possibility of trust failure by specifying an alternate beneficiary which has not become impracticable or impossible. N.C.G.S. § 36A-53(a).

Am Jur 2d, Charities §§ 162, 163.

3. Trusts § 8 (NCI3d)— trust income—constructive delivery

In a declaratory judgment action to determine the proper beneficiary of a trust, the trial court erred in concluding that the trust was mandatory, did not err by finding and concluding that the trustees had constructively distributed income which was not actually paid to Davis Hospital and which was left in the trust to be reinvested by the trustees, and erred by concluding that income not actually paid to Mrs. Wagner during her lifetime was constructively delivered.

Am Jur 2d, Charities §§ 139, 156.

4. Trusts § 10.3 (NCI3d)— capital gains—constructively delivered

The trial court did not err in concluding that capital gains from trust principal had been constructively distributed to Davis Hospital where, although the trial court incorrectly concluded that the testator intended income to include capital gains, the trust was discretionary and the evidence supported the findings of fact and the conclusion that the trustees in their discretion constructively distributed the capital gains.

Am Jur 2d, Charities §§ 139, 156.

5. Trusts § 10 (NCI3d) — termination of trusts — existence of alternate beneficiary

A charitable trust did not fail and the funds did not pass to the next of kin where the alternate beneficiary, Barium Springs, still existed.

Am Jur 2d, Charities §§ 155, 160.

Judge GREENE concurs in part and dissents in part.

APPEAL by defendants from judgment entered 28 November 1989 by *Judge James C. Davis* in IREDELL County Superior Court. Heard in the Court of Appeals 6 December 1990.

On 26 August 1942, L. C. Wagner executed a will setting up a trust. The income from the trust was to be paid to his wife during her lifetime. Following her death, the trust income was to be used in promoting Davis Hospital, Inc. The will in part provides:

> ITEM 5. It is my will that my Trustees heretofore and above named and appointed shall use the income from all my property for the purpose of promoting the welfare and, if possible, the perpetuation of the Davis Hospital, Incorporated. . . . If at any time it shall be made to appear to the satisfaction of the Trustees herein named or their successors that any of the funds, in their hands belonging to this trust, is needed or can be used to advantage to promote and perpetuate said Hospital and aid sick, injured and suffering humanity, either of the white or colored race, then said Trustees are hereby authorized to use such sum or sums either with the income or principal of said Trust Fund as in the discretion of a two-third majority of said Board of Trustees shall be deemed wise and expedient.
>
> ITEM 6. That in the event the said Davis Hospital, Incorporated, shall for any cause cease to operate and function as a hospital or that the conditions of said hospital should become such that in the opinion of a two-third majority of the trustees herein named that it would be inadvisable to supply further funds for that cause then and in that event the said Trustees shall use any funds then remaining unexpended as in their discretion may seem best for the promotion of the Barium Springs Orphanage at Barium Springs, North Carolina. . . .

L. C. Wagner died 5 July 1946, and his wife, Mary Wagner, died 2 July 1956. On or about 30 April 1983, Davis Hospital, Inc. sold all of its assets, and on or about 1 May 1983 it ceased to operate the hospital. The proceeds of the sale were paid over to Davis Hospital Foundation, Inc., a nonprofit corporation for which one of its purposes is to promote nursing education. On 11 October 1984, Davis Hospital, Inc. filed Articles of Dissolution.

In December 1983, the Trustees of the Wagner Trust (hereinafter "Trustees") passed a resolution stating that Davis Hospital, Inc. was no longer operating a hospital; that the Barium Springs Orphanage, the alternate beneficiary in the event the hospital ceased to operate, was no longer operating as an orphanage; therefore, the trust income should be paid to the Davis Hospital Foundation, Inc. Davis Hospital, Inc. and Davis Hospital Foundation, Inc. paid all income received from the Trustees from May 1983 to June 1985 to Gardner-Webb College, which had been operating since September 1984 the Davis School of Nursing of Gardner-Webb College, Inc., and leasing buildings which formerly housed the Davis Hospital School of Nursing for its Statesville campus. Mitchell Community College, which had participated in educating nurses jointly with Davis Hospital, continued to operate a joint program with Gardner-Webb.

The Trustees brought this declaratory judgment action seeking a determination as to the appropriate distribution of the funds. The Trustees named as defendants Barium Springs Home for Children, Inc., Davis Hospital Foundation, Inc., Mitchell Community College, Gardner-Webb College, and the heirs of L. C. Wagner, including Mary Davis Broyhill Craig, who seeks a share of the trust as an heir of L. C. Wagner. On 20 December 1988, a motion was granted to add as defendants the heirs of Mary Wagner. Davis Hospital, Inc. was also made a party.

On 4 August 1988, a motion by Barium Springs Home for Children, Inc. to strike Mitchell Community College and Gardner-Webb College as parties defendant was denied. On 3 November 1988, summary judgment motions filed by Barium Springs Home for Children, Inc., Mitchell Community College, and Mary Davis Broyhill Craig were denied.

The parties stipulated that the reference in the will to "the Barium Springs Orphanage at Barium Springs, North Carolina" referred to the institution at Barium Springs owned and operated

by The Regents of the Orphans' Home which changed its name in 1961 to Barium Springs Home for Children.

Following the first hearing, the Trustees moved to reopen for additional evidence on the grounds that they had discovered since the first hearing that the income tax returns from 1956 to 1983 showed that all the trust income had been distributed to Davis Hospital, Inc. though Davis Hospital, Inc. had permitted part of the income to remain in the trust in order that it be reinvested by the Trustees. Over Barium Springs' objection, the motion was granted.

The trial court stated in its findings of fact:

> 49. The purpose for which Barium Springs Orphanage existed in 1946 was the maintenance, care and support of orphans. The purpose for which Barium Springs Home for Children, Inc. exists today and existed in 1983 is to minister to the needs of troubled youth . . . and to offer certain family life services. In 1983 and to the present, only a small percentage of the clientele . . . have been single or double orphans. . . .

The trial court also found that in the 1960's Barium Springs Home for Children closed its schools; the children ceased working on its farms and in its shops; and by 1968, it "was no longer operating as an institution for purely custodial care in a similar setting to what used to be an orphanage" but instead was operating a "day-care program for normal children of the neighborhood from while [sic] families." In 1974, Barium Springs Home for Children amended its charter substituting the words "for the care, control, education, maintenance and support of indigent or orphan children" with "the purpose of Barium Springs Home for Children is a multi-function family service agency." The trial court further stated that in 1977 it "ceased being an orphanage . . . and began a program of working exclusively with troubled, alienated and disturbed adolescents," for which treatment was not provided free of charge. The trial court also stated that the institution "is not now and has not been since at least January 1, 1977, an orphanage." The trial court found that the portion of the the trust income which had not been actually paid to Davis Hospital had been reinvested for the hospital by the Trustees.

The trial court concluded that the trust is a mandatory trust, that the will manifested a general charitable intent, that the disposi-

tion of the trust funds became impracticable once Davis Hospital ceased to exist, that the provision designating Barium Springs as beneficiary had become impracticable on the grounds that Barium Springs Orphanage did not exist, and that the *cy pres* doctrine applies. The trial court further concluded that Mitchell Community College and Gardner-Webb College are the continuation of the Davis Hospital Nursing Program and that the intention of L. C. Wagner "can best be preserved . . . by directing that the trustees of said Trust apply the income and so much of the principal as in their discretion is appropriate for the Nursing Education Programs of Mitchell Community College and Gardner-Webb College."

The trial court awarded Davis Hospital, Inc. approximately 1.7 million dollars which included capital gains which the court determined should be considered part of the income actually and constructively received by Davis Hospital. The trial court further ordered that all income from the remaining trust funds and any principal in the Trustees' discretion be distributed annually to Mitchell Community College and Gardner-Webb College.

From this judgment, defendant Barium Springs Home for Children, Inc. and defendant Mary Craig appeal.

Womble Carlyle Sandridge & Rice, by Dewey W. Wells, Elizabeth L. Quick, and Mark E. Richardson III, for defendant-appellant Barium Springs Home for Children.

Anderson & McLamb, by Sheila K. McLamb, for defendant-appellant Mary Craig.

McElwee, McElwee, Cannon & Warden, by E. Bedford Cannon, for defendant-appellees Davis Hospital, Inc. and Davis Hospital Foundation, Inc.

Hamrick, Mauney, Flowers & Martin, by Fred Flowers, for defendant-appellee Gardner-Webb College.

Pope, McMillan, Gourley, Kutteh & Parker, by William P. Pope, for defendant-appellee Mitchell Community College.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Walter F. Brinkley, for North Carolina Child Care Association, Inc., amicus curiae.

ORR, Judge.

Defendant Barium Springs Home for Children, Inc. (hereinafter "Barium Springs") raises four issues on appeal contending that the trial court erred in the following respects: (1) failing to find and conclude that Barium Springs is the proper beneficiary under the trust and considering evidence regarding changes at Barium Springs, (2) considering evidence regarding the testator's intent and applying the *cy pres* doctrine, (3) determining the Trustees made constructive delivery to Davis Hospital of the undistributed trust income, and (4) ruling that capital gains should be treated as income and that capital gains had been constructively delivered to Davis Hospital.

In reviewing a declaratory judgment, 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. The function of our review is, then, to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions. [Citation omitted.]

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).

In interpreting and construing the terms of a will,

> [t]he cardinal rule . . . is that the intention of the maker be ascertained if possible. The intention which controls is that which is manifest, expressly or impliedly, from the language of the will. Where the intention is clearly and consistently expressed there is no need for judicial interpretation, and the court must first examine the will and, if possible, ascertain its meaning without reference to rules or canons of construction. Only where there is ambiguity or uncertainty is it proper for the court to take into consideration the established rules or canons for the construction of wills. [Citations omitted.]

First Union Nat'l Bank v. Moss, 32 N.C. App. 499, 503, 233 S.E.2d 88, 91-92, *disc. review denied*, 292 N.C. 728, 235 S.E.2d 783 (1977).

I.

[1] Barium Springs in its first assignment of error contends that the trial court erred in failing to find and conclude that Barium Springs is the proper beneficiary of the trust on the grounds that the will itself and the stipulated facts establish as a matter of law that Barium Springs is entitled to benefit from the trust. Barium Springs in its fourth assignment of error contends that the trial court erred in considering evidence regarding the changes at Barium Springs and finding and concluding "the alternative plan [with Barium Springs as beneficiary] was impracticable or impossible."

Based on the evidence, the trial court made findings of fact that the purpose, function, and services of Barium Springs have changed and that "Barium Springs Orphanage does not now exist." The trial court also quoted the Trustees' resolution stating that "Barium Springs Orphanage is no longer in existence as an orphanage." The trial court made further findings of fact and corresponding conclusions of law that "[e]ven if Barium Springs Orphanage does exist," the testator's intention regarding Barium Springs is "impossible or impracticable to fulfill."

"Where the language employed by the testator is plain and its import is obvious, . . . the words of the testator must be taken to mean exactly what they say." *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965) (quoting *Elmore v. Austin*, 232 N.C. 13, 18, 59 S.E.2d 205, 209 (1950)).

> "If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient; and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it."

Wachovia Bank & Trust Co. v. Wolfe, 243 N.C. 469, 474, 91 S.E.2d 246, 251 (1956) (quoting *McDaniel v. King*, 90 N.C. 597, 602 (1884)).

Davis Hospital Foundation, Inc., Mitchell Community College, Gardner-Webb College, and Davis Hospital, Inc. (hereinafter "appellees") argue that Barium Springs is not entitled to benefit from the trust as alternate beneficiary because an orphanage at Barium Springs no longer exists. Appellees argue the will is unclear on

the following grounds: "(1) the testator's named reference does not match the name used by the institution at any time in its history and (2) even allowing the reference to embrace the institution as currently named, the activities of the home have changed dramatically since the will's execution."

Regarding the name of the institution, the Trustees in their complaint stated that Barium Springs "is owned and operated by Barium Springs Home for Children, Inc., which, except for its name, is the same corporation which owned and operated Barium Springs Orphanage at the time of the death" of the testator. Significantly, the parties stipulated that the reference to the institution in the will referred to the Barium Springs Home for Children, Inc.

Based on the will itself, which is sufficiently plain in meaning, and the parties' stipulations, the testator's intention is clear—in the event the hospital ceased to operate, the funds were to go to Barium Springs, which was clearly identified by the testator in his will. Furthermore, the will does not specify any condition requiring the institution to continue to function in the identical capacity in which it operated as of the death of the testator. Nonetheless, the trial court found that Barium Springs no longer exists under the will by apparently implying a condition that it not deviate from its precise function at the time of the execution of the will such that the trust became "impossible or impracticable."

In *In Re Estate of Staab*, 173 N.W.2d 866 (Iowa 1970), one of the residuary legatees was St. Monica's Home, which at the time of the execution of the will served as a home for unwed mothers and children under age four, but at the time of the testator's death, it operated as a retirement home while retaining its corporate identity. The court stated that St. Monica's Home was still in existence, and if the testator had intended the funds to be used only for a home for unwed mothers and children under age four, she should have clearly stated so in the will. *Id.* at 871-72.

In *First Am. Nat'l Bank v. DeWitt*, 511 S.W.2d 698 (Tenn. Ct. App. 1972), the will provided that part of the trust funds would go to the trustees of the "Protestant Orphanage of Nashville, Tennessee" if it was still in existence. The will had no requirement as to how the funds were to be used. The "Nashville Protestant Orphans' Asylum" provided residential care for needy girls and was in existence at the time of the execution of the will. In 1957, due to changing needs, the institution stopped providing such care,

and in 1958 amended its charter and changed its name to the "Protestant Orphanage Foundation, Inc." and began providing funds for a day care center for retarded children. Since 1963, it has operated the day care center. The court held that the institution named in the will had not ceased to exist. *Id.* at 707.

Here, as we stated above, there is no express condition in the will requiring that Barium Springs remain the same, and we will not imply such a condition. We recognize the consequences that would result from implying such a condition to charitable trusts so that a charitable organization would be required to function in the exact same capacity as it did at the time the trust was created. First, charitable institutions would be unable to adapt to the changing needs of society and would be forced to forego any changes in services or functions. Second, by implying such a condition, the numerous wills and trusts drafted prior to this case would have to be revised in order to comply with the testator's intent. Finally, such an implied condition would lead to difficult determinations as to how much change is permitted and whether the charitable organization has changed to such an extent that it is no longer the charitable institution the testator intended to benefit. We do not wish to resort to such line-drawing. Thus, we conclude that the trial court erred in failing to find and conclude Barium Springs is the proper beneficiary.

II.

[2] Barium Springs in its second assignment of error contends that the trial court erred in considering extrinsic evidence regarding the testator's intent and in concluding the testator manifested a general charitable intent. In its third assignment of error, Barium Springs contends that the trial court erred in considering evidence regarding the history of the nursing programs at Davis Hospital, Gardner-Webb College, and Mitchell Community College, and in applying the *cy pres* doctrine.

The equitable doctrine of *cy pres* "is a saving device applied to charitable trusts by the courts 'to direct the application of the property to a charitable purpose as near as possible to the precise objective of the donor,' when his precise intention cannot be effectuated." *Board of Trustees of UNC-CH v. Heirs of Prince*, 311 N.C. 644, 647, 319 S.E.2d 239, 242 (1984) (quoting E. Fisch, D. Freed, and E. Schachter, *Charities and Charitable Foundations* § 561 (1974)).

In North Carolina, the *cy pres* doctrine is applied pursuant to N.C. Gen. Stat. § 36A- 53(a) (1984) which provides in relevant part:

> If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee . . . order an administration of the trust . . . as nearly as possible to fulfill the manifested general charitable intention of the . . . testator. . . . This section shall not be applicable if the . . . testator has provided . . . for an alternative plan in the event the charitable trust . . . is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust . . . and such trust . . . fails, the intention shown in the original plan shall prevail in the application of this section.

Thus, the statute applies only when three conditions have been met: (1) the testator manifested a general charitable intent; (2) the trust has become illegal, impossible, or impracticable; (3) the testator has not provided for an alternative disposition if the trust fails. *Prince*, 311 N.C. at 647, 319 S.E.2d at 242.

Here the trial court stated in its findings of facts that "Barium Springs Home for Children is not now and has not been since at least January 1, 1977, an orphanage" and that "Barium Springs Orphanage" and Davis Hospital no longer exist. It further stated that "[e]ven if Barium Springs Orphanage does exist, it is impossible or impracticable to fulfill the intention of the testator"; that he manifested "a general intention to devote his property to charity"; and that, therefore, N.C. Gen. Stat. § 36A-53 applies.

Based on its findings, the trial court concluded:

> 13. GS 36A-53 provides that if a trust for charity becomes impossible or impracticable of fulfillment, and if the testator manifested a general intention to devote the property to charity, then any Judge of the Superior Court may order an administration of the trust "as nearly as possible to fulfill the manifested general charitable intention" of the testator. The Statute further provides that when the testator provides an alternative plan which is also charitable and such charity also

fails, then the general intention shown in the original plans shall prevail.

14. The Will of L. C. Wagner manifested general charitable intention. It became impracticable to fulfill on the termination of Davis Hospital. The alternative plan was impracticable or impossible to fulfill because Barium Springs Orphanage did not then exist.

The trial court further concluded that the two colleges "continue the existence of one of the two primary purposes of Davis Hospital" through their nursing programs and that the testator's intent "can best be preserved and perpetuated" through distributions of the trust funds to these institutions.

The first condition has not been met, and the trial court erred in finding and concluding that the testator manifested a general charitable intent. " 'If a gift to a specific charitable corporation lapses it may not be applied cy pres unless from the will or extrinsic evidence the Court may find a general charitable intent *beyond that shown by the gift to the specific charitable corporation.*' " *Wilson v. First Presbyterian Church*, 284 N.C. 284, 300, 200 S.E.2d 769, 779 (1973) (quoting *Rhode Island Hospital Trust Co. v. Williams*, 50 R.I. 385, 390, 148 A. 189, 191 (1929)).

Appellees contend that item 5 of the will evidences such a general charitable intent to "aid sick, injured and suffering humanity." That section states in part:

> If at any time it shall be made to appear to the satisfaction of the Trustees . . . that any of the funds . . . is needed or can be used to advantage to promote and perpetuate said Hospital and aid sick, injured and suffering humanity, . . . then said Trustees are hereby authorized to use such sum or sums . . . .

In item 5, the testator states his intention to aid the Davis Hospital specifically and his motive that the promoting of the hospital will "aid sick, injured and suffering humanity" not any general charitable intent. Nothing in the will indicates more than that the testator wanted to promote Davis Hospital. In the first part of item 5, he states his purpose "of promoting the welfare and, if possible, the perpetuation of Davis Hospital."

In item 11 of the will, the testator specifies his requests of his trustees including "it is my aim to be a contributor for [Davis Hospital's] perpetuation." He further states that:

> I request my Trustees to encourage public sentiment to aid in securing a suitable building for the care of colored patients. . . . Under this plan, if necessary, I would expect you to apply a reasonable donation from my estate to aid in said suitable building, though my hope is that said estate be kept as nearly intact as it is humanly possible for the sole purpose of maintenance, thereby to aid in the perpetuity of the Davis Hospital, Incorporated. It is my further request that a reasonable percentage of my estate will be used for the care of the needy among our colored friends . . . .

Additional evidence of the testator's specific intent to aid Davis Hospital is found in item 12:

> It is my final parting wish to my Trustees . . . to use every effort and exhaust every means humanly possible to perpetuate the Davis Hospital, Incorporated, located on West End Avenue in the City of Statesville, N.C., for the treatment of sick and injured humanity. This hospital was organized and has been carried on through the years by the effort and services of my nephew, Dr. James W. Davis, and it is my sincere wish that this noble work begun by him shall be carried on throughout the years to come.

In addition, the testator provided for the possibility of trust failure by specifying an alternate beneficiary. "The failure, or conscious omission, to provide for the possibility of trust failure is further evidence of the [testator]'s general charitable intentions." *Prince*, 311 N.C. at 649, 319 S.E.2d at 243.

We recognize "[t]he fact that a testator bequeathed practically all of his estate for charitable purposes is sound evidence denoting that he had a general charitable intention." *Id.* However, here the will itself clearly reflects only the testator's specific intent to aid Davis Hospital, and there is no other evidence to the contrary. Thus, the trial court's finding that the testator manifested a general charitable intent was not supported by the evidence, and the trial court erred in finding and concluding that the *cy pres* statute was applicable.

Although the Davis Hospital has ceased to operate and thus in that respect the trust is "impracticable," the third condition has also not been met since the testator did make an alternative disposition in favor of Barium Springs which, as we determined above, has not become impracticable or impossible. Thus, for the reasons above, we conclude that the trial court erred in applying *cy pres*.

III.

[3] Barium Springs next contends that the trial court erred in determining that the Trustees made constructive delivery to Davis Hospital of the trust income which had not actually been paid to the hospital. Barium Springs argues that the trust is mandatory only regarding the identity of the beneficiary but discretionary regarding the distribution of income.

The trial court stated in its findings of fact that during the time Dr. Hoyle Whiteside served as a trustee of the trust (1972 to the present), "the only discretion the Trustees of the Wagner Trust possessed with regard to payments to Davis Hospital, Inc. was as to the timing of disbursements." Further, the trial court stated that the Trustees "had no discretion as to the beneficiaries of the income or as to the amount to be distributed." Based on its findings, the trial court concluded that the trust is mandatory and "[t]he only discretion which the Trustees of the trust have is discretion as to the time of distribution of funds."

In *Lineback v. Stout*, 79 N.C. App. 292, 296, 339 S.E.2d 103, 106 (1986), we stated:

> A discretionary trust is a trust wherein the trustee is given the discretion to determine whether and to what extent to pay or apply trust income or principal to or for the benefit of a beneficiary. Under a true discretionary trust, the trustee may withhold the trust income and principal altogether from the beneficiary and the beneficiary, as well as the creditors and assignees of the beneficiary, cannot compel the trustee to pay over any part of the trust funds. A trust wherein the trustee has discretion only as to the time or method of making payments to or for the benefit of the beneficiary is not a true discretionary trust. [Citations omitted.]

Regarding the mandatory or discretionary powers of a trustee, our Supreme Court stated:

> A power is mandatory when it authorizes and commands the trustee to perform some positive act. A power is discretionary when the trustee may either exercise it or refrain from exercising it, . . . or when the time, or manner, or extent of its exercise is left to his discretion. [Citations omitted.]

Woodard v. Mordecai, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951).

To determine if a trustee's power is mandatory or discretionary, we must look to the

> intent of the settlor as evidenced by the terms of the trust. The intent of a settlor is determined by the language he chooses to convey his thoughts, the purposes he seeks to accomplish and the situation of the parties benefitted by the trust. Use by the settlor of words of permission or option, or reference to the discretion of the trustee, in describing the trustee's power, indicates that the settlor intended that the power be discretionary, whereas the use of directive or commanding language indicates that a mandatory power was intended. [Citations omitted.]

Lineback, 79 N.C. App. at 297, 339 S.E.2d at 107.

Although item 5 states that the Trustees "shall use the income . . . for the purpose of promoting the welfare and, if possible, the perpetuation of the Davis Hospital," we conclude that this language merely denotes the testator's purpose in establishing the trust and the identity of the beneficiary. However, the second part of item 5 states:

> If at any time it shall be made to appear to the satisfaction of the Trustees . . . that any of the funds, in their hands belonging to this trust, is needed or can be used to advantage to promote and perpetuate said Hospital and aid sick, injured and suffering humanity, . . . then said Trustees are hereby authorized to use such sum or sums either with the income or principal of said Trust Fund *as in the discretion of a two-third majority* of said Board of Trustees shall be deemed wise and expedient. [Emphasis added.]

The second part of item 5 indicates that whether and when the income is to be distributed lies in the discretion of the Trustees, and they are "authorized" to make distributions in their discretion. We conclude that the trial court's findings of fact were not sup-

ported by the evidence, and thus the trial court erred in concluding that the trust was mandatory.

Therefore, the critical question is whether the Trustees using their discretionary power constructively delivered the income which was not actually paid to Davis Hospital. In the Trustees' resolution quoted in the trial court's findings, the Trustees stated that all income "has heretofore been distributed to Davis Hospital, Inc." Further, the trial court found that the Davis Hospital trustees "regarded all of the earnings (including capital gains) of the . . . Trust as Davis Hospital, Inc. property" but that they requested the Wagner Trustees to reinvest the funds not actually paid to the hospital. The trial court further found that Davis Hospital would "make the Trustees of the Wagner Trust aware of a particular need" and the Trustees would distribute cash when available so as not to sell the assets, and the rest of the funds were reinvested. Further, testimony at trial revealed that the Trustees "felt" the undistributed income belonged to Davis Hospital. The trial court stated also in its findings of fact:

> 37. The Trustees of the Wagner Trust considered the income (including capital gains) of the Trust not actually distributed to Davis Hospital, Inc. to be the property of Davis Hospital, Inc.
>
> 38. All income of the Wagner Trust (including capital gains) were distributed to the Davis Hospital Inc. annually. Some distributions were in the form of cash in response to a requested need. Other distributions were in the form of investments made by the Wagner Trustees of income not actually distributed for the benefit of and at the request of the Trustees of the Hospital.
>
> 39. The Trustees of the Wagner Trust did not segregate the assets it was reinvesting for the Davis Hospital, Inc. from the other assets. . . .

The trial court further found that in the Wagner Trust's federal and state tax returns filed 1946 to 1988 and in the possession of the Wagner Trust's certified public accounting firm (with the exception of the years 1957-1959 for which records and documents exist "from which all gross and net income and expenses" can be determined), "all net income including capital gains is shown as having been distributed."

The trial court concluded that all net income from 5 July 1946 to 2 July 1956 which was not actually paid to Mrs. Wagner and all net income from 2 July 1956 to 30 April 1983 was "either actually or constructively distributed" to Davis Hospital. Thus, the trial court concluded that:

> 10. Davis Hospital, Inc. is entitled to and the owner of funds in the possession of L. C. Wagner Trustees in the amount of $1,695,882.09; said figure derived as follows:
>
> (a) all undistributed net income from the L. C. Wagner Trust for the period of time from July 5, 1946 until July 2, 1956 in the amount of $115,599.92
>
> (b) all undistributed net income from the L. C. Wagner Trust for the period of time from July 2, 1956 until April 30, 1983 in the amount of $947,813.31
>
> (c) 69.29% of all undistributed net income from the L. C. Wagner Trust for the period of time from May 1, 1983 until and including December 31, 1988 in the amount of $632,468.86.

Appellees contend that even if the trust is discretionary, the Trustees exercised their discretion by allocating all the income to the hospital. Barium Springs cites several tax cases and contends that under these cases the absence of documentary evidence that the funds were delivered precludes a finding of constructive delivery. Although the tax argument is persuasive, it is not necessarily controlling here.

In determining whether a negotiable note had been constructively delivered, our Supreme Court stated that "constructive delivery will be held sufficient if made with the intention of transferring the title, but there must be some unequivocal act, more than the mere expression of an intention or desire" such that " 'the maker in some way evinced an intention to make it an enforceable obligation against himself, according to [the instrument's] terms, by surrendering control over it and intentionally placing it under the power of the payee.' " *Cartwright v. Coppersmith*, 222 N.C. 573, 578, 24 S.E.2d 246, 249 (1943); *Sinclair v. Travis*, 231 N.C. 345, 57 S.E.2d 394 (1950). Here the Trustees clearly intended that the income be paid to Davis Hospital; the Davis Hospital trustees considered all such income to have been distributed, and the trustees filed tax returns reporting that such income had been paid. Thus, we conclude that there is some evidence to support the trial court's

findings that the undistributed income was constructively delivered, and even if there is some evidence to support findings to the contrary, we cannot say that the trial court erred in finding and concluding the Trustees "constructively distributed" the income not actually paid to Davis Hospital.

However, item 2 of the will states that income from the testator's property was to be used by his wife in the upkeep of his property and to supplement the dividends used for her support and that "[a]ll other income collected from my property during the life of my wife, Mary Wagner, shall be held by her either as Executrix or Trustee and shall become a part of the principal of my estate." Thus, under the terms of the will, income not actually distributed to her became part of the trust corpus, and the trial court erred in concluding that the income not actually paid to Mrs. Wagner during her lifetime was "constructively delivered."

IV.

[4] Barium Springs next contends that the trial court erred in ruling that capital gains should be treated as income and that capital gains had been constructively delivered to Davis Hospital. Here the trial court found that the Trustees "considered the income (including capital gains) of the Trust not actually distributed to Davis Hospital, Inc. to be the property of Davis Hospital, Inc." The trial court further stated in its findings of fact that in the tax returns filed "all net income including net capital gains is shown as having been distributed." In its conclusions of law, the trial court stated that the testator intended the term "income" to include capital gains and concluded that all "net income generated by the L. C. Wagner Trust [except the income actually distributed to Mary Wagner] was either actually or constructively distributed by the L. C. Wagner Trust to Davis Hospital, Inc."

We recognize that "principal" includes "[c]onsideration received by the trustee . . . on the sale or other transfer of principal." N.C. Gen. Stat. § 37-19(b)(1) (1984) (applicable under N.C. Gen. Stat. § 37-40 to any receipt received after 1 January 1974 whether the trust was established before or after that date). Appellees, however, argue that N.C. Gen. Stat. § 37-18(a)(1) (1984) applies. The statute provides that a trust is administered regarding allocation of receipts and expenditures "[i]n accordance with the terms of the trust instrument or will, notwithstanding contrary provisions of this Article." The will is silent on the allocation of capital gains, and thus the

trial court was incorrect in concluding that the testator intended "income" to include capital gains. We concluded above, however, that the trust is discretionary and that under the terms of the trust the Trustees are "authorized to use such sum or sums either with the income or principal . . . as in the discretion of a two-third majority of said Board of Trustees shall be deemed wise and expedient." Here the evidence supports the findings of fact and thus the conclusion that the trustees in their discretion "constructively distributed" the capital gains as we determined above in regard to income. Thus, the trial court did not err in concluding that capital gains had been "constructively distributed" to Davis Hospital.

V.

[5] Defendant Craig also contends that both Davis Hospital and Barium Springs no longer exist and that, therefore, there are no remaining beneficiaries under the trust. Thus, Ms. Craig argues that under the North Carolina rules of descent and distribution, the funds pass to the next of kin. We concluded above that Barium Springs, the alternate beneficiary, still exists, and thus the trust does not fail.

We conclude that Barium Springs as alternate beneficiary is entitled to benefit from the trust excluding income including capital gains "constructively distributed" to Davis Hospital from 2 July 1956 up until the time Davis Hospital ceased "to operate and function as a hospital."

Reversed in part, affirmed in part, and remanded to the trial court for entry of judgment consistent with this opinion.

Judge PHILLIPS concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

With the exception of the majority's treatment of the issue of constructive delivery of the undistributed income and capital gains, I concur in the majority opinion. With respect to the issue of constructive delivery, I dissent.

I question whether there is sufficient competent evidence in the record to support the finding of fact that the Wagner Trustees considered the undistributed income and capital gains to be Davis Hospital's property. This finding was based in large part on a resolution passed by the Wagner Trustees in December of 1983, approximately thirty-seven years after inception of the trust. Therefore, the resolution does not reveal the Wagner Trustees' intent *prior* to 1983.

However, assuming that there is competent evidence to support this finding of fact, it does not support a conclusion that there was a constructive delivery of the undistributed income and capital gains. Constructive delivery requires more than intent. It requires an "unequivocal act" resulting in the surrender of control over the funds. *Cf. Sinclair*, 231 N.C. at 352-53, 57 S.E.2d at 399 (constructive delivery of note). Here, the majority holds that the filing of the tax returns reporting the income and capital gains as having been distributed is the necessary unequivocal act surrendering control. I disagree. The tax return entries did no more than give the trust a tax break. It did not result in the surrender of control over the funds. In fact, the Davis Hospital trustees were not even aware of the tax return entries. Furthermore, there is nothing in the record which would show that the Wagner Trustees in any way segregated the funds or made any bookkeeping entry to reflect the transfer of the income or capital gains to Davis Hospital. I see no unequivocal act resulting in the loss of control and therefore no constructive delivery of the undistributed income and capital gains. Accordingly, I would reverse the judgment of the trial court.

RUSSELL A. MATHESON AND WIFE, ELAINE R. MATHESON AND KAY LEE WRIGHT v. CITY OF ASHEVILLE

No. 8928SC897

(Filed 19 March 1991)

1. **Municipal Corporations § 2.6 (NCI3d)— annexation —provision of fire protection services in annexed area—sufficiency of showing**

Respondent city showed prima facie compliance with N.C.G.S. § 160A-47 where the annexation report showed that respondent intended to negotiate a contract with a volunteer fire department to provide fire protection services, but, failing that, respondent would provide fire protection from its existing facilities; the station serving the area to be annexed was 2.5 miles from the farthest point in the area, while the city's maximum response distance in its fire protection jurisdiction was three miles; the city intended to add an all-terrain pumping vehicle to the station in order to service the new area, thus providing it with exactly the same, if not more, protection than the rest of the city; evidence of response time showed that it was basically the same from the existing fire station to points within the city and points in the area to be annexed; the Court of Appeals has previously held that response time is only one of many factors that determines whether an annexation report complies with statutory requirements for the extension of fire protection services; and evidence that the City could use strong suction to draft water out of the water mains and could truck 3,000 gallons of water to a fire was sufficient evidence of an adequate water supply to provide fire protection.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 65.

2. **Municipal Corporations § 2.6 (NCI3d)— annexation—provision of police protection in annexed area—sufficiency of showing**

Respondent city's plan to increase its police force proportional to the increase in the population attributable to annexation was a sufficiently sophisticated plan for the provision of services to meet the requirements of N.C.G.S. § 160A-47(3)a.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 65.

3. **Municipal Corporations § 2.6 (NCI3d)— annexation—provision of solid waste collection services—no showing of discrimination between existing service and service to annexed area**

Petitioners failed to show that the city's plan to provide solid waste collection services to those individuals in the area to be annexed who lived on city or state streets and to make no provision for those who lived on private streets would provide less service to those in the annexed area than to those in the existing city limits.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 65.

4. **Municipal Corporations § 2.6 (NCI3d)— annexation—provision of water and sewer services—provisions and timetables adequate**

A city met the requirements of N.C.G.S. § 160A-47(3)b and c where its annexation report contained adequate provisions and timetables for the extension of both water and sewer lines, and there was no substantial evidence that the current water supply was insufficient to service the annexed territory; furthermore, if residents were to find after annexation that the city did not provide water and sewer services, they could petition the court for a writ of mandamus requiring the city to provide such services.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 65.

5. **Municipal Corporations § 2.3 (NCI3d)— annexation—boundaries not laid out according to topographical features**

Respondent city was not required to extend the boundaries of a proposed annexation area to include ridge lines where to do so would have defeated the city's compliance with the other mandatory portions of the annexation statute.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 59, 65.

6. Municipal Corporations § 2.1 (NCI3d)— annexation—metes and bounds description allegedly different in newspaper and ordinance

Petitioners failed to indicate specifically how the metes and bounds description of a proposed annexation published in the Asheville newspaper varied from the metes and bounds description contained in the annexation ordinance, failed to indicate how the alleged variance prejudiced them in any manner, and failed to provide the court on appeal with a legible copy of the metes and bounds description which was published in the newspaper, rendering impossible the court's independent comparison of the two descriptions.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 66.

7. Municipal Corporations § 2.4 (NCI3d)— annexation—admission and exclusion of evidence—no error

In an action to have an annexation ordinance declared null and void, the trial court did not err in (1) allowing opinion testimony of the fire chief that the city could provide adequate fire protection to the annexed area, since that opinion was based on the water carrying capacity of the equipment that would be used to respond to structure fires within the annexation area; (2) allowing the opinion evidence during cross-examination, since petitioners explicitly stated that they had no objection to the city putting on its evidence through the chief during cross-examination as long as they were allowed to cross-examine him at the conclusion of his testimony for the city; (3) allowing into evidence letters that the chief wrote in an effort to negotiate a contract with a volunteer fire department for provision of fire protection services to the annexed area, since there was sufficient evidence aside from the letters to show a good faith effort to negotiate by the city; and (4) refusing to allow a lay witness to testify as to whether there could be an adequate response by city fire trucks to a certain destination in a hypothetical situation, since there was no foundation showing that the opinion called for was rationally based on the witness's perception.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 65, 66.

APPEAL by petitioners from judgment entered 17 March 1989 by *Judge Charles C. Lamm, Jr.*, in BUNCOMBE County Superior Court. Heard in the Court of Appeals 2 April 1990.

Alley, Hyler, Killian, Kersten, Davis & Smathers, by George B. Hyler, Jr., and Robert J. Lopez, for petitioner-appellants.

Nesbitt & Slawter, by William F. Slawter, for respondent-appellee.

Assistant City Attorney Sarah Patterson Brison for respondent-appellee.

PARKER, Judge.

Petitioners instituted this civil action to have an annexation ordinance adopted by respondent City of Asheville (herein "the City") declared null and void or, alternatively, to have the ordinance remanded for compliance with Part 3 of Article 4A of Chapter 160A of the North Carolina General Statutes.

On 26 July 1988 the Asheville City Council adopted a resolution stating its intent to annex a portion of the area known as Beaverdam Valley (herein "the Valley"). On 9 August 1988 the Council approved and made available for public inspection its annexation report for the extension of city services into the area proposed for annexation. Pursuant to N.C.G.S. § 160A-49(b), notice of public hearing was published in the *Asheville Citizen-Times* on 30 August and 8 September 1988. The public hearing was held 13 September 1988. On 18 October 1988 the ordinance of annexation was adopted by the City Council.

Petitioners instituted this action on 17 November 1988 by filing a petition in Superior Court, pursuant to N.C.G.S. § 160A-50, seeking judicial review of the ordinance. The court rendered judgment in favor of respondent and petitioners appeal.

Petitioners bring forward numerous assignments of error on appeal. To facilitate discussion of the issues raised, we have grouped petitioners' assignments of error into four arguments. Petitioners first contend that the trial court erred in finding and concluding that the report of plans for the extension of services to the annexation area met the requirements of N.C.G.S. § 160A-47. Second, petitioners assert that the trial court erred in finding and concluding that respondent used natural topographic features and streets

and roads wherever practical as required by N.C.G.S. § 160A-48(e). Third, petitioners argue that the trial court erred in finding and concluding that the annexation ordinance described the external boundaries of the annexation area by metes and bounds as required by N.C.G.S. § 160A-49(e)(1). Finally, petitioners contend that the trial court erred in its admission and exclusion of certain evidence.

I.

First, petitioners contend that the court erred in finding and concluding that the City's plan to extend major municipal services to the annexed area met the statutory requirement that such services be provided on substantially the same basis and in the same manner as the services were provided within the municipality prior to annexation. Petitioners challenge the City's plan to provide fire protection, police protection and solid waste collection services to the Valley. Petitioners also assert that the trial court erred in upholding the ordinance without concluding that the annexation report adequately provided plans and timetables for the extension of water mains and sewer lines.

For an annexation ordinance to be valid, the record must show prima facie "complete and substantial" compliance with Article 4A of N.C.G.S. § 160A as a condition precedent to the municipality's right to annex the territory. *In re Annexation Ordinance (Jacksonville)*, 255 N.C. 633, 122 S.E.2d 690 (1961); *Huntley v. Potter*, 255 N.C. 619, 122 S.E.2d 681 (1961). Once the municipality has made its prima facie showing of compliance, the burden shifts to petitioners to prove either a procedural irregularity in the annexation process materially prejudicing petitioners' rights or a failure on the part of the municipality to comply with statutory prerequisites to annexation as a matter of fact. *Huntley v. Potter*, 255 N.C. at 628, 122 S.E.2d at 686-87.

General Statute 160A, Article 4A, Part 3 provides authority for involuntary annexation by a municipality with a population of more than 5,000 persons. Section 160A-47 requires, *inter alia*, that a municipality, as a prerequisite to annexation, plan to:

> Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed on the date of annexation *on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.*

> A contract with a rural fire department to provide fire protection shall be an acceptable method of providing fire protection. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines. A contract with a private firm to provide solid waste collection services shall be an acceptable method of providing solid waste collection services.

N.C.G.S. § 160A-47(3)a (1987) (emphasis added). At a minimum, the City's annexation report must "provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services." *In re Annexation Ordinance (Charlotte)*, 304 N.C. 549, 554, 284 S.E.2d 470, 474 (1981) (citations omitted), *quoted in Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 22, 356 S.E.2d 599, 605 (1987), *aff'd per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988).

[1] As to the provision of fire protection services the annexation report provided:

> The City is prepared to make a good faith offer to negotiate a five-year contract with the Beaverdam Volunteer Fire Department to pay annually the amount of money that the tax rate in the district in effect [on] the date of adoption of the Resolution of Intent would generate, based on the property values on January 1 of each year in the area to be annexed.
>
> If upon the effective date of annexation the City has not contracted with the rural fire department for protection, the City will provide fire protection on and after the effective date of annexation on the same basis and manner as provided within the rest of the City. Such protection will be provided by a response consistent with the City's fire response policy, with primary ("first due") response from City Station # 7 located near Merrimon Avenue. The City's maximum response distance in its fire protection jurisdiction is three (3) miles. The annexation area lies approximately 2.5 miles from Asheville Fire Station # 7 to the furthermost point of the Beaverdam Annexation Boundary measured using the same standard applied in the rest of the City. Reports of structure fires in that area will

> be assigned an immediate response of two (2), [sic] engines, one (1) squad, one (1) ladder company and one District Chief. A four wheel drive pumper truck will be added to Station # 7 inventory in order to service the mountainous terrain of the Beaverdam Valley as well as other steep sections of the city. The balance of Asheville's firefighting resources would be available for intervention or support in event of a major emergency. The area would also receive fire prevention and fire investigation services from the City's Fire Department.

Petitioners first contend that the statements in the annexation report regarding the provision of fire protection services are "conclusory" and, thus, are insufficient to meet the requirements of N.C.G.S. § 160A-47(3)a. Second, petitioners assert that they presented substantial and competent evidence showing that the City's plan fails to provide reasonably effective fire protection services until such time as an adequate water supply and water distribution system is available to the area to be annexed. We note that regardless of their contentions, petitioners did not present substantial competent evidence showing that water would not be supplied to the annexed area or that fire protection would not be provided in substantially the same manner as in the rest of the City.

Petitioners argue that the City cannot provide adequate fire protection to the annexation area on account of the distance from the closest municipal fire station to the most distant area of the Valley. The City introduced uncontradicted evidence at trial, however, that at least two, and possibly three or four, areas within the existing municipal limits were the same distance from the nearest fire station, the one providing them with fire protection service, as is the furthest point of the annexed area from Fire Station #7.

Petitioners also contend that since the primary access road into the Valley is a narrow, winding, two-lane road subject to accidents and hazardous weather conditions that the City will not be able to provide adequate fire protection. The City presented evidence at trial that, although not ideal, there are secondary access roads into the Valley in case Beaverdam Road is blocked due to an accident. Additionally, the City has committed itself to purchase an all-terrain pumper truck to ensure the provision of adequate fire protection service to the mountainous regions of the City regardless of the weather. This vehicle will be located at the fire station closest to the annexed territory, thereby providing peti-

tioners with exactly the same, if not more, protection than the rest of the City.

Petitioners further argue that Fire Station #7 will not be able to respond to fires in the Valley within five minutes. Although there was some evidence at trial that a five-minute response time could be critical in saving lives, current Asheville City Fire Chief Ruckavina, who was admitted as an expert in fire protection, testified that the City has no standard response time, but ensures an adequate response time by limiting the jurisdiction of its primary response fire stations to an area within a three-mile radius of each fire station. The evidence presented at trial showed that on an actual run to a nursing home located within a 2.1 mile radius of Fire Station #7 the City Fire Department was on the scene within seven minutes after receiving the call. We also note that petitioners' own evidence, in the form of a videotape of an investigator making a timed run from Fire Station #7 to a remote, mountainous region of the annexation area showed that it took approximately eight minutes. The fact that equipment coming from other areas of the City will take longer to respond is the same for all outlying areas of the City.

This Court has held that the response time is only one of many factors that determines whether an annexation report complies with statutory requirements for the extension of fire protection services. *See, e.g., In re Durham Annexation Ordinance*, 66 N.C. App. 472, 481, 311 S.E.2d 898, 903-04, *disc. rev. denied*, 310 N.C. 744, 315 S.E.2d 701 (1984). In upholding the City's plan for the provision of fire protection services in *In re Durham*, this Court stated:

> Petitioners' notions of equality and average service are not consistent with the practical application of [the language of the statute]. As was apparent from the evidence presented by the City, there are many variables that affect the level of fire protection afforded to different areas of a municipality: height and size of buildings, construction materials, proximity of buildings to one another and street pattern, among others. That the City of Durham has accounted for these variables is reflected in its placement of fire stations and the equipment and manpower assigned to each. Obviously, the aerial trucks and tanker will respond to fires in the downtown area in less time than to fires in outlying developments.

Id. at 479-80, 311 S.E.2d at 903. In our opinion, therefore, the City has shown prima facie compliance with the statute by proposing to provide fire protection services to the annexed area under the same plan as such services are provided to the pre-annexation portions of the City, and similar response times should be anticipated. *See also In re Durham Annexation Ordinance*, 69 N.C. App. 77, 88, 316 S.E.2d 649, 656, *disc. rev. denied and appeal dismissed*, 312 N.C. 493, 322 S.E.2d 553 (1984) (rejecting petitioners' argument that the annexation violated N.C.G.S. § 160A-47(3)a because response times to fires would be longer in the newly annexed areas than in the rest of the city). The fact that the annexation report did not include an average response time will not preclude a finding of compliance with the statute. *See In re Durham Annexation Ordinance*, 66 N.C. App. at 481, 311 S.E.2d at 984 (citing *In re Annexation Ordinance (Charlotte)*, 304 N.C. 549, 284 S.E.2d 470 (1981)).

Finally, petitioners assert that there is inadequate water supply or an inadequate number of fire hydrants in the Valley for the City to provide adequate fire protection. To support this argument petitioners presented evidence that the Volunteer Fire Department currently providing fire protection for the Valley does not rely on the existing water system but has equipment that will transport approximately 3,200 gallons of water to the scene of a fire. We note that if the City successfully negotiates a contract with the Volunteer Fire Department to continue providing the Valley with fire protection then this argument would be moot.

In the event that the City is unable to negotiate such a contract, however, there was sufficient evidence at trial to show that the City could provide adequate fire protection given the existing water system in the Valley. First, Chief Ruckavina testified that water pressure itself was not determinative of his Department's ability to provide fire protection because, in addition to the water pressure in the existing system, firefighters could also use strong suction to draft water out of the water mains. Second, the City's planned response to structure fires in the Valley will send a first response of 1,000 gallons of water supplemented by an additional 2,000 gallons, supplied by the vehicles responding from Stations #1 and #3, for a total of approximately 3,000 gallons of water supplied to the scene of the fire. Finally, both the Fire Chief and a District Chief gave their expert opinions that this response would adequately provide water for fire protection within areas of the

Valley where no water mains or fire hydrants are currently located until such time as these structures can be installed. This Court has previously held that, until such time as water mains and fire hydrants are installed, the provision of water by tanker to ensure adequate water flow is "reasonably effective fire protection services" under the statute. *In re Durham Annexation Ordinance*, 69 N.C. App. at 88, 316 S.E.2d at 656. For the foregoing reasons, the evidence discussed above supports the trial court's findings of fact and conclusions of law with regard to the provision of fire protection to the area of annexation.

[2] As to police protection the plan provides that:

> On and after the effective date of the annexation, the full range of police services will be provided to the area on the same basis and manner as provided within the rest of the City. These services include regular patrol division, criminal investigations, community relations/crime prevention, ordinance enforcement and traffic control.
>
> The 1988 population of the City of Asheville is estimated to be 65,200. The number of sworn personnel of the Asheville Police Department is currently 134, or one sworn police officer to every 486 citizens of the city (65,200/134 = 1:486). The estimated population of the Beaverdam Valley annexation area is 1,102. Applying the current ratio of police personnel services to the increase of population of the city's jurisdiction due to the Beaverdam Valley annexation, the department will increase it's [sic] patrol forces by three sworn officers (1,102/486 = 2.27 officers).

Our Supreme Court has held that the annexation report need only contain information on (i) the level of services available in the City at the time of making the report, (ii) the City's commitment to provide the same level of services to the annexed area within the statutory period, and (iii) the method for financing the extension of such services. *Cockrell v. City of Raleigh*, 306 N.C. 479, 484, 293 S.E.2d 770, 773-74 (1982) (citing *In re Annexation Ordinance (Charlotte)*, 304 N.C. at 554-55, 284 S.E.2d at 474). Petitioners assert that the mere increase in the police force proportional to the increase in the population attributable to annexation is not a sufficiently sophisticated plan for the provision of services to meet the requirements of N.C.G.S. § 160A-47(3)a. We disagree.

The City's plan states that current police protection services available in the City include regular patrol division, criminal investigations, community relations/crime prevention, ordinance enforcement and traffic control. These services are delivered by the 134 sworn police officers of the City's Police Department. The annexation report states that each of these police protection services will be available in the Valley area as of the date of annexation and that the City Police Department will hire three additional sworn officers to maintain its current ratio of one officer for every 486 citizens. This plan is sufficient to meet the requirements of N.C.G.S. § 160A-47(3)a. *See In re Annexation Ordinance (Charlotte)*, 304 N.C. at 554, 284 S.E.2d at 473 (upholding a plan to provide police protection which stated only that police protection was provided 24 hours a day, with immediate response to calls, and which specifically listed particular services provided, including crime prevention, record-keeping, youth section, vice section and helicopter service); *In re Annexation Ordinance (Jacksonville)*, 255 N.C. at 635, 122 S.E.2d at 692-93 (upholding an annexation report specifying only that the "routine patrol" would be extended into the annexed territory and giving the average response time for such patrol); *Thrash v. City of Asheville*, 95 N.C. App. 457, 469, 383 S.E.2d 657, 664 (1989), *disc. rev. denied on additional issues*, 326 N.C. 54, 389 S.E.2d 105-06 (1990) (holding that the city's plan to provide a full range of police services, including a regular patrol division, criminal investigation, ordinance enforcement and traffic control, to the annexed territory on substantially the same basis as to the rest of the city was sufficient to meet the requirements of N.C.G.S. § 160A-47, especially where the plan included a commitment to hire additional personnel and to acquire new equipment to provide such services), *rev'd on different ground*, 327 N.C. 251, 393 S.E.2d 842 (1990); *In re Durham Annexation Ordinance*, 69 N.C. App. at 87, 316 S.E.2d at 655-56 (holding that an annexation plan was sufficient to meet the requirements of N.C.G.S. § 160A-47(3) even though it indicated that three patrol units would be added to the Public Safety Department in order to provide sufficient law enforcement to one area to be annexed but indicated that no additional personnel would be needed to provide adequate law enforcement in another area to be annexed). Petitioners' assignments of error related to the trial court's findings and conclusion that the provisions for police protection substantially complied with the statutory prerequisites for annexation are overruled.

[3] As to the collection of solid wastes petitioners contend that the annexation plan is defective in that it "will deny solid waste collection services to those individuals in the newly annexed area residing on other than city or state streets." Petitioners contend that by annexation they will experience a decrease in "governmental services" because, they allege, currently all residents, even those residing on private roads, receive solid waste collection services through a private contractor. Regardless of the level of services that county residents receive through a private contractor prior to annexation, the City is only required to provide annexed territories with substantially the same level of services as are enjoyed in other areas of the City. N.C.G.S. § 160A-47(3)a. To this end the City presented uncontradicted evidence that it is the City's policy only to provide solid waste collection services to residences on streets maintained by the State or the City. A town's established policies for the provision of municipal services within pre-existing municipal limits should be taken into account when determining whether a proposed plan for extension of services to annexed territories is discriminatory. *See Greene v. Town of Valdese*, 306 N.C. 79, 86-87, 291 S.E.2d 630, 635 (1982); *In re Annexation Ordinance (Jacksonville)*, 255 N.C. at 644, 122 S.E.2d at 699. The burden was on petitioners to come forward with competent and substantial evidence either that there were no streets within the pre-existing boundaries of the City that were disqualified from solid waste collection services or that the residents of "private streets," in fact, received solid waste collection services. Petitioners failed to present any such evidence at trial; therefore, this assignment of error is overruled.

[4] Petitioners' final argument is that the trial court failed to make any findings of fact or conclusions of law as to whether the City's plan provides for the extension of water mains and sewer outfall lines in accordance with N.C.G.S. §§ 160A-47(3)b or c. Petitioners contend that "[i]t is readily apparent that any meaningful reading of the statute requiring extensions of major water trunk lines and water lines presupposes the existence of an adequate water supply to feed such lines." Petitioners assert that while respondent may have identified a plan and timetable for the water lines, no plan or associated timetables have been identified for the water supply. Although the trial judge failed to make findings of fact or conclusions of law with regard to whether the City's plan met the statutory requirements for the extension of

water and sewer lines, our review of the record on appeal reveals that the annexation report contained adequate provisions and timetables for the extension of both the water and the sewer lines.

With regard to the water supply, we note that an independent agency, the Asheville-Buncombe Water Authority (herein "ABWA"), provides water service both to Asheville and to the rest of Buncombe County. Prior to annexation there was a twelve-inch water main running down Beaverdam Valley Road and several six-inch water mains on adjacent roads in the annexation area. The ABWA supplied water to these lines. Even though the city manager admitted that ABWA had hoped to have a new reservoir built by 1986 and that bids were yet to be solicited for a reservoir at a higher elevation at the time of the hearing in 1988, petitioners failed to introduce substantial evidence showing that the existing water supply was insufficient to service the new water mains. In fact, although petitioners complain that there is inadequate water flow through the existing lines, the evidence introduced at trial showed that a pumping facility had been installed in the late 1970's or early 1980's at the end of Kimberly Avenue on Beaverdam Road, which increased both the water flow and the pressure. Without substantial evidence that the current water supply was insufficient to service the annexed territory, the City was only required to detail its plan for extending water and sewer lines in order to comply with the provisions of N.C.G.S. §§ 160A-47(3)b and c. After this area is annexed, if the residents find that the City is not providing them with water and sewer services they may petition the court for a writ of mandamus requiring the City to provide such services. *See Moody v. Town of Carrboro*, 301 N.C. 318, 325, 271 S.E.2d 265, 270 (1980); *Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 429, 378 S.E.2d 225, 229 (1989). At present, however, since the City included in the annexation report its plans and timetables for extending the water mains and the sewer lines to the Valley, we conclude that it has met the requirements of N.C.G.S. §§ 160A-47(3)b and c.

II.

[5] Petitioners' second argument is that the trial court erred in finding and concluding that the City used natural topographic features as boundaries for the area to be annexed wherever practical in accordance with N.C.G.S. § 160A-48(e). Petitioners complain that the City did not use the ridge lines to define the area to

be annexed. The City contends that it could not use the ridge lines as a boundary for the annexation area because the higher elevations of the "valley" are so sparsely populated as to disqualify the Valley as "developed for urban purposes" if included in the proposed annexation area.

N.C.G.S. § 160A-48 describes the character of areas which may properly be annexed. Generally, such an area (i) cannot be included within the boundary of another incorporated municipality, (ii) must be adjacent to the existing boundaries of the annexing municipality, (iii) must be "developed for urban purposes" or must connect an outlying area "developed for urban purposes" with the municipality and (iv) "wherever practical" should use topographic features as boundaries. N.C.G.S. § 160A-48 (1987). In addition to topographic features, the statute explicitly permits the use of streets as boundaries. N.C.G.S. § 160A-48(e). "In order to establish non-compliance with G.S. 160A-48(e), petitioners must show two things: (1) that the boundary of the annexed area does not follow topographic features, and (2) that it would have been practical for the boundary to follow such features." *In re Durham Annexation Ordinance*, 69 N.C. App. at 88, 316 S.E.2d at 656 (citing *Garland v. City of Asheville*, 63 N.C. App. 490, 305 S.E.2d 66, *disc. rev. denied*, 309 N.C. 632, 308 S.E.2d 715 (1983)); *see also Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E.2d 630 (1982) (applying the two-part test for noncompliance with the topographic boundary condition contained in N.C.G.S. § 160A-36(d)).

Our examination of the record reveals that petitioners presented no evidence of the practicality or reasonableness of following topographic features as boundaries for the annexation area. In fact the only evidence with regard to the use of topographic features came from two witnesses for the City. The senior city planner testified that she established the boundary for the annexed area by drawing a line around the concentrated area of the Valley that qualified as a "developed urban area." She further testified that, in her opinion, if the boundaries had been extended to the ridge lines, the area would not have qualified under the use test of N.C.G.S. § 160A-48(c)(3). The surveyor who drew the metes and bounds description testified that "[t]here were no real prominent topographic features that [the City] could use other than a few roads . . . and paved streets." The surveyor also testified that he did not follow the ridge lines because to do so would have

required moving a considerable distance away from the "urban area" as defined by the planning department.

In harmonizing the "developed for urban purposes" requirement with the use of topographic features requirement of N.C.G.S. § 160A-36 (the involuntary annexation statute for municipalities with a population of less than 5,000), our Supreme Court has stated the following rule:

> We emphasize that the provisions of subsection (d) of G.S. 160A-36 [the topographic features requirement] contain no mandatory standards or requirements for annexation. Where the boundary of the annexed area, which meets the subdivision and use test of G.S. 160A-36(b) and (c), can be established along ridge lines, streams, and creeks without defeating the area's compliance with the other portions of G.S. 160A-36 the boundary must follow such features. Where, however, to follow natural topographic features would convert an area which would otherwise meet the statutory tests of G.S. 160A-36(b) and (c) into an area that no longer satisfies those requirements, the drawing of boundaries along topographic features is no longer "practical," i.e., not "possible of reasonable performance" within the meaning of the language of the statute.

Greene v. Town of Valdese, 306 N.C. at 85, 291 S.E.2d at 634. The provisions of N.C.G.S. §§ 160A-48(b), (c) and (e) are virtually identical to their counterparts in N.C.G.S. §§ 160A-36(b), (c) and (d). Therefore, under the rule enunciated in *Greene*, we hold that the City was not required to extend the boundaries of the proposed annexation area to include the ridge lines where to do so would have defeated the City's compliance with the other mandatory portions of the annexation statute.

III.

[6] Petitioners next argue that the trial court erred in finding and concluding that the annexation ordinance described the external boundaries of the annexation area by metes and bounds as required by N.C.G.S. § 160A-49(e)(1). Petitioners contend that a comparison of the metes and bounds description of the area to be annexed contained in the published notice of public hearing differs from the metes and bounds description of the area of annexation contained in the annexation ordinance, and that such discrepan-

cy is a fatal defect in the annexation procedure. The City argues that such discrepancies were pointed out to the trial court and the court, nonetheless, concluded that the ordinance contained a metes and bounds description in compliance with the annexation statute. "[S]ubstantial compliance is all that is required in meeting the boundary requirements set forth in the [annexation] statutes." *In re Annexation Ordinance (Asheville)*, 62 N.C. App. 588, 598, 303 S.E.2d 380, 385, *disc. rev. denied and appeal dismissed*, 309 N.C. 820, 310 S.E.2d 351 (1983).

Petitioners have failed to indicate specifically how the metes and bounds description published in the *Asheville Citizen-Times* varied from the metes and bounds description contained in the annexation ordinance and, more importantly, have failed to indicate that this alleged variance prejudiced them in any manner. *See In re Annexation Ordinance (Winston-Salem)*, 303 N.C. 220, 233, 278 S.E.2d 224, 232 (1981). Petitioners also have failed to provide the Court with a legible copy of the metes and bounds description that was published in the *Asheville Citizen-Times*, rendering impossible our independent comparison of the two descriptions. It is the duty of the appellant to see that the record is properly prepared and transmitted. *Mooneyham v. Mooneyham*, 249 N.C. 641, 107 S.E.2d 66 (1959); *Industrotech Constructors v. Duke University*, 67 N.C. App. 741, 314 S.E.2d 272 (1984). Moreover, current Rule 9(a)(1)e of the North Carolina Rules of Appellate Procedure, which states that the record must contain so much of the evidence as is necessary for an understanding of all errors assigned, presupposes that the evidence transmitted will be sufficient in substance, form and appearance to allow the Court to understand the assignments of error. *See Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 315 S.E.2d 537 (1984) (dismissing the appeal for failure to comply with the appellate procedure rule requiring transmittal of all evidence necessary for understanding of all errors assigned). Based on its review of the evidence, the trial court found as fact and concluded as a matter of law that the description of the territory to be annexed met the requirements of N.C.G.S. § 160A-49(e)(1). The metes and bounds description contained in the annexation ordinance supports this finding and conclusion. Since petitioners failed to transmit to this Court any evidence showing that the trial court erred in this conclusion, the assignment of error is overruled.

IV.

[7] Petitioners next contend that the trial court erred in the admission and exclusion of certain evidence at trial. Petitioners first object to the admission of the opinion testimony of Chief Ruckavina that the City could provide adequate fire protection to the portion of the annexation area not presently served by ABWA water mains. This objection is based on petitioners' assertion that no evidence supports this opinion. Petitioners also object to the trial court allowing Chief Ruckavina to testify during cross-examination as an expert in the field of fire protection. Petitioners do not object to the court's qualification of Chief Ruckavina as an expert, only to the fact that he was qualified during cross-examination.

As to petitioners' contention that the Chief's opinion concerning the provision of fire protection to the annexation area was not supported by any evidence, an expert witness's opinion is admissible if based upon facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . ." N.C.G.S. § 8C-1, Rule 703 (1988). At trial Chief Ruckavina testified that he formulated his plan for providing fire protection services to the annexation area based on the number of existing fire hydrants and the diameter of the water mains. He also testified that in the field of fire protection services this was an acceptable method of calculating water flow available for fighting fires. Chief Ruckavina's opinion, that fire protection substantially similar to that provided within the pre-annexation limits of the City could be provided to the annexation areas not yet served by fire hydrants and water mains, was based on the water carrying capacity of the equipment that would be used to respond to structure fires within the annexation area. These empirical considerations were sufficient bases for his expert opinion.

As to the admission of such opinions during cross-examination, the North Carolina Rules of Evidence provide that the court shall exercise reasonable control over the interrogation of witnesses and the presentation of evidence "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C.G.S. § 8C-1, Rule 611(a) (1988). The transcript reveals that the trial court allowed consolidation of the Fire Chief's testimony so that he would not have to be recalled. Petitioners have failed to demonstrate that the trial

court abused its discretion in allowing the Chief to testify as an expert during cross-examination. The trial transcript also reveals that, although counsel for petitioner objected when Chief Ruckavina was first tendered as an expert, petitioners later explicitly stated that they had no objection to the City putting on its evidence through Chief Ruckavina during cross-examination as long as petitioners were allowed to cross-examine him at the conclusion of his testimony for the City. Having waived their objection at trial, petitioners will not be permitted to raise it on appeal.

Next, petitioners argue that the trial court erred in allowing into evidence two letters from Chief Ruckavina to the former Fire Chief of the Beaverdam Volunteer Fire Department, Bill Redmond. Petitioners contend that these letters were irrelevant to the issue of whether the City had made a good faith effort to negotiate a contract with the Volunteer Fire Department for the provision of fire protection services to the Valley because Mr. Redmond was not the Fire Chief at the time the letters were sent. Petitioners also assert that since the trial court's finding of fact with regard to the City's negotiations with the Beaverdam Volunteer Fire Department was based, at least in part, on this "impermissible evidence," the finding of fact was deficient. This argument is without merit. Regardless of whether these letters were relevant to the issue of the City's good faith negotiations, subsequent to the admission of the letters, Chief Ruckavina and District Chief Griffin testified that they made an offer to the Volunteer Fire Department's Board of Trustees to contract with the Volunteer Fire Department for fire protection for the annexation area. This testimony was not contradicted by petitioners' evidence; therefore, sufficient evidence existed, aside from the letters, to support the trial court's findings of fact and conclusion of law and petitioners could not have suffered prejudice from the admission of the letters.

Finally, petitioners contend that the trial court erred in refusing to allow Mr. Wayne Adams, the administrator at the Brentwood Nursing Home, to testify as to whether there could be an adequate response to Brentwood from Fire Station #7 in the event that Beaverdam Road was blocked. Petitioners readily concede that Adams was not qualified to give expert testimony on this issue; however, petitioners contend that such testimony was admissible as lay witness testimony under N.C.G.S. § 8C-1, Rule 701. The rule states:

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

N.C.G.S. § 8C-1, Rule 701 (1988). First, we note that the question was targeted to a hypothetical situation, *viz.*, in the event that Beaverdam Road was blocked would Station #7 be able to provide an adequate response to a fire at the Brentwood Nursing Home? The opinion of a lay witness must be rationally based on the witness's perception and must be helpful to the trier of fact. In the present case petitioners failed to present evidence that Mr. Adams had ever witnessed the City Fire Department's response to a fire at the Brentwood Nursing Home under the conditions posited in the hypothetical question. As there was no foundation showing that the opinion called for was rationally based on the witness's perception, the opinion was inadmissible.

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. OTIS REGINALD LYONS

No. 9014SC490

(Filed 19 March 1991)

1. Courts § 83 (NCI4th); Criminal Law § 197 (NCI4th)— waiver of statutory speedy trial—overruling of another judge—dismissal not prejudicial

The trial court was bound by another superior court judge's ruling that defendant had waived his right to a statutory speedy trial, and the trial court therefore could not dismiss the case, with or without prejudice, on that basis, even if the Speedy Trial Act had not been repealed; however, since defendant was re-indicted on the same charges in his original indictment,

he was not harmed by the dismissal without prejudice on statutory speedy trial grounds because, based on the original judge's ruling, defendant was not entitled to a dismissal at all on that basis.

Am Jur 2d, Criminal Law § 866.

Waiver or loss of accused's right to speedy trial. 57 ALR2d 302.

2. Conspiracy § 32 (NCI4th); Assault and Battery § 85 (NCI4th)— sufficiency of evidence of intent to kill

There was sufficient evidence of a specific intent to kill so that the trial court did not err in denying defendant's motion to dismiss conspiracy and secret assault charges where the evidence tended to show that defendant first confronted the victim, cursed him, pointed a gun at his head, and slapped him because the victim was standing too close to the road when defendant drove past; the victim did not strike defendant; a few minutes later there was a second confrontation during which the victim ripped defendant's clothes and bloodied his face and after which defendant threatened the victim; and a few minutes after the second confrontation, defendant and two of his companions ambushed the victim and his companions, shooting at them while hiding in bushes.

Am Jur 2d, Assault and Battery § 13; Homicide §§ 570, 573, 574, 578.

3. Conspiracy § 32 (NCI4th)— conspiracy to commit felonious assault—injury—sufficiency of evidence

Evidence was sufficient to show that defendant conspired with two others to commit the offense of assault with a deadly weapon with intent to kill inflicting serious bodily injury where it tended to show that defendant told the victim he was going to "burn" him; a companion later approached defendant's car and told him "they" were coming and that "we're fixing to get them"; shortly afterward defendant and two companions ran together into the bushes; and more than two guns were fired at the victim and his companion.

Am Jur 2d, Assault and Battery § 11.

4. Assault and Battery § 86 (NCI4th) — secret assault — disjunctive instruction — error

Defendant is entitled to a new trial on the charge of secret assault since the indictment charged that defendant committed the crime "upon Douglas Jones *and* Preston Jones," but the trial court instructed that the jury could return a guilty verdict if it found that defendant committed the crime against one *and/or* the other, since it could not be determined if all jurors found defendant assaulted one victim, all found he assaulted the other victim, all found both offenses, or some found one offense while some found the other offense.

Am Jur 2d, Assault and Battery § 107; Homicide § 581; Trial § 628.

Judge COZORT concurring in part and dissenting in part.

APPEAL by defendant from judgment entered 6 December 1989 in DURHAM County Superior Court by *Judge Orlando F. Hudson.* Heard in the Court of Appeals 16 January 1991.

Lacy H. Thornburg, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for the State.

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

GREENE, Judge.

On 27 November 1989, defendant was tried on charges of malicious assault in a secret manner with a deadly weapon with intent to kill, assault with a deadly weapon, conspiracy to commit the offense of assault with a deadly weapon with intent to kill inflicting serious injury, and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. The jury returned verdicts of guilty of all charges except the two counts of assault with a deadly weapon with intent to kill inflicting serious injury and on these two counts defendant was found not guilty. The trial court imposed a sentence of twenty years for secret assault. The other assault charge and the conspiracy charge were consolidated and the court imposed a sentence of ten years to run at the expiration of the twenty-year sentence. Defendant appeals.

Pretrial Procedure

Defendant was arrested on 19 March 1989, and first indicted on 1 May 1989. On 19 July 1989, and upon defendant's motion for a speedy trial under the Speedy Trial Act, former N.C.G.S. § 15A-701 *et seq.*, Judge Howard E. Manning issued an "Order for Prompt Trial," providing that defendant's case be brought to trial on or before 1 September 1989 or in the alternative that the case be dismissed. On 31 August 1989, defendant and the State agreed to continue the case to 5 September 1989 in order to start the case on the Tuesday after a three-day holiday. Judge Joe Freeman Britt allowed the continuance. On 5 September 1989, before Judge Orlando F. Hudson, the State moved to continue the case to 3 October 1989. The State also moved to join two co-defendants with defendant's trial. Judge Hudson allowed joinder, and further ruled that by consenting to a continuance on 31 August 1989 defendant "waived any rights and protection under the order of July 19, 1989, requiring that this case be tried by September 1, 1989" and that "the defendant has waived any right to a speedy or prompt trial on the trial of these cases." Defendant excepted to this ruling. On 2 October 1989, before Judge Britt, defendant moved under the Speedy Trial Act to dismiss the case for denial of a speedy trial. Defendant's motion asserted in part:

> 6. That the Defendant and counsel excepted to the ruling of Judge Hudson. The case was set to be brought on before Judge Britt on October 2, 1989.
>
> 7. That the continuance granted by Judge Hudson was in violation of the Defendant[']s rights to a speedy trial under the Constitution of the United States, the Constitution of the State of North Carolina, and was in direct and specific contravention of the Order issued by Judge Howard E. Manning, Jr., on July 19, 1989, as modified with the consent of the Defendant to allow trial commence on or before September 5, 1989.

Judge Britt dismissed the case without prejudice and new indictments were returned on 16 October 1989 charging defendant with the same offenses charged in the original indictments.

TRIAL

The evidence introduced by the State at trial tends to show that on the evening of 19 March 1989, one Danny McKay was

standing outside a nightclub with a "fraternity brother" when a car going past nearly hit him. The car stopped and defendant got out of the car. Defendant approached McKay and told him to "get the fuck out of the street." Defendant then "pointed his hand in my fraternity brother's face and then at that point my fraternity brother knocked his hand out of his face and then [defendant] reached in his car and told his partner to give him the gun." A "very large handgun" was handed to defendant from inside the car. "He put it to my head and he said, now, what's up, like that and then like I didn't say nothing . . . and after that, he hit me upside my head. He slapped me with the opposite hand he had the gun in." Defendant then got back into his car and drove away. McKay went back inside the club and told off-duty police officers, who were working as security officers in the club at the time, what had happened outside.

Ten to fifteen minutes later, defendant entered the club. McKay approached defendant and asked defendant why he had pulled a gun on him. "[Defendant] said get the fuck out of my face and I struck him and hit him." McKay and defendant began fighting. The fight was broken apart and defendant was taken outside by the security guards while McKay was retained inside the club with his fraternity brothers. While one of the security guards was questioning defendant about the fight, defendant pointed at McKay and said, "That's okay, wait, I'm going to burn you; I'm going to burn you." Another witness testified that she heard defendant say, "I'm going to get you, man, I'm going to get you. I want you; I'm going to get you." The guards kept McKay and his fraternity brothers at the club until defendant had time to leave. McKay did not see defendant again that night.

A few minutes after defendant left the club, approximately ten fraternity brothers, including McKay, started walking down the street away from the club. Suddenly, they heard shots being fired. Though the number of shots varied from witness to witness, it appears from the testimony that two to six shots were fired. McKay was not hit. However, two of the fraternity brothers, Douglas Jones and Preston Jones, were wounded and later recovered.

Defendant's girlfriend, Lynette Osborne, testified that she and a friend, Toni Lowery, were standing outside when defendant exited the club after his fight with McKay. Defendant's friends, Tim Little and Wallace Daye, also appeared outside the club about that time.

Daye went into the club, then back outside to defendant and said, "I seen 'em . . . I seen who they is." Osborne, Lowery and defendant then walked to the parking lot and got in defendant's car. A few minutes later Daye approached the car, opened the car door and said, "Here they come Bop (defendant's nickname), we're fixing to get them." Osborne saw Daye loading a gun. Osborne jumped from the car and saw Little hiding some distance away. Little was also holding a gun. Osborne testified that Little fired his gun twice and Daye fired once.

Another witness, Tonya Weaver, testified that she was at the club that night. She and a friend were walking a short distance ahead of the fraternity brothers as they left the club. Weaver saw defendant, Little and Daye running from the parking lot "[a]nd they ran past me and [defendant] brisked me." Weaver also saw a silver handle, which appeared to her to be a gun handle, sticking out of defendant's jacket pocket. Defendant, Little and Daye ran into some bushes nearby. The fraternity brothers approached and "[t]hey walked right into the gunshots." Weaver heard approximately five gunshots. She was also able to see the flash from the guns as they fired, and testified that she knows more than two guns were being fired.

A police officer testified that he responded to a call reporting a disturbance at the club. After checking the gunshot victims, he was told by another officer that there was a car in the parking lot which was believed to be the car of the people who did the shooting. The officers checked the inside of the car and found two pieces of paper with defendant's name written on them. They also found a .45-caliber automatic handgun on the rear passenger floorboard.

Defendant offered evidence, including his own testimony, tending to show that McKay provoked the initial confrontation with defendant in the street in front of the club, though defendant admits he got a handgun from Daye who was in defendant's car. He also admits slapping McKay. After the first confrontation with McKay, defendant went somewhere else and had approximately nine mixed drinks and then returned to the club. He had two handguns in his car, his own and one belonging to Little. While defendant testified that he did not actually see who did the shooting, several of defendant's witnesses stated that Little and Daye fired the shots.

At the end of all the evidence, defendant's motion to dismiss the charges was denied.

The issues are: (I) whether the trial court erred by dismissing, without prejudice, the charges against defendant; (II) whether the trial court erred in denying defendant's motion to dismiss the charges of conspiracy and maliciously assaulting in a secret manner in that there was insufficient evidence of the essential element of specific intent to kill; (III) whether the trial court erred in denying defendant's motion to dismiss the conspiracy charge in that there was insufficient evidence of a conspiracy; and (IV) whether the trial court erred by instructing the jury that a verdict of guilty should be returned if the jury found that defendant maliciously assaulted in a secret manner "Preston Jones and/or Douglas Jones."

I

[1] Defendant first argues that Judge Britt erred in dismissing without prejudice the charges against defendant. Defendant contends that under N.C.G.S. § 15A-703(a) (1988) of the Speedy Trial Act, the trial court must make findings of fact from which the trial court can conclude whether defendant's statutory right to a speedy trial has been violated. We agree with the State's assertion that the Speedy Trial Act was repealed 1 October 1989, the day before Judge Britt's ruling, and that the statutory mandates would appear to be irrelevant to this case. Without so deciding, however, we find the determinative issue to be whether Judge Britt's ruling has any effect in this case in light of Judge Hudson's earlier ruling that defendant had waived his right to a speedy trial.

Judge Hudson gave his ruling on 5 September 1989. The record indicates that defendant excepted to Judge Hudson's ruling and that defendant thereby preserved the right to argue the validity of that ruling on appeal. However, rather than making a direct attack against Judge Hudson's ruling on this appeal, defendant made a collateral motion to dismiss on statutory speedy trial grounds before Judge Britt on 2 October 1989. The language of defendant's motion itself suggests that defendant was actually appealing Judge Hudson's ruling to Judge Britt by stating that defendant "excepted to the ruling of Judge Hudson" and that Judge Hudson had violated defendant's right to a speedy trial. Inherent in Judge Britt's order of dismissal on speedy trial grounds, even though the dismissal was without prejudice, is a finding by Judge Britt that defendant

had not waived his right to a statutory speedy trial. Thus, Judge Britt in effect overruled Judge Hudson on the question of whether defendant had a statutory right to a speedy trial. Judge Britt also in effect overruled Judge Hudson on the question of whether defendant was entitled to a dismissal under the Speedy Trial Act, be it with or without prejudice.

As a general rule, "one Superior Court judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Neas*, 278 N.C. 506, 510, 180 S.E.2d 12, 15 (1971). In *Neas*, our Supreme Court applied this rule and found the trial judge "correctly held that he was without authority to overrule the order denying defendant's motion to dismiss [on constitutional speedy trial grounds] which had been entered in this case by [an earlier judge]. . . ." *Id.* We apply the same rule in the present case and find that, under the circumstances presented in this case, Judge Britt was bound by Judge Hudson's ruling that defendant had waived his right to a statutory speedy trial and could not, therefore, dismiss the case, with or without prejudice, on that basis even if the Speedy Trial Act had not been repealed.

Since defendant was re-indicted on the same charges in his original indictment, we find defendant was not harmed by the dismissal without prejudice on statutory speedy trial grounds because based on Judge Hudson's ruling defendant was not entitled to a dismissal at all on that basis. Under Judge Hudson's order, finding defendant had waived his rights and granting the State a continuance, defendant would have been tried on 3 October 1989. Due to the erroneous dismissal without prejudice, defendant was actually tried on 27 November 1989. However, any prejudice to defendant which may be inferred from this delay was brought about by defendant himself when he moved for dismissal on statutory speedy trial grounds after Judge Hudson had already ruled defendant had waived those rights.

II

[2] Defendant next argues the State failed to produce evidence of a specific intent to kill on the part of defendant, and that since this specific intent is a necessary element of the conspiracy and secret assault charges, these charges should have been dismissed upon defendant's motion.

When considering a motion to dismiss, the trial court is concerned only with the sufficiency of the evidence to submit the case to the jury, and not with the weight of the evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Defendant's motion is considered in light of all the evidence introduced by the State as well as that introduced by the defendant. *State v. Perry*, 316 N.C. 87, 95, 340 S.E.2d 450, 456 (1986). The trial court must consider the evidence in the light most favorable to the State, and allow the State every reasonable inference which may be drawn from the evidence. *State v. Autry*, 101 N.C. App. 245, 251, 399 S.E.2d 357, 361 (1991). The court must determine whether there is substantial evidence, direct or circumstantial, of each element of the crime charged. *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956). Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Autry* at 251, 399 S.E.2d at 361. The trial court need not determine the evidence excludes every reasonable hypothesis of innocence before denying the motion. *Powell* at 101, 261 S.E.2d at 118.

"A defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988). Here, the evidence indicates defendant first confronted McKay apparently because McKay was standing too close to the road when defendant drove past. For this apparent reason, defendant cursed McKay, pointed a gun at his head, and then slapped him. McKay did not strike defendant. A few minutes later defendant and McKay got into a fight inside the club. The evidence indicates, however, that during this second confrontation defendant's clothing was ripped and his face bloodied by McKay. After the fight was over, defendant told McKay he was going to "burn" him, and that "I want you; I'm going to get you." A few minutes later defendant was sitting in his car when Daye appeared and said, "Here they come . . . we're fixing to get them." Defendant, Daye and Little were then seen running into some bushes and defendant had what appeared to be a gun handle sticking out of his jacket pocket. Finally, moments later, muzzle flashes were seen coming from within the bushes, and were produced by "more than two guns."

The assault was in the form of an ambush. The victims "walked right into the gunshots." The nature and manner of the assault,

the conduct of the parties, and the other relevant circumstances summarized above, when considered in a light favorable to the State, constitute evidence from which a reasonable mind could infer that defendant harbored a specific intent to kill. We therefore find that there is substantial evidence of the element of intent to kill and that the trial court did not err in denying defendant's motion on that basis.

III

[3] Defendant next argues the trial court erred in denying his motion to dismiss because there was insufficient evidence that defendant conspired with Daye and Little to commit the offense of assault with a deadly weapon with intent to kill inflicting serious bodily injury. Specifically, defendant contends there was no evidence of an agreement or implied understanding between defendant, Daye and Little.

A conspiracy may be proved by direct or circumstantial evidence and is established by showing the existence of an express agreement or a mutual implied understanding between defendant and others to do an unlawful act or to do a lawful act by unlawful means. *State v. Collins*, 81 N.C. App. 346, 350, 344 S.E.2d 310, 313, *appeal dismissed*, 318 N.C. 418, 349 S.E.2d 601 (1986).

Here, defendant told McKay he was going to "burn" him. Daye later approached defendant's car and told him "they" were coming and that "we're fixing to get them." Shortly afterward defendant, Daye and Little ran together into the bushes and "more than two guns" were fired. We find this evidence sufficient for reasonable minds to conclude that at the very least, defendant, Daye and Little had a mutual implied agreement to commit the assaults. Thus we find substantial evidence of the necessary element of an agreement between defendant and the co-conspirators, and the trial court did not err in denying defendant's motion to dismiss on this basis.

IV

[4] Defendant's final argument is that the trial court erred in its jury instruction on the charge of secret assault. The indictment for this charge presents in part that defendant maliciously and in a secret manner committed assault and battery with a deadly weapon "upon Douglas Jones *and* Preston Jones . . ." (emphasis added). However, the court instructed the jury as follows:

Now, I charge for you to find the defendant guilty of malicious assault and battery in a secret manner with a deadly weapon with the intent to kill, the State must prove five things beyond a reasonable doubt.

First, that the defendant committed an assault and battery upon Douglas Jones *and/or* Preston Jones by intentionally shooting him with a handgun.

Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. Once again, a handgun is a deadly weapon.

Third, that the defendant committed the assault and battery upon Douglas Jones *and/or* Preston Jones in a secret manner. The assault and battery would be in a secret manner if Douglas Jones *and/or* Preston Jones was unaware of the defendant's intent to commit the assault and battery until it was too late to defend himself.

Fourth, that the defendant had the intent to kill Douglas Jones *and/or* Preston Jones.

And fifth, that the defendant acted maliciously. That is with ill-will, hatred or animosity towards Douglas Jones *and/or* Preston Jones.

So I charge that if you find from the evidence beyond a reasonable doubt that on the alleged date the defendant, Otis Lyons, maliciously committed an assault and battery upon Douglas Jones *and/or* Preston Jones [it will be your] duty to return a verdict of guilty of malicious assault and battery in a secret manner with a deadly weapon with the intent to kill. . . .

(Emphases added.) Defendant argues his conviction under this disjunctive instruction was the result of an ambiguous verdict in that some jurors may have found defendant assaulted Douglas Jones while others may have found defendant assaulted Preston Jones.

State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), and *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), set forth the analysis to be used in determining whether a disjunctive jury instruction, as was used in this case, is fatally defective. If a single offense is submitted to the jury for its determination, but they are instructed disjunctively that they may return a verdict of guilty

of the single offense submitted if they find defendant committed either of two underlying acts, either of which in itself is a separate crime, then the instruction is fatally ambiguous because it is impossible to determine whether the jury unanimously found that defendant committed one particular offense. *Diaz* at 554, 346 S.E.2d at 494 (separate offenses of possession and transportation of drugs submitted disjunctively as basis for trafficking offense). However, if an offense is submitted to the jury and they are merely instructed disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied. *Hartness* at 566, 391 S.E.2d at 180 (alternative acts submitted disjunctively as basis for establishing first element of offense of indecent liberties).

In the present case, the trial court instructed the jury disjunctively permitting consideration of two possible crimes for which defendant could be separately convicted and punished, i.e., secretly assaulting Douglas Jones and secretly assaulting Preston Jones. The jury was permitted to consider these separate crimes in determining whether defendant was guilty of a single crime of secret assault under N.C.G.S. § 14-31. Therefore, as in *Diaz*, the jury's verdict is fatally ambiguous because it cannot be determined whether all the jurors found defendant assaulted Douglas, all found he assaulted Preston, all found both offenses, or some found one offense while some found the other offense. *Diaz* at 554, 346 S.E.2d at 494. Therefore, a new trial is necessary on the charge of secret assault.

Secret assault—new trial.

Assault with a deadly weapon—no error.

Conspiracy—no error.

Judge PARKER concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with that portion of the majority opinion which finds no error in the trial of the charges of assault with a deadly weapon

and conspiracy. I dissent, however, with the portion of the majority opinion which grants a new trial on the charge of secret assault.

I believe the majority errs in holding that a new trial is necessary on the charge of secret assault under the Supreme Court's ruling in *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). Rather, I find this case is controlled by *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). In *Hartness*, our Supreme Court was reviewing the defendant's conviction of taking indecent liberties with a minor. The defendant contended that the trial court erred by giving an instruction which allowed the jury to split its decision regarding which alleged immoral act by defendant against the minor constituted the offense, thereby rendering the verdict potentially nonunanimous. *Id.* at 563, 391 S.E.2d at 178. In finding no error in the judge's instruction, the Supreme Court stated:

> This Court in *Diaz* reversed a conviction for trafficking in marijuana on the grounds that it was obtained upon a fatally ambiguous disjunctive instruction. The jury had been instructed to return a guilty verdict if it found that defendant "knowingly possessed or knowingly transported marijuana." *Id.* at 553, 346 S.E.2d at 494. This Court noted that transportation and possession of marijuana "are separate trafficking offenses for which a defendant may be separately convicted and punished" and that by instructing the jury as he did, the trial judge "submitted two possible crimes to the jury." *Id.* at 554, 346 S.E.2d at 494. This Court found the instruction to be fatally ambiguous because it was impossible to determine whether all of the jurors found possession, all found transportation, or some found one and some the other.
>
> The reasoning in *Diaz* is misapplied in the present context. The risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive in the same manner as does the trafficking statute. The trafficking statute at issue in *Diaz*, N.C.G.S. § 90-95(h)(l) (1985), enumerates the following proscribed activities: sale, manufacturing, delivery, transportation, and possession. Each is a discrete criminal offense. By contrast, N.C.G.S. § 14-202.1 proscribes simply "any immoral, improper, or indecent liberties." Even if we assume that some jurors found that one type of sexual conduct occurred and

others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

Id. at 564-65, 391 S.E.2d at 179.

The Court further stated:

As the statute indicates, the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

Id. at 567, 391 S.E.2d at 180.

I find *Hartness* applicable to the present situation. Defendant commits the crime of secret assault, a single offense, by shooting at either Douglas Jones, Preston Jones, or both. The possibility that jurors may disagree upon which person defendant shot would not affect the unanimity of the jury's decision that the defendant committed the secret assault. I vote no error.

THOMAS PATRICK SHILLINGTON, PLAINTIFF v. K-MART CORPORATION, DEFENDANT

No. 9010SC600

(Filed 19 March 1991)

1. Appeal and Error § 330 (NCI4th)— videotapes—written transcript encouraged

Appellants are encouraged to submit, from the outset, a written transcript of the entire proceedings rather than videotapes in the interest of judicial economy and timely resolution of appeals.

Am Jur 2d, Appeal and Error § 404.

2. Libel and Slander § 16 (NCI3d)— arrest for looting—slander—evidence insufficient to go to jury

The trial court correctly granted a directed verdict for defendant in an action for slander arising from plaintiff's arrest for looting and trespass following a tornado where plaintiff's evidence showed that defendant's security guard informed a fellow guard and a police officer that plaintiff came onto K-Mart property, picked up K-Mart property and threw it down when challenged, essentially accusing plaintiff of trespass and looting; defendant's security guard refused to listen to plaintiff's explanation as to what he was doing on the site; plaintiff had picked up a K-Mart coat and placed it on a tree; and plaintiff was on a ridge which was close to but not within K-Mart's leased property. The statements made by defendant's agent accusing plaintiff of looting and trespass during an emergency were protected by the qualified privilege and plaintiff failed to present sufficient evidence of malice to rebut the presumption of good faith.

Am Jur 2d, Libel and Slander §§ 32, 49, 50.

3. Appeal and Error §§ 149, 418 (NCI4th)— false imprisonment—voluntary dismissal—no argument on appeal—abandoned

A directed verdict in favor of defendant on a claim for false imprisonment was affirmed where plaintiff voluntarily dismissed one claim without prejudice and presented no argument on appeal as to the other claim. A party has no right to appeal from a judgment entered on his own motion, and the assignment of error without argument was deemed abandoned.

Am Jur 2d, Appeal and Error § 697.

4. Malicious Prosecution § 13 (NCI3d)— trespass and looting following tornado—malicious prosecution—evidence insufficient for jury

The trial court did not err by granting a directed verdict in favor of defendant on plaintiff's malicious prosecution claim arising from plaintiff's arrest for looting and trespass following a tornado. Defendant's agents' actions in giving information to the Raleigh Police when turning plaintiff over to them were neither malicious nor in reckless disregard of plaintiff's rights so as to constitute malicious prosecution.

Am Jur 2d, Malicious Prosecution § 45.

5. Trespass § 2 (NCI3d)— arrest for looting and trespass following tornado—intentional infliction of emotional distress—evidence insufficient to go to jury

The trial court properly granted a directed verdict for defendant on a claim for intentional infliction of emotional distress arising from plaintiff's arrest for trespass and looting following a tornado where the events in question occurred during a state of emergency; plaintiff was walking in an area in close proximity to the defendant's property and in an area where defendant's merchandise had been scattered by the winds; defendant's agents saw plaintiff pick up an item of K-Mart property and put it down; defendant's agents were present at the site for the purpose of protecting K-Mart property from looters and others who would take advantage of the situation; given what McLaughlin saw of plaintiff's activities, his refusal to listen to plaintiff's explanation, although rude and officious, does not reach the level of being extreme and outrageous; and plaintiff did not present any evidence that McLaughlin's statements were intended to cause extreme emotional distress.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4, 5, 8.

Modern status of intentional infliction of mental distress as independent tort; "outrage." 38 ALR4th 998.

6. Master and Servant § 35.2 (NCI3d)— arrest for looting and trespass following tornado—negligent supervision—evidence insufficient to go to jury

The trial court properly granted directed verdict on a claim for negligent supervision following plaintiff's arrest for looting and trespass following a tornado where plaintiff's sole contention was that K-Mart negligently failed to inform its agents of the precise location of the property line along the portion of the property across a valley from the rear of the store; the area in question was normally thick with small pines and larger trees; the area was a tangle of downed trees and debris after the tornado; there was no road, path, or other visible physical evidence of the location of the boundary line; and the only evidence as to the location of the line came from a survey that plaintiff himself conducted which showed

the line to run parallel with and close to the ridge upon which plaintiff was walking.

Am Jur 2d, Master and Servant §§ 417-419, 443.

Judge WELLS concurs in part and dissents in part.

APPEAL by plaintiff from order entered 25 April 1990 in WAKE County Superior Court by *Judge Robert L. Farmer* directing verdict on plaintiff's first, third, fourth, fifth and seventh claims for relief. Heard in the Court of Appeals 6 December 1990.

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[1] Initially, we would take this opportunity to express our view on the use of videotapes, as opposed to a written transcript, as a method of conducting appellate review of the trial court proceedings. The trial of this case was videotaped in accordance with the Rules to Govern the Use of Video Court Reporting System During Test/Evaluation Period, done by order of the Supreme Court in Conference on 3 February 1988. Videotapes, four in number, were submitted to this Court as part of the Record on Appeal. No written transcript accompanied the briefs and record, except for selected excerpts of some of the testimony included as appendices in the parties' briefs. Although there may be many substantial benefits in videotaping trial proceedings, it is our opinion that the use of videotapes in this Court for appellate review greatly frustrates effective review of the trial proceedings, especially in cases such as this where questions of sufficiency of the evidence are determinative. The time needed to adequately review the evidence is greatly enlarged. This presents problems for an appellate court which must deal with a high volume of cases. We recognize that we can request the Administrative Office of the Courts to produce a written transcript from the videotapes for our use. However, in the interests of judicial economy and a timely resolution of these appeals and in the absence of a rule from the Supreme Court requiring a written transcript in cases that are appealed to this Court, we would encourage appellants to submit, from the outset, a written transcript of the entire proceedings.

This is an appeal from a directed verdict in favor of defendant, granted at the close of plaintiff's evidence. At trial, plaintiff's evidence tended to show the following:

During the early morning hours of 28 November 1988, a series of tornados struck Raleigh, North Carolina, causing severe damage to a large area. In response to the widespread damage, the mayor issued a state of emergency proclamation which covered the area involved in this suit. One of the areas hardest hit was the area surrounding the Town Ridge Shopping Center on Highway 70 West. The large K-Mart store located there was completely destroyed and the ATEC Associates, Inc. building, situated several hundred feet to the northwest of K-Mart, was damaged. The high winds scattered K-Mart property over a wide area including the ravine or valley behind the store and the ridge at the far side of the ravine.

On the morning of 29 November 1988, plaintiff and a co-worker, both employees of ATEC, arrived at work to find the ATEC building damaged and the electrical power off. Having determined that they could not work, they decided to walk around the area to survey the damage. While walking in the area of the K-Mart store they encountered Raleigh Police Officer Stephenson. The three talked amicably for 15-20 minutes during which time plaintiff informed the officer that he was employed at nearby ATEC Associates. As they separated, Officer Stephenson pointed or gestured to the path of the tornado, including the area behind K-Mart, and told them not to go in that area and not to cross any police tapes. Plaintiff and his co-worker then returned to ATEC. Upon examining the damage, they found that ATEC documents and equipment were scattered in the vacant lot behind the ATEC building and that some documents and equipment were missing. They began a search for the missing documents and equipment, in the course of which plaintiff and his co-worker walked along the ridge behind the K-Mart, in an area that had clearly been in the tornado's path. While moving in this area, plaintiff picked up a coat with a K-Mart tag and placed the coat on a tree in the open.

Officer Stephenson testified that he spotted plaintiff walking along the ridge but lost sight of him after a large mound of dirt obscured his view of the plaintiff. Some time later, Robert McLaughlin, a K-Mart security guard, stationed with a view of the valley and the ridge, saw plaintiff and called to him in an angry voice, demanding that plaintiff come to him in the valley. Plaintiff complied with this assertion of authority and entered the valley as ordered. McLaughlin met him along the way and, taking him by the arm, moved him further into the valley area, whereupon he searched plaintiff. Plaintiff testified that he attempted to explain

to McLaughlin that he was looking for lost ATEC property but that McLaughlin would not listen and told him to be quiet. Officer Stephenson became aware that plaintiff had been apprehended when he overheard or was apprised of radio communication between McLaughlin and another K-Mart security guard, Mr. Hayes. When Officer Stephenson arrived in the valley, plaintiff was already there in the company of McLaughlin. Based on information from McLaughlin and/or other K-Mart security personnel that plaintiff had come on K-Mart property, was picking up K-Mart merchandise and had thrown down an item of K-Mart merchandise when challenged, Stephenson and his supervisor decided to arrest plaintiff and take him before the magistrate. Neither Stephenson nor any other police officer was specifically aware of the location of the K-Mart property lines in relation to the ridge where plaintiff was walking, or actually saw plaintiff come into the valley area or saw him pick up K-Mart property. At no time, either at the scene or at the magistrate's office, did plaintiff attempt to explain his behavior to Officer Stephenson.

Plaintiff was taken before the magistrate and charged with trespass during an emergency and looting in violation of G.S. § 14-288.6. The magistrate found probable cause based solely on Officer Stephenson's testimony; no K-Mart personnel appeared at the magistrate's office at any time. Plaintiff was fingerprinted and confined overnight in jail under $10,000 cash bond. He was released the next afternoon about 4:00 p.m. Plaintiff was found not guilty at a subsequent criminal trial in Wake County District Court.

Plaintiff testified that as a result of false statements by K-Mart employees he suffered great emotional distress, depression, embarrassment, humiliation, fear over possible conviction for a crime he did not commit and inability to support his family in the event of imprisonment and out of pocket expenses in defending the criminal charges.

On 26 May 1989, plaintiff filed an action against K-Mart for compensatory and punitive damages, alleging (1) slander, (2) and (3) false imprisonment (two counts), (4) malicious prosecution, (5) intentional infliction of emotional distress, (6) negligent hiring, and (7) negligent supervision. Plaintiff took a voluntary dismissal as to his sixth claim on 26 March 1990. On 29 March 1990, at the close of plaintiff's evidence, the trial court granted defendant's motion for directed verdict pursuant to G.S. § 1A-1, Rule 50, as

to the first, third, fourth, fifth and seventh claims. On 2 April 1990, plaintiff took a voluntary dismissal without prejudice as to his second claim pursuant to G.S. § 1A-1, Rule 41. Plaintiff appeals from the directed verdict.

McMillan, Kimzey & Smith, by Katherine E. Jean, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Richard T. Boyette and Kari L. Russwurm, for defendant-appellee.

JOHNSON, Judge.

With regard to an appeal from a directed verdict, this Court has stated:

> A motion by a defendant for a directed verdict under N.C. Gen. Stat. § 1A-1, Rule 50(a) of the Rules of Civil Procedure, tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. On such a motion, the plaintiff's evidence must be taken as true and the evidence must be considered in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference to be drawn therefrom. A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts that the evidence reasonably tends to establish. (Citations omitted.)

Shreve v. Duke Power Co., 97 N.C. App. 648, 649-50, 389 S.E.2d 444, 444 (1990). With this rule in mind, we determine whether plaintiff's evidence is sufficient to take the case to the jury on any of his claims.

THE SLANDER CLAIM

[2] Plaintiff alleges that defendant's agent falsely accused him of a crime, that he did so maliciously in that he refused to listen to plaintiff's explanation, that the statements were repeated in the local press, and that as a result, plaintiff was damaged in his personal and professional reputation, incurred attorneys fees in defending himself in court and underwent extreme emotional distress. He contends that this constitutes slander *per se*. Plaintiff's evidence showed that defendant's security guard, while acting within the scope of his employment, informed fellow guard Hayes and

Officer Stephenson that plaintiff came onto K-Mart property, that he picked up K-Mart property and threw it down when challenged, essentially accusing plaintiff of trespass and looting. He also testified that McLaughlin refused to listen to his explanation as to what he was doing on the ridge. Plaintiff admits that he picked up a K-Mart coat and placed it on a tree and that he was on the ridge beyond the valley. His evidence also shows that K-Mart's leased property extended close to but did not include the ridge area.

Slander, generally, is the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business or means of livelihood. *Beane v. Weiman Co.*, 5 N.C. App. 276, 168 S.E.2d 236 (1969). "Where the injurious character of the words appear on their face as a matter of general acceptance they are actionable *per se.*" *Williams v. Freight Lines and Willard v. Freight Lines*, 10 N.C. App. 384, 388, 179 S.E.2d 319, 322 (1971). Accusations of crime or offenses involving moral turpitude constitute slander *per se*. *Penner v. Elliot*, 225 N.C. 33, 33 S.E.2d 124 (1945); *Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986). Where the words are actionable *per se*, the law raises a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage. *Badame v. Lampke*, 242 N.C. 755, 89 S.E.2d 466 (1955); *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987). To establish a claim for slander *per se*, a plaintiff must prove: (1) that defendant's statement was slanderous *per se*, (2) the statement was false, and (3) the statement was published or communicated to and understood by a third person. *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988).

Plaintiff's evidence was that he did pick up an item of K-Mart merchandise but that he was not, at any relevant time, on K-Mart property. Plaintiff's evidence is sufficient, viewed in the light most favorable to him, to show that defendant falsely accused him of a crime and that defendant communicated this accusation to third parties, Mr. Hayes and Officer Stephenson.

The question remains whether this communication is protected by a qualified privilege. This Court has stated:

> A defamatory statement is qualifiedly privileged when made (1) in good faith, (2) on subject matter (a) in which the declarant has an interest or (b) in reference to which the declarant has a right or duty, (3) to a person having a corresponding interest, right, or duty, (4) on a privileged occasion, and (5) in a manner

and under circumstances fairly warranted by the occasion and duty, right or interest.

Shreve, 97 N.C. App. at 650-51, 389 S.E.2d at 446. Where the occasion is privileged, as is the case here, *see Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962), the presumption of law is that the defendant acted in good faith, and the burden is on the plaintiff to prove that the publication was made with actual malice. *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971). Actual malice may be proven by a showing that the defamatory statement was made with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity. *Gibby v. Murphy*, 73 N.C. App. 128, 325 S.E.2d 673 (1985). "If plaintiff cannot meet his burden of showing actual malice, the qualified privilege operates as an absolute privilege and bars any recovery for the communication, even if the communication is false." *Clark v. Brown*, 99 N.C. App. 255, 263, 393 S.E.2d 134, 138, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990).

We hold that defendant's alleged refusal to listen to plaintiff's explanation does not rise to the level of a reckless disregard for the truth. Plaintiff's evidence was that he did pick up a coat belonging to K-Mart, that he was walking in a tangled debris-strewn area close to the K-Mart which had been leveled by the tornado and over which was scattered essentially the entire contents of the K-Mart store. It was only later, by means of a survey, that the precise location of the property line in that area could be established, and that survey put the line close to where plaintiff was challenged.

We find that the statements made by the defendant's agents accusing plaintiff of looting and trespass during an emergency were protected by the qualified privilege and that plaintiff has failed to present sufficient evidence of malice to rebut the presumption of good faith. This assignment is overruled.

FALSE IMPRISONMENT

[3] By his next assignment of error, plaintiff contends that the trial court erred in directing a verdict for defendant on plaintiff's false imprisonment claim. Plaintiff alleged two claims of false imprisonment against defendant. By his second claim plaintiff alleges that defendant's agents McLaughlin and Shankles unlawfully restrained him. By his third claim plaintiff alleges that defendant's

agents, without probable cause or reasonable grounds, unlawfully restrained him by directing the Raleigh police officer to arrest plaintiff. The trial judge directed verdict for defendant on plaintiff's third claim. Plaintiff voluntarily dismissed his second claim without prejudice. In his brief on appeal, plaintiff directs his argument toward the elements of the second claim. He presents no argument as to the third claim.

Only an aggrieved party may appeal in the case. G.S. § 1-271. A party has no right to appeal from a judgment entered on his own motion. *Trust Co. v. Morgan, Attorney General*, 9 N.C. App. 460, 176 S.E.2d 860 (1970). "Questions raised by assignment of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned." North Carolina Rules of Appellate Procedure 28(a). Since plaintiff presents no argument as to his third claim it is deemed abandoned and the directed verdict in favor of defendant on plaintiff's third claim is affirmed.

MALICIOUS PROSECUTION

[4] Plaintiff next assigns error to the directed verdict in favor of defendant on plaintiff's malicious prosecution claim. The elements of malicious prosecution are: "(1) that defendant initiated the earlier proceeding, (2) that he did so maliciously and (3) without probable cause, and (4) that the earlier proceeding terminated in plaintiff's favor." *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984). The fourth element is not at issue as plaintiff was found not guilty at trial. As to the other three elements we find plaintiff's evidence insufficient as a matter of law. First we find that defendant did not initiate the criminal proceeding against plaintiff. Officer Stephenson testified that he and his supervisor decided to arrest plaintiff based on the information they received from defendant, but defendant's agents neither directed that they do so nor did defendant's agents press charges themselves, nor did they appear at the magistrate's office at any time. Further, Officer Stephenson testified that he also considered the fact that plaintiff had entered an area he had been warned to stay out of. Plaintiff's evidence fails on this issue. *See Harris v. Barham*, 35 N.C. App. 13, 239 S.E.2d 717 (1978). As to the malice and probable cause elements, we find that plaintiff's evidence also is insufficient as a matter of law. Probable cause, as used in the context of malicious prosecution, is defined as a "reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a

cautious man in the belief that the accused is guilty of the offense with which he is charged." *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966). "Probable cause . . . has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." *Id.* "Although a want of probable cause may not be inferred from malice, the rule is well settled that malice may be inferred from want of probable cause, *e.g.*, as where there was a reckless disregard of the right of others in proceeding without probable cause." *Id.*

We find that under the facts of this case, defendant's agent's actions in giving information to the Raleigh Police and turning plaintiff over to them was neither malicious nor in reckless disregard of his rights so as to constitute malicious prosecution. This assignment is overruled.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[5] By his fourth Assignment of Error plaintiff contends that the trial judge erred in granting a directed verdict on plaintiff's claim of intentional infliction of emotional distress. We disagree. The essential elements of this tort are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). The "extreme and outrageous conduct" necessary for recovery is defined as conduct which "exceeds all bounds usually tolerated by decent society." *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979). Neither physical injury nor the foreseeability of injury are elements of the tort. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

> This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he 'desires to inflict severe emotional distress . . . [or] knows that such distress is certain, or substantially certain, to result from his conduct . . . [or] where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotional distress will follow' and the mental distress does in fact result.

Id. at 449, 276 S.E.2d at 333, *quoting* Restatement (Second) of Torts § 46, Comment i (1965). The determination of what is extreme and outrageous conduct is a question of law for the court. *Briggs v. Rosenthal*, 73 N.C. App. 672, 327 S.E.2d 308, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985).

We hold that defendant's conduct could not reasonably be regarded as extreme and outrageous. The events in question occurred during a state of emergency following a devastating tornado. Plaintiff was walking in an area in close proximity to the defendant's property and in an area where defendant's merchandise had been scattered by the winds. Defendant's agents saw plaintiff pick up an item of K-Mart property and put it down. Defendant's agents were present at the site for the purpose of protecting K-Mart property from looters and others who would take advantage of the situation. Given what McLaughlin saw of plaintiff's activities, his refusal to listen to plaintiff's explanation, although certainly rude and officious, does not reach the level of being extreme and outrageous. Nor does plaintiff present any evidence that McLaughlin's statements were intended to cause extreme emotional distress.

Plaintiff has presented insufficient evidence to take his claim of intentional infliction of emotional distress to the jury. Accordingly, the trial court properly directed verdict for defendant on this count.

NEGLIGENT SUPERVISION

[6] Finally, plaintiff assigns error to the trial court's directing verdict on plaintiff's negligent supervision claim. Plaintiff's sole contention is that K-Mart negligently failed to inform their agents of the precise location of the property line along the portion of the property across the valley from the rear of the store. The area in question was normally thick with small pines and larger trees. After the tornado struck, the area was a tangle of downed trees and debris. There was no road or path or other visible physical evidence of the location of the boundary line. The only evidence as to the location of the line came from a survey that plaintiff himself conducted which showed the line to run parallel with and close to the ridge upon which plaintiff was walking. Plaintiff has failed to point to acts of negligent supervision by defendant K-Mart sufficient to take his claim to the jury and we therefore affirm the trial court's dismissal of that claim. This assignment is overruled.

For the reasons stated above we affirm the directed verdicts on all counts.

Affirmed.

Judge COZORT concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS dissenting in part and concurring in part.

As to plaintiff's claims for slander and malicious prosecution, I respectfully dissent.

In my opinion, the circumstances surrounding the accusation by defendant's agent that plaintiff was trespassing and looting were sufficiently disputed to leave a jury question as to whether defendant's agent acted with a reckless disregard for the truth.

As to the malicious prosecution claim, it is clear to me that defendant's agent procured the arrest of plaintiff, and that but for the accusations of defendant's agent, there would have been no prosecution. Again, the question of whether defendant's agent acted reasonably under all the circumstances is for the jury.

In all other respects, I concur in the majority opinion.

JUDY GOSSETT ATKINS v. GLENN TURNER ATKINS

No. 9018DC774

(Filed 19 March 1991)

1. Divorce and Separation § 121 (NCI4th)— equitable distribution—marital property—gift to husband and wife

The trial court did not err in an equitable distribution action by concluding that a 13.87 acre tract of land was marital property where the wife, who claimed that the tract was marital property, met her burden of establishing each of the four elements required to support a determination that property was marital; there was no dispute that the property was acquired by either spouse or both spouses during the course

of the marriage and before the date of the separation and was presently owned; and the husband failed to meet his burden of excepting the property from the definition of marital property in that the deed was a conveyance to both the husband and wife and was not acquired as an exchange for other property.

Am Jur 2d, Divorce and Separation §§ 880, 884.

2. **Divorce and Separation § 147 (NCI4th)— debts—classification as separate or marital**

There was sufficient evidence in an equitable distribution action to classify debts to Wachovia and the AT&T Credit Union as marital where the wife testified that she used those funds to purchase various items for the home and clothing for the parties; however, there was no evidence in the record regarding the purposes for which money received from a Visa account was expended and therefore there was insufficient evidence to support a classification of the Visa debt as marital.

Am Jur 2d, Divorce and Separation § 935.

3. **Divorce and Separation § 135 (NCI4th)— valuation of personal property—property not valued separately—no error**

The party who received all of the marital personal property in an equitable distribution action was not prejudiced by the failure of the trial court to value each item where all of the personal property classified as marital was distributed to one party and no purpose would be served in requiring the trial court to place a value on each individual item.

Am Jur 2d, Divorce and Separation § 937.

4. **Divorce and Separation § 137 (NCI4th)— equitable distribution—valuation of property—property examined after date of separation**

The trial court did not err in an equitable distribution action by allowing two experts to testify to the value of the personal and real property where those experts examined the property some eighteen months after the separation date. There was no evidence in the record that either witness considered evidence of post-separation occurrences in valuing the property, both witnesses exhibited familiarity with the market values at the time of the separation of the parties, and there was no evidence from either party that the condition of the proper-

ty was altered between the date of separation and the date of the appraisal.

Am Jur 2d, Divorce and Separation §§ 938, 939.

5. Divorce and Separation §§ 148, 155, and 145 (NCI4th)— equitable distribution—unequal distribution—distribution factors

The trial court erred in an equitable distribution action by not considering evidence that the husband paid homeowner's insurance premiums on the marital home between the date of separation and the date of trial, by not considering evidence that the husband was primarily responsible for maintaining and preserving the marital property between the date of separation and the date of trial, and by not considering evidence that the wife earned a larger income than the husband. N.C.G.S. § 50-20(c)(11a), N.C.G.S. § 50-20(c)(1).

Am Jur 2d, Divorce and Separation §§ 903, 918.

6. Divorce and Separation § 158 (NCI4th)— equitable distribution—unequal distribution—distributive factors

The trial court erred in an equitable distribution action by considering as a distributional factor that the husband had received an inheritance of significant value since there was no evidence to support the value of the inheritance, and by considering that the party with the burden of proof had the property appraised and the appraiser testified as to the value of the property. The court did not err by considering as a distributional factor that the value of the marital property had increased from the date of the separation to the date of trial and that such increase inured to the benefit of the husband.

Am Jur 2d, Divorce and Separation §§ 883, 939.

7. Divorce and Separation § 165 (NCI4th)— equitable distribution—unequal distribution—installments denied

It was within the trial court's discretion in an equitable distribution action to refuse to allow the husband to pay a distributive award of $67,783 in installments.

Am Jur 2d, Divorce and Separation § 931.

APPEAL by defendant from judgment filed 22 March 1990 in GUILFORD County District Court by *Judge William L. Daisy*. Heard in the Court of Appeals 12 February 1991.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff-appellee.

Rivenbark, Kirkman, Alspaugh & Moore, by Douglas E. Moore, for defendant-appellant.

GREENE, Judge.

Defendant (Husband) appeals from an order of equitable distribution filed 22 March 1990.

The evidence before the court reveals that the parties were married 23 August 1965. In 1958, the Husband's father died leaving by will his property to his wife, the Husband's mother (Mother). The Mother remarried in 1964. In March, 1969, the Mother and her new husband conveyed interests in a tract of land containing 52 acres to the Husband, the Husband's sister, and the Husband's brother. Each of the three grantees, all children of the Mother, received a one-sixth undivided interest. The Husband, his brother, and sister paid no monies to their mother in consideration for the deed. On the same day, all the children including the Husband and their wives, along with the Mother and her new husband, conveyed the entire 52 acres of land to Roy L. Hendrix and wife, Hazel M. Hendrix (Hendrix). On the same day, Hendrix executed a deed of trust on the 52-acre tract of land to Frank C. Ausband, Trustee for the Husband, his brother, his sister and his mother. The deed of trust acknowledged the existence of a debt of $51,381.23. The amount of the note and deed of trust reflected the difference between the purchase price of $68,500 and the amount paid at the time of the transfer. The Husband received his pro rata share of the monies paid by Hendrix, including his share of the deposit and his share of the monies received in full payment of the note and deed of trust. Subsequently, the Mother and her husband conveyed several tracts of land to the Husband and plaintiff (Wife) as tenants by the entirety, namely a 13.87-acre tract and a 3.22-acre tract both deeded 15 September 1969.

The trial court found in pertinent part:

5. The date [Wife] and [Husband] separated is November 14, 1986. The Court has valued the marital property as of the date of separation.

. . . .

13. When the parties separated, [Wife] and [Husband] owned as tenants by the entirety certain real property described as 13.87 acres in Guilford County. Said property was acquired during the marriage as a gift from [Husband]'s mother, Helen Atkins. During the marriage of [Wife] and [Husband], [Husband]'s mother, Helen Atkins, deeded other real property to her various children including [Husband] in their separate names exclusive of their spouses. It is clear to the Court that Helen Atkins knew the difference in deeding property to one of her children versus deeding property to a child and that child's spouse. . . .

17. The [Wife] offered testimony of a real estate appraiser. The appraiser testified that he looked at the property on May 15, 1988. Based on the condition of the property, its location and comparables at the time, it was his opinion that the property had a fair market value of $160,000 on May 15, 1988. He further testified that in his opinion the property had a fair market value of $155,000 on November 14, 1986, and that it is currently worth between $165,000 and $170,000.

18. The Court finds the value of the real property to be $150,000.00. It is appropriate that the property by [sic] distributed to [Husband].

. . . .

30. Both parties have contended that an equal division is not equitable.

31. The [Husband] contends that the following factors apply to support an unequal division on [Husband]'s behalf:

(a) The income, property, and debts of each spouse: The [Husband] contends [Wife] has a superior financial standing, particularly she has a better income earning capacity. The Court finds that while [Wife] regularly earned more than [Husband], that he was never unable to work and pursued the career of his choice.

(b) The length of the marriage and age and health of each spouse: [Husband] contends that his health is such that he cannot obtain employment comparable to [Wife]'s employment. The Court finds no credible evidence supporting this position.

(c) The efforts made by each spouse to acquire the property: The [Husband] contends that the real property was acquired through [Husband]'s family. The Court finds that the marital real property was never [Husband]'s separate property, but rather finds that it was a gift to [Wife] and [Husband] and that both contributed fully to its development.

. . . .

(e) The actions taken by either spouse to preserve or waste (diminish) marital assets: [Husband] contends he has concentrated his efforts in the maintenance and preservation of all of the marital property. [Husband] contends [Wife] has failed to cooperate in the paynent [sic] of a note to Wachovia and the parties are now involved in a collection action in Superior Court of Guilford County. The Court finds that neither [Wife] nor [Husband] paid the Wachovia debt and that [Wife] paid significant other marital debts after the date of separation as well as paying the property taxes each and every year.

. . . .

34. The Court finds that [Husband] is not entitled to a division of marital property which constitutes more than half the marital estate.

35. [Wife] contends that the following factors apply to support an unequal division on [Wife]'s behalf:

(a) The income, property and liabilities of each party at the time the division of property is to be come [sic] effective: The Court finds that the [Husband] has received an inheritance since the separation of [Wife] and [Husband] which has significant value.

(b) The increased value of the real property since the date of separation: The Court finds that since the date of separation, the value of the real property has increased from $150,000 to between $165,000 and $170,000 and that said

increase will inure to the benefit of [Husband], and it is significant.

(c) The difficulty of evaluating any component asset: The Court finds that the [Wife] at her expense hired a real property appraiser, pension appraiser, and personal property appraiser which were of significant help to the Court in valuing the marital estate.

36. The Court finds that [Wife] is entitled to an unequal division and that she should receive $7,500 in addition to a distribution based on an equal division of the net marital estate.

37. In order to effectuate an equitable division of marital assets, it is appropriate that judgment enter against [Husband] in favor of [Wife] in the amount of $67,783.

. . . .

The trial court then concluded that the 13.87-acre tract of land and the personal property of the parties was marital property and distributed the assets and debts among the parties in accordance with an unequal division. The 13.87-acre tract and the personal property were distributed to Husband. The court further concluded:

43. [Wife] is entitled to an unequal division and she should receive $7,500 in addition to a distribution based on an equal division of the net marital estate.

44. In order to effectuate an equitable division of marital assets, it is appropriate that judgment enter against [Husband] in favor of [Wife] in the amount of $67,783.

The issues are: (I) whether the 13.87-acre tract is marital or separate property; (II) whether the debts are marital or separate; (III) whether the trial court is required to value each item of personal property classified as marital; (IV) whether an expert, who only observed the property at the time of trial, is competent to testify to the value of the property as of the date of separation; (V) whether the evidence supports an unequal division of the marital property; and (VI) whether the trial court erred in failing to allow the husband to pay the distributive award in installments.

I

[1] The Husband argues that the 13.87-acre tract of land received from his mother is separate property because he received the 13.87-acre tract in exchange for his interest in the 52-acre tract of land. The Wife argues the 13.87-acre tract is marital property.

The trial court must classify and identify property as marital or separate "depending upon the proof presented to the trial court of the nature" of the assets. *Johnson v. Johnson*, 317 N.C. 437, 455, n.4, 346 S.E.2d 430, 440 (1986). The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. *See Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987); *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990); *Zaborowski v. Zaborowski*, 547 So.2d 1296, 1297 (Fla. Dist. Ct. App. 1989) (party claiming pension is marital property bears burden of proof). A party may satisfy her burden by a preponderance of the evidence. *Johnson* at 454, 346 S.E.2d at 440.

The party claiming the property to be marital must meet her burden by showing by the preponderance of the evidence that the property: (1) was "acquired by either spouse or both spouses"; and (2) was acquired "during the course of the marriage"; and (3) was acquired "before the date of the separation of the parties"; and (4) is "presently owned." N.C.G.S. § 50-20(b)(1). If this burden is met and a party claims the property to be separate, that party has the burden of showing the property is separate. This burden is met by showing by the preponderance of the evidence that the property was: (1) "acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage" (third-party gift provision); or (2) "acquired by gift from the other spouse during the course of marriage" and the intent that it be separate property is "stated in the conveyance" (inter-spousal gift provision); or (3) was "acquired in exchange for separate property" and no contrary intention that it be marital property is "stated in the conveyance" (exchange provision). N.C.G.S. § 50-20(b)(2). If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.

If the party claiming the property to be marital does not meet his burden of showing that the property was acquired during the

course of the marriage, the property does not immediately become, as a matter of law, separate property. The party claiming the property as his separate property must meet the burden of establishing by the preponderance of the evidence that the property was "acquired by [him] before marriage . . . ," N.C.G.S. § 50-20(b)(2), or acquired by him after separation with his own separate funds, *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E.2d 668, *disc. rev. denied*, 314 N.C. 121, 332 S.E.2d 490 (1985).

Here the Wife, who claimed the 13.87-acre tract to be marital, met her burden of establishing each of the four elements required to support a determination that the property was marital. In fact there is no dispute that the property was "acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned . . . ." N.C.G.S. § 50-20(b)(1). The Husband, however, has failed to meet his burden of excepting the property from the definition of marital property.

First, the property was not acquired by *a* spouse by bequest, devise, descent or gift as required by the third-party gift provision. Instead, the deed was a conveyance to *both* the Husband and the Wife. Second, the property was not acquired by gift from the Wife under the inter-spousal gift provision, but was conveyed to both the Husband and Wife by the Husband's mother. Third, we find the Husband did not establish by the preponderance of the evidence that the property was acquired under the exchange provision.

Since the Husband paid no consideration for the one-sixth undivided interest that he received from his mother in the 52-acre tract, that interest was his separate property because it was a "gift [to him] during the course of the marriage." N.C.G.S. § 50-20(b)(2). However, the Husband immediately sold that property for consideration, which no one argues was unfair or unreasonable, and received his pro rata share of the sale proceeds. Therefore, the exchange for his one-sixth interest in the 52 acres of land was the monies he received from the sale of the properties, not his receipt of the 13.87 acres from his mother. Furthermore, the trial court apparently rejected, as not credible, the Husband's evidence that his mother conveyed the 13.87-acre tract of land in exchange for his transfer of his interest in the 52-acre tract. *Church v. Mickler*, 55 N.C. App. 724, 287 S.E.2d 131 (1982) (the trial court is judge of the credibility of witnesses in trial without jury).

Accordingly, since the Wife met her burden of showing the property is marital, and since the Husband failed to meet his burden of showing the property is separate, we find no error in the trial court's conclusion that the 13.87-acre tract of land is marital.

II

[2] The Wife offered testimony and the trial court found as fact that the following debts were marital debts: A debt due on a Visa card in the name of both the Husband and the Wife in the amount of $2,631.55; a joint debt to Wachovia Bank in the amount of $4,464.40; and a debt in the Wife's name to AT&T Credit Union in the amount of $4,885.35. The Husband argues that the Wife failed in her burden of proving that these debts were marital debts. "The party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was 'incurred during the marriage for the joint benefit of the husband and wife.' " *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990) (quoting *Byrd* at 424, 358 S.E.2d at 106). There is no dispute in this case that the Wife offered adequate evidence as to the value of these debts on the date of separation. The only question is whether the evidence was adequate to show that the debt was "incurred during the marriage for the joint benefit" of the parties. The fact that the debt is in the name of one or both of the spouses is not determinative of the proper classification. *Miller* at 80, 387 S.E.2d at 183.

We agree with the Husband that there is insufficient evidence in this record to support a classification of the Visa debt as a marital debt. There is no evidence in the record regarding the purposes for which the money received from the Visa account was expended. However, on the Wachovia and AT&T debts, the record reveals adequate evidence to support a classification of these debts as marital. The Wife testified that she used the funds which she obtained on these accounts to purchase various items for the home and clothing for the parties.

III

[3] The Husband next argues that the trial court erred in failing to value each item of personal property separately. We disagree. The trial court is required to value all the marital assets, including personal property. *See Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d

104 (1988). However, where all the personal property classified as marital is distributed to one party, as here, there is no purpose served in requiring the trial court to place a value on each individual item. Accordingly, the Husband who received all the marital personal property has not been prejudiced by the failure of the trial court to value each item.

IV

[4] The Husband next argues that the experts who testified as to the value of the personal and real property were not competent to testify because they only examined the property some eighteen months after the separation date. We disagree.

John Pait who was admitted as an expert in the "appraisals of used property" testified that he appraised the personal property on 15 June 1988, and that in his opinion the value of the personal property on 15 June 1988 was the same as it was on the date the parties separated, 14 November 1986. Specifically, he said:

> In my opinion, all the property was . . . taken care of. It wasn't like it was going downhill where it was sitting. . . . In my opinion, it would be the same value.

Mr. Pait valued the personal property at $11,126, placing a value on each item of personal property.

Henry Watts was accepted by the court as an "expert in real estate appraisal in Guilford County." He testified that he inspected the real property on 15 May 1988 and that he arrived at a fair market value for the property as of that date. He estimated the value to be in the amount of $160,000. He further testified:

> Q. Do you have an opinion as to whether the value of this property would have been substantially different November 14th of 1986 versus May 15th, 1988?
>
> A. Just strictly allowing for the passage of time, I would estimate the value, as of the date of separation, at approximately $155,000.
>
> Q. And do you have an opinion of the value of that property today?
>
> A. I would estimate that as of this date, that it would be approximately $165,000 to $170,000, primarily due to the increase in value just for the land itself.

We find both experts were competent to testify as to the value of the property on the date of separation. The fact that they did not appraise the property on the actual date of separation is not fatal. There is no evidence in the record either witness considered "evidence of post-separation occurrences" in valuing the property, *Christensen v. Christensen*, 101 N.C. App. 47, 55, 398 S.E.2d 634, 639 (1990) (evidence of post-separation occurrences is prohibited in valuing marital property), and they both exhibited familiarity with the market values at the time of separation of the parties. Furthermore, there is no evidence from either party that the condition of the property was altered between the date of separation and the date of the appraisal.

V

The Husband next argues that the trial court erred in making an unequal distribution of the marital property to the Wife and that the evidence instead requires an unequal distribution in his favor.

A

[5] The Husband first contends that he presented evidence on several of the factors under N.C.G.S. § 50-20(c) that should have been considered by the trial court, but were not, in determining an appropriate distribution of the marital property.

We agree with the Husband that the trial court erred in three factors: (1) evidence that the Husband paid homeowner's insurance premiums on the marital home between the date of separation and the date of the trial should have been considered as a distributional factor under N.C.G.S. § 50-20(c)(11a); (2) evidence that the Husband was primarily responsible for maintaining and preserving the marital property between the date of separation and the date of trial should have been considered as a distributional factor under N.C.G.S. § 50-20(c)(11a); (3) evidence that the Wife earned a larger income than the Husband should have been considered by the trial court as a distributional factor under N.C.G.S. § 50-20(c)(1).

B

[6] The Husband next contends that the Wife presented evidence on several of the factors under N.C.G.S. § 50-20(c) that should not have been considered by the trial court, but were, in determining the appropriate distribution of the marital property.

We agree with the Husband that the trial court erred in two factors: (1) since there is no evidence to support the value of the inheritance the Husband received from his mother, it was error for the trial court to consider as a distributional factor under N.C.G.S. § 50-20(c)(1) that the Husband had received an inheritance of "significant value" from his mother's estate; and (2) since the party claiming property to be marital has the burden of presenting evidence on the value of such property, *Miller* at 80, 387 S.E.2d at 184, it is error to consider as a distributional factor that the party with the burden of proof had the property appraised and the appraiser testified as to the value of the property. We find no error by the trial court in its consideration, as a distributional factor, that the value of the marital property had increased from the date of the separation to the date of the trial and that such increase inured to the benefit of the husband. *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988).

VI

[7] The Husband finally argues that the trial court erred in not allowing him to pay the distributive award of $67,783 in installments. We disagree. It is within the trial court's sound discretion to determine whether the distributive award is to be made payable as a lump sum or over a fixed period of time. *See* N.C.G.S. § 50-20(e); *Lawing v. Lawing*, 81 N.C. App. 159, 179, 344 S.E.2d 100, 113 (1986).

After a thorough review of the transcript and record on appeal, we find the Husband's remaining assignments of error are without merit.

Affirmed in part, reversed in part, and remanded.

Judges WELLS and WYNN concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR FOR NORTH CAROLINA, COMPLAINANT v. AUSTIN BERRYHILL FABRICATORS, INC., RESPONDENT

No. 9010SC158

(Filed 19 March 1991)

1. **Master and Servant § 114 (NCI3d)— OSHA proceeding—proof of defense of impossibility**

In proving the defense of impossibility in an OSHA proceeding, the employer must show (1) that compliance with the standard was not possible or would preclude performance of the work and (2) that the employer used alternative means of protection not specified in the standard or that alternative means of protection were unavailable.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 33, 42.

2. **Master and Servant § 114 (NCI3d)— OSHA proceeding—impossibility defense—economic infeasibility**

An employer's burden of proving the impossibility defense for its failure to provide guards on press brakes is not met by showing that the press brakes are used in custom work rather than production work, that use of the guards is difficult, expensive, and would require changes in modes of production, or that the guarding devices would slow down or impede the production rate. In order to establish impossibility based on economic infeasibility, the employer must show that the safety devices are extremely costly and that such costs would financially imperil the employer's existence.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 33, 42.

3. **Master and Servant § 114 (NCI3d)— OSHA proceeding—failure to comply with safety regulations—impossibility defense—evidence insufficient**

A decision by the OSHA Review Board that it was technologically and economically feasible to place guards on points of operation of three press brakes in respondent's custom metal fabrication shop and that respondent failed to prove the defense of impossibility was supported by substantial evidence where the complainant presented expert testimony

that five types of safety guards and other protective devices had effectively been installed in other custom metal fabrication shops and were available for use in respondent's shop; a part owner of respondent testified that respondent had never sought a variance, consulted experts in machine guarding or alternative means of protection, or tried to use any of the suggested devices; conclusory testimony by two witnesses that guarding the press brakes would put respondent "out of business" and "at a noncompetitive basis" was insufficient to establish economic infeasibility; and testimony by two witnesses for respondent that it was impossible to guard the press brakes was adequately refuted.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 138.

APPEAL by respondent from judgment entered 22 April 1988 by *Judge Donald W. Stephens* in WAKE County Superior Court. Heard in the Court of Appeals 18 September 1990.

This is an appeal from the judgment of the superior court affirming the decision of the OSHA Review Board reversing an OSHA hearing examiner and reinstating an OSHA citation and penalty against respondent Austin Berryhill Fabricators.

On 12 May 1981, Art Willis, a safety officer of the North Carolina Department of Labor, OSHA Division, inspected Austin Berryhill Fabricators' (hereinafter ABF) plant near Greensboro, North Carolina. During the inspection, Willis observed in the forming area of ABF's plant three unguarded press brakes: a 75-ton Wisconsin Forcemaster CL 211 press brake; a Chicago 55-ton Dreis and Krump press brake; and a Chicago 25-ton Dreis and Krump press brake. As a result of his inspection, Willis recommended that ABF be issued a citation setting forth both serious and nonserious alleged occupational safety and health violations. James Hall, Chief of Enforcement Services Bureau of OSHA Division, subsequently issued the citations. Citation Number One alleged serious violations for the following items: item number 1 for violation of 29 CFR 1910.212(a)(3)(ii) for not properly guarding points of operation of the three press brakes; item number 2 for violation of 29 CFR 1910.107(b)(10) for not effectively isolating the spraying area from the area in which the lighting units were located; and item number 3 for violation of 29 CFR 1910.219(e)(3)(i) for not enclos-

ing by guards a V-belt drive on an 18-gauge Lockformer, a Pexto powered roller and a flat-belt sanding machine. Citation Number Two alleged nonserious violations.

After receiving the citations, ABF filed a notice of protest to the OSHA Review Board for Citation Number One, item number 1 and the proposed penalties to Citation Number One, items numbers 1, 2, and 3. Citation One, item number 2 was deleted in an amended citation. Commissioner Brooks filed a complaint requesting that the Review Board affirm the citation and assess appropriate penalties. In its answer, ABF denied the alleged violations. The issues presented to the Review Board were: "(a) Did Respondent establish by the greater weight of the evidence that providing a guard at the point of operation of three press brakes was impossible under the facts and circumstances presented? (b) Was a penalty of $200.00 for violation of 29 CFR 1910.219(e)(3)(i) just and reasonable under the facts and circumstances of this case?" After a hearing, the Hearing Examiner first concluded that the proposed penalty for Citation Number One, item number 3 was just and reasonable under the circumstances and affirmed the penalty. ABF did not appeal from this ruling. Second, with respect to the serious violation alleged in Citation Number One, item number 1, the Hearing Examiner concluded that ABF had proven by the greater weight of the evidence that "under the facts and circumstances of this case it was impossible with existing technology to guard the points of operation of three press brakes in question because of the numerous sizes of pieces of metal fabricated and the number of bends required to be made due to the custom nature of Respondent's business and further, that there were no available alternative protective measures that could be used." The Hearing Examiner dismissed the citation for not guarding points of operation on the press brakes.

Commissioner Brooks then petitioned the Safety and Health Review Board of North Carolina (hereinafter Review Board) for review of the Hearing Examiner's dismissal of Citation Number One, item number 1. The Review Board reversed the Hearing Examiner's decision but granted ABF leave to seek a permanent variance from the standard. ABF applied for a permanent variance and the application was denied by Commissioner Brooks. ABF then filed a motion for hearing prior to entry of final order. Following a nonevidentiary hearing, the Review Board entered its final order reversing the Hearing Examiner. ABF then petitioned pursuant to G.S. 150B-43 for judicial review in superior court. After a hearing

the trial court entered judgment on 22 April 1988 affirming the decision of the Review Board. Respondent appeals.

Attorney General Lacy H. Thornburg, by Ralf F. Haskell, for complainant-appellee.

Tuggle Duggins Meschan & Elrod, P.A., by Rayford K. Adams, III, for respondent-appellant.

EAGLES, Judge.

Respondent brings forth five assignments of error. First, respondent contends that the trial court erred in holding that the Review Board's decision did not prejudice its substantial rights. Second, respondent contends that the trial court erred in affirming the Review Board's decision as to the impossibility defense since the Review Board's decision was based on an error of law. Third, respondent contends that based on the entire record the trial court erred in affirming the Review Board's decision. Fourth, respondent contends that the trial court erred in affirming the Review Board's decision because the decision was contrary to the findings of fact made by the Review Board and omitted uncontroverted findings of fact by the hearing examiner. Finally, respondent contends that it proved the defense of impossibility by a preponderance of the evidence.

Initially we note that judicial review of OSHA Review Board decisions is under the Administrative Procedure Act (Article 4 of Chapter 150B). G.S. 95-141. The whole record test is applicable to judicial review under the Administrative Procedure Act. *In re Appeal of K-Mart Corp.*, 319 N.C. 378, 354 S.E.2d 468 (1987). "This Court is bound by the findings of the [reviewing body] if they are supported by competent, material, and substantial evidence in view of the entire record as submitted." *Id.* at 380, 354 S.E.2d at 469. G.S. 150B-51(b) provides that

> the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

The Occupational Safety and Health Act was enacted " 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.' As we have repeatedly stated, the Act was not intended to be remedial so much as to 'prevent the first injury, including those of a non-serious nature.' " *Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1138 (8th Cir. 1988) (citations omitted). "Congress has made it clear that '[f]inal responsibility for compliance with the requirements of this act remains with the employer.' " *Id.*

[1] "[A]n employer [can] defend affirmatively on the ground that compliance with a standard is impossible because of the nature of the work in progress." Garrison & Associates, Inc., O.S.H. Dec. (CCH) paragraph 19,550 (1975) and cases cited therein. "But in all such cases the burden has been on the employer asserting the defense to establish it by a preponderance of the evidence." *Id.*

> The "impossibility" defense has been specifically discussed in connection with the safety devices requirement of 29 C.F.R. § 1926.105(a). The defense encompasses technological and also economic infeasibility, which is, however, narrowly construed since standards may be economically feasible within the meaning of the Act although financially burdensome.

Southern Colorado Prestress Co. v. Occupational Safety and Health Review Commission, 586 F.2d 1342, 1351 (10th Cir. 1978).

> In our view, if an employer has carried out its affirmative duty under the Act to take all available measures to protect its employees, then it should pose little additional hardship on the employer to show that alternative measures of protec-

> tion were unavailable or infeasible. Indeed, it is the legal burden on the employer to make such a demonstration that provides a critical incentive for employers to faithfully carry out their duty to protect employees by all possible means.

843 F.2d at 1138. In proving the defense of impossibility, the employer must show that (1) compliance with the standard was not possible or would preclude performance of the work and (2) that the employer used alternative means of protection not specified in the standard, or that alternative means of protection were unavailable. *See Brock, supra; see also* Hughes Bros. Inc., O.S.H. Dec. (CCH) paragraph 22,909 (1978). "The employer bears the initial responsibility to comply with the standards promulgated by the Secretary. Where the employer determines that the specified means of compliance is infeasible, it must affirmatively investigate alternative measures of preventing the hazard, and actually implement such alternative measures to the extent feasible." 843 F.2d at 1139.

[2] The employer's burden of proof is not met by merely establishing the fact that an employer's press brakes are used in custom work rather than production work. K & T Steel, Corp., O.S.H. Dec. (CCH) paragraph 20,445 (1976). Likewise the burden is not carried by the employer when he merely establishes that "compliance is difficult, expensive, would require changes in modes of production, or that one method of compliance has been unsuccessfully attempted." Hughes Brothers Inc., O.S.H. Dec. (CCH) paragraph 22,909 (1978). Nor is it sufficient for the employer to show that guarding devices would slow down or impede the production rate. Mobile Component Distributors, Inc., O.S.H. Dec. (CCH) paragraph 20,477 (1976). "A successful economic feasibility argument must demonstrate both that it is extremely costly for the employer to comply with the Secretary's order and that the employer cannot absorb this cost. . . . Although the expense . . . may be somewhat burdensome, economic infeasibility is established only when the employer's existence as an entity is financially imperiled by compliance." *Faultless Division v. Sec. of Labor*, 674 F.2d 1177, 1190 (7th Cir. 1982).

Here respondent first contends that its substantial rights were prejudiced when the trial court affirmed the Review Board. Respondent argues that its rights were prejudiced by the reinstatement of the citation and fine and by the requirement that it install expensive guarding mechanisms which it contends would render the machines unusable for custom metal fabrication and effectively

prevent ABF from continuing its custom fabrication business. On this record, we disagree. Accordingly, this assignment of error must fail.

[3] Next, respondent contends that the Review Board erred when it concluded that respondent could have properly guarded each fabrication operation and thus respondent did not prove the impossibility defense.

After careful review of the record, we determine that the Review Board based its decision on its finding of fact that a separate point of operation guard could be provided for each individual press brake and on the following findings of fact relevant to the issue of whether respondent had carried its burden of proof on the impossibility defense. First, respondent had not contracted with professional safety consultants or engineers to recommend guards or alternate protection even though respondent had attended trade shows and consulted with sales personnel who stated that no existing guards could be used. Second, complainant presented evidence that safety guards and other protective measures had effectively been installed on similar press brakes used in similar manufacturing operations even though the guards inhibited production slightly or required production schedules to be readjusted. Third, complainant "contend[ed]" that light curtains, barrier guards (either fixed or movable), palm buttons, wrist restrainers or pullback devices were protective guards which could have been used. Fourth, respondent had never previously sought a variance or filed a petition for modification of abatement. Here, since respondent had not affirmatively investigated alternative measures of prevention, the defense of impossibility was not available. *See Brock, supra.* Accordingly, the Review Board's decision was not based on an error of law.

Respondent also contends that even if the Review Board correctly concluded that it was physically possible to guard the press brakes, the impossibility defense could still be established based on economic infeasibility. After careful review of the record, we find that respondent has not presented sufficient evidence to prove by the greater weight of the evidence that it was economically infeasible to guard the press brakes. There is conclusory testimony from Mr. Corn that guarding the press brakes would "put [ABF] out of business" and Mr. Poe's testimony that both Mr. Hedgecock and Mr. Corn told him that guarding the brakes could in fact

be done, but "would put them at a noncompetitive basis with their competitors in the marketplace." We hold this conclusory testimony insufficient to establish economic infeasibility. Accordingly, this contention has no merit.

Next, respondent contends that the trial court erred in affirming the decision of the Review Board because from a review of the entire record the Review Board's decision was not supported by substantial evidence. Respondent contends that "[a]n examination of all the evidence offered and contained in the Record reveals that not only is there no substantial competent evidence supporting the Review Board's decision; all competent evidence supports ABF's position that providing guards for the press brakes was impossible." Respondent further argues that complainant's evidence fails to reach the level of substantial evidence. We disagree.

At the outset, we note that "[t]he '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." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). " '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." *Id.*

Respondent has the burden of proving by the greater weight of the evidence the defense of impossibility. *See* Garrison & Associates, Inc., *supra.* We note parenthetically that proof by preponderance of the evidence and proof by the greater weight of the evidence are synonymous burdens of proof. *Cincinnati Butchers Supply Co. v. Conoly*, 204 N.C. 677, 169 S.E. 415 (1933). While it was respondent's burden to prove that the press brakes could not be guarded, complainant has presented substantial evidence on this issue. During the hearing, Art Willis, who was qualified as an expert in general industry safety, testified that light curtains, plastic plates and palm buttons were guards which could be used for custom operations. He further testified that he had seen a light curtain operate on equipment fabricating a piece similar to that fabricated by respondent. Darryl Poe, who was qualified as an expert in machine guarding, testified that he had visited respondent's plant to offer technical assistance and concluded that

barrier guards, movable barrier guards, restraints or pull back devices would be most feasible for respondent's operations and that he had seen these guarding devices successfully used in shops similar to respondent's plant. James Hall testified that he had observed the following safety devices and guards being used to properly guard machines in custom metal fabrication shops: pullbacks; restraints; fixed and movable barrier guards; physical barriers; and light screens or curtains. Complainant also introduced an exhibit showing guards which were available for press brakes.

In its brief, respondent argues that the testimony of witnesses Willis, Poe and Hall was adequately refuted. First, respondent contends that Mr. Willis' testimony was ineffectual on the issue of whether the subject press brakes could be guarded because Mr. Willis "was neither knowledgeable nor observant, and had never seen in operation—even in a production shop—*any* of the guards which he claims are suitable for ABF's press brakes." We find that argument unpersuasive in view of testimony from Mr. Willis that he had seen these guards in use in similar operations. Respondent further contends that since Mr. Hall never visited respondent's place of business, his testimony on the impossibility issue was meaningless. While this factor may diminish the weight accorded to this testimony, the testimony itself could constitute substantial evidence. *See Lackey, supra.* Here, there was substantial evidence to support the Review Board's finding that it was feasible to guard the subject press brakes and that respondent failed to prove the defense of impossibility.

Respondent also contends that the trial court erred in affirming the Review Board's decision on the grounds that the Review Board's decision was contrary to the findings of fact and arbitrarily and capriciously omitted facts contained in the hearing officer's decision. We disagree.

The Review Board in its decision found that respondent had not presented sufficient evidence to prove by the greater weight of the evidence that it was impossible to guard the press brakes and that no available alternative protective measures could be used. Respondent argues that finding of fact number 17 was the only finding which related to the question of whether the subject press brakes could be guarded. We find ample evidence in the record on the feasibility of guarding the subject brakes. The findings of fact which were omitted by the Review Board in its decision were

not necessary to the decision. Accordingly, this contention has no merit.

Finally, respondent argues that it proved the defense of impossibility by a preponderance of the evidence. Here respondent presented two witnesses who testified that it was impossible to guard the brakes; however this testimony was adequately refuted. Donnis Corn, part owner of ABF, testified that he never designed a press brake, never designed any guards for ABF, had no formal training on custom metal fabrication, and had not operated any press brakes. Corn further testified that ABF had never sought a variance, had never sought assistance from experts in machine guarding or alternative means of protection, and had never tried to use any of the suggested devices. Likewise, a review of Mr. Hegner's testimony shows that he was only familiar with one type of guarding device, the light curtain, and that it was usually difficult to use this device or other devices in custom manufacturing; however, Mr. Hegner had not observed respondent's three unguarded press brakes specifically while they were in operation. Mr. Hegner even stated that he could only talk about the Sick Light Curtain since it was the only device that he sold. Respondent failed to respond to a Department of Labor request for an inspection of the three unguarded press brakes by a private consultant in machine guarding techniques to assist in assessing respondent's request for a variance. Here respondent has failed to show that the compliance with the standard was not possible or would preclude performance of its work or that it had used alternative means of protection or that alternative means were unavailable. *See Brock, supra.* Respondent has failed to prove by the greater weight of the evidence the impossibility defense. Accordingly, this assignment of error must fail.

The decision of the trial court is affirmed.

Affirmed.

Judges JOHNSON and PARKER concur.

TIMOTHY GLENN WARZYNSKI AND WIFE, NANNETTE HARPER WARZYNSKI, PLAINTIFFS v. EMPIRE COMFORT SYSTEMS, INC., SAFEL-INELSA ORBAICETA, S.A. AND JENKINS GAS COMPANY OF POLLOCKSVILLE, NORTH CAROLINA, DEFENDANTS

No. 904SC260

(Filed 19 March 1991)

1. Sales § 22.3 (NCI3d)— products liability—heater—sealed container defense

The trial court erred by granting summary judgment for defendant Empire based on the sealed container defense in a products liability action where plaintiffs' home was destroyed by a fire caused by an allegedly faulty gas heater; the heater was manufactured by Safel, a Spanish company; Safel had sales, licensing, patent, trademark and technical assistance agreements and licenses with Empire, an Illinois corporation; Empire had the exclusive right to sell the heaters in the United States; Empire acquired the heaters from Safel in sealed containers; Tharrington Industries was a North Carolina distributor for Empire; and Tharrington Industries sold the Empire Corcho gas heaters to Jenkins Gas Company, which sold two of the heaters to plaintiffs and installed them in plaintiffs' home. Although language in Empire's advertisement was mere puffing and not an express warranty, there was a genuine issue of material fact as to whether Empire was the apparent manufacturer of the heater. N.C.G.S. § 99B-2(a).

Am Jur 2d, Products Liability §§ 504, 684.

Products liability; defective heating equipment. 1 ALR4th 748.

2. Rules of Civil Procedure § 4 (NCI3d); Process § 14 (NCI3d)— products liability action—jurisdiction over Spanish company—mailing by clerk of court—stream of commerce

The trial court correctly held in a products liability action that a Spanish heater manufacturer was subject to the jurisdiction of North Carolina courts where the court had before it an affidavit of addressing and mailing from the clerk of court and an affidavit from a representative of Federal Express that complied with the requirements of N.C.G.S. § 1-75.10(4). Proper service is presumed when the provisions of N.C.G.S.

§ 1A-1, Rule 4, are met, and Rule 4(j3) provides proof of service may be made as prescribed in N.C.G.S. § 1-75.10. Moreover, Safel subjected itself to the jurisdiction of the courts of North Carolina by injecting its product into the stream of commerce without any indication that it wanted to exclude North Carolina.

Am Jur 2d, Products Liability § 903.

3. **Process § 14 (NCI3d)— products liability—Spanish defendant—jurisdiction**

The trial court did not err in a products liability action by denying defendant Safel's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) where Safel purposefully injected its heaters into the stream of commerce without any indication that it wanted to exclude North Carolina and, although Judge Reid in ruling on Safel's motion to dismiss erroneously concluded that an earlier ruling by a different judge on defendant Empire's motion for summary judgment also ruled on whether defendant Safel was subject to North Carolina jurisdiction, Judge Reid made extensive findings of fact regarding service of process and the relationship between Empire and Safel; concluded that process and service were proper and that the exercise of in personam jurisdiction was justified in light of Safel's program to promote and distribute its heaters throughout the U.S.; and a review of the record indicates that the findings were supported by competent evidence and that the findings supported the conclusions.

Am Jur 2d, Products Liability § 903.

4. **Accord and Satisfaction § 5 (NCI4th)— products liability action—agreement not to sue—not supported by consideration**

The trial court did not err by granting summary judgment for plaintiffs on defendant Jenkins' defenses of accord and satisfaction and release in a products liability action involving a gas heater where, although the evidence conflicted as to the substance of the agreement between Jenkins and plaintiffs' attorney, any promise not to sue Jenkins was unenforceable because it was not supported by adequate consideration.

Am Jur 2d, Accord and Satisfaction §§ 12, 13.

APPEAL by plaintiffs and defendant Safel-Inelsa, S.A., from order signed 15 August 1989 by *Judge James D. Llewellyn* in

JONES County Superior Court. Appeal by defendant Safel-Inelsa, S.A., from order signed 22 December 1989 by *Judge David E. Reid, Jr.* in JONES County Superior Court. Appeal by defendant Jenkins Gas Company of Pollocksville, North Carolina, from order signed 22 December 1989 by *Judge David E. Reid, Jr.* in JONES County Superior Court. Heard in the Court of Appeals 25 September 1990.

Plaintiffs, the Warzynskis, brought this products liability action after a fire destroyed their home and their personal belongings. The Warzynskis contend that a faulty Empire Corcho gas heater caused the fire.

Defendant Safel-Inelsa Orbaiceta, S.A. (Safel), manufactured the gas heaters that are the subject of this suit. Safel is a Spanish company with its principal office in Pamplona, Spain. In 1984 Safel entered into two contracts with Empire Comfort Systems, which is an Illinois corporation: (1) a sales and licensing agreement and (2) a patent, trademark and technical assistance agreement and license. In 1986 the two companies also entered a repair and modification subcontracting agreement. Under the sales and licensing agreement, Empire had the exclusive right to sell the Empire Corcho gas heaters in the United States. Empire and Safel agreed to share the cost of advertising the heaters in the United States. Safel and Empire shared expenses for advertising but did not share profits.

Tharrington Industries is a North Carolina distributor for Empire. Tharrington Industries sold the Empire Corcho gas heaters to Jenkins Gas Company of Pollocksville.

Defendant Jenkins Gas Company of Pollocksville sold two Empire Corcho Model R-15 gas heaters to the Warzynskis in October 1985. Jenkins' employees installed the heaters in the Warzynskis' home.

On 2 January 1986, a fire allegedly caused by one of the Empire gas heaters destroyed the Warzynski residence. The Warzynskis brought suit against Empire, Safel and Jenkins alleging negligence and breach of express and implied warranties. Defendant Safel filed a motion to dismiss under Rule 12(b). Defendants Jenkins and Empire filed answers denying liability.

Three final orders are the subject of this appeal. First, plaintiffs Warzynski and defendant Safel each appeal the entry of summary judgment in favor of defendant Empire Comfort Systems.

Summary judgment for defendant Empire was based on the sealed container defense of G.S. 99B-2(a). Second, Safel appeals the denial of its Rule 12(b) motion to dismiss. Third, defendant Jenkins appeals the entry of summary judgment for the plaintiffs on their sixth affirmative defense—accord and satisfaction and release.

Blanchard, Tucker, Twiggs & Abrams, P.A., by Charles F. Blanchard and Jerome P. Trehy, Jr., for the plaintiff-appellant/appellee.

White & Allen, P.A., by John R. Hooten and John C. Archie, for the defendant-appellant/appellee Jenkins Gas Company of Pollocksville, North Carolina.

Maupin Taylor Ellis & Adams, P.A., by Mark S. Thomas and M. Keith Kapp, for the defendant-appellant Safel-Inelsa, S.A.

Harris and Associates, by Thomas E. Harris and C. David Creech, for the defendant-appellee Empire Comfort Systems, Inc.

EAGLES, Judge.

[1] We first address the plaintiffs' and defendant Safel's appeal of the entry of summary judgment in favor of Empire Comfort Systems. Here, summary judgment was based on the sealed container defense of G.S. 99B-2(a). We hold that the trial court erred in granting summary judgment for Empire because a genuine issue of material fact existed as to whether Empire was the apparent manufacturer of the heaters. By so holding, we adopt § 400 of the Restatement (Second) of Torts and conclude that a seller who holds himself out to the public as the manufacturer of a product is not protected from products liability actions by G.S. 99B-2(a).

G.S. 99B-2(a) provides:

> No product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession; provided, that the provisions

> of this section shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent.

Here, the parties direct their arguments to the exceptions to the sealed container defense of G.S. 99B. We conclude that none of the parties dispute that Empire acquired the heaters from Safel in sealed containers. The plaintiffs first contend that the trial court erred in granting summary judgment because Empire made express warranties regarding the heaters. As noted above, G.S. 99B-2(a) excludes actions for express warranties. We find plaintiff's argument that Empire made express warranties without merit. Empire advertised that it sold "America's most complete line of reliable, economical gas heating appliances." Under the Uniform Commercial Code "a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." G.S. 25-2-313(2). Under the facts presented, we cannot say that Empire's statement that the heater was "reliable" was so regarded by the Warzynskis as to be part of the reason for their purchase. *See* 3 A. Squillante & J. Fonseca, Williston on Sales § 17-5 (4th ed. 1974). Accordingly, we hold that the language in Empire's advertisement is merely puffing and not an express warranty.

Plaintiffs also argue that Empire is not entitled to assert the sealed container defense under G.S. 99B because Empire was more than a "mere conduit" in the distribution chain. We agree.

Plaintiffs rely on the Restatement (Second) of Torts which provides as follows: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Restatement (Second) of Torts § 400 (1965). Comment d provides:

> [W]here it is clear that the actor's only connection with the chattel is that of a distributor of it (for example, as a wholesale or retail seller), he does not put it out as his own product and the rule stated in this section is inapplicable. Thus, one puts out a chattel as his own product when he puts it out under his name or affixes to it his trade name or trademark. . . . The mere fact that the goods are marked with such additional words as "made for" the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section.

> . . . However, where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own. That the goods are not the product of him who puts them out may also be indicated clearly in other ways.

Restatement (Second) of Torts § 400 comment d (1965).

Our research disclosed only one case in which the appellate courts of this state have considered section 400 of the Restatement. The Supreme Court cited this section of the Restatement with approval in dicta in *Rulane Gas Co. v. Montgomery Ward & Co.*, 231 N.C. 270, 56 S.E.2d 689 (1949).

Empire argues that section 400 is a form of strict liability and that it is contrary to the express language of G.S. 99B-2. We disagree. Section 400 is not a form of strict liability because it does not impose on sellers the absolute duty to make products safe. It merely provides that a seller is subject to the same liability as a manufacturer if the seller leads the public to believe that he is the manufacturer. Empire also contends that in *Neihage v. Kittrell Auto Parts, Inc.*, 41 N.C. App. 538, 255 S.E.2d 315 (1979), *disc. rev. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979), this Court rejected the argument that a company can be made liable for negligent manufacturing merely by putting its name on a product. In *Neihage* the Court held only that summary judgment was proper where plaintiff did not offer any evidence that the defendant represented or held itself out to the public as having designed or manufactured a steel punch.

We believe that § 400 and G.S. 99B-2 can be read together and do not conflict. In fact G.S. 99B-2 is consistent with § 402 of the Restatement (Second) of Torts. Section 402 provides:

> A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.

Restatement (Second) of Torts § 402 (1965).

Here, Empire and Safel shared the expenses of advertising the heaters and Empire serviced the heaters. The heaters also came with an "Empire Heating Appliance Limited Warranty." The record indicates that all of the advertising promoting the heaters referred to Empire and not to Safel. Nowhere in its advertising did Empire say that it was not the manufacturer nor did it say that the heater was manufactured in another country. One of Empire's promotional flyers for dealers and wholesalers called the Empire Corcho "America's best made and best-selling unvented gas wall furnace." Nothing on any of the packaging indicated that Safel was the manufacturer. The only evidence to indicate that Empire might not have manufactured the heater was a decal on the carton and the heater that said the heater was made in Spain. The decal did not refer to Safel at all. Therefore, we hold that a genuine issue of material fact exists as to whether Empire was the apparent manufacturer of the heaters. Accordingly, we reverse the trial court's entry of summary judgment for Empire.

[2] Additionally, we hold that the trial court correctly found that Safel was subject to the jurisdiction of the courts of this state. Rule 4(j3) establishes procedures for service of process in a foreign country. The rule allows for service by any form of mail requiring a signed receipt and addressed and dispatched by the clerk of court to the party to be served. Rule 4(j3) also provides that proof of service may be made as prescribed in G.S. 1-75.10 and shall include an affidavit of "addressing and mailing" by the clerk of court. The trial court had before it an affidavit of "addressing and mailing" from the clerk of court and an affidavit from a representative of Federal Express that complied with the requirements of G.S. 1-75.10(4). Proper service is presumed when the provisions of Rule 4 are met. G.S. 1A-1 Rule 4(j2)(2). At the time the trial court considered Empire's motion for summary judgment, Safel had offered no evidence to rebut that presumption.

We also find no merit in Safel's argument that there was no basis for the court's exercise of personal jurisdiction. Under *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 51, 306 S.E.2d 562, 568 (1983), a corporation is subject to the jurisdiction of the courts of this state when it has "purposefully injected [its] product into the stream of commerce without any indication that it desired to limit the area of distribution of its product so as to exclude North Carolina." Here, Safel gave Empire an exclusive right to sell the heaters in the United States with no limit as to North

Carolina. Under *Bush v. BASF*, Safel injected its product into the stream of commerce and subjected itself to the jurisdiction of the courts of this state.

Safel argues that the recent United States Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), has rendered *Bush v. BASF* "overbroad" and "untenable." We disagree. A majority of the Court did not join in the section of the *Asahi* opinion that attempts to question the stream of commerce doctrine. Thus, *Asahi* does not overrule previous cases that follow the stream of commerce theory, including *Bush v. BASF*.

[3] Next, we turn to the denial of defendant Safel's motion to dismiss for lack of jurisdiction. We hold that the trial court did not err.

We note that Safel assigned error to the trial court's denial of its motion to dismiss under Rule 12(b)(4) and 12(b)(5) but chose not to pursue its appeal on these issues. Accordingly, we will address only the denial of Safel's motion under Rule 12(b)(2).

Safel first contends that the trial court erred because the evidence of record here does not support the exercise of personal jurisdiction and the exercise of personal jurisdiction would therefore violate due process. We disagree. As discussed above, *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 306 S.E.2d 562 (1983), controls. Here by entering the sales agreement with Empire, Safel purposefully injected its heaters into the stream of commerce without any indication that it desired to limit the area of distribution so as to exclude North Carolina.

Next, Safel argues that the trial court erred by denying Safel's motion to dismiss because the trial court's grant of summary judgment for defendant Empire did not decide Safel's motion to dismiss for lack of jurisdiction. Judge Llewellyn granted summary judgment for Empire on 15 August 1989 and did not address Safel and its pending Rule 12(b) motion. In his order denying Safel's motion to dismiss, Judge Reid concluded that "[n]ecessarily, and by implication, Judge Llewellyn has ruled in this action on whether or not the Defendant Safel is subject to the jurisdiction of the Superior Court of Jones County, North Carolina; the sufficiency of the process and service of process and the propriety of the exercise of in personam jurisdiction over the Defendant Safel are

presently the law of the case, and may not be overturned by this Court." We agree that the trial court's grant of summary judgment for defendant Empire did not also decide Safel's motion to dismiss. However, we do not agree with Safel that it was denied a genuine opportunity to challenge jurisdiction and service of process. In his order Judge Reid made extensive findings of fact regarding process and service of process and the relationship between Empire and Safel. Judge Reid also concluded that process and service were proper and that the exercise of in personam jurisdiction was justified in light of Safel's program to promote and distribute its heaters throughout the United States. A review of the record discloses that the trial court's findings of fact are supported by competent evidence and that the findings of fact support the trial court's conclusions of law. Therefore, they are binding on this Court. *Bangle v. Webb*, 220 N.C. 423, 17 S.E.2d 613 (1941). Accordingly, we hold that the trial court's denial of Safel's motion to dismiss was proper.

[4] Finally, we address Jenkins' appeal of summary judgment on its defense of accord and satisfaction and release. We hold that the trial court did not err in granting summary judgment for the plaintiffs on these issues.

Jenkins' insurance carrier employed Dr. Manning, an expert and employee of Accident Reconstruction Analysis, Inc. to investigate the fire.

Jenkins contends that the trial court erred in granting summary judgment for plaintiffs because the evidence conflicted as to whether Dr. Manning agreed to release his report to Mr. Warzynski and as to whether Dr. Manning later entered into a release with plaintiffs' counsel. Jenkins argues that Dr. Manning's deposition directly conflicted with Mr. Warzynski's affidavit. We disagree. Dr. Manning's deposition does not address the alleged agreement he made with Mr. Warzynski; it only addresses Dr. Manning's discussions with plaintiffs' attorneys. Plaintiffs presented the uncontradicted affidavits of Mr. Warzynski and J.P. Walston, Jenkins' own manager, that Mr. Warzynski agreed to bring the heaters to Raleigh on Dr. Manning's representation that he would give Mr. Warzynski a copy of his report and photographs taken at the scene of the fire. Summary judgment is properly entered when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Meadows v. Cigar Supply Co.*, 91 N.C. App. 404, 371 S.E.2d 765 (1988). Here,

no genuine issue of fact existed since defendant presented no evidence to dispute the alleged agreement between Mr. Warzynski and Dr. Manning.

We agree with Jenkins' contention that the evidence conflicted as to the substance of the agreement between Jenkins and plaintiffs' attorney. Defendants argue that plaintiffs agreed not to make Jenkins a party to the suit in exchange for a copy of the report. Plaintiffs contend that the agreement was not to use the report or call Dr. Manning as a witness. However, we note that the undisputed facts are that Dr. Manning had previously promised to provide Mr. Warzynski with a copy of the report. Therefore, defendants had a preexisting duty to provide plaintiffs with a copy of the report. Even if plaintiffs' counsel and Jenkins agreed that plaintiff would not sue Jenkins, the promise was unenforceable because it was not supported by adequate consideration. "It is generally established that a promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party." *Burton v. Kenyon*, 46 N.C. App. 309, 311, 264 S.E.2d 808, 809 (1980). Summary judgment is designed to eliminate trial when a fatal weakness in a claim or defense is exposed. *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 332, 303 S.E.2d 365, 368 (1983). We hold that the trial court properly entered summary judgment in favor of the plaintiffs on Jenkins' affirmative defense of accord and satisfaction and release because the defense is unfounded as a matter of law.

For the reasons stated the order of the trial court granting summary judgment for defendant Empire is reversed, the order of the trial court denying defendant Safel's motion to dismiss is affirmed and the order allowing summary judgment on defendant Jenkins' defense of accord and satisfaction and release is affirmed.

Affirmed in part; reversed in part.

Judges JOHNSON and PARKER concur.

DEBRA D. NISBET v. THOMAS G. NISBET, JR.

No. 903DC673

(Filed 19 March 1991)

1. **Divorce and Separation § 18 (NCI4th)— alimony and child support—procedural irregularities—not prejudicial**

Any procedural irregularities did not cause sufficient prejudice to defendant to reverse a partial summary judgment for plaintiff for arrearages in child support and alimony, increases in both, and specific performance of certain provisions of the separation agreement.

Am Jur 2d, Divorce and Separation §§ 856, 857.

2. **Divorce and Separation § 18 (NCI4th)— alimony—separation agreement—silent on whether provisions of agreement dependent on each other**

The trial court erred in an action to enforce a separation agreement by granting partial summary judgment for plaintiff on her claim for arrearages for alimony where the agreement was silent on whether the provisions of the agreement were dependent on each other. On a remand, the trial court must determine whether defendant's payment of alimony is dependent upon plaintiff's complying with certain provisions of the agreement; whether plaintiff breached the pertinent provisions of the agreement if they are dependent; whether any breaches were of a substantial nature; and compute the specific amounts owed and to be paid, determining which Consumer Price Index is to be used.

Am Jur 2d, Divorce and Separation § 833.

3. **Divorce and Separation § 409 (NCI4th)— child support—separation agreement—provisions not dependent on each other**

The trial court did not err by granting a partial summary judgment for plaintiff on the issue of child support arrearages where defendant had alleged that plaintiff had violated provisions of the separation agreement. The duty of a parent to pay child support as agreed in a separation agreement will not be excused because the other parent does not comply with other provisions of the separation agreement unrelated to the financial support of the children. However, the trial

court on remand is to compute the child support arrearage and specifically identify it, rather than ordering a recovery for alimony and child support arrearages, and must resolve questions of which Consumer Price Index is to be used, what is meant by "increases in income," and how the income is to be calculated.

Am Jur 2d, Divorce and Separation § 833.

4. **Divorce and Separation § 399 (NCI4th)— child support—contention of inability to pay—motion in the cause**

A contention that defendant was financially unable to make child support payments called for in a separation agreement was relevant only to future payments and could be considered only after the defendant filed a motion in the cause for the trial court to set an amount of child support which differs from that in the separation agreement.

Am Jur 2d, Divorce and Separation § 847.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657.

APPEAL by defendant from order of *Judge James E. Ragan, III*, entered 28 September 1989 in PITT County District Court. Heard in the Court of Appeals 14 December 1990.

Ward and Smith, P.A., by John M. Martin and Glenn E. Ireland, for plaintiff appellee.

Kafer & Hunter, by Charles William Kafer, for defendant appellant.

COZORT, Judge.

Plaintiff and defendant entered into a separation agreement calling for, among other things, defendant to pay alimony and child support to plaintiff. Plaintiff instituted this action claiming defendant had stopped making the payments called for in the agreement. Plaintiff requested payment of arrearages and an order directing specific performance of the agreement. Defendant claimed he was excused from the payment of alimony and child support because plaintiff violated provisions of the agreement providing for visitation, barring plaintiff's harassment of the defendant and prohibiting plaintiff's cohabitating with a member of the opposite sex in the

presence of the children. The trial court granted partial summary judgment for the plaintiff, ordering defendant to pay more than $11,000.00 in arrearages and directing specific performance of certain portions of the separation agreement. On appeal, defendant contends the trial court erred in granting partial summary judgment for plaintiff. We hold the trial court erred in granting summary judgment on the plaintiff's claim for alimony. We further hold that plaintiff was entitled to judgment on the claim for child support, finding defendant's payment of child support was not dependent upon plaintiff's compliance with the visitation, non-harassment and non-cohabitation provisions of the agreement.

Plaintiff (wife) and defendant (husband) were married on 11 July 1970; three children were born of the marriage. The parties separated on 2 January 1985. On 29 April 1985, the parties executed a separation agreement. The agreement contained provisions regarding custody, visitation, child support, alimony, property settlement, and certain other miscellaneous provisions. The agreement called for $250.00 per month alimony and $500.00 per child per month in child support, to be paid by defendant to plaintiff. The agreement provided for increases in the amount of child support and alimony by providing for percentage adjustments based upon changes in the "Consumer Price Index for Consumer Goods." Plaintiff and defendant subsequently divorced.

Plaintiff filed this action on 17 February 1987, alleging defendant began reducing the child support payments in May of 1986. She further alleged that defendant failed to increase alimony or child support as provided in the agreement. In her prayer for relief, plaintiff requested that the court (1) award her custody of the children, (2) require the defendant to pay alimony and child support including the increases for both as provided in the separation agreement, (3) direct defendant to pay arrearages, and (4) enforce other provisions of the agreement. In an amendment to the complaint, the plaintiff requested the court enforce other provisions of the agreement, including a provision banning cohabitation with a member of the opposite sex while the children are visiting and a provision providing for tickets to certain athletic events.

In his answer and counterclaim, defendant alleged that plaintiff breached the separation agreement by harassing him, by refusing to comply with custody and visitation provisions, and by cohabitating with a male to whom she is not married. Defendant also claimed

that he is financially unable to comply with the support and alimony provisions of the agreement. Defendant prayed for dismissal of the plaintiff's complaints, recision of the 29 April 1985 agreement, damages for plaintiff's breaches of the separation agreement, and for custody of the children.

On 18 January 1989, plaintiff filed a motion, with supporting affidavits, for partial summary judgment. At the 20 July 1989 hearing on plaintiff's motion, the court determined that there were no genuine issues of material fact on the issues of whether defendant breached the provisions of the agreement providing for child support, alimony, increases in both, and providing the plaintiff and children tickets to certain athletic events. The trial court's order directed defendant to pay $11,828.48 in arrearages, which amount included Consumer Price Index increases, plus interest of $1,532.86. The order also directed specific performance of the provisions of the agreement dealing with support for the children, alimony, and the tickets to athletic events. Defendant appeals.

[1] In his first five assignments of error, the defendant contends the trial court erred in granting summary judgment because of procedural defects relating to the notice of the hearing, the scope of the hearing, and the entry of the order after the hearing. We have reviewed those arguments and have determined that any procedural irregularities did not cause sufficient prejudice to defendant to justify reversal of the order. These assignments of error are summarily overruled.

[2] Defendant next contends that the court's grant of summary judgment was improper because there are genuine issues of material facts present which would preclude judgment for plaintiff, under N.C. Gen. Stat. § 1A-1, Rule 56 (1990). Defendant contends there are genuine issues of fact as to: (1) whether plaintiff's harassment of defendant and interference with defendant's visitation with the children in violation of the separation agreement excused defendant's performance, (2) which Consumer Price Index measurement is to be used in the calculation of child support and alimony increases owing by the defendant, (3) whether plaintiff violated the agreement by cohabiting with a male to whom she is not married, and (4) whether defendant has the financial ability to make the payments called for under the agreement.

Defendant argues that summary judgment was improper because there was a material question of fact as to whether plaintiff

harassed the defendant and interfered with visitation in violation of the separation agreement, thereby excusing his obligations under the agreement. Defendant contends that his payment of child support and alimony was dependent upon plaintiff's compliance with all terms of the separation agreement. Plaintiff responds that there is no provision in the separation agreement which makes defendant's duty to pay alimony and child support conditional upon plaintiff's compliance with the agreement. Therefore, plaintiff argues, plaintiff's nonperformance is not an issue in this case.

Although neither the trial court, plaintiff, nor defendant makes a distinction between the defendant's obligation to pay alimony and his obligation to pay child support, we find the obligations are distinguishable. For reasons which follow, we hold: (1) the defendant's obligation to pay *child support* is not dependent upon plaintiff's compliance with the visitation, non-harassment and non-cohabitation provisions; and (2) the issue of whether the defendant's payment of *alimony* is dependent upon plaintiff's compliance with those same provisions of the separation agreement is a factual issue to be resolved by determining the intent of the parties when they signed the agreement.

The appellate courts of this State have consistently held that the issue of whether a spouse's right to alimony or maintenance and support is dependent upon that spouse's compliance with other provisions in the separation agreement is determined by the construction of the contract between the parties. For example, this Court has held that the issue of whether payment to the wife for her support is dependent on the agreement's provision for the husband's visitation rights is determined by the terms of the agreement and the parties' intent. *Williford v. Williford*, 10 N.C. App. 451, 455-56, 179 S.E.2d 114, 117 (1971). In *White v. White*, our Supreme Court held that whether the parties intended for payment of support to the wife to be in reciprocal consideration of a property settlement is a factual issue to be resolved based on the particular facts of the case. 296 N.C. 661, 667-69, 252 S.E.2d 698, 702 (1979). In *Wheeler v. Wheeler*, the Supreme Court held that, where the separation agreement made the payment of alimony conditional upon the wife's performance of duties under the agreement, the agreement would be enforced as written. 299 N.C. 633, 641-42, 263 S.E.2d 763, 768 (1980). In *Hayes v. Hayes*, this Court again held that whether the wife's right to her support is dependent upon compliance with other conditions in the agreement depends

upon the intent of the parties. The Court noted that there is a presumption that the provisions are separable, with the burden of proof on the party claiming the provisions are integrated. 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990). More recently, our Court addressed the question of dependency in *White v. Bowers*, 101 N.C. App. 646, 400 S.E.2d 760 (1991). In *White*, plaintiff-wife brought suit to specifically enforce a provision of a separation agreement which required defendant-husband to pay for the college education of his 18-year-old daughter. The trial court granted summary judgment in favor of defendant, concluding that, because plaintiff breached the agreement by seeking and obtaining an increase in child support, plaintiff was not entitled to seek enforcement of the provisions requiring defendant to provide post high school education for his adult children. *Id.* at 647-48, 400 S.E.2d at 761. This Court held that summary judgment was improper because it was not clear from the agreement whether the provisions of the separation agreement were intended to be dependent on each other. *Id.* at 652, 400 S.E.2d at 763. We stated that "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." *Id.* at 651, 400 S.E.2d at 763. Thus, it was for the finder of fact to determine whether the husband's agreement to pay for college for his adult children was dependent upon his wife's acceptance of a specific rate of child support without asking for an increase.

Applying these rules of law to the case below, we find the trial court erred in granting summary judgment for plaintiff on her claim for arrearages for alimony. Defendant forecast evidence that plaintiff violated provisions of the agreement. The agreement is silent on the question of whether the provisions are dependent of each other. On remand, the trial court must determine whether defendant's payment of alimony is dependent upon the plaintiff's complying with the provisions of the agreement dealing with visitation, non-cohabitation and non-harassment. The burden of proof of integration of the provisions is on the defendant. *Hayes*, 100 N.C. App. at 147, 394 S.E.2d at 680. If the trial court finds the provisions in question are dependent, the trial court must then determine whether plaintiff breached the pertinent provisions, and, if so, whether those breaches were of a substantial nature. *See Smith v. Smith*, 225 N.C. 189, 198, 34 S.E.2d 148, 153 (1945). If the trial court finds plaintiff is entitled to arrearages in alimony and specific performance of the agreement, the trial court must

compute the specific amounts owed and to be paid. In this regard, defendant correctly points out in his brief that the separation agreement does not specify which "Consumer Price Index" is to be used to compute increases in alimony. The trial court must find that answer by deciding what the parties intended when they signed the agreement.

[3] On the issue of defendant's obligation to pay child support, we find a different result to be appropriate. Defendant has cited no case, and we are aware of no case from this jurisdiction, which holds that the contractual obligation of one parent to pay child support is dependent upon the other parent's compliance with provisions of the separation agreement dealing with visitation, non-harassment or non-cohabitation with persons of the opposite sex.

It is the policy of this State that both parents have a duty to support their minor children. *Plott v. Plott*, 313 N.C. 63, 68, 326 S.E.2d 863, 867 (1985); N.C. Gen. Stat. § 50-13.4 (1987). The duty of a parent to pay child support as agreed to in a separation agreement, will not be excused because the other parent does not comply with other provisions of the separation agreement unrelated to the financial support of the children. Thus, in the case below, defendant's obligation to pay child support as provided in the separation agreement is not dependent upon plaintiff's compliance with visitation, non-harassment, or non-cohabitation provisions in the same agreement. To hold otherwise would punish the children for the misbehavior of a parent. The defendant admitted that he had reduced the child support payments. Plaintiff was therefore entitled to prevail on the issue of child support.

The court below concluded that plaintiff was entitled to recover $11,828.48 in arrearages for child support and alimony from the date of each separate breach of those provisions set forth in the separation agreement. From the trial court's order we cannot tell what portion of the $11,828.48 is for child support and what portion is alimony. On remand, the trial court must compute the child support arrearage and specifically identify it in its order.

As we noted above, the agreement is silent as to which national publication of the changes in the Consumer Price Index is to be used in the calculation of the child support increase. Defendant also argues that a material issue of fact exists as to what the parties intended by the term "net increases in income" in the separation agreement. Summary judgment is not proper when in-

tent is at issue. *Valdese Gen. Hosp. v. Burns*, 79 N.C. App. 163, 339 S.E.2d 23 (1986). Thus, the trial court must resolve the questions of what Consumer Price Index is to be used, what is meant by "increases in income," and how the increase is to be calculated in the child support.

[4] The defendant also contended in his brief that summary judgment was improper because he was financially unable to make the payments called for in the agreement. That contention would be relevant only to future payments and could be considered only after the defendant files a motion in the cause for the trial court to set an amount of child support which differs from that in the separation agreement. *Bottomley v. Bottomley*, 82 N.C. App. 231, 234-35, 346 S.E.2d 317, 320 (1986).

Last, defendant does not assign error to the trial court's order specifically enforcing the agreement provision regarding the athletic tickets. Therefore, we affirm that portion of the trial court's order.

In summary, we remand the case in order for the trial court to: (1) determine the proper Consumer Price Index measurement to use, (2) calculate the child support arrearage that defendant owes, (3) determine whether plaintiff's right to receive alimony is dependent on her compliance with the visitation, non-harassment and non-cohabitation provisions, and (4) make factual findings as to plaintiff's alleged violations of the agreement.

The trial court's order is

Affirmed in part, reversed in part, and remanded for further proceedings.

Judges PARKER and GREENE concur.

ADRIAN DEPASQUALE v. AODGHAN O'RAHILLY

No. 9020SC521

(Filed 19 March 1991)

1. **Conversion § 10 (NCI4th)— stock—repurchase agreement—no showing of right to possession—directed verdict for defendant**

The trial court properly granted defendant's directed verdict motion in an action for conversion of stock where plaintiff had conveyed shares of stock in a farm to defendant with plaintiff holding an option to repurchase within one year; both parties entered into separate agreements with a third party under which the stock was conveyed to the third party; both agreements were subject to a pledge and escrow agreement under which the stock would be released to plaintiff if the balance due defendant was not paid by 8 July 1985; and plaintiff learned after the deadline that the third party and defendant had agreed, among other things, to extend the deadline for payment. Construed as a whole, it is clear that the parties' intent was that the parties would have the rights provided by the UCC if the third party failed to make timely payment to defendant. Upon the third party's failure to pay defendant by the deadline, the stock would be delivered to the sellers for its disposition by their escrow agents, and plaintiff has shown no ownership rights in the stock entitling him to possession.

Am Jur 2d, Conversion §§ 75, 76.

2. **Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions denied—no error**

The trial court did not err in an action for conversion of stock by denying defendant's motion for attorney fees under N.C.G.S. § 1A-1, Rule 11 where review of the complaint in conjunction with the answer, counterclaim and reply reveals a complaint presenting facially plausible claims. An award of sanctions under Rule 11 on the ground that a pleading is not warranted by existing law requires a two part analysis. The court must determine whether the pleading is facially plausible when read in conjunction with the responsive pleadings and, if not, whether the complaint was warranted by the existing

law to the best of the signer's knowledge, information and belief formed after reasonable inquiry.

Am Jur 2d, Conversion § 120; Damages §§ 615, 616.

3. Costs § 36 (NCI4th)— action for conversion of stock—attorney fees denied—no error

The trial court did not err in an action for conversion of stock by denying defendant's motion for attorney fees under N.C.G.S. § 6-21.5 where plaintiff's pleadings, viewed in conjunction with defendant's responsive pleadings, facially presented a justiciable issue of law.

Am Jur 2d, Conversion § 120; Damages §§ 615, 616.

APPEAL by plaintiff from order filed 2 January 1990 and by defendant from order filed 9 January 1990 in MOORE County Superior Court by *Judge F. Fetzer Mills*. Heard in the Court of Appeals 12 December 1990.

William V. McPherson, Jr., and Michaels & Jones Law Offices, by E. Spencer Parris, for plaintiff-appellant/appellee.

Hendrick, Zotian, Cocklereece & Robinson, by William A. Blancato, for defendant-appellant/appellee.

GREENE, Judge.

The plaintiff appeals the trial court's judgment filed 2 January 1990 allowing the defendant's motion for directed verdict. The defendant appeals the trial court's order filed 9 January 1990 denying the defendant's motion for attorney fees made pursuant to N.C.G.S. § 1A-1, Rule 11 (Rule 11) and N.C.G.S. § 6-21.5 (1986).

Viewed in the light most favorable to the plaintiff, the evidence shows the following: Prior to 31 May 1982, the plaintiff owned all 1000 shares of the stock of Little River Farms, Inc. [Farms]. In May, 1982, financial difficulties prompted the plaintiff to convey 510 shares of stock to the defendant and to place the other 490 shares in voting escrow with an employee of the defendant. In consideration of this conveyance, the defendant agreed to cure Farms' loan defaults at a cost of $120,000. The parties' agreement gave the plaintiff the option of repurchasing the 510 shares of stock from the defendant within a twelve month period.

During the next twelve months, the plaintiff found a third party who was interested in buying all of the stock of Farms. On 8 July 1983, both the plaintiff and the defendant entered into separate agreements with the third party. The defendant conveyed his 510 shares to the third party for $500,000 to be paid on or before 8 July 1985. Under the plaintiff's agreement with the third party, the plaintiff and his nephew conveyed the other 490 shares of stock to the third party, of which amount 400 were the plaintiff's, in exchange for allowing the plaintiff's mother to reside in the main residence without paying rent for the rest of her life or until the land on which the residence is located is sold, at which time she would receive $125,000 of the sale proceeds. Additionally, the third party agreed to employ the plaintiff for two years at the rate of $20,000 for the first year, and $30,000 for the second. Furthermore, the agreement provided that if the farm was repurchased from a proposed syndication, the plaintiff and his nephew would own an undivided one-half interest in the 130 acres comprising the race track, barns, and other outbuildings. Alternatively, if the farm or any part of it was sold, the third party would pay the plaintiff and his nephew a pro rata portion of the profits of the sale after certain expenses had been paid.

Both the defendant's and the plaintiff's separate agreements with the third party were made subject to a pledge and escrow agreement [Agreement] which was also entered into by the parties on 8 July 1983. Under this Agreement, the third party pledged the stock to secure payment of the obligation owed to the defendant. The Agreement provided that "[t]he pledge shall be for the benefit of the Sellers, and the Escrow Agents shall hold the Pledged Stock for the benefit of Sellers to the extent of the outstanding principal balance then due to Mr. Aodghan O'Rahilly." The Agreement also provided the following:

> 4. *Release of Stock.*
>
> . . . .
>
> (B) The Pledged Stock shall be released from the Pledge and delivered to Sellers on July 8, 1985 if Buyer has not paid the balance due Aodghan O'Rahilly under paragraph 3 of the Stock Purchase Agreement or July 8, 1985 whichever is earlier or upon the happening of one or more of the stated conditions described in paragraph 4 of the Addendum. . . .

5. *Remedies of Sellers.* Upon the default by Buyers under these terms, Sellers shall have all of the rights given to secured parties upon default by the Uniform Commercial Code of the State of North Carolina. The Escrow Agents shall have the sole right and power to exercise all rights of the Sellers as secured parties and shall do so for the benefit of the Sellers, to the extent of the outstanding principal balance then due Mr. O'Rahilly at the time of the exercise of such rights.

After the 8 July 1985 deadline, the plaintiff learned that the third party had not paid the defendant the entire amount owed to him. Rather, the third party and the defendant had entered into another agreement on the matter of payment which, among other things, extended the date for payment. On the basis of the fourth paragraph of the Agreement, the plaintiff believed that he was entitled to a return of his stock because the third party did not pay the defendant the entire debt owed to him by the original 8 July 1985 deadline. Therefore, the plaintiff sued the defendant for the conversion of his 400 shares of stock and for cutting off his alleged right to redeem the 510 shares of stock sold to the defendant in 1982. The defendant made a motion for summary judgment which the trial court denied. At trial, at the end of the plaintiff's evidence, the defendant moved for and the trial court granted a directed verdict for defendant pursuant to N.C.G.S. § 1A-1, Rule 50. After the trial court allowed the defendant's motion, the defendant moved for attorney fees against the plaintiff's attorneys pursuant to Rule 11 and for attorney fees generally pursuant to N.C.G.S. § 6-21.5, which motions the trial court denied.

The issues are (I) whether the evidence viewed in the light most favorable to the plaintiff allows but one reasonable inference, that the plaintiff was not entitled under the Agreement to the return of his stock upon the third party's failure to pay the defendant in full by 8 July 1985; and (II) whether the trial court erred in refusing to award the defendant attorney fees pursuant to (A) Rule 11, or (B) N.C.G.S. § 6-21.5.

I

[1] Plaintiff's Appeal

The purpose of a motion for directed verdict is to test the legal sufficiency of the evidence for submission to the

> jury and to support a verdict for the non-moving party. . . . In deciding the motion, the trial court must treat non-movant's evidence as true, considering the evidence in the light most favorable to non-movant, and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence. . . . Non-movant's evidence which raises a mere possibility or conjecture cannot defeat a motion for directed verdict. . . . If, however, non-movant shows more than a scintilla of evidence, the court must deny the motion.

McFetters v. McFetters, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990) (citations omitted).

"[A] contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible." *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984), *disc. rev. denied*, 312 N.C. 797, 325 S.E.2d 631 (1985). Where a contract is clear and unambiguous, "its construction is a matter of law for the court." *Id.* at 503, 320 S.E.2d at 896. With such a contract, "the court may not ignore or delete any of its provisions." *Lineberry v. Lineberry*, 59 N.C. App. 204, 206, 296 S.E.2d 332, 333 (1982). Furthermore, "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).

The plaintiff argues that paragraph 4(B) of the Agreement provides that the plaintiff is entitled to a return of his stock upon the third party's failure to pay the defendant by 8 July 1985, that the third party failed to pay the defendant by 8 July 1985, and that the defendant's agreement with the third party extending the payment deadline amounts to conversion by the defendant of the plaintiff's right to receive the stock. If paragraph 4(B) were not followed by paragraph 5, the plaintiff's argument would possibly have merit. However, as contracts are construed as a whole, paragraph 4(B) must be viewed in light of paragraph 5. When this is done, the parties' intent from the contract becomes clear: If the third party failed to make timely payment to the defendant, the sellers would have all rights regarding the stock as provided

by the Uniform Commercial Code in North Carolina, Chapter 25 of the General Statutes [UCC], and their escrow agents would have the duty and the sole right to exercise the sellers' rights. Upon the third party's failure to pay the $500,000 to the defendant by 8 July 1985, the stock would be delivered to the sellers for its disposition by their escrow agents according to the UCC. Thus, even assuming the third party failed to pay the $500,000 to the defendant by 8 July 1985, and that the defendant's and third party's agreement concerning payment was ineffective, which issue we do not now decide, the plaintiff was not entitled to the stock as it would have been disposed of by the escrow agents according to the UCC. Accordingly, the plaintiff has shown no ownership rights in the stock entitling him to have its possession, and the trial court properly granted the defendant's directed verdict motion as the plaintiff has no claim for conversion. *See Gadson v. Toney*, 69 N.C. App. 244, 246, 316 S.E.2d 320, 321-22 (1984) (plaintiff must prove his ownership in property for conversion action to exist).

II

Defendant's Appeal

(A) Rule 11

[2] The defendant argues that because the plaintiff's pleadings were not warranted by the existing law, the trial court erred in denying his Rule 11 motion for attorney fees against the plaintiff's attorneys. We disagree. Prior to imposing sanctions against an attorney under Rule 11 on the ground that the non-movant's pleadings are not warranted by the existing law, the movant must show that the attorney's conduct in researching and filing the pleadings was not objectively reasonable. *See Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (standard under Rule 11 is "one of objective reasonableness"); *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991) (burdens of persuasion and proof on movant). However, because inquiry into the attorney's conduct relating to these matters "threatens to encroach on the attorney-client relationship and into areas protected by the attorney-client privilege or opinion work product," such inquiry into the attorney's conduct is permitted only if the pleading in question is not facially plausible. G. Joseph, Sanctions: The Federal Law of Litigation Abuse § 17(B)(1), at 64 (1989 & Supp. 1990); *Bryson*, 102 N.C. App. at 12, 401 S.E.2d at 653. Therefore, an award of sanctions under Rule 11 on the ground that a pleading is not war-

ranted by existing law requires a two-part analysis. First, the court must determine whether the pleading, when read in conjunction with the responsive pleadings, is facially plausible. *Bryson*, 102 N.C. App. at 12, 401 S.E.2d at 653-54. If it is facially plausible, then the inquiry is complete, and sanctions are not proper. If the pleading is not facially plausible, then the second issue is whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law. *Id.* at 13, 401 S.E.2d at 654; *see also* Rule 11. This second issue requires a determination of whether the attorney "undertook a reasonable inquiry into the law," and whether "based upon the results of the inquiry, . . . [the attorney] reasonably believed that . . . [the pleading] was 'warranted by existing law . . . .'" *Bryson*, 102 N.C. App. at 13-14, 401 S.E.2d at 654. If the court answers either prong of the second issue negatively, then Rule 11 sanctions are appropriate.

The plaintiff alleged that he was entitled to the stock on the grounds that the defendant converted it by conspiring with the third party. The defendant answered the complaint and filed a counterclaim in which he alleged that the plaintiff owed him $200,000 plus interest on an unpaid debt arising from a promissory note executed by the parties in 1979. The plaintiff filed a reply which raised a defense to the counterclaim that the sale by the defendant of the stock to the third party rendered the defendant's claim on the debt null and void because the defendant, having sold the stock, rendered his own performance under the 1979 note impossible because the plaintiff, once the stock had been sold, could no longer redeem the stock from the defendant according to an alleged right of redemption asserted in the plaintiff's amended complaint. Our review of the complaint in conjunction with the answer, counterclaim, and reply reveals a complaint presenting facially plausible claims. Therefore, no inquiry into the attorneys' conduct is required, and the defendant is not entitled to sanctions under Rule 11.

(B) N.C.G.S. § 6-21.5

[3] The defendant essentially argues that because the plaintiff's complaint is based upon a "strained construction" of the Agreement, the pleadings do not present a justiciable issue of *law*, and therefore the defendant is entitled to attorney fees under N.C.G.S. § 6-21.5. We disagree. Again, as in Rule 11, the first issue is whether the pleading, when read in conjunction with all the responsive

pleadings, facially presents a justiciable issue of law. *Bryson*, 102 N.C. App. at 16, 401 S.E.2d at 656. If not, the second issue is "whether the losing party should reasonably have been aware that the pleading he filed contained no justiciable" issue of law. *Id.* at 16-17, 401 S.E.2d at 656. Viewing the pleadings in conjunction with the defendant's responsive pleadings, we believe, as we do under our Rule 11 analysis, that the plaintiff's pleadings facially presented a justiciable issue of law. Accordingly, the trial court could not have taxed either the plaintiff or his attorneys with the defendant's attorney fees. *Id.* at 15-16, 401 S.E.2d at 655-56 (under N.C.G.S. § 6-21.5 attorney fees may be imposed on attorney, client, or both).

In summary, we affirm the trial court's grant of the defendant's motion for directed verdict and the trial court's denial of the defendant's motion for attorney fees pursuant to Rule 11 and N.C.G.S. § 6-21.5.

Affirmed.

Judges PARKER and COZORT concur.

BRANDON A. CARTER, BY AND THROUGH HIS GUARDIAN AD LITEM, ALVIN CARTER, PLAINTIFF v. JOHN WILLIAM CLOWERS AND JOSEPH ALEXANDER DEENEY, DEFENDANTS

No. 9010SC698

(Filed 19 March 1991)

1. **Rules of Civil Procedure § 15 (NCI3d)— notice of voluntary dismissal—no amendment allowed**

An N.C.G.S. § 1A-1, Rule 41(a)(1) notice of voluntary dismissal is not like a pleading, which can be amended by Rule 15(a); rather, it is more like a judgment which, after it is entered, terminates the trial court's power to allow amendments.

Am Jur 2d, Motions, Rules, and Orders § 19.

2. Rules of Civil Procedure § 60 (NCI3d)— voluntary dismissal— one defendant accidentally dismissed—relief under Rule 60 proper

Where plaintiff voluntarily dismissed his action against both defendants with prejudice, intended to dismiss with prejudice against only one defendant, and then attempted to amend the notice of dismissal by filing a motion pursuant to N.C.G.S. § 1A-1, Rule 15(a), the Court of Appeals treated the motion to amend as a Rule 60(b) motion for relief and granted plaintiff the relief he sought from the original dismissal, since the motion to amend the dismissal met the requirement of a Rule 60(b) motion in that it identified the date of the original motion, the error which occurred in the original, and the clarification sought; the trial court found that the dismissal with prejudice as to one defendant was an inadvertent mistake made by plaintiff's counsel; the court concluded the error was due to excusable neglect; the dismissal was not entered with the consent of the minor plaintiff nor was it based on any agreement between the parties; there was thus no evidence of prejudice to the dismissed defendant; and the motion to amend was filed about three months after the original notice of dismissal, thus satisfying the one-year time limit of Rule 60(b).

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 84.

APPEAL by defendants from order entered 30 March 1990 by *Judge George R. Greene* in WAKE County Superior Court. Heard in the Court of Appeals 15 January 1991.

Guardian Ad Litem for plaintiff filed this action on 9 November 1988 seeking damages for personal injuries. Defendant Clowers filed an answer, moving to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), and defendant Deeney filed a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b) for insufficient process, insufficient service of process, and lack of personal jurisdiction. The court allowed defendants' motions on 28 September 1989.

Plaintiff filed a motion to amend, requesting that the court reconsider the dismissal of Clowers from the action pursuant to G.S. § 1A-1, Rule 59(e). The motion was denied, prompting plaintiff to appeal the order dismissing both defendants. Then on 1 November 1989, plaintiff filed a "Notice of Dismissal of Appeal and Complaint"

pursuant to G.S. § 1A-1, Rule 41(a). This document dismissed the appeal and the complaint as to both defendants *with prejudice*. Three months later, however, plaintiff filed a "Motion to Amend Notice of Voluntary Dismissal," pursuant to G.S. § 1A-1, Rule 15, seeking to amend the notice of dismissal. In his motion to amend, plaintiff stated that he had erred in dismissing the action against Deeney and that only Clowers should have been dismissed with prejudice.

On 30 March 1990, the trial court granted plaintiff's motion, ordering that the notice of dismissal be amended to read "as to Defendant Deeney, without prejudice." On 24 April 1990, defendants appealed from the order granting plaintiff's motion to amend.

According to the briefs and records, the facts in this case are as follows: On 23 September 1987, Deeney borrowed a van owned by Clowers. Deeney returned the vehicle later that day by parking it in Clowers' driveway. Sometime later, the unoccupied vehicle rolled backward from its parked position, allegedly striking the minor plaintiff, a four-year-old child, who was playing in the front yard of his home at the time. Plaintiff suffered multiple burns and abrasions about the face, abdomen and extremities and a laceration of the scalp. Some permanent scarring resulted.

In his order granting plaintiff's motion to amend the Rule 41(a) notice of dismissal, the trial judge made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

8. Counsel for the Plaintiff admits that the dismissal with prejudice as to Defendant Deeney was an error and should have been without prejudice.

9. The prejudicial dismissal of Defendant Deeney was not contemplated by the Defendants and was a surprise to them.

10. The parties had never agreed to dismiss Defendant Deeney with prejudice.

11. The action of counsel for the Plaintiff in dismissing Defendant Deeney with prejudice was done by mistake and without the consent of the minor Plaintiff.

CONCLUSIONS OF LAW

1. The Defendant Deeney had not been properly served with process in this proceeding and, accordingly, the Court had no personal jurisdiction over him.

2. The Notice of Dismissal with prejudice has no effect on a claim against Defendant Deeney because the Court had no personal jurisdiction over him when the dismissal was entered.

. . .

3. The Voluntary Dismissal with Prejudice as to Defendant Deeney was entered by mistake and inadvertence by counsel for the Plaintiff, not pursuant to any agreement between the parties, or with the consent of the Plaintiff.

4. The action of counsel for the Plaintiff in dismissing the action against Defendant Deeney with prejudice was excusable neglect.

5. The Defendant Deeney has not been prejudiced in any way by virtue of the dismissal with prejudice.

Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by Peter J. Sarda and Richard P. Nordan, for plaintiff appellee.

Bailey & Dixon, by Gary S. Parsons and Mary Elizabeth Clarke, for defendant appellants.

ARNOLD, Judge.

Defendants' sole assignment of error is whether the court erred in granting plaintiff's motion to amend his notice of voluntary dismissal with prejudice.

Initially, we question the trial court's reasoning for allowing the motion to amend the Rule 41(a) dismissal. The second Finding of Fact reads, "The Notice of Dismissal with prejudice has no effect on a claim against Defendant Deeney because the Court had no personal jurisdiction over him when the dismissal was entered." If the trial court did not have jurisdiction over defendant when the dismissal was filed, what is the basis for the court's jurisdiction to amend that notice now? Moreover, a voluntary dismissal is effective whether or not a court has jurisdiction. A plaintiff is free to abandon an alleged or potential claim against another party at any time. *Clement v. Clement*, 230 N.C. 636,

55 S.E.2d 459 (1949). Moreover, a Rule 41(a)(1) notice of dismissal is an action taken by the plaintiff ending the suit, and *no action of the court* is necessary to give the notice its full effect. *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963).

[1] Furthermore, we doubt that a Rule 15(a) motion is the proper procedural tool for correcting an error that appears in a notice of dismissal. G.S. § 1A-1, Rule 15(a) provides that after defendant has served a responsive pleading, plaintiff "may amend his pleading only by leave of court or by written consent of the adverse party." While the terms of the rule require that "leave shall be freely given when justice so requires," the rule necessarily presumes that some cause of action must be pending in order for the court to have jurisdiction to exercise its discretion. G.S. § 1A-1, Rule 15(a). We note further that Rule 15(a) allows amendments to "pleadings." Accordingly, the question is whether a notice to dismiss is like a pleading, which can be amended by Rule 15(a), or whether it is more like a judgment, which after it is entered terminates the court's power to allow amendments.

Under G.S. § 1A-1, Rule 41(a)(1), plaintiff may voluntarily dismiss his suit, without order of the court, by filing a notice of dismissal at any time before resting his case. The rule provides that dismissal is without prejudice, unless otherwise stated, allowing plaintiff to commence a new action based on the same claim within one year. G.S. § 1A-1, Rule 41(a)(1). A dismissal taken with prejudice, however, "indicates a disposition on the merits, [and] is said to preclude subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication." *Johnson v. Bollinger*, 86 N.C. App. 1, 8, 356 S.E.2d 378, 383 (1987) (quoting *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974)).

For the purposes of this case, federal Rule 41(a)(1) is the same as our state law. As one federal court has noted, "[A] notice of dismissal itself is the operative document." *Noland v. Flohr Metal Fabricators, Inc.*, 104 F.R.D. 83, 85 (1984). In a frequently cited case concerning the effect of a notice of dismissal, the Fifth Circuit Court of Appeals stated:

> That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed

> by adversary or court. There is not even a perfunctory order of court closing the file.

American Cyanamid, at 297 (5th Cir. 1963). It also is logical to assume that neither can a *plaintiff* revive an action he or she voluntarily dismissed. "After the dismissal, there is no longer a pending action, and therefore no further proceedings are proper." *Noland*, at 85 (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2367, at 186 (1971)).

While no North Carolina cases specifically address whether a court has jurisdiction to allow a Rule 15(a) motion to amend a Rule 41(a)(1) notice of dismissal, this Court has on several occasions disallowed motions to amend pleadings after *final judgment* was entered. *See Harris v. Family Medical Center*, 38 N.C. App. 716, 248 S.E.2d 768 (1978) (plaintiff's right to amend lost if trial court grants defendant's motion for judgment on the pleadings); *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987) (once a Rule 12(b)(6) motion is granted, the trial court is "no longer empowered to grant plaintiff leave to amend under Rule 15(a) . . . ." *Id.* at 7, 356 S.E.2d at 382); *Sentry Enterprises, Inc. v. Canal Wood Corp. of Lumberton*, 94 N.C. App. 293, 380 S.E.2d 152 (1989) (plaintiff may not amend his pleadings after entry of summary judgment, even if the grant to amend is made on the court's own motion).

Given the cases cited and the construction of Rule 41(a)(1), we find that plaintiff's original notice of dismissal did, by itself, operate to dismiss the suit as to both defendants. Because the suit was no longer pending, the amended notice was ineffective to undo the original notice. *See Noland*, 104 F.R.D. at 85.

[2] Nevertheless, we believe G.S. § 1A-1, Rule 60(b), Relief from Judgment or Order, provides a permissible method to reopen this case. Rule 60(b) permits a party to move for relief from "a final judgment, order or proceeding . . . . " for reasons of "(1) [m]istake, inadvertence, surprise, or *excusable neglect*." (Emphasis added). To proceed under Rule 60(b), however, requires an initial determination of whether a notice of dismissal constitutes a "judgment, order or proceeding." A federal case, very similar to the one before us, offers some guidance. *See Noland*, 104 F.R.D. 83. In *Noland*, a federal district court concluded that a voluntary "dismissal can be considered a 'proceeding' thus allowing relief via Rule 60(b)." *Noland*, 104 F.R.D. at 86.

In *Noland*, the plaintiff brought an action against two defendants, then sought to dismiss one by filing a Rule 41 notice of dismissal as to the "action." Inadvertently, he failed to limit the dismissal to only one defendant. *Id.* at 84. Then plaintiff, just as in the case before us, attempted to amend the notice of dismissal by using Rule 15(a). The district court rejected that approach, but on its own initiative granted plaintiff relief from the notice to dismiss by way of Rule 60(b). The court examined the plaintiff's Amended Notice of Dismissal and determined that it satisfied the requirements of a valid Rule 60(b) motion for relief from judgment. *Id.* at 87. While this approach may seem unorthodox, Rule 60(b) is an unusual rule, having been described as "a grand reservoir of equitable power." *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976). The facts here warrant equity's intrusion into this problem.

Of course, the usual method for seeking relief under Rule 60(b) is by filing a motion. Nonetheless, other means may be sufficient. "[N]omenclature is unimportant, moving papers that are mislabeled in other ways may be treated as motions under Rule 60(b) when relief would be proper under that rule." 7 J. Moore & J. Lucas, *Moore's Federal Practice* § 60.18[8], at 60-139 (2d ed. 1983). "[A]lthough Rule 60 says that the court is to act 'on motion,' it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975), *cert. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).

Another concern here, however, is whether defendant Deeney has been prejudiced by this decision to consider plaintiff's motion to amend as a Rule 60(b) motion. Specifically, did the amended notice identify the original error and clarify the action sought, thereby alerting defendant of the change desired? *See Noland*, 104 F.R.D. at 87. In this case, the motion to amend the dismissal identified the date of the original motion, the error that occurred in the original and the clarification sought. Thus, it meets the technical requirements of a Rule 60(b) motion.

The trial court's order granting the motion to amend also contains findings of fact and conclusions pertinent to the issue of prejudice. Facts found by a judge in this context are conclusive if there is any evidence on which to base such findings. *Doxol*

Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971). The trial judge found that the dismissal with prejudice as to Deeney was an inadvertent mistake made by plaintiff's counsel. He concluded the error was due to "excusable neglect." The dismissal was not entered with the consent of the minor plaintiff, and neither was it based on any agreement between the parties. Defendants were completely surprised by Deeney's dismissal with prejudice, and the trial judge concluded no evidence of prejudice existed.

The decision to dismiss Clowers apparently occurred after the parties agreed that Clowers' insurance covered Deeney's operation of the vehicle. Once this was determined, the parties agreed to dismiss Clowers, but a dismissal with prejudice of Deeney was never contemplated by either party.

Finally, Rule 60(b) contains a time limitation. A motion based on Rule 60(b)(1) for "excusable neglect" must be made within a "reasonable time, and . . . not more than one year after the judgment, order or proceeding was entered or taken." G.S. § 1A-1, Rule 60(b). Considering the motion to amend as a Rule 60(b) motion satisfies this time requirement because it was filed about three months after the original notice of dismissal.

The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. 11 C. Wright & A. Miller, *supra*, § 2851. Generally, the rule is liberally construed. *See Howard v. Williams*, 40 N.C. App. 575, 253 S.E.2d 571 (1979). Procedural actions that prevent litigants from having the opportunity to dispose of their case on the merits are not favored. *See id.* There has been no decision on the merits of this case.

Based on the foregoing analysis, we construe the motion to amend the dismissal as a Rule 60(b) motion and grant plaintiff the relief he sought from the original dismissal. Therefore, the action is dismissed with prejudice as to defendant Clowers and without prejudice as to defendant Deeney. Although we take an alternative procedural route, the result here is to affirm the relief granted in the trial court's judgment.

Modified and Affirmed.

Judges JOHNSON and LEWIS concur.

PRIME SOUTH HOMES, INC., PLAINTIFF v. RICHARD E. BYRD AND VICKIE S. BYRD, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. ALBERT H. BEST, W. ROSS JAMES, III, PATRICIA A. OLSON AND CHARLES D. OLSON, THIRD-PARTY DEFENDANTS

No. 9010SC506

(Filed 19 March 1991)

1. **Arbitration and Award § 43 (NCI4th)— denial of arbitration— appeal from interlocutory order proper**

An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

Am Jur 2d, Appeal and Error § 156.

Appealability of state court's order or decree compelling or refusing to compel arbitration. 6 ALR4th 652.

2. **Arbitration and Award § 19 (NCI4th)— waiver of right to compel arbitration—sufficiency of evidence**

The trial court did not err in concluding that plaintiff had waived its right to compel arbitration where defendants were prejudiced by plaintiff's use of judicial discovery procedures (deposing a nonparty witness who appeared only in response to a subpoena and gaining access to and copying voluminous documents produced by the witness), and defendants expended significant amounts of money in defense of plaintiff's suit before plaintiff belatedly demanded arbitration.

Am Jur 2d, Arbitration and Award § 51.

APPEAL by plaintiff from order entered 15 February 1990 by *Judge F. Gordon Battle* in WAKE County Superior Court. Heard in the Court of Appeals 29 November 1990.

On or about 30 June 1988, plaintiff-appellant and defendants-appellees entered into a contract for the renovation of defendants' residence for an agreed upon price of $162,000. The contract contained a binding arbitration clause which provided that all claims or disputes arising out of the contract would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. A dispute arose concerning the construction and on 26 January 1989, plaintiff filed a claim

of lien pursuant to G.S. § 44A, Article 2, to accord it lien priority for $30,500 allegedly owed by defendants to plaintiff.

On 12 July 1989, plaintiff filed a complaint against the defendants in district court. Defendants filed an answer and counterclaims on 25 September 1989, alleging breach of contract, express warranty, and implied warranty; negligence; fraud; negligent misrepresentation; conversion; and unfair trade practice. The case was transferred to superior court with plaintiff's consent on 11 October 1989. On 9 November 1989, defendants filed a third-party complaint naming individually the principals of plaintiff-corporation as third-party defendants and alleging the same torts previously alleged in their counterclaim against plaintiff Prime South.

On 15 November 1989, defendants noticed the deposition of non-party witness Sharon Harris for 30 November 1989, but continued it until 14 December 1989 at plaintiff's request. On 13 December 1989, plaintiff's counsel inspected and copied various documents voluntarily produced by defendants pursuant to an earlier informal discovery request. At the deposition of Ms. Harris on 14 December 1989, both parties examined the witness and inspected and copied numerous documents produced by her. The deposition was suspended at 5:30 p.m. with agreement of both parties that it would be reconvened at the convenience of both parties. Ms. Harris was present at the deposition in response to a subpoena duces tecum and would not voluntarily confer with any of the parties' counsel.

On 22 December 1989, plaintiff filed a demand for arbitration and reply to defendants' counterclaims. On 4 January 1990, plaintiff's attorney filed an answer on behalf of the third-party defendants and a motion to compel arbitration.

Defendants had accrued legal fees in excess of $10,000 as of the time of the hearing on plaintiff's motion to compel. From denial of its motion to compel arbitration, plaintiff appeals.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Richard T. Boyette and David A. Rhoades, for plaintiff-appellant.

James F. Jordan for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by William E. Moore, Jr., for Richard E. Byrd and Vickie S. Byrd, defendants and third-party plaintiffs-appellees.

JOHNSON, Judge.

Plaintiff contends that the trial court erred in concluding that plaintiff had waived its right to compel arbitration and specifically alleges that certain findings of fact are not supported by the evidence.

The trial court based its denial of plaintiff's motion on the following conclusions of law:

> (1) If arbitration were now ordered, Defendants would be impermissibly prejudiced by Plaintiff's delay in seeking arbitration and its actions inconsistent therewith, and by Plaintiff's use of discovery procedures unavailable in arbitration;
>
> (2) Plaintiff has impliedly waived its right to seek arbitration in this action.

The trial court supported its conclusions by the following findings of fact to which plaintiff specifically objects as not being supported by the evidence.

> (11) Defendants' voluntary production of documents to Plaintiff was induced by Plaintiff's actions and assertions consistent with a litigation stance;
>
> . . .
>
> (15) The non-party witness deposed by Plaintiff, Third-Party Defendants and defendants was not unavailable for an arbitration hearing and thus was not subject to a discovery deposition under N.C.G.S. § 1-567.8(b);
>
> (16) By attending and participating in the deposition of the non-party witness, Plaintiff made use of a judicial discovery procedure unavailable in arbitration;
>
> (17) Plaintiff benefited from document discovery that is compulsory under the Rules of Civil Procedure but that might not have been available in arbitration, as the availability of such discovery would be within the discretion of the arbitration panel;
>
> . . .
>
> (22) Defendants have incurred in excess of Ten Thousand Dollars ($10,000.00) in legal fees to defend this civil action;

(23) A sizable portion of the legal fees incurred by Defendants would not have been incurred had Plaintiff sought arbitration without delay;

(24) Defendants and their counsel have spent numerous hours defending this action;

(25) A substantial amount of the time spent by Defendants and their counsel in defending this action would not have been spent had Plaintiff sought arbitration without delay[.]

"Findings of fact, when supported by any evidence, are conclusive on appeal. Conclusions of law, even if stated as factual conclusions, are reviewable." *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 465, 98 S.E.2d 871, 876 (1957) (citations omitted). "On appeal, the findings of fact made below are binding on this court if supported by the evidence, even when there may be evidence to the contrary." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). While facts found below which are supported by the evidence are conclusive on this Court, we are not bound by the inferences or conclusions that the trial court draws from them. *Heath v. Kresky Mfg. Co.*, 242 N.C. 215, 87 S.E.2d 300 (1955). In accordance with these principles, we must determine whether there is evidence in the record which would support the trial court's findings of fact and if so, whether those findings of fact support the conclusion that plaintiff has waived its right to compel arbitration.

[1] Initially, we note that an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983); G.S. §§ 1-277(a), 7A-27(d)(1). *See Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

[2] Plaintiff contends and we recognize that there exists in North Carolina a strong public policy in favor of settling disputes by arbitration. *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). The leading case is *Cyclone Roofing Co. v. Lafave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984), where it was stated:

> Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. Because of the reluctance

to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.

As to what constitutes prejudice the Supreme Court further stated:

> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon (citations omitted).

Id. at 229-30, 321 S.E.2d at 876-77. The mere filing of pleadings by both parties does not constitute waiver of an arbitration provision. *Id.* at 230, 321 S.E.2d at 876. Nor does plaintiff's filing of a claim of lien and his institution of suit to enforce it prohibit him from pursuing his claim for arbitration. *Adams v. Nelsen*, 313 N.C. 442, 329 S.E.2d 322 (1985).

We affirm the court below because we find that defendants have been prejudiced by plaintiff's use of judicial discovery procedures and because defendants had expended significant amounts of money in defense of plaintiff's suit before plaintiff belatedly demanded arbitration.

The discovery procedures available during arbitration are limited by statute. With regard to discovery, G.S. § 1-567.8 (1983) states in pertinent part:

> (a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths.
>
> (b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in a manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearings.
>
> (c) All provisions of law compelling a person under subpoena to testify are applicable.

Thus, contrary to a civil case at law, where there exists a broad right to discovery, *see* G.S. § 1A-1, Rules 26 to 37, discovery during arbitration is at the discretion of the arbitrator and further requires that the deponent "cannot be subpoenaed or is unable to attend the hearings." G.S. § 1-567.8(b). *See generally*, C. Foster, *The Law & Practice of Commercial Arbitration in North Carolina* § 2:01 (1986).

In support of its conclusion that plaintiff waived his right to arbitration, the court below found that plaintiff benefited when defendants voluntarily turned over material requested by plaintiff. Plaintiff contends that there is no evidence on the record from which the court could determine defendants' motivation in allowing voluntary document inspection and that plaintiff's access to this material does not constitute a use of judicial discovery procedures. We reject this argument. When a party to a lawsuit, in anticipation of litigation, voluntarily complies with a discovery request which could have been compelled, the requesting party will not be heard to complain that his receipt of such materials does not constitute use of a discovery procedure. However, we base our decision on other grounds.

In the case *sub judice*, plaintiff filed a suit to collect on his lien without demanding arbitration. Defendants answered and counterclaimed against plaintiff. Defendants then filed a third-party claim against the principals of the plaintiff corporation. Following that, plaintiff participated in the deposition of non-party witness Sharon Harris, a local resident. Ms. Harris' deposition was noticed by defendants and she appeared in response to a subpoena. Plaintiff does not challenge the finding of fact, supported by affidavit, that Ms. Harris would not have voluntarily appeared for deposition. At the deposition, plaintiff had access to and copied voluminous documents produced by Ms. Harris regarding defendants' substantive counterclaims and third-party claims. It was one week after attending Ms. Harris' deposition, which filled 225 pages of transcript, that plaintiff filed his demand for arbitration.

We find that Ms. Harris was not a "witness who cannot be subpoenaed or is unable to attend the hearing" since she was a local resident and could have been subpoenaed to attend an arbitration hearing (and in fact was deposed under subpoena). Defendants noticed the deposition of Ms. Harris in reasonable expectation of litigation, there having been no demand to the contrary. Thus plain-

tiff took advantage of a discovery procedure not available for arbitration to gain pre-trial access to defendants' evidence regarding his substantive claims, and having benefited from that access, immediately demanded arbitration, cutting off defendants' ability to participate in reciprocal discovery. *Cf. Servomation*, 316 N.C. at 545, 342 S.E.2d at 854-55 (plaintiff not prejudiced in answering numerous interrogatories posed by defendant when sizeable portion of interrogatories were directed toward securing information relating to arbitration clause in contract).

In Findings of Fact 22-25, the trial judge found that defendants had expended in excess of $10,000 in legal fees, a sizeable portion of which would not have been incurred by defendants had plaintiff sought arbitration within a reasonable time. In support of their case, defendants submitted a detailed billing record which itemized the attorney fees incurred by defendants from the date of suit through the drafting of their memorandum opposing plaintiff's motion to compel arbitration. The charges cover time spent researching, drafting and filing pleadings associated with plaintiff's suit, and more significantly, preparing for, rescheduling, taking, and defending, the deposition of Ms. Harris. The accrual of these costs was by reason of plaintiff's delay in demanding arbitration and would not have been incurred had plaintiff made a timely demand.

In conclusion, we find that the trial judge's findings of fact are supported by the evidence and the conclusion of law is supported by the findings of fact. We affirm the judgment below and find that plaintiff has impliedly waived his right to compel arbitration.

Affirmed.

Judges WELLS and COZORT concur.

CAROLINA TRUCK & BODY COMPANY, INC., PETITIONER-APPELLANT v. GENERAL MOTORS CORPORATION, RESPONDENT-APPELLEE

No. 9028SC884

(Filed 19 March 1991)

Automobiles and Other Vehicles § 179 (NCI4th)— heavy truck franchise—cancellation—good faith and good cause

The trial court did not err by concluding that the Commissioner of Motor Vehicles correctly determined that the termination of petitioner's heavy duty truck franchise was for good cause and was undertaken in good faith where respondent suffered a decline in its share of the heavy duty truck market, notified petitioner and all of its heavy duty franchise dealers as early as 7 November 1986 that the Heavy Duty Addendum to the franchises would be canceled no later than 31 December 1987 and conclusively notified petitioner of such cancellation on 23 December 1986, petitioner actively sought a joint venture franchise from the new Volvo GM joint venture, and petitioner was informed that it would not receive such franchise. N.C.G.S. § 20-305(6), interpreted *in para materia*, provides that a manufacturer may cancel a franchise if discontinuing the sale of the product line and the discontinuance is for good cause; the Legislature could not conceivably have enacted a statute prohibiting a manufacturer from canceling a franchise agreement if the manufacturer determined to stop manufacturing that product because it was unprofitable. There was ample evidence in the record of respondent's loss of profits in the heavy duty truck market and the record is replete with evidence of respondent's good faith in canceling its heavy duty truck franchise with petitioner.

Am Jur 2d, Automobiles and Highway Traffic § 152; Private Franchise Contracts §§ 572, 573.

Validity, construction, and application of state statutes regulating dealings between manufacturers, dealers, and franchisees. 82 ALR4th 624.

APPEAL by petitioner from judgment entered 7 June 1990 by *Judge Robert D. Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 14 January 1991.

On 21 April 1987, petitioner filed this action before the North Carolina Commissioner of Motor Vehicles alleging that respondent "wrongfully and unfairly" terminated petitioner's heavy duty truck franchise in violation of N.C. Gen. Stat. § 20-305.

On 26 September 1988, the matter was heard by Robert A. Pruett, Hearing Officer for the Division of Motor Vehicles. The Administrative Hearing concluded on 28 September 1988. By order dated 20 March 1989, the Commissioner issued its findings of fact and conclusions of law in respondent's favor. Petitioner appealed for judicial review of Conclusions of Law numbers 2, 3 and 4. In a companion case, respondent appealed Conclusion of Law number 1 that the termination of a Heavy Duty Addendum (to a franchise) constitutes the termination of a franchise under North Carolina law. This conclusion of law effectively established that the trial court had jurisdiction to proceed with the issues in the present case and therefore must be determined before proceeding with the issues before us. Judge F. Gordon Battle affirmed the conclusion in the companion case, which determination is now on appeal by General Motors Corporation and before this Court as No. 9010SC692. For the purposes of the appeal in the present case, we must proceed on the assumption that the heavy duty addendum was, in fact, a franchise agreement.

On 30 April 1990, oral arguments were heard by Judge Lewis in the present matter. On 7 June 1990, the trial court entered its judgment and concluded "that the Commissioner correctly determined that the termination of [petitioner's] Heavy Duty Addendum was for good cause and undertaken in good faith."

From this judgment, petitioner appeals.

Roberts Stevens & Cogburn, P.A., by Frank P. Graham and W.O. Brazil, III, for petitioner-appellant.

Poyner & Spruill, by Cecil W. Harrison, Jr. and Laura Broughton Russell, for respondent-appellee.

ORR, Judge.

Petitioner argues two errors on appeal. For the following reasons, we affirm the trial court's judgment of 7 June 1990.

The following facts are pertinent to this case on appeal. Petitioner and respondent entered into a renewal contract in 1975

entitling petitioner to sell heavy duty trucks manufactured by respondent. From 1950 until that time, petitioner had been a General Motors franchisee, selling light and medium duty GMC trucks.

On 1 November 1985, petitioner and respondent entered into a renewal heavy duty franchise agreement (heavy duty addendum), which had a term of five years to and including 31 October 1990. The heavy duty addendum, which is the subject of this appeal, gave petitioner the nonexclusive right to purchase and sell new heavy duty truck motor vehicles marketed by GMC Truck & Coach Operation of General Motors Corporation. The addendum also stated that it would remain in effect "unless cancelled."

In August 1985, due to an economic decline in its share of the heavy duty truck market during the 1980's, respondent and Volvo Truck Corporation (hereinafter Volvo) met to consider forming a joint venture in the area of heavy duty truck manufacturing. Respondent notified petitioner, as well as all of its heavy duty franchise dealers, as early as 7 November 1986, that the heavy duty addendum would be cancelled no later than 31 December 1987. Respondent conclusively notified petitioner of such cancellation on 23 December 1986, that its heavy duty truck addendum would be cancelled on 31 December 1987 due to its plans to cease manufacturing heavy duty trucks.

Petitioner actively sought a joint venture franchise from Volvo GM (the new joint venture) for heavy duty trucks and was informed on 10 March 1987 that it would not receive such franchise. Petitioner does not contest any findings of fact, including those stating that respondent had no role in the daily operation of Volvo GM and had no control over any of Volvo GM's decisions relating to its dealers.

On 31 December 1987, respondent stopped marketing all of its heavy duty truck models and no longer shipped these models to any of its dealers nationwide. All heavy duty addenda were cancelled as of that date.

Petitioner's assignments of error concern whether the trial court erred in affirming the Commissioner's conclusions of law that respondent's actions in discontinuing its heavy duty truck models and cancelling petitioner's heavy duty truck addendum (franchise) complied with N.C. Gen. Stat. § 20-305. Petitioner maintains that these actions do not comply with the statute because such actions

were not supported by good cause and were not undertaken in good faith. We disagree.

The standard of review for this Court of a decision by the Commissioner of Motor Vehicles is governed by N.C. Gen. Stat. § 150A-51 (recodified as § 150B-51). N.C. Gen. Stat. § 20-300 (1983). *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985). Under § 150B-51, this Court must consider the entire record as submitted and determine whether the administrative decision is supported by substantial evidence. This is commonly referred to as the "whole record" test. *White v. N.C. Bd. of Examiners of Practicing Psychologists*, 97 N.C. App. 144, 153, 388 S.E.2d 148, 154, *appeal dismissed and disc. review denied*, 326 N.C. 601, 393 S.E.2d 891 (1990) (citation omitted). The court is not permitted to replace the administrative agency's decision when there are two reasonably conflicting views, although this Court may have reached a different decision on a *de novo* review. *Id.* at 154, 388 S.E.2d at 154. "Substantial evidence has been defined as more than a scintilla or a permissible inference; it is relevant evidence which is adequate to support a conclusion." *Id.* (citation omitted).

The conclusions of law to which petitioner assigns error are:

2. GMC's withdrawal from the heavy duty truck business on a nationwide basis was a reasonable and justifiable business decision and was implemented in a nondiscriminatory manner. Under such circumstances, the termination of Carolina Truck's heavy duty addendum was for good cause in compliance with G.S. 20-305(6).

3. All actions of GMC in connection with its withdrawal from the heavy duty truck business were undertaken in good faith, i.e., were honest in fact and were done with the observation of reasonable commercial standards of fair dealing in trade. Under such circumstances, the termination of Carolina Truck's heavy duty addendum was undertaken in good faith as required by G.S. 20-305(6).

4. GMC withdrawal from the heavy duty truck business was in all respects in conformity with the requirements of the Motor Vehicle Dealers and Manufacturers Licensing Law (G.S. 20-285 *et seq.*).

In the companion case, *Carolina Truck & Body Company, Inc. v. General Motors Corporation*, which is presently on appeal before this Court as case No. 9010SC692 (filed 19 March 1991), respondent assigns error to conclusion of law number 1.

> 1. The Heavy Duty Truck Addenda to the Sales and Service Agreement entered into by GMC and Carolina Truck is a franchise as defined in North Carolina General Statute 20-286(a).

For purposes of this appeal, we must assume that conclusion of law number 1 is correct in that the heavy duty truck addenda is a franchise defined by statute.

We shall now address whether the termination of this addendum was for good cause and in good faith pursuant to N.C. Gen. Stat. § 20-305(6).

Under this statute, it is unlawful for any manufacturer to cancel a franchise agreement except for good cause or in good faith. In pertinent part, the statute states:

> Notwithstanding the terms, provisions or conditions of any franchise or notwithstanding the terms or provisions of any waiver, to terminate, cancel or fail to renew any franchise with a licensed new motor vehicle dealer unless the manufacturer has: satisfied the notice requirements of subparagraph c.; and the Commissioner has determined, if requested in writing by the dealer *within the time period specified in G.S. 20-305(6)c1II, III or IV, as applicable*, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise and the manufacturer has acted in good faith as defined in this act regarding the termination, ...
>
> a. Notwithstanding the terms, provisions or conditions of any franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation, or renewal when:
>
> 1. There is a failure by the new motor vehicle dealer to comply with a provision of the franchise which provision is both reasonable and of material significance to the franchise relationship provided that the dealer has been notified in writing of the failure within 180 days after the manufacturer first acquired knowledge of such failure;

> 2. If the failure . . . defined in 1 above, relates to the performance of the new motor vehicle dealer in sales or service, then good cause shall be defined as the failure of the new motor vehicle dealer to comply with reasonable performance criteria established by the manufacturer if the new motor vehicle dealer was apprised by the manufacturer in writing of such failure; . . . .

N.C. Gen. Stat. § 20-305(6) (1983) (emphasis added).

Viewing the above statutory language, standing alone, it appears that respondent did not have good cause under the statute to terminate petitioner's heavy duty truck franchise in that respondent terminated the franchise because it discontinued the manufacture and sale of the product. However, under subsection (6)c, which is referred to in the above statutory language:

> Notification of Termination, Cancellation and Nonrenewal.
>
> 1. Notwithstanding the terms, provisions or conditions of any franchise prior to the termination, cancellation or nonrenewal of any franchise, the manufacturer shall furnish notification of such termination, cancellation or nonrenewal to the new motor vehicle dealer as follows:
>
> . . . .
>
> IV. Not less than 180 days prior to the effective date of such termination or cancellation where the manufacturer or distributor is discontinuing the sale of the product line.

N.C. Gen. Stat. § 20-305(6)c.1.IV. (1983). This portion of § 20-305 implies that a manufacturer may cancel a franchise if discontinuing the sale of the product line, which is exactly what respondent did in the present case.

It is well-settled law in this state that when the language of a statute is unclear or ambiguous, a court may interpret the language of the statute in accordance with what the court presumed the Legislature intended. *State v. White*, 58 N.C. App. 558, 294 S.E.2d 1 (1982). Moreover, "statutes relating to the same subject should be construed *in para materia*, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990) (citation omitted).

With these general principles in mind, we find that the statute, interpreted *in para materia*, provides that a manufacturer may cancel a franchise if discontinuing the sale of the product line and that this action is for "good cause." We cannot conceive that the Legislature would enact a statute prohibiting a manufacturer from cancelling a franchise agreement if it determined to stop manufacturing that product because it was unprofitable. Further, we do not believe that the Legislature intended that a franchise agreement could be cancelled for "good cause" only when the dealer did some affirmative act which would give the manufacturer "good cause" to cancel the franchise. Clearly, the Legislature does not require a manufacturer to continue on a road to certain bankruptcy by requiring the manufacturer to continue to make and sell unprofitable models of cars or trucks.

Having established that cancellation of a franchise if discontinuing a product line is a "good cause" under the statute, we further find that the evidence on this issue supports the trial court's findings of fact and conclusions of law. There is ample evidence in the record before us of respondent's loss of profits in the heavy duty truck market during the period in question, and the trial court made specific findings of fact to this effect in findings numbers 12 through 17. In findings numbers 26 through 29, the trial court found that respondent was discontinuing its product line in the heavy duty truck market as it applied to all of its dealers.

Moreover, we hold that the trial court did not err in concluding that respondent's withdrawal from the heavy duty truck market was in good faith as required by § 20-305(6). Good faith is defined in § 20-286(8b) as "honest in fact and the observation of reasonable commercial standards of fair dealing in the trade as defined and interpreted in G.S. 25-2-103(1)(b)."

The record before us is replete with evidence of respondent's good faith in cancelling its heavy duty truck franchises with petitioner. Respondent gave petitioner at least a year's notice concerning the likelihood of cancellation; respondent treated petitioner no differently than it did any of its other heavy duty truck franchisees; and more importantly, there is no evidence of dishonesty by respondent in this matter. The evidence of record supports findings of fact numbers 20 through 26 and 32 through 38, which support the trial court's conclusion of law on this issue.

Therefore, for the above reasons, we find that the trial court did not err and affirm its judgment of 7 June 1990.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

ROGER STEVEN MAYHEW, EMPLOYEE-PLAINTIFF v. CHARLES JERRY HOWELL AND RONNIE C. CRAVEN, NON-INSURED EMPLOYER, AND/OR RYAN HOMES, INC., EMPLOYER, AND HOME INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 9010IC548

(Filed 19 March 1991)

Master and Servant § 50 (NCI3d)— workers' compensation—injury during construction of house—no recovery against defendant owner of house

Plaintiff who was employed as a carpenter by defendant partners, who had been hired to do framing work on houses being built by defendant Ryan Homes, Inc., was not entitled to recover workers' compensation benefits from the insurance carrier of Ryan Homes since defendant partnership was an independent contractor; defendant Ryan Homes did not sublet any contract for the performance of work to defendant partnership; and defendant Ryan Homes was not a principal contractor with respect to the house plaintiff was working on, but rather was the owner, so that N.C.G.S. § 97-19, providing for liability of principal contractors, intermediate contractors, or subcontractors who sublet work without requiring proof that the subcontractor has workers' compensation coverage, was inapplicable to this case.

Am Jur 2d, Workmen's Compensation §§ 167, 168, 170, 171, 172.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from opinion and award entered 7 February 1990 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 1990.

Plaintiff was employed as a carpenter by C. Jerry Howell and Ronnie C. Craven, partners hired to do framing work on houses being built by Ryan Homes, Inc. in Hunting Creek Subdivision in Mecklenburg County. Ryan Homes contracts with others to do the framing work for their homes. When the partnership was hired, a coordinator for Ryan Homes inquired as to whether Howell and Craven were covered by workers' compensation insurance. When he was told there was none, Howell was told to obtain such insurance. Nevertheless, Ryan Homes permitted them to begin work without proof of obtaining a certificate of workers' compensation insurance. Plaintiff was injured when he fell from the roof of one of the houses on 6 June 1988 and fractured his feet.

Plaintiff's claim for workers' compensation was denied by Ryan Homes's insurance carrier. Plaintiff's case was heard by Deputy Commissioner Morgan S. Chapman who filed an opinion and award on 17 May 1989 dismissing Ryan Homes and Home Indemnity Company as defendants. The Deputy Commissioner concluded that the Howell and Craven partnership was an independent contractor and that:

> 5. G.S. 97-19 does not apply to this case in that Ryan Homes did not sublet any contract for the performance of work to defendants Howell and Craven. Ryan Homes was not a principal contractor with respect to the house plaintiff was working on, but rather was the owner, and it did not agree to provide workers' compensation insurance coverage to Howell and Craven. Consequently, Ryan Homes and its insurance company, Home Indemnity Company, are not liable to plaintiff for workers' compensation benefits for his injury.

The Full Commission filed an opinion and award 7 February 1990 affirming and adopting the opinion and award of the deputy commissioners.

From this opinion and award, plaintiff appeals.

Harkey, Fletcher, Lambeth and Nystrom, by Philip D. Lambeth, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Mika Z. Savir, for defendant-appellees.

ORR, Judge.

Plaintiff contends that the Full Commission erred in affirming and adopting the opinion and award of the Deputy Commissioner who concluded that N.C. Gen. Stat. § 97-19 (Supp. 1990) does not apply in this case. For the reasons set forth below, we disagree and affirm the opinion and award of the Full Commission.

"The well-established rule concerning the role of the appellate court in reviewing an appeal from the Industrial Commission is that the Court 'is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings'." *Guy v. Burlington Industries*, 74 N.C. App. 685, 689, 329 S.E.2d 685, 687 (1985) (quoting *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980)).

Under the North Carolina Workers' Compensation Act, an injured person can recover workers' compensation benefits only if he is an employee of the one from whom he seeks compensation at the time he is injured. *Dockery v. McMillan*, 85 N.C. App. 469, 355 S.E.2d 153, *disc. review denied*, 320 N.C. 167, 358 S.E.2d 49 (1987); *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E.2d 645 (1965); *see* N.C. Gen. Stat. § 97-2 (Supp. 1990).

N.C. Gen. Stat. § 97-19 provides:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate . . . stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits . . . on account of injury or death of . . . any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

Our Supreme Court has stated that the statute "protect[s] the employees of financially irresponsible sub-contractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate [sic] contractors, and sub-contractors from relieving themselves of liability under the Act by doing through sub-contractors what they would otherwise do through the agency

of direct employees." *Withers v. Black*, 230 N.C. 428, 434, 53 S.E.2d 668, 673 (1949). This statute "relates to contractors and subcontractors—not to employers and independent contractors." *Beach v. McClean*, 219 N.C. 521, 528, 14 S.E.2d 515, 520 (1941). "G.S. 97-19 is not applicable to an independent contractor as distinguished from a subcontractor of the class designated by the statute." *Greene v. Spivey*, 236 N.C. 435, 444, 73 S.E.2d 488, 494 (1952) (citation omitted). Plaintiff contends that Howell and Craven were subcontractors of Ryan Homes and thus N.C. Gen. Stat. § 97-19 should apply. We disagree.

> An injured person employed by an independent contractor
>
> may not recover compensation from the contractee, unless the contractee is himself the principal contractor and sublets the contract without requiring a certificate of the subcontractor that the subcontractor had procured compensation insurance . . . . But when the contractee is not a principal contractor but is a principal letting work by independent contract, an employee of the independent contractor cannot recover . . . against the principal, even though the work is intrinsically dangerous, since such action is founded on the common law doctrine of negligence, and the provisions of GS 97-19 relate to the contractors and subcontractors and not to principals and independent contractors.

8 Strong's N.C. Index 3d *Master and Servant* § 50 at 563 (1977).

In *Greene*, our Supreme Court stated that there was "neither evidence nor finding of fact that [the hardwood company] at any time sublet any part of its logging operations or other work to [defendant], nor made any contract with him for the performance of work of any kind." 236 N.C. at 443, 73 S.E.2d at 494. Defendant "at no time stood in the position of subcontractor to [the hardwood company]" and thus the hardwood company was not liable under N.C. Gen. Stat. § 97-19 for injuries to defendant's employees. *Id.* at 444, 73 S.E.2d at 494.

In *Evans v. Tabor City Lumber Co.*, 232 N.C. 111, 117, 59 S.E.2d 612, 616 (1950), our Supreme Court concluded that N.C. Gen. Stat. § 97-19 did not apply in that case because the party at issue was not a subcontractor "within the meaning of the statute." There the Court stated: "If the [lumber company] had been in fact and in law an original contractor within the provisions of

such Act, G.S. 97-19, he would be liable with the codefendant; but not as we view it in the present proceeding." *Id.* at 116, 59 S.E.2d at 615. The Court further stated:

> The logic of the Industrial Commission in concluding that there can be no sub-contractor without an original contractor is unimpeachable; and by "original contractor" is meant one who has undertaken for another to do something, the performance of which he has in whole or in part sublet to another. It would be unreasonable to assume that a person could contract with himself to do something for his own benefit so as to answer the definition of original contractor if he should contract the performance of that operation to another person or concern.

Id. at 117, 59 S.E.2d at 616.

Plaintiff relies on *Richards* where the critical issue was whether the claimant was an independent contractor, or a subcontractor who was an independent contractor, or an employee so that the Industrial Commission had jurisdiction. There the claimant contracted with Nationwide Homes to build a house, and the Court concluded that the claimant was an independent contractor. *Id.* at 306, 139 S.E.2d at 653. Our Supreme Court noted that "GS 97-19 . . . imposes liability, under certain specified circumstances, on the principal contractor or employer for injuries and death to employees of his independent contractor or of his subcontractor . . . ." *Id.* at 302, 139 S.E.2d at 650.

Here the Full Commission found that defendant "did not sublet any contract for the performance of work to defendants Howell and Craven" and that defendant was not a "principal contractor" but the "owner." As previously noted in *Evans*, an "original contractor" is "one who has *undertaken for another* to do something." 232 N.C. at 116, 59 S.E.2d at 616 (emphasis added). Ryan Homes had not undertaken to do anything for anyone else and thus could not be an "original contractor." Therefore, § 97-19 is inapplicable. Thus, we conclude that there was sufficient evidence to support the findings of fact, and the conclusions of law are supported by the findings of fact.

We have considered plaintiff's other assignment of error and find it is without merit. We affirm the opinion and award of the Industrial Commission.

Affirmed.

Judge GREENE concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the facts that the Commission found lead inexorably to the conclusion that on the occasion involved Ryan Homes, though an owner was also a principal contractor, Howell and Craven was a subcontractor, and Ryan Homes is obligated under G.S. 97-19 to provide workers' compensation benefits to plaintiff. For the Commission did not just find that Ryan Homes hired someone to do the framing on the house. It found that Ryan was building houses for an entire subdivision and selling them to the public; that in doing so it contracted with others to perform the framing and to "install the plumbing and the wiring and to perform other functions necessary to build the house"; and it "provided a project superintendent to check the construction to make certain that it complied with the plans and specifications as well as to replace damaged or missing materials." Thus, Ryan was doing everything that a principal building contractor does and in volume. Contrary to the situation of the alleged contractor in *Evans v. Tabor City Lumber Co.*, 232 N.C. 111, 59 S.E.2d 612 (1950), Ryan was also doing something for others. For it was not building the houses to occupy or rent, it was building them to sell, and the houses were built for and on behalf of those who bought them. Since G.S. 97-19 applies to one who hires a sub or independent contractor to build one house for another, it is absurd to suppose that it does not apply to a concern that hires sub or independent contractors to build houses for an entire community. As in *Withers v. Black*, 230 N.C. 428, 53 S.E.2d 668 (1949), Ryan's situation is also one that G.S. 97-19 was enacted for.

DIANE ELLISON GOODWIN, ADMINISTRATRIX OF THE ESTATE OF ALAN BRYANT GOODWIN, PLAINTIFF v. THOMAS EDWARD CASHWELL, JR. AND GEORGE W. KLUGER, INC., DEFENDANTS

No. 9014SC659

(Filed 19 March 1991)

Rules of Civil Procedure § 60.2 (NCI3d); Contracts § 49 (NCI4th) — error in structured settlement — motion to set aside denied — parol evidence not admissible

The trial judge did not err by refusing to set aside a judgment approving a settlement agreement where a structured settlement was agreed upon for the deceased's three-year-old daughter; the settlement agreement and release were approved by the court; and defendants subsequently discovered that the annuity company had used the wrong birth date and the cost of the annuity was $130,000 more than the amount projected by defendants. Although defendants asserted mutual mistake, the settlement agreement simply sets forth the payments to be made by defendants and makes no representation as to the cost of the annuity to defendants. Moreover, the language of the settlement agreement provides a clear and unambiguous statement of the parties' intent and the parol evidence rule prohibits evidence of any prior agreements between the parties as to the cost of the annuity to defendants. N.C.G.S. § 1A-1, Rule 60.

Am Jur 2d, Compromise and Settlement §§ 34, 48.

APPEAL by defendants from order entered 22 March 1990 in DURHAM County Superior Court by *Judge George R. Greene*. Heard in the Court of Appeals 13 December 1990.

Poe, Hoof & Reinhardt, by J. Bruce Hoof, for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Dan M. Hartzog and H. Lee Evans, Jr., for defendant-appellants.

WYNN, Judge.

In this appeal, defendants seek to overturn the order denying their motion for relief from a judgment approving a settlement made with plaintiff. For the reasons which follow, we affirm the decision of the trial judge.

I

Alan Bryant Goodwin was killed in an automobile accident in July of 1988. His widow, Diane Ellison Goodwin, was appointed administratrix of his estate and filed a wrongful death action against defendants, Thomas Edward Cashwell and George W. Kluger, Inc., the driver and owner of the tractor-trailer involved in the accident with Mr. Goodwin.

Prior to trial, a representative of the defendants' insurer, Continental Insurance Company ("Continental") and the plaintiff's attorney, Mr. William L. Thorpe, engaged in settlement negotiations. A preliminary understanding was reached between Continental and Mr. Thorpe that Continental would offer to settle the case for $800,000.00 payable in one of two ways: 1) a lump-sum payment of $800,000.00 or 2) a payment of $500,000.00 and a structured settlement providing payments to Mr. Goodwin's three-year-old daughter, Ellison.

In order to make the structured settlement offer, Continental obtained a proposal from an annuity company, Settlement Options, Inc. Based upon the prevailing interest rates in December of 1988 and Ellison's date of birth, the annuity company proposed an annuity that would pay Ellison $2,500.00 per year until her seventeenth birthday at which time her yearly payments would increase to $19,250.00 for the next six years. The annuity would make one-time payments of over $500,000.00 at age twenty-five, over $1,000,000.00 dollars at age thirty and a final payment of over $1,000,000.00 dollars at age thirty-five.

Continental communicated the structured settlement proposal to Mr. Thorpe in a letter. Based upon this information, plaintiff decided to settle the case and to accept the structured settlement option. The parties executed a settlement agreement and release which was subsequently approved by order of Superior Court Judge I. Beverly Lake, Jr.

After judgment was entered approving the agreement, defendants discovered that the annuity company, in making its calculations, erroneously used the date 30 March 1988 as Ellison's date of birth instead of her actual birthdate of 30 March 1983. As a result of this error, the actual cost of the annuity was $130,000.00 more than the amount projected by the defendants.

The settlement agreement stated the correct date of birth and apparently, Mrs. Goodwin was unaware that the incorrect birthdate had been used to calculate the structured settlement payments. Defendants tried unsuccessfully to resolve the matter with plaintiff. On 2 January 1990, nearly a year after the judgment was entered, the defendants filed a motion for relief from judgment pursuant to N.C. R. Civ. P. 60 seeking to have the order approving the settlement set aside. From the denial of that motion, defendants appeal.

II

Defendants' sole assignment of error on appeal is the trial court's denial of their motion to set aside the judgment approving the settlement agreement reached between the parties. They contend that the trial judge abused his discretion in denying the motion to set aside the judgment because the present value of the settlement was much greater than the amount agreed to by the parties due to an error by the annuity company, "unbeknownst to the parties." As such, they further argue that the error resulted from a mutual mistake of fact and therefore the trial judge should have allowed parol evidence of the parties' negotiations in this case to determine the "parties true intentions." For the following reasons, we affirm the decision of the trial judge denying the motion to set aside the judgment.

A motion for relief from an order made pursuant to N.C. R. Civ. P. 60 is addressed to the sound discretion of the trial judge and on appeal our review is limited to determining whether the trial judge abused his discretion. *Greenhill v. Crabtree*, 45 N.C. App. 49, 262 S.E.2d 315, *aff'd*, 301 N.C. 520, 271 S.E.2d 908 (1980).

In support of the motion to set aside the judgment, the defendants first assert a claim of mistake of fact pursuant to N.C. R. Civ. P. 60(b)(1). To rescind a judgment due to mistake of fact, there must be a mutual mistake of fact. "A unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to void a contract or conveyance." *Financial Services v. Capitol Funds*, 288 N.C. 122, 136, 217 S.E.2d 551, 560 (1975).

The defendants contend that the mistake was mutual in that both parties agreed to purchase an annuity for $300,000.00 and that both parties were mistaken as to the actual future payments

that the decedent's child would receive from the annuity based on a present value of $300,000.00, based on figures received from the annuity company. But the evidence supports, and the trial judge found as fact, that the settlement agreement makes no representation as to the cost of the annuity to defendants. The agreement does not set forth a present value for the settlement; but rather, it provides for a lump-sum payment of $500,000.00 and periodic payments to the minor child without reference as to the actual cost of the periodic payments. In short, the agreement simply sets forth the payments to be made by the defendants to Mrs. Goodwin and the decedent's child. The defendants' allegation that the mistake as to the present value of the annuity was mutual, is not evident in the settlement agreement.

Defendants also seek relief from the order approving the settlement under Rule 60(b)(6) which provides that the court may provide relief from a judgment for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) is not a catch-all rule although it has been described as a "grand reservoir of equitable power to do justice in a particular case." *Vaglio v. Town & Campus Int'l, Inc.*, 71 N.C. App. 250, 255, 322 S.E.2d 3, 7 (1984) (citations omitted). In order to be entitled to relief under Rule 60(b)(6) the movant must show that (1) extraordinary circumstances exist and that (2) "justice demands" such relief. *Id.* at 255, 322 S.E.2d at 6.

The defendants in this case contend that the trial judge should have allowed parol evidence of the parties' negotiations to determine their true intentions. This evidence, the defendants argue, would have supported their assertion that the mistake was mutual and further established a basis for equitable relief under Rule 60(b)(6). The defendants thereby contend that the parol evidence rule does not bar evidence of the parties' negotiations to show that the parties mutually agreed and intended to have the defendants purchase an annuity at a cost of $300,000.00.

North Carolina's Parol Evidence Rule provides that:

> Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing. The execution of the final writing may be termed the "integration" of the transaction. By it all prior and contemporaneous negotiations or agreements, whether oral or written, are "merged" into the writing, which thus becomes the exclusive source of the

parties' rights and obligations with respect to the particular transaction or the part thereof intended to be covered by it.

2 Brandis, *North Carolina Evidence* (3rd Rev. Ed. 1982), § 251 at pp. 294-95.

Here, the settlement agreement of the parties provides in pertinent part as follows:

> *Release and Discharge*
>
> In consideration of the payments called for herein, the Plaintiff completely releases and forever discharges the Defendant . . . from any and all past, present or future claims, demands, obligations, actions, causes of action . . . which the Plaintiff now has, or which may hereafter accrue . . . . This Release . . . shall be a fully binding and complete settlement between the Plaintiff, the Defendant and the Insurer . . . .
>
> . . . .
>
> *Entire Agreement and Successors in Interest*
>
> This Settlement Agreement contains the entire agreement between the Plaintiff, the Defendant and the Insurer with regard to the matters set forth herein and shall be binding upon and enure to the benefit of the executors, administrators, personal representative, heirs, successors and assigns of each.

The language of this settlement agreement provides a clear and unambiguous statement of the parties' intent; the settlement agreement was intended to be the final expression of the agreement between the parties. The prior negotiations and discussions of the parties which the defendants contend show an intent to limit the cost of the structure to $300,000.00 are superseded and made legally ineffective. As a consequence, in this case, the parol evidence rule prohibits evidence of any prior agreements between the parties as to the cost of the annuity to the defendants. *See, e.g., Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 323 S.E.2d 23 (1984).

In sum, the evidence supports the contention that the mistake resulting in a greater cost for the annuity was a unilateral mistake and not one of mutuality. Moreover, the defendants have failed to show that parol evidence is admissible to support their contention that a mutual mistake of fact occurred for which they are entitled to equitable relief. The foregoing leads us to the conclusion

that the trial judge acted within his sound discretion in denying the defendants' motion to set aside the judgment.

For the foregoing reasons, the judgment of the trial judge is

Affirmed.

Judges PHILLIPS and EAGLES concur.

ELIZABETH J. RUDISILL, PLAINTIFF v. JIMMY O. RUDISILL, DEFENDANT

No. 9026DC414

(Filed 19 March 1991)

1. **Divorce and Separation § 290 (NCI4th)— alimony—modification of 1975 consent judgment**

The trial court did not err by increasing the amount of spousal support defendant must pay to plaintiff where defendant concedes that a 1975 consent judgment had become an order of the court and was modifiable; the consent judgment does not set forth specifically and clearly whether the parties intended that the support and property provisions be separable; and the language of the contract, its purpose and the respective circumstances of the parties evidence an intent on the part of the parties to separate the support and property provisions.

Am Jur 2d, Divorce and Separation § 699.

2. **Divorce and Alimony § 134 (NCI4th)— modification of 1975 consent judgment—funds for repair of house**

The trial court erred by ordering defendant to pay plaintiff for repairs on the marital home where the home had been awarded to plaintiff by a 1975 consent judgment. Once the property passed to plaintiff, the trial judge had no authority to order defendant to pay plaintiff for repairs on the home.

Am Jur 2d, Divorce and Separation § 958.

APPEAL by defendant from order entered 14 December 1989 in MECKLENBURG County District Court by *Judge Daphne L. Cantrell.* Heard in the Court of Appeals 3 December 1990.

Knox, Knox & Freeman, by H. Edward Knox and Bobby L. Bollinger, Jr., for plaintiff-appellee.

Bailey, Patterson, Caddell & Bailey, P.A., by G. Russell Kornegay, III, and T. Scott White, for defendant-appellant.

WYNN, Judge.

In this appeal, defendant, Jimmy O. Rudisill ("Mr. Rudisill"), seeks to overturn an order modifying a consent agreement made with his former spouse, Elizabeth J. Rudisill ("Mrs. Rudisill"). For the reasons which follow, we affirm that part of the decision of the trial judge modifying the award of alimony and reverse that part of the decision awarding additional funds to repair the residence of the plaintiff.

I

In July 1975, Mr. and Mrs. Rudisill entered into a consent agreement settling "all matters and things in controversy," particularly spousal support, child support and division of the marital property. Based upon the consent agreement, the trial court entered a consent order setting forth, *inter alia*, that Mr. Rudisill would pay spousal support in the amount of $300.00 per month and transfer his interest in the marital home to Mrs. Rudisill. At the time the consent order was entered, Mrs. Rudisill was not employed and suffered from a significant diabetic condition.

Between 1975 and 1984, the record indicates that Mrs. Rudisill remained unemployed with the exception of sporadic babysitting. In 1984, she worked for a child care center, but the evidence suggests that she only remained there for five months. Beginning in 1984, her diabetes worsened such that she required medical treatment for her eyes and feet and she suffered from respiratory ailments. She incurred substantial medical and pharmaceutical expenses. Moreover, Mrs. Rudisill was unable to pay for the upkeep of the former marital home and it fell into disrepair.

In February 1989, Mrs. Rudisill filed a motion in the cause for modification of alimony seeking an increase in spousal support. Mr. Rudisill countered by filing a motion to decrease the alimony. After hearing evidence in support of both motions, the trial court ordered Mr. Rudisill to pay an increase of $200.00 in monthly alimony, a lump sum payment of $3,000.00 for the repair of the house and

$1,250.00 for plaintiff's attorney's fees. From that order, defendant appeals.

II

[1] Mr. Rudisill first assigns error to the trial court's decision to increase the amount of spousal support that he must pay to Mrs. Rudisill. He contends that the consent order of 14 July 1975 was a full and final settlement of the issues and that under the law as it existed at the time of this agreement, the terms of this consent order are not modifiable. We disagree.

We note first that the rule of *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), in which our Supreme Court held that consent agreements approved by the court will be treated as court ordered judgments and are therefore modifiable does not apply to this case. The rule of that case was expressly limited to that case and to consent judgments entered after the date of that opinion. Since the consent order in this case was entered in 1975, it is governed by the law as it existed before the *Walters* decision.

Prior to *Walters*, the Supreme Court differentiated two types of consent judgments: (1) Consent judgments modifiable only under contract law—where the court merely approved or sanctioned the contract between the parties, and as such, the parties were required to seek enforcement and modification under contract law and (2) Consent judgments modifiable by the court—where the court fully adopted the agreement between the parties as its own determination, and as such, this type of consent judgment was treated as a court order and was enforceable through the court's contempt powers or modifiable by the court within certain limitations. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964). In the latter type of consent judgment, the support provisions of an agreement were not modifiable if they were reciprocal and inseparable from provisions for settling property matters. *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979). However, there was a presumption that spousal support provisions constituted alimony and the burden was upon the party opposing modification to show that the support provisions were reciprocal and inseparable. *Id.; Cecil v. Cecil*, 74 N.C. App. 455, 457, 328 S.E.2d 899, 900 (1985).

In his brief on appeal, the defendant states that "[w]here, as in the case *sub judice*, a consent judgment becomes an order of the court, then the court has the power to modify any alimony

provisions contained therein." The defendant thereby concedes that the consent judgment in this case is of the second type but he contends that it is not subject to modification in this case because the spousal support ordered is reciprocal and inseparable from the provisions in the agreement dividing the property.

Thus, the issue in this case is whether the support and property provisions in the consent judgment are reciprocal and inseparable. The determination of this issue depends upon the construction of the consent judgment as a contract between the parties. *White* at 667, 252 S.E.2d at 702. "If the consent judgment is clear and unambiguous and leaves no room for construction, its construction is a matter of law . . . ." *Allison v. Allison*, 51 N.C. App. 622, 627, 277 S.E.2d 551, 554 (1981) (citations omitted), *disc. review denied*, 303 N.C. 543, 281 S.E.2d 660. However, where the consent judgment is ambiguous, the court must determine the construction of the consent judgment by ascertaining the intent of the parties at the time the agreement was entered. *White* at 667-68, 252 S.E.2d at 702. The intent of the parties is determined from the language of the contract, its subject matter and purpose, and the parties' situation at the time of its execution. *Id.*

In the case at bar, the consent judgment does not set forth specifically and clearly whether the parties intended that support and property provisions be separable. As such, this is not a consent judgment which is so clear and unambiguous that the construction of it is a matter of law. *See, e.g., Britt v. Britt*, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

Instead, we must examine the construction of the contract by determining the intention of the parties. First, we examine the pertinent language of the contract. The consent judgment here provides in pertinent part:

> 2. The defendant vacated the premises on or about January 19, 1975, without provocation on the part of the plaintiff and that such vacation of the premises was without provocation on the part of the plaintiff and that such vacation of the premises was within the contemplation of N.C.G.S. 50-16.1(3) and subsections thereof and grounds upon which the Court could grant relief for a permanent award of support and maintenance by the defendant to the plaintiff and upon the further grounds that the plaintiff is unemployed and is a dependent spouse within the meaning of the terms of N.C.G.S. 50-16.1(3) and

> the defendant is a supporting spouse within the meaning of the terms of N.C.G.S. 50-16.1(4). . . .
>
> . . . .
>
> 4. That a reasonable amount of support and alimony to be paid by defendant to plaintiff is the sum of $300.00 per month . . . due on the first day of each month thereafter until the plaintiff remarries, expires or defendant is no longer obligated to provide for her maintenance and support . . . and the parties have agreed that this is a reasonable amount of subsistence taking into consideration the plaintiff's needs and the defendant's capacity to pay.
>
> 5. That the parties are the joint owners of a residence . . . and as a further consideration the defendant does hereby transfer by deed all of his right, title and interest to the plaintiff . . . .

It is clear from the language of this consent order that the payment of alimony to the plaintiff was based upon abandonment by the defendant. Although the court did not expressly conclude that the defendant abandoned the plaintiff, the consent judgment is couched in terms which reflect abandonment. Further, the court expressly found that the defendant was a supporting spouse and that the plaintiff was a dependent spouse under N.C.G.S. 50-16.1(3). Significantly, the court made independent findings as to the defendant's ability to pay alimony and upon this finding the court made a determination that the defendant was able to pay $300.00 per month. While the property provision notes that it is as a "further consideration," the language indicates that the property provision was additional consideration and not inseparable consideration. The language of the consent judgment supports the conclusion that the support and property provisions were separate considerations.

Second, the purpose of the consent judgment was to settle "all matters and things in controversy" between the parties. This provision evidences the intent of the parties to incorporate in the agreement the terms by which they intended to live. But while the defendant urges this court to find that the inclusion of this language prohibits future modification of spousal support payments, we are disinclined to do so. As stated in *White*, language of this type does not show an intent "to foreclose any future modification of support payments." Likewise, the designation of the support

payments as alimony mitigates against such an intent, but it is not conclusive. *White* at 668, 252 S.E.2d at 702.

Third, the circumstances of the parties at the time the agreement was entered indicates that defendant had apparently abandoned the plaintiff who was a dependent spouse. The defendant was an able-bodied man who earned income sufficient to support the plaintiff, that income being $934.00 per month. Also, the plaintiff was unemployed and not able to provide for herself. These circumstances of the parties indicate that the intention of the parties was to make an independent determination of the spousal support provision without dependence on the property provision.

From the foregoing analysis, we conclude that the language of the contract, its purpose and the respective circumstances of the parties evidence an intent on the part of the parties to separate the support and property provisions. Accordingly, the trial court properly modified the support provision of the agreement.

III

[2] Finally, we note that in the order modifying the alimony, the trial judge found that the house which had been awarded to the plaintiff by the consent judgment was in need of repair due to plaintiff's lack of funds to make timely repairs. We note that not even under pre-*Walters* cases was a party allowed to seek a modification of a property division which had been sanctioned by the court. Once the property passed to plaintiff, the trial judge had no authority to order defendant to pay plaintiff for repairs on the home. As such, the part of the judgment awarding the plaintiff $3,000.00 to repair her residence must be reversed.

IV

Based upon the foregoing discussion, the decision of the trial judge is

Affirmed as to the modification of the spousal support, and reversed on the additional award for repair of the plaintiff's residence.

Chief Judge HEDRICK and Judge LEWIS concur.

CRAMER MOUNTAIN COUNTRY CLUB AND PROPERTIES, INC., PETITIONER
v. NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, DIVISION OF LAND RESOURCES, RESPONDENT

No. 9027SC843

(Filed 19 March 1991)

Waters and Watercourses § 3.2 (NCI3d) — violation of Sedimentation and Pollution Control Act — sufficiency of evidence

Evidence was sufficient to support respondent's assessment of a $6,600.00 penalty against petitioner for violations of the Sedimentation and Pollution Control Act where petitioner's violations included failure to file an erosion control plan with the local government having jurisdiction over the site thirty days prior to land disturbing activity and failure to have this plan approved and a copy on site; failure to provide a buffer zone in proximity to a lake or natural watercourse; failure to plant exposed slopes or provide them with permanent ground cover sufficient to restrain erosion; and failure to build sedimentation basins and maintain existing basins.

Am Jur 2d, Pollution Control §§ 134, 135.

APPEAL by respondent from *Cornelius (C. Preston), Judge.* Order entered 3 April 1990 in Superior Court, GASTON County. Heard in the Court of Appeals 18 February 1991.

This is a proceeding wherein respondent, North Carolina Department of Natural Resources and Community Development, assessed a penalty against petitioner, Cramer Mountain Inc., in the amount of $6,600.00 for violations of the North Carolina General Statutes and the Sedimentation and Pollution Control Act. From the imposition of this penalty, Cramer Mountain Inc. petitioned the Office of Administrative Hearings for review of the agency's decision. After a hearing, Administrative Law Judge Genie Rogers recommended that the penalty be reduced. Thereafter, the agency disregarded the recommended decision of the administrative law judge and in its final agency decision, assessed the full penalty against Cramer Mountain Inc. Cramer Mountain Inc. petitioned the Gaston County Superior Court for review of the final agency decision. Upon review, Judge Cornelius entered the following order: "[t]hat the final agency decision is unsupported by substantial

evidence admissible under G.S. 150B-29(a), 150B-30 or 150B-31 in view of the entire record as submitted and therefore the agency's decision is reversed." From this order, respondent Department of Natural Resources and Community Development appealed.

Tim L. Harris & Associates, by Thomas R. Gladden, Jr., for the petitioner, appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sueanna P. Sumpter for respondent, appellant.

HEDRICK, Chief Judge.

Respondent assigns as error the trial court's order reversing the final agency decision. N.C. General Statutes chapter 150B provides the standard of review to be followed by the court charged with reviewing a contested decision. The statute provides in pertinent part:

> . . . the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (5) Unsupported by substantial evidence admissible under 150B-29(a), 150B-30 or 150B-31 in view of the entire record as submitted.

G.S. 150B-51(b)(5) (1990).

"In reviewing an administrative decision to determine whether the decision is supported by substantial evidence, this Court pursuant to G.S. 150B-51(5), must apply the 'whole record' test." *Leiphardt v. N.C. School of the Arts*, 80 N.C. App. 339, 344, 342 S.E.2d 914, 919, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). In using the "whole record" test, the court must take into account all competent evidence to determine if there is substantial evidence to support the agency's findings of fact and conclusions of law. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988). Our Supreme Court defined "substantial" evidence as "such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

When used, the "whole record" test mandates that the court take into account any evidence in the record that fairly detracts from the weight of the evidence in determining the substantiality of evidence. *See Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). The court must take into account contradictory evidence or that evidence where conflicting inferences could be drawn. *Id.* Substantial evidence is "more than a scintilla or a permissible inference." *Lackey* at 238, 293 S.E.2d at 176.

With these principles in mind, we turn to the evidence presented in the record: Petitioner owns property in Gaston County, N.C. that is being developed for residential purposes. The size of the property is approximately 300 acres with a twenty-acre parcel that is "disturbed." Petitioner was sent a notice of violation from the Gaston County Soil Erosion Control office, that this "disturbed" parcel was in violation of the Gaston County Soil Erosion and Sedimentation Control Ordinance.

This notice set out violations, included corrective measures to be taken, and set a deadline for compliance of 23 May 1987. Later visits to the site showed the parcel to be out of compliance as late as 12 June 1987. On 25 June 1987 Gaston County Commissioners waived jurisdiction to respondent. An inspection of the property on 2 July 1987 by respondent revealed violations of the Sedimentation and Pollution Control Act of 1973 (hereinafter SPCA). These violations included failure to file an erosion and sedimentation plan with respondent's office thirty days before beginning a land disturbing activity; failure to conduct this land disturbing activity pursuant to an acceptable plan; failure to take reasonable measures to protect public and private property from this disturbance; failure to maintain a buffer zone; failure to maintain an adequate erosion control measure or vegetative cover on graded slopes and fills; failure to provide exposed graded slopes with ground cover devices; and failure to maintain all temporary and permanent sedimentation control devices during development of a site. Petitioner received a Notice of Violation by certified mail on 21 July 1987, citing numerous violations of corrective measures that were to be taken. Among the measures to be implemented were: following erosion plans; providing buffer zones; providing an adequate ground cover on cut and fill slopes; and providing for additional

sediment storage by removing sediment. The compliance deadline was set for 31 July 1987. On 23 July 1987 the regional office of respondent received a plan which they later rejected. On 3 August 1987 an inspection revealed that offsite sedimentation continued to occur. A Notice of Continuing Violation was sent by certified mail and received 6 August 1987. Another inspection on 26 August 1987 revealed some compliance, but the property was still in violation. A letter from respondent on 3 September 1987 informed petitioner that a civil penalty would be imposed for these violations. A subsequent inspection on 25 September 1987 revealed that temporary measures had been installed and were adequately maintained. A recommended decision was made to respondent from their regional office that the penalty should be assessed in the amount of $100.00 per day until compliance was reached. In reaching this decision, respondent used the recommendation by the regional office and the following criteria: the degree and extent of harm caused by the violation; the amount of money saved by noncompliance; the cost of rectifying the damage; whether the violation was committed willfully; the prior record of the violator and factors enumerated in 15 NCAC 4C .0006. The civil penalty began running on 21 July 1987 and ceased 24 September 1987. The penalty was based on the recommendation, the factors enumerated above, and the fact that severe offsite erosion had occurred. The penalty ran for a period of 66 days and amounted to $6,600.00. Petitioner requested judicial review of the final agency decision of respondent to the Office of Administrative Hearings. The case was heard before Judge Genie Rogers and a recommended decision was made to respondent by Judge Rogers on 19 April 1989. Judge Rogers found from the evidence presented at the hearing that (1) petitioner had violated the SPCA by conducting land disturbing activity before approval of a plan, however, these violations were not willful since petitioner thought a plan had been approved; (2) petitioner did not violate the SPCA by failing to file an erosion plan 30 days before land disturbing activity began since petitioner submitted a plan to Gaston County local government; (3) petitioner did violate the act by failing to take reasonable measures to protect public and private property from damages; failing to provide a buffer zone; failing to maintain graded slopes with adequate ground cover or device to control erosion; that no violations were willful; petitioner did not save money by failing to comply, nor did petitioner have any record of failure to comply with the law. In the recommended decision made by Judge Rogers, the penalty of $6,600.00

was not reasonable and, instead, recommended a penalty of $35.00 per day or $2,310.00. Respondent took the proposed decision into account but concluded that the administrative judge had erred in the conclusions of law in the recommended decision and imposed the $6,600.00 penalty. Petitioner then requested judicial review in the Gaston County Superior Court. Judge C. Preston Cornelius entered an order on 5 August 1989 reversing the agency's final decision.

Based on an examination of the whole record, we conclude that there is sufficient evidence to support respondent's decision as to penalties in the amount of $100.00 per day for violations of the SPCA.

The violations of the act included failure to file an erosion control plan with the local government having jurisdiction over the site thirty days prior to land disturbing activity and failure to have this plan approved and a copy on site. The record tends to show that a plan was filed by an engineer with Gaston County for approval sometime in the spring of 1987. There was no evidence to show that an approved copy was present at the site thirty days before the land disturbing activity as required by G.S. 113A-57(4) and 15 NCAC 4B .0017(a).

The record shows that petitioner was in violation of the act by failing to provide a buffer zone in proximity to a lake or natural watercourse, as required by G.S. 113A-57(1). Testimony from the record indicates that this violation continued to occur throughout the penalty phase, thus petitioner was not in compliance with the act.

Petitioner did not comply with the requirements of the act, in that exposed slopes be planted or provided with permanent ground cover sufficient to restrain erosion. Testimony in the record indicates that several visits were made to the site during the penalty phase, and areas were found to be barren of seed or other permanent ground cover as required by the statute. Thus, the evidence in the record shows a violation of G.S. 113A-57(2) and 15 NCAC 4A .0007(2).

Based on the evidence in the record, petitioner failed to maintain erosion and sedimentation control measures and facilities as required by 15 NCAC 4B .0013 and pursuant to the approved erosion and sedimentation plan. Testimony throughout the record indicates that petitioner failed to build sedimentation basins and

maintain existing basins as was witnessed at different inspections occurring on 3 August and 26 August 1987.

Based on an examination of the whole record, we conclude that there is substantial evidence to support respondent's decision to assess penalties in the amount of $100.00 per day, totaling $6,600.00, for violations of the statutes and the SPCA. Thus, this court concludes that the Gaston County Superior Court erred in reversing the final agency decision of respondent.

Reversed.

Judges COZORT and LEWIS concur.

ADELAIDE M. KREMER AND HUSBAND, H. H. KREMER, PLAINTIFFS v. FOOD LION, INC., DEFENDANT

No. 9020SC597

(Filed 19 March 1991)

1. **Negligence § 57.5 (NCI3d)— slip and fall—grocery store—obstructed aisle—directed verdict for defendant denied**

The trial court did not err by denying defendant's motions for a directed verdict and judgment n.o.v. in an action arising from plaintiff's fall in defendant's grocery store. Viewed in the light most favorable to plaintiff, defendant created a hazard and unnecessarily exposed customers to danger by leaving two bags of dog food protruding into the aisle next to an ice cream cooler; the store manager reprimanded the stock boy upon discovering the bags in that location; and the stock boy did not deny responsibility.

Am Jur 2d, Premises Liability § 551.

Liability for injury to customer from object projecting into aisle or passageway in store. 26 ALR2d 675.

2. **Evidence § 36 (NCI3d)— slip and fall—statements by store manager—admissible**

Statements by a grocery store manager after a customer's fall were admissible in the subsequent negligence action as

a hearsay exception for admissions of the agent of a party opponent. N.C.G.S. § 8C-1, Rule 801(d)(D).

Am Jur 2d, Evidence § 605.

3. **Negligence § 58 (NCI3d)— slip and fall—grocery store—contributory negligence of customer—directed verdict denied**

The trial court did not err by denying defendant's motions for a directed verdict and judgment n.o.v. based on plaintiff's contributory negligence in an action arising from plaintiff's fall in defendant's grocery store where, viewing the evidence in the light most favorable to plaintiff, plaintiff walked along the left wall of defendant's store and turned to the left, toward the store front and an ice cream cooler; items were placed above the cooler designed to draw the attention of shoppers; dog food bags were at plaintiff's feet; after taking two steps, plaintiff fell over the dog food bags, which were protruding into the aisle; no other displays were in this five-foot area; and this evidence supports a finding that plaintiff acted prudently in looking ahead of herself and not at her feet.

Am Jur 2d, Premises Liability §§ 795, 808.

4. **Negligence § 57.5 (NCI3d)— slip and fall in grocery store—evidence sufficient—new trial on disregard of instructions and evidence—denied**

The trial court did not err by not setting aside a negligence verdict and ordering a new trial on the grounds of manifest disregard by the jury of the proper instructions of the court and insufficiency of the evidence to justify the verdict where there was sufficient evidence to support the verdict.

Am Jur 2d, Evidence §§ 1080, 1163.

5. **Damages § 178 (NCI4th)— slip and fall—damages—remittitur denied—no abuse of discretion**

The trial court did not abuse its discretion in a negligence action arising from plaintiff's fall in defendant's grocery store by failing to grant defendant's motion for remittitur on the grounds that the jury manifestly disregarded the court's proper jury instructions and that the evidence was insufficient as to damages. Plaintiff's injuries were substantial, requiring two operations on her hip; her recuperation was slow; and

she suffered a partial permanent disability in the use of her right leg.

Am Jur 2d, Damages §§ 332-335.

Excessiveness or adequacy of damages awarded to injured person for injuries to trunk or torso. 12 ALR3d 117; 16 ALR4th 238.

APPEAL by defendant from judgment entered 5 March 1990 in MOORE County Superior Court by *Judge C. Preston Cornelius.* Heard in the Court of Appeals 12 December 1990.

On 28 April 1986 plaintiff Adelaide Kremer entered defendant's grocery store in Aberdeen, North Carolina to purchase a few items. After selecting two tomatoes in the produce department located in the front right corner of the store, plaintiff carried the tomatoes in her hand and circled the perimeter of the store. Plaintiff walked along the left wall toward the front of the store. After deciding against purchasing beer displayed along the left wall, she turned toward the front of the store in the direction of the ice cream coolers five feet away in order to select ice cream. No displays, carts or other items were in this five foot space between the beer and ice cream coolers. After taking two steps, plaintiff fell over two 25 lb. bags of dog food located on the floor, according to her testimony, protruding 10 inches in front of the ice cream cooler. According to testimony at trial, a manager came to plaintiff's assistance and angrily told a stock boy that this was no way to make a display and to "[g]et those damn bags out of here."

Plaintiff suffered a fracture of the right hip requiring surgery and resulting in 20% permanent partial injury to her right leg. At trial the jury found defendant to be negligent and plaintiff not contributorily negligent and awarded plaintiff $90,000.00. Defendant moved for directed verdict and judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 and to set aside the verdict and order a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 on the grounds that the jury manifestly disregarded the proper jury instructions and insufficiency of the evidence to support the verdict. The trial court denied defendant's motions. Defendant appeals.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by P. Wayne Robbins and Carol M. White, for plaintiffs-appellees.

Anderson, Broadfoot, Johnson & Pittman, by T. Alan Pittman, for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns error to the trial court's denial of defendant's motions for directed verdict and judgment notwithstanding the verdict. The party moving for a directed verdict bears a heavy burden. *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987). 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. *Id.* Issues arising in negligence cases are ordinarily not susceptible to summary adjudication because application of the applicable standard of care is generally for the jury. *William v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979) (Citation omitted). A motion by a defendant for a directed verdict under N.C. Gen. Stat. § 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). On such a motion, the plaintiff's evidence must be taken as true and the evidence must be considered in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference to be drawn therefrom. *Id.* A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Id.* (Citations omitted). A motion for judgment notwithstanding the verdict is essentially a renewal of a motion for directed verdict and the rules regarding the sufficiency of the evidence to go to the jury are equally applicable. *Taylor v. Walker, supra.*

The owner of a store is not an insurer of its customer's safety but is under a duty to exercise ordinary care in keeping the store's aisles and passageways reasonably safe so as not to unnecessarily expose customers to danger. *Rives v. Great Atlantic & Pacific Tea Co.*, 68 N.C. App. 594, 315 S.E.2d 724 (1984) (Citations omitted). Viewing the evidence in the light most favorable to plaintiff, defendant created a hazard and unnecessarily exposed customers to danger by leaving two bags of dog food protruding into the aisle next

to the ice cream cooler. Plaintiff testified that the store manager reprimanded the stock boy upon discovering the bags in that location, saying, "You don't leave anything in an aisle protruding the way that was. That's not the way we put up a display. Get those damn bags out of here." Plaintiff also testified that the stock boy failed to deny responsibility. This evidence was sufficient to take the issue of defendant's negligence to the jury.

[2] Defendant further contends that the trial court erred by admitting the statements made by the store manager as being inadmissible hearsay. However, the manager's statements are admissible as an exception to the hearsay rule for admissions by a party opponent which include "statements by [a party's] agent or servant concerning a matter within the scope of his agency or employment made during the existence of his relationship." N.C. Gen. Stat. § 8C-1, Rule 801(d)(D) (1988).

[3] Defendant also contends that the trial court erred in denying defendant's motions for directed verdict and judgment notwithstanding the verdict because the evidence showed that plaintiff was contributorily negligent. Defendant is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the plaintiff, shows contributory negligence as a matter of law. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E.2d 559 (1981). Although failure to discover an obvious defect will usually be considered contributory negligence as a matter of law, this general rule does not apply when circumstances divert the attention of an ordinarily prudent person from discovering an existing dangerous condition. *Id.* Our Supreme Court has stated that in such cases the issue of contributory negligence is not whether the reasonably prudent person would have seen the object had he looked, but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor. *Id.; See also Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 379 S.E.2d 677 (1989). Viewing the evidence in the light most favorable to the plaintiff, plaintiff walked along the left wall of defendant's store and after deciding against purchasing beer, she turned to the left in the direction of the ice cream cooler and store front. Evidence was offered that items were placed above the cooler designed to draw the attention of shoppers. The dog food bags were at her feet and after taking two steps she fell over the dog food bags protruding into the aisle. No other displays were in this five foot

area and this evidence supports a finding that plaintiff acted prudently in looking ahead of herself and not at her feet. The trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict.

[4] Defendant also assigns error to the trial court's failure to set aside the verdict and order a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 on the grounds of the manifest disregard by the jury of the proper instructions of the court and insufficiency of the evidence to justify the verdict. Having determined that sufficient evidence exists to support a verdict for plaintiff, we find no error in the trial court's failure to set aside the verdict.

[5] Defendant assigns error to the trial court's failure to grant defendant's motion for "remittitur" on the grounds that the jury manifestly disregarded the court's proper jury instructions and the insufficiency of the evidence to justify the verdict as to damages. Defendant contends the verdict is excessive and that the jury manifestly disregarded the trial court's instructions to the jury to refrain from basing their verdict on anger for the defendant or sympathy for the plaintiff. In his assignment of error and the discussion found in his brief, defendant fails to mention N.C. Gen. Stat. § 1A-1, Rule 59. Nevertheless, we address defendant's contention involving "remittitur" in the context of Rule 59. Rule 59 of the North Carolina Rules of Civil Procedure states "A new trial may be granted . . . [when] . . . (6) excessive or inadequate damages appear[ ] to have been given under the influence of passion or prejudice. . . ."

> [I]t is plain that a trial judge's *discretionary* order pursuant to G.S. [§] 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown. . . . [A]n appellate court should not disturb a discretionary Rule 59 motion unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a miscarriage of justice.

Worthington v. Bynum and Cogdell v. Bynum, 305 N.C. 478, 290 S.E.2d 599 (1982). Initially we note that defendant did not request that the trial court make findings of fact or enter conclusions of law on its motion. *See Andrews v. Peters*, 318 N.C. 133, 347 S.E.2d 409 (1986). Second, we note that defendant's brief only makes limited reference to the evidence on plaintiff's injuries and damages, at-

tempting to cast the evidence in a light favorable to defendant. Plaintiff's injuries were substantial, requiring two operations on her hip. Her recuperation was slow and she suffered a partial permanent disability in the use of her right leg. On this record, we can find no abuse of discretion in the trial court's ruling.

No error.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. RACHEL D. DARBY

No. 904SC809

(Filed 19 March 1991)

Criminal Law § 1098 (NCI4th)— involuntary manslaughter— defendant in position of trust or confidence—finding of aggravating factor improper

The aggravating factor that defendant took advantage of a position of trust or confidence could not be used to increase a sentence beyond the presumptive for involuntary manslaughter when the manslaughter conviction could have been based on the predicate crime of misdemeanor child abuse, which has as an element that the defendant was a parent of the victim, or by a finding that defendant committed a criminally negligent act, and the jury was instructed as to both possibilities.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552, 554.

APPEAL by defendant from judgment entered 2 May 1990 by *Judge Herbert O. Phillips, III* in ONSLOW County Superior Court. Heard in the Court of Appeals 25 February 1991.

Defendant was convicted of the involuntary manslaughter of her thirteen-month-old child and sentenced to a term of imprisonment exceeding the presumptive term.

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

Popkin and Associates, by Samuel S. Popkin, for defendant-appellant.

JOHNSON, Judge.

Defendant argues the trial court erred in finding as factors in aggravation: (1) that the victim was very young; and (2) that defendant took advantage of a position of trust or confidence to commit the offense. She contends the aggravating factors were improperly found because the evidence necessary to prove them was necessary to prove an element of the offense as defined for the jury. *See* G.S. § 15A-1340.4(a)(1).

The trial court here defined involuntary manslaughter for the jury as the unintentional killing of a human being by an act done in a criminally negligent way or by an unlawful act not amounting to a felony. *See State v. Wingard*, 317 N.C. 590, 346 S.E.2d 638 (1986). The court instructed that in order for the jury to find defendant guilty of the offense, the State had to prove beyond a reasonable doubt: (1) that defendant acted in a criminally negligent way, or unlawfully; and (2) that defendant's negligence or unlawful conduct proximately caused the victim's death. The court specifically defined criminal negligence. The court further instructed that defendant acted unlawfully if the victim was less than sixteen years old, and defendant was the victim's parent, and if defendant inflicted physical injury on the victim or created a substantial risk that the victim would suffer physical injury by other than accidental means. The latter instruction describes a violation of G.S. § 14-318.2, which defines misdemeanor child abuse. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978).

Defendant argues that the trial judge impermissibly utilized factors in aggravation which were also used as evidence to prove essential elements of the offense, to wit, misdemeanor child abuse, and that this double use violates the prohibition in G.S. § 15A-1340.4(a) that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. The State argues that since the jury instructions were written in the disjunctive (a conviction for involuntary manslaughter could be found if the jury found the defendant had committed either (1) a criminally negligent act *or* (2) an unlawful act not amounting to a felony,

to wit, misdemeanor child abuse) there is no double use problem and in order for defendant's argument to prevail the instructions would have to be worded in such as way as to allow conviction of involuntary manslaughter only on the basis of misdemeanor child abuse.

Initially, we note that misdemeanor child abuse can support a conviction of involuntary manslaughter. *State v. Byrd*, 309 N.C. 132, 305 S.E.2d 724 (1983). The infancy of the victim can be used to aggravate a sentence for felony child abuse, *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), but the trust or confidence factor cannot. *State v. Young*, 67 N.C. App. 139, 312 S.E.2d 665 (1984). Felony child abuse and misdemeanor child abuse have in common the element of parent-child relationship. *Cf.* G.S. §§ 14-318.2 and 14-318.4. Thus, defendant's argument can apply, if at all, only to the double use of the trust or confidence factor.

The issue is whether the aggravating factor that the defendant took advantage of a position of trust or confidence can be used to increase a sentence beyond the presumptive for involuntary manslaughter when the manslaughter conviction could have been based on the predicate crime of misdemeanor child abuse, which has as an element that the defendant was a parent of the victim, or by a finding that defendant committed a criminally negligent act, and the jury was instructed as to both possibilities. We hold that it cannot.

The Fair Sentencing Act, found at G.S. §§ 15A-1340.1 to -1340.7, applies to the sentencing of all persons convicted of felonies other than Class A or Class B felonies. The Act provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation[.]" G.S. § 15A-1340.4(a). *See generally, Ahearn*, 307 N.C. 584, 300 S.E.2d 689. In *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), defendant was convicted of second degree murder. The jury was instructed that the inference of malice arises as a matter of law from the intentional killing of a human being with a deadly weapon. The sentencing judge found as an aggravating factor that defendant used a deadly weapon. Defendant argued that the use of a deadly weapon was necessary to prove the malice element of second degree murder and thus its use to aggravate the sentence violated G.S. § 15A-1340.4(a). The Supreme Court agreed and adopted a "bright-line" rule regarding the use of a deadly weapon as an aggravating

factor when that use might have been used by the jury as proof of malice. The Court held that when "the facts justify an instruction on the inference of malice arising as a matter of law from the use of a deadly weapon, evidence of the use of that deadly weapon may not be used as an aggravating factor at sentencing." *Id.* at 417, 306 S.E.2d at 788. The Court adopted this rule "to avoid hairsplitting factual disputes necessitated by having to second-guess jury decisions as to the existence of malice." *Id.* The *Blackwelder* Court illustrated the problem by reference to *State v. Keaton*, 61 N.C. App. 279, 300 S.E.2d 471, *disc. review denied*, 309 N.C. 463, 307 S.E.2d 369 (1983), and *State v. Hough*, 61 N.C. App. 132, 300 S.E.2d 409, *disc. review denied*, 308 N.C. 193, 302 S.E.2d 246 (1983). In *Keaton*, the defendant was convicted of second degree murder. The trial judge found in aggravation that he had used a deadly weapon. Defendant argued on appeal that the use of a deadly weapon as an aggravating factor violated the Fair Sentencing Act since use of a deadly weapon was evidence necessary to prove malice. The jury in that case had been instructed that malice could be inferred from the use of a deadly weapon. The *Keaton* Court agreed and held that "as there were no facts and circumstances indicating that [the victim's] death was unusually gruesome, other than the fact that he died from gunshot wounds, the necessary element of malice must have been inferred by the jury from the evidence that defendant intentionally shot [the victim] with a gun." *Keaton*, 61 N.C. App. at 283-84, 300 S.E.2d at 473. Thus, the use of a deadly weapon could not be used as an aggravating factor. *Accord, State v. Gaynor*, 61 N.C. App. 128, 300 S.E.2d 260 (1983). In contrast, the *Hough* Court found that the use of a deadly weapon could properly be used as an aggravating factor where the fact that the victim had been shot four times provided other evidence by which the trial judge could infer malice. "Defendant's use of the deadly weapon in this case was not necessary to prove the element of malice." *Hough*, 61 N.C. App. at 135, 300 S.E.2d at 411.

Having illustrated the problem, the *Blackwelder* Court opined that

> [s]hort of requiring every jury to specify upon what facts and circumstances it relied in determining the existence of malice, it is simply not possible to conclude, with any degree of certainty, that a jury instructed on the inference of malice would not have considered the use of a deadly weapon as evidence necessary to prove the element of malice.

Blackwelder, 309 N.C. at 417-18, 306 S.E.2d at 788.

This Court faces a similar problem in the case *sub judice*. The jury was instructed that it could convict defendant of involuntary manslaughter if it found that she had committed a criminally negligent act or if she had committed an unlawful act not amounting to a felony, either of which was the proximate cause of death. They were further instructed as to the elements of criminal negligence and the unlawful act of misdemeanor child abuse, including the parent-child relationship. The jury convicted defendant of involuntary manslaughter and there is nothing in the record as to the basis for their decision. Were defendant convicted on the basis of a criminally negligent act, the finding in aggravation that defendant was in a position of trust or confidence would not violate G.S. § 15A-1340.4. If defendant were convicted on the basis of misdemeanor child abuse, aggravation of sentence based on the trust or confidence factor would be improper. Thus, we are faced with a situation of the type faced by the Court in *Blackwelder*. Unless a bright-line rule is applied to the facts *sub judice*, we will of necessity have to "second-guess" the jury decision. This we will not do.

We find under the facts of this case that it was error for the trial judge to find as an aggravating factor that defendant was in a position of trust or confidence and remand to the trial court for resentencing. *State v. Chatman*, 309 N.C. 169, 301 S.E.2d 71 (1983).

Remanded for resentencing.

Judges PHILLIPS and WYNN concur.

KENNETH HIGGINS AND WIFE, KATHLEEN HIGGINS v. ROBERT PATTON, JR. AND NANCY PATTON

No. 9028SC860

(Filed 19 March 1991)

1. Rules of Civil Procedure § 11 (NCI3d)— voluntary dismissal— authority of court to impose sanctions

Plaintiff's voluntary dismissal did not deprive the trial court of jurisdiction to impose Rule 11 sanctions upon him.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 39, 40.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR4th 778.

2. **Rules of Civil Procedure § 11 (NCI3d)— parties who may be sanctioned**

Defendants erroneously believed that N.C.G.S. § 1A-1, Rule 11 allowed the trial court to impose sanctions only upon the plaintiff because he had verified the complaint and upon his attorney because he had signed the complaint, when in fact defendants were entitled to request sanctions against the attorney as signer of the complaint and against both plaintiffs as represented parties, regardless of whether plaintiffs signed the complaint.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 39, 40.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR4th 778.

3. **Rules of Civil Procedure § 11 (NCI3d)— complaint grounded in fact and warranted by law—no sanctions based on improper purpose**

The trial court erred in imposing sanctions on the erroneous assumption that a complaint which is well grounded in fact and warranted by the existing law may nonetheless be filed for an improper purpose.

Am Jur 2d, Damages §§ 613, 616.

4. **Rules of Civil Procedure § 11 (NCI3d)— filing of complaint for improper purpose—when sanctions may be imposed**

To impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the Rule 11 legal or factual certification requirements; furthermore, if it is determined that the complaint is in violation of either the factual or legal certification requirements of Rule

11, there exists a basis for sanctions and it is therefore unnecessary to address the issue of improper purpose.

Am Jur 2d, Damages §§ 613, 616.

5. Rules of Civil Procedure § 11 (NCI3d)— complaint for trespass—factual certification requirement—insufficiency of showing in record

Plaintiffs' complaint met the legal certification requirement of Rule 11 where it alleged that defendants, without permission, entered and damaged plaintiffs' land and it therefore facially presented a plausible claim for trespass; however, it was impossible to determine from the record whether the complaint met the factual certification requirement of Rule 11 where the trial court did not determine whether plaintiff undertook a reasonable inquiry into the facts or whether plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.

Am Jur 2d, Trespass § 69.

APPEAL by plaintiff Kenneth Higgins from order filed 4 May 1990 in BUNCOMBE County Superior Court by *Judge Robert D. Lewis*. Heard in the Court of Appeals 19 February 1991.

Talmage Penland for plaintiff-appellant.

Shuford, Best, Rowe, Brondyke & Wolcott, by James Gary Rowe, for defendant-appellees.

GREENE, Judge.

Kenneth Higgins (plaintiff) appeals the trial court's order filed 4 May 1990 granting the defendants' N.C.G.S. § 1A-1, Rule 11 motion for sanctions against the plaintiff.

In January of 1989, Charles and Joy Higgins received a judgment in the Buncombe County Superior Court under which they were granted an easement by implication across land owned by Charles' brother, who is the plaintiff, and the plaintiff's wife. According to the judgment, the easement was to run "over and across the presently located road right-of-way" on the plaintiff's land. Furthermore, Charles and Joy Higgins were "granted such use in said road right-of-way and easement which is reasonably necessary

to the fair, full, convenient and comfortable enjoyment of their property . . . ."

In 1989, Nancy Patton and her son, Robert (defendants), lived on the property owned by her brother, Charles Higgins, and used the easement that Charles had received in the 1989 judgment. In late March and early April of 1989, the defendants, with Charles' permission, performed various acts of work on the easement, including leveling the road right-of-way. The plaintiff and his wife brought suit against the defendants alleging that when the defendants leveled the road, they trespassed onto the plaintiff's land outside of the easement causing damage to it. The plaintiff verified the complaint. The defendants answered the complaint denying that a trespass had occurred and moving for Rule 11 sanctions. The defendants requested sanctions only against the plaintiff and his wife and not their attorney, even though their attorney had signed the complaint.

At trial, the plaintiff produced eight witnesses, seven of whom substantiated the plaintiff's claim. However, the last witness the plaintiff called, a surveyor, gave testimony somewhat contrary to the previous witnesses. After the defendants had cross-examined the surveyor, the trial court excused the jury for the day and then proceeded to ask the surveyor several questions. Afterwards, the trial judge stated to the plaintiff's attorney, "Well, . . . somebody owes this Court an explanation at this point. . . . You called this man [the surveyor] as your witness, and he's testifying that your man took the posts down as he was going out there, and your man says he didn't. . . . Well, there's some perjury going on here in this lawsuit, and it's very distressful for me to be a part of that kind of thing." The trial court then recessed for the evening. The next morning, the plaintiffs took a voluntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) without prejudice. The defendants then asked the trial court to conduct a hearing on their Rule 11 motion for sanctions against the plaintiff and his wife, in which motion the defendants alleged that this lawsuit was not well grounded by the facts, not warranted by the existing law, and was brought for an improper purpose. After receiving evidence, the trial court concluded that the plaintiff brought this lawsuit to harass the defendants. On this basis, the trial court granted the defendants' motion for sanctions only against the plaintiff and ordered the plaintiff to pay $2,000 "to cover attorney fees . . . ." Furthermore, the trial court assessed the costs of the action

against the plaintiff. Only the plaintiff has appealed the trial court's order.

The issue is whether a trial court may impose sanctions against a plaintiff on the ground that the complaint was interposed to harass the defendant when the trial court does not determine whether the complaint was well grounded in fact or was warranted by existing law.

[1] We note initially that the plaintiff argues that his voluntary dismissal deprived the trial court of jurisdiction to impose sanctions upon him. We disagree. As we have recently stated, "attorney fee requests under Rule 11 . . . raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues." *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991).

[2] We also point out that the record suggests that the defendants believed that Rule 11 allowed the trial court to impose sanctions only upon the plaintiff, because he had verified the complaint, and upon his attorney, because he had signed the complaint. This is a misconception. Rule 11(a) allows the trial court to impose sanctions on the *signer* of the pleading, "a represented party, or both . . . ." The party verifying the pleading in accordance with Rule 11(b) is not the signer as that term is used in Rule 11(a). Therefore, the defendants were entitled to request sanctions against the attorney, as signer of the complaint, and against both plaintiffs as represented parties, regardless of whether the plaintiffs signed the complaint. The trial court granted the defendants' motion only with respect to the plaintiff and not his wife. As the defendants did not appeal the trial court's order, we do not address whether Rule 11 sanctions would have been proper against the plaintiff's wife.

[3, 4] In imposing sanctions against the plaintiff, the trial court concluded in pertinent part:

> Considering without deciding that the plaintiffs' contentions, based upon an unreasonable and self-serving interpretation of Judge Lamm's language, may be grounded in fact and in law, the Court, nevertheless, concludes that the real purpose of this lawsuit was to harass Charles Higgins and those who were using the road with his permission.

Thus, the trial court imposed sanctions on the assumption that a complaint which is well grounded in fact and warranted by the existing law may nonetheless be filed for an improper purpose. This assumption is incorrect. "[W]hen a complaint satisfies the law and fact prongs of a Rule 11 analysis, the complaint cannot be deemed to have been interposed for an improper purpose." *Bryson*, 102 N.C. App. at 11, 401 S.E.2d at 653. To hold otherwise could deter the filing of valid claims which the parties have a right to have adjudicated by our courts regardless of their motivation. Therefore, to impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the Rule 11 legal or factual certification requirements. Furthermore, if it is determined that the complaint is in violation of either the factual or legal certification requirements of Rule 11, there exists a basis for sanctions and it is therefore unnecessary to address the issue of improper purpose.

[5] Here, the complaint meets the legal certification requirement of Rule 11. When considered in conjunction with the answer, the complaint facially presents a plausible claim for trespass. *See Bryson*, 102 N.C. App. at 12, 401 S.E.2d at 653. Specifically, the complaint alleges that the defendants, without permission, entered and damaged the plaintiff's land. *See Keziah v. Seaboard Air Line R.R. Co.*, 272 N.C. 299, 311, 158 S.E.2d 539, 548 (1968) ("[a]ny unauthorized entry on land in the actual or constructive possession of another constitutes a trespass"); *Sentry Enters., Inc. v. Canal Wood Corp.*, 94 N.C. App. 293, 297, 380 S.E.2d 152, 154 (1989) ("[t]o prove trespass plaintiff must show" "unauthorized entry on plaintiff's land" by defendant). The defendant's answer merely denied that a trespass had occurred. Because the complaint facially presents a plausible claim, it is unnecessary to inquire further into the plaintiff's conduct prior to filing the complaint. *See Bryson*, 102 N.C. App. at 12, 401 S.E.2d at 653.

However, we are unable to determine from the record whether the complaint meets the factual certification requirement of Rule 11. That determination requires a two-step analysis. G. Joseph, Sanctions: The Federal Law of Litigation Abuse § 9, at 131 (1989). First, the court must determine whether the plaintiff undertook a reasonable inquiry into the facts. *Id.* Second, the court must determine whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact. *Id.* § 9, at 131-32. "The reasonableness of this belief—like

the reasonableness of the antecedent inquiry—is judged under an objective standard." *Id.* § 9, at 132; *see also Bryson*, 102 N.C. App. at 9-10, 401 S.E.2d at 652. If the court answers either prong of the two-step analysis negatively, then sanctions against the plaintiff are appropriate.

Because the trial court did not undertake this two-step analysis, and because this Court is not in the position to undertake this factual analysis, we must vacate the order of the trial court to the extent of any award, including attorney fees, based upon the Rule 11 sanction. On remand, the parties will be permitted to introduce new evidence on the issues raised by the factual certification requirement.

Affirmed in part, vacated in part and remanded.

Judges WELLS and WYNN concur.

ROGER D. MESSER, ET AL. v. LAUREL HILL ASSOCIATES

WILLIAM L. HUNT, ET AL. v. GEORGE L. EDWARDS, JR., ET AL.

No. 9015SC741

(Filed 19 March 1991)

1. **Rules of Civil Procedure § 56.2 (NCI3d)— untimely summary judgment motion—only issues raised by timely movant's motion considered**

The trial court may only grant summary judgment for an untimely movant on issues raised by the timely movant's summary judgment motion; therefore, because plaintiffs' summary judgment motion in this breach of contract action went only to liability, the trial court had the power to render summary judgment for defendants with respect to liability, notwithstanding the procedural defects in defendants' summary judgment motion.

Am Jur 2d, Summary Judgment §§ 5, 12, 16, 17.

2. Contracts § 87 (NCI4th)— breach of contract to construct street—impossibility of performance—insufficiency of evidence—risk of impossibility assumed by defendants

In an action for breach of contract to construct a street, there was no merit to defendants' contention that they were entitled to summary judgment on the liability issue because their performance under the parties' agreement was rendered impossible by conditions imposed upon them by the town manager, since in the parties' original contract in 1983, defendants agreed to build Bayberry Drive according to Chapel Hill standards; in 1984 the town council adopted a plan to build Laurel Hill Parkway; in 1985 defendants modified the original agreement to build Bayberry Drive using the same unqualified language, but extending the final date of completion; because the precise location for the parkway had not been chosen at the time of the 1985 agreement, the possibility that the parkway may have prevented the construction of Bayberry Drive as agreed might reasonably have been anticipated by defendants; defendants did not show that their alleged inability to construct Bayberry Drive because of the location of the parkway was not reasonably foreseeable; and the unqualified contractual language tended to show that defendants assumed the risk that the parkway could prevent performance of the contract.

Am Jur 2d, Building and Construction Contracts § 61; Contracts §§ 678, 679, 684.

Modern status of the rules regarding impossibility of performance as defense in action for breach of contract. 84 ALR2d 12.

3. Appeal and Error § 118 (NCI4th)— appeal from denial of partial summary judgment motion—interlocutory appeal

Plaintiffs' appeal of the denial of its partial summary judgment motion is dismissed because the denial of a motion for summary judgment is a non-appealable interlocutory order.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

APPEAL by plaintiffs from judgment filed 22 March 1990 in ORANGE County Superior Court by *Judge D. B. Herring, Jr.* Heard in the Court of Appeals 12 December 1990.

Lyman & Ash, by Cletus P. Lyman and Robert H. Smith, for plaintiff-appellants.

Moore & Van Allen, by Laura B. Luger and Kevin M. Capalbo, for defendant-appellees.

GREENE, Judge.

The plaintiffs appeal the final judgment filed 22 March 1990 in which the trial court allowed the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment.

This Court has previously stated the facts of this case. *See Messer v. Laurel Hill Assocs.*, 93 N.C. App. 439, 440-43, 378 S.E.2d 220, 221-22 (1989). Therefore, we relate only those facts needed to resolve the issues raised in this appeal.

On 22 September 1983, the plaintiffs sold Laurel Hill IV and V to the defendants. As part of the consideration running to the plaintiffs, the defendants promised to "build to Chapel Hill standards . . . Bayberry Drive (from Arboretum Drive to . . . [Rhododendron] Drive and to the eastern boundary of Laurel Hill IV) . . . by December 30, 1985." As of 22 September 1983, the plaintiffs had obtained pre-approval of a preliminary subdivision plat for Laurel Hill IV which would have allowed Bayberry Drive to be built according to the terms of the parties' agreement. The defendants never filed the required application for a final plat approval.

In September of 1984, the Chapel Hill Town Council adopted a thoroughfare plan which proposed a thoroughfare to be known as the Laurel Hill Parkway but which did not specify its precise location. In May of 1985, before the time for performance under the original agreement had expired, the parties agreed to extend the final date of completion for Bayberry Drive. Under the modification, the defendants again agreed to "build to Chapel Hill standards Bayberry Drive from Arboretum Drive to . . . [Rhododendron] Drive and to the eastern boundary of Laurel Hill IV by December 1, 1987."

At sometime before 5 December 1985, the defendants sought reapproval of the preliminary subdivision plat for Laurel Hill IV. By letter dated 5 December 1985, the Chapel Hill Town Manager

informed the defendants that the preliminary plat did not require reapproval. However, because of the planned parkway, two new conditions were added to the preliminary plat reapproval. According to the Planning Director of Chapel Hill, "After December 5, 1985, Town approvals would no longer permit the construction of Bayberry Extension along the exact alignment originally permitted by the Town." The defendants had until December of 1986 to apply for a final plat approval. They never filed for such approval, and their preliminary plat reapproval lapsed.

Because the defendants did not complete Bayberry Drive by the 1 December 1987 deadline, the plaintiffs sued the defendants for breach of contract. The defendants admitted that the road had not been completed, but argued impossibility of performance as a defense. On 9 March 1990, the plaintiffs filed a motion for partial summary judgment under N.C.G.S. § 1A-1, Rule 56 on the issue of the defendants' liability for their failure to perform according to the parties' contract. The motion was scheduled to be heard on 19 March 1990, the first day of trial. On 16 March 1990, the defendants filed a motion for summary judgment on liability and damages and an application for an order to shorten the time for service of their motion upon the plaintiffs. The defendants wanted their motion heard on 19 March 1990. On 19 March 1990, the trial court heard arguments on the summary judgment motions, denied the plaintiffs' motion, and granted the defendants' motion for summary judgment.

The issue presented by this appeal is whether the trial court erred in entering summary judgment for the defendants on the issue of liability where the evidence tends to show that the defendants assumed the risk of the governmental action.

[1] In relevant part, N.C.G.S. § 1A-1, Rule 56(c) provides a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." "Failure to comply with this *mandatory* 10 day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule." *Zimmerman's Dep't Store v. Shipper's Freight Lines*, 67 N.C. App. 556, 557-58, 313 S.E.2d 252, 253 (1984) (emphasis added). However, noncompliance with Rule 56(c) may be waived by the person entitled to the notice. *Zimmerman's*, 67 N.C. App. at 558, 313 S.E.2d at 253. The person entitled to such notice waives it when he par-

ticipates in the hearing but does not object to the improper notice. *Westover Prods., Inc. v. Gateway Roofing, Inc.*, 94 N.C. App. 163, 166, 380 S.E.2d 375, 377 (1989). Furthermore, when an initial movant makes a timely summary judgment motion and then another movant makes an untimely summary judgment motion and the trial court grants summary judgment for the untimely movant, our appellate courts will not disturb on the ground of untimeliness the trial court's grant of the untimely movant's summary judgment motion. *Greenway v. North Carolina Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 314-15, 241 S.E.2d 339, 343 (1978). This is so because the timely movant's summary judgment motion triggers the evaluation which leads to the trial court's grant of the untimely movant's summary judgment motion. *Id.* at 315, 241 S.E.2d at 343. However, the extent of the trial court's power to grant summary judgment for an untimely movant based upon a timely movant's summary judgment motion necessarily depends upon the timely movant's summary judgment motion. Accordingly, the trial court may only grant summary judgment for an untimely movant on the issues raised by the timely movant's summary judgment motion.

Here, the defendants gave notice on 16 March 1990, and their summary judgment motion was to be heard on 19 March 1990. Therefore, they did not meet Rule 56(c)'s 10-day notice requirement. Because the plaintiffs' summary judgment motion went only to liability, the trial court had the power to render summary judgment for the defendants with respect to liability notwithstanding the procedural defects in the defendants' summary judgment motion.

[2] The defendants argue that they are entitled to summary judgment on the liability issue because their performance under the parties' agreement was rendered impossible by conditions imposed upon them by the town manager. The burden was on the defendants on this issue.

Whether governmental action will excuse a party from liability for nonperformance of a contract is a legal question for the court. *Helms v. B & L Inv. Co.*, 19 N.C. App. 5, 7, 198 S.E.2d 79, 81 (1973). Generally, such nonperformance will be excused " 'where performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing, whether impossible or not . . . .' " *Id.* (citation omitted). To meet their burden on summary judgment, the defendants were required to "prove each element of the defense. Thus, it is not enough

to establish that performance became impossible in the legal sense. Rather, it must also be shown that the party had not assumed the risk of the event that occurred. Moreover, in most cases it must be shown that the event was not reasonably foreseeable." 17A Am. Jur. 2d *Contracts* § 674 (1991). This is true because the " 'terms of a contract may be such that, expressly or by construction, one of the parties assumes the risk of subsequent governmental interference preventing his performance of his undertaking.' " *Helms*, 19 N.C. App. at 8, 198 S.E.2d at 81 (citation omitted). Furthermore, "where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, an unqualified undertaking is to be construed as an absolute contract binding the promisor to perform things which subsequently become impossible or to pay damages for the nonperformance. . . ." 17A Am. Jur. 2d *Contracts* § 678 (1991).

Here, the defendants did not meet their burden of showing the existence of the defense. In the parties' original contract, the defendants agreed to build Bayberry Drive according to Chapel Hill standards. In 1984, the Town Council adopted the plan for the Laurel Hill Parkway. In 1985, the defendants modified the original agreement using the same unqualified language. Because the precise location for the parkway had not been chosen at the time of the 1985 agreement, the possibility that the parkway may have prevented the construction of Bayberry Drive as agreed might reasonably have been anticipated by the defendants. The defendants therefore have not shown that their alleged inability to construct Bayberry Drive because of the location of the parkway was not reasonably foreseeable. Furthermore, the unqualified contractual language tends to show that the defendants assumed the risk that the parkway could prevent performance of the contract. Therefore, on the evidence presented, the defendants did not meet their burden on summary judgment. Accordingly, summary judgment for the defendants was error.

[3] Furthermore, the plaintiffs' appeal of the denial of its partial summary judgment motion is dismissed because "the denial of a motion for summary judgment is a non-appealable interlocutory order." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 230 (1985); *see also Coleman v. Interstate Cas. Ins. Co.*, 84 N.C. App. 268, 270, 352 S.E.2d 249, 251 (1987) (grant of partial summary judgment on liability not immediately appealable). Because

of our decision, we need not address the remaining issues argued in the briefs.

Dismissed in part, reversed in part, and remanded.

Judges PARKER and COZORT concur.

NCNB NATIONAL BANK OF NORTH CAROLINA v. ROBERT O'NEILL AND TED TINSLEY, INDIVIDUALLY AND AS PARTNERS OF T & O INVESTMENTS, A NORTH CAROLINA GENERAL PARTNERSHIP

No. 905SC863

(Filed 19 March 1991)

1. **Mortgages and Deeds of Trust § 32.1 (NCI3d)— mortgagee holding first and second mortgages—anti-deficiency judgment statute applicable**

When a mortgagee holding two mortgages on the secured property purchases at its own foreclosure sale, its ability to successfully maintain a deficiency action is governed by N.C.G.S. § 45-21.36 regardless of whether it brings the deficiency action to collect on its first or second mortgage.

Am Jur 2d, Mortgages §§ 918, 919.

2. **Mortgages and Deeds of Trust § 32.1 (NCI3d); Partnership § 4 (NCI3d)— partners—property interest sufficient to invoke anti-deficiency judgment statute**

Individual defendants as partners in defendant partnership, though not enjoying the traditional rights of owners, held a property interest sufficient to invoke the protection of N.C.G.S. § 45-21.36, the anti-deficiency statute, since it would violate principles of equity to allow a creditor a possible windfall recovery from a partner which it could not recover from the partnership on a partnership debt.

Am Jur 2d, Mortgages § 910.

3. Mortgages and Deeds of Trust § 321 (NCI3d); Partnership § 4 (NCI3d)— partners' reliance on anti-deficiency judgment statute—no error

There was no merit to plaintiff's contention that allowing defendant to rely on the set-off of N.C.G.S. § 45-21.26 would violate public policy and alter the parties' bargain, since the statute does not relieve the mortgagor of its debt, but simply limits the plaintiff to what it bargained for—repayment in full plus interest, and defendants must still produce evidence that the properties sold were fairly worth the amount of the debt at the time and place of sale, or at least that they were worth substantially more than was bid.

Am Jur 2d, Mortgages § 910.

APPEAL by defendants from order entered 26 January 1990 in NEW HANOVER County Superior Court by *Judge James R. Strickland.* Heard in the Court of Appeals 19 February 1991.

Plaintiff brought an action for deficiency judgments against defendants on 29 August 1988. Defendant O'Neill (O'Neill) defaulted on a loan secured by a deed of trust on certain properties. Defendant T & O Investments (T & O) defaulted on two loans secured by other properties. Foreclosure proceedings were initiated by plaintiff, which purchased all of the properties. The sales left a deficiency of over $95,000.00 on the O'Neill loan, and $41,500.00 on the second T & O loan.

Plaintiff moved for summary judgment on the T & O deficiency. Defendants responded with a forecast of evidence tending to show that the properties were worth more than plaintiff had bid on them. The trial court entered an order of partial summary judgment for plaintiff on the T & O deficiency holding all defendants jointly and severally liable for the debt and certified the judgment as final pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Defendants appeal.

Moore & Van Allen, by Jonathan D. Sasser and Kevin M. Capalbo, for plaintiff-appellee.

Poisson, Barnhill & Britt, by Donald E. Britt, Jr. and J. L. Seay, Jr., for defendants-appellants.

WELLS, Judge.

[1] This case turns on whether N.C. Gen. Stat. § 45-21.36 applies on these facts and can be relied on by defendants at a trial on the merits. We hold that it does and reverse the order of summary judgment.

N.C. Gen. Stat. § 45-21.36 states, in pertinent part:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part. . . .

Relying on *Northwestern Bank v. Weston*, 73 N.C. App. 162, 325 S.E.2d 694, *cert. denied*, 314 N.C. 117, 332 S.E.2d 483 (1985), plaintiff contends that this statute is inapplicable since it brought this action to collect on the deficiency on the second mortgage on the property, and initiated the foreclosure under a power of sale in the first mortgage. We disagree. The statute applies to the mortgagee who holds the obligation secured by the property for sale. *Id.* It is designed to protect mortgagors from mortgagees who purchase at sales they have conducted or initiated pursuant to the power of sale in their mortgage contracts with the mortgagors. *Id.*

In *Northwestern Bank*, the plaintiff holder of the second mortgage purchased the property at a foreclosure sale initiated by the holder of the first mortgage. Since it did not initiate the sale and had to compete on an even footing with other bidders, we held

that plaintiff should be regarded as an "other purchaser" not subject to the anti-deficiency provisions of the statute.

In this case, plaintiff held both obligations secured by the property sold. It initiated the sale pursuant to a power of sale in the first mortgage contract, but it still purchased at its own sale, and has brought this deficiency action because the sum it bid did not satisfy the second loan. N.C. Gen. Stat. § 45-21.36 applies well-settled principles of equity to provide protection for debtors whose property has been sold and purchased by their creditors for a sum less than its fair value. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936), *aff'd*, 300 U.S. 124, 81 L.Ed. 552 (1937).

When the mortgagee who initiates the sale also holds the second mortgage on the property, the same possibility of abuse leading to a windfall applies. Plaintiff has provided us with no reason, nor does there appear to be any, why a mortgagor is less in need of protection from a mortgagee purchasing at its own sale simply because the mortgagee holds two mortgages on the property, and bids only enough to cover the first debt despite the fact that the fair value of the property is higher. We hold that when a mortgagee purchases at its own foreclosure sale, its ability to successfully maintain a deficiency action is governed by N.C. Gen. Stat. § 41-21.36 regardless of whether it brings the deficiency action to collect on its second mortgage.

[2] Plaintiff also contends that even if the statute applies to this type of situation, only T & O may rely on it as a defense. The General Assembly clearly intended to limit the protection of the statute to those who hold a property interest in the mortgaged property. *Raleigh Federal Savings Bank v. Godwin*, 99 N.C. App. 761, 394 S.E.2d 294 (1990). Parties without such an interest, but liable on the underlying debt, may not rely on the statute as a defense. *Id.* O'Neill and Tinsley are jointly and severally liable for the debt as general partners of T & O Investments. N.C. Gen. Stat. § 59-45. We must determine, therefore, whether they have any property interest in the mortgaged property.

Each partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. N.C. Gen. Stat. § 59-55(a). The incidents of this tenancy are severely limited. N.C. Gen. Stat. § 59-55(b). These sections of the Uniform Partnership Act tend to lead in opposite directions on the question of a partner's

interest in specific partnership property, with the first section declaring flatly that partners are co-owners, and the second so limiting a partner's rights as to lead to the conclusion that any interest is at best illusory. *See* A. Bromberg and L. Ribstein, *Bromberg and Ribstein on Partnership*, § 3.04 (1988). This conflict has created confusion and conflicting results in the cases. *Cf. Wills v. Wills*, 750 S.W.2d 567 (Mo. App. 1988), with *Mississippi Valley Title Ins. Co. v. Malkove*, 540 So.2d 674 (Ala. 1988).

A tenancy in partnership is *sui generis*. *Ewing v. Caldwell*, 243 N.C. 18, 89 S.E.2d 774 (1955). Traditional concepts of ownership and property interests, therefore, do not fit neatly into an analysis of this tenancy. We hold that each partner, though certainly not enjoying the traditional rights of owners, holds a property interest sufficient to invoke the protection of N.C. Gen. Stat. § 45-21.36. If it were otherwise, mortgagees could avoid the requirements of N.C. Gen. Stat. § 45-21.36 when foreclosing on property owned by a partnership simply by suing the partners for a deficiency. *Raleigh Federal Savings Bank, supra*, and the other cases relied on by plaintiff in which we refused to extend the protection of N.C. Gen. Stat. § 45-21.36 all involve an obligor who willingly assumed an independent obligation. In a partnership context, the obligation is imposed by partnership law, based solely on the parties' status as general partners. "Well-settled principles of equity" which this statute is designed to embody would seem to cut against allowing a creditor a possible windfall recovery from a partner which it could not recover from the partnership on a partnership debt.

[3] Finally, plaintiff contends that allowing defendant to rely on the statutory set-off would violate public policy and alter these parties' bargain. This statute does not relieve the mortgagor of its debt. *Richmond Mortgage and Loan Corp.*, 300 U.S. at 129-30, 81 L.Ed. at 555-56. It simply limits the plaintiff to what it bargained for—repayment in full plus interest. *Id.* Defendants still must produce evidence that the properties sold were fairly worth the amount of the debt *at the time and place of sale*, or at least that they were worth substantially more than was bid. For the reasons stated, the order of the trial court is

Reversed.

Judges GREENE and WYNN concur.

DEBORAH ANN REED, PLAINTIFF v. CLARA PARKS ABRAHAMSON, JAMES OWEN ABRAHAMSON, KAREN BARWICK AND ROBERT LEONARD BARWICK, SR., DEFENDANTS

No. 9015SC568

(Filed 19 March 1991)

Rules of Civil Procedure § 58 (NCI3d)— entry of judgment—notation of jury verdict in clerk's minutes—appeal untimely

Entry of judgment in this case took place when the jury returned a verdict in open court for a sum certain and the clerk made a notation of "jury verdict" in the official minutes, not when the judgment was later signed by the trial judge, and defendant's notice of appeal, filed 32 days after the jury verdict was returned, was untimely. Appellate Rule 3(c); N.C.G.S. § 1A-1, Rule 58.

Am Jur 2d, Appeal and Error §§ 302, 303.

APPEAL by defendants from judgment entered 2 October 1989 in ORANGE County Superior Court by *Judge F. Gordon Battle*. Heard in the Court of Appeals 12 December 1990.

On 21 January 1988 plaintiff filed this personal injury action against defendants for damages suffered in an automobile accident on 22 January 1985. The trial commenced on 26 September 1989 and terminated on 2 October 1989 at which time the jury returned a verdict in favor of plaintiff against all defendants for $50,000.00. On this same day, the assistant clerk of court for the Orange County Superior Court entered the words "jury verdict" on the official minutes of court. Plaintiff prepared a judgment incorporating the jury's verdict which the trial judge signed on 9 October 1989. Defendants Barwick filed written notice of appeal on 3 November 1989. Defendants Abrahamson filed written notice of appeal on 13 November 1989. Plaintiff filed a motion in the trial court to dismiss defendants Barwicks' appeal as untimely pursuant to Rule 3(c) of the North Carolina Rules of Appellate Procedure. The trial court denied plaintiff's motion to dismiss, ruling that defendants' appeal was timely filed.

Prior to filing the record and briefs, plaintiff filed a motion in the Court of Appeals to dismiss the appeals as untimely under

the provisions of Rule 3 of the North Carolina Rules of Appellate Procedure and Rule 58 of the North Carolina Rules of Civil Procedure.

Toms, Reagan & Montgomery, by Frederic E. Toms, for plaintiff-appellee.

E. Elizabeth Lefler and George W. Miller, Jr. for defendants-appellants Karen Barwick and Robert Leonard Barwick, Sr.

Young, Moore, Henderson & Alvis, P. A., by Ralph W. Meekins and Knox Proctor, for defendants-appellants Clara Parks Abrahamson and James Owen Abrahamson.

WELLS, Judge.

Because we find merit in plaintiff's motion to dismiss this appeal as untimely, we first address plaintiff's motion and need not reach the merits of defendants' appeals.

Plaintiff moves to dismiss this appeal pursuant to Rule 3(c) of the North Carolina Rules of Appellate Procedure for the reason that defendants failed to give notice of appeal within thirty (30) days after the entry of judgment in this action. The giving of notice of appeal within the prescribed period is a jurisdictional requirement and defendants' failure to give timely notice renders the Court of Appeals without jurisdiction to hear this appeal. *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983).

Plaintiff contends that entry of judgment occurred on 2 October 1989, the day the jury rendered its verdict for plaintiff against defendants for $50,000.00 and the clerk made notation of "jury verdict" in the official minutes of the Superior Court. Plaintiff further contends that defendants Barwick untimely filed their notice of appeal 32 days later on 3 November 1989. Defendants contend that the date of entry of judgment was 9 October 1989, the date the trial judge signed the judgment. Defendants contend that 9 October 1989 is the proper date because the trial judge delayed entry of judgment by directing plaintiff's attorney to prepare the judgment for signing. Defendants also contend that the clerk's notation provides inadequate notice to constitute an entry of judgment.

Rule 3(c) of the North Carolina Rules of Appellate Procedure requires that written notice of "appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry." The Rule further states:

> If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

N.C.R. App. P. 3(c) (1990). Therefore, the validity of the Abrahamsons' appeal depends upon the timeliness of the Barwicks' appeal. The conditions of entry of judgment are set out in Rule 58 of the North Carolina Rules of Civil Procedure.

Rule 58 provides:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

N.C. Gen. Stat. § 1A-1, Rule 58 (1990). This case falls within the plain language of paragraph one of Rule 58. Neither party contends this judgment was not rendered in open court; therefore, this case is not governed by paragraph three. *See Ives v. Real-Venture, Inc.*, 97 N.C. App. 391, 338 S.E.2d 573 (1990). Nothing in the record suggests that in this case it was necessary for the trial judge to direct notations in the minutes or that this case is governed by paragraph two. *See Behar v. Toyota of Fayetteville*, 90 N.C.

App. 603, 369 S.E.2d 618 (1988). In fact, in his order denying plaintiff's motion to dismiss defendants' appeal as untimely, the trial judge made the finding of fact that "[t]he Court gave no direction to the Clerk with respect to a notation of such verdict." The jury verdict clearly awarded a sum certain for $50,000.00, providing the parties with oral notice of judgment. *See Patel v. Mid Southwest Electric*, 88 N.C. App. 146, 362 S.E.2d 577 (1987). The clerk made the notation "jury verdict" in the official minutes of court on 2 October 1989 and such notation constituted entry of judgment. *Id.*

Defendants further contend that the clerk's notation of "jury verdict" fails to give sufficient detail to constitute an entry of judgment because the notation lacks the award amount and the identification of the prevailing party. We find no authority holding the clerk's notation must be so detailed. Defendants only offer the following statement in *Shuford, North Carolina Civil Practice and Procedure*, 3d § 58-4, pp. 474-75 (1988): "Where the amount of a judgment for money is not included in the notation, it is not considered a proper entry of judgment, and the time for appeal will not begin to run until a proper entry is made." The sole case supporting this proposition in *Shuford* is a case decided under Rule 79(a) of the federal rules which requires the clerk of court to maintain a civil docket with entries showing the substance of each order or judgment of the court. *Id.* However, there is no such corresponding North Carolina rule. *Wilson, North Carolina Civil Procedure*, p. 324 (1989). Although it may be the better practice for the clerk to make notations of the essential terms of the judgment in his minutes, such detail is not required in North Carolina. *Id.* The official comment states that the purpose of Rule 58 is to provide notice to the parties of entry of judgment and that when judgment is entered in open court, as in the case here, all parties will presumably have notice. N.C. Gen. Stat. § 1A-1, Rule 58 (1990) (Official Comment). Consistent with our holding in *Patel, supra*, we must hold that entry of judgment in this case took place when the jury verdict, returned in open court for a sum certain, was noted in the clerk's minutes, not when later signed by the trial judge.

Accordingly, the defendants' appeals are

Dismissed.

Chief Judge HEDRICK and Judge ORR concur.

FOREST OAKS HOMEOWNERS ASSOCIATION OF LINCOLN COUNTY, PLAINTIFF v. DON R. ISENHOUR AND WIFE, NOLA ISENHOUR, DEFENDANTS

No. 9027SC868

(Filed 19 March 1991)

Deeds § 74 (NCI4th)— restrictive covenants—modular homes allowed —mobile homes prohibited

Restrictive covenants prohibiting the erection of mobile homes in a residential subdivision did not apply to keep defendants from erecting what plaintiffs contended was a "double-wide" mobile home, since the Court of Appeals turned to those definitions provided by the official government agencies which have researched the differences between "modular" homes, which were allowed by the restrictive covenants in question, and mobile homes, which were not allowed, and the court determined that the structure in question was a "modular home."

Am Jur 2d, Covenants, Conditions, and Restrictions § 213.

APPEAL by plaintiff from judgment entered 3 April 1990 by *Judge Forest E. Ferrell* in LINCOLN County Superior Court. Heard in the Court of Appeals 25 February 1991.

Plaintiff filed a complaint on 14 September 1989 alleging defendants had violated the restrictive covenants regarding the prohibition against erecting a mobile home in their residential subdivision. On 30 October 1989 plaintiff was granted a preliminary injunction enjoining defendants from any further construction, installation, improvements to, or completion of the structure in question. On 23 February 1990 both parties filed motions for summary judgment. On 3 April 1990 plaintiff's motion for summary judgment was denied and defendants' motion for summary judgment was granted.

Sigmon, Sigmon and Isenhower, by C. Randall Isenhower, for plaintiff-appellant.

Jonas, Jonas & Rhyne, by Richard E. Jonas, for defendants-appellees.

JOHNSON, Judge.

The sole issue on appeal is whether the court erred in granting summary judgment in favor of defendants. Plaintiff contends the

structure erected by defendants is a "double-wide" mobile home which is strictly prohibited by the restrictive covenants of the subdivision, which state in pertinent part:

> No residence of a temporary nature shall be erected or allowed to remain on any lot, and no trailer, basement, shack, tent, garage, barn or any other structure of a similar nature shall be used as a residence on any lot, either temporarily or permanently and no building shall be erected, placed, altered or permitted to remain on any lot, even though it may meet and comply with all of the other conditions and restrictions, if such building is a trailer; or is a shell home; or is a mobile home, whether single-wide, double-wide or larger; or has outer walls which are, or appear to be, constructed of exposed concrete blocks or asbestos shingles or siding.

Plaintiff bases its contention on the following uncontested facts: (1) that the structure was brought onto the property in two sections, both on their own wheels and axles; (2) that each section was built in a factory on permanent metal frameworks; (3) that upon delivery the sections were joined and placed over poured concrete footings without a foundation; and (4) that the foundation was then built under the joined sections.

Elsewhere in the restrictions it states "Modular or component homes or prebuilt homes are permitted provided the same is erected on a permanent foundation and has a 4 in 12 pitch roof and a 16 inch overhang."

Plaintiff also contends the structure did not meet the other restrictive covenants in that the roof pitch did not conform to the restrictions nor was the roof overhang of sufficient depth. These problems were apparently corrected prior to the motion hearing, leaving the sole question of whether the type of structure violates the restrictions.

Plaintiff admits the structure has been given the status of "modular home" as defined by the North Carolina State Residential Building Code. Mobile homes are officially designated "manufactured homes" and are defined in accordance with the Department of Housing and Urban Development Code. The restrictive covenants of the subdivision specifically allow the erection of "modular" homes, although neither "modular" nor "mobile" type homes are clearly defined in the convenants beyond the name designation. Where

covenants are lacking specific definitions, they are given effect according to the natural meanings of the words used. *See Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981).

Plaintiff cites *Barber v. Dixon*, 62 N.C. App. 455, 302 S.E.2d 915, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 732 (1983) wherein this Court held that the defendants' home, brought onto the property in two sections, was a mobile home within the definition of the restrictive covenants in force despite the fact that the axles, wheels and tongues were removed prior to installation. Plaintiff also cites *Starr v. Thompson*, 96 N.C. App. 369, 385 S.E.2d 535 (1989), wherein this Court held under circumstances on point with those in this case, that the definitions of "modular" versus "manufactured" referred to zoning restrictions and were not applicable to definitions contained in restrictive covenants. The *Starr* opinion further states that whether a structure is a "mobile" home depends on its characteristics rather than upon what it is called by zoning authorities or what is established by building standards. *Id.* at 371, 385 S.E.2d at 536.

In both cases, this Court held that the structures in question violated the restrictive convenants in force which prohibited the erection of mobile homes. It is important to note, however, that in both cases the restrictive covenants involved did not specifically allow the erection of "modular" homes. For that reason, this Court was not required to differentiate between the two and could easily interpret the intent of the restrictions to prohibit any structures of the type complained of. In the case before us, the Declaration of Restrictions for the Forest Oaks Subdivision does allow "modular" homes as opposed to "mobile" homes, making a more clearly defined determination of the intent of the restrictions necessary.

Because the covenants in question differentiate between the two types of homes without further definition, this Court must turn to those definitions provided by the official government agencies which have researched the differences. On that basis, and giving effect to the natural meanings of the words used, we find the structure in question to be a "modular" home and as such does not violate the restrictive covenants in force at the Forest Oaks Subdivision.

For this reason, we find no error in the trial court's granting of summary judgment for defendants.

Affirmed.

Judges PHILLIPS and WYNN concur.

GUILFORD COUNTY PLANNING & DEVELOPMENT DEPARTMENT AND GUILFORD COUNTY v. DALE SIMMONS AND WIFE, JUDY SIMMONS

No. 9018DC587

(Filed 19 March 1991)

Municipal Corporations §§ 30.11, 31.2 (NCI3d)— building chicken houses—question as to location of property—failure to petition for review of denial of variance—defendants collaterally estopped from raising issues

In an action for a restraining order to prohibit defendants from building chicken houses on the property in question without the required building permit, setback requirements, and other approval procedures, the trial court was required to determine whether the property in question is located in Guilford County; if it is not in Guilford County, the Board had no authority and plaintiff's suit must be dismissed; if the property is in Guilford County, defendants are collaterally estopped from raising an issue as to whether the property in question is subject to the Guilford County zoning ordinance, since defendants failed to petition the superior court for review of the Board's denial of their request for a variance.

Am Jur 2d, Administrative Law §§ 493-495; Zoning and Planning § 245.

APPEAL by plaintiffs from judgment entered 28 March 1986 by *Judge J. Bruce Morton* in GUILFORD County District Court. Heard in the Court of Appeals 24 October 1990.

Guilford County Attorney's Office, by Samuel M. Moore, J. Edwin Pons and Jonathan V. Maxwell, for plaintiff appellants.

J. Frank Harris for defendant appellees.

COZORT, Judge.

The case below has its origins in the defendants' request for a building permit from the Guilford County Department of Planning and Development. Their request was denied, and they appealed to the Guilford County Board of Adjustment (the Board). The defendants sought a variance from setback requirements of Guilford County's zoning ordinance in order to construct two chicken houses. The Board denied the defendants a variance. Nevertheless, the defendants began construction of the chicken houses, and the plaintiffs initiated the case below with a complaint seeking a temporary restraining order against the defendants and preliminary and permanent injunctions prohibiting the defendants from building "on the portion of the property located in Guilford County without the required building permit, setback requirements and other approval procedures." The defendants answered, and, after further pleading, the case was tried without a jury. The trial court's judgment of 28 March 1986 denied the relief prayed for by plaintiffs, and they appealed. We vacate the judgment and remand the case for additional findings pursuant to N.C. Gen. Stat. § 1A-1, Rule 52 (1990).

On review we note initially that Rule 52(a) provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Under Rule 52(a)(1), the "facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

The parties stipulated that the issues to be tried were:

a. Whether the property owned by the Defendants upon which they seek to erect chicken houses is subject to the Guilford County Zoning Ordinance.

b. Whether the property owned by the Defendants upon which they seek to erect chicken houses is located in Guilford County.

On those issues the trial court made the following pertinent finding of fact and conclusions of law:

14. That the Court is of the opinion that this case can be decided on issue a. in paragraph 12.a. in the Pre-Trial Order—whether the Defendants' property is subject to the Guilford County Zoning Ordinance; that the Court declines to proceed to issue b. in paragraph 12.b. in the Pre-Trial Order since the Court is of the opinion that issue b. is not necessary to a determination of this case.

* * * *

3. That the property upon which the Defendants seek to erect chicken houses is not shown on the Official Zoning Map of Guilford County (Plaintiffs' Exhibit 9) and is therefore not in Guilford Guilford [*sic*] for zoning purposes only.

* * * *

5. That this case can be decided on issue a. in paragraph 12.a. in the Pre-Trial Order—whether the defendants' property is subject to the Guilford County Zoning Ordinance; that the Court declines to proceed to issue b. in paragraph 12.b. in the Pre-Trial Order since issue b. is not necessary to a determination of this case.

Whether the property in question is located within Guilford County is a threshold issue. If the property is not in the county, the Board has no authority over it. N.C. Gen. Stat. §§ 153A-320, -340 (1987). If the Board lacks authority, the trial court lacks subject matter jurisdiction to entertain the plaintiffs' suit. If, upon remand, the court finds that the property is not in Guilford County, the court must dismiss the plaintiffs' suit.

If, on the other hand, the court finds that the property in question is in Guilford County, the defendants are collaterally estopped from raising in the case below issues they were required to raise by petitioning for review of the Board's decision. N.C. Gen. Stat. § 153A-345(e) (1987) provides in pertinent part that

> [E]ach decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary

> or chairman of the board at the time of its hearing of the case, whichever is later.

Having failed to petition the superior court for review of the Board's denial of their request for a variance, the defendants cannot now be heard to assert that the property on which they are building "is not shown within the boundaries of Guilford County as depicted on the official zoning map of Guilford County and therefore is not subject to the Guilford County zoning ordinance."

In *Durham County v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964), the defendant appealed to the Board of Adjustment for a variance after he had been denied a building permit. The Board upheld the administrator's denial of the permit; the defendant did not petition for review of the Board's decision. When the defendant proceeded with construction, the plaintiff sought injunctive relief to enforce Durham County's zoning ordinance. The Court held:

> with reference to the adverse decision by the Board of Adjustment, the applicable statutes provide: "Every decision of such board shall be subject to review by the superior court by proceedings in the nature of *certiorari*." The decision of the Board of Adjustment is not subject to collateral attack. As stated . . . in *S. v. Roberson*, "When . . . the building inspector's decision was affirmed by the board of adjustment the defendant should have sought a remedy by proceedings in the nature of *certiorari* for the purpose of having the validity of the ordinances finally determined in the Superior Court, and if necessary by appeal to the Supreme Court. This he failed to do and left effective the adjudication of the board of adjustment."

Addison, 262 N.C. 280, 283-84, 136 S.E.2d 600, 603 (1964) (citations omitted). Our Courts have consistently required litigants aggrieved by decisions of Boards of Adjustment to seek relief as mandated by statute. *See City of Hickory v. Catawba Valley Machinery Co.*, 39 N.C. App. 236, 238, 249 S.E.2d 851, 852 (1978); *Elizabeth City v. LFM Enterprises Inc.*, 48 N.C. App. 408, 413, 269 S.E.2d 260, 262 (1980); and *New Hanover County v. Pleasant*, 59 N.C. App. 644, 648-49, 297 S.E.2d 760, 762 (1982).

The case below is remanded to the trial division for a finding on the issue of whether the property on which the defendant is building is located in Guilford County and for entry of the ap-

propriate judgment pursuant to Rule 52(a). Upon remand the trial court may hear additional evidence, if the court determines such is necessary to resolve that issue.

Vacated and remanded.

Judges WELLS and LEWIS concur.

BASIL S. HARRIS, PLAINTIFF v. THE PROCTER & GAMBLE MANUFACTURING COMPANY, DEFENDANT

No. 9018SC840

(Filed 19 March 1991)

Libel and Slander § 10 (NCI3d)— employee's suspected drug involvement—discharge—details communicated to employees—no abuse of qualified privilege

Where plaintiff was dismissed from his employment with defendant because of suspected involvement with drugs, plaintiff did not show that defendant exceeded the scope of its qualified privilege by communicating the details of his discharge to all employees in the Greensboro facility and to those away at the Cincinnati facility, since plaintiff offered no evidence of actual malice or excessive publication.

Am Jur 2d, Libel and Slander §§ 116, 275.

Libel and slander: privileged nature of communications to other employees or employees' union of reasons for plaintiff's discharge. 60 ALR3d 1080.

APPEAL by plaintiff from *Freeman (William H.), Judge*. Order entered 10 May 1990 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 February 1991.

This is a civil proceeding wherein plaintiff alleged intentional infliction of emotional distress, negligence and defamation of character (slander and libel) by defendant, Procter & Gamble. The record on appeal tends to show that plaintiff was employed by defendant at its Guilford County facility on or about 8 June 1981. Mr. J. R. (Roy) Thornton was the plant manager in charge of this

facility. Mr. Thornton focused his energy on "sound business and human relations principles" thus creating a teamwork type of environment at the facility. Sometime in the fall of 1988, Thornton became concerned that the facility and its employees were not drug free. Mr. Thornton solicited help with this problem from the Procter & Gamble headquarters in Cincinnati. Mr. Joe Corry came to the facility to conduct an investigation and inquiry. Following his arrival, notice of his presence and purpose was given to employees. Following this notice, Mr. Corry conducted interviews with several employees including plaintiff, and inquired about drug use in the facility. Plaintiff denied any involvement with drugs and any knowledge of other employees using drugs. Two managers were present during the interviews with Corry. Sometime after the interviews, plant management called a meeting to discuss the results and propose actions based on the results. Managers were informed of individuals suspected to be involved with drugs. After this discussion, management concluded that eight people should be discharged, including plaintiff. Upon arriving at work on 12 December 1988, plaintiff was informed of his discharge and escorted to the employee exit. Employees at the facility were told the names of the eight discharged employees and the reason for discharge from a "talk sheet" where the statement was written. Company employees away from the plant were called and informed of the discharges as well. Employees were told not to discuss information dealing with the discharges as this might lead to legal exposure for the employees. Plaintiff filed a complaint against defendant 1 February 1989 in Guilford County Superior Court. Defendant filed a motion for summary judgment 27 April 1990. From an order granting summary judgment entered 10 May 1990, plaintiff appealed.

Romallus O. Murphy for plaintiff, appellant.

Smith Helms Mulliss & Moore, by Martin N. Erwin and Michael A. Gilles, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff's sole argument on appeal is that the trial court erred in granting defendant's motion for summary judgment. Plaintiff argues the evidence shows that a genuine issue of material fact existed and, therefore, defendant is not entitled to judgment as a matter of law. We disagree.

Plaintiff concedes that defendant was entitled to a qualified privilege concerning the communication that plaintiff had been discharged. However, plaintiff argues defendant exceeded the scope of his qualified privilege by communicating the details of his discharge to all employees in the Greensboro facility and those away at the Cincinnati facility.

"Summary judgment is the device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980); N.C. R. Civ. P. 56. In determining whether summary judgment is proper, the court must view the evidence in the light most favorable to the nonmoving party, giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor. *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E.2d 190 (1975).

> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Stewart v. Check Corp., 279 N.C. 278, 285, 182 S.E.2d 410, 415, (1971), quoting, 50 Am. Jur.2d Libel and Slander section 195 (1970).

The essential elements for the qualified privilege to exist are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and to proper parties only. *Id.* Even though a qualified privilege may provide a defense to a defamation action, if this privilege is found to be abused, it ceases to exist. *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 201 S.E.2d 503, *cert. denied*, 285 N.C. 85, 203 S.E.2d 57 (1974).

"The qualified privilege may be lost by proof of actual malice on defendant's part or by excessive publication." *Id.* at 346, 201 S.E.2d at 508. The evidentiary matter offered in support of the motion for summary judgment discloses, and plaintiff concedes, that the defendant had a qualified privilege with respect to com-

munications concerning plaintiff's discharge. Plaintiff did not show actual malice nor excessive publication merely by presenting evidence that the defendant told all facility employees about his dismissal and facts relating to his dismissal. Once defendant had offered evidence disclosing the qualified privilege the burden was on plaintiff to offer some evidence that the publication was malicious or excessive.

Plaintiff has offered nothing to raise a genuine issue of material fact with respect to malice or excessive publication. Summary judgment for the defendant was proper and will be affirmed.

Affirmed.

Judges COZORT and LEWIS concur.

WATHA PAINTER GRIGG AND BRENT LYDELL GRIGG v. ROBERT LESTER, M.D., AND GASTON GYNECOLOGY & OBSTETRICS, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION

No. 8827SC1359

(Filed 19 March 1991)

Physicians, Surgeons, and Allied Professions § 16 (NCI3d)— injury to uterus during caesarean section—res ipsa loquitur inapplicable

In a medical malpractice action where defendant performed a caesarean section on plaintiff, she suffered an unrepairable tear in the rear wall of the uterus which had to be removed, there was no direct proof of the cause, and defendant was in control of the medical procedure during which the injury occurred, the trial court did not err in failing to instruct the jury on the doctrine of *res ipsa loquitur*, since the injury in question was not of a type that ordinarily does not occur in the absence of some negligence by the physician; *res ipsa loquitur* is based upon common knowledge and experience; and the cause of tears which occur in the uterus during the process of delivering a child by caesarean section is not generally known to laymen.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 278, 333-335.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during cesarean delivery. 76 ALR4th 1112.

APPEAL by plaintiffs from judgment entered 16 June 1988 by *Judge Forrest A. Ferrell* in GASTON County Superior Court. Heard in the Court of Appeals 22 August 1989.

Kelso & Ferguson, by Lloyd T. Kelso, for plaintiff appellants.

Kennedy Covington Lobdell & Hickman, by Charles V. Tompkins, Jr., for defendant appellees.

PHILLIPS, Judge.

The trial of this medical negligence action ended with the jury finding that the injury the femme plaintiff admittedly sustained while defendant obstetrician was undertaking to deliver her child by caesarean section was not caused by his negligence. That it was appropriate to deliver the child surgically, after several hours of unprogressive labor, is conceded—disputed is whether the nature of the injury and the circumstances surrounding it required the court to charge the jury on the doctrine of *res ipsa loquitur*, as plaintiffs requested. The doctrine applies, so our Courts have held many times, when direct proof of the cause of an injury is not available, the instrumentality involved in the accident is under the defendant's control, and the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission. *Snow v. Duke Power Co.*, 297 N.C. 591, 256 S.E.2d 227 (1979); *Parks v. Perry*, 68 N.C. App. 202, 314 S.E.2d 287, *disc. review denied*, 311 N.C. 761, 321 S.E.2d 142 (1984); *Russell v. Sam Solomon Co.*, 49 N.C. App. 126, 270 S.E.2d 518 (1980), *disc. review denied*, 301 N.C. 722, 274 S.E.2d 231 (1981). The injury was an unrepairable tear in the rear wall of the uterus, which had to be removed, there is no direct proof of the cause, and defendant was in control of the medical procedure during which the injury occurred. Thus, the decisive issue is whether the injury is one that does not ordinarily occur in the absence of some negligent act or omission. If it is, the doctrine of *res ipsa loquitur* applies to plaintiffs' case and the court's failure to instruct the jury thereon would require a new trial. For though the failure to charge the doctrine did not prevent the case from going to the jury, plaintiffs' position would have been materially stronger if the doctrine had been charged. *Hyder v. Weilbaecher*, 54 N.C. App. 287, 283 S.E.2d 426 (1981), *disc. review denied*, 304 N.C. 727, 288 S.E.2d 804 (1982).

The direct evidence as to plaintiff's injury is contained in an explanation that Dr. Lester gave to Mrs. Grigg and his testimony as an adverse witness. His explanation of her injury was as follows:

> That there had been complications and that I had had an abnormality of the uterus which is called like a Bandl's ring around the baby's head, and when they went in, they couldn't get the baby through the ring and couldn't get him out of the ring and in the process of trying to deliver the baby, it had torn the wall of the uterus away and they had to, you know, do the hysterectomy.

His testimony was to the following effect: After making the customary transverse incision across the front part of the uterus, he reached inside to bring the baby's head up out of the pelvis, but was unable to dislodge the baby's head from the lower part of the uterus; he worked his fingers to the bottom of the baby's head and had a nurse to push through the vagina with her hand to try to break the suction on the head; while continuing to work his fingers back and forth underneath and on the top of the baby's head, it suddenly came free but suddenly disappeared into the plaintiff's abdomen through a tear in the rear wall of the uterus; after delivering the baby, he and an obstetrician who assisted in the procedure determined that the tear extended across almost the entire back wall of the uterus and could not be repaired; he could not explain why the tear occurred; he had not had a similar experience in his practice and knew of no obstetrician who had.

The only other pertinent evidence concerning the injury is contained in the hospital record and the opinion testimony based thereon. *Plaintiffs' obstetrical expert*, who expressed the opinion that defendant was negligent in several respects, opined or testified as follows: The tear across the rear of the uterus was caused by defendant's hand in attempting to forcibly move the baby's head from the uterus; there was no Bandl's ring, no constriction ring; it was a traumatic tear that occurred after he began manipulating the baby's head in an attempt to deliver the child; after failing in his attempts to pass his hand behind the head to act as a shoehorn he should have taken some other step to push the head up, but he just kept trying to move the head up towards the back of the womb with his hand; the injury is uncommon; he had never seen or heard of one like it; it is not an inherent risk of a caesarean section; the instrumentality that caused the

injury was Dr. Lester's hand; in such situations the obstetrician must be gentle because the baby's and mother's tissues in the area are fragile; "[i]t would take a fair amount of force to push your hand through the uterus, although the back part of the uterus is thinned out, it's still a muscle and it would take a fair amount of force . . . It doesn't happen accidentally. One would have to persist in pushing against the back of the uterus, which one should never do, to tear it"; attempting to deliver the head by using his hand in the lower part of the uterus after it became obvious it was not going to work was inappropriate. One of *defendants' experts* expressed the opinion that because of the position of the uterus and the child the uterus could not have been torn as it was by Dr. Lester pushing with his hand.

We cannot find that the injury in question is of a type that ordinarily does not occur in the absence of some negligence by the physician, and therefore hold that the *res ipsa loquitur* doctrine does not apply to this case and the court's failure to charge thereon was not error. This is our decision because *res ipsa loquitur* is based upon common knowledge and experience, Prosser and Keeton, *The Law of Torts*, Sec. 39, pp. 244-251 (5th ed. 1984), and in our opinion as of yet the cause of tears that occur in the uterus during the process of delivering a child by caesarean section is not generally known to laymen. Any layman, we think, could properly infer from the nonopinion testimony presented in this case that the tear resulted from force applied by Dr. Lester—but in the absence of testimony by someone knowledgeable and expert in such matters, a layman would have no basis for concluding that the force exerted was either improper or excessive. The common knowledge, experience and sense of laymen qualifies them to conclude that some medical injuries are not likely to occur if proper care and skill is used; included, *inter alia*, are injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field. *See Mitchell v. Saunders*, 219 N.C. 178, 13 S.E.2d 242 (1941); *Parks v. Perry, supra.* But the cause or causes of tears in the uterus during a caesarean section is neither so apparent nor well known as the cause of those and similar injuries.

Plaintiffs' other contentions, even if they had merit, are not about matters that would justify a new trial, as counsel candidly conceded in arguing the appeal, and discussing them would serve no purpose.

No error.

Judges WELLS and PARKER concur.

JAMES WARNER CRATT, EMPLOYEE, PLAINTIFF v. PERDUE FARMS, INC., EMPLOYER; SELF-INSURED (CRAWFORD & COMPANY, SERVICING AGENT), DEFENDANT

No. 9010IC875

(Filed 19 March 1991)

Master and Servant § 96.6 (NCI3d)— workers' compensation— employee's leg and back discomfort—Industrial Commission's finding not supported by evidence

There was no competent evidence to support the Industrial Commission's finding that plaintiff was "suffering no significant back or leg discomfort," since there was evidence that plaintiff continued to experience severe back and leg discomfort any time he attempted to become normally active and that the condition was at least partially attributable to the injury plaintiff sustained while in defendant's employ; therefore, the case is remanded to the Industrial Commission for a finding as to whether plaintiff was permanently and totally disabled within the meaning of N.C.G.S. § 97-29.

Am Jur 2d, Workmen's Compensation §§ 289, 340, 550.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 17 April 1990. Heard in the Court of Appeals 20 February 1991.

This is a proceeding under the Worker's Compensation Act wherein plaintiff seeks to recover compensation for injuries sustained. The record tends to show the following: On 19 April 1986, plaintiff suffered a back injury while working for Perdue Farms, Inc. This injury aggravated a pre-existing but previously asymptomatic degenerative condition of plaintiff's spine, and necessitated surgery to excise a herniated disc, as well as corrective surgery to alleviate decompression of the lumbar nerve roots resulting from the pre-existing degenerative condition.

The Industrial Commission made findings of fact and conclusions of law and awarded plaintiff compensation at a rate of $165.75 per week during the period 26 June 1986 to 17 June 1987 on account of plaintiff's temporary total disability, and an additional seventy-five weeks compensation at the same weekly rate on account of his retained twenty-five per cent (25%) permanent partial disability pursuant to G.S. 97-31, as well as reasonable attorney fees, and medical expenses incurred as a result of the injury by accident.

Plaintiff appealed.

Hugh D. Cox for plaintiff, appellant.

Williamson, Herrin, Barnhill & Savage, by Mickey A. Herrin, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff assigns error to the refusal of the Commission to award him permanent total disability benefits pursuant to G.S. 97-29. Plaintiff argues that the evidence shows that he is permanently disabled from any and all kinds of employment because of his severe back and leg discomfort, a degenerative condition which is not expected to improve.

In *Harmon v. Public Service of N.C., Inc.*, 81 N.C. App. 482, 344 S.E.2d 285, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 595 (1986), quoting *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E.2d 214 (1985), this Court held that when an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, the award of workers' compensation must take into account such impairment and also that a plaintiff suffering from "chronic back and leg pain" cannot be fully compensated under G.S. 97-31 and is entitled to compensation under G.S. 97-29.

In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the conclusions of law are supported by the findings of fact. *Barham v. Food World*, 300 N.C. 329, 266 S.E.2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 116 (1980).

The Industrial Commission found as a fact that plaintiff "ultimately reached maximum medical improvement and/or the end of the healing period" and that plaintiff was having "no significant back or leg discomfort." Based on that determination, the Commission concluded as a matter of law that plaintiff was not entitled to recover for permanent total disability under G.S. 97-29, but was relegated to a recovery under G.S. 97-31 for permanent partial disability of the back.

In reviewing the record, we find no competent evidence to support the finding that "the plaintiff is suffering no significant back or leg discomfort." On the contrary, our review finds evidence which shows that plaintiff is continuing to experience severe back and leg discomfort any time he attempts to become normally active, and that this condition is at least partially attributable to the injury plaintiff sustained. Whether the evidence in the record is sufficient to support a finding that plaintiff is totally and permanently disabled within the meaning of G.S. 97-29 is yet to be determined.

Therefore, the cause is remanded to the Industrial Commission to make findings from the evidence sufficiently definitive to determine the question of whether the plaintiff is entitled to benefits under G.S. 97-29.

Remanded.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. ROBERT McINNIS

No. 9018SC1031

(Filed 19 March 1991)

1. Bastards § 5.1 (NCI3d)— nonsupport of illegitimate child— inconsistent results of blood tests properly admitted

In a prosecution of defendant for nonsupport of an illegitimate child, the trial court did not err in allowing into evidence inconsistent results of blood tests, as such evidence was not excluded by N.C.G.S. § 8-50.1(a)(1).

Am Jur 2d, Bastards § 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

2. Bastards § 5 (NCI3d)— nonsupport of illegitimate child— presence of male at hospital—blanks on birth certificate— evidence properly excluded

In a prosecution of defendant for nonsupport of an illegitimate child, the trial court did not err in excluding (1) hospital records which defendant argued were admissible to show that a putative father other than defendant was seen with the mother and child at the hospital and (2) the birth certificate with the name of the father left blank, since the hospital records had little probative value and were misleading because no evidence was presented identifying the male person, who could have been a relative or friend, and the absence of a named father on the birth certificate had little probative value and was misleading because under N.C.G.S. § 130A-101(f) the name of the father of an illegitimate child may not be entered on the child's birth certificate without the father's sworn consent.

Am Jur 2d, Bastards §§ 104, 113.

APPEAL by defendant from judgment entered 5 April 1990 in GUILFORD County Superior Court by *Judge James A. Beaty, Jr.* Heard in the Court of Appeals 22 February 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane T. Friedensen, for the State.

Barry Snyder for defendant-appellant.

WYNN, Judge.

Defendant was charged by warrant with nonsupport of an illegitimate child. After pleading guilty in district court, he gave notice of appeal to superior court. In a special verdict, the jury found defendant to be the father of the child, to have been demanded by the mother to adequately support the child, to have willfully neglected or refused to maintain or provide adequate support for the child, and to be guilty of willful neglect or refusal to provide adequate support and maintain his illegitimate child. The jury accordingly found defendant guilty as charged. Defendant received a suspended six-month sentence. He appealed.

None of defendant's six assignments of error merit relief.

[1] By his first assignment of error, defendant contends the court erred by admitting the result of blood tests showing the probability of defendant's fathering the child to be 99.54%. Citing N.C. Gen. Stat. § 8-50.1(b)(1), he argues that the test result was not admissible because it varied greatly from the result of blood tests performed by another laboratory showing the probability of paternity to be only 93.75%. We disagree.

Preliminarily, we note that N.C. Gen. Stat. § 8-50.1(b)(1) is applicable to civil actions only; the statute which applies to criminal actions is N.C. Gen. Stat. § 8-50.1(a)(1). This statute simply provides that when test results are consistent and show the defendant not to be the father of the child, the jury is required to return a special verdict of not guilty. We see nothing in this statute which prohibits the admission into evidence of inconsistent results.

[2] Defendant also contests the exclusion of evidence through his second through fifth assignments of error, which we address seriatim. Under his second assignment, defendant contends that the trial court erred by excluding hospital records which purported to show that the mother, a father and child were "bonding." Under the third assignment, he contends that the trial court erred by excluding the child's birth certificate in which the name of the father was left blank. Defendant argues that the hospital records were admissible to show that a putative father other than defendant was seen with the mother and child at the hospital and that the birth certificate was admissible to impeach the mother's testimony by showing that at an earlier time she did not name defendant as the father.

Assuming, *arguendo*, that the hospital records and birth certificate were relevant and admissible for the purposes stated by defendant, we hold that the trial court did not abuse its discretion in excluding the evidence under N.C. Gen. Stat. § 8C-1, Rule 403, because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The hospital records had little probative value and were misleading because no evidence was presented identifying the male person, who could have been a relative or friend. Likewise, the absence of a named father on the birth certificate had little probative value and was misleading because under N.C. Gen. Stat. § 130A-101(f) (1990 Cum. Supp.), the name of the

father of an illegitimate child may not be entered on the child's birth certificate without the father's sworn consent.

Defendant does not sufficiently identify the excluded evidence which forms the basis of his fourth and fifth assignments of error. The record does not show the content or substance of the excluded testimony so we cannot determine whether the exclusion was prejudicial. These assignments of error are therefore dismissed. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *cert. granted and judgment vacated on other grounds*, --- U.S. ---, 108 L.Ed.2d 602 (1990).

By his final assignment of error, defendant contends that he was denied due process by the court's threat to hold defendant's counsel in contempt of court for his persistence in seeking the admission of the hospital records. We cannot find any such threat in the settled record on appeal. This assignment of error is also dismissed.

We hold defendant received a fair trial free of prejudicial error.

No error.

Judges JOHNSON and PHILLIPS concur.

MORRIS E. ABEYOUNIS, JOHN S. CAREY, CHESTER D. COMBS, TERESA G. FOUNTAIN, A. P. KATALINIC, ROBERT DAVID KIDD, MICHAEL B. LASSITER, L. R. NARRAMORE, R. O. PARROTT, HOVIE POPE, KEVIN T. REID, J. N. SMITH, GEORGE A. WESSON, GARY W. ZIBELIN, PLAINTIFFS v. TOWN OF WRIGHTSVILLE BEACH, DEFENDANT

No. 905SC804

(Filed 19 March 1991)

Retirement Systems § 4 (NCI3d)— contribution to officers' retirement plan—contribution improperly funded from salary increase

The trial court properly found that defendant town funded the mandatory two percent contribution to police officers' Supplemental Retirement Income Plan from a three and one-half percent pay increase for town employees in violation of N.C.G.S. § 143-166.50, since the statute clearly provided that the employer

and not the employee should fund the contribution, and the town manager's testimony was unequivocal that the Board of Aldermen funded the mandatory two percent contribution from the salary increase.

Am Jur 2d, Pensions and Retirement Funds § 1608.

APPEAL by defendant, Town of Wrightsville Beach, from a judgment entered 3 April 1990 at the Civil Superior Court, NEW HANOVER County by *Judge David E. Reid.* Heard in the Court of Appeals 13 February 1991.

Hewlett & Collins, by John C. Collins, for plaintiff-appellees.

Martin, Wessell & Raney, by John C. Wessell, III, for defendant-appellant.

LEWIS, Judge.

N.C.G.S. § 143-166.50(e) states in part that:

> From July 1, 1987 until July 1, 1988, local government employers shall contribute an amount equal to at least two percent of participating local officer's monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers; . . .

In 1987 the Town Manager of Wrightsville Beach issued the following Budget Message to the Mayor and Board of Aldermen:

> A 3½% increase in the pay plan is recommended for permanent employees in all ranges and steps. . . . In the case of Police Officers the 2% 401(K) contribution which the Town has been mandated by the General Assembly to make on behalf of each officer will come from this 3½% increase. Thus, police officers will see an increase of 1½% in gross take home pay. The balance of the 3½% increase will be directed to a tax deferred 401(K) account.

The Town enacted budget Ordinance No. 1059 (1987), assigning a one and one-half percent raise to the Town police and a three and one-half percent raise to all other employees. Plaintiffs filed a complaint for declaratory judgment on the issue of whether the Town's apparent deduction of the mandated two percent contribution from a three and one-half percent wage increase for Town employees violates N.C.G.S. § 143-166.50. At trial plaintiffs offered

in evidence an opinion of the Attorney General's office which stated that the mandated two percent contribution may not be taken out of salary or salary increases. The trial court found that the Town had deducted its two percent contribution from the three and one-half percent pay raise and concluded that "payment of the contribution may not be funded from the officer's (sic) own salary or salary increase or a portion thereof."

Defendant appeals on the basis that the court's interpretation of the statute undermines the Town's executive discretionary authority to decide the salary increase of its employees. The Town argues that a statute must be construed strictly and that if the legislature had intended to preclude their practice of deducting the contribution from the officer's salary increase, the statute would have so stated. The Town argues, in the alternative, that the two percent contribution did not come from the officers' salary increase because they never received a three and one-half percent increase. Counsel for both parties acquitted themselves well in preparing for and arguing this case.

A statute is to be construed according to its plain language and need not be constructed where it speaks for itself. *J.F. Nance v. Southern Railway*, 149 N.C. 267, 272, 63 S.E. 116, 118 (1908). Where a statute provides that the municipal employer shall make a contribution of an amount equal to at least two percent of an employee's monthly compensation to the Supplemental Retirement Fund, the language clearly states that the employer and not the employee fund the contribution. N.C.G.S. § 143-166.50. Were the contribution to come from the employees' salary or from a salary increase the employees otherwise would have received, then the employee and not the employer would be funding the contribution, contravening the statute.

The trial court found that the Town funded the mandatory two percent contribution from the salary increase of the officers. Findings of the trial court in an action for declaratory judgment are to be upheld where they are supported by competent evidence. *Collier v. Mills*, 245 N.C. 200, 209, 95 S.E.2d 529, 533 (1956). The Town Manager testified at trial that the Board decided to raise the salary of the police officers one and one-half percent because it adopted his recommendation to deduct the two percent mandatory contribution from the three and one-half percent raise the police otherwise would have received. The court specifically asked the Town Manager the following:

Court: Your statement then is that all Town employees had a 3½ percent increase in comparison, but that for the police officers 2 percent of that increase was directed to the 401(K) plan?

Ans: Yes.

The Town manager's testimony is unequivocal that the Board of Aldermen funded the mandatory two percent contribution from the salary increase. Where it is clear that but for the mandatory two percent contribution the officers would have received the full three and one-half percent raise, which the Town has effectively admitted in its brief and at oral argument, reason dictates that the contribution is being funded from the salary increase of the officers. The trial court's finding is supported by competent evidence. *Collier v. Mills*, 245 N.C. 200, 209, 95 S.E.2d 529, 533 (1956). The Town may increase or decrease the salary of the officers according to its own discretion, as long as the Town and not the officers fund the mandatory two percent contribution. Where the contribution is funded from the salary increase of the officers, the Ordinance violates N.C.G.S. § 143-166.50.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. KATRINA MARIE GRANT CALLAHAN

No. 9016SC945

(Filed 19 March 1991)

Constitutional Law § 340 (NCI4th)— judge in jury chambers— constitutional right of defendant to be present violated

Defendant's constitutional right to be present at every stage of his trial was violated by the trial judge's ex parte communications with the jury before the verdict was rendered. Art. I, §§ 18 and 23 of the N. C. Constitution; Sixth and Fourteenth Amendments to U. S. Constitution.

Am Jur 2d, Trial §§ 600, 1001, 1048.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR4th 410.

APPEAL by defendant from judgment entered 1 March 1990 in ROBESON County Superior Court by *Judge Samuel T. Currin.* Heard in the Court of Appeals 22 February 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie L. Bateman, for the State.

Assistant Public Defender Daniel Shatz for defendant appellant.

WYNN, Judge.

Defendant was convicted of first degree burglary and was sentenced to fifty years active imprisonment. Defendant appeals.

Defendant has offered eight arguments on appeal based on ten assignments of error. Because the first argument warrants a new trial for defendant, we need not address the others. The facts of this case do not bear on the assignment brought forward, and likewise do not merit discussion here.

The record reveals that during the course of the trial, the presiding trial judge, Judge Samuel T. Currin, engaged in an ex parte communication with the jury. Following a lunch recess, the jury was instructed to reassemble in the jury deliberation room. Prior to reconvening court, Judge Currin entered the jury room where the jurors had gathered. During this time period, the length of which is not revealed in the record, Judge Currin was alone with the jurors. Neither defendant, her attorney, the court reporter, nor any other court personnel were present. Judge Currin's entrance and exit from the jury room was observed by the defense counsel, the courtroom clerk, and the court reporter. The allegation is not refuted by the State. This conduct on the part of the presiding judge violated the defendant's rights under article I, sections 18 and 23 of the North Carolina Constitution and the sixth and fourteenth amendments of the United States Constitution.

Article I, section 23 of the North Carolina Constitution gives a criminal defendant the right to be present at every stage of her trial. *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969). The sixth and fourteenth amendments to the United States Constitution give an accused the same protection. *Id.* (citing *Pointer*

v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923 (1965)). A criminal defendant also has the right to a public trial, a right guaranteed by article I, section 18 of the North Carolina Constitution and the sixth and fourteenth amendments to the United States Constitution. "The public, and especially the parties are entitled to see and hear what goes on in the courts." *In Re Nowell*, 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977) (citations omitted). *See also Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984).

It is well established under North Carolina law that *ex parte* communications between the trial court and the jury is prohibited. In *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987), our Supreme Court reversed a defendant's conviction because the trial court admonished the jury in the jury room outside the presence of the defendant, counsel and court reporter. The Court held that this communication violated the defendant's right to be present at every stage of his trial. *Id.* at 139, 357 S.E.2d at 612.

The Supreme Court again addressed this issue in *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990). There, the trial court had held private, unrecorded bench conferences with three potential jurors. The court then excused the jurors. These private communications between the court and the prospective jurors took place in the courtroom with the defendant and counsel present. Nevertheless, the Supreme Court held that the private communications at the bench denied the defendant his right to be present at every stage of the trial.

Finally, and perhaps most telling in this case, is *State v. Buckom*, 100 N.C. App. 179, 394 S.E.2d 704 (1990). In that case, the presiding judge (the same judge who presided over the case *sub judice*) twice met with the jurors in the jury room in the absence of the defendant or the court reporter (the defendant was proceeding *pro se*). One of the meetings occurred during a recess prior to the jury rendering its verdict. This court held that the conduct of the trial judge was indistinguishable from that in *Payne, supra*, and constituted reversible error.

As in *Buckom*, the defendant's constitutional right to be present at every stage of her trial was violated by the Judge's *ex parte* communications with the jury before the verdict was rendered. It follows that the defendant is entitled to a new trial.

New trial.

Judges JOHNSON and PHILLIPS concur.

PAMELA WRAY McCOLLUM v. PHILLIP J. McCOLLUM v. FIRST NATIONAL BANK OF REIDSVILLE

No. 9017DC915

(Filed 19 March 1991)

Rules of Civil Procedure § 14 (NCI3d)— divorce and equitable distribution action—bank not a proper third-party defendant

In an action for divorce and equitable distribution, the trial court did not err in dismissing defendant's third-party complaint against a bank from which plaintiff allegedly fraudulently obtained an equity line of credit secured by a deed of trust on the marital home, since a defendant, as a third-party plaintiff, may file a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of plaintiff's claim against him; the bank could not be held liable to defendant should an absolute divorce be granted; if the transaction resulting in the deed of trust was found to have been entered into without defendant's consent and knowledge, the debts secured by the deed of trust would be held separate to plaintiff; and any misconduct by plaintiff affecting the value of the property would also be considered in distributing the property.

Am Jur 2d, Divorce and Separation §§ 863, 903, 929, 940, 941, 951.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division. 41 ALR4th 416.

APPEAL by defendant/third-party plaintiff, Phillip J. McCollum, from order entered 21 May 1990 in ROCKINGHAM County District Court by *Judge Phillip W. Allen.* Heard in the Court of Appeals 22 February 1991.

No brief filed for plaintiff-appellee, Pamela Wray McCollum.

Max D. Ballinger, for defendant and third-party plaintiff-appellant, Phillip J. McCollum.

Carruthers & Roth, by Kenneth R. Keller and Grady L. Shields, for third-party defendant-appellee, First National Bank of Reidsville.

WYNN, Judge.

Plaintiff, Pamela Wray McCollum, originated this action on 16 January 1990 by filing a complaint whereby she sought an absolute divorce and equitable distribution of the marital property. Defendant, Phillip J. McCollum, filed an answer in which he asserted a counterclaim against plaintiff and a third-party complaint against third-party defendant, First National Bank of Reidsville ("Bank"). Defendant alleged that plaintiff fraudulently obtained an equity line of credit in the amount of $28,000.00 from the Bank, secured by a deed of trust on the marital home, without his knowledge and consent and through his forged signature which was purportedly "witnessed" by Bank employees. The Bank filed a motion to dismiss the third-party complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. The trial court allowed the Bank's motion and by order dated 21 May 1990, dismissed the third-party complaint. From this order, Mr. McCollum appealed.

The sole question before us is whether the court erred by dismissing the third-party complaint. We hold that it did not.

Rule 14(a) of the Rules of Civil Procedure governs the filing of a third-party complaint. This rule allows a defendant, as a third-party plaintiff, to file a summons and complaint "upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ." N.C. Gen. Stat. § 1A-1, Rule 14(a) (1990). Plaintiff's claims against Mr. McCollum were for an absolute divorce and for an equitable distribution of the marital property. Obviously, the Bank could not be held liable to Mr. McCollum should an absolute divorce be granted. Mr. McCollum argues that the Bank could be liable to him should his share of the marital estate be reduced by the amount of the indebtedness. We disagree. If the transaction resulting in the deed of trust is found to have been entered into without Mr. McCollum's consent and knowledge, the debts secured by the deed of trust would be held to be separate to Mrs. McCollum. *See Branch Bank-*

ing and Trust Co. v. Wright, 74 N.C. App. 550, 328 S.E.2d 840 (1985). Any misconduct by Mrs. McCollum affecting the value of the property would also be considered in distributing the property. *See Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985). Conversely, if the transaction is valid, the Bank clearly has no liability.

The order is affirmed.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

GENERAL MOTORS CORPORATION, PETITIONER v. CAROLINA TRUCK & BODY COMPANY, INC., RESPONDENT

No. 9010SC692

(Filed 19 March 1991)

Administrative Law § 55 (NCI4th)— case won by petitioner—petitioner not aggrieved party—appeal dismissed

Petitioner was not an aggrieved party and its appeal is therefore dismissed where it sought a review of the ruling by the Commissioner of Motor Vehicles that the Heavy Duty Truck Addendum to the sales and service agreement between the parties constituted a franchise; the trial court concluded that the termination of the addendum amounted to the termination of a franchise; and petitioner's rights were in no way adversely affected.

Am Jur 2d, Appeal and Error §§ 179, 184.

APPEAL by petitioner from judgment entered 29 March 1990 in WAKE County Superior Court by *Judge F. Gordon Battle*. Heard in the Court of Appeals 14 January 1991.

This is a companion case to *Carolina Truck & Body Company, Inc. v. General Motors Corporation*, 102 N.C. App. 262, 402 S.E.2d 135 (1991), also filed this day. We will summarize only those facts necessary to resolve petitioner's appeal.

Respondent filed an action before the North Carolina Commissioner of Motor Vehicles alleging that petitioner "wrongfully and unfairly" terminated its heavy duty truck franchise in violation of N.C. Gen. Stat. § 20-305. The Commissioner ruled in petitioner's favor by order dated 20 March 1989, concluding that petitioner's actions were undertaken with good cause and in good faith. Respondent appealed these conclusions to Buncombe County Superior Court on 20 April 1989. Petitioner had filed a separate appeal in Wake County Superior Court on 19 April 1989, praying for a limited review of the findings of fact and the conclusion of law stating that the Heavy Duty Truck addendum to the sales and service agreement between the parties constituted a franchise.

Each petition for review was heard in the county in which it was filed. The trial court in this action reviewed the record and denied petitioner's appeal, concluding that the termination of the addendum amounted to the termination of a franchise.

Poyner & Spruill, by Cecil W. Harrison, Jr. and Laura Broughton Russell, for petitioner-appellant.

Roberts Stevens & Cogburn, P. A., by Frank P. Graham and W. O. Brazil, III, for respondent-appellee.

WELLS, Judge.

The decision of the Motor Vehicles Commissioner on the termination of a franchise is reviewable pursuant to Chapter 150B of the General Statutes. N.C. Gen. Stat. § 20-305(6). N.C. Gen. Stat. § 150B-43 provides that "any person who is aggrieved" may petition for judicial review of a final agency decision. A "person aggrieved" is any person or group of persons whose rights have been adversely affected. *Matter of Wheeler*, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

We can think of no way in which petitioner's rights were adversely affected by the agency decision. It won its case. We have considered petitioner's claim that it was attempting to preserve a cross-assignment of error but note that the Commissioner's decision in petitioner's favor was upheld both in the trial court and by this Court. Petitioner is not a party aggrieved. This appeal is therefore

Dismissed.

Chief Judge HEDRICK and Judge ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 MARCH 1991

BAILEY v. HIATT No. 9010SC905	Wake (88CVS09007)	Affirmed
BUCK (WALL) v. BUCK No. 9023DC781	Wilkes (89CVD1273)	Reversed
DAVIDSON ELECTRIC MEMBERSHIP CORP. v. CITY OF LEXINGTON No. 9022SC443	Davidson (88CVS1170)	Affirmed
DECOLA v. ASAY No. 908DC808	Lenoir (89CVD897)	Affirmed
FERGUSON v. ASHEVILLE CONTRACTING CO. No. 8928SC1050	Buncombe (80CVS1904) (80CVS1459) (80CVS1458) (80CVS1457) (80CVS1455) (80CVS1454) (80CVS1453) (80CVS1448) (80CVS1447) (80CVS1446) (80CVS1445) (80CVS1452) (80CVS1451) (80CVS1450) (80CVS1460) (80CVS1449)	Affirmed
FIRST UNION NAT. BANK v. CONNELLY No. 9026SC794	Mecklenburg (88CVS6064)	Affirmed
GARDNER v. THOMASON No. 905SC214	New Hanover (87CVS1521)	Affirmed
GARDNER v. THOMASON No. 905SC360	New Hanover (87CVS1521)	Affirmed
HOLLAND v. BOYLES PAINT CONTRACTOR No. 9010IC626	Ind. Comm. (845213)	Affirmed
IN RE JONES v. HATTERAS YACHTS No. 903SC849	Craven (89CVS1703)	Affirmed

IN RE LOWERY No. 9026DC683	Mecklenburg (87J383)	Affirmed
IN RE MATTHEW GREENWOOD CHURCH No. 9023DC718	Wilkes (77J40)	Affirmed
MILLER v. MEIS No. 9021SC841	Forsyth (88CVS4414)	Appeals Dismissed
PICKARD v. PICKARD No. 9014DC370	Durham (82CVD1642)	Affirmed
PRICE v. WALKER No. 9011SC825	Harnett (88CVS0283) (88CVS1462)	Affirmed
ROBBINS v. BLANTON'S TRANSPORT, INC. No. 907SC1070	Wilson (90CVS327)	Dismissed
STATE v. BALDWIN No. 9016SC801	Robeson (89CRS10586)	Appeal Dismissed
STATE v. BARNES No. 9018SC251	Guilford (89CRS33088)	No Error
STATE v. BAXTER No. 9026SC1044	Mecklenburg (90CRS20431)	No Error
STATE v. BOWSER No. 906SC962	Hertford (90CRS1475)	No Error
STATE v. BOYKIN No. 902SC171	Beaufort (89CRS4181) (89CRS4182) (89CRS4183) (89CRS4184)	No Error
STATE v. BROOKER No. 9019SC632	Rowan (89CRS12457) (89CRS12465) (89CRS12596) (89CRS12597)	Appeal Dismissed
STATE v. DICKERSON No. 909SC963	Person (89CRS4535) (89CRS4536)	No Error
STATE v. DIXON No. 9015SC730	Orange (89CRS9301)	Affirmed
STATE v. DONALDSON No. 9018SC984	Guilford (88CRS32363)	Affirmed

STATE v. EZEKIEL No. 9018SC957	Guilford (88CRS59832) (88CRS59833) (88CRS59834)	Affirmed
STATE v. FEIMSTER No. 9022SC1011	Iredell (89CRS3240)	Affirmed
STATE v. GANN No. 9021SC756	Forsyth (89CVS25383)	Dismissed
STATE v. GILL No. 9026SC890	Mecklenburg (86CRS37614)	Affirmed
STATE v. GOINS No. 9019SC558	Montgomery Goins (89CRS3942) (89CRS3943) (89CRS3944) (89CRS4179) (89CRS4180) (89CRS4181) Needham (89CRS3945) (89CRS3946) (89CRS3947) (89CRS3948) (89CRS4182) (89CRS4183) (89CRS4184) (89CRS4185)	No Error
STATE v. HARRIS No. 9026SC1061	Mecklenburg (89CRS88362)	Appeal Dismissed
STATE v. JOHNSON No. 9021SC1006	Forsyth (90CRS2845)	Appeal Dismissed
STATE v. JONES No. 9026SC1078	Mecklenburg (89CRS54942) (89CRS54943) (89CRS54944)	Affirmed
STATE v. MADKINS No. 9018SC229	Guilford (88CRS63251)	No Error
STATE v. McCAIN No. 9018SC983	Guilford (89CRS20583)	Affirmed
STATE v. MEBANE No. 9015SC975	Alamance (90CRS06904) (90CRS06905)	No Error

STATE v. MORTON No. 9018SC936	Guilford (89CRS61192) (89CRS61193) (89CRS61194) (89CRS61195)	No Error
STATE v. OXNER No. 9020SC1075	Union (90CRS255)	No Error
STATE v. PARKER No. 9018SC1019	Guilford (89CRS47251)	No Error
STATE v. PARKS No. 8930SC575	Graham (88CRS25) (88CRS26) (88CRS27) (88CRS28) (88CRS29)	No Error
STATE v. PEAY No. 9021SC1046	Forsyth (89CRS15431)	No Error
STATE v. REID No. 9027SC896	Gaston (89CRS27303) (89CRS27305)	No Error
STATE v. ROSS No. 9012SC828	Hoke (89CRS4329)	No Error
STATE v. SLADE No. 9026SC1067	Mecklenburg (89CRS86270) (89CRS71483)	Appeal Dismissed
STATE v. SLOAN No. 9026SC867	Mecklenburg (89CRS61510)	No Error
STATE v. TAYLOR No. 9021SC1045	Forsyth (89CRS33434)	No Error
STATE v. WILLIAMS No. 9016SC499	Robeson (88CRS6417) (88CRS6419)	No Error
STATE v. YEFKO No. 903SC305	Pitt (89CRS12985) (89CRS13908) (89CRS13910) (89CRS13912) (89CRS13914)	Affirmed
W.G.T. SERVICES, INC. v. VOGLER No. 9026SC782	Mecklenburg (89CVS12998)	Affirmed

BOBBY CHARLES PATRICK AND WIFE, OMIE PATRICK, PLAINTIFFS v. RONALD WILLIAMS, PROFESSIONAL ASSOCIATION AND RONALD C. WILLIAMS, INDIVIDUALLY, DEFENDANTS

No. 9026SC350

(Filed 2 April 1991)

1. **Rules of Civil Procedure § 15 (NCI3d)— motion to amend— undue delay in filing—undue prejudice to opposing party**

The trial court did not err in denying defendants' motion to amend their answer where defendants filed the motion almost a full year after filing the answer and after both parties had conducted extensive discovery; if the trial court had allowed the amendment, plaintiffs would have been required to produce evidence of an automobile driver's negligence approximately five years after the accident giving rise to the claims here; thus the trial court's ruling was justified at least on grounds of defendants' undue delay and undue prejudice to plaintiffs; by their motion defendants sought to deny one of plaintiffs' crucial allegations which the original answer had admitted; and the withdrawal of a judicial admission is not favored.

Am Jur 2d, Pleading §§ 309, 310.

2. **Rules of Civil Procedure § 56.3 (NCI3d)— negligence of driver— admission in answer—summary judgment on negligence question proper**

In an action for legal malpractice arising from defendants' representation of plaintiffs in a negligence action which in turn arose from an automobile accident, there was no merit to defendants' contention that the trial court erred in allowing plaintiffs' motion for partial summary judgment on the issue of negligence of the automobile driver, since defendants' answer specifically admitted allegations in plaintiffs' complaint with regard to the driver's negligence.

Am Jur 2d, Pleading § 179; Summary Judgment §§ 6, 32, 41.

3. **Attorneys at Law § 45 (NCI4th)— malpractice—successive failures of attorney to take action—summary judgment for client proper**

The trial court properly entered summary judgment for plaintiffs on the issue of defendants' legal malpractice where the forecast of uncontroverted evidence was that defendant

attorney failed to estimate the value of plaintiffs' claim against a negligent automobile driver, failed to make an independent evaluation of the driver's assets, failed to consult plaintiffs about the driver's offer of judgment and to inform them of the entry of judgment pursuant to Rule 68 until more than six months had passed, and failed to appeal the trial court's order which terminated plaintiffs' claims to underinsured motorist coverage, since these successive failures constituted an omission of reasonable care and diligence which proximately caused damage to plaintiffs, his clients.

Am Jur 2d, Attorneys at Law §§ 199, 202, 206; Summary Judgment § 26.

4. **Rules of Civil Procedure § 56.1 (NCI3d)— malpractice—issue argued but not pleaded—waiver of notice requirement—failure of court to rule on issue—error**

In a legal malpractice action arising from defendants' representation of plaintiff in a negligence action which in turn arose from an automobile accident, the trial court erred in declining to decide whether the amount of underinsured motorist coverage otherwise available should be reduced by any amounts paid to or for the benefit of plaintiff pursuant to the Workers' Compensation Act, although neither plaintiffs' nor defendants' motion for partial summary judgment gave notice of this issue, where plaintiffs waived the notice requirement by failing to object or move for additional time on this issue; plaintiffs admitted that the policy providing for underinsured motorist coverage also provided for reduction in that coverage by the amount of workers' compensation benefits paid to a party; and plaintiffs themselves moved for partial summary judgment with regard to the amount of underinsurance coverage available to them.

Am Jur 2d, Automobile Insurance §§ 316, 320; Summary Judgment §§ 14, 30.

5. **Attorneys at Law § 49 (NCI4th)— malpractice—punitive damages—court's refusal to submit to jury—error**

In an action for legal malpractice, plaintiffs' forecast of evidence was sufficient to support submission of an issue as to punitive damages based on gross negligence where it tended to show that defendants failed to determine the assets of the

original alleged tortfeasor, failed to estimate the value of plaintiffs' claim, accepted a binding settlement offer without consulting plaintiffs, did not perfect an appeal of the trial court's denial of their motion to set aside the judgment reflecting the settlement, and failed to disclose the entry of judgment for more than six months, which prohibited plaintiffs from being able to make a claim for available underinsured motorist insurance.

Am Jur 2d, Attorneys at Law § 226.

Allowance of punitive damages in action against attorney for malpractice. 13 ALR4th 95.

APPEAL by plaintiffs and defendants from judgment of *Judge Chase Saunders* entered 19 January 1990 out of court and out of session in MECKLENBURG County Superior Court. Heard in the Court of Appeals 24 October 1990.

Charles M. Welling for plaintiff appellants-appellees.

Hedrick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendant appellants-appellees.

COZORT, Judge.

Seeking compensatory and punitive damages, plaintiffs sued defendants for legal malpractice. We affirm in part and reverse in part the trial court's Order of 19 January 1990 disposing of various motions and granting partial summary judgment to plaintiffs and defendants.

The case below has its origin in an automobile accident. On 5 December 1984 Bobby Charles Patrick (Patrick), while driving a truck owned by his employer, was involved in a collision with a truck driven by James H. Greene (Greene). As a result of Patrick's injuries, his damages exceed $63,000 for medical expenses, treatment, and lost wages.

In January 1985, plaintiffs (Patrick and his wife) employed defendant herein, Ronald Williams (Williams), to represent them in "all matters and things arising out of or connected with" the accident of 5 December 1984. In July 1986, Williams, on behalf of the Patricks, filed an action alleging that Greene's negligence caused the accident and seeking recovery for damages including

loss of consortium. The action joined the following parties as defendants in a declaratory judgment claim to determine Bobby Patrick's rights, if any, under applicable policies of the defendants: Iowa National Mutual Insurance Company (Iowa National), Bobby Patrick's liability insurance carrier; Michigan Mutual Insurance Company (Michigan Mutual), the liability insurance carrier of Patrick's employer; and State Farm Mutual Insurance Company (State Farm), Greene's liability insurance carrier. Iowa National became insolvent, and the North Carolina Insurance Guaranty Association (North Carolina Guaranty) was substituted in its place. North Carolina Guaranty, Michigan Mutual, and Greene filed answers to the complaint.

In December 1986, Greene's attorney sent to Williams an offer of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure. Although the text of that offer (in the amount of $25,000) is not included in the Record, Williams responded to the offer by sending a letter, dated 15 December 1986, to the attorneys for North Carolina Guaranty and Michigan Mutual. Williams' letter read as follows:

> Pursuant to North Carolina General Statutes 20-279.21(b)(4) please accept this letter as written notice in advance of settlement between the underinsured motorist, Jimmy Harris Greene, and Bobby Charles Patrick. By copy of this letter we are notifying Mr. Greene's attorney that we accept the Offer of Judgment.

The record indicates that on 19 December 1986 Greene's attorney filed an affidavit, with attached copies of his offer and of Patrick's letter quoted above, to prove service and acceptance of the offer of judgment. The record also indicates that, on the same day, the clerk, in accordance with Rule 68, entered judgment for the plaintiffs against Greene in the amount of $25,000 plus costs. On 19 December 1986, Greene's attorney also petitioned the court to determine the distribution of the judgment proceeds pursuant to N.C. Gen. Stat. § 97-10.2(j) (1985). On 21 January 1987, an Order was entered directing that the proceeds of the judgment against Greene "be distributed in part to Plaintiffs, in part to counsel for Plaintiffs [Williams] and in part to Michigan Mutual [the workers' compensation insurance carrier]." Neither the text of the 19 December 1986 Judgment against Greene, nor that of the 21 January 1987 Order, distributing the proceeds, appears of record.

On 27 January 1987, Williams filed a motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to have the Judgment of 19 December 1986 set aside. After a hearing on 10 June 1987, the trial court entered an Order on 7 July 1987 denying the Rule 60 motion on the grounds, among others, that "any alleged mistake claimed by the Plaintiffs in support of their motion [by Williams] to set aside the judgment of December 19, 1986 was a unilateral mistake, and a mistake of law, and it is therefore not appropriately remedied under Rule 60(b)(1)." Williams failed to file an appeal of that Order, consequently, the Judgment of 19 December 1986 remains final.

On 26 August 1988 the Patricks filed a complaint alleging that Williams was negligent in providing legal services to them. The essence of their complaint was that Williams committed "gross legal malpractice" by accepting the $25,000 offer of judgment and failing to appeal the order denying relief from the judgment entered on 19 December 1986, "thereby releasing forever . . . the primary tort-feasor, Jimmy H. Greene, and by operation of law . . . releasing" the insurance companies providing applicable underinsured motorist coverage. Williams answered, and, after further pleadings, the parties made cross-motions for partial summary judgment.

Amending an earlier order, the trial court entered an Order on 19 January 1990, which included the following dispositions: (1) denied defendants' motion to amend their answer; (2) granted defendants' motion for partial summary judgment on the plaintiffs' claim for punitive damages; (3) granted defendants' motion for a protective order from plaintiffs' discovery request for documents related to defendants' financial worth; (4) granted plaintiffs' motion for partial summary judgment "in regard to negligence of the original tort feasor Jimmy Harris Greene"; and (5) granted plaintiffs' motion for partial summary judgment on their claim regarding defendants' legal malpractice. Further, the order provided: (6) "that the liability insurance policies were in effect prior to the 1985 amendments to N.C.G.S. § 20-179.21(b)(4), and the Michigan Mutual policy provided $60,000.00 underinsurance coverage, and the Iowa National policy provided for $50,000.00 underinsurance coverage"; and (7) "[t]hat the issue of any credit for amounts paid to or for the benefit of the Plaintiff, Bobby Charles Patrick, pursuant to the Workers' Compensation Act is not an issue before the Court at this time, and the Court declines to rule thereon."

Plaintiffs and defendants appealed the Order of 19 January 1990. We shall discuss defendants' appeal first. Defendants assign error to the trial court's rulings in issues (1), (4), (5), and (7) above. We address these assignments of error seriatim.

[1] The defendants contend that the trial court abused its discretion in denying their motion to amend their answer. We disagree.

Rule 15(a) of the North Carolina Rules of Civil Procedure provides that, after the time for amendment as a matter of right expires, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). As defendants correctly note, a motion to amend is addressed to the sound discretion of the court, and its decision will not be disturbed on appeal without a clear showing of abuse of discretion. *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 42, 298 S.E.2d 409, 411 (1982), *disc. review denied*, 308 N.C. 194, 302 S.E.2d 248 (1983). It does not appear of record that defendants moved, pursuant to Rule 52(a) of the North Carolina Rules of Civil Procedure, for findings and conclusions to support the court's decision. Without such a motion, formal findings and conclusions are not required, and it is " 'presumed that the Judge, upon proper evidence, found facts to support' " the ruling. *Allen v. Wachovia Bank and Trust Co.*, 35 N.C. App. 267, 269, 241 S.E.2d 123, 125 (1978) (quoting *Haiduven v. Cooper*, 23 N.C. App. 67, 69, 208 S.E.2d 223, 224 (1974)).

Where there is no declared reason for the denial of a motion to amend, an appellate court "may examine any apparent reasons for such denial." *Leasing Corp.*, 60 N.C. App. at 43, 298 S.E.2d at 411. Among the reasons justifying denial of amendment are: "(a) undue delay, (b) bad faith or dilatory tactics, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.* at 43, 298 S.E.2d at 411-12. In the case below defendants moved to amend their answer almost a full year after filing it and after both parties had conducted extensive discovery. Moreover, if the trial court had allowed amendment, plaintiffs would have been required to produce evidence of Greene's negligence approximately five years after the accident. Thus, at least on grounds of defendants' undue delay and undue prejudice to plaintiffs, the trial court's ruling was justified. We note finally that by their motion to amend the defendants sought to deny the

allegation that plaintiff Bobby Patrick was damaged "as a direct and proximate result of the negligence of James H. Greene." Defendants' original answer admitted that allegation, and the withdrawal of a judicial admission is not favored. 31A C.J.S. § 299 (1964). Accordingly, we hold the trial court did not abuse its discretion.

[2] We turn next to defendants' contention that the trial court erred "in allowing the plaintiffs' motion for partial summary judgment on the issue of the negligence of Jimmy H. Greene." Emphasizing in particular Greene's affidavit dated 27 November 1989, defendants contend that for purposes of summary judgment there remains a genuine issue of fact regarding Greene's negligence in the 1984 accident. We disagree.

We first note that summary judgment is to be granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191 (1990).

The defendants' answer, filed 28 October 1988, expressly admitted the allegations contained in paragraphs one through eight and paragraph ten of the plaintiffs' complaint. Paragraphs seven, eight, and ten of that complaint made the following pertinent allegations of fact:

> 7. That as a direct and proximate result of the negligence of the aforesaid James H. Greene, Plaintiff, Bobby C. Patrick, sustained serious, crippling and permanent injuries . . . .
>
> 8. That as a direct and proximate result of the negligence of James H. Greene, as set forth above, the Plaintiff, Bobby C. Patrick, has been damaged to and about his person in excess of $10,000.00.
>
> * * * *
>
> 10. That at the time of the automobile collision referred to above, on December 5, 1984, Plaintiff Bobby C. Patrick was a regular employee of Neese's Country Sausage Company, Inc., a North Carolina corporation, and was then and there operating a 1980 Chevrolet truck owned by his employer; that the aforesaid James H. Greene was operating a 1972 Ford

vehicle and negligently collided with the vehicle being operated by Plaintiff Bobby C. Patrick . . . .

A judicial admission is made for the purpose of removing a fact or facts from the realm of dispute between litigants. Such an admission "is binding in every sense, absent a showing of fraud, misrepresentation, undue influence or mutual mistake. Evidence offered in denial of the admitted fact should undoubtedly be rejected." 2 H. Brandis, Brandis on North Carolina Evidence § 166 (3d ed. 1988). This Court has repeatedly held that a party seeking to avoid summary judgment cannot create a genuine issue of material fact by offering evidence "which contradicts prior judicial admissions." *Brown v. Lyons*, 93 N.C. App. 453, 458, 378 S.E.2d 243, 246 (1989); *accord, Rollins v. Junior Miller Roofing Co.*, 55 N.C. App. 158, 162, 284 S.E.2d 697, 701 (1981); and *Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978), *disc. review allowed*, 296 N.C. 585, 254 S.E.2d 32, *aff'd*, 297 N.C. 696, 256 S.E.2d 688 (1979). Thus, for purposes of the case below, the trial court correctly held defendants to be bound by their solemn admissions, and it properly granted summary judgment on the issue of Greene's liability.

[3] We turn next to defendants' contention that it was error to grant partial summary judgment for the plaintiffs "on the issue of defendants' legal malpractice." Citing *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985), defendants maintain that, "in pursuing a claim for legal malpractice, the Plaintiff must prove that: (1) the original claim was valid; (2) it would have resulted in a Judgment in Plaintiff's favor; and (3) the Judgment would have been collectable." Defendants' argument misreads *Rorrer* and misstates the legal standard applicable to the case below. As a close reading of *Rorrer* makes plain, the three-prong test adopted by defendants applies only "[w]here the plaintiff bringing suit for legal malpractice has *lost* another suit allegedly due to his attorney's negligence." (Emphasis added.) *Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369. The plaintiffs' case against Greene never went to trial, nor to summary judgment, nor was it dismissed by the trial court. It was settled by acceptance of an offer of judgment.

As *Rorrer* notes, our Supreme Court's most thorough exposition of legal malpractice is found in *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954). The general standard applicable to an

attorney, set out in *Hodges* and quoted with approval in *Rorrer*, is as follows:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.
>
> * * * *
>
> [An attorney] is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the *omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.*

Rorrer, 313 N.C. at 341, 329 S.E.2d at 358 (emphasis added).

Applying that standard to the case below, we note that the defendants' answer admitted that, as a result of the accident in 1984, plaintiff Bobby Patrick "sustained serious injuries and . . . that his medical expenses, treatment, and lost income are in excess of $63,000." As noted above, the defendants admitted that Greene's negligence caused the accident. The defendants further admitted that the Iowa National insurance policy provided "to the plaintiffs . . . underinsured motorist coverage in the amount of $50,000" and that Bobby Patrick's employer was insured by Michigan Mutual under a policy which "would and did inure to the benefit of the plaintiffs."

Regarding the amount of Patrick's claim against Greene and Greene's ability to pay a judgment against him, Ronald Williams testified as follows:

> Q Now, did you ever form an opinion during your representation of Mr. Patrick as to what would be a fair amount to settle his case that you would recommend to him to accept?

A No.

* * * *

[Y]ou don't know what assets that [Greene] may have had to satisfy [a] judgment, do you?

A Specifically, no, I don't.

Q You never had done anything about checking him out as to what he owned in the way of real estate or any other assets?

A My recollection of that is this: That I asked his attorney about that and got an answer that he didn't have anything to speak of and likely that it was nothing in excess of the exemptions that are granted a judgment debtor in North Carolina.

Q You relied then on what his attorney—Greene's attorney told you?

A I believe that I did, yes. If I did not, I did not have other information. I'll tell you that.

In their complaint the plaintiffs stated that Williams did not consult with them before accepting Greene's offer of judgment. Williams answered the plaintiffs' allegation as follows: "[T]he defendants have no independent recollection at this time of accepting the offer of $25,000 without consulting with the plaintiffs, nor do the defendants have any independent recollection of consulting with the plaintiffs prior to accepting said offer. As such, the allegations . . . are denied." In support of their motion for partial summary judgment on the issue of defendants' malpractice, both plaintiffs presented affidavits stating that they had not authorized Williams to settle their lawsuit for $25,000, that they were not consulted about the offer of judgment in December 1986 when it was made, and that they first learned about the settlement when they received a letter from Williams "dated July 8, 1987 stating that the $25,000.00 had been paid into the Court." No response to these affidavits appears of record. Rule 56(e) of the North Carolina Rules of Civil Procedure provides in part as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response,

by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990).

Regarding Patrick's claims under the Iowa National and Michigan Mutual insurance policies, Williams testified that

> it was not my opinion when I accepted that money that it terminated his claim.
>
> Q When did it become your opinion?
>
> A I'm not sure but it is now.
>
> Q It is now?
>
> A Uh huh.
>
> Q And what do you base that on?
>
> A The denial of my Rule 60-B motion and—yeah. The case is over.
>
> Q The case is over?
>
> A Yeah. I don't think he had any claims after that to them.
>
> Q When was it over?
>
> A I think it was over when the judge denied my Rule 60-B motion and I did not pursue the appeal.
>
> Q And when was that?
>
> A When the—I guess on July 7, 1987, when the order was entered denying my Rule 60-B motion.
>
> Q And when did the time for appeal expire from that?
>
> A That would have been ten days later.

The defendants contend that Williams' letter of 15 December 1986 was intended solely "to put the underinsured motorist [insurance] carriers on notice of the fact that a settlement was about to be accomplished with the insurance carrier for the primary defendant." They maintain that "Williams simply did not accept an Offer of Judgment as contemplated under Rule 68(a), but rather a letter he wrote to third parties was construed as an acceptance

of [the offer of judgment] by the counsel for [Greene]" and the clerk of court who entered judgment. In an affidavit submitted to the trial court in support of his Rule 60 motion, Williams stated, in pertinent part, that

> [d]iscovery revealed that Michigan Mutual had $60,000 underinsured motorist coverage wherein Mr. Patrick was the "insured" and that Iowa National had $50,000 underinsured motorist coverage wherein he was the "insured." Mr. Patrick has incurred over $62,000 in medical bills and lost wages alone which [have] been paid by the worker[s'] compensation carrier.
>
> * * * *
>
> Mr. Byrum, [counsel for Greene] drew and submitted his judgment on December 19, 1986 without first submitting it to Plaintiffs' counsel. It was signed that same day. If Mr. Byrum had submitted it to Plaintiffs' counsel beforehand, he would have had a chance to review it and require that the judgment be restricted to preserve Plaintiffs' claims against the underinsured motorist carriers and if Mr. Byrum and Plaintiffs' counsel could not have agreed on the language, no judgment would have been entered.

Nevertheless, as Williams conceded, he failed to file, much less perfect, an appeal of the trial court's Order of 7 July 1987, which ruled that no reason justified relief from the Judgment of 19 December 1986; consequently, the plaintiffs were barred from recovering their damages from insurance proceeds that would otherwise have been available.

Thus, the forecast of uncontroverted evidence was that Williams failed to estimate the value of plaintiff Bobby Patrick's claim against Greene, failed to make an independent evaluation of Greene's assets, failed to consult his clients about Greene's offer of judgment and to inform them of the entry of judgment pursuant to Rule 68 until more than six months had passed, and failed to appeal the trial court's Order of 7 July 1987 which terminated Bobby Patrick's claims to underinsured motorist coverage. These successive failures constitute an omission of reasonable care and diligence that proximately caused damage to his clients. Thus, the trial court properly entered summary judgment on the issue of defendants' legal malpractice.

[4] We turn next to defendants' contention that the trial court erred in declining to decide whether the amount of underinsured motorist coverage otherwise available should be reduced by "any amount paid to or for the benefit of the plaintiff, Bobby Charles Patrick, pursuant to the Workers' Compensation Act." We agree.

While neither the plaintiffs' nor the defendants' motion for partial summary judgment gave notice of this issue, we note that it was argued before the trial court. The notice required by Rule 56(c) of the North Carolina Rules of Civil Procedure may be waived "by participation in the hearing and by a failure to object to the lack of notice or failure to request additional time by the non-moving party." *Westover Products v. Gateway Roofing*, 94 N.C. App. 163, 166, 380 S.E.2d 375, 377 (1989). It does not appear of record that the plaintiffs either objected to or moved for additional time on this issue. Moreover, in response to the defendants' request for admissions, the plaintiffs conceded that the Michigan Mutual policy provided for reduction in underinsured motorist coverage "by the amount of workers' compensation benefits paid to a party" claiming underinsured motorist coverage. We note, finally, that the plaintiffs themselves moved for partial summary judgment with regard to the "amount of underinsurance [coverage] available" to them. Calculation of and judgment on that amount would necessarily involve the reduction, if any, permissible for workers' compensation benefits paid to plaintiff Bobby Patrick. A reduction is permitted under some circumstances, *see, e.g., Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854 (1989), *rehearing denied*, 325 N.C. 277, 384 S.E.2d 517 (1989), *appeal after remand*, 102 N.C. App. 392, 402 S.E.2d 648 (1991), but not others, *see, e.g., Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990).

We hold that plaintiffs waived the requirement for notice on this issue and that the trial court should have reached it before giving judgment on the amount of underinsurance coverage that would have been available to plaintiff Bobby Patrick. Accordingly, we reverse the trial court's order with respect to this issue and remand the case for a determination of the amount of workers' compensation benefits paid and the permissible reduction, if any, in the amount of underinsured motorist coverage.

The plaintiffs' cross-appeal assigns error to issues (2), (3), and (6) in the trial court's order of 19 January 1990. We address these in turn.

[5] The plaintiffs contend that the trial court erred in granting the defendants' motion for partial summary judgment on the issue of punitive damages. We agree.

Where a claim is grounded in negligence rather than an intentional tort, punitive damages may be recovered only for gross or wanton negligence. *Paris v. Michael Kreitz, Jr., P.A.*, 75 N.C. App. 365, 373-74, 331 S.E.2d 234, 241, *disc. review denied*, 315 N.C. 185, 337 S.E.2d 858 (1985). Our Supreme Court, "in references to gross negligence, has used that term in the sense of wanton conduct. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 396-97 (1956). Where the pleadings and evidence warrant,

> an issue as to punitive damages should be submitted to the jury. Upon submission thereof, it is for the jury to determine (1) whether punitive damages in *any* amount should be awarded, and if so (2) the amount of the award. These questions are determinable by the jury in its discretion.

Id. at 26, 92 S.E.2d at 395. Applying these principles to the case below, we conclude that the forecast of evidence supports the submission of an issue as to punitive damages.

While case law clearly establishes that attorneys may be held liable, among other breaches of duty, for failing to inform their clients of an existing settlement offer, *see*: 2 R. Mallen & J. Smith, *Legal Malpractice* § 24.36 (3d ed. 1989) and Annotation, *Legal Malpractice in Settling or Failing to Settle Client's Case*, 87 A.L.R. 3d 168, 183-85 (1978), neither the plaintiffs nor the defendants cite case law from this or other jurisdictions bearing on punitive damages as applied to facts substantially the same as those involved in the case below. We are aware of no case law precisely on point. Our review of plaintiffs' evidence below leads us to the conclusion that the successive failures of the defendants constituted gross negligence. Plaintiffs' forecast of evidence showed that defendants failed to determine the assets of the original alleged tort-feasor, failed to estimate the value of plaintiffs' claim, accepted a binding settlement offer without consulting plaintiffs, did not perfect an appeal of the trial court's denial of his motion to set aside the judgment reflecting the settlement, and failed to disclose the entry of judgment for more than six months, which prohibited plaintiffs from being able to make a claim for any other available insurance

proceeds. We thus hold the plaintiffs are entitled to submit to the jury an issue as to punitive damages. This is not to say that every claim involving the breach of a fiduciary duty nor every action involving legal malpractice supports a claim for punitive damages. But where, as here, plaintiffs offer evidence that defendants engaged in a repeated course of conduct which constituted a callous or intentional indifference to the plaintiffs' rights, the plaintiffs have made out a claim for punitive damages. Accordingly, summary judgment for the defendants on the issue of punitive damages is reversed.

We turn next to the plaintiffs' contention that the trial court erred in granting the defendants' motion for a protective order regarding plaintiffs' discovery proceedings on defendants' net worth. Because the evidence supports the submission of an issue as to punitive damages, the trial court's order on this issue was in error and is reversed.

Finally, in view of our holding that the trial court erred in declining to decide whether the underinsured motorist coverage that would otherwise have been available should be reduced by workers' compensation benefits paid, we need not reach the plaintiffs' assignment of error to the trial court's conclusion that the "Michigan Mutual policy provided $60,000.00 underinsurance coverage, and the Iowa National policy provided for $50,000.00 underinsurance coverage." Upon remand the trial must first determine whether a reduction for benefits paid under workers' compensation applies before calculating the applicable amounts of underinsured motorist coverage.

In summary, we hold:

(1) The trial court did not err in denying defendants' motion to amend their answer;

(2) The trial court erred in granting summary judgment for defendants on the issue of punitive damages;

(3) The trial court erred in granting defendants' motion for a protective order regarding defendants' financial worth;

(4) The trial court did not err in granting summary judgment for plaintiffs in regard to the negligence of the original tort-feasor Greene;

(5) The trial court did not err in granting summary judgment for plaintiffs on the issue of defendants' legal malpractice; and

(6) The trial court erred in declining to decide the issue of whether to reduce the amount of coverage available by payments made pursuant to the Workers' Compensation Act.

Affirmed in part, reversed in part, and remanded.

Judges WELLS and LEWIS concur.

JONATHAN DUNBAR WESTON v. CAROLINA MEDICORP, INC., AND FORSYTH MEMORIAL HOSPITAL, INC., D/B/A FORSYTH MEMORIAL HOSPITAL

No. 9021SC677

(Filed 2 April 1991)

1. **Appeal and Error § 341 (NCI4th)— challenge to findings of fact—any competent evidence standard—assignment of error ineffective**

Since the proper standard on appeal to challenge the trial court's findings of fact is the "any competent evidence" standard, but all of plaintiff's assignments of error with regard to the trial court's findings asserted that they were "clearly erroneous"—the federal standard for review of the trial court's findings of fact—plaintiff's assignments of error with regard to the findings of fact were ineffective to challenge the sufficiency of the evidence to support the findings.

Am Jur 2d, Appeal and Error § 839.

2. **Constitutional Law § 105 (NCI4th)— doctor's hospital staff privileges revoked—due process violation claimed—no "state action"—claim not addressed**

The court need not address plaintiff doctor's argument that defendants violated plaintiff's state and federal constitutional due process rights in suspending and revoking his hospital staff privileges, since "state action" is required to trigger the protections of constitutional due process provisions, and de-

fendant private, non-profit hospital did not engage in state action in disciplining plaintiff.

Am Jur 2d, Constitutional Law §§ 821, 822, 824; Hospitals and Asylums § 10.

3. **Hospitals § 6 (NCI3d)— revocation of doctor's hospital staff privileges—failure to follow hospital policy—no absolute discretion in doctor to withhold HIV test results**

There was no merit to plaintiff doctor's contention that N.C.G.S. § 130A-143 gave him the absolute discretion to decide whether to divulge information about HIV test results, and that defendants wrongfully, arbitrarily, or capriciously suspended and revoked plaintiff's hospital staff privileges because of his failure to follow hospital policy, since the statute does provide that all information that any person has the AIDS virus infection is "strictly confidential," but there are thirteen exceptions where release of the confidential information is permitted, one of them being release to "health care personnel providing medical care to the [infected] patient"; and the plaintiff was bound by the hospital's policy, which was consistent with N.C.G.S. § 130A-143, of identifying patients "as being potentially infectious."

Am Jur 2d, Hospitals and Asylums §§ 10, 11.

4. **Constitutional Law § 88 (NCI4th)— doctor's hospital staff privileges revoked—claims of retaliation and discrimination not considered**

Plaintiff doctor had no claim for discrimination under 42 U.S.C.S. § 1983 based on defendant hospital's suspension and later revocation of plaintiff's staff privileges because no state action was involved in the hospital's actions. Nor did plaintiff have a claim under 42 U.S.C.S. § 1981 for retaliation and discrimination in the making or enforcement of a contract where the trial court found that plaintiff had no contract with defendant hospital.

Am Jur 2d, Civil Rights §§ 13, 18, 50; Hospitals and Asylums § 10.

5. **Rules of Civil Procedure § 52 (NCI3d)— findings of fact written by attorney—adoption by court proper**

The trial court did not err in adopting verbatim defendant's proposed findings of fact and conclusions of law.

Am Jur 2d, Trial §§ 1256, 1257.

Propriety and effect of trial court's adoption of findings prepared by prevailing party. 54 ALR3d 868.

APPEAL by plaintiff from judgment filed 22 November 1989 in FORSYTH County Superior Court by *Judge W. Douglas Albright.* Heard in the Court of Appeals 14 December 1990.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Anthony H. Brett, for defendant-appellees.

GREENE, Judge.

The plaintiff appeals the judgment filed 22 November 1989 wherein the trial court denied the injunctive relief sought by the plaintiff.

[1] In this case, the trial court sat as the factfinder. "It is well settled that when the trial judge sits as factfinder, his findings of fact are binding [on appeal] if they are supported by *any competent evidence* in the record, but his conclusions of law are reviewable." *R.L. Coleman & Co. v. City of Asheville*, 98 N.C. App. 648, 651, 392 S.E.2d 107, 108-09, *disc. rev. denied*, 327 N.C. 432, 395 S.E.2d 689 (1990) (emphases added); *see also* N.C.G.S. § 1A-1, Rule 52(c). Accordingly, the proper standard on appeal to challenge the trial court's findings of fact is the "any competent evidence" standard. Here, all of the plaintiff's assignments of error with regard to the trial court's findings assert that they are "clearly erroneous." The "clearly erroneous" standard is the federal standard for review of the trial court's findings of fact. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 84 L.Ed.2d 518, 528 (1985). The plaintiff's assignments of error with regard to the findings of fact are therefore ineffective to challenge the sufficiency of the evidence to support the findings under the "any competent evidence" standard of appellate review. Accordingly, the trial court's findings of fact are conclusive on this appeal. *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 582-83, 347 S.E.2d 25, 28 (1986) (where plaintiff did not assign error to trial court's findings, they were conclusive).

We summarize the trial court's pertinent findings as follows: The plaintiff is an African-American physician specializing in obstetrics and gynecology and has practiced his specialty in Winston-Salem, North Carolina, since 1979. In 1979, he was granted medical staff privileges at Forsyth Memorial Hospital. The defendant Carolina Medicorp, Inc. [Medicorp], is a non-profit corporation which has owned the hospital's facilities since 1984. Defendant Forsyth Memorial Hospital, Inc. [Hospital], is a separate, private, non-profit corporation affiliated with Medicorp. The Hospital is the corporation which operates the hospital, and its board of trustees is the governing authority for the hospital.

Prior to 1984, Forsyth County owned the hospital's facilities. In 1983, the Forsyth County Commissioners voted to transfer the facilities to Medicorp, and the deed effectuating the transfer was executed and filed in January of 1984. The transfer was made pursuant to N.C.G.S. § 131E-8 (1988 & Supp. 1990) which mandates the operation of the hospital "as a community general hospital open to the general public" and the provision of medical services "to indigent patients as the municipality or hospital authority and the nonprofit corporation shall agree." As a condition of the transfer, the County Commissioners have the right to appoint the majority of the Hospital's board of trustees. Forsyth County has no other involvement in the operation of the Hospital. Forsyth County has not provided any funding to Medicorp or the Hospital since 1984. All of the actions complained of in this proceeding are ones taken by Hospital rather than Medicorp.

In 1986, the Hospital adopted infectious disease control policies for patients infected with the HIV (Human Immune Deficiency) virus. These policies "required a physician admitting a patient with the HIV infection to place the patient on blood and body fluid isolation, a status which identifies a patient as being potentially infectious and also requires the use of protective measures for health care personnel coming in contact with the patient."

In February of 1988, the plaintiff admitted a patient whom he had known to be infected with the HIV virus since 1987. In August of 1987, the plaintiff reconfirmed that the patient was infected with the HIV virus. During this patient's admission to the hospital in February of 1988, she was treated for premature labor and discharged. The plaintiff did not place the patient on blood and body fluid isolation, did not notify any of the health care person-

nel treating the patient that she was infected with the HIV virus, and did not enter any information in the patient's medical chart at the hospital indicating that she had this infectious condition. Later in the month, the patient returned to the hospital in labor and had a rapid delivery which was managed by a nurse.

The nurse who handled the "delivery did not have gloves on both of her hands as is required by the policy known as 'universal precautions' (which is recommended by the U.S. Center for Disease Control and is required by State communicable disease regulations and the Hospital's policies) due to the speed at which the events during the course of the delivery occurred." Once Hospital personnel learned that the patient had the HIV virus, members of the nursing staff became concerned that the plaintiff had not followed the Hospital's blood and body fluid isolation policy. At an administrative hearing conducted to determine if the plaintiff had violated Hospital policy, Dr. Weston testified and admitted that he had conducted a confirmatory test on the patient in August of 1987 which indicated that she did have the HIV virus. The hearing committee concluded that the plaintiff had violated the Hospital policy and disrupted hospital operations. The investigating committee recommended that the plaintiff be suspended from the Medical Staff for three months. The hearing committee presented its recommendations to the Executive Committee which unanimously approved the recommendation that Dr. Weston's privileges be suspended for three months. "While the Medical-Dental Staff Bylaws provided Dr. Weston with the right to appeal this recommendation to the Hospital's Board of Trustees, he chose not to do so."

In 1989, the plaintiff was involved in various incidents which raised questions concerning whether the Hospital should continue to allow the plaintiff to practice medicine at the hospital. In one incident, a patient died from excessive blood loss after a surgery performed by the plaintiff. Another incident involved the plaintiff's alleged mismanagement of a laparoscopy, which is "a procedure involving insertion of an instrument into a patient to remove an ectopic (outside of the uterus) pregnancy from an ovarian tube." Another incident involved an alleged improper, premature cesarean section which endangered the baby's life. Another incident involved the alleged dropping by the plaintiff of a baby on its head during delivery.

Based upon these events, the plaintiff was summarily suspended from the Medical Staff. The plaintiff appealed the summary suspension to the Executive Committee and to the Hospital's board of trustees. Both bodies affirmed the suspension pending a full investigation. A three-member investigating committee was appointed to investigate these events. After the investigation, the Executive Committee deliberated and recommended that the plaintiff's staff privileges "be revoked because his 'medical judgment is impaired at this time.' The Executive Committee encouraged Dr. Weston to reapply for his privileges whenever he can demonstrate that his medical judgment has been restored and that he can comply with the qualifications for membership on the Medical-Dental Staff."

Based upon these findings, the trial court concluded, among other things, that the "Hospital's termination of plaintiff's Hospital Staff privileges was not 'state action,' " that the plaintiff did not have a contract with the Hospital, and that "[n]one of the actions challenged by plaintiff . . . were arbitrary, capricious, unreasonable, discriminatory, retaliatory or otherwise in violation of law." Based upon its conclusions, the trial court ordered "that the plaintiff have and recover nothing of the defendants . . . ."

The issues are whether (I) a private, non-profit hospital in suspending and revoking a physician's staff privileges engages in state action; (II) N.C.G.S. § 130A-143 (1990) granted the plaintiff the absolute right to decide whether to divulge information about a patient's HIV test results to other medical personnel; (III) the plaintiff may bring claims for retaliation and discrimination pursuant to 42 U.S.C.S. § 1981 (Law. Co-op. 1986); and (IV) a trial court may adopt the proposed findings of fact and conclusions of law prepared by an attorney.

I

[2] The plaintiff argues that the trial court erred in concluding that the defendants did not violate the plaintiff's state and federal constitutional due process rights in suspending and revoking the plaintiff's staff privileges. We note initially that the trial court found that "[a]ll of the actions complained of in this proceeding are ones taken by Forsyth Memorial Hospital, Inc. [Hospital], rather than Carolina Medicorp, Inc. [Medicorp]." As mentioned at the outset, we are bound by the trial court's findings. Therefore, we limit

our discussion to whether the Hospital violated the plaintiff's due process rights. Furthermore, the trial court found and concluded that the Hospital was a private, non-profit hospital. We are bound by the finding and we may not question the conclusion because the plaintiff did not properly assign error to it. N.C.R. App. P. 10.

"The Fourteenth Amendment of the [United States] Constitution provides in part that '[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.' " *Blum v. Yaretsky*, 457 U.S. 991, 1002, 73 L.Ed.2d 534, 545 (1982). This Amendment "protects individuals only from governmental and not private action . . . ." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930, 73 L.Ed.2d 482, 491 (1982). Article 1, § 19 of the North Carolina Constitution provides in part that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." This Article, like the Fourteenth Amendment, was designed " 'to protect the individual from the State.' " *North Carolina Real Estate Licensing Board v. Aikens*, 31 N.C. App. 8, 13, 228 S.E.2d 493, 496 (1976) (citation omitted). Accordingly, "state action" is required to trigger the protections of the "synonymous" due process provisions of the Fourteenth Amendment to the United States Constitution and Article 1, § 19 of the North Carolina Constitution. *NCAA v. Tarkanian*, 488 U.S. 179, 191, 102 L.Ed.2d 469, 484 (1988) (Fourteenth Amendment does not protect individual from private conduct); *see Bulova Watch Co. v. Brand Distribs. of North Wilkesboro*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974) (due process expressions under federal and state constitutions are synonymous).

"In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Tarkanian*, 488 U.S. at 192, 102 L.Ed.2d at 484-85. This is so because "the relationship between a private corporation and a state or local government may be such or the function performed by the corporation may be such that actions taken by the corporation may be governmental rather than private actions." *Briscoe v. Bock*, 540 F.2d 392, 395 (8th Cir. 1976) (private hospital terminating physician's staff membership and privileges). Here, the alleged state action by the Hospital involves the suspension and revocation of the plaintiff's staff privileges. Accordingly, for the Hospital's conduct to be classified as state action, the plaintiff must show that a sufficiently close

nexus exists between the State and the challenged action of the Hospital so that the Hospital's action " 'may be fairly treated as that of the State itself.' " *Yaretsky*, 457 U.S. at 1004, 73 L.Ed.2d at 546 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 42 L.Ed.2d 477, 484 (1974)); *Lubin v. Crittenden Hosp. Ass'n*, 713 F.2d 414, 415 (8th Cir. 1983), *cert. denied*, 465 U.S. 1025, 79 L.Ed.2d 685 (1984) (private hospital placed physician on one-year probation).

Whether the Hospital's suspension and revocation of the plaintiff's staff privileges was "state action depends upon the specific facts and circumstances surrounding the challenged action." *Albright v. Longview Police Dep't*, 884 F.2d 835, 838 (5th Cir. 1989) (private hospital's termination of personnel director not state action). The required nexus may be shown where "the State creates the legal framework governing the conduct, . . . if it delegates its authority to the private actor, . . . or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior . . . ." *Tarkanian*, 488 U.S. at 192, 102 L.Ed.2d at 485 (citations omitted). The nexus may also be shown where "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Yaretsky*, 457 U.S. at 1005, 73 L.Ed.2d at 547 (citation omitted). Because neither the State nor any local government created any legal framework governing the challenged conduct, delegated authority to the Hospital, or accepted any benefits from any alleged unconstitutional behavior, these methods for establishing the nexus do not apply. Furthermore, "[a]lthough health care is certainly an 'essential public service', it does not involve the 'exercise by a private entity of powers traditionally exclusively reserved to the State.' " *Modaber v. Culpeper Memorial Hosp., Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982) (citation omitted) (private hospital revoked physician's staff privileges); *see also Lubin*, 713 F.2d at 416; *Sides v. Cabarrus Memorial Hosp., Inc.*, 287 N.C. 14, 25-26, 213 S.E.2d 297, 304 (1975) ("construction, maintenance and operation of a public hospital by either a city or a county is a proprietary function"). Accordingly, the required nexus may not be established under the "public function" method either.

The plaintiff argues that state action should be found to exist for four separate reasons, each of which lacks merit. First, the General Assembly enacted N.C.G.S. § 131E-8 thus allowing and governing the conveyance of the hospital to Medicorp and granting Medicorp's power to operate the hospital. The fact that a state

statute governs the method of *conveying* municipal hospitals to private, non-profit corporations does nothing to explain how a private, non-profit hospital's suspension and revocation of staff privileges constitutes state action. *See Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989) (no state action where legislation authorized revocation of staff privileges); *Garst v. Stoco, Inc.*, 604 F. Supp. 326, 333-34 (E.D. Ark. 1985) (insufficient nexus where state statute required private hospital to have bylaws but state did not approve them and did not monitor hospital's actions taken pursuant to them).

Second, the label given to N.C.G.S. Chapter 131E, Article 2 is "Public Hospitals," and under N.C.G.S. § 143-318.10(b) (1990), the Hospital is a "public body." The label given Chapter 131E is irrelevant in determining whether a private, non-profit hospital's suspension and revocation of staff privileges constitutes state action. Likewise, the definition of a "public body" for purposes of the open meetings statute does not establish a sufficient nexus for state action.

Third, the county commissioners have the right to appoint the majority of the Hospital's board of trustees. The trial court found that this right was a "condition of the deed transferring the" hospital to Medicorp. The appointment right of some but not all of the trustees, though indicative of state action, does not alone compel the conclusion that the suspension and revocation of the plaintiff's staff privileges constituted state action in this case. Though Forsyth County appoints the majority of the Hospital's board, the trial court found that the "County has no other involvement in the affairs of the Hospital." The County does not fund the Hospital. The plaintiff does not argue and the record does not reveal that the County had any control over the board of trustees. Without any governmental control over the Hospital's board, the nexus between the County and the Hospital's revocation of the plaintiff's staff privileges is at best remote. *Lubin*, 713 F.2d at 416 (insufficient nexus where physician did not allege that state participated in disciplinary procedures); *see also Garst*, 604 F. Supp. at 333-34 (state did not approve bylaws nor did it monitor action taken pursuant to them).

Fourth, the statute requires the Hospital to operate as a community general hospital open to the public and to provide care to indigent patients. This fact does not transform a private, non-profit hospital's disciplinary decisions into state action. *Albright*,

884 F.2d at 841 (lease provision required private hospital to accept indigent patients); *see also Modaber*, 674 F.2d at 1026 (insufficient nexus where hospital implemented governmental program). Accordingly, because of the absence of state action, we need not address the plaintiff's arguments addressed at the alleged due process violations.

II

[3] The plaintiff argues that the trial court committed prejudicial error in concluding that the defendants did not wrongfully, arbitrarily, or capriciously suspend and revoke the plaintiff's staff privileges. The plaintiff argues that N.C.G.S. § 130A-143 gives him the absolute discretion to decide whether to divulge information about HIV test results. On the basis of the alleged statutory right, the plaintiff argues that to the extent the defendants considered the plaintiff's exercise of this alleged statutory right in suspending and revoking his staff privileges, it acted wrongfully, arbitrarily, or capriciously in violation of *Claycomb v. HCA-Raleigh Community Hosp.*, 76 N.C. App. 382, 385-86, 333 S.E.2d 333, 336 (1985), *disc. rev. denied*, 315 N.C. 586, 341 S.E.2d 23 (1986).

The pertinent provisions of N.C.G.S. § 130A-143 read:

> All information and records, whether publicly or privately maintained, that identify a person who has AIDS virus infection or who has or may have a disease or condition required to be reported pursuant to the provisions of this Article shall be strictly confidential. This information shall not be released or made public except under the following circumstances:
>
> . . . .
>
> (3) Release is made to health care personnel providing medical care to the patient . . . .

North Carolina Gen. Stat. § 130A-143 mandates that all information that any person has the AIDS virus infection is "strictly confidential." However, the statute provides thirteen exceptions where release of the confidential information is permitted. One such exception permits release to "health care personnel providing medical care to the [infected] patient." The statute does not mandate release of this information to health care providers. Therefore, were it not for the Hospital's blood and body fluid isolation policy, the plaintiff would be correct in his argument that the release

of this information was within his discretion. However, the plaintiff was bound by the Hospital's policy of identifying patients "as being potentially infectious," and that policy is consistent with N.C.G.S. § 130A-143. Therefore, the Hospital's actions in disciplining the plaintiff for his failure to comply with the policy was not a wrongful, arbitrary, or capricious act.

III

[4] The plaintiff argues (1) that the trial court erred in finding and concluding that the defendants' actions in suspending the plaintiff's staff privileges for three months and then in revoking his staff privileges altogether were not retaliatory for purposes of 42 U.S.C.S. § 1981, 42 U.S.C.S. § 1983 (Law. Co-op. 1986), and the First and Fourteenth Amendments to the United States Constitution, and (2) that the trial court committed prejudicial error in concluding that the Hospital did not racially discriminate against the plaintiff pursuant to 42 U.S.C.S. § 1981 when it revoked his staff privileges.

Having concluded that there was no state action involved in the Hospital's actions, we do not address the merits of the 42 U.S.C.S. § 1983 claim because such a claim requires state action. *Tarkanian*, 488 U.S. at 191, 102 L.Ed.2d at 484 (state action required under § 1983); *West v. Atkins*, 487 U.S. 42, 48, 101 L.Ed.2d 40, 48-49 (1988) (violator must act under color of state law). We do not address the federal constitutional claims for the same reason. *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1163-64 (10th Cir. 1986) (state action required for claims under First and Fourteenth Amendments); *Fike v. United Methodist Children's Home of Va.*, 709 F.2d 284, 286-87 (4th Cir. 1983) (state action required for First Amendment claim). Section 1981 affords a remedy against retaliation and discrimination in private employment, thus state action is not a prerequisite for a § 1981 action. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 44 L.Ed.2d 295, 301 (1975).

To recover on a 42 U.S.C.S. § 1981 claim, the plaintiff was required to prove, among other things, "that he engaged in activity protected by § 1981 . . . ." *Goff v. Continental Oil Co.*, 678 F.2d 593, 599 (5th Cir. 1982); *see also Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). The activities protected are the making and enforcement of contracts. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176, 105 L.Ed.2d 132, 150 (1989). "Where an alleged act of discrimination does not involve the impairment of one of

these specific rights, [i.e., the making and enforcement of contracts,] § 1981 provides no relief." *Id.*

The plaintiff argues that the prohibited acts of retaliation and discrimination occurred in the course of disciplinary action taken against him by the Hospital. The plaintiff does not argue that he was retaliated or discriminated against by the defendants in the making of a contract. Furthermore, the trial court concluded that the plaintiff did not have a contract with the Hospital. The plaintiff did not assign error to this conclusion. Therefore, the plaintiff does not have a claim for retaliation or discrimination in the enforcement of a contract. Accordingly, the plaintiff does not have a 42 U.S.C.S. § 1981 claim for retaliation or discrimination.

IV

[5] The plaintiff also argues that the trial court's fact-finding process was erroneous because the trial court virtually adopted verbatim the defendants' proposed findings of fact and conclusions of law. We disagree. Where the trial court adopts verbatim a party's proposed findings of fact, those findings will be set aside on appeal only where there is no competent evidence in the record to support them. *See* N.C.G.S. § 1A-1, Rule 52; *Johnson v. Johnson*, 67 N.C. App. 250, 256-57, 313 S.E.2d 162, 166 (1984) (proper for trial court to direct attorney to prepare proposed findings and conclusions).

We have reviewed the plaintiff's remaining arguments and find them to be without merit. Accordingly, the judgment of the trial court is

Affirmed.

Judges PARKER and COZORT concur.

RAY R. BROYHILL v. AYCOCK & SPENCE, A NORTH CAROLINA PARTNERSHIP; AND W. MARK SPENCE, INDIVIDUALLY

No. 901SC552

(Filed 2 April 1991)

1. **Attorneys at Law § 44 (NCI4th)— legal malpractice—existence of attorney-client relationship—summary judgment improper**

The trial court in an action for legal malpractice erred in entering summary judgment for defendant attorneys where there existed a genuine issue of material fact as to whether there was a contract of employment between plaintiff and defendants such that defendants represented plaintiff in the real estate transaction at issue.

Am Jur 2d, Attorneys at Law § 197.

2. **Appeal and Error § 447 (NCI4th)— non-client third-party liability—issue first raised on appeal**

In a legal malpractice action, plaintiff was not entitled to argue for the first time on appeal a theory of non-client third-party liability based upon nonprivity of contract between plaintiff and defendants.

Am Jur 2d, Appeal and Error §§ 545, 546, 567; Attorneys at Law § 232.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by plaintiff from order entered 29 March 1990 in DARE County Superior Court by *Judge Thomas S. Watts*. Heard in the Court of Appeals 5 December 1990.

Jeffrey L. Miller for plaintiff-appellant.

Hornthal, Riley, Ellis & Maland, by M. H. Hood Ellis, for defendant-appellees.

GREENE, Judge.

Plaintiff, Ray R. Broyhill, filed a complaint alleging attorney malpractice against defendant law partnership, Aycock & Spence, and against defendant, W. Mark Spence, on 10 May 1988. Plaintiff appeals from a summary judgment allowed for defendants on 29 March 1990.

Plaintiff's complaint alleges in part:

FACTUAL ALLEGATIONS

6.

The plaintiff and the defendants Partnership and Spence contracted on a number of occasions for Spence and for the Partnership to represent the plaintiff in various legal matters, particularly real estate transactions.

7.

On or about February 4, 1985, the plaintiff, as seller, and Sea Isle Realty, Inc., and Kenneth Z. Smith, as purchasers, entered into an offer to purchase certain real estate described in said contract as "Block 16, Lots 1 through 27, Kill Devil Hills, Section 1; Being the same tract of land formerly owned by C. B. Morrisette, Jr.," for a price of $496,000.00. A copy of said offer to purchase is attached hereto and incorporated herein by reference as if fully set out as Exhibit "A."

8.

The plaintiff employed the defendants Partnership and Spence to represent his interests in connection with the closing of the above-referenced contract and the defendants Partnership and Spence agreed to represent the plaintiff in a competent and professional manner commensurate with accepted standards for licensed attorneys in North Carolina handling real estate transactions.

9.

The defendants Partnership and Spence, agreed *inter alia*, to prepare a promissory note and deed of trust covering the subject property pursuant to the terms of the attached Exhibit "A," offer to purchase.

10.

A legal description of the property which is the subject of Exhibit "A" is:

[Lots 1 through 27], Block 16, Section 1, of the subdivision known as "Kill Devil Hills," . . . .

11.

The defendants Partnership and Spence failed, without any justification whatsoever, to include Lots 1, 6 and 7 of the above-described property in the deed of trust which was recorded by the defendants at Book 397, page 570, Dare County Registry, on or about April 5, 1985. This omission lessened the security for the monies owed to the plaintiff.

12.

The plaintiff, upon realizing the negligent omission of said lots by the defendants Partnership and Spence, immediately contacted both defendants and made them aware of their negligent breach by virtue of said omission.

13.

Despite repeated demands by the plaintiff that the documents in question be corrected by the defendants Partnership and Spence, said documents have not been corrected by either defendant.

14.

The negligent omission complained of above has caused monetary damages to the plaintiff which, despite demands, have not been recompensed by either the defendant Partnership or the defendant Spence.

. . . .

FIRST COUNT (NEGLIGENCE)

16.

The plaintiff repeats and realleges each and every allegation hereinabove set out.

17.

When the plaintiff employed the defendants Partnership and Spence, they undertook and agreed to represent the plaintiff in a proper, skillful and diligent manner.

18.

The conduct of the defendants Partnership and Spence was not in accordance with the standard of practice of compe-

tent attorneys licensed to practice in the State of North Carolina in the handling of real estate transactions where such defendants were holding themselves out as skillful attorneys in the practice of real estate law.

19.

The plaintiff, as a direct and proximate result of the negligence of the defendants, has incurred legal expenses in the filing of this action, as well as in the filing of an action in the nature of a reformation of a deed of trust. Since these expenses were incurred solely because of the defendants' negligence, the defendants should be fully liable for same.

20.

As a direct result of the negligence of the defendants Partnership and Spence, the plaintiff has suffered damages in excess of $10,000.00 pursuant to rule 8(a)(2) of the North Carolina Rules of Civil Procedure.

SECOND COUNT (BREACH OF CONTRACT)

21.

The plaintiff repeats and realleges each and every allegation as set out above.

22.

The defendants Partnership and Spence entered into a contract with the plaintiff to perform professional legal services for him in connection with the above-referenced real [e]state transaction.

23.

The plaintiff has, at all times, performed all the agreements in the contract on his part at the time and in the manner specified.

24.

The defendants Partnership and Spence failed, neglected and refused to perform the conditions of the contract as hereinbefore alleged and as a result, the plaintiff has been damaged.

25.

The defendants Partnership and Spence breached the contract and refused to render professional services without reasonable cause. Said breach consisted of the negligent omission of three (3) lots from the deed of trust and the refusal or inability to correct said omission.

. . . .

Defendants' answer denied all pertinent allegations of the complaint, particularly those contending that plaintiff was represented by defendants.

During the summary judgment hearing held 26 March 1990, defendants introduced in support of their motion both plaintiff's and defendant Spence's depositions. Following are relevant excerpts from defendant Spence's deposition:

Q All right. Now, I'm sure you've heard the testimony of Mr. Broyhill concerning these—not the incident situation but the six or seven closings that you've been involved in prior to the incident one wherein Mr. Broyhill was selling individual lots or just one or two lots at a time to Ken Smith; is that correct?

A I heard him testify about them, yes.

Q Okay. Did you consider yourself to be acting as attorney for Ken Smith, Ray Broyhill or both of them at the time of those transactions?

A I considered myself to be representing Ken Smith or Sea Isle Realty, Incorporated, whoever the party was.

Q All right. So I take it then you did not consider yourself to be representing Ray Broyhill in any manner?

A Never did. At the time. Still don't. I was told that by Mr. Broyhill.

Q When were you told that?

A The time I recall most distinctly is the time where I forwarded [a] proposed closing statement . . . and when he got the proposed closing statement, he called me on the phone and said he did not pay attorney's fees when he was the seller in a transaction. He represented himself.

Q Did he tell you that he had an agreement with Ken Smith where Ken Smith would pay the attorney's fees for the transaction?

A No.

Q He never did tell you that?

A No, he did not.

Now, in that transaction, as I recall it, having been refreshed by the documents you handed up, Ken Smith paid a seller's attorney's fee. Having once been put on notice that I was not to represent Mr. Broyhill, a seller's fee was not charged thereafter in any of the transactions that have been testified about.

Plaintiff offered his affidavit which states in part:

3. In the past and before the sale of the land concerned in this lawsuit, I have sold lots in the Kill Devil Hills area to Mr. Ken Smith. He was the realtor when I bought the lots. He wanted to develop them, so I sold him the lots one or two at the time. These sales were done in my absence. Mr. Smith and I used Mark Spence as our attorney to handle these transactions. Mr. Spence did all of the legal work which I needed to sell the lots to Mr. Smith. He prepared legal documents for me in these sales transactions and for the purpose of meeting my legal obligations and needs in the matters. I considered him my attorney in the matters, and I wrote to him or communicated with him by phone as to his services on my behalf. I paid Mr. Spence for his services by reimbursing Ken Smith for attorney's fees and costs. Since I was not present for the closings of the sale, I arranged for Mr. Smith to pay Mr. Spence's fees in my behalf and I then reimbursed Mr. Smith.

. . . .

5. Mr. Spence was the attorney employed by me and Ken Smith to represent us in closing the sale of the lots to Sea Isle Realty. He was representing both of us. Mr. Spence prepared legal documents for me and which were supposed to protect my interests in the sales transaction. Mr. Spence was my trustee under the deed of trust involved in the transaction, and I relied upon him as my attorney to see that all of my paperwork

was properly prepared and that my interests were looked out for. I was not going to attend the closing and it was therefore important that my attorney attend to the transaction at closing.

Things had gone alright [sic] in my previous dealings with Mr. Spence representing my interests in closings with Mr. Smith, so I had no reason to change the relationship in this sale. I wrote to Mr. Spence and I spoke with him by phone about the terms of the sale and about his services. When there was a problem in the payoff of my mortgage in the sale, I used Mr. Spence to get things straight. I relied upon Mr. Spence to do whatever was necessary on my behalf to close the sale. He had done a good job for me up until then and, based upon our discussions, I felt that he was going to take care of my interests in my absence as he had in the past. I did not employ any other attorney to represent me, nor did I appear at the closing, because Mr. Spence was employed in my behalf and I relied upon his assurances and services.

6. After the sale was closed and the papers were recorded in Dare County, Mr. Spence sent me my papers. I noticed that the deed of trust did not include three (3) lots which were supposed to be listed as part of the real property pledged to me in the sale. I got in touch with Mr. Spence and told him of this mistake. He said he would take care of it. Mr. Spence had prepared the deed and deed of trust in this sale for my benefit and as my attorney. He made a mistake in failing to include the three (3) lots in the papers and I called him on it. He told me he would check into it and take care of it. At no time had I agreed to release any lots for the $50,000 down payment at the time of the closing. The written contract made it clear that the twenty-seven (27) lots were to be released for $16,518.51 each after the closing. This release amount was determined by dividing the amount I was financing, $446,000 by the twenty-seven (27) lots financed which gave us a release value of $16,518.51 per lot. The $50,000 downpayment was not included in determining the release of any lots and was not paid for the release of any lots.

7. At no time did Mr. Spence notify me that he did not represent my interests in the sales transaction, that he only represented Mr. Smith or Sea Isle Realty's interest, or that

I should secure separate and timely representation of my interests prior to or at the closing of the sales transaction. Mr. Spence never stated to me anything about who he represented or the scope of his representation in the sales transaction at issue in this lawsuit.

The issues are: (I) whether the trial court erred in granting summary judgment in that there is a genuine issue of material fact as to whether an attorney-client relationship existed; and (II) whether plaintiff is entitled to argue on appeal a theory of non-client third-party liability based upon nonprivity of contract between plaintiff and defendant.

I

[1] Plaintiff first contends the trial court erred in granting defendants' motion for summary judgment in that there exists a genuine issue of material fact as to whether there was a contract of employment between plaintiff and defendants such that defendants represented plaintiff in the real estate transaction at issue.

Our Rules of Civil Procedure provide that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c) (1990). The burden is on the movant to show there is no genuine issue of material fact and the non-movant only has to refute any showing that his case is fatally deficient. *Cheek v. Poole*, 98 N.C. App. 158, 162, 390 S.E.2d 455, 458, *disc. rev. denied*, 327 N.C. 137, 394 S.E.2d 169 (1990). All inferences are resolved against the movant and the facts asserted by the non-movant must be accepted as true. *Vernon, Vernon, Wooten, Browne & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 298, 326 S.E.2d 316, 319 (1985). The trial court's role in ruling on a summary judgment motion is to determine whether a genuine issue of material fact exists, but not to decide an issue of fact. *Barrow v. Murphrey*, 95 N.C. App. 738, 740, 383 S.E.2d 684, 685 (1989).

In support of their motion for summary judgment, defendants introduced defendant Spence's deposition in which he denied that he had ever represented plaintiff in any transaction and that, at one point, plaintiff claimed to Spence that he represented himself.

Plaintiff, on the other hand, presented his affidavit stating that defendants, and particularly defendant Spence, did represent plaintiff in the transaction at issue. Therefore, a genuine issue of material fact is presented as to whether there was an attorney-client relationship. *See Ives v. Real-Venture, Inc.*, 97 N.C. App. 391, 388 S.E.2d 573, *disc. rev. denied*, 327 N.C. 139, 394 S.E.2d 174 (1990) (genuine issue of material fact existed where third-party defendants presented deposition testimony that they were not retained to conduct title search or purchase title insurance and defendants presented affidavit that third-party defendants were retained for these purposes). We further reject defendants' argument that plaintiff's affidavit shows only an ineffective unilateral attempt to form an attorney-client relationship. This Court has held that an express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties even in the absence of the payment of fees or the lack of a formal contract. *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 88 L.Ed.2d 338 (1985). Plaintiff's affidavit states that defendants had represented him in a number of similar transactions, that defendants prepared legal documents for him, that plaintiff wrote to and telephoned defendants to give instructions pertinent to his representation, that plaintiff paid defendants through Ken Smith because plaintiff was not present at closing, that defendant Spence served as plaintiff's trustee under the relevant deed of trust, that plaintiff used defendant Spence to straighten out a problem with plaintiff's mortgage payoff related to the sale at issue, and that defendant Spence said he would take care of correcting the deed of trust. If true, these factual assertions would tend to establish an attorney-client relationship based upon the conduct of the parties.

Accordingly, summary judgment was improper because there is a genuine issue of material fact regarding the existence of an attorney-client relationship.

II

[2] Plaintiff next argues that summary judgment was improper because, even if an attorney-client relationship did not exist, defendants are liable to plaintiff as a non-client third party. Plaintiff contends *United States Leasing 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),

stands for the proposition that an attorney may be held liable for negligence by a non-client third party in the absence of privity of contract.

While the first count in plaintiff's complaint purports to be a count in negligence, paragraph seventeen, as contained within that count, establishes that plaintiff was pleading the negligent performance of a duty arising from a contract of employment and representation between plaintiff and defendants. Nowhere in the complaint does plaintiff plead a theory of non-client third-party liability. Both the breach of contract and negligence counts, as pled by plaintiff, are based on privity of contract. There is also no indication in the record that plaintiff argued a nonprivity or non-client third-party theory before the trial court at the hearing on summary judgment. Failure to plead or argue a theory of recovery before the trial court precludes the assertion of that theory on appeal. *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 131, 388 S.E.2d 538, 556 (1990) (party could not argue third-party beneficiary theory on appeal where complaint and argument below was based upon direct contract).

Reversed and remanded.

Judge ORR concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

I agree that the record raises an issue of fact as to defendants' liability under the relationship of attorney and client. I do not agree, however, that the complaint does not adequately allege defendants' liability in the absence of that relationship, as the real basis for defendants' liability is not the attorney-client relationship, but defendants' failure to properly do what they either agreed, were instructed, or undertook to do—namely, draw the deed of trust in accordance with the sale terms.

Leaving aside the attorney-client relationship, the other circumstances alleged—that defendants prepared the deed of trust under an agreement to include all the lots listed in the offer to purchase but without justification failed to include some of them—clearly state an enforceable claim for relief under theories of both

breach of contract and negligence. Shrinking the circumstances alleged even further, the allegation that defendants undertook to draw the deed of trust in accordance with the terms of the sale and without justification failed to do so, also states an enforceable claim since even an unobligated, disinterested volunteer can be liable for improperly performing a service or task undertaken. These claims being inherent in the comprehensive claim alleged and readily discernible from reading the complaint, it was not necessary to label them with a nonprivity or other theory of some kind. For legal rights are based upon circumstances, not theories, and the circumstances alleged, if proven, would entitle plaintiff to recover under either of the so-called theories stated by the majority. Nor is it legally significant that plaintiff did argue this at the hearing, as the sufficiency of a pleading is not determined by argument, but by its content.

ARTHUR BENNETT MANNING AND WIFE, LUGENE MANNING v. CLARENCE ERNEST FLETCHER, JR. AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 907SC150

(Filed 2 April 1991)

Insurance § 69 (NCI3d)— underinsured motorist coverage—reduction for net workers' compensation payments

In reducing underinsured motorist coverage liability in a business automobile insurance policy by amounts paid to the insured as workers' compensation benefits, the amounts paid as workers' compensation benefits are to be calculated after the workers' compensation insurance carrier has been reimbursed by insurance proceeds from the tortfeasor's liability insurance carrier.

Am Jur 2d, Automobile Insurance §§ 316, 320.

Uninsured motorist coverage: validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law. 24 ALR3d 1969.

APPEAL by plaintiffs from Judgment entered 15 December 1989 by *Judge Richard B. Allsbrook* in NASH County Superior Court. Heard in the Court of Appeals 16 November 1990.

Ralph G. Willey, III, P.A., for plaintiff appellants.

Poyner & Spruill, by Ernie K. Murray, for North Carolina Farm Bureau Mutual Insurance Company, defendant appellee.

COZORT, Judge.

The question presented by the case below is whether, upon remand from our Supreme Court, the trial court properly calculated the amount due plaintiff Arthur Manning under defendant's insurance policy providing underinsured motorist coverage. Finding the court erred in calculating the amount due, we reverse the trial court.

Plaintiff Arthur Manning was injured in an automobile accident on 13 March 1985. He suffered severe physical injuries, including complete loss of bladder and sexual function. In March 1986 Arthur and his wife Lugene Manning (the Mannings) initiated an action against defendant Clarence Fletcher, alleging that Fletcher negligently drove his automobile into Arthur Manning's path while Manning was driving his employer's truck. The Mannings' complaint included a claim for loss of consortium. Manning's employer was insured by North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). Under a business auto policy, Farm Bureau provided underinsured motorist coverage up to $100,000. Under a separate policy, Farm Bureau provided workers' compensation insurance. In July 1987 the Mannings' lawsuit was converted to a declaratory judgment action, with Farm Bureau being added as a party-defendant. The separate interests of Farm Bureau as workers' compensation carrier and as underinsured motorist carrier were represented by separate counsel. In the final pretrial order, the parties entered into stipulations, which can be summarized, in pertinent part, as follows:

> As a result of the collision, Arthur Manning's damages are not less than $100,000;
>
> At the time of the accident, Fletcher had in effect a policy of liability insurance issued by State Farm Insurance Company [State Farm] which provided coverage of $25,000 per person, $50,000 per occurrence;

Farm Bureau's policy to Manning's employer provided underinsurance motorist coverage to Manning in the stated amount of $100,000, in accordance with N.C. Gen. Stat. § 20-279.21.

Farm Bureau's workers' compensation policy provided disability and medical benefits of $59,000 to Manning, with the North Carolina Industrial Commission having awarded that amount to Manning.

The case was heard without a jury. On 26 August 1987, the trial court entered judgment making findings of fact and the following pertinent conclusions of law:

4. The $25,000.00 paid by State Farm Mutual Insurance Company to the plaintiffs and the subsequent distribution to North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier, subject to attorneys fees for legal services rendered to North Carolina Farm Bureau Mutual Insurance Company by plaintiffs' counsel in the amount of $8,333.33 is agreed upon by the parties without the necessity of order by this Court and is not to be considered further in this declaratory judgment.

5. That North Carolina Farm Bureau Mutual Insurance Company, underinsured motorist carrier, is obligated to pay the plaintiffs the difference between the stated limit of the underinsured motorist coverage in its policy of $100,000.00 and the limit of the liability insurance paid by State Farm Mutual Insurance Company on behalf of the defendant, Fletcher, in the amount of $25,000.00; that North Carolina Farm Bureau Mutual Insurance Company, as underinsured motorist carrier, is obligated to pay the plaintiffs the sum of $75,000.00 pursuant to its policy and the North Carolina Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. 20-279.21 (b)(4).

6. That North Carolina Farm Bureau Mutual Insurance Company is not entitled to reduce its underinsured motorist coverage to the plaintiffs in the amount of $75,000.00 because of benefits paid to the plaintiff, Arthur Bennett Manning, pursuant to the North Carolina Workers' Compensation Act; that such reduction is not permitted by either N.C. Gen. Stat. 20-279.21 (b) (4) or N.C. Gen. Stat. 20-279.21 (e) of the North Carolina Motor Vehicle Safety and Financial Responsibility Act.

7. That North Carolina Farm Bureau Mutual Insurance Company, as workers compensation carrier, is entitled to subrogation against the proceeds of the underinsured motorist coverage afforded by North Carolina Farm Bureau Mutual Insurance Company, as the underinsured motorist carrier, up to $34,000.00, pursuant to N.C. Gen. Stat. 97-10.2 et seq.

8. That the Nash County Superior Court has authority, in its discretion, to distribute the proceeds of the underinsured motorist coverage to be paid by North Carolina Farm Bureau Mutual Insurance Company in the amount of $75,000.00 between the plaintiffs, the employer and the North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier, pursuant to N.C. Gen. Stat. 97-10.2 (j).

9. That the underinsured motorist insurance coverage in the amount of $75,000.00 should be paid by North Carolina Farm Bureau Mutual Insurance Company, underinsured motorist insurer to the plaintiffs; that the plaintiffs are entitled to $41,000.00 of said proceeds free of any claim or lien of any party to this action; that the plaintiffs are to retain the balance of the proceeds in the amounts of $34,000.00, until such time as the Court, in its discretion, distributes this amount between the plaintiffs and North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier.

10. That the Nash County Superior Court cannot exercise its discretion in distributing the balance of $34,000.00 between the plaintiffs and North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier, without further hearing as to the present physical and economic condition of the plaintiff, Arthur Bennett Manning; that a subsequent hearing should be calendared, with notice to plaintiffs and North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier, to determine the distribution of the balance of $34,000.00 between the parties.

The defendants appealed the judgment of 26 August 1987 to this Court, which affirmed the trial court on the issue of not permitting Farm Bureau to reduce its underinsured motorist coverage because of workers' compensation benefits paid to plaintiff Arthur Manning. *Manning v. Fletcher*, 91 N.C. App. 393, 398, 371 S.E.2d 770, 773 (1988). Our Supreme Court granted discretionary review and reversed this Court, holding that the statute permits reduction

of the underinsured motorist coverage by the amounts paid as workers' compensation benefits. The Supreme Court remanded the case to the trial division for further proceedings. *Manning v. Fletcher*, 324 N.C. 513, 518, 379 S.E.2d 854, 857 (1989).

Noting that our Supreme Court had not decided whether the " 'amounts paid' by the workers' compensation carrier are determined *before* the workers' compensation carrier receives reimbursement from the tortfeasor's liability carrier *or after* the workers' compensation carrier receives such reimbursement," the plaintiffs petitioned the Supreme Court to rehear the case "for the purpose of calculating the [amount] of underinsured motorist coverage owed to [plaintiff Arthur Manning] under the Farm Bureau policy." The Court denied that petition "without prejudice to any rights plaintiffs may have to argue before the trial division the proper calculation of the amounts due them."

On remand, the trial court, on 15 December 1989, entered a judgment finding:

> 4. North Carolina Farm Bureau Mutual Insurance Company/Worker's Compensation Carrier paid $59,000.00 in worker's compensation benefits to Arthur Bennett Manning, and . . . was subsequently reimbursed in the amount of $25,000.00 from proceeds received by Manning from State Farm Mutual Insurance Company, liability carrier, so that the amount of worker's compensation paid by North Carolina Farm Bureau Mutual Insurance Company/Worker's Compensation Carrier not reimbursed by the proceeds of liability insurance is $34,000.00.
>
> 5. The limit of liability of the Farm Bureau policy requires that its $100,000.00 of underinsured motorist coverage be reduced by the aggregate of the $25,000.00 of Fletcher's liability coverage paid to Manning and the $59,000.00 of worker's compensation benefits paid to Manning.

and concluding:

> 2. Pursuant to the limit of liability language contained in the Farm Bureau policy and G.S. 20-279.21(b)(4), Farm Bureau's $100,000.00 underinsured motorist coverage liability must be reduced by the $25,000.00 of liability coverage paid to Plaintiffs. *Manning v. Fletcher*, 324 N.C. 513, 515 (1989).

3. Pursuant to the limit of liability clause of the policy, Farm Bureau's $100,000.00 limit of underinsured motorist coverage liability must also be reduced by the $59,000.00 of worker's compensation paid to the Plaintiffs.

The trial court then ordered that the maximum amount required to be paid by Farm Bureau as underinsured motorist carrier is $16,000.00, and further ordered:

> [P]ursuant to G.S. 97-10.2(j), and upon the worker's compensation carrier's waiver of hearing as to the apportionment of the $16,000.00 heretofore adjudged owing, and in light of the amount already received by the Worker's Compensation carrier, the Court determines that no portion of the $16,000.00 shall be paid to North Carolina Farm Bureau Mutual Insurance Company/Worker's Compensation Carrier in connection with its claimed subrogation lien pursuant to the Worker's Compensation Act, but that the entire $16,000.00 shall be apportioned to the Plaintiff Arthur Bennett Manning.

On appeal, plaintiffs contend the trial court erred by reducing the amount of underinsured motorist coverage owed to plaintiff Arthur Manning by $59,000.00 rather than $34,000.00. The first figure represents the total amount paid to or on behalf of Manning as workers' compensation benefits. The second figure represents the "net" outlay of workers' compensation benefits after reduction by the $25,000.00 received from the tort-feasor's liability insurer. We agree that the amount of underinsured motorist coverage owed to plaintiff Manning should be reduced by only the "net" workers' compensation benefits paid, $34,000.00.

The proper calculation of the amount owed to Arthur Manning is determined by the interaction of N.C. Gen. Stat. § 97-10.2 (1985), N.C. Gen. Stat. § 20-279.21 (1985), Farm Bureau's insurance contract with Arthur Manning's employer, and applicable case law.

The pertinent language in Farm Bureau's auto insurance contract reads as follows:

1. Regardless of the number of covered autos, insureds, claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the limit of UNINSURED MOTORISTS INSURANCE shown in the declarations.

2. Any amount payable under this insurance shall be reduced by:

   a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits and

   b. All sums paid by or for anyone who is legally responsible, including all sums paid under the policy's LIABILITY INSURANCE.

In *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854 (1989), our Supreme Court construed the operation of § 20-279.21(b)(4) and (e) upon the facts presented by the plaintiffs' declaratory judgment action. The Court noted that, pursuant to subsection (b)(4),

> [t]he payment to plaintiff was therefore limited to the difference between Fletcher's liability coverage of $25,000 and the $100,000 limit of Farm Bureau's underinsured motorist coverage as specified in the policy. Plaintiff and Farm Bureau agree that the maximum amount of Farm Bureau's liability under N.C.G.S. § 20-279.21(b)(4) is $75,000.
>
> Farm Bureau argues that, under the limit of liability provision in its underinsured motorist coverage policy with plaintiff's employer, the $75,000 may be further reduced by the $59,000 paid to plaintiff as workers' compensation benefits, for a total payment to plaintiff of $16,000.

Manning, 324 N.C. at 515, 379 S.E.2d at 855. The Court then held that "N.C.G.S. § 20-279.21(e) permits an insurance carrier to reduce the underinsured motorist coverage liability in a business auto insurance policy by amounts paid to the insured as workers' compensation benefits." *Id.* at 518, 379 S.E.2d at 857. The language of the Court's holding left unresolved the issue of whether amounts paid as workers' compensation benefits were to be calculated before or after the workers' compensation insurance carrier has been reimbursed by insurance proceeds from the tort-feasor's liability insurance carrier.

As appellate reports have frequently noted, the "purpose of this State's compulsory motor vehicle insurance laws, of which the underinsured motorist provisions are a part, was and is the protection of innocent victims who may be injured by financially irresponsible motorists." *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 224, 376 S.E.2d 761, 763 (1989). In the case

below, the plaintiff, as the parties stipulated, suffered serious injuries, permanent disability, and economic loss which amounted to damages of "not less than $100,000.00." Based on the parties' stipulations the trial court found that the North Carolina Industrial Commission entered a final award for the plaintiff of $59,000.00 in workers' compensation benefits, which was paid by Farm Bureau as workers' compensation insurance carrier. The trial court also found that the

> $25,000.00 paid to the plaintiffs by State Farm Mutual Insurance Company [Clarence Fletcher's liability insurance carrier] is subject to the workers' compensation subrogation lien of North Carolina Farm Bureau Mutual Insurance Company, and *by agreement of the parties, is to be immediately disbursed to North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier,* except for the payment of $8,333.33 to plaintiffs' counsel for legal services rendered on behalf of North Carolina Farm Bureau Mutual Insurance Company pursuant to N.C. Gen. Stat. 97-10.2 (f)(2) . . . . (Emphasis added.)

As workers' compensation insurance carrier, Farm Bureau's net payment to Arthur Manning is $34,000 ($59,000 paid in benefits reduced by the $25,000 paid to Farm Bureau by State Farm, Fletcher's carrier). As underinsured motorist insurance carrier, Farm Bureau's limit of liability to Manning is $75,000 (the contractual limit of $100,000 less the $25,000 paid by State Farm). If the $75,000 limit is reduced by the net payment of $34,000 in workers' compensation benefits, plaintiff Arthur Manning is owed $41,000 in underinsured motorist coverage. Thus, he will recover his stipulated damages of $100,000 in the form of $59,000 in workers' compensation benefits and $41,000 in underinsured motorist coverage. There will be no double recovery for the same injuries. Calculating the reduction of underinsured motorist coverage on the basis of net workers' compensation benefits paid is consistent with the provisions of § 20-279.21 of the Financial Responsibility Act, which " 'is remedial in nature and is to be liberally construed to effectuate its purpose of providing coverage for damages to injured parties caused by insured motorists with liability coverage not sufficient to provide complete compensation for the damages.' " *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 296, 378 S.E.2d 21, 26 (1989) (quoting *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 5, 367 S.E.2d 372, 375 (1988)).

The defendants contend that the "$25,000 repaid to the workers' compensation carrier pursuant to the pretrial order was not required by law to be so paid .... [T]he fact that Plaintiffs voluntarily paid the $25,000 of *liability* funds back to their workers' compensation carrier" should not affect the reduction of plaintiff Manning's underinsured motorist coverage by the $59,000 of workers' compensation benefits paid prior to the $25,000 reimbursement.

Defendants' argument mischaracterizes the right of workers' compensation insurance carriers to reimbursement in the event of a judgment against or settlement with a third-party tort-feasor. In the event of such a judgment or settlement the employer is entitled, subject to court costs and attorney fees, to reimbursement "for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission." N.C. Gen. Stat. § 97-10.2(f)(1)(c) (1985). "The insurance carrier affording coverage to the employer under this Chapter *shall be subrogated* to all rights and liabilities of the employer ...." N.C. Gen. Stat. § 97-10.2(g) (1985) (emphasis added). The mandatory nature of the workers' compensation insurance carrier's lien on a recovery from the third-party tort-feasor is not altered by the discretionary authority of the trial judge, pursuant to § 97-10.2(j) to apportion the recovery between the employee and the insurance carrier, if that recovery is inadequate to satisfy the insurance carrier's lien.

Finally, the defendants' characterization of the reimbursement as voluntary overlooks their stipulation to the following agreement:

> State Farm Insurance Company and Arthur Bennett Manning recognize the subrogation lien of North Carolina Farm Bureau Mutual Insurance Company, workers' compensation carrier, in the $25,000.00 to be paid to Arthur Bennett Manning by State Farm Insurance Company and agree that said payment of $25,000.00 shall be disbursed pursuant to order of the Nash County Superior Court acting pursuant to N.C.G.S. 97-10.2(j) in the following amounts: $16,666.67 to North Carolina Farm Bureau Mutual Insurance Company and $8,333.33 to Henson, Fuerst & Willey, P.A., attorneys.

The position taken by the defendants in their brief, if adopted by this Court, would promote litigation rather than settlement of subrogation claims.

For the reasons stated above we reverse the trial court and hold that the underinsured motorist coverage applicable to plaintiff Arthur Manning should be reduced by $34,000 rather than $59,000. The cause is remanded to the trial court for disbursement of $41,000, pursuant to N.C. Gen. Stat. § 97-10.2(j), consistent with *Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 330 (1990), *disc. review allowed*, 328 N.C. 270, 400 S.E.2d 449 (1991).

Reversed and remanded.

Judges WELLS and JOHNSON concur.

BUTLER INTERNATIONAL, INC., D/B/A MSI/MARUNAKA, PLAINTIFF v. CENTRAL AIR FREIGHT, INC., DEFENDANT

No. 8919SC1337

(Filed 2 April 1991)

1. **Carriers § 118 (NCI4th)— machine damaged in transit—defense of improper packaging unavailable to carrier—directed verdict for shipper proper**

In an action to recover for damage to a machine during shipment by defendant air freight carrier, the trial court did not err in directing verdict for plaintiff shipper, since defendant was liable for the damage done to plaintiff's machine in transit absent the defense of shipper's negligence; since defendant had the right to refuse to accept any shipment whose packaging defendant considered improper or insufficient, defendant was precluded from maintaining a defense of improper packaging where it accepted the container for shipment; and defendant having accepted the crate, the only inference was that its destruction and damage to the machine were due to defendant's negligence in transit.

Am Jur 2d, Carriers §§ 529, 530.

2. **Carriers § 134 (NCI4th)— machine damaged in transit—amount of damages recoverable by shipper**

In an action to recover for damage to a machine during shipment by defendant carrier, the trial court properly con-

cluded that defendant was obligated to pay plaintiff the full amount of the declared value of the machine since the bill of lading showed a declared value of $18,000; plaintiff's evidence showed that it had paid $329.50 for excess value and that it had been billed $18,000 for the machine by the manufacturer; the evidence was undisputed that the machine was not usable in its damaged condition; there was evidence that value at destination was $500, the amount which could be realized if the machine were taken apart and parts were sold; and defendant presented no credible evidence suggesting that the parties' contractual agreement as to stipulated value should not be enforced.

Am Jur 2d, Carriers §§ 286, 640, 644, 652.

APPEAL by defendant from judgment entered in open court on 23 August 1989 by *Judge Russell G. Walker, Jr.*, in RANDOLPH County Superior Court. Heard in the Court of Appeals 7 June 1990.

O'Briant, O'Briant & Bunch, by W. Edward Bunch, for plaintiff-appellee.

Carruthers & Roth, P.A., by Kenneth L. Jones, for defendant-appellant.

PARKER, Judge.

Plaintiff Butler International, Inc., d/b/a MSI/Marunaka instituted this civil action to recover the sum of $18,885.50 from defendant Central Air Freight as a result of damage in transit to an OTM-2400 edgebanding machine (also referred to as an OTF-2400). At trial the evidence tended to show the following: Plaintiff sold five woodworking machines—four KCB-50s and one OTM-2400—to American Marunaka. Since American Marunaka had only a sales office, the machines were to be shipped to Asian Pacific Distribution Corporation's warehouse in Torrance, California. Plaintiff hired defendant to transport the five machines from plaintiff's place of business in High Point, North Carolina, to Torrance, California. On 6 May 1988 Mark Anderson, defendant's agent, picked up the machines at plaintiff's place of business. A bill of lading for the machines was executed by Tom Evans, plaintiff's agent, and by Mr. Anderson. On the bill of lading the declared value of the four KCB-50s was $12,000.00 each. The fifth machine, the OTM-2400, the only one involved in this action, had a declared value of $18,000.00. Defend-

ant's airbill showed transportation charges of $885.50, which plaintiff paid. Of this amount, $329.50 was for "declared excess value" of the machinery. At some point prior to the time of its arrival in Torrance, California, the OTM-2400 was damaged.

According to plaintiff's president, Tim Butler, when delivered to defendant, the OTM-2400 was bolted to a skid, wrapped in plastic and completely encased in a wooden crate with the exception of the top of the machine. From the testimony of Mr. Masao Nishioka, the manager of Asian Pacific's warehouse who received the machine, the machine was damaged in the following manner:

> That particular unit came along on two pieces of four-by-four bolted to the machine on the bottom of the machine and came in really bad shape. One of the four-by-four's [sic] was ripped off, and it looked like it fell down on the ground. I don't know how it happened, but dropped or knocked down or something, and some bottom pieces, which was [sic] bolted to the four-by-fours was [sic] bent. And the screws were ripped off and some wiring were teared(sic) off, and I believe some other parts attached to the machine was [sic] also broken. We immediately thought this was really damaged, so we immediately called him [Mr. Ozaki] and asked him to come over and look at it.

The damaged machine had been shipped back to the manufacturer in Japan. Plaintiff had not been paid for the damaged machine by American Marunaka. Plaintiff had been invoiced $18,000.00 for the OTM-2400 on 3 March 1988 but still owed the manufacturer, Marunaka International, Inc., $18,000.00 for the machine. Mr. Shoichi Ozaki, Vice President of American Marunaka, corroborated the testimony as to damage to the OTM-2400 and testified that the parts might have been worth $400.00 or $500.00. Mr. Ozaki also testified that the OTM-2400 cost approximately $15,000.00 and sold to a customer for $20,000.00.

Defendant's evidence tended to show that plaintiff had inflated the value of the machine on the bill of lading. According to Evans, who was no longer employed by plaintiff at the time of trial, plaintiff purchased the OTM-2400 for only $6,500.00 and would not have sold it to the California customer for more than $12,500.00. Evans further testified that, contrary to Butler's testimony, the OTM-2400 was packed in a manner such that not only the top, but also both ends of the machine, were exposed. Although Evans had been the person primarily responsible for crating the OTM-2400, in his opin-

ion the packaging was "skimpy" and "poor." Defendant also introduced the deposition testimony of a cargo freight claims inspector, Mr. Earl Chad, whom defendant had hired to inspect the damaged machine. Mr. Chad was tendered and accepted as an expert in the fields of cargo freight claims inspections and packaging evaluation. After he had personally inspected the damaged machine, Mr. Chad's expert opinion was that the packaging had completely failed to protect the machine during normal movement. The expert also gave his opinion that packaging the machine so that both ends and the top were exposed would not be adequate to protect the machine during transport.

At the close of all evidence plaintiff moved for a directed verdict. The basis for this motion was that there was no evidence that defendant informed plaintiff that the packaging was inadequate or refused to ship the machine for this reason. This motion was granted in open court by the trial court. In granting the motion the trial court stated:

> [T]here is no evidence in this case of any contributory negligence on the part of the Plaintiff in shipping these goods. The witness for the Defendant, the manager of the Defendant's terminal, has testified under oath as to what the packaging standards required by the Defendant are for shipments and has further stated under oath that this shipment would not have been received and shipped by the Defendant had it not met those standards. The common carrier is, under the law of this state, is an insurer for the delivery of goods in good condition absent an act of God, an act of a public enemy, the fault of the shipper, or some inherent deficiency in the nature or quality of the goods. There is no fault of the shipper in this case arising from the evidence that has been presented. As to the value, the value shown on the bill of lading is the measure of damage in this case, and the Defendant has been paid a standard fee set by his tariff for the increase of the common carrier's liability to include up to the values placed on the bill of lading.

Accordingly, the trial court awarded plaintiff $18,000.00. Defendant appeals from the grant of directed verdict in favor of plaintiff.

[1] On appeal defendant brings forward multiple assignments of error. We first address defendant's contention that the trial court erred in granting a directed verdict in favor of plaintiff.

On motion for directed verdict all the evidence that tends to support the nonmovant's case must be taken as true and considered in the light most favorable to the nonmovant, who is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence. *Mann v. Transportation Co. and Tillett v. Transportation Co.*, 283 N.C. 734, 746, 198 S.E.2d 558, 566 (1973). "A directed verdict for the party with the burden of proof, however, is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration." *Financial Corp. v. Harnett Transfer*, 51 N.C. App. 1, 5, 275 S.E.2d 243, 246, *disc. rev. denied*, 302 N.C. 629, 280 S.E.2d 441 (1981).

Defendant initially argues that the evidence adduced at trial raised a factual issue as to whether plaintiff, the shipper, was negligent in packaging the machine for shipment to California. Specifically, defendant relies on (i) an admission by Tim Butler that his company was responsible for properly packing the machine for shipping, (ii) the testimony of its expert that the machine was improperly packaged to protect it from normal movement during the course of transit and (iii) the testimony of Tom Evans that the machine was poorly packaged.

As defendant is an air freight carrier in interstate commerce, the determination of liability is governed by federal common law. The Federal Aviation Act of 1958, 49 U.S.C. app. §§ 1301 *et seq.* (1982) (herein the "FAA"), as amended by the Airline Deregulation Act of 1978, 49 U.S.C. app. §§ 1371-76 (1982), expressly preempts state regulation of air cargo carriers such as defendant. *Ragsdale v. Airborne Freight Corp.*, 173 Ga. App. 48, 49, 325 S.E.2d 428, 430 (1984) (citing 49 U.S.C. app. § 1305(a) (1982)); *see also Cummings v. Purolator Courier Corp.*, 670 F. Supp. 92, 94 (S.D.N.Y. 1987), and cases cited therein. The deregulation of airline cargo service in no way altered, however, the applicability or substance of prior federal common law rules of contract for fixing the extent of a carrier's liability for loss or injury to goods during interstate transportation. *See, e.g., First Pennsylvania Bank v. Eastern Airlines, Inc.*, 731 F.2d 1113, 1122 (3d Cir. 1984); *U.S. Gold Corp. v. Federal Exp. Corp.*, 719 F. Supp. 1217, 1224 (S.D.N.Y. 1989) (citing additional cases), *certified for appeal*, 1990 WL 6579 (S.D.N.Y. Jan. 25, 1990) (WESTLAW). Federal common law governs because the FAA does not establish the liability of air carriers, as is the

case for surface carriers under the Interstate Commerce Act. *North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-34 (2d Cir. 1978).

Under federal common law, adopted by North Carolina case law, a carrier is liable for loss of goods in transit unless the carrier can show that the loss was attributable to an act of God, the public enemy, the fault of the shipper or an inherent defect in the goods shipped. *Missouri Pacific R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 12 L.Ed.2d 194, 197 (1964); *accord Cigar Co. v. Garner*, 229 N.C. 173, 47 S.E.2d 854 (1948); *see also Merchant v. Lassiter*, 224 N.C. 343, 30 S.E.2d 217 (1944); *Moore v. R.R.*, 183 N.C. 213, 111 S.E. 166 (1922); *Tool Corp. v. Freight Carriers, Inc.*, 33 N.C. App. 241, 234 S.E.2d 758 (1977). Plaintiff establishes a *prima facie* case of liability when he introduces evidence showing delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition. *Missouri Pacific R. Co.*, 377 U.S. at 138, 12 L.Ed.2d at 198; *Precythe v. R.R.*, 230 N.C. 195, 52 S.E.2d 360 (1949); *Fuller v. R.R.*, 214 N.C. 648, 200 S.E. 403 (1939); *Edgerton v. R.R.*, 203 N.C. 281, 165 S.E. 689 (1932), *cert. denied*, 288 U.S. 605, 77 L.Ed. 980 (1933). Establishment of the *prima facie* case entitles the plaintiff to have the case submitted to the jury. The burden then shifts to the carrier to produce evidence of one of the above-mentioned conditions which, if established to the satisfaction of the jury, would negate its liability. If the carrier elects to offer no evidence, then it assumes the risk of an adverse verdict. *Precythe v. R.R.*, 230 N.C. at 197, 52 S.E.2d at 361.

In the present case although defendant produced evidence that plaintiff's own negligence contributed to the damage that was sustained during transport of the machine, the evidence showed that defendant would not have shipped the machine if it had not been properly packaged. At trial Kay Dezern was called as a witness by plaintiff. Ms. Dezern, formerly a salesperson with defendant, testified that defendant would not have shipped the crated machine if it had not been packaged properly. Dwight Moore, defendant's terminal manager at the Greensboro, North Carolina terminal, testified that a visual inspection is performed on everything that "hits our dock" and admitted that defendant would not have shipped the machine if it had not been packaged properly, but contended that there were no packaging experts at the terminal and that "[i]f you look at it and the merchandise is enclosed and it doesn't

have any sharp or protruding edges, there are no boards hanging off of it, things of that nature. That's pretty much what we look for."

Defendant's own tariff, introduced into evidence at trial, provides the following:

> Rule No. 5 PACKING AND MARKING REQUIREMENTS
>
> 1 Shipments must be prepared or packed to insure safe transportation with ordinary care in handling.
>
> 2 Any article susceptible to damage by ordinary handling must be adequately protected by proper packing and must be marked or bear appropriate labels.
>
> . . . .
>
> Rule No. 20 SHIPMENTS NOT ACCEPTABLE
>
> The following shipments will not be accepted under any circumstances.
>
> . . .
>
> 21 Shipments improperly packed or packaged.
>
> . . . .
>
> Rule No. 30 INSPECTION OF SHIPMENTS
>
> 1 All shipments are subject to inspection by CAFI.
>
> . . . .
>
> Rule No. 50 LIABILITIES NOT ASSUMED
>
> . . .
>
> 2 Without limiting the generality of Paragraph 1, CAFI shall not be liable for any loss, damage, mis-delivery, or other result caused by:
>
> . . .
>
> C. Improper or insufficient packing, securing or addressing or any other violation of the terms contained herein.
>
> . . . .

> Rule No. 140 SHIPMENTS SUBJECT TO DELAY
>
> The following conditions may delay delivery of the shipment to the consignee:
>
> . . .
>
> 5 Improperly packaged shipments that have to be repackaged by CAFI or turned back to the shipper for repackaging.

In addition to defendant's tariff, defendant's packaging expert, who examined the machine after delivery in California, testified that if the carrier has staff "perusing" the freight then "obvious discrepancies [in the packaging] should be caught or could be caught at the terminal location before actual movement out of state or out of country." Defendant's own evidence showed that its personnel visually inspected each shipment before it left the terminal. From the testimony the contents and packaging were readily apparent on a visual inspection, and defendant's personnel should have observed and determined that the crate was or was not sufficiently sturdy to withstand the wear and tear of transit. Defendant having accepted the crate, the only inference is that its destruction and damage to the machine were due to defendant's negligence in transit. Since defendant had the right to refuse to accept any shipment whose packaging defendant considered improper or insufficient, defendant is precluded from maintaining a defense of improper packaging where it accepted the container for shipment. Under the applicable law, absent the defense of shipper's negligence, defendant was liable for the damage done to plaintiff's machine in transit.

[2] Defendant also contends that the trial court erred in taking the issue of damages from the jury. Under federal common law defendant's tariffs, together with the bill of lading and airbill in evidence in this case, "constitute the contract of carriage between the parties and 'conclusively and exclusively govern the rights and liabilities between the parties.' " *Neal v. Republic Airlines, Inc.*, 605 F. Supp. 1145, 1147 (N.D. Ill. 1985) (citation omitted). The " 'obligation of the carrier must be determined solely from the recitals of the written contract itself.' " *Uniden Corp. v. Fed. Exp. Corp.*, 642 F. Supp. 263, 266 (M.D. Pa. 1986) (quoting *Thomas v. Trans World Airlines, Inc.*, 457 F.2d 1053, 1058 (3d Cir. 1972)); *see also Husman Const. Co. v. Purolator Courier Corp.*, 832 F.2d 459, 461 (8th Cir. 1987).

Rule No. 82 in defendant's tariff provides:

> In consideration of CAFI's rate for the transportation of any shipment, which rate, in part, is dependent upon the value of the shipment, the shipper and all other parties having an interest in the shipment agree that unless a higher value is declared at time of shipment and a greater charge paid at the rate of $.50 per $100.00, the limit of CAFI's liability is $1.00 per pound with a maximum of $100.00 per shipment, plus the amount of CAFI's transportation charges applicable to that part of the shipment lost or damaged. In no event shall CAFI be liable for special, incidental, or consequential damages, including but not limited to loss or profits or income whether or not CAFI had knowledge that such damages might be incurred. Maximum declared value is $75,000.00. Any shipment in excess of such value may be made upon prior approval by CAFI, who shall determine the rate thereof.

This provision determines "not only the nature and extent" of defendant's liability "but also the nature and extent of the shipper's right of recovery." *North American Phillips*, 579 F.2d at 233. In order to have the benefit of the limitations stated in its tariff, a carrier must give the shipper a reasonable opportunity to declare a higher value by paying a higher freight rate. *First Pennsylvania Bank v. Eastern Airlines, Inc.*, 731 F.2d 1113, 1117 (3d Cir. 1984).

The general measure of damages for damaged goods is the "difference between the market value of the property in the condition in which it should have arrived at its destination and its market value at destination in its damaged condition less salvage collected." 2 S. Sorkin, *Goods in Transit* § 11.03 at 11-11 (1990). Notwithstanding this general rule, courts have recognized that each case must be decided on its own facts and that not all goods have an ascertainable market value. As the Supreme Court stated in *Illinois Cent. R. Co. v. Crail*, 281 U.S. 57, 74 L.Ed. 699 (1930):

> The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable.

Id. at 64-65, 74 L.Ed. at 703. In such cases some courts have accepted the invoice price at the place of shipment. *See, e.g., Union Pacific R. Co. v. Burke*, 255 U.S. 317, 65 L.Ed. 656 (1921); *Tatlow*

& Pledger (PTY) Ltd. v. Hermann Forwarding Co., 456 F. Supp. 351, 355 (S.D.N.Y. 1978).

In the present case the bill of lading shows a declared value of $18,000.00. Plaintiff's evidence showed that it had paid $329.50 for excess value and that it had been billed $18,000.00 for the OTM-2400 by the manufacturer. The evidence was undisputed that the machine was not usable in its damaged condition. The only evidence of value at destination was testimony of one witness that the machine could possibly have been taken apart and the parts sold for $500.00. Where the declared value represents plaintiff's actual loss, a rule allowing a shipper to recover his price for the goods deemed destroyed "achieve[s] at least a rough justice." *Dobbs on Remedies* § 5.10, at 379 (1973). Defendant having presented no credible evidence suggesting that the parties' contractual agreement as to stipulated value should not be enforced, the trial court properly concluded that defendant was obligated to pay plaintiff the full amount of the declared value of the machine.

Defendant's remaining assignments of error relate to the admission of certain evidence at trial. Having determined that the trial court did not err in directing a verdict for plaintiff, we do not address these assignments of error.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

CONSERVATION COUNCIL OF NORTH CAROLINA, SIERRA CLUB, THE WILDERNESS SOCIETY, NATIONAL PARKS AND CONSERVATION ASSOCIATION, AND DEFENDERS OF WILDLIFE, APPELLANTS v. T. ERIE HASTE, JR., VICE CHAIRMAN OF THE NORTH CAROLINA COASTAL RESOURCES COMMISSION, AND THE NORTH CAROLINA COASTAL RESOURCES COMMISSION, APPELLEES

No. 901SC342

(Filed 2 April 1991)

Administrative Law and Procedure § 56 (NCI4th); Waters and Watercourses § 7 (NCI3d)— Bonner Bridge—erosion control methods—adoption of temporary rule—right of petitioners to contested case hearing

Petitioners were entitled to a contested case hearing on the Coastal Resources Commission's adoption of a temporary rule permitting otherwise prohibited erosion control devices in certain circumstances and its issuance of a permit to the Department of Transportation pursuant to the temporary rule to construct a stone revetment and groin to protect the Bonner Bridge from erosion where they alleged that the Commission's decision violated various statutes, including notice and comment procedures required by the Coastal Area Management Act; petitioners were all conservation groups with members in North Carolina and so were directly affected by the decision; and petitioners presented arguments to sustain their contention that they had a substantial likelihood of prevailing in the contested case. The Coastal Resources Commission's order denying such hearing was affected by error of law where the Commission found that there was no basis in law for petitioners' allegation that the temporary rule adopted by the Commission failed to comply with CAMA's notice and comment provisions, was unsupported by the evidence where the Commission mischaracterized petitioners' position regarding alternatives to construction of "hard erosion control" measures, and was arbitrary and capricious because it required petitioners to allege specifically that the Commission either acted arbitrarily and capriciously or abused its discretion by adopting the temporary rule, thus imposing an additional burden that N.C.G.S. § 113A-121.1(b) does not require, rather than addressing the merits of petitioners' claim.

Am Jur 2d, Administrative Law §§ 279, 280.

APPEAL from order entered 6 February 1990 by *Judge D. M. McLelland* in DARE County Superior Court. Heard in the Court of Appeals 23 October 1990.

On 31 March 1989 the Department of Transportation requested a Coastal Area Management Act (CAMA) major development/dredge and fill permit to construct a stone revetment and groin at the northern end of Pea Island on North Carolina's Outer Banks. The purpose of the construction was to protect from erosion N.C. Highway 12 and the Herbert C. Bonner Bridge, which spans Oregon Inlet. When the Department of Transportation applied for the permit, North Carolina Coastal Resources Commission (CRC or Commission) regulations prohibited hard erosion control structures on the ocean shoreline. 15 NCAC 7H.0308(a)(1)(B). The regulations provided that beach nourishment and relocation were the preferred erosion control measures. 15 NCAC 7H.0308(a)(1)(A).

On 12 May 1989 the Department of Transportation asked the Commission to adopt an emergency rule that would permit otherwise prohibited erosion control structures in the circumstances presented by the Department of Transportation application. On 26 May 1989 the Commission adopted an emergency rule, 15 NCAC 7H.0308(a)(1)(M), which provided:

> Erosion control structures that would otherwise be prohibited by these standards may be permitted on finding that:
>
> (i) the erosion control structure is necessary to protect a bridge which provides the only existing road access to a substantial population on a barrier island; that is vital to public safety; and is imminently threatened by erosion;
>
> (ii) the preferred erosion control measures of relocation, beach nourishment or temporary stabilization are not adequate to protect public health and safety; and
>
> (iii) the proposed erosion control measure will have no adverse impacts on adjacent properties in private ownership and will have minimal impacts on public use of the beach.

The Commission issued this rule under G.S. 150B-13, which allows agencies to adopt temporary rules without following otherwise mandatory Administrative Procedure Act (APA) notice and comment procedures. The Commission gave no opportunity for public notice

and comment and, pursuant to the emergency rule, issued CAMA permit 138-89 to the Department of Transportation on 22 June 1989.

After complying with notice and hearing requirements under the CAMA and the APA, the Commission adopted the temporary rule as a permanent rule effective 1 December 1989. On 12 July 1989 pursuant to G.S. 113A-121.1(b), petitioners requested an administrative contested case hearing to challenge the Commission's issuance of permit 138-89. The Commission's Vice-Chairman denied the petitioners' request. The Superior Court of Dare County affirmed the Vice-Chairman, and the petitioners appeal.

Conservation Council of North Carolina, by John D. Runkle, for petitioner-appellants.

Sierra Club Legal Defense Fund, by Robert G. Dreher and Sandra Goldberg, for petitioner-appellants.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith and Special Deputy Attorney General James B. Richmond, for respondent-appellees.

EAGLES, Judge.

The issue before us is whether appellants are entitled to a contested case hearing under the Coastal Area Management Act (CAMA) to contest the Department of Transportation's decisions as to what measures are appropriate to protect the southern end of the Herbert C. Bonner Bridge from erosion. We hold that appellants are entitled to a contested case hearing.

Petition for Contested Case Hearing

Petitioners requested a contested case hearing under G.S. 113A-121.1(b) which provides:

> A determination of the appropriateness of a contested case . . . shall be based on whether the person seeking to commence a contested case:
>
> (1) Has alleged that the decision is contrary to a statute or rule;
>
> (2) Is directly affected by the decision; and
>
> (3) Has a substantial likelihood of prevailing in a contested case.

In support of their hearing request, petitioners alleged that the Commission's decision to issue the permit violated the following statutes and rules: G.S. 113A-108 (no permit shall be issued which is inconsistent with state guidelines); G.S. 113A-120(8) (no permit shall be issued for development inconsistent with the state guidelines); G.S. 113A-107 (state guidelines shall be amended in accordance with procedures set forth requiring prior notice to specified officials and a public comment period); G.S. 150B-13 (adoption of temporary rule must be necessitated by serious and unforeseeable threat to public safety); G.S. 150B-13 (agency must certify need for temporary rule and provide statement of reasons for its findings); 15 NCAC 7H.0308(a)(1)(A) (preferred erosion control measures shall be beach nourishment and relocation); (a)(1)(B) (erosion control structures, including jetties and groins, prohibited); (a)(1)(D) (erosion control measures which interfere with public access and use of ocean beaches prohibited); (a)(1)(E) (erosion control measures which significantly increase erosion on adjacent properties prohibited); and the rule at the center of this controversy, (a)(1)(M) (permitting exceptions to rules where necessary to protect bridge, where beach nourishment inadequate to protect public health and safety, and erosion measure will have no adverse impacts on adjacent private properties and minimal impact on public use of beach). We note that effective 1 November 1989, Chapter 7 of Title 15 of the North Carolina Administrative Code was transferred and recodified at Chapter 7 of Title 15A.

Petitioners are all conservation groups with members in North Carolina. The Vice-Chairman's order does not dispute that the petitioners are directly affected by the decision to issue the permit.

To support petitioners' contention that they have a substantial likelihood of prevailing in the contested case, they first argue that the CRC lacked authority to enact emergency amendments to its guidelines because it violated CAMA notice and comment provisions. The petitioners also argue that assuming the validity of the emergency rule, issuance of the permit was not justified because beach nourishment would have adequately protected the bridge. The petitioners also argue that the Commission's certification of the need for the temporary rule did not contain the findings and statement of reasons required by G.S. 150B-13(a). Finally, petitioners argue that the prerequisites for authorizing construction of a groin pursuant to the temporary rule were not present.

Order of the Vice-Chairman Denying the Contested Case Hearing

The Vice-Chairman made the following findings in his order: (1) the petitioners' argument regarding violation of the CAMA notice provisions had no basis in law because petitioners cited a section of CAMA that was "repealed" in 1987; (2) the petitioners' contention that the CRC failed to comply with the procedures for adopting a temporary rule under G.S. 150B-13 had no basis in law because the petitioners did not allege that the CRC was arbitrary and capricious or had abused its discretion; (3) the petitioners' argument that issuance of the permit was contrary to applicable statutes and rules was without merit because petitioners failed to allege that any alternative that did not involve hard erosion control was adequate to protect public health; (4) the record does not support the petitioners' allegation that the permit would result in adverse impact on adjacent properties and more than minimal impact on public use of the beach; (5) the petitioners failed to allege that the temporary filling of one acre of coastal wetlands was contrary to applicable statutes and regulations; and (6) for the reasons stated, the petitioners did not have a reasonable likelihood of success in prevailing in the contested case.

Standard of Review

G.S. 113A-121.1(b) provides that a determination that a person may not commence a contested case is a final agency decision and is subject to judicial review under Article 4 of Chapter 150B of the General Statutes. G.S. 150B-51(b) provides that the court reviewing a final decision may reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions violate constitutional provisions, exceed the statutory authority or jurisdiction of the agency, are made upon unlawful procedure, are affected by other error of law, are unsupported by substantial evidence in view of the whole record, or are arbitrary and capricious. After a careful review of the record, we hold that the Commission's decision may have prejudiced substantial rights of the petitioners because the agency's findings and conclusions are affected by error of law, are unsupported by substantial evidence in view of the whole record, and are arbitrary and capricious.

Analysis

Appellants contend that the order of the Vice-Chairman was affected by error of law. We agree. The Vice-Chairman found that there was no basis in law for petitioners' allegation that the temporary rule failed to comply with CAMA's notice and comment provisions. Although petitioners cited a subparagraph of section 107 that had been recodified in 1987, CAMA section 107 still requires that the Commission mail a copy of all proposed and adopted rules to various interested persons and that all persons who receive a proposed rule must have 30 days to comment. G.S. 113A-107(c). The Commission offers no support for its argument that recodified section 107 does not apply to amendment of existing guidelines. Additionally, we find no reason to conclude that the legislature intended to create differing obligations to give notice in the adoption of new rules and the amendment of existing rules. We agree with appellants that the reading advanced by the Commission would make CAMA notice and comment requirements ineffective. Following the Commission's logic, the notice and comment requirements could always be evaded by simply characterizing any new guideline as an amendment of an existing rule.

The purpose of CAMA's input and review provisions is to curb arbitrary and unreasoned action by the CRC. *Adams v. North Carolina Department of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978). Additionally, the mandatory provisions of the APA complement the procedural safeguards in the CAMA. *Id.* The temporary rule provisions of G.S. 150B-13 exempt agencies only from *APA* notice and comment requirements. G.S. 150B-13(a). Clearly, the General Assembly did not intend that the Commission use APA temporary rules to circumvent public review and comment on major projects that could affect the State's coastal resources. Accordingly, we hold that the Vice-Chairman's decision to deny petitioners a contested case hearing was based on an error of law.

Appellants also contend that the order denying the contested case hearing was arbitrary and capricious because the Commission in its order mischaracterized appellants' position regarding alternatives to construction of the revetment and groin. We agree that petitioners' position was mischaracterized.

In denying the contested case hearing, the Commission found that petitioners failed to allege that an alternative that did not involve hard erosion control was adequate to protect public health

and safety. Under G.S. 150B-51(5) this Court must apply the whole record test. Under the whole record test, the reviewing court considers both the evidence that supports the agency decision and evidence which detracts from it. "In essence, the reviewing court determines whether an administrative decision has a rational basis in the evidence." *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 344, 342 S.E.2d 914, 919, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). Here, the petitioners offered evidence that beach nourishment alone would sufficiently protect the bridge. They submitted an environmental assessment from the U.S. Fish and Wildlife Service that described a sand management plan with an *optional* revetment. The environmental assessment stated: "This plan to protect the bridge and highway does not require a revetment to be effective." Petitioners also offered affidavits of coastal scientists who said that beach nourishment alone was adequate to protect the bridge. The evidence here does not support the Commission's finding that the petitioners failed to offer an alternative that did not require hard erosion control structures. Accordingly, we hold that the CRC's finding mischaracterized the petitioners' position and is unsupported by substantial evidence in view of the whole record.

Appellants also contend that the Commission's order was arbitrary and capricious because the Vice-Chairman required petitioners to allege explicitly that the CRC acted arbitrarily and capriciously or abused its discretion by adopting the temporary rule. We agree that petitioners were not required to specifically allege that the CRC's action was arbitrary and capricious or was an abuse of discretion. "[T]he most important characteristic of pleadings in the administrative process is their unimportance. . . . The Administrative Procedure Act does not require the particularity of the pleading of an indictment or a statement of the elements of a cause of action . . . ." *N.C. Department of Correction v. Hill*, 313 N.C. 481, 484, 329 S.E.2d 377, 379 (1985) (citations omitted). Here, the request for the contested case hearing put the Commission on notice of the petitioners' allegations and the Commissioner should have addressed the merits of their claims rather than summarily dismissing the request for failure to make a specific allegation. Our Supreme Court has said:

> Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; when they

> fail to indicate "any course of reasoning and the exercise of judgment," or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements.

Commissioner of Insurance v. Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980) (citations omitted). We hold that the Commission's order was arbitrary and capricious because it required petitioners to specifically allege that the CRC either acted arbitrarily and capriciously or abused its discretion. This finding did not address the merits of petitioners' claim and imposes on petitioners an additional burden that G.S. 113A-121.1(b) does not require. Dismissal based on this finding shows "a lack of fair and careful consideration," does not indicate a "course of reasoning," and imposes unfair requirements on the petitioners.

Conclusion

For the reasons stated, we hold that the Commission's order was affected by error of law, unsupported by the evidence, and arbitrary and capricious. We believe that the Commission's decision may have prejudiced substantial rights of the petitioners. Accordingly, we hold that petitioners have met the requirements of G.S. 113A-121.1(b) and are entitled to a contested case hearing on the adoption of the temporary rule and issuance of Permit 138-89.

Finally, we note that this decision may have little practical consequence since the CRC followed proper procedures when it adopted the text of the temporary rule as a permanent rule. The petitioners' contested case hearing may result in the Commission deciding either to grant a similar permit to the Department of Transportation relying on the authority of the permanent rule or to deny the Department of Transportation's application.

Reversed and remanded for contested case hearing.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. DONALD E. SHUBERT

No. 9030SC524

(Filed 2 April 1991)

1. Criminal Law § 78 (NCI4th)— pretrial publicity—refusal to change venue proper

Defendant failed to show that the trial judge abused his discretion in denying defendant's motion for change of venue where defendant offered evidence of a newspaper article published one day preceding trial, but the article referred to neither defendant's nor the victim's name and only one paragraph referred to the incident involving defendant; defendant failed to show any prejudice by potential or actual jurors or that any juror was even aware of the article's existence; and defendant failed to show that he exhausted his peremptory challenges.

Am Jur 2d, Criminal Law § 378.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

2. Assault and Battery § 116 (NCI4th)— assault with deadly weapon with intent to kill inflicting serious injury—instruction on lesser offense not required

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to instruct on the lesser included offense of assault inflicting serious injury where the uncontradicted evidence showed that defendant's fists and feet were used as deadly weapons in that defendant repeatedly used them to cause the serious injuries to the defenseless 81-year-old female victim in a manner likely to produce death or great bodily harm, and that these injuries required extensive hospitalization and apparently caused permanent brain damage.

Am Jur 2d, Assault and Battery §§ 48, 53, 58.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 33 ALR3d 922.

3. **Constitutional Law § 287 (NCI4th) — removal of court-appointed attorney — request denied**

The trial court did not err in denying defendant's request to remove his court-appointed attorney and replace him with another attorney where defendant asserted little more than broad and general statements of dissatisfaction with his attorney.

Am Jur 2d, Criminal Law § 982.

4. **Criminal Law § 53 (NCI3d) — assault victim — cause of injuries — expert medical testimony admissible**

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in admitting into evidence the opinion testimony of the treating physician in the emergency room on the night of the beating and the testimony of the victim's personal physician who treated her during her two and one-half month hospitalization concerning the cause of injuries to the victim, since the witnesses were in a better position than the jury to formulate an opinion as to the cause of the victim's injuries. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Assault and Battery § 96; Expert and Opinion Evidence § 211.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries. 87 ALR2d 926.

5. **Criminal Law § 43.4 (NCI3d) — photographs of assault victim — admissibility**

The trial court did not err in admitting photographs of an assault victim taken at the hospital where the pictures were used for the proper purpose of illustrating a witness's testimony. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Assault and Battery § 96; Evidence §§ 785-787, 789, 790.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries. 87 ALR2d 926.

6. Criminal Law § 73 (NCI3d)— assault victim's statement to witnesses—testimony admissible

Statements made by an unavailable assault victim to witnesses testifying at trial regarding the assault were admissible under N.C.G.S. § 8C-1, Rule 804(b)(5), since the State provided defendant with one week's notice of its intention to use the statements; defendant declared at trial that he had no problem with the amount of notice given; and the victim's statements offered the most probative evidence regarding the events which occurred in the victim's bedroom during the beatings.

Am Jur 2d, Assault and Battery § 102; Evidence § 717.

7. Assault and Battery § 17 (NCI4th)— assault with deadly weapon—feet as deadly weapon—no variance between indictment and proof

Evidence that the victim was hit with something harder than a fist and that human blood was found on defendant's shoes was sufficient to justify an inference that the assault was in part committed with defendant's feet, and therefore no fatal variance existed between the indictment which alleged assault with a deadly weapon, defendant's feet, and the offense proven.

Am Jur 2d, Assault and Battery § 95.

APPEAL by defendant from judgment entered 2 February 1990 in UNION County Superior Court by *Judge Marvin K. Gray*. Heard in the Court of Appeals 16 January 1991.

Defendant was charged with first degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury.

At trial, the evidence tended to show the following: On 30 June 1990, defendant and Harold Purser were living at the Opportunity House, an alternative sentencing program run for persons on probation, operated by the Covenant Prison Ministries. The two had been drinking and at approximately 11:30 p.m. they left the Opportunity House and walked up the street past 902 Gill Street in Monroe, North Carolina, the home of Lizzie Price, the 81-year-old female victim. Harold Purser testified that defendant wanted to rob Lizzie Price. Before entering the home, defendant cut the victim's telephone line and opened a window with a butcher

knife that defendant had brought from the Opportunity House. After opening the window, defendant pushed Harold Purser through the window and Purser unlocked the front door for defendant. Once the defendant was inside, Harold Purser ran outside the house. Defendant later made Purser come inside and look for money. While inside the house Purser heard the victim yelling for help and saw her lying on the floor and defendant standing next to her. Purser then ran outside and returned to the Opportunity House. Shortly after midnight, the victim's neighbor, Myrl Elliott, saw the victim's bedroom lights on, went over to check on her, and found her in a pool of blood. Elliott ran home and telephoned the police. Fingerprints taken at the scene of the crime matched those of defendant. Also, defendant's tennis shoes had human bloodstains on them. On 31 August 1989 the police arrested defendant and Harold Purser.

As a result of the attack, Ms. Price suffered black eyes, bruises, a fractured right hip, and lacerations, including a facial laceration requiring stitches. Ms. Price also suffered chronic organic brain syndrome damage which left her mentally incompetent and unable to walk. These injuries caused Ms. Price to be hospitalized for one and one-half months at Union Memorial Hospital. Ms. Price was transferred from the hospital to Elliott White Springs Rebound Head Trauma Unit in Lancaster, South Carolina, where she still resided at the time of the trial.

A jury returned verdicts of guilty for both first degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury. From consecutive sentences of 50 years for first degree burglary and 20 years for assault with a deadly weapon with intent to kill inflicting serious injury, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Melissa L. Trippe, for the State.

John H. Painter for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns error to the trial court's denial of defendant's motion for a change of venue. Defendant contends that he received an unfair trial due to negative pretrial publicity. N.C. Gen. Stat. § 15A-957 (1988) provides:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending

so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:

(1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or

(2) Order a special venire under the terms of G.S. 15A-958.

. . .

The burden is on the defendant to show the prejudice which allegedly prevents defendant from getting a fair trial. *State v. Boykin*, 291 N.C. 264, 229 S.E.2d 914 (1976). A motion for change of venue based upon prejudice against the defendant is addressed to the sound discretion of the trial judge and his decision will not be disturbed on appeal unless the defendant can show an abuse of discretion. *Id.*

Defendant contends that the trial court failed to exercise any discretion by summarily denying his motion without opportunity to present his case for change of venue. Before trial, defendant's counsel orally requested a change of venue and presented to the trial court one newspaper article reported one day preceding the trial. The article referred to neither the defendant's nor the victim's name and only one paragraph referred to the incident involving defendant.

Defendant fails to suggest how the article greatly prejudiced him and the courts of North Carolina have consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings alone are insufficient to establish prejudice against a defendant. *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, *death sentence vacated*, 429 U.S. 809 (1976). The *voir dire* examination of potential jurors was not recorded and is not a part of the record before this Court. Further, defendant failed to renew his motion following the *voir dire* examination of potential jurors or to show any prejudice by potential or actual jurors. Defendant also failed to show that defendant exhausted his peremptory challenges. In fact, defendant has failed to show that the article in any way intimates defendant was guilty or that any juror was even aware of the article's existence. When a defendant alleges prejudice on the basis of pretrial publicity and does not show that he exhausted his peremptory challenges, or that there were jurors who were objectionable or had prior knowledge of the case, defend-

ant has failed to carry his burden of establishing the prejudicial effect of the pretrial publicity. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325, *death sentence vacated*, 428 U.S. 904 (1976). Therefore, we hold that defendant has failed to show that the trial judge abused his discretion in denying defendant's motion for change of venue.

[2] Defendant assigns error to the trial court's failure to instruct on the lesser included offense of assault inflicting serious injury. Although defendant failed to request such instructions and failed to object to the given instructions, defendant contends his objection is not waived. The trial court instructed on assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury. Defendant contends that the jury could have found that defendant's fists and feet were not deadly weapons had they been properly instructed.

An instruction on a lesser included offense is only required when there is some evidence to support the particular offense. *See State v. Little*, 51 N.C. App. 64, 275 S.E.2d 249 (1981), and cases cited and discussed therein. It is the presence of such evidence which determines whether it is necessary to instruct the jury on lesser included offenses. *State v. Norman*, 14 N.C. App. 394, 188 S.E.2d 667 (1972). A deadly weapon is "any instrument which is likely to produce death or great bodily harm, under the circumstances of its use. . . ." The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924). Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. . . . *State v. Parker*, 7 N.C. App. 191, 171 S.E.2d 665 (1970) (citation omitted). The uncontradicted evidence shows defendant repeatedly used his fists and feet to cause the serious injuries to the defenseless 81-year-old female victim in a manner likely to produce death or great bodily harm. These injuries required extensive hospitalization and apparently caused permanent brain damage. Under these facts the requested instruction was properly denied.

[3] Defendant assigns error to the trial court's denial of defendant's request to remove his court-appointed attorney and replace him with another attorney.

> The established law, however, is that the trial judge must satisfy himself only that the "present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." "[T]he obligation of the court [is] to inquire into defendant's reasons for wanting to discharge his attorneys and to determine whether those reasons were legally sufficient to require the discharge of counsel." Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict. The trial court's sole obligation when faced with a request that counsel be withdrawn is to make sufficient inquiry into defendant's reasons to the extent necessary to determine whether defendant will receive effective assistance of counsel. (Citations omitted).

State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982). Defendant in this case asserts little more than broad and general statements of dissatisfaction with his attorney. Under these circumstances we find no abuse of the trial court's discretion in denying defendant's request for another attorney.

[4] Defendant assigns error to the trial court's admitting into evidence the opinion testimony of Drs. Berg and Trotter concerning the cause of the injuries to the victim. Defendant contends no proper foundation was laid for the opinion testimony. Defendant also contends that admitting this opinion evidence violated the purpose of Rule 702 of the North Carolina Rules of Evidence to admit expert testimony only if it will assist the trier of fact to understand or determine a fact in issue.

> Expert *testimony* is admissible when it "can assist the jury to draw certain inferences from facts because the expert is better qualified" than the jury to interpret the information presented. . . . The test for admissibility of expert testimony is simply "whether the jury can receive 'appreciable help' from the expert witness. . . ." A trial judge has "wide latitude of discretion" when determining the admissibility of expert testimony. (Citations omitted).

State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989). The record reveals that Dr. Berg was the treating physician in the emergency room on the night of the beating. Dr. Berg treated the victim's wounds for at least 40 minutes and examined her over the course of several hours. At trial, defendant made no objection when plaintiff tendered Dr. Berg as an emergency medicine expert. Dr. Trotter had been the victim's personal physician for four or five years and examined her the morning after her attack and continued to treat her for the two and one-half months during her hospitalization before her transfer to a rehabilitation unit in South Carolina. We hold that Dr. Berg and Dr. Trotter were in a better position than the jury to formulate an opinion as to the cause of the victim's injuries and the trial court properly exercised its discretion to admit such evidence.

[5] Defendant assigns error to the trial court's overruling of defendant's objection to and denial of a motion to suppress the State's photographic evidence. Defendant contends that the three photographs of the victim taken at the hospital were admitted solely to inflame the jury and should have been excluded pursuant to Rule 403 of the North Carolina Rules of Evidence.

The admissibility of photographic evidence is governed by Rule 403 which states:

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

N.C. Gen. Stat. § 8C-1, Rule 403 (1986). Exclusion under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's discretion. *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988) (citation omitted). Abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Id.* In the instant case, the State introduced three photographs, one of the victim's facial and head injuries, one of the victim's arm injuries and one of the victim's leg injuries. Defendant's brief fails to show how the photographs were excessively prejudicial or cumulative. From the record before this Court, we can only determine that the pictures were used for the proper

purpose of illustrating the witness' testimony and, therefore, the trial court properly exercised its discretion.

[6] Defendant assigns error to the trial court's admitting statements made by the victim to witnesses testifying at trial regarding the assault. Defendant contends the victim's statements to the police officer and the victim's neighbor were admitted hearsay in violation of the North Carolina Rules of Evidence, Rule 804(b)(5) (1988). Rule 804 provides exceptions to the hearsay rule when the declarant is unavailable and, more particularly, section (b)(5) states:

> Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

In his brief, defendant limits his argument to the two grounds that the admitted evidence was not more probative on the point for which it is offered than any other evidence and the State failed to give timely notice of its intention to offer such statements into evidence. The record reveals that the State provided defendant with written notice of its intention to use the victim's statements a week before defendant was required to meet the statement at trial. This notice, combined with defendant's declaration at trial that he had no problem with the amount of notice given, leads us to conclude that defendant had fair opportunity to meet the victim's statements. Also, we conclude that the victim's statements offer the most probative evidence regarding the events that occurred in the victim's bedroom during the beatings. Although other circumstantial evidence was offered in support of the fact that defendant entered the victim's room and beat her, the victim's

testimony is the only eyewitness account of the beating available to the court.

[7] Defendant assigns error to the trial court's denial of defendant's motion to dismiss at the close of the State's evidence on the grounds that a fatal variance exists between the indictment and proof. Defendant contends that the indictment charged defendant with "unlawfully, willfully, and feloniously did assault Lizzie Price with his feet, a deadly weapon, with the intent to kill and inflicting serious injury," but the evidence proved only the use of defendant's fists. Although defendant's fists could have been deadly weapons given the manner in which they were used and the relative size and condition of the parties, *see State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429 (1983), the evidence that the victim was hit with something harder than a fist and that human blood was found on defendant's shoes is sufficient to justify an inference that the assault was in part committed with defendant's feet and no fatal variance existed between the indictment and the offense proven. *See State v. Hobbs*, 216 N.C. 14, 3 S.E.2d 431 (1939).

No error.

Chief Judge HEDRICK and Judge ORR concur.

WAYLAND S. BARNES, INDIVIDUALLY AND EXECUTOR OF THE ESTATE OF MILDRED L. WILSON, PETITIONER v. KEN EVANS, MARIE STERLING, ELLEN NORTHEY O'NEAL, MARGARET POMEROY, VIRGINIA SMITH, PAT DALY, COLERAIN BAPTIST CHURCH, COLERAIN METHODIST CHURCH, BILLY GRAHAM EVANGELICAL ASSOCIATION, J. FRANK WILSON, DOROTHY WILSON, MARGARET STERLING, KAY STERLING ELLIS, RUTH BRISTOW, CAROL BARNES, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO, AND ANY UNKNOWN AND UNNAMED HEIRS OF MILDRED L. WILSON, ET ALS., RESPONDENTS

No. 906SC37

(Filed 2 April 1991)

Wills § 28.6 (NCI3d)— certificates of deposit as cash—intention of testatrix

The phrase "remaining cash and bonds" as used by the testatrix in her will included her certificates of deposit because

the greater weight of authority seems to be that the word cash includes certificates of deposit, the testatrix's intent as gathered from the four corners of the will seemed to indicate such a construction, and there is a presumption that one who makes a will does not intend to die intestate as to any part of her property.

Am Jur 2d, Wills §§ 1265, 1266.

What passes under terms "cash," "cash on hand," or "cash assets" in will. 27 ALR3d 1406.

Judge EAGLES dissenting.

APPEAL by respondents from judgment entered 4 October 1989 by *Judge Cy A. Grant* in BERTIE County Superior Court. Heard in the Court of Appeals 28 August 1990.

Mildred L. Wilson died testate in Bertie County on 31 October 1987. The 90-day inventory for her estate showed assets totaling $832,717.92, comprised of the following: (1) $1,424.42 in " 'cash,' coins, uncashed checks and traveler's checks"; (2) $88,072.58 in bonds; (3) $416,375.79 in certificates of deposit; (4) $33,144.52 in a checking account; (5) $24,453.66 in savings accounts; (6) household furnishings and a car valued at $7,080.00; (7) a farm with a tax value of $221,071.00; (8) residential property with a tax value of $32,696.00; and (9) approximately $8,500.00 in interest and other income received after death.

The executor of her estate petitioned for declaratory relief, asking the court to construe the will and to declare whether certificates of deposit should be treated as cash under the will. The will contained the following bequest (referred to by the trial court as a "devise"):

Item V

$5000.00 to Colerain Baptist Church
$2000.00 to Colerain Methodist Church
$5000.00 to Billy Graham Evangelical Assn.
$5000.00 to J. Frank Wilson, Knoxville, Tenn.
$5000.00 to Dorothy Wilson, Asheville, N.C.
$2000.00 to Mrs. Margaret Sterling
$2000.00 to Marie Sterling

$2000.00 to Kay Sterling Ellis

$2000.00 to Ellen Northey O'Neal

$2000.00 to Mrs. Ruth Bristow

$5000.00 to Mrs. Carol Barnes

The remaining Cash and Bonds I leave to the University of N.C. at Greensboro, N.C., to be put in a trust fund.

The specific amounts of money devised in this section totaled $37,000.00. The 90-day inventory showed that the estate had $59,022.60 in checking accounts, savings accounts, currency, coins, uncashed checks and traveler's checks.

The trial court found that the last sentence in Item V was not a general residuary clause but rather a specific devise consisting of cash and bonds. The court also found that the certificates of deposit were not cash and that the executor was to treat them as property not specifically devised. The certificates of deposit were available for the payment of debts and other expenses of the estate, and to satisfy the devises stated in the will. Remaining funds would then pass by intestate succession. The University of North Carolina at Greensboro appeals.

Pritchett, Cooke & Burch, by W.L. Cooke, for petitioner appellee Wayland S. Barnes.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles J. Murray, for the State.

Baker, Jenkins & Jones, P.A., by Robert C. Jenkins and Robert E. Ruegger, for respondent appellee Lou Wilson Mason.

WELLS, Judge.

The University of North Carolina assigns as error the trial court's ruling that decedent's certificates of deposit were among property that was not specifically devised. The trial court's ruling resulted in the certificates of deposit passing by intestate succession rather than passing to the University under the will. The issue here is whether the term "remaining cash and bonds" in Item V of the will includes decedent's certificates of deposit. We hold that "remaining cash and bonds" includes certificates of deposit.

While, as might be anticipated, the cases are not always consistent, the weight of authority seems to be that the word or

term "cash" as used in a will includes bank accounts, both checking and savings and includes certificates of deposit. *See Annotation, "What Passes Under Terms 'Cash,' 'Cash On Hand,' or 'Cash Assets'" In Will*, 27 ALR3d 1406. It has been held that the basic principles which govern other types of bank deposits are applicable to certificates of deposit. 10 Am. Jur. 2d, *Banks*, Sec. 455. Under generally accepted rules of accounting, certificates of deposit are generally regarded as a specie of cash. *See Wilson, Kell & Bedford, Accountant's Handbook*, Sec. 10-2 (5th ed. 1970). *Black's Law Dictionary* defines "certificate of deposit" as "[a] written acknowledgment by a bank or banker of a deposit with promise to pay to depositor, to his order, or to some other person or to his order." *Black's Law Dictionary*, 205 (5th ed. 1979). Black's defines "cash" as "[m]oney or the equivalent; usually ready money. Currency and coins, negotiable checks, and balances in bank accounts. That which circulates as money." *Black's Law Dictionary*, 196 (5th ed. 1979).

Thus, it appears that the word "cash" is not such a technical one that it will have the same definite and precise meaning in all circumstances. In *Heyer v. Bullock*, 210 N.C. 321, 186 S.E. 356 (1936), Chief Justice Stacy aptly refers to Justice Holmes' insightful observation that "[A] word is not a crystal, transparent and unchangeable; it is the skin of a living thought and may vary greatly in color and content according to the circumstances . . . in which it is used." We cannot, therefore, resolve the use of the words "other cash," as used in Mildred Wilson's will, by resorting to a narrow, technical definition or interpretation. As instructed by Chief Justice Stacy in *Heyer, supra*, we must look for the meaning of these words according to the subject treated and the context in which they were used.

It is an elemental rule of construction that the intention of the testator is the polar star which must guide the courts in the interpretation of wills. *Pittman v. Thomas*, 307 N.C. 485, 299 S.E.2d 207 (1983), and cases cited and relied on therein. *See also Wachovia Bank & Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E.2d 758 (1963).

The intent of the testatrix must be gathered from the four corners of the will and the circumstances attending its execution. *Pittman, supra.* "Circumstances attendant" include the relationship between the testatrix and the beneficiaries named in the will, and the nature and extent of the testator's property. *Pittman, supra.*

In the case now before us, the testatrix was not survived by a spouse or lineal descendants. Her next of kin were all cousins, the record not disclosing their degree of kin. Ms. Wilson's will provided for her cousins, her gifts varying from small to quite large, one cousin receiving property of value well in excess of one hundred thousand dollars.

Ms. Wilson disposed of her entire estate, a circumstance which invokes another basic rule of construction of wills that in searching for the testatrix's intent, the courts are guided by the presumption that one who makes a will does not intend to die intestate as to any part of her property. *Wing v. Wachovia Bank & Trust Co.*, 301 N.C. 456, 272 S.E.2d 90 (1980). Ms. Wilson's will was carefully and, for a lay person, artfully drafted. It is not reasonable to infer that she intended that almost one-half of her considerable estate—nearly one-half million dollars in value—be left adrift in the unchartered and uncertain seas of intestacy.

We hold that Ms. Wilson's will must be construed to bequeath her certificates of deposit to the University of North Carolina at Greensboro. The judgment below is deemed modified to so provide. In all other respects, the judgment is affirmed.

Affirmed in part; reversed and modified in part.

Judge EAGLES dissents.

Judge LEWIS concurs.

Judge EAGLES dissenting.

I respectfully dissent. I would hold that on this record "remaining cash and bonds" does not include certificates of deposit.

The majority opinion rests primarily on the presumption against intestacy. Our courts have observed that the presumption against intestacy "is of varying force, according to the circumstances of the particular case, and cannot, of course, justify the Court in making a will for the testator." *Sutton v. Quinerly*, 228 N.C. 106, 108, 44 S.E.2d 521, 522 (1947). Here, I believe that the presumption against intestacy must yield to the language of the will. "[The presumption against intestacy], however strong, is but a rule of construction, which must yield to the true intent of the testator when that can be ascertained." *Williard v. Weavil*, 222 N.C. 492,

496, 23 S.E.2d 890, 893 (1943). I believe that the intention of the testator can be ascertained from the language in the will. Accordingly, it is not the place of this Court to rewrite the will.

I agree with the majority that the word "cash" standing alone does not have such a technical definition that it will have the same definite and precise meaning in all circumstances. However, on this record it is possible to ascertain Mildred L. Wilson's intent in using the phrase "remaining cash and bonds."

First, I note that the rule is that ordinary words must be given their ordinary meaning when construing wills. Both Black's Law Dictionary and Webster's Third New International Dictionary suggest that cash usually means "ready money." In construing a holographic will, "simple conversational words" must be given "their natural, ordinary, or popular meaning." *Anders v. Anderson*, 246 N.C. 53, 58, 97 S.E.2d 415, 419 (1957). Unlike the majority, I think that most people perceive a difference between a checking account or a savings account on the one hand and a certificate of deposit on the other, in terms of the ready availability of money. I am not persuaded that how certificates of deposit are treated in banking statutes or under accounting principles is relevant in this context. Also, other cases construing the word "cash" are at best a "meager aid in the ascertainment of the testator's intent." *Morris v. Morris*, 246 N.C. 314, 316, 98 S.E.2d 298, 300 (1957).

Additionally, the majority mistakenly focuses its inquiry on the word "cash" alone. The bequest reads: "The remaining cash and bonds I leave to the University of N.C. at Greensboro, N.C., to be put in a Trust Fund." Logic suggests that when a writer specifically mentions certain items, by implication she intends to exclude some other items. This principle is expressed in the maxim "expressio unius est exclusio alterius." Here, Mildred L. Wilson specifically mentioned her cash and her bonds. She did not enumerate her certificates of deposit. I can only conclude that she would also have listed her certificates of deposit had she intended to include them in the bequest.

Finally, I question the majority's conclusion that Mildred L. Wilson's will was so artfully drafted that she could not have failed to bequeath the certificates of deposit. Here, the testator's will was artful in that she used very definite and specific language. As the majority notes, Mildred L. Wilson provided for some of her cousins quite generously in her will. I do not find it unreasonable

to conclude that these family members are entitled to the portion of her estate not disposed of by her will.

Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. JIMMY JAMES MOORE

No. 9018SC276

(Filed 2 April 1991)

1. **Criminal Law § 1284 (NCI4th)— habitual felon—underlying crime a misdemeanor—conviction as habitual felon improper**

The trial court erroneously sentenced defendant as an habitual felon since the underlying crime of which he was convicted, possession of less than one gram of cocaine, was a misdemeanor (as N.C.G.S. § 90-95(d)(2) read at the time of the offense) rather than a felony as required by the Habitual Felons Act.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 15.

2. **Criminal Law § 1283 (NCI4th)— habitual felon—insufficiency of indictment**

The trial court erred in sentencing defendant as an habitual felon on the conviction for sale of cocaine since the habitual felon indictment did not charge defendant with the felony of selling a controlled substance, namely cocaine, while being an habitual felon.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 21.

3. **Narcotics § 4.2 (NCI3d)— sale of cocaine to undercover officers—go-between—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for sale of cocaine where it tended to show that a third person acted as a go-between to effect the sale of cocaine by defendant to an undercover officer.

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

STATE v. MOORE

[102 N.C. App. 434 (1991)]

APPEAL by defendant from judgment entered 21 September 1989 by *Judge Lester P. Martin, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 13 November 1990.

On 20 February 1989 defendant was indicted for possession with intent to sell and deliver cocaine in violation of G.S. 90-95(a)(1), delivery of cocaine in violation of G.S. 90-95(a)(1), and sale of cocaine in violation of G.S. 90-95(a)(1). Defendant was also indicted as an habitual felon on 21 August 1989 as a result of these charges.

During trial, the State's evidence tended to show that on 28 October 1988 at approximately 8:45 p.m. Larry Davis Dunlap approached two undercover officers, Detectives R.J. Tolley and G.J. Robbins, who were sitting in an old van in the vicinity of Florida Street and Freeman Mill Road in Greensboro, North Carolina. Dunlap first spoke to Detective Robbins and asked if they were looking for a particular place or what they were looking for. Detective Robbins replied that they were looking for "The Hill." Dunlap then informed the two officers that they did not want to go to the place called "The Hill." The officers then stated that they heard they could get something that they wanted at "The Hill." Dunlap then asked, "Well, what do you need to get?" and the officers replied, "Well, how about a little coke." Detective Tolley testified that "coke" meant cocaine.

Dunlap then told the officers that he thought he could get some cocaine for them. He subsequently walked across the street and began to talk to some people. Dunlap returned to the van approximately five to ten minutes later. Dunlap informed the officers that he knew someone who would sell them some cocaine and asked for money to purchase the cocaine. Detective Tolley told Dunlap that she had the money but that she was not going to give it to him because she did not trust him. She told him that she wanted to go along with him. Dunlap left the car again and returned a few minutes later. Detective Tolley then walked across the street with Dunlap. Another individual, who was later identified as defendant, approached them. Detective Tolley could not hear the conversation between Dunlap and defendant. Within thirty seconds, Dunlap asked Detective Tolley for the money. Detective Tolley gave him a twenty dollar bill and a ten dollar bill, both of which had been previously photocopied to record the serial numbers. Detective Tolley then observed Dunlap giving defendant the money and defendant taking a small bag allegedly containing

cocaine from his right front pants pocket and giving it to Dunlap. Dunlap handed the bag to Detective Tolley. Detective Tolley examined the contents of the bag.

Afterwards, she walked back towards the van with Dunlap and thanked him for making the deal for her. Detective Tolley got back into the van with Detective Robbins and they left the area. The detectives then called for assistance in arresting both Dunlap and defendant. At the time of defendant's arrest, he had in his possession the twenty dollar bill with the corresponding serial number that appeared on the photocopy. Dunlap testified that he kept the ten dollar bill.

The jury convicted defendant of possessing less than one gram of cocaine and guilty of the sale of cocaine. The jury found defendant not guilty of delivery of controlled substance. After his conviction, defendant pled guilty to the habitual felon indictment. The trial court sentenced defendant to twenty years imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Alexander McC. Peters, for the State.

Assistant Public Defender Frederick G. Lind for defendant-appellant.

EAGLES, Judge.

[1] Defendant first contends that the trial court erroneously sentenced him as an habitual felon in count one since possession of less than one gram of cocaine is a misdemeanor pursuant to G.S. 90-95(d)(2). Defendant contends that he was not convicted of the underlying felony and as a result cannot be sentenced as an habitual felon. We agree.

> Properly construed this act [Habitual Felons Act (G.S. 14-7.1 through 14-7.6)] clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a *pending prosecution for the "principal," or substantive, felony.* [Emphasis added.] The act does not authorize a proceeding independent from the prosecution of some substan-

tive felony for the sole purpose of establishing a defendant's status as an habitual felon.

State v. Allen, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977).

> The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding "is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past." *Spencer v. Texas, supra*, 385 U.S. at 556. Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. "The habitual criminal act . . . does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered." *State v. Tyndall*, 187 Neb. 48, 50, 187 N.W.2d 298, 300, *cert. denied sub nom. Goham v. Nebraska*, 404 U.S. 1004 (1971).

Id. at 435, 233 S.E.2d at 588. *See also State v. Thomas*, 82 N.C. App. 682, 347 S.E.2d 494 (1986), *cert. denied*, 320 N.C. 637, 360 S.E.2d 102 (1987).

G.S. 90-95(d)(2), as it was in effect on 28 October 1988 (the date of defendant's misconduct), provided that any person who unlawfully possessed a controlled substance classified in Schedule II, III, or IV was guilty of a misdemeanor. Under G.S. 90-90 cocaine was classified as a Schedule II controlled substance. If the amount of cocaine was one gram or more, the violation was a felony. G.S. 90-95(d)(2). We note parenthetically that G.S. 90-95(d)(2) now provides that if the controlled substance is cocaine regardless of the amount involved, possession is punishable as a Class I felony.

Here, the jury found defendant guilty of possession of less than one gram of cocaine. Pursuant to G.S. 90-95, as it existed on 28 October 1988, possession of less than one gram was a misdemeanor. Defendant was not convicted of the *underlying felony*. Accordingly, with respect to Count One he could not be sentenced as an habitual felon.

The State argues that G.S. 90-95(e)(3), as it was in effect on 28 October 1988, provided that a defendant who was convicted of a misdemeanor violation would have been punished as a felon because he had previously been convicted of an offense punishable under this Article. After careful consideration, we find the State's argument unpersuasive.

[2] Next defendant contends that the trial court erred in sentencing him as an habitual felon on the conviction for sale of cocaine in Count Three of the indictment because the Habitual Felon Indictment did not charge defendant with the felony of selling a controlled substance, namely cocaine, while being an habitual felon. We agree.

> "It is a universal rule that an indictment must allege all the elements of the offense charged. A defendant is entitled to be informed of the accusation against him and to be tried accordingly." "A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute that offense charged." "The purpose of an indictment 'is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction.' "

State v. Squire, 292 N.C. 494, 506, 234 S.E.2d 563, 570, *cert. denied* by *Brown v. North Carolina*, 434 U.S. 998, 98 S.Ct. 638, 54 L.Ed. 2d 493 (1977).

Here the habitual felon indictment charged defendant with possession with intent to sell and deliver cocaine and delivery of cocaine while being an habitual felon. The jury acquitted defendant of felonious delivery of cocaine but found defendant guilty of felonious sale of cocaine. The felonious sale of cocaine was not alleged as an underlying felony in the habitual felon indictment. Accordingly, defendant did not have sufficient notice of this particular charge against him.

We note that after his conviction of the charges in 88 CRS 60211, defendant pled guilty to the habitual felon indictment. However, G.S. 15A-1022(c) provides that "[t]he judge may not accept a plea of guilty or no contest without first determining that there

is a factual basis for the plea." Defendant was acquitted of each of the felonies charged in the habitual felon indictment. Here, because of the acquittals, the trial court should not have accepted defendant's plea. *See State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980).

[3] Defendant also contends that the trial court erred in denying his motion to dismiss the charge of sale of cocaine due to the insufficiency of the evidence. Defendant contends that the "evidence in [his] case at best would show a possible delivery of cocaine to Larry Dunlap but the evidence does not show the sale by the defendant to Officer Tolley." We disagree.

In order to survive defendant's motion to dismiss, the evidence must show two things: "(1) that defendant had knowledge [Dunlap] was buying or taking delivery of the cocaine for another person; and (2) that the person named in the indictment was that other person." *State v. Wall*, 96 N.C. App. 45, 50, 384 S.E.2d 581, 583 (1989).

> Defendant's guilty knowledge may be shown by circumstantial evidence. In reviewing the denial of a motion to dismiss we examine the evidence in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is "substantial" if a reasonable person would consider it sufficient to support the conclusion that the essential element exists.

Id. "It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." *State v. Kelly*, 243 N.C. 177, 180, 90 S.E.2d 241, 244 (1955).

Here there was substantial evidence that Dunlap was acting on behalf of another. There was testimony that Dunlap told Detective Tolley that he knew someone who would sell the detective some cocaine. Later, Dunlap crossed the street with Detective Tolley and held a conversation with defendant. Dunlap then approached Detective Tolley and asked for the money. Detective Tolley gave Dunlap the money who in turn gave the twenty dollar bill to defendant. Defendant then gave Dunlap a small plastic bag containing the controlled substance and Dunlap gave the bag to Officer Tolley. Here there was more than a scintilla of competent evidence to support the allegations in the bill of indictment and it was the court's duty to submit the case to the jury. *See State v. Kelly*,

243 N.C. 177, 180, 90 S.E.2d 241, 243. Accordingly, this assignment of error is overruled.

With respect to defendant's remaining assignments of error, our review of defendant's brief reveals that he has failed to comply with the mandatory provisions of Rule 28 of the Rules of Appellate Procedure. Rule 28(b)(5) provides that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or *authority cited*, will be taken as abandoned." (Emphasis added.) Since defendant has failed to cite any authority in support of his remaining assignments of error, those assignments of error are deemed abandoned.

In summary, we arrest judgment in the twenty-year sentence given to defendant as an habitual felon and remand this case for entry of judgment and sentencing on convictions for the misdemeanor possession of cocaine and the felonious sale of cocaine.

As to case #89CRS20601, vacated.

As to case #88CRS60211, remanded.

Judges ARNOLD and PARKER concur.

LARRY KENNETH CARTER v. BECKY G. CARTER

No. 9017DC796

(Filed 2 April 1991)

1. **Rules of Civil Procedure § 41.1 (NCI3d)— equitable distribution claim—voluntary dismissal—notice to defendant not required**

Plaintiff's voluntary dismissal of his equitable distribution claim was not invalid because it was entered without notice to defendant, since defendant had filed no pleadings at the time plaintiff filed the voluntary dismissal. N.C.G.S. § 1A-1, Rule 41(a)(1).

Am Jur 2d, Divorce, Discontinuance, and Nonsuit §§ 22, 33.

2. Rules of Civil Procedure § 60 (NCI3d)— divorce decree affirmed by court on appeal—equitable distribution claim reserved for future resolution—error

Although defendant could have been relieved from the divorce judgment rendered against her as a result of the negligence of her attorney pursuant to N.C.G.S. § 1A-1, Rule 60(b) if she were not at fault, the court could not nullify one of the legal effects of the divorce decree, i.e., preclusion of adjudication of any equitable distribution claim not asserted prior to entry of the divorce, while leaving the divorce judgment itself intact.

Am Jur 2d, Divorce and Separation §§ 877, 957.

Default decree in divorce action as estoppel or res judicata with respect of marital property rights. 22 ALR2d 724.

APPEAL by plaintiff from order filed 28 June 1990 in ROCKINGHAM County District Court by *Judge Philip W. Allen.* Heard in the Court of Appeals 12 March 1991.

J. Michael Thomas for plaintiff-appellant.

Wayne E. Crumwell for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an order reserving for future adjudication the issue of equitable distribution.

On 28 December 1989, the plaintiff filed a complaint for absolute divorce and equitable distribution. Personal service was had on the defendant on 29 December 1989 and no answer or responsive pleading of any type was filed on behalf of the defendant. On 30 January 1990, the plaintiff filed a notice of voluntary dismissal of his equitable distribution claim and on that same day obtained a judgment of absolute divorce. On 20 February 1990, the attorney for the defendant filed a motion "pursuant to Rule 60(b)1 of the Rules of Civil Procedure for relief from [the] judgment entered . . . on the 30th day of January, 1990, awarding the Plaintiff . . . a Judgment of Divorce." Specifically, the motion requested as relief that the court:

a. Set aside the [divorce] entered on the 30th day of January, 1990, and provide the Defendant an opportunity to file a responsive pleading in this cause to the Complaint, or in the alternative,

b. Amend the judgment to include a reservation of the Defendant's right to request equitable distribution of the marital property of the parties.

The defendant's attorney alleged in support of his motion:

5. That the Defendant's failure to file a responsive pleading in this matter was the result of excuseable [sic] neglect, as the following facts supported by the attached affidavit show:

a. That on the 23rd day of December, 1989, the Defendant herein, Becky G. Carter, retained Attorney Wayne E. Crumwell of the Rockingham County Bar to represent her in an action for absolute divorce and equitable distribution of the marital property to be filed against the Plaintiff herein, Larry Kenneth Carter.

b. That on the 24th day of December, 1989, Attorney Wayne E. Crumwell prepared and Becky G. Carter executed a Complaint for Absolute Divorce and Equitable Distribution of Marital Property, a copy of the document being attached hereto as an Exhibit. Further, that this Complaint was not filed due to Attorney Crumwell's office being closed in observance of the Christmas and New Year Holidays.

c. That during the first week of January, 1990, Defendant Becky G. Carter brought a copy of the Complaint and Civil Summons that had been served on her during the holiday period. On January 8, 1990, an Answer was prepared in which she joined the Plaintiff in his prayer for absolute divorce and equitable distribution of their marital property, a copy of this Answer is attached hereto as an Exhibit.

d. That the Answer which the Defendant Becky G. Carter had executed was not filed in the Office of the Clerk of Superior Court for Rockingham County, because it was mislaid in another client's file by Attorney Wayne E. Crumwell.

6. That Defendant Becky G. Carter treated this lawsuit with the attention which a prudent person gives to important business.

7. That the Defendant has a meritorious cause of action in this matter in that prior to the institution of this action the Plaintiff had offered the Plaintiff [sic] $25,000.00 as consideration for purchasing her interest in their marital property.

The answer which was prepared by defendant's attorney on 8 January 1990 and not filed alleged in pertinent part:

That the allegations of the Plaintiff's Complaint are admitted.

WHEREFORE, the Defendant joins the Plaintiff in his prayer for relief, as follows:

1. That the bonds of matrimony heretofore existing between the Plaintiff and the Defendant be dissolved and that the Plaintiff be granted an absolute divorce from the Defendant;

2. That the marital property of the parties be equitably distributed between the Plaintiff and the Defendant, as provided by NCGS 50-20 and 50-21. . . .

The trial court after hearing the defendant's Rule 60 motion entered the following pertinent findings of fact, conclusions of law, and order:

FINDINGS OF FACT:

. . . .

3. That the Defendant, after being duly served with the Complaint filed by the Plaintiff, presented the pleadings to her attorney and had an Answer prepared on the 8th day of January, 1990, in which she joined the Plaintiff in his prayer for relief for an absolute divorce and for equitable distribution of the marital property of the parties. Further, that through no fault of the Defendant, this Answer was not properly filed and was not available to the Court on the date the matter was considered by the Court.

4. That based upon affidavits in evidence and upon the original Complaint filed by the Plaintiff herein, the parties during the marriage had accumulated certain property, including, but not limited to, real property where the parties formerly resided. Further, that the aforementioned property acquired during the marriage is marital property subject to equitable distribution by the Court, and, therefore, a meritorious claim to be litigated in the cause of action.

5. That the Plaintiff appeared with counsel in Court on the 30th day of January, 1990, and entered notice of dismissal on his claim for equitable distribution, and presented evidence for the imposition of a judgment of absolute divorce without reserving the right to equitable distribution which both parties had reason to anticipate based upon the Complaint filed by the Plaintiff.

6. That no notice was given to the Defendant by the Plaintiff of his intention to dismiss the cause of action and request for equitable distribution of the marital property of the parties.

CONCLUSIONS OF LAW:

. . . .

b. That upon requesting equitable distribution of the parties marital property, by way of a prayer for such relief in the Complaint, both the Plaintiff and the Defendant had reason to expect that the claim would be fully litigated, and that such a claim was not subject to a voluntary dismissal by one party without due notice to the other party.

c. That the failure to file both a Complaint for absolute divorce requesting equitable distribution and the failure to file an Answer after being duly served with a Complaint for absolute divorce requesting equitable distribution was neglected through no fault of the Defendant, but rather was the neglect of her attorney, not to be imputed to her, constituting excuseable [sic] neglect.

d. That based upon the Complaint of the Plaintiff and upon evidence presented by affidavit there were marital assets subject to equitable distribution and both parties had legitimate claims to be litigated before the Court, and therefore a meritorious claim existed on the part of the Defendant.

. . . .

ORDER

NOW, THEREFORE IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That with the consent of the parties the effect of the Judgment entered on the 30th day of January, 1990, as far as

dissolving the formerly existing marital relationship, is reaffirmed.

2. That the voluntary dismissal entered on the 30th day of January, 1990 is stricken from the record and the original claim for equitable distribution requested by the Plaintiff is reinstated, subject to further orders of this Court.

3. That in so far as the Judgment entered on the 30th day of January, 1990, failed to reserve the original claim for equitable distribution, that omission in said judgment is hereby reinstated and the claims for equitable distribution are to be added to the claims for relief and to the judgment of divorce by way of amendment, by treating this order as an amendment to the Judgment entered on the 30th day of January, 1990.

The issues presented are: (I) whether the plaintiff's voluntary dismissal of his equitable distribution claim was invalid because it was entered without notice to defendant; and (II) whether the trial court had authority to reaffirm the divorce decree and reserve for future resolution the issue of equitable distribution.

I

[1] If there is no counterclaim pending at the time the plaintiff desires to enter a voluntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) or if there is a counterclaim and that counterclaim is independent and does not arise out of the same transaction as the complaint, "a party may voluntarily dismiss his suit without the opposing party's consent by filing a notice of dismissal." *Gillikin v. Pierce*, 98 N.C. App. 484, 487, 391 S.E.2d 198, 199, *disc. rev. denied*, 327 N.C. 427, 395 S.E.2d 677 (1990). When there exists a counterclaim arising out of the same transaction alleged in the plaintiff's complaint, " '. . . the plaintiff cannot take a [voluntary dismissal] without the consent of the defendant. . . .' " *Id.* (quoting *McCarley v. McCarley*, 289 N.C. 109, 112, 221 S.E.2d 490, 492 (1976)).

Here, at the time the plaintiff filed his voluntary dismissal of his claim for equitable distribution, the defendant had filed *no* pleadings. Therefore, the plaintiff was free to enter his voluntary dismissal of his equitable distribution claim without any notice to the defendant or the defendant's consent. Had the defendant filed her answer which had been prepared on 8 January 1990, admitting the allegations of the plaintiff's complaint and joining

in plaintiff's request for equitable distribution, the plaintiff would not have been able to take a voluntary dismissal without the consent of the defendant. This is so because the defendant's proposed answer was "in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint." *McCarley* at 113, 221 S.E.2d at 493 (defendant's answer admitting allegations of the complaint and joining in plaintiff's request for absolute divorce was deemed to be a counterclaim).

II

[2] A party may be relieved, pursuant to N.C.G.S. § 1A-1, Rule 60(b) from a divorce "judgment rendered against him as a result of the negligence of his attorney if the litigant himself is not at fault." *Wood v. Wood*, 297 N.C. 1, 7, 252 S.E.2d 799, 802 (1979). However, "[n]either Rule 60(b)(6) nor any other provision of law authorizes a court to nullify or avoid one or more of the legal effects of a valid judgment while leaving the judgment itself intact." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987). One of the legal effects of a divorce decree is to preclude adjudication of any equitable distribution claim not asserted prior to the entry of the divorce. *Howell* at 89, 361 S.E.2d at 587; N.C.G.S. § 50-11 ("absolute divorce . . . shall destroy the right of a spouse to an equitable distribution . . . unless the right is asserted prior to judgment of absolute divorce").

Here, the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce. Therefore, the order must fail. *Howell.*

In so holding, we reject defendant's argument that the court effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim. Assuming the defendant was correct in her argument, the reservation of the equitable distribution claim would be a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim or separate action requesting equitable distribution. *Lutz v. Lutz*, 101 N.C. App. 298, 303, 399 S.E.2d 385, 388 (1991).

Accordingly, the order of the trial court reinstating plaintiff's claim for equitable distribution and reserving for trial the issue of equitable distribution are reversed.

Reversed.

Judges WELLS and WYNN concur.

STATE OF NORTH CAROLINA v. PATRICK GREENIDGE

No. 9026SC630

(Filed 2 April 1991)

1. **Narcotics §§ 1.3, 4 (NCI3d)— movement of drugs from porch to yard next door—substantial movement**

Where a person moves cocaine from a dwelling and to a point beyond its curtilage, such movement is sufficient to constitute real and substantial movement; thus, the mere act of tossing the cocaine from a dwelling into the yard next door amounts to transportation sufficient to sustain a charge of trafficking in cocaine by transportation in violation of N.C.G.S. § 90-95(h)(3).

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 40, 47.

2. **Narcotics § 1.3 (NCI3d)— trafficking in drugs by transportation—substantial movement—factors to be considered**

In prosecutions for trafficking in drugs by transportation, determination of whether the movement is a "substantial movement" so as to constitute transportation requires, among other things, considerations as to the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 40, 47.

3. **Narcotics § 4.5 (NCI3d)— trafficking in cocaine by transportation—instructions on movement improper**

The trial court improperly instructed the jury that simply moving cocaine from inside the house to the porch constituted

trafficking in cocaine by transportation in violation of N.C.G.S. § 90-95(h)(3).

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 40, 47.

APPEAL by defendant from judgment entered 12 February 1990 by *Judge Kenneth A. Griffin* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 22 January 1991.

Defendant was tried and convicted of trafficking in cocaine by possession and trafficking in cocaine by transportation both in violation of G.S. § 90-95(h)(3). From the imposition of consecutive seven year sentences, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Rebecca B. Barbee, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show the following. On 4 November 1989, Charlotte Police Officers R. L. Ferguson, H. W. Lewis and Sergeant W. A. Neal responded to a call at a residence located at 626 Miller Street. Officer Ferguson proceeded to the front door of the residence, Officer Lewis positioned himself near the back door and Sergeant Neal stood at the corner of the house in between Officers Ferguson and Lewis.

At trial, Officer Ferguson testified that after he knocked on the door he saw a man peer out the door window and thereafter heard him shout "it's the police." As he heard movement inside, he knocked a second time; and after about three minutes, the door was opened.

Officer Lewis' testimony at trial was that he was positioned about thirty feet from the back door when Officer Ferguson knocked on the front door. Shortly thereafter, he observed a black man, later identified as the defendant, step onto the back porch, zip up a bag and toss it into the yard next door. When the man tossed the bag, he yelled at him at which time, the man froze for a second and then ran back into the house. Officer Lewis then retrieved the bag and its contents were submitted to a crime lab for analysis.

It was later determined that the white powder found inside the bag weighed 36.96 grams and contained cocaine.

[1] By Assignment of Error number one, defendant contends that the trial court erred in denying his motions to dismiss the charge of trafficking in cocaine by transportation. Specifically, defendant argues that the act of tossing the bag of drugs off the back porch is insufficient to support the offense of trafficking in cocaine by transportation. We disagree.

Initially, we note that we have found no case law suggesting that G.S. § 90-95(h) was enacted merely to prevent the transportation of drugs where an instantaneous sale or distribution is to occur. Thus, we believe the evil sought to be prevented by the legislature is *all* drug movement with the intent of selling and distributing, with time being of no consequence.

In reviewing the sufficiency of the evidence presented by the State to overcome a motion to dismiss, all evidence must be viewed and considered in the light most favorable to the State. *State v. Thompson*, 59 N.C. App. 425, 427, 297 S.E.2d 177, 179 (1982), *disc rev. denied, appeal dismissed*, 307 N.C. 582, 299 S.E.2d 650 (1983). Where it is determined that substantial evidence, whether direct, circumstantial, or both, exists to support a finding that the offense charged was committed and the defendant committed it, a motion to dismiss must be denied. *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975).

General Statutes § 90-95(h)(3) provides that "[a]ny person who sells, manufactures, delivers, *transports*, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomer, compound, derivative, or preparation thereof . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine.' " (Emphasis added.) While the word "transport" is not defined in the North Carolina Controlled Substance Act, G.S. § 90-87, it has previously been defined as "any *real* carrying about or movement from one place to another." *Cunard Steamship Company v. Mellon*, 262 U.S. 100, 122, 43 S.Ct. 504, 506, 67 L.Ed. 894, 901 (1922) (emphasis added). The transfer of drugs from one location to another, whether by carrying or tossing those drugs, clearly constitutes movement. The remaining question is whether it constitutes "transportation." In the case *sub judice*, we must determine if the defendant's act of tossing the drugs from the dwelling is such a movement as to constitute "*real*" movement, *i.e.*, transportation. *Id.* "Real" connotes

"substantial." *See* Black's Law Dictionary 1597 (5th ed. 1979). Thus, the type of movement required for transportation to have occurred is a "substantial movement."

We recognize that no case law specifically speaks to whether tossing drugs from one place to another amounts to transportation pursuant to G.S. § 90-95(h)(3). Both the State and the defendant, however, rely upon *State v. Outlaw*, 96 N.C. App. 192, 385 S.E.2d 165 (1989), to support their respective contentions. The State contends that like *Outlaw*, once the defendant moved the cocaine from one place to another, he trafficked in cocaine by transporting it. Defendant contends that: (1) the act of tossing drugs off the back porch to avoid detection by the police does not constitute trafficking in cocaine by transportation, as articulated in *Outlaw*; and (2) no evidence exists showing an attempt on his part to carry drugs to some other location. The latter contention, however, is clearly in error since the evidence shows the *completed* act of drug movement from one location to another. The fact that the drugs were tossed rather than carried is irrelevant.

Our holding here is consistent with our holding in *Outlaw*. In *Outlaw*, we held that where evidence showed that the defendant removed drugs from his dwelling, placed them into his truck parked in the driveway and commenced backing the truck down the driveway in order to leave the dwelling and its curtilage (although the defendant never left the curtilage with the drugs, the evidence clearly showed that he would have completed backing down the driveway but for the police's arrival), such movement of the drugs by the defendant constituted "any real carrying about or movement of the [drugs] from one place to another." *Cunard*, 262 U.S. at 122, 43 S.Ct. at 506, 67 L.Ed. at 901. Thus, the movement under the *Outlaw* circumstances constituted transportation pursuant to G.S. § 90-95(h)(3). The evidence in the case *sub judice* is stronger than the evidence in *Outlaw*. Here, the defendant actually completed the act of removing the drugs from the dwelling and its curtilage on which he was located to a location clearly beyond that property. Therefore, we hold that in cases like this, where a person moves drugs from a dwelling and to a point beyond its curtilage, such movement is sufficient to constitute real and substantial movement. Thus, the mere act of tossing the drugs from a dwelling to a point outside its curtilage amounts to transportation. Accordingly, the evidence of defendant's actions was sufficient to sustain the

charge of trafficking in cocaine by transportation in violation of G.S. § 90-95(h)(3).

[2] Defendant argues that a finding of transportation on the facts *sub judice* could result in a charge of trafficking where a suspect merely throws drugs onto the ground when approached by the police, or where a suspect moves drugs from room to room in a house, or from one drawer to another drawer, or from inside the house to the porch. We disagree. The requirement for a "substantial movement" as articulated in *Outlaw* and this case requires a consideration of *all* the circumstances surrounding the movement and not simply the fact of a physical movement of the contraband from one spot to another. Thus, in addressing the question of whether the movement is a "substantial movement" so as to constitute transportation requires, among other things, considerations as to the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved.

[3] By Assignment of Error number two, defendant contends that the trial court erred in its instruction to the jury on the elements of trafficking in cocaine by transportation. Specifically, the trial court instructed the jury to find the defendant guilty of trafficking in cocaine by transportation if it found "that the defendant knowingly transported cocaine from inside the residence located at 626 Miller Street to the porch of said residence." This, however, was in error. In instructing the jury, the trial court must declare and explain the law arising on the evidence, state the evidence to the extent necessary to explain the application of the law and refrain from expressing an opinion as to whether or not a fact has been proved. G.S. § 15A-1232. The question as to whether an act of movement is sufficient to constitute transportation is one of law and "the court must take the responsibility of so declaring." *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924).

It is clear to us, in light of the principles articulated in *Outlaw*, that the trial judge's limited instruction of what evidence constituted transportation was too restrictive. The judge considered *only* the evidence showing a movement of the drugs from inside the house to the porch. The judge should have, however, considered *all* of the circumstances surrounding the movement of the drugs in determining if there was "real movement," *i.e.*, transportation.

Here, the evidence shows that in addition to moving the drugs from inside the house to the porch, the defendant tossed the drugs

beyond the curtilage of the property with the intent to later retrieve them. This evidence should have been considered and the court should have declared and explained the law arising on this evidence in its instruction to the jury on the issue of whether the defendant transported cocaine.

Based upon our discussion contained in Assignment of Error number one, the trial court, under the facts *sub judice*, improperly instructed the jury that simply moving the cocaine by the defendant from inside the house to the porch constituted trafficking in cocaine by transportation in violation of G.S. § 90-95(h)(3). Accordingly, for error in the jury instruction, defendant is entitled to a new trial.

New trial.

Judges ARNOLD and LEWIS concur.

LILLIAN O. RABON, PLAINTIFF v. THOMAS O. RABON, DEFENDANT

No. 904DC436

(Filed 2 April 1991)

1. **Rules of Civil Procedure § 8.2 (NCI3d)— timeliness of answer— objection waived where answer relied upon**

Plaintiff could not on appeal ask the court to rule in her favor based on defendant's untimely answer where plaintiff relied in the trial court on defendant's answer in asking the court to grant a divorce, and plaintiff by doing so impliedly consented to the late filing of defendant's answer.

Am Jur 2d, Appeal and Error §§ 563, 591; Pleading §§ 126, 356.

2. **Rules of Civil Procedure § 41.1 (NCI3d)— equitable distribution—setting aside separation agreement—voluntary dismissal not appropriate**

Where plaintiff filed a complaint seeking an absolute divorce, the setting aside of the parties' separation agreement and property settlement on the grounds of fraud and misrepresentation by defendant, and equitable distribution of the marital property, and defendant filed an answer joining

in the claims for absolute divorce and equitable distribution, the trial court could not grant plaintiff's motion for voluntary dismissal as to the claims for equitable distribution and setting aside the separation agreement, since the court did not have before it the parties' agreements and therefore could not determine if the agreements fully disposed of the property rights arising out of the marriage and thus barred an equitable distribution claim, or whether the equitable distribution claim was allowable and was not subject to voluntary dismissal because of defendant's "counterclaim" for equitable distribution.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 21, 22; Divorce and Separation § 836.

3. **Divorce and Separation § 162 (NCI4th)— absolute divorce—equitable distribution claim—action to set aside separation agreement—judgment on the pleadings improper**

The trial court erred in allowing plaintiff's motion for judgment on the pleadings on the issue of equitable distribution where there was a factual issue as to whether separation and property settlement agreements fully disposed of the parties' marital property.

Am Jur 2d, Divorce and Separation § 834; Pleading §§ 231-233.

APPEAL by defendant from a judgment entered on 12 February 1990 by *Judge Leonard W. Thagard* in DUPLIN County District Court. Heard in the Court of Appeals 3 December 1990.

Lana Starnes Warlick for plaintiff-appellee.

Fredric C. Hall for defendant-appellant.

LEWIS, Judge.

The three issues in this case are whether the trial court erred: 1) in denying defendant's motion to set aside plaintiff's notice of voluntary dismissal, 2) in allowing the plaintiff's motion for judgment on the pleadings, and 3) in denying the defendant's motion to amend his pleadings to allege a counterclaim for equitable distribution.

The plaintiff and the defendant were married on 27 December 1959. They lived together until their separation on 13 July 1987.

The plaintiff and defendant entered into a written separation agreement and a property settlement dated 13 July 1987.

On 8 August 1988, the plaintiff filed a complaint seeking: 1) a divorce based on one year's separation, 2) the setting aside of the separation agreement and property settlement on the grounds of fraud and misrepresentation by the defendant, and 3) equitable distribution of the marital property. The defendant filed an untimely answer admitting the allegations concerning the divorce, but denying allegations with respect to fraud and misrepresentation. Defendant also joined in plaintiff's prayer for relief for an absolute divorce and equitable distribution.

On 29 December 1989, the plaintiff filed a notice of voluntary dismissal as to both her claim for equitable distribution and her request to have the court set aside the separation agreement and property settlement. On 5 January 1990, the plaintiff filed a motion for judgment on the pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c).

In response to the plaintiff's motions, the defendant filed a motion to set aside plaintiff's voluntary dismissal on 5 January 1990. On 23 January 1990, defendant also filed a motion for leave to amend his answer by adding a formal counterclaim for equitable distribution. After hearing arguments, the trial court entered an order granting the plaintiff's motion for judgment on the pleadings, awarding the plaintiff an absolute divorce, and denying the defendant's motions to set aside plaintiff's voluntary dismissal and to amend defendant's pleading.

First

The first issue before this Court is whether the trial judge erred in denying the defendant's motion to set aside the plaintiff's voluntary dismissal. N.C.G.S. § 1A-1, Rule 41(a) allows a plaintiff to take a voluntary dismissal without a court order "by filing a notice of dismissal at any time before the plaintiff rests his case. . . ." The defendant argues, however, that *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976), is controlling in this case and requires the court to set aside the plaintiff's voluntary dismissal.

[1] First, as a preliminary matter, we note that the plaintiff argues the defendant's answer was untimely, and thus, should not be considered. Although the plaintiff mentioned the untimeliness of the defendant's answer when arguing his motions to the trial court, the plaintiff relied on the defendant's answer in asking the court

to grant the divorce. The plaintiff, by doing so, impliedly consented to the late filing of the defendant's answer. *See Ingle v. Ingle*, 53 N.C. App. 227, 232, 280 S.E.2d 460, 463 (1981). Therefore, the plaintiff may not now, on appeal, ask the court to rule in its favor based on the defendant's untimely answer. The defendant's answer will be treated as though it was timely.

[2] In *McCarley*, the plaintiff filed an action for absolute divorce. The defendant responded in his answer by admitting the allegations in the complaint and prayed also for divorce. The plaintiff then filed a notice of voluntary dismissal. The defendant moved to have the voluntary dismissal set aside. The court granted the defendant's motion.

In *McCarley*, the North Carolina Supreme Court agreed with the trial court's ruling. The court stated that the defendant's answer was, in effect, a counterclaim "seeking affirmative relief and arising out of the same transactions alleged in the complaint." *McCarley v. McCarley*, 289 N.C. at 113, 221 S.E.2d at 493. Thus, the court held that it would be manifestly unjust to allow the plaintiff to withdraw his original allegations without the consent of the defendant. *Id.*

N.C.G.S. § 50-20(a) states that "[u]pon application of a party, the court . . . shall provide for an equitable distribution of marital property between the parties. . . ." There is no specific requirement in the statute regarding the correct manner in which to plead a claim for equitable distribution. In this case, the defendant joined in the plaintiff's prayer for equitable distribution in his answer. "Failure to label the affirmative allegations as a counterclaim is, of course, not fatal if they sufficiently support a claim for relief." *McCarley v. McCarley*, 289 N.C. at 114, 221 S.E.2d at 494 (citation omitted). As in *McCarley*, the defendant's answer was, in effect, a counterclaim. In this case, the defendant sought equitable distribution. However, here the original request by the plaintiff in her complaint was that she asked the court to set aside a separation agreement and property settlement based on fraud which the defendant denied; in *McCarley*, the plaintiff in her original complaint asked the court to enter a divorce based on one year's separation.

Under our present law, if a court finds that a separation agreement fully disposes of the parties' rights arising out of the marriage, the court may not set aside the separation agreement and property settlement, absent fraud or misrepresentation. A separa-

tion agreement and property settlement entered into by the parties which fully disposes of the property rights arising out of a marriage acts as a bar to equitable distribution. *Hagler v. Hagler*, 319 N.C. 287, 295, 354 S.E.2d 228, 235 (1987).

Unless both parties legally consent to rescinding the agreement, the court is without the power to discard valid contracts between the parties and to order equitable distribution. The parties in this case did not rescind the separation agreement and property settlement, nor were there any findings of fraud or misrepresentation. Here, the parties admitted to the existence of the agreements, but the agreements were not presented to the court.

McCarley pronounced a general rule that when a defendant sets up a claim for affirmative relief against a plaintiff arising out of the same transactions alleged by the plaintiff, the plaintiff cannot take a voluntary dismissal without the consent of the defendant. In this case, the plaintiff's original claim may have been barred by law. If the court finds that the agreements fully disposed of the parties' rights arising out of the marriage, and thus bar an equitable distribution claim, the court would not be bound to apply the rule addressed in *McCarley*.

The trial judge did not have the agreements before him so that he could determine if the agreements fully disposed of the property rights arising out of the marriage. We hold, therefore, that the judge could not grant the plaintiff's voluntary dismissal without this information. Although the judge specifically found that the agreements fully disposed of the parties' marital property, there was no evidence to support such a finding. We remand this case for a determination of whether, in fact, the separation agreement and property settlement fully disposed of the property rights arising out of the marriage.

Second

[3] The next issue before this Court is whether the trial court properly allowed plaintiff's motion for judgment on the pleadings, pursuant to N.C.G.S. § 1A-1, Rule 12(c). The defendant contends that the plaintiff failed to plead the existence of the separation agreement as an affirmative defense and that the plaintiff did not meet her burden of proving that there was no marital property subject to equitable distribution.

N.C.G.S. § 52-10(a) provides that a contract between spouses which releases rights acquired by marriage "may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released." In plaintiff's original complaint, the plaintiff acknowledged the existence of the separation agreement and property settlement in her second cause of action and in her prayer for relief. The defendant admitted the existence of the agreements in his answer. Although the plaintiff took a voluntary dismissal as to the setting aside of the separation agreement and her equitable distribution claim, the plaintiff and defendant do not dispute in their pleadings that they entered into a separation agreement and property settlement. We hold that the pleadings were sufficient to satisfy N.C.G.S. § 52-10(a).

The trial court expressly found in its order that: the separation agreement and property settlement "dated July 13, 1987 fully disposed of the parties' property rights arising out of the marriage." However, the trial judge did not view the separation agreement or the property settlement to ascertain whether the agreements disposed of all property rights of the parties. Under N.C.G.S. § 1A-1, Rule 12(c), a party moving for judgment on the pleadings must show that no material issue of fact exists and that he or she is clearly entitled to judgment. *Newbold v. Globe Life Ins. Co.*, 50 N.C. App. 628, 629, 274 S.E.2d 905, 906 (1981) (citation omitted). Whether the agreements fully disposed of the parties' marital property is a factual issue that could only be determined by examining the agreements. Therefore, we hold that the trial court erred in allowing plaintiff's motion for judgment on the pleadings.

Third

The last issue before the Court is whether the trial court erred in denying the defendant's motion to amend his pleadings to allege a counterclaim for equitable distribution. As we held the defendant's initial answer was in effect a counterclaim which was sufficient to state a claim for equitable distribution, we need not address this issue.

Reversed and remanded for the trial court to determine if the agreements fully disposed of the parties' property rights arising out of the marriage.

Chief Judge HEDRICK and Judge WYNN concur.

WEST END III LIMITED PARTNERS, A NORTH CAROLINA LIMITED PARTNERSHIP, AND TRISTAR DEVELOPMENT GROUP, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFFS/APPELLANTS v. GWENDOLYN H. LAMB, SUBSTITUTE TRUSTEE, AND SALLY MARKHAM MICHIE, BY AND THROUGH GUIDO DE MAERE, AS LEGAL GUARDIAN OF HER ESTATE, DEFENDANTS/APPELLEES

No. 9015SC802

(Filed 2 April 1991)

Attorneys at Law § 55 (NCI4th)— attorney's fees to collect debt— no finding as to reasonableness

The trial court erred in awarding plaintiffs attorney's fees in an amount equal to 15% of the amount of their debt to defendants without making findings as to the actual hours expended collecting the debt and the reasonable value of those services.

Am Jur 2d, Costs § 78.

APPEAL by plaintiffs from order entered 8 May 1990 by *Judge Darius B. Herring, Jr.*, in ORANGE County Superior Court. Heard in the Court of Appeals 13 February 1991.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by Charles T. L. Anderson, for plaintiff appellants.

R. Michael Pipkin, P.A., for Sally Markham Michie by and through Guido De Maere, as Legal Guardian of her Estate, defendant appellees.

COZORT, Judge.

Plaintiffs commenced this action seeking injunctive and declaratory relief from a foreclosure proceeding and attempted enforcement of provisions in a promissory note. The trial court granted defendants' motion for summary judgment and enforced the attorney's fees, trustee's fees and interest provisions of the note. Plaintiffs appeal the portion of the court's order which provides that defendants are entitled to judgment in the sum of $39,924.24 in attorney's fees. We affirm in part and reverse in part.

Plaintiff Tristar is a general partnership, and plaintiff West End III (hereinafter West End), a limited partnership. Tristar, acting for West End, and defendant Guido De Maere, acting for Sally Markham Michie, entered into an "offer to purchase and contract"

to purchase real property of the Michie estate. Each partner of Tristar, as a general partner of West End, executed a promissory note dated 1 March 1989, in the amount of $265,000.00 with interest payable the first day of each month until 1 September 1989 when the balance was due. The note contained a provision that "[u]pon default the holder of this Note may employ an attorney to enforce the holder's rights . . . and endorsers of this Note hereby agree to pay to the holder reasonable attorneys fees not exceeding a sum equal to fifteen percent (15%) of the outstanding balance." The partners also executed a deed of trust to secure the note.

On 29 August 1989, Tristar requested an extension, advising De Maere that payment of the balance due on 1 September 1989 would be difficult. De Maere denied the request. On 20 September, De Maere sent plaintiffs a notice that the Michie estate considered the nonpayment of the principal on 1 September 1989 a default and planned to enforce the attorney's fees provisions contained in the promissory note. De Maere also instituted a foreclosure proceeding on 20 September. On 22 September, plaintiff West End tendered to De Maere an escrow account check for the balance owed. Because a deposit made by West End did not appear on the teller's computerized account balance until 26 September, the check was dishonored when De Maere attempted to cash it on 23 and 25 September. On 26 September, West End tendered a cashier's check to counsel for De Maere. De Maere's counsel advised plaintiffs that the check was sufficient to stop interest from accumulating, but that additional interest from 22 September to 26 September, trustee's fees and attorney's fees of $39,967.80 were past due.

On 11 October 1989, plaintiffs filed suit seeking to enjoin defendants from proceeding with foreclosure of the real property and seeking a declaratory judgment declaring the amount due under the note. The complaint further prayed that, in the event attorney's fees are declared due, the award of attorney's fees be based on the actual attorney's fees incurred. In their answer, defendants prayed that the court award attorney's fees and trustee's fees as provided in the note. Plaintiffs and defendants moved for summary judgment. On 8 May 1989, the trial court found "there is no genuine issue of material fact in this matter and that the Defendants are entitled to Judgment as a matter of law." The court decreed, among other things, that the defendants were entitled to attorney's

fees of $39,924.24, which is 15% of the balance due in September of 1989.

The issues presented on appeal are whether defendants are entitled to summary judgment and, if so, whether the trial court erred in ordering payment of attorney's fees of 15% without determining whether that amount was reasonable. We hold that the court properly found that defendants were entitled to judgment for attorney's fees; however, we find the court erroneously ordered plaintiffs to pay $39,924.24 in attorney's fees without making findings as to the reasonableness of the fee.

Plaintiffs contend that summary judgment was improper because defendants' claim for attorney's fees is barred as a matter of law because defendant De Maere breached his duty to notify the plaintiffs of the dishonor of the tendered payment. Plaintiffs cite us to no law which imposes such a duty, and we reject plaintiffs' argument.

Plaintiffs also argue that summary judgment for defendants was inappropriate because plaintiffs had substantially performed their obligations under the note. We find this argument to be completely without merit and summarily reject it. We hold the trial court properly determined that defendants were entitled to judgment for attorney's fees.

We now address the dispositive issue raised on appeal, whether the trial court erred in awarding defendants $39,924.24 in attorney's fees without considering whether that amount was reasonable. In *Coastal Production Credit v. Goodson Farms*, 70 N.C. App. 221, 319 S.E.2d 650, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984), defendant Goodson Farms defaulted on a promissory note which was secured by farm real estate and equipment. Plaintiff began seizure proceedings and filed a motion for attorney's fees. The promissory note provided that "defendants agreed to pay a 'reasonable attorney's fee of not less than ten per centum of the total amount due hereon, unless contrary to the laws of the state where this note is executed.' " *Id.* at 224, 319 S.E.2d at 653. We determined that resolution of the controversy involved construction of the note and the statutory provision governing attorney's fees. We held that the note and N.C. Gen. Stat. § 6-21.2(1) combined "to set a range of reasonable attorneys' fees between 10% and 15%." *Id.* at 225, 319 S.E.2d at 654. We further held that the fixing of attorney's fees within the permissible range lay in the

discretion of the court, but that the law requires evidence and findings of fact supporting the reasonableness of the award. *Id.* at 226, 319 S.E.2d at 655.

Defendants cite *W. S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 360 S.E.2d 814 (1987), for the proposition that attorney's fees equal to 15% of the outstanding balance is reasonable as a matter of law. In *Clark*, a panel of this Court held that "the trial court properly allowed plaintiff to recover reasonable fees amounting to 15% of the outstanding balance owed." *Id.* at 423, 360 S.E.2d at 816. We read *Clark* to contain an implicit acknowledgment that, under the particular facts of that case, 15% was a reasonable fee. The fee allowed in *Clark* was $4,800.00, an amount which appears far more reasonable for debt collection than the $39,924.24 figure in the case below. In the present case, we are unable to make such a determination of reasonableness where the only evidence of the actual time spent by defendants' attorney is the defendants' attorney's billing worksheet indicating that the attorney had worked six hours prior to the request for $39,924.24. Our interpretation of *Clark* is reinforced by this Court's recent decision in *Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff'd in part, rev'd in part (on other grounds)*, 326 N.C. 470, 389 S.E.2d 803 (1990). In *Barker*, the note sued upon provided for "reasonable fees 'but not more than such attorneys' usual hourly charges for the time actually expended.' " *Id.* at 544, 378 S.E.2d at 570. We held that an award of attorney's fees under N.C. Gen. Stat. § 6-21.2 was supported by sufficient evidence where the plaintiff submitted an affidavit by his attorney and billing statements showing the actual work performed and the attorney's hourly rates. Further, the "trial court made findings of fact as to the reasonable amount of time required for the services and the reasonableness of the hourly rates." *Id.*, 378 S.E.2d at 571. In the present case, the court made no findings as to the amount of time defendants' attorney actually spent attempting to collect the debt, the attorney's hourly rates, or the reasonable amount of time required to collect a debt such as the one owed by plaintiffs. Such findings are required by *Coastal Production* and *Barker*.

We hold the case must be remanded in order for the trial court to make findings as to the actual hours expended collecting the debt owed by plaintiffs and the reasonable value of those services.

The order of summary judgment is affirmed in part, reversed in part, and remanded for further findings.

Chief Judge HEDRICK and Judge LEWIS concur.

S. MILLER WILLIAMS AND ROSEBOROUGH RIDGE OWNERS' ASSOCIATION, INC. v. E. THOMAS ABERNETHY AND WIFE, ANN T. ABERNETHY

No. 9024SC854

(Filed 2 April 1991)

Easements § 8.2 (NCI3d)— keeping gate across easement closed— right of servient owner to require—genuine issues of material fact

Where an easement was created by an express conveyance and the conveyance was silent on whether the servient owner had a right to require the dominant owner to keep the gate across the easement closed, the relative advantage to the servient estate and the relative disadvantage to the dominant estate determined whether plaintiffs could require defendants to keep the gate closed; these were genuine issues of material fact; and the trial court therefore erred in entering summary judgment for plaintiffs.

Am Jur 2d, Easements and Licenses §§ 89, 91.

Right to maintain gate or fence across right of way. 52 ALR3d 9.

APPEAL by defendants from order entered 30 April 1990 in AVERY County Superior Court by *Judge Charles C. Lamm, Jr.* Heard in the Court of Appeals 19 February 1991.

Hemphill & Gavenus, by Kathryn G. Hemphill and William B. Cocke, Jr., for plaintiff-appellees.

Randal S. Marsh and Larry S. Moore for defendant-appellants.

GREENE, Judge.

The defendants appeal from the order of the trial court granting plaintiffs' motion for summary judgment and finding defendant E. Thomas Abernethy in civil contempt of court.

Plaintiffs filed this action seeking a permanent injunction enjoining the defendants from removing a gate which plaintiff S. Miller Williams (Williams) had installed across a right-of-way previously granted to the defendants by Williams. The defendants filed a counterclaim seeking an order that the right-of-way be declared "open and unobstructed perpetually" and also seeking an injunction restraining the plaintiffs from closing the gate across the right-of-way. Plaintiffs moved for summary judgment.

The evidence before the trial court included: Williams on 15 June 1980 conveyed to the defendant E. Thomas Abernethy (Abernethy) "all of the Tracts #2 and #3 of the Harbour Corporation lands as shown on map prepared by Robert E. Grindstaff, Registered Surveyor . . . and such map being recorded in Book 15, Page 4 of the Avery County Registry, Avery County, State of North Carolina . . ."; Tracts 2 and 3 represented a portion of the properties owned by Williams and were not contiguous to any state road; that on the map recorded in Book 15, Page 4 of the Avery County Registry there is depicted a sixty-foot private road right-of-way leading from Tracts 2 and 3 to North Carolina State Road 1511; on 30 July 1982, Williams and his wife conveyed to the defendants a "Deed of Easement" granting "a non-exclusive right of way and easement of ingress, egress, and regress . . . along and through the private gravel road being 60 feet in width" and connecting State Road 1511 to defendants' Tracts 2 and 3; neither the recorded map or the Deed of Easement made any reference to any gate across the right-of-way or contained any express reservation of the right of the plaintiffs to maintain such a gate; at the time the defendants purchased the property from Williams there was a locked gate maintained at the intersection of the sixty-foot right-of-way and North Carolina State Road 1511; at some point after the defendants purchased the properties they left the gate open or closed at their discretion; that defendants' properties are located in a subdivision known as "Roseborough Ridge" and there are other property owners in the subdivision who are all members of the Roseborough Ridge Owners' Association, Inc.; the defendants are the only full-time residents of the subdivision and the property

is located in a relatively isolated area in Avery County surrounded on three sides by national forest; in 1988, without the plaintiffs' permission, the defendants removed the gate from the premises; and Abernethy is totally disabled and that the defendant Ann Abernethy is in declining health and is "severely burdened by having to open or close the gate to acquire access to . . . [her] home." In evidence also was the affidavit of Ann Abernethy which provided in part:

> The position of the gate requires me to step in and out of a ditch a minimum of four (4) times a day to enter and exit my property, further, I have to leave the rear of my automobile in the state road travel surface to allow the gate to swing in an open position. I have to negotiate a down hill slope to close the gate upon entry to my drive.

The trial court ordered:

> 1. That summary judgment is hereby granted in favor of the Plaintiffs against the Defendants on the issue of the Plaintiffs' right to maintain a metal swing gate in a closed position on the private access road near its terminus at Roseborough Road;
>
> 2. That the Defendants are permanently enjoined from obstructing or interfering with the construction and maintenance of a swing gate in a closed position on the private access road;
>
> 3. That the Plaintiffs are entitled to maintain said gate in a closed position as a perpetual easement;
>
> . . . .

The trial court also found Abernethy in civil contempt of court for removing the metal gate after a temporary order had been entered prohibiting such removal.

The issue is whether the possessor of land (dominant owner) who has, as appurtenant thereto, an easement over the land of another (servient owner) may be required by the servient owner to keep a gate, placed across the easement by the servient owner, in a closed position.

When an easement is created by an express conveyance and the conveyance is "perfectly precise" as to the extent of the ease-

ment, the terms of the conveyance control. Restatement of Property § 483 comment d, at 3012 (1944) [hereinafter Restatement]; *see also Higdon v. Davis*, 315 N.C. 208, 215, 337 S.E.2d 543, 547 (1985); 3 R. Powell, Powell on Real Property ¶ 415[2], at 34-183 (rel. 1986); 2 G. Thompson, Commentaries on the Modern Law of Real Property § 425, at 651 (repl. 1980) ("extent of an easement is determined by the terms of the grant . . ."). "By the phrase 'extent of an easement' is meant the limits of the privileges of use authorized by the easement." Restatement, *supra*, § 482 comment a, at 3009. Where the language of the express conveyance is ambiguous as to the extent of the easement, the grant "may be interpreted by reference to the attendant circumstances, to the situation of the parties, and especially to the practical interpretation put upon the grant by the acts of the parties in the use of the easement immediately following the grant." 2 G. Thompson, *supra*, § 385, at 528; *see also* Restatement, *supra*, § 483, at 3010; *Jacobs v. Jennings*, 221 N.C. 24, 25-26, 18 S.E.2d 715, 715-16 (1942) (where express language stated that easement " 'shall be and remain as it now is,' " extrinsic evidence used to determine extent of easement when created). When, however, there is no language in the conveyance addressing the extent of the easement, extrinsic evidence is inadmissible as to the extent of the easement. However, in such cases, a reasonable use is implied. R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 8.9, at 459 (1984); *see also Strickland v. Shew*, 261 N.C. 82, 85, 134 S.E.2d 137, 140 (1964). Therefore, in such cases "the servient estate may maintain a gate across the right-of-way if necessary for the servient estate and if it does not unreasonably interfere with the right-of-way use." 2 G. Thompson, *supra*, § 385, at 531; *see also Chesson v. Jordan*, 224 N.C. 289, 293, 29 S.E.2d 906, 909 (1944). "The determination as to what constitutes an unreasonable interference on the part of the possessor of the servient tenement with the use of the land by the owner of the easement depends primarily upon a consideration of the relative advantage to him of his desired use and the disadvantage to the owner of the easement." Restatement, *supra*, § 481 comment a, at 3008; *see also* Restatement, *supra*, § 486, at 3027 (privileges of servient tenement possessor).

Here the easement was created by an express conveyance and the conveyance is silent on whether the servient owner has a right to require the dominant owner to keep the gate across the easement closed. Therefore, whether the plaintiffs may require

the defendants to keep the gate closed depends on the relative advantage to the servient estate and the relative disadvantage to the dominant estate. In this case, genuine issues of material fact are presented, thus precluding entry of summary judgment. Because the defendants provided no argument as to why the temporary order giving rise to the contempt order is void, the assignment of error relating to the contempt order is taken as abandoned. N.C.R. App. P. 28(b)(5).

Contempt order affirmed; summary judgment order vacated and remanded.

Judges WELLS and WYNN concur.

IN RE: RUSSELL A. COBB, JR., D.C., PETITIONER

No. 9018SC834

(Filed 2 April 1991)

Constitutional Law § 172 (NCI4th)— conviction under federal statute—subsequent disciplinary sanction under state statute—no double jeopardy

A conviction under a federal statute followed by disciplinary sanctions by the Board of Chiropractic Examiners pursuant to a state statute for the same conduct does not violate the double jeopardy clause. N.C.G.S. § 90-154(b)(2).

Am Jur 2d, Criminal Law § 249; Physicians, Surgeons, and Other Healers § 74.

APPEAL by petitioner from judgment entered 17 May 1990 by *Judge William H. Freeman* in GUILFORD County Superior Court. Heard in the Court of Appeals 14 February 1991.

On 3 October 1988, petitioner entered a guilty plea to three counts of wire fraud in violation of 18 U.S.C. § 1343. On 13 October 1988, Darrell A. Trull, D.C., filed a disciplinary complaint with the North Carolina Board of Chiropractic Examiners charging petitioner with a violation of N.C. Gen. Stat. § 90-154(b)(2). On 29 May 1989, petitioner entered a plea of guilty to the violation. Follow-

ing a hearing, the Board concluded that a violation of 18 U.S.C. § 1343 "constitutes 'conviction of a felony' within the meaning of G.S. 90-154(b)(2)" and thus he was found guilty of violating § 90-154(b)(2). The Board ordered a disciplinary sanction of a five-year license suspension but suspended this sanction and placed petitioner on probation with a 90-day active suspension.

Petitioner filed this petition for judicial review of the Board's decision. He simultaneously filed for and was granted a temporary restraining order staying the enforcement of the Board's decision, which was periodically extended by stipulation of the parties pending judicial review. The trial court affirmed the Board's decision.

From this judgment, petitioner appeals.

Harris and Iorio, by John S. Iorio and Douglas S. Harris, for petitioner-appellant.

Vance C. Kinlaw for respondent-appellant.

ORR, Judge.

On appeal, petitioner assigns as error the Board's decision rendering a disciplinary sanction of a five-year license suspension suspended with probation and a 90-day active suspension. Petitioner contends this sanction constitutes punishment for his violation of 18 U.S.C. § 1343 and violates the constitutional prohibition against double jeopardy on the grounds that he has already been punished for these federal crimes. U.S. Const. amend. V; N.C. Const. art. I, § 19. We disagree.

The scope of our review is governed by the North Carolina Administrative Procedure Act which provides that a reviewing court may reverse an agency's decision if the agency decision has prejudiced "substantial rights" because it is "in violation of constitutional provisions." N.C. Gen. Stat. § 150B-51(b)(1) (1987).

The prohibition against double jeopardy protects against "multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 104 L.Ed.2d 487, 496 (1989). The U.S. Supreme Court has held that "two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Heath v. Alabama*, 474 U.S. 82, 92, 88 L.Ed.2d 387, 396 (1985). "[T]he States are separate

sovereigns with respect to the Federal Government." *Id.* at 89, 88 L.Ed.2d at 394.

In *State v. Myers*, 82 N.C. App. 299, 346 S.E.2d 273 (1986), the defendant was convicted of violating 18 U.S.C. § 2113(d) and was indicted for the same robbery in violation of N.C. Gen. Stat. § 14-87. This Court held that the offense for which the defendant was being prosecuted was not the "same offense" he had been punished for in federal court where he was convicted of violating federal law. *Id.* at 299, 346 S.E.2d at 273. This Court stated:

> Though the act committed is the same in both cases, the *offense* is not. In its legal signification, of course, an *offense*, or crime, is not merely a bad act of some kind, it is the violation of a *law*. All sovereign states, and it is fundamental to our system of government that the United States of America and the various states are separate, distinct sovereign states, have the power to enact laws and prosecute those who violate them; and it is no bar to a prosecution that the offender has already been punished for the same act by another sovereign. [Citations omitted.]

Id. at 300, 346 S.E.2d at 273-74.

Here petitioner was first convicted of violating federal law and then was sanctioned pursuant to N.C. Gen. Stat. § 90-154 (1990). Petitioner argues that *Myers* does not apply on the grounds that his conviction under the federal statute itself is the grounds for the sanction pursuant to N.C. Gen. Stat. § 90-154 and thus the State is "piggy-backing on a Federal investigation and proceeding, and enhancing the defendant's punishment." Petitioner argues that "when the Sovereignty of North Carolina has borrowed from the Sovereignty of the United States by using a violation of the U.S. Code as a basis for a State sentence, then the State clearly subjects itself to the issue of double jeopardy, regardless of the existence of separate sovereigns." Petitioner cites no authority for this contention, and as stated above, a state is a separate sovereign from the federal government. *See Heath*, 474 U.S. at 89, 88 L.Ed.2d at 394.

Under N.C. Gen. Stat. § 90-154(b), the Board of Chiropractic Examiners may impose sanctions where a practitioner has been "convict[ed] of a felony or of a crime involving moral turpitude." Thus, § 90-154 provides disciplinary sanctions for the conviction of *any* felony. Title 18, U.S.C. § 1343 sets forth the penalty for

the transmission by wire in interstate commerce to further a scheme to obtain money by false pretenses. Here, not only are the "offenses" not identical, but, more importantly, as stated above, two separate sovereigns are involved.

Furthermore, our Supreme Court has held that where a defendant had been punished under prison rules for escape and then was convicted of felonious escape and sentenced, there was no double jeopardy violation since the prison rules involved were "administrative and not judicial." *State v. Shoemaker*, 273 N.C. 475, 477, 160 S.E.2d 281, 282 (1968). Although the U.S. Supreme Court has held "that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution," *Halper*, 490 U.S. at 448-49, 104 L.Ed.2d at 502, the disciplinary sanction in the present case does not amount to "punishment" but instead is remedial. In *Helvering v. Mitchell*, 303 U.S. 391, 399, 82 L.Ed. 917, 922 (1938), the U.S. Supreme Court stated that "revocation of a privilege voluntarily granted" is "characteristically free of the punitive criminal element" and is remedial.

We conclude that a conviction under a federal statute followed by disciplinary sanctions pursuant to a state statute for the same conduct does not violate the double jeopardy clause.

Affirmed.

Judges JOHNSON and PARKER concur.

UNITED STATES FIRE INSURANCE COMPANY, PLAINTIFF v. SOUTHEAST AIRMOTIVE CORPORATION, DEFENDANT

No. 9026SC762

(Filed 2 April 1991)

Rules of Civil Procedure § 13 (NCI3d)— insurance coverage determined in earlier action—reimbursement issue—no compulsory counterclaim

Plaintiff insurer's claim against the insured for reimbursement of expenses incurred by it in defending a third party's claim arising from a plane crash was not barred by a previous action to determine whether its policy provided coverage, since the claim for reimbursement did not exist at the time of the serving of the complaint in the previous action and therefore could not have been a compulsory counterclaim.

Am Jur 2d, Counterclaim, Recoupment, and Setoff § 13.

APPEAL by plaintiff from an order allowing the defendant's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure entered by *Judge Chase B. Saunders* on 25 May 1990. Heard in the Court of Appeals 11 February 1991.

Rodney A. Dean, by Rodney Dean and Michael G. Gibson, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, by Gaston H. Gage and Keith M. Weddington, for defendant-appellee.

LEWIS, Judge.

On 15 November 1983 a twin engine airplane owned and operated by the defendant Southeast Airmotive Corporation (Southeast) crashed en route from Smith Reynolds Airport in Winston-Salem to Douglas International Airport in Charlotte. At the time of the crash the defendant was insured under a policy by the plaintiff. The plaintiff United States Fire Insurance Company (U.S.F.I.) was required by law pursuant to 14 CFR 298.41 to include the CAB standard endorsement as a part of the policy of insurance. As a result of the plane crash the defendant made a formal demand upon the plaintiff for a defense of a lawsuit brought by a third party against the defendant for damages resulting from the crash. The plaintiff denied coverage under the existing policy since the

standard endorsement excluded coverage for property carried in the aircraft or in the custody of the insured.

On 1 May 1984 Southeast filed a declaratory judgment against U.S.F.I. as a result of denial of coverage. An order was issued in Mecklenburg County Superior Court granting summary judgment for Southeast and finding that the policy of insurance provided liability coverage for the claims asserted by the third party. U.S.F.I. appealed to this Court and on 17 December 1985 this Court issued an order affirming the judgment of the trial court. *Southeast Airmotive Corporation v. United States Fire Insurance Company*, 78 N.C. App. 418, 337 S.E.2d 167 (1985). The opinion held that U.S.F.I. had coverage under its policy based on the finding that the phrase "Unless otherwise provided by the policy of insurance" in paragraph 5 of the CAB standard endorsement created an ambiguity between coverage and exclusion which was required to be resolved in favor of the insured.

U.S.F.I. subsequently defended the lawsuit brought by the third party, incurring expenses in the amount of $80,499.48. U.S.F.I. demanded reimbursement for the costs of defense from Southeast because their liability for defense had resulted from an ambiguity created by the CAB endorsement, and the CAB endorsement provides that:

> The named insured will promptly reimburse the insurer for payments made by the insurer which the insurer would not have been obligated to make except for the provisions of this endorsement.

Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted, alleging that the subject of the plaintiff's complaint was previously joined as an issue in the prior action, and that the subject of the complaint is in the nature of a compulsory counterclaim which should have been brought in the prior action and is now barred. This motion was granted. Plaintiff appeals.

A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein give the defendant sufficient notice of the nature and basis of plaintiff's claim. *Cassels v. Ford Motor Company*, 10 N.C. App. 51, 55, 178 S.E.2d 12, 15 (1970). Plaintiff argues that

the subject of the present complaint was not joined in the previous action and is not in the nature of a compulsory counterclaim.

A counterclaim is compulsory when it is in existence at the time of the serving of the pleading, when it arises out of the same transaction or occurrence, and when it does not require the presence of third parties over whom the Court cannot acquire jurisdiction. N.C.G.S. § 1A-1, Rule 13(a)(1). *Faggart v. Biggers*, 18 N.C. App. 366, 370, 197 S.E.2d 75, 78 (1973).

The CAB endorsement operates to provide a minimum level of coverage for all air carrier insurance contracts. When the endorsement extends coverage of a base policy, it clearly provides for subsequent reimbursement to be made from the insured to the insurer. The CAB endorsement itself contemplates a distinction between coverage and reimbursement. Whereas coverage for loss predicated on the base policy need not be reimbursed, coverage which would not have been provided but for the CAB endorsement is to be reimbursed. The apparent objective of the distinction is to guarantee compensation for damages suffered by third parties without allowing the insured to benefit from coverage for which it has not contracted.

The previous declaratory judgment action raised the issue of coverage. This Court decided that coverage arose from an ambiguity between the language in the endorsement and the language in the base policy. Had this Court decided that the loss was not covered, or that coverage was predicated on the base policy alone, the issue of reimbursement would never have arisen. The reimbursement clause is triggered only after coverage results from the presence of the CAB endorsement. Therefore, a claim for reimbursement is not a claim which existed at the time of the serving of the complaint in the previous action. As such it is not in the nature of a compulsory counterclaim. *Faggart v. Biggers*, 18 N.C. App. 366, 370, 197 S.E.2d 75, 78 (1973).

Furthermore, this action for reimbursement was not joined in the previous action concerning coverage, and it is not barred by estoppel. Collateral estoppel is applicable only (1) where the issues to be precluded are the same as those involved in the prior action, (2) where those actions were actually raised and litigated, (3) where the issues must have been relevant to the disposition of the prior action, and (4) where the determination of those issues must have been necessary to the resulting judgment. *King v.*

Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973). Insofar as the issue of reimbursement is distinct from the issue of coverage, the issue of reimbursement was neither raised nor disposed of in the prior action. *Id.*

We conclude that the complaint does raise a claim upon which relief can be granted and is not barred by any previous action. The trial court's order granting the defendant's motion is

Reversed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. FRED SHORES, JR.

No. 9017SC1023

(Filed 2 April 1991)

Constitutional Law § 266 (NCI4th)— counsel likely to testify— disqualification—denial of right to counsel of choice

The trial court erred in disqualifying defendant's attorney from representing him during pretrial proceedings on the ground that it appeared likely that the State would call the lawyer as a witness in the case, since the disqualification denied defendant his constitutional right to counsel of his choice. Sixth Amendment to U. S. Constitution.

Am Jur 2d, Criminal Law §§ 967, 969; Witnesses § 98.5.

APPEAL by defendant from order entered 1 May 1990 by *Judge Lester P. Martin, Jr.* in SURRY County Superior Court. Heard in the Court of Appeals 12 March 1991.

From an order disqualifying counsel from representing him during pretrial proceedings, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mary Jill Ledford, for the State.

Zimmer and Zimmer, by Jeffrey L. Zimmer, Melinda Haynie Crouch and Maura A. McCaughey, for defendant-appellant.

JOHNSON, Judge.

By an indictment returned on 16 October 1989, Fred Shores, Jr., the defendant, was charged with murder, larceny of an automobile and burning of personal property. By order dated 18 January 1990, Ray E. Chandler, an attorney licensed to practice law in the State of South Carolina, was allowed to make a special appearance for the purpose of assisting the defendant's North Carolina attorney in the preparation and presentation of his defense. A hearing was held on 14 March 1990 wherein the District Attorney brought to the court's attention that it appeared likely that the State would call Chandler as a witness in the case. Moreover, the court was informed that the State's witness Amanda Durham was expected to testify that after the disappearance of the victim, Michael Teague, the defendant had a conversation with an attorney, whom she believed was Chandler, after which the defendant told her that his lawyer wanted to know if the authorities had a body, and if they did not have any evidence, they could not prove anything and that the defendant then burned the victim's body.

On 1 May 1990, a hearing was held to determine if Chandler should be allowed to continue representation in the trial and the proceedings leading up to the trial based upon the potential conflict. The court thereafter ruled that Chandler could not represent the defendant in the trial or in the proceedings preceding the trial. A petition of Writ of Certiorari for review of the 1 May 1990 order was filed by the defendant in apt time.

On appeal, defendant contends that the trial court erred in disqualifying his attorney from representing him during pretrial proceedings. Specifically, defendant contends that the disqualification denied him of his constitutional right to counsel of his choice. We agree.

An accused's right to counsel in a criminal prosecution is guaranteed by the Sixth Amendment of the United States Constitution and is applicable to the states through the Fourteenth Amendment, Sections 19 and 23 of the North Carolina Constitution. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983). This right includes the right to select an attorney of the accused's choice. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987). "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to insure that

a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140, *reh'g denied*, 487 U.S. 1243, 108 S.Ct. 2918, 101 L.Ed.2d 949 (1988). We note that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160, 108 S.Ct. 1692, 100 L.Ed.2d 140. Therefore, where it is shown that an actual conflict or the potential for conflict exists, the presumption in favor of an accused's counsel of choice will be overcome. *Id.* As there is a necessity of avoiding the appearance of impropriety, it is incumbent upon a court faced with either an actual or potential conflict of interest, regarding attorney representation, to conduct an appropriate inquiry and, if need be, grant the motion for disqualification. The trial court must be given substantial latitude in granting or denying a motion for attorney disqualification. *Id.*

In his brief, defendant relies upon *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982), *cert. denied*, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984), to support his argument that if disqualification of his attorney is warranted, the disqualification should apply only to the actual trial. A careful examination of the factual circumstances and holding in *Cunningham* convinces us that this case is analogous to the case *sub judice*.

In *Cunningham*, defendants Cunningham and Sweeney, who were attorneys, appealed from an order of the federal district court disqualifying their respective attorneys in a criminal prosecution on the grounds of conflict of interest and that it was likely that defendant Sweeney's attorney, Michael Kennedy, would be called as a witness during the trial to either rebut, corroborate, or explain the testimony of Sweeney's receptionist who allegedly had a conversation with Kennedy that would readily support the charges against Cunningham and Sweeney. As to Sweeney's appeal, the Second Circuit Court of Appeals held that his interest as a criminal defendant in being represented by counsel of his own choice outweighed the government's interest in disqualifying his attorney. Thus, Kennedy was permitted to participate in all aspects of defendant Sweeney's defense except the actual trial.

Similarly, in balancing our defendant's interests in retaining counsel of his choice against that of the State's in disqualifying Chandler during pretrial proceedings, we believe defendant's "Sixth

Amendment right . . . is too important to be denied on the basis of a mere, though substantial, possibility" that Chandler might be called as a witness. *Id.* at 1075. In making this decision, we have considered the fact that if Chandler were disqualified this early in the proceedings and a pretrial hearing determines that either Amanda Durham cannot testify on behalf of the State or that the attorney-client privilege prohibits Chandler from testifying, defendant will have lost his constitutional right for no good reason. Accordingly, the order appealed from must be

Reversed.

Judges PARKER and ORR concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. RONALD E. DAVENPORT

No. 9010SC844

(Filed 2 April 1991)

State § 12 (NCI3d)— dismissed employee—no just cause—proper procedure not followed—award of back pay proper

The trial court did not err in holding that the State Personnel Commission was arbitrary and capricious in its decision not to award back pay to respondent employee who had been dismissed without just cause and without following proper procedure.

Am Jur 2d, Public Officers and Employees § 297.

APPEAL by petitioner from order entered 8 June 1990 by *Judge Gregory A. Weeks* in WAKE County Superior Court. Heard in the Court of Appeals 18 February 1991.

Attorney General Lacy H. Thornburg, by Associate Attorney General Patsy Smith Morgan, for petitioner appellant.

Nichols, Miller & Sigmon, P.A., by M. Jackson Nichols, for respondent appellee.

COZORT, Judge.

The North Carolina Department of Transportation (DOT) appeals Judge Weeks' order modifying the Decision and Order of the State Personnel Commission by ordering that respondent Ronald Davenport receive back pay. We affirm.

Respondent was employed by DOT as a highway engineer from 5 August 1967 until his suspension on 27 March 1987. From 1973 to the time of suspension, respondent was in charge of DOT's district office. Respondent requested and DOT granted him outside work permits authorizing him to engage in private survey work for 10 hours per week in the evenings and on weekends. During the time he was in charge of the district office, respondent commingled private business data with official documents in his office. DOT's evidence indicates that on several occasions respondent used DOT's copying machine for private purposes, had a secretary type matters not related to DOT's business, and made local telephone calls for other than official DOT business.

On 27 March 1987, Davenport was suspended without pay pending an investigation by the State Bureau of Investigation. The suspension letter did not specify any alleged misconduct on the part of the respondent. Respondent appealed his suspension and sought a hearing. On 3 September 1987, DOT gave respondent a letter of dismissal. The letter informed Davenport that he was being dismissed for actions constituting conflict of interest; abuse and misuse of departmental facilities, equipment and personnel; and conduct unbecoming a DOT employee. Although the letter indicated that Davenport had conducted personal business on State time, it failed to specify names, dates, or times when Davenport was alleged to have conducted private business matters during business hours. Respondent petitioned the Office of Administrative Hearings for a hearing pursuant to N.C. Gen. Stat. § 150B-23 (Cum. Supp. 1990).

At the hearing, the administrative law judge made factual findings and concluded that the evidence presented by DOT was insufficient to show "just cause" to dismiss a career employee. The judge also concluded that DOT failed to give respondent specific reasons for his dismissal as required by law. Based on his findings and conclusions, the administrative law judge made the following recommended decision:

> That the decision to dismiss [Davenport] be reversed as not being for just cause and that [Davenport] be reinstated with full benefits as well as attorney fees.

The State Personnel Commission (Commission) adopted the administrative law judge's findings of fact and conclusion that it had jurisdiction to find facts and issue a recommended decision. The Commission rejected, however, the judge's conclusion that respondent was entitled to back pay. The Commission ordered that respondent be reinstated, but that "because of [respondent's] conduct in the matter, the Commission declines to order an award of backpay [*sic*]." The Commission further recommended that disciplinary action be instituted against those responsible for DOT's failure to follow proper procedure in suspending and dismissing respondent. Pursuant to N.C. Gen. Stat. § 150B-45 (1987), DOT petitioned the Wake County Superior Court for judicial review of the Commission's final decision.

The superior court adopted as its own the administrative law judge's findings of fact. The court found that the "State Personnel Commission abused its discretion and was arbitrary and capricious in its application of 25 N.C.A.C. 1B .0243 [*sic*] in that the findings of fact indicate such egregious procedural violations that it constitutes lack of substantive just cause." The court concluded that the second part of N.C. Admin. Code tit. 25, r.1B.0432 (December 1989), which has a *mandatory* requirement for reinstatement, back pay and attorney's fees should have been applied. Rule .0432(b) provides:

> Failure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. The Personnel Commission, in its discretion, may award back pay and attorney's fees for such a violation or, it may determine that the violation is so severe that it rises to the level to constitute lack of substantive just cause; such a determination shall require reinstatement, backpay [*sic*] and attorney's fees as remedies.

The trial court concluded that, as a matter of law, the statute requires reinstatement *and* back pay because the procedural violations were so egregious that back pay was required. The court modified the Commission's decision to include all findings, conclusions and recommended decisions of the administrative law judge. DOT appeals.

The sole issue presented on appeal is whether the trial court erred by modifying the Commission's decision to provide respondent with back pay. We affirm.

N.C. Gen. Stat. § 150B-51 (1987) provides the standard of review with which the superior court reviews a final decision in a contested case where an administrative judge has made a recommended decision. First, the court shall determine whether the Commission heard new evidence after receiving the recommended decision. In the present case, the Commission did not. Second, the court must determine whether the Commission's decision states the specific reasons the Commission did not adopt a recommended decision. Here, the Commission's order reveals reasons the administrative law judge's recommendation of back pay was not adopted. After these initial determinations, the reviewing court may affirm, remand, reverse or modify the decision. The court may reverse or modify the agency's decision

> if the substantial rights of the [party] may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> * * * *
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b). It is clear from the record that the Commission found DOT's procedural violations to be egregious enough to recommend disciplinary actions against those who participated in the suspension and dismissal of respondent. Thus, the Commission made a determination that the violation was "so severe that it rises to the level to constitute lack of substantive just cause." N.C. Admin. Code tit. 25, r.1B.0432 (December 1989). Rule .0432 *requires* that respondent receive back pay. Thus, the trial court did not err in holding that the Commission was arbitrary and capricious in its decision not to award back pay. The decision of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge LEWIS concur.

BARBARA DYER AND RONALD PERKINS, CAVEATORS v. STATE OF NORTH CAROLINA, PROPOUNDER

No. 905SC758

(Filed 2 April 1991)

Wills § 25 (NCI3d)— award of attorney fees to caveators—error

Though caveators presented evidence that testatrix, their mother who left all her property to the State, was eccentric, they did not present substantial evidence that she did not know the kind, nature, and extent of her property; therefore, the evidence was insufficient to support a conclusion that the caveat proceeding had substantial merit, and the award of attorney fees to the caveators is reversed. N.C.G.S. § 6-21(2).

Am Jur 2d, Wills §§ 81, 1094.

APPEAL by Propounder from order entered 14 March 1990 in NEW HANOVER County Superior Court by *Judge David E. Reid, Jr.* Heard in the Court of Appeals 25 January 1991.

Terry B. Richardson for caveator-appellees.

Lacy H. Thornburg, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.

GREENE, Judge.

The State of North Carolina (Propounder) appeals from an order of the trial court awarding attorneys fees to Barbara Dyer and Ronald Perkins (Caveators).

On 29 November 1982, Jannie Lou Perkins Alston (Testatrix) executed a will devising all of her property to the State of North Carolina. She died on 21 November 1985. In March of 1986 the Caveators, the children of the Testatrix, filed a caveat proceeding seeking to annul the probate of the will. The caveat proceeding was heard in the superior court, and on 8 February 1990, a jury returned a verdict in favor of the Propounder of the will. The Caveators did not appeal the jury verdict. Rather, they moved the court pursuant to N.C.G.S. § 6-21(2) (1986) for an award of attorneys fees. The trial court awarded a fee to the Caveators in the amount of $3,500 and directed that the fee be paid from the estate of the Testatrix.

The issue presented is whether the caveat proceeding had substantial merit.

North Carolina Gen. Stat. § 6-21(2) provides that costs in a caveat proceeding "shall be taxed against either party, or apportioned among the parties, in the discretion of the court . . . ." This has been construed to allow the trial court to require the costs to be paid "out of the funds of the estate . . . ." *Mayo v. Jones*, 78 N.C. 406, 407 (1878). However, costs shall include attorneys fees "only if . . . [the trial court] finds that the [caveat] proceeding has substantial merit." N.C.G.S. § 6-21(2). Whether a caveat proceeding has substantial merit is a legal question reviewable by the appellate courts *de novo*. A caveat proceeding has substantial merit if there is substantial evidence to support the claim. " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Thompson v. Wake County Board of Ed.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (citation omitted). Here, the Caveators claim that the Testatrix did not have the necessary testamentary capacity to execute her will. Therefore, to support an award of attorneys fees the Caveators must have presented "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that the Testatrix lacked the necessary testamentary capacity at the time of the execution of the will.

"A person has sufficient testamentary capacity within the meaning of the law if he (1) comprehends the natural objects of his bounty; (2) he understands the kind, nature, and extent of his property; (3) he knows the manner in which he desires his act to take effect; and (4) he realizes the effect his act will have upon his estate. It is sufficient for the caveators to negative only one of these essential elements." *In re Womack*, 53 N.C. App. 221, 223, 280 S.E.2d 494, 496, *disc. rev. denied*, 304 N.C. 391, 285 S.E.2d 837 (1981). Here, the Caveators claim that the evidence sufficiently negates that the Testatrix "understood the kind, nature, and extent of her property." Specifically, they point to the following evidence: That the sole beneficiary was the State of North Carolina; that the Testatrix put salt around her house and Bibles in her doorway to fight off evil spirits; that she complained of hearing slamming doors and bells ringing when she was home alone; that she believed in witchcraft; and that she generally lived in isolation from other people. The Propounder points to the following evidence: That the lawyer who prepared the will testified that the Testatrix understood

the consequences of making a will; that she knew the natural objects of her bounty; that she knew that she had property and that she wanted to leave it to the State of North Carolina and not to her children; that her business affairs were in good shape at the time of her death, i.e., her bills and mortgages were current; and that she was examined by a psychiatrist in 1975 and found to be fully oriented with no psychotic behavior.

The Testatrix's behavior represents a deviation from accepted standards of conduct but there is no substantial evidence in this record to support a conclusion that she did not know the kind, nature, and extent of her property. "Eccentricity is not insanity . . . ." 1 N. Wiggins, Wills and Administration of Estates in North Carolina § 49 (2d ed. 1983). "Evidence of the testator's peculiarities, such as cooking cakes for the dogs at Christmas, having pets for companions at the dinner table, or living in filth, generally will not be held sufficient to invalidate the testator's will." *Id.*

Accordingly, the Caveators did not present substantial evidence to support a conclusion that the caveat proceeding had substantial merit, and the award of attorneys fees to the Caveators must be reversed.

Reversed.

Judges PARKER and COZORT concur.

GILBERT THOMAS ROACH, PLAINTIFF v. JOSEPH CHARLES SMITH AND THELMA AVERY SMITH, DEFENDANTS

No. 903SC710

(Filed 2 April 1991)

Interest § 2 (NCI3d)— judgment entered more than four years before motion made—no prejudgment or postjudgment interest allowed

No judge is authorized, pursuant to a motion made in the cause, to order the payment of prejudgment interest or postjudgment interest on a judgment entered more than four years before the motion in the cause is made.

Am Jur 2d, Interest and Usury §§ 59, 60.

APPEAL by plaintiff from *Llewellyn (James D.), Judge*. Order entered 23 April 1990 in Superior Court, CRAVEN County. Heard in the Court of Appeals 11 March 1991.

This is a civil action wherein plaintiff seeks to recover damages for injuries resulting from the negligence of defendants.

The uncontroverted facts disclose the following: On 10 January 1985, Judge Bradford Tillery entered a judgment that "plaintiff have and recover of the defendant the sum of $125,500 with interest thereon as provided by G.S. 24-5 from the 12th day of November, 1982." On 25 May 1989, the plaintiff made a motion for prejudgment interest pursuant to G.S. 24-5 in the amount of $6,449.75 calculated at the rate of 8% interest from 12 November 1982 through 10 January 1985 on the amount of $25,000 (the amount of liability insurance coverage). Subsequently, on 28 February 1990, plaintiff made a motion for postjudgment interest on the prejudgment interest amount until such time as the judgment is satisfied.

On 23 April 1990, Judge James Llewellyn entered an order denying plaintiff's motions. Plaintiff appealed.

Beaman, Kellum, Hollows & Jones, P.A., by J. Allen Murphy, for plaintiff, appellant.

Ward and Smith, P.A., by Susan K. Ellis, and Kenneth R. Wooten, for defendant, appellees.

HEDRICK, Chief Judge.

We are unaware of any rule that authorizes any judge, pursuant to a motion made in the cause, to order the payment of prejudgment interest or postjudgment interest on a judgment entered more than four years before the motion in the cause is made.

We hold Judge Llewellyn had no authority to entertain or allow the motions in this case, and said motions should have been dismissed. *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C. App. 257, 362 S.E.2d 870 (1987). However, we treat the order denying the motions as one dismissing them, and affirm it.

Affirmed.

Judges COZORT and LEWIS concur.

UNITED LABORATORIES, INC., A DELAWARE CORPORATION, PLAINTIFF v. WILLIAM DOUGLAS KUYKENDALL AND SHARE CORPORATION, A WISCONSIN CORPORATION, DEFENDANTS

No. 9028SC97

(Filed 16 April 1991)

1. **Appeal and Error § 49 (NCI3d)— covenant not to compete—objection to exclusion of evidence—similar evidence already admitted**

In an action for breach of covenant not to compete, the trial court's error, if any, in excluding a newsletter relating to defendant employer's policy of defending employees in suits brought by the employees' former employers was harmless, since other similar evidence was before the jury.

Am Jur 2d, Appeal and Error §§ 800, 802.

2. **Damages § 161 (NCI4th)— covenant not to compete—mitigation of damages—instruction not required**

The trial court did not err in refusing to instruct the jury in an action for tortious interference with a covenant not to compete and unfair trade practices that plaintiff had to mitigate its damages where defendant failed to meet its burden of proving that plaintiff did not act reasonably.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 542 et seq.

3. **Master and Servant § 11.1 (NCI3d); Unfair Competition § 1 (NCI3d)— covenant not to compete—inducement of employee to breach—unfair trade practice**

The trial court did not err in concluding that defendant employer engaged in an unfair trade practice by paying legal fees and costs to induce defendant employee to breach his covenant not to compete with plaintiff, his former employer, by offering to subsidize the income, draw, and expenses of defendant employee in the event of an injunction, and by using defendant employee's customer information to divert accounts from plaintiff.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 542 et seq.

4. Election of Remedies § 2 (NCI3d)— interference with contract—unfair trade practices—election properly allowed

The trial court did not err in allowing plaintiff to elect between the punitive damages awarded on its claim for tortious interference with a contract and trebled damages for unfair trade practices.

Am Jur 2d, Election of Remedies §§ 8 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 360, 362.

5. Election of Remedies § 4 (NCI3d); Costs § 37 (NCI4th)— tortious interference with contract—unfair trade practices—election between punitive damages and trebled compensatory damages—attorney fees for unfair trade practices

Plaintiff's election of punitive damages for tortious interference with a covenant not to compete rather than trebled damages for unfair trade practices under N.C.G.S. § 75-1 did not constitute an election against the Chapter 75 award in its entirety so as to prohibit the trial court from awarding attorney fees to plaintiff under N.C.G.S. § 75-16.1 in the unfair trade practices action.

Am Jur 2d, Election of Remedies §§ 8 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 360, 362.

6. Costs § 37 (NCI4th)— decision to award attorney fees proper—insufficient findings in award

In an action for unfair trade practices arising out of tortious interference with a covenant not to compete, the trial court did not abuse its discretion in its decision to award attorney fees, since there was ample evidence that defendant wilfully engaged in the acts and practices found by the jury; however, the trial court erred in failing to include in its order findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 365.

APPEAL by defendant Share Corporation from judgment entered 19 July 1989 by *Judge Hollis M. Owens* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 15 November 1990.

This is the second appeal in this matter. Plaintiff United Laboratories, Inc. (hereinafter United) and defendant Share Corporation (hereinafter Share) are in the business of selling specialty chemical products to commercial and municipal accounts. United and Share compete directly against each other. United hired defendant William Douglas Kuykendall in 1971 to sell chemical products. During his employment, Kuykendall signed a covenant not to call upon any of United's customers for eighteen months in the event he left United's employment. In 1985, Kuykendall responded to a Share advertisement for chemical sales representatives. During Kuykendall's interview with Vern Palmer, Share's Vice President of Sales, Kuykendall and Palmer allegedly discussed Kuykendall's covenant not to compete with United. Palmer advised Kuykendall that in the event United brought legal action against Kuykendall for violation of the covenant, Share would pay the legal costs associated with defending the lawsuit. Subsequently, Kuykendall agreed to work for Share. After beginning work with Share, Kuykendall called upon former customers of his while he was employed with United and sold within the restricted sales territory allegedly causing plaintiff to lose sales with its customers.

On 26 November 1985, plaintiff filed its original action against defendant Share and defendant Kuykendall seeking an injunction and damages based on Kuykendall's alleged breach of restrictive covenants, Share's interference resulting from the two restrictive covenants and Kuykendall's and Share's unfair trade practices under G.S. Chapter 75. On 31 December 1985, the trial court entered a preliminary injunction enjoining Kuykendall from "soliciting, calling upon or contacting" customers of plaintiff that Kuykendall had previously contacted on plaintiff's behalf and from disclosing United's confidential information to Share. The case went to trial on 23 June 1986. The trial court directed a verdict against defendants on the issue of liability and submitted the issue of damages to the jury. The jury returned a judgment in the amount of $38,738.89 which was trebled upon the court's finding of liability pursuant to G.S. 75-1.1. The trial court awarded attorneys' fees and costs for $47,522.23 pursuant to G.S. 75-16.1. The trial court also entered a permanent injunction enjoining Kuykendall from selling, directly or indirectly, Share products within United's territory for the remainder of his eighteen month covenant period and enjoining Share from utilizing, directly or indirectly, any confidential information obtained from Kuykendall. Defendants appealed from the trial court's judgment.

This court reversed that judgment in *United Laboratories, Inc. v. Kuykendall*, 87 N.C. App. 296, 361 S.E.2d 292 (1987), holding that the two restrictive covenants executed by Kuykendall were unenforceable and accordingly there could be no interference. This court then ordered a directed verdict in favor of Share on the interference claim, held that the trial court improperly directed a verdict as to the Chapter 75 claims and remanded those claims for a new trial. Plaintiff then appealed to the North Carolina Supreme Court who affirmed the Court of Appeals in part and reversed it in part holding that the restrictive covenants were enforceable. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988). The Court stated that it could not determine from the verdict which part of the damages was attributable to the breach of contract claim. Accordingly, the Supreme Court remanded that matter for trial as to the damages on the breach of contract claim against Kuykendall. The Supreme Court remanded the interference claim for a new trial as to both liability and damages. The unfair trade practice claim was also remanded for trial on the issues of liability and damages.

Prior to the second trial, Share offered to settle the case for $20,000. United rejected this offer and countered that it would settle the case if Share entered into an eternal consent decree whereby Share would not solicit or hire United's sales representatives in violation of their contracts with United and paid $225,000. Share rejected the counteroffer.

This matter went to trial again on 22 May 1989. The jury returned a verdict in favor of plaintiff against Kuykendall on damages for breach of contract in the amount of $11,700; they found liability and damages against Share on the interference claim in the amount of $1.00 in nominal damages and $100,000 in punitive damages and made findings of facts and found damages on the unfair trade practice claim in the amount of $15,000 compensatory damages which United conceded was duplicative of the compensatory damages awarded for the breach of contract claim. At a subsequent hearing, the trial court awarded legal fees to United in the amount of $250,000. The trial court then entered judgment against Kuykendall on the breach of contract claim in the amount of $11,700; against Share on the interference claim in the amount of $1.00 in nominal damages and $100,000 in punitive damages; and against Share on the unfair trade practice claim in the amount of $45,000 which was $15,000 in compensatory damages trebled with $250,000 in attorneys' fees.

United elected the $1.00 nominal damages and $100,000 punitive damages of the interference claim and $15,000 untrebled compensatory damages and $250,000 attorneys' fees in the unfair trade practices claim. Share appeals.

Petree, Stockton & Robinson, by Jackson N. Steele and Schwartz & Freeman by Paul G. Simon and Jamie A. Maloney, for plaintiff-appellee.

Brock, Drye & Aceto, P.A., by Michael W. Drye, for defendant-appellant.

EAGLES, Judge.

[1] First, Share assigns as error the trial court's exclusion from evidence a newsletter which Share contends was relevant to its intent. Without citing any authority, Share argues that it was unfair for the trial court to hold that plaintiff could introduce either the entire newsletter or none of it and then later refuse the same option to Share on the grounds that the document was irrelevant. Share argues that this was "the height of unfairness."

We hold that it is unnecessary to decide whether the trial court erred in refusing to admit the newsletter. The substance of the newsletter which related to Share's policy of defending employees in suits brought by the employees' former employers was admitted into evidence when portions of a transcript from the deposition of Share's General Counsel, Stephen C. Raymonds, were read to the jury. Also the jury heard similar testimony from portions of a transcript from the deposition of Share's Chairman of the Board and Director, Paul desJardins. During his deposition, Mr. desJardins stated that he did not know whether an offer was made to Kuykendall to pay for legal fees and expenses incurred during litigation but stated that "we [Share] will defend any of our employees whether they be salespeople or not, or what, in any litigation of this type." He further replied "yes" to a question concerning whether it was the custom and practice of Share to inform potential salespersons that it would pay legal fees and expenses prior to their being employed. While the newsletter contained details concerning the litigation of another suit, it addressed the policy of Share in defending its employees so that the threat of litigation would not deter a potential employee from leaving the employment of one of Share's competitors. Also, in a letter dated 15 October 1985, Stephen Raymonds told David Brown, General

Counsel for United, that "[a]s you probably know, Share has a history of fighting for the right of the salesperson to be free to choose for whom he or she wishes to work." Where the same evidence or testimony is introduced during the trial, the exclusion of even relevant evidence is harmless error. *Munchak Corp. v. Caldwell*, 37 N.C. App. 240, 247, 246 S.E.2d 13, *disc. rev. denied*, 295 N.C. 647, 248 S.E.2d 252 (1978). Accordingly, this assignment of error is overruled.

[2] Second, Share assigns as error the trial court's refusal to instruct the jury that United had to mitigate its damages. Share contends that had the trial court instructed the jury on this issue, "the jury would have returned a verdict of zero damages or at least of smaller damages as to the unfair trade practice claims." We disagree.

> "The rule in North Carolina is that an injured plaintiff, whether his case be 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. *Johnson v. R.R.*, 184 N.C. 101, 113 S.E. 606. This rule is known as the doctrine of avoidable 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. 22 Am. Jur. 2d Damages §§ 30-32 (1965)."

Watson v. Storie, 60 N.C. App. 736, 739, 300 S.E.2d 55, 58 (1983), *appeal after remand*, 70 N.C. App. 327, 318 S.E.2d 910 (1984), quoting, *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 73-4 (1968). Where the duty to minimize damages applies, the burden is on the party who breached the contract to show matters in mitigation. *Andrews & Knowles Produce Co. v. Currin*, 243 N.C. 131, 90 S.E.2d 228 (1955). "A trial judge is required to instruct a jury on the law arising from the evidence presented." *Lusk v. Case*, 94 N.C. App. 215, 216, 379 S.E.2d 651, 652 (1989). "When a defendant submits a request for specific instructions which are correct and are supported by the evidence, the trial court commits reversible error in failing to submit the substance of those instructions to the jury." *Alston v. Monk*, 92 N.C. App. 59, 66, 373 S.E.2d 463, 468 (1988), *disc. rev. denied*, 324 N.C. 246, 378 S.E.2d 420 (1989).

Here, the evidence does not support the instruction on mitigation of damages. No testimony indicates that plaintiff failed to

mitigate its damages or act other than reasonably. During trial, Eric Frazer, Vice President of Sales for United, testified that after Kuykendall left, they "started to call all of the accounts on the telephone and tried to assure them that United would still service their needs, and tried to maintain that relationship or contact with the customer." Frazer further testified that they "then took the accounts and [they] divided them up between three of our top sales representatives in those areas, and our most experienced sales representatives, and had them call on the accounts and try to service the accounts as well." Kuykendall even testified that he had approached United about returning to his former job, which can be attributed to the delay, if any, on United's part in reassigning the accounts. While we note that Share presented testimony from one of United's former customers stating that he did not remember being called on by United after Kuykendall left the company, we hold that Share had not met its burden of proving that United did not act reasonably in seeking to reduce its loss. Since defendant has failed to meet its burden of proving that plaintiff did not act reasonably in minimizing its loss, we find it unnecessary to address whether the instruction is relevant as a matter of law to the unfair trade practice claim. Accordingly, this assignment of error is overruled.

[3] Third, Share contends that the trial court erred in concluding that Share engaged in an unfair trade practice by paying legal fees and draws and by using employees' customer information. We disagree.

> The overall purpose and legislative intent of G.S. 75-1.1 is "to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State, and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer." Furthermore, "[t]he statutes do not protect only individual consumers, but serve to protect business persons as well." Thus, disputes between competitors in business fall under the province of the statute. Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has on the marketplace. Based upon the jury's findings of fact, the court must determine as a mat-

ter of law whether a defendant's conduct violates this section. [Citations omitted.]

McDonald v. Scarboro, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683-84, *disc. rev. denied*, 323 N.C. 476, 373 S.E.2d 864 (1988).

> No precise definition of "unfair methods of competition" as used in this section exists.
>
> > "Unfair competition has been referred to in terms of conduct 'which a court of equity would consider unfair.' (Citation omitted.) Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others."

Id., 370 S.E.2d at 684, quoting, *Harrington Manufacturing Co. v. Powell Manufacturing Co.*, 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469, *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979). "Furthermore, '[t]he concept of "unfairness" is broader than and includes the concept of "deception." ' " *Id.*, quoting, *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981), quoting, *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980). "Unfair methods of competition have been found by this Court in actions involving competitive business relationships." *Id.* at 19, 370 S.E.2d at 684. "The act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce. Unfair methods of competition [. . .] would not promote good faith at any level of commerce." *Id.* at 20-21, 370 S.E.2d at 685 (citations omitted).

Here, in its verdict, the jury specifically found that Share did the following: "(a) Offer[ed] to pay legal fees and costs to induce Kuykendall, in breach of his covenant not to compete, to attempt to divert to Share, unfairly, United's accounts; (b) Induce[ed] Kuykendall to use his relationship with United's accounts and knowledge of confidential business information to attempt to divert to Share, unfairly, United's accounts; (c) Offer[ed] to subsidize the income, draw and expenses of Kuykendall in the event of an injunction, to induce Kuykendall, to divert to Share, unfairly, United's accounts; and (d) As a matter of routine practice, offer[ed] to pay

legal fees and costs to induce experienced chemical sales representatives, in breach of the salesmen's covenant not to compete, to attempt to divert to Share, unfairly, the former employer's accounts." The jury also found that Share's conduct was in commerce or affected commerce. We agree with the trial court's finding that Share's conduct violated G.S. Chapter 75. These facts constituted unfair methods of competition and did not promote good faith dealings between Share and United. Accordingly, the trial court did not err in its judgment.

[4] Fourth, Share contends that the trial court erred in misapplying the doctrine of election of remedies. Share argues that when United conceded that it was not entitled to both punitive damages and trebled damages, "United actually . . . conced[ed] that it had to elect between its interference claim and its unfair trade practices claim." Share contends that the trial court erred in allowing United to elect between the punitive damages awarded on its interference claim and the trebled portion of its unfair trade practices claim. We disagree.

"Plaintiffs may in proper cases elect to recover either punitive damages under a common law claim or treble damages under N.C.G.S. § 75-16, but they may not recover both." *Ellis v. Northern Star Co.*, 326 N.C. 219, 227, 388 S.E.2d 127, 132, *r'hrg denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). In *Ellis*, the libel and unfair and deceptive trade practice claim arose from the same letter. There the jury awarded plaintiff, Ellis Brokerage Company, actual damages in the amount of $32,500 which pursuant to G.S. 75-16 would be trebled to $97,500 and punitive damages in the amount of $12,500 for libel. The *Ellis* court stated that on remand, the trial court had to allow plaintiff to elect its remedy: "either a total of $45,000 for the combined libel award; or a total of $97,500 under N.C.G.S. § 75-16." *Id.*

Here, under the rationale of *Ellis*, *supra*, the trial court properly allowed the election of damages from the allocated award. Plaintiffs here could have elected to recover the trebled $15,000 compensatory award ($45,000) for defendants' violation of G.S. 75-1.1 and recovered nominal damages of $1.00 for the tortious interference claim or plaintiffs could have elected to take the nominal and punitive damages awarded for the tortious interference claim and the compensatory damages awarded for the violation of G.S. 75-1.1. Here plaintiff chose the latter.

[5] Share also contends that by electing the complete award of damages on the tortious interference claim, plaintiff elected against the Chapter 75 award in its entirety and is not entitled to attorneys' fees. Contrary to plaintiff's assertion, the law in this State does not hold that a plaintiff must elect against a Chapter 75 violation in its entirety. It merely holds that plaintiff must elect between punitive damages and compensatory damages that are *trebled* pursuant to G.S. 75-16. *See HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 379 S.E.2d 868, *rev. on additional issues allowed*, 325 N.C. 271, 382 S.E.2d 439 (1989). *See also Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 333 S.E.2d 299 (1985); *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 344 S.E.2d 297, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986); *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981); *Jennings Glass v. Brummer*, 88 N.C. App. 44, 362 S.E.2d 578 (1987), *disc. rev. denied*, 321 N.C. 473, 364 S.E.2d 921 (1988).

In *HAJMM Co., supra*, this court stated that

> [i]f the trial court finds that defendants engaged in an unfair or deceptive trade practice, plaintiff is entitled to have its actual damages trebled and may be entitled to attorney fees in the trial court's discretion, if the court finds that defendants' act or practice was willful and their refusal to resolve the matter was unwarranted. N.C. Gen. Stat. §§ 75-16 and 75-16.1 (1988). Plaintiff would then elect to recover either punitive damages or treble damages.

94 N.C. App. at 15, 379 S.E.2d at 876-77. In *Pinehurst v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 338 S.E.2d 918, *disc. rev. denied and writ of supersedeas and temporary stay denied*, 316 N.C. 378, 342 S.E.2d 896 (1986), this court upheld the trial court's award of attorneys' fees under G.S. 75-16.1 even where plaintiffs had offered no proof on the monetary value of their damages. The decision to award attorneys' fees is within the sole discretion of the trial court. Here, since Share did violate G.S. 75-1.1, we find no abuse of discretion.

[6] Fifth, Share contends that the trial court erred in awarding excessive attorneys' fees with no findings under G.S. 75-1.1. Share argues that the trial court erred in making a "full award of attorneys' fees for the first trial and the two appeals despite the two reversals and the need for a second trial." Share contends that the trial court made its award without making any findings

as to the "reasonableness of the fees, the necessity for all of the hours, the quality of the services, or anything else." Share further contends that the trial court erred in not reducing plaintiff's request by allegedly unauthorized costs. We agree.

G.S. 75-16.1 provides that

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The 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 suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.
>
> One purpose for the statute authorizing attorneys' fees is to encourage individuals to bring valid actions to enforce the statute by making such actions economically feasible. Whether to award or deny these fees is within the sound discretion of the trial judge. Once the court decides to award attorneys' fees, however, it must award reasonable attorneys' fees. Furthermore, in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable, the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.

Cotton v. Stanley, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989) (citations omitted). *But c.f., McDonald v. Scarboro*, 91 N.C. App. 13, 370 S.E.2d 680 (1988).

In the instant case, during a hearing concerning whether facts found by the jury in its verdict constituted unfair and deceptive trade practices and what attorneys' fees, if any, plaintiff was entitled to, the trial court made the appropriate statutory findings justifying plaintiff's entitlement to attorneys' fees. First, there is ample record evidence that Share wilfully engaged in the acts and practices found by the jury. Share's policy of defending its

employees in suits resulting from the breach of covenants not to compete and its active encouragement of its employees to violate the covenants under the belief that the covenants were not enforceable is sufficient evidence on the wilfulness of Share's violation. Secondly, there is record evidence that there was unwarranted refusal on the part of Share to settle. Prior to the second trial, Share made an offer of $20,000 to settle this matter. After United demanded $225,000 and an eternal consent agreement, Share did not make a counteroffer. In view of the jury's award, Share's attempt at settling this matter was not realistic. After careful review of the record, we find that the trial court did not abuse its discretion in its decision to award attorneys' fees. However, the trial court did not include in its order findings of fact "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." 94 N.C. App. at 369, 380 S.E.2d at 421. Without these factual findings, we are unable to make a determination as to the reasonableness of the trial court's award. We also note that plaintiff's attorneys are entitled to fees for post-trial motions and this appeal.

Share also contends that the trial court erred in making its finding that there had been an unwarranted refusal by Share to pay the unfair trade practice claim. For the reasons stated above, this assignment of error is overruled.

Share next contends that the trial court erred in admitting an affidavit on the issues of whether Share's conduct constituted a wilful unfair trade practice. We disagree.

On these facts, we find it unnecessary to determine the admissibility of the affidavit. "In a trial by the court sitting as finder of fact, we presume that the trial judge disregards incompetent evidence. On appeal, it must be shown that the trial judge was affirmatively influenced by the incompetent matter to justify a finding of prejudicial error." *Spencer v. Spencer*, 70 N.C. App. 159, 167, 319 S.E.2d 636, 643 (1984). Here defendant has failed to rebut that presumption. Accordingly, this assignment of error is overruled.

In summary, we find no error in the trial below with the exception of the trial court's award of attorneys' fees. Accordingly, we remand this cause for entry of findings of fact consistent with this opinion on the attorneys' fee award including an award of attorneys' fees for post-trial motions and this appeal.

Affirmed in part; reversed and remanded in part.

Judges ARNOLD and PARKER concur.

RAZIA SAVANI v. NOORALI K. SAVANI

No. 9010DC773

(Filed 16 April 1991)

1. **Judges § 5 (NCI3d)— child support action—recusal denied—no error**

The trial judge did not err by refusing to recuse himself in an action for child support, attorney's fees and modified visitation where the judge had presided over earlier hearings between the parties and had shared office space with plaintiff's counsel when in private practice. Canon 3(c)(1) of the Code of Judicial Conduct directs that judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned; the test to apply in deciding what is reasonable is whether a reasonable man, knowing all of the circumstances, would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner. A careful review of the record and defendant's basis for the recusal motion shows that the circumstances do not reasonably warrant questioning the judge's impartiality.

Am Jur 2d, Judges §§ 154, 181.

2. **Divorce and Separation § 397 (NCI4th)— retroactive child support—sufficiency of findings**

There were sufficient findings to support a trial court's award of retroactive child support where plaintiff presented an affidavit of expenses incurred following the child's placement in her custody, the court made a finding of the child's expenses based on the affidavit, and the court found the amount to be reasonable.

Am Jur 2d, Divorce and Separation §§ 1035 et seq.

3. Divorce and Separation § 394 (NCI4th)— child support—findings—sufficient

The trial court did not err in awarding prospective child support where there was evidence to support the court's findings that the child needed $770 per month, defendant had a gross income of $5,250 per month, plaintiff had a gross income of $1,189 per month, and plaintiff had reduced her expenses so that she would have enough funds to pay the expenses of the child. The trial court determines the credibility of the evidence and what it establishes, and the court's findings are conclusive on appeal if supported by any evidence, even if there is also evidence to the contrary.

Am Jur 2d, Divorce and Separation §§ 1035 et seq.

4. Divorce and Separation § 551 (NCI4th)— attorney fees—no abuse of discretion

The trial court did not abuse its discretion in a child support action by awarding attorney fees to plaintiff where the trial court's finding that plaintiff had insufficient means to defray the expense of the action was supported by sufficient evidence; the court's finding that defendant refused to provide adequate support for the child under the circumstances is well supported by the evidence; and there was no abuse of discretion in the amount of the attorney fees.

Am Jur 2d, Divorce and Separation § 1061.

Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order. 57 ALR4th 710.

5. Divorce and Separation § 377 (NCI4th)— visitation of child—modification of schedule

There was ample evidence to support the trial judge's modification of a visitation schedule where the court set out a detailed visitation schedule at the initial custody hearing; defendant missed one-half of his scheduled visits and failed to notify plaintiff that he would be unable to come; the missed visits caused plaintiff additional expense and inconvenience because it was necessary to arrange last minute day care on those weekends she was scheduled to work; and plaintiff and defendant were having difficulty agreeing on the five-week

period during which defendant was to have the child in the summer.

Am Jur 2d, Divorce and Separation §§ 1003 et seq.

6. **Divorce and Separation § 394 (NCI4th)— child support action—information concerning insurance—required to be furnished**

The trial judge did not abuse his discretion in a child support action by requiring defendant to provide plaintiff with information concerning accident and health insurance on the child where the original custody order had required defendant to maintain accident and health insurance through his employer.

Am Jur 2d, Divorce and Separation § 1025.

7. **Rules of Civil Procedure § 54 (NCI3d)— final order—defendant's proposal—signed without defendant's review**

The trial court did not err in an action for retroactive child support, attorney fees, and modified visitation by not allowing defendant to review the draft or final order prior to execution where defendant had submitted proposed findings of fact, conclusions of law, and a memorandum of law. Once the trial judge found the facts and entered his order, it was not incumbent upon him to submit his order to defendant prior to its execution.

Am Jur 2d, Motions, Rules and Orders §§ 35-39.

Judge GREENE concurring.

APPEAL by defendant from judgment signed 2 February 1990, nunc pro tunc, 1 November 1989 in WAKE County District Court by *Judge Jerry W. Leonard.* Heard in the Court of Appeals 12 February 1991.

A. Larkin Kirkman for plaintiff-appellee.

Donald H. Solomon, P.A., by Meredith J. McGill, for defendant-appellant.

WYNN, Judge.

This appeal was instituted by defendant following an order granting plaintiff child support, attorney's fees, and modified visitation. For the reasons which follow, we affirm.

Plaintiff and defendant were married on 28 January 1983. One child was born of the marriage, Junaid Noorali Savani, on 7 February 1984. The parties separated in 1986 and an order awarding custody of their child to defendant was entered on 26 May 1986. In October 1986, plaintiff and defendant reconciled, and lived together until 9 December 1987.

On 15 January 1988, plaintiff filed a motion for change of custody, attorney's fees and child support. After four days of hearings during the 22 August 1988 Session of the District Court of Wake County, Judge Leonard entered an order on 24 October 1988 granting custody of the child to plaintiff and awarding child support in an amount to be determined after submission of financial affidavits by the parties to the court. A visitation schedule was also included in the order. Attorney's fees were not awarded in this order. Defendant gave notice of appeal on 28 October 1988 and dismissed his appeal on 1 January 1989.

On 22 May 1989, plaintiff filed a motion for hearing and entry of order setting child support and attorney's fees. Prior to a hearing on plaintiff's motion, plaintiff filed an additional motion to modify visitation on 28 June 1989. After several continuances requested by the defendant, a hearing was held on both motions on 24 October 1989. An order was entered 1 November 1990, granting plaintiff retroactive and prospective child support, attorney's fees and a modified visitation schedule. This appeal followed.

I

[1] Defendant raises eight issues within seven assignments of error. First, defendant assigns error to the trial judge's refusal to recuse himself from hearing the case at bar. Defendant advances the following three arguments in support of this motion: 1) the trial judge presided over the modification of custody hearing in November 1988, which transferred custody of the child from defendant to plaintiff, 2) the trial judge had presided over a hearing on 22 September 1989 concerning child support, the same issue to be tried on 24 October 1989, in which defendant was scheduled to be present but failed to appear due to inclement weather, and 3) the trial judge and plaintiff's counsel of record shared office space at some earlier point in time while the judge was in private practice.

Canon 3(c)(1) of the Code of Judicial Conduct directs that, "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . ." The test to apply in deciding what is reasonable is whether "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner." *McClendon v. Clinard*, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978).

A careful review of the record and defendant's basis for his recusal motion shows that the circumstances here do not reasonably warrant questioning Judge Leonard's impartiality. During the custody hearing of November 1988, Judge Leonard found as a fact and concluded that the child was in need of support. A later hearing to determine the amount was to be scheduled following the parties submitting financial affidavits to the court. Judge Leonard ordered the parties to submit these affidavits no later than 25 November 1988. Plaintiff submitted her affidavit on 28 November 1988, and defendant did not submit his affidavit until almost one year later. We fail to see how the trial judge's impartiality could reasonably be questioned in the second hearing when he had already ordered defendant to pay support during the first hearing.

The fact that Judge Leonard heard evidence on the support issue on 22 September 1989 in defendant's absence is also not adequate grounds to require findings of fact on the issue of recusal. "A trial judge should recuse himself or refer the recusal motion to another judge if there is 'sufficient force in the allegations contained in defendant's motion to proceed to find facts.' " *Kaufman v. Kaufman*, 97 N.C. App. 227, 234, 388 S.E.2d 207, 211 (1990) (quoting *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976)). The record reflects that both plaintiff and defendant had notice of this hearing and both were prepared to attend. Defendant did not attend due to Hurricane Hugo, but was not able to notify Judge Leonard of this fact until 26 September 1989. As soon as Judge Leonard learned of defendant's excusable absence, he set aside the proceedings of that hearing. Defendant's claim that he was prejudiced by this hearing because he did not get to cross-examine plaintiff's testimony nor present his testimony is without merit. Both parties had a full and fair opportunity to present evidence and cross-examine proffered testimony during the October 1989 hearing.

Next, defendant argues that Judge Leonard should have recused himself on the ground that he had shared office space with plaintiff's counsel when Judge Leonard was in private practice. At first glance, this argument poses a closer question than defendant's other recusal arguments. We do not believe, however, when all the circumstances are considered, that defendant was prejudiced by Judge Leonard's refusal to recuse himself on this ground. *See Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 300 S.E.2d 230 (1983), *modified on other grounds*, 309 N.C. 695, 309 S.E.2d 193 (1983).

During the custody hearing, plaintiff's lead counsel was an attorney from Georgia who obtained permission to represent plaintiff in the modification of custody proceeding. Mr. Lebowski's affidavit for attorney's fees states that he represented plaintiff in this capacity until 26 August 1988. At that point, Judge Leonard had already determined that custody should be awarded to plaintiff, and that the child was in need of support. Defendant's testimony during the hearing of October 1989 also acknowledged that the child was in need of support. Therefore, the primary issue before Judge Leonard by the time Mr. Kirkman became plaintiff's lead counsel was the amount of support to be provided. Based on all the circumstances, we do not agree that a reasoning person would question Judge Leonard's impartiality. This assignment of error is overruled.

II

[2] Defendant by his second assignment of error alleges that there were insufficient findings of fact to support the court's award of retroactive child support.

A party requesting retroactive child support can seek an order for reimbursement of the nonsupporting parent's share of reasonably necessary expenditures made in the past for support of the child. *See Buff v. Carter*, 76 N.C. App. 145, 331 S.E.2d 705 (1985); *Warner v. Latimer*, 68 N.C. App. 170, 314 S.E.2d 789 (1984). A trial court must make specific factual findings to support an award of reimbursement for past support. *Sloan v. Sloan*, 87 N.C. App. 392, 360 S.E.2d 816 (1987). The party seeking retroactive child support must present sufficient evidence of the expenditures made in the past on behalf of the child, and that these expenditures were reasonably necessary. *See, generally, Buff* at 146, 331 S.E.2d at 706; *See also Rawls v. Rawls*, 94 N.C. App. 670, 675, 381 S.E.2d 179, 182 (1989) (stating that "retroactive child support payments

are recoverable for amounts actually expended on the child's behalf . . . ."). An award of retroactive child support must also take into account the defendant's ability to pay during the period in the past for which reimbursement is sought. *Buff, supra*, at 146, 331 S.E.2d at 706 (citations omitted).

Here, the plaintiff presented an affidavit of the expenses she incurred following the child's placement in her custody. Contrary to defendant's assertion that plaintiff's affidavit did not constitute evidence of actual expenditures, an affidavit is recognized by this court as a basis of evidence for obtaining support. *See Kaufman v. Kaufman*, 97 N.C. App. 227, 388 S.E.2d 207 (1990). Here, plaintiff enumerated expenses for the child in the amount of $681.00 per month as of 28 November 1988. She then testified that her monthly expenses for the child as of 24 October 1989 were $770.00 per month, and that this was an increase of $89.00 from her November 1988 affidavit due to early school care of $15.00 per month and $75.00 per month for additional child care. Based on this evidence, the trial court found that the plaintiff had expenses for the child of at least $7,627.20 for the period 19 November 1988 through 24 October 1989. The Court found this amount to be reasonable under the circumstances taking into account plaintiff's income, the needs of the child, the income of the defendant and the accustomed standard of living of the child with defendant. Since there is evidence in the record to support the trial judge's findings of fact and subsequent conclusions of law, this assignment of error is overruled.

III

[3] Defendant's next two assignments of error address the sufficiency of the evidence to support the trial court's award of prospective child support. For the reasons which follow we find no error.

> Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual findings specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents.

Newman v. Newman, 64 N.C. App. 125, 127-28, 306 S.E.2d 540, 542, *disc. review denied*, 309 N.C. 822, 310 S.E.2d 351 (1983) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). "Evidence of actual past expenditures is essential in determining [a child's] present reasonable needs." *Kaufman, supra*, at 232, 388 S.E.2d at 209 (1990) (citing *Norton v. Norton*, 76 N.C. App. 213, 332 S.E.2d 724 (1985)). The general rule is that the ability of a party to pay child support is determined by that person's income at the time the award is made.

In the instant case, the trial judge, after hearing testimony from both plaintiff and defendant found that the reasonable needs of the child for health, education and maintenance was $770.00 per month. Of this amount, defendant was ordered to pay $700.00 per month. In reaching this conclusion, the trial judge considered evidence and made findings of plaintiff's and defendant's disposable income in order to determine the appropriate amount of child support each could afford to contribute to meet the reasonable needs of the child. Our Supreme Court has stated that using the disposable income (net income after expenses) is a way to fairly reflect the parties' relative ability to contribute proportionately to support of the child. *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985).

At the time of the hearing, defendant had a gross income of $5,250.00 per month. The plaintiff presented evidence showing a gross income of $1,189.00 per month. Both parties presented detailed evidence regarding their living expenses, estates and debts. From this evidence, the trial court determined that plaintiff's reasonable expenses exceeded her income, but that she had reduced her expenditures so that she would have enough funds to pay for the expenses of the child. The trial court determines the credibility of the evidence and what it establishes. Once the trial court has made such findings, on appeal they are conclusive, if supported by any evidence, even if there is also evidence to the contrary. *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984). Since there is evidence to support the trial court's findings, defendant's third and fourth assignments of error are overruled.

IV

[4] Defendant's fifth assignment of error questions the sufficiency of the evidence to support the trial judge's award of attorney's fees to plaintiff in the amount of $5,800.00. An award of attorney's

fees is permissible in a child support action pursuant to N.C. Gen. Stat. § 50-13.6 (1987), which provides in pertinent part as follows:

> [T]he Court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the Court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . .

Here, the trial judge found that the plaintiff was an interested party acting in good faith, and the defendant does not challenge these findings. Defendant does, however, advance three arguments in support of his contention that the award of attorney's fees to plaintiff was improper. First, defendant alleges that the evidence failed to show that the plaintiff had insufficient means to defray the expense of the action. We have already detailed the trial judge's findings regarding plaintiff's and defendant's financial status in assignments of error three and four above. After hearing the testimony on plaintiff's financial condition, the trial court found that plaintiff had insufficient means to defray the expense of the action. This finding is supported by sufficient evidence. *See Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

In his second argument, defendant alleges that the evidence was insufficient to find that he refused to provide adequate support "under the circumstances" existing at the time of the institution of this proceeding. Defendant's statement of the law is correct, because without a finding that a party refused to provide adequate support under the circumstances existing at the time of the action, an award of attorney's fees is improper. *See Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985). However, in the instant case the trial judge found the necessary facts to support an award of attorney's fees to plaintiff. These facts show that from the time that plaintiff received custody of Junaid in November 1988, defendant was ordered by the court to pay child support. The amount of support was to be determined once the parties submitted their affidavits of financial status to the court. The trial judge set 25 November 1988 as the time to submit these affidavits to the Court. Defendant did not submit an affidavit of financial status until almost one year later, after the plaintiff had requested child support. Dur-

ing this time period, defendant did not pay any money for the support of the child until June 1989. Therefore, the trial judge's finding that defendant refused to provide adequate support for the child under the circumstances is well supported by the evidence.

Third, defendant argues that the amount of attorney's fees is not supported by the evidence. We disagree. Both of plaintiff's attorneys who represented her in the custody and support hearings, submitted detailed affidavits of their experience, time, and preparation of the case. Based on this evidence, the trial judge found that an attorney's fee of $80.00 per hour for 75 and 10 hours of time respectively was a reasonable amount to award for time spent on the issue of support only. In a custody and support action, once the statutory requirements of Section 50-13.6 have been met, whether to award attorney's fees and in what amounts is within the sound discretion of the trial judge and is only reviewable based on an abuse of discretion. *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985). We do not find an abuse of discretion in the instant case.

V

[5] In his sixth assignment of error, defendant argues that there was insufficient evidence to support the trial judge's modification of the existing visitation schedule. Under N.C. Gen. Stat. § 50-13.7 (1987), a party is required to demonstrate substantially changed circumstances affecting the welfare of the child in order to be granted a modification of an existing custody order. *Kelly v. Kelly*, 77 N.C. App. 632, 335 S.E.2d 780 (1985). The word custody under the statute also includes visitation. *See Clark v. Clark*, 294 N.C. 554, 243 S.E.2d 129 (1978).

In this case, the plaintiff presented sufficient evidence from which the trial judge could find that the visitation schedule needed to be modified. During the initial custody hearing of November 1988, the trial judge set out a detailed visitation schedule. By the time of the support hearing, evidence was presented to show that defendant had missed approximately one-half of his scheduled visits and had failed to notify plaintiff that he would be unable to come. Plaintiff testified, and the trial judge found, that these missed visits had caused plaintiff additional expenses and inconvenience because it was necessary to arrange last minute day care on those weekends that she was scheduled to work. Defendant and plaintiff were also having difficulties agreeing as to which

five-week period during the summer that the defendant was to have the child. This was ample evidence to support the trial judge's modification of the visitation schedule. Defendant's sixth assignment of error is overruled.

VI

[6] In his seventh assignment of error, defendant alleges that the trial judge should not have ordered him to provide plaintiff with information on medical insurance that he was required to maintain for the child. In the original custody order, the trial judge ordered that defendant maintain accident and health insurance on the child through defendant's employer. At the hearing of 24 October 1989, plaintiff testified that defendant had not provided her with any of the necessary insurance information. Consequently, the trial judge ordered defendant to provide this information to the plaintiff. It was within the trial judge's discretion to place this requirement in his order, and we find no abuse of that discretion.

VII

[7] Finally, defendant assigns error because the trial court entered its final order without allowing defendant's attorney an opportunity to review the draft or final order prior to execution. Defendant submitted proposed findings of fact, conclusions of law, and a memorandum of law on the support issue to the trial judge for his consideration. Apparently, the trial judge considered the defendant's proposals in the making of his order. However, once the trial judge found the facts and entered his order, it was not incumbent upon him to submit his order to defendant prior to its execution. We find no merit in defendant's final assignment of error.

For the foregoing reasons, the decision of the trial court is,

Affirmed.

Judge WELLS concurs.

Judge GREENE concurs in a separate opinion.

Judge GREENE concurring.

The trial court in its order noted in its findings of fact that the prospective child support was to be determined in accordance with the *advisory* child support guidelines. In fact, the guidelines

in effect at the time of the entry of the trial court's order were the *presumptive* child support guidelines which in this case required a child support payment of $892.00 each month unless the trial court deviated from that amount on the basis of one of eight statutory criteria. *See Greer v. Greer*, 101 N.C. App. 351, 353-54, 399 S.E.2d 399, 401 (1991) (setting out eight statutory criteria); *see also Browne v. Browne*, 101 N.C. App. 617, 622-23, 400 S.E.2d 736, 739-40 (1991) (first set of presumptive guidelines in effect from 1 October 1989 through 30 September 1990). In applying the advisory rather than the presumptive guidelines, the trial court erred. However, since the plaintiff does not raise this issue on appeal, I join with the majority in affirming the order of the trial court.

IN THE MATTER OF: THE APPEAL OF THE CHURCH OF THE CREATOR FROM THE DENIAL OF ITS CLAIM FOR EXEMPTION BY THE MACON COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1989

No. 9010PTC858

(Filed 16 April 1991)

Taxation § 22 (NCI3d)— tax exempt status revoked—insufficient notice given taxpayer—improper procedure by tax assessor's office

The procedures used by respondent county tax office in revoking petitioner's tax exempt status violated the North Carolina Machinery Act, N.C.G.S. § 105-271 *et seq.*, where respondent inspected petitioner's property, determined that it was no longer entitled to an exemption as property used for religious purposes, informed petitioner that it was removed from tax exempt status on 14 February 1989, and gave petitioner 30 days to correct its alleged deficiencies or appeal; however, pursuant to the Act, a county assessor has the power to challenge an exemption once granted by requiring the taxpayer to file a new application if the assessor perceives that one of the changes in the property listed in the statute has occurred, but the application for exemption must be made during the listing period, and the county therefore is required to notify the taxpayer before the listing period that such an application will be required for the coming tax year.

Am Jur 2d, State and Local Taxation §§ 316, 381.

Judge WYNN dissenting.

APPEAL by respondent Macon County from the final decision of the Property Tax Commission entered 22 December 1989. Heard in the Court of Appeals 12 March 1991.

Petitioner Church of the Creator owns a building and certain property in Macon County. In 1984, the Macon County Tax Office granted a property tax exemption for the church building and land pursuant to N.C. Gen. Stat. § 105-278.3 (real and personal property used for religious purposes).

During the summer of 1988, Macon County's Tax Assessor went on inspection visits of additions to the residence of the church's "pontifex maximus," which adjoins the exempted property. He saw what appeared to him to be indications of lack of use of the church building and lack of maintenance on the land. By letter dated 14 February 1989, the assessor informed petitioner:

> It appears that your property does not meet the requirements any longer. After visiting your place several times doing [sic] this past year, it seems that the place is not being used for any type of activity. Also, your organization has never completed an application for tax exemption. You have also failed to submit a copy of your incorporation papers, by-laws, and charter.
>
> Our office has no choice but to take you out of tax exempt status. You have thirty days from the date of this letter to comply with the requirements or to appeal, or this notice is final.

The petitioner did not respond as requested, but did challenge the authority of the assessor to do what he had done, and pointed out that it had properly applied for and been granted an exemption. The revocation of exempt status was then finalized, and petitioner appealed to the Macon County Board of Equalization and Review, which affirmed this decision.

Petitioner then appealed to the North Carolina Property Tax Commission. The Commission concluded that the assessor had exceeded his authority and failed to employ a lawful procedure in revoking petitioner's tax exempt status. It further concluded that since the action was before the Macon County Board of Equalization

and Review solely as an appeal from this improper procedure, the Board lacked the authority to remove the previously granted exemption. Respondent appeals.

William D. Harazin for petitioner-appellee.

McMurray, McMurray & Alexander, by John W. Alexander, for respondent-appellant.

WELLS, Judge.

Our review is governed by N.C. Gen. Stat. § 105-345.2, which states that a final decision of the Property Tax Commission may be reversed or modified if appellant's substantial rights have been prejudiced because the Commission's findings, conclusions, inferences, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

We have reviewed the record and respondent's assignments of error and view the dispositive question presented by this appeal to be whether the Commission correctly held that the procedures used by respondent in revoking petitioner's tax exempt status violated the North Carolina Machinery Act (N.C. Gen. Stat. § 105-271 *et seq.*). We affirm.

Every owner of property seeking exemption from property taxes under provisions of the Act has the burden of establishing entitlement to such an exemption. N.C. Gen. Stat. § 105-282.1. The owner must file an application for exemption each year during the listing period. *Id.* This period begins on the first business day in January and extends through the end of the month, unless extended by the Board of County Commissioners. N.C. Gen. Stat. § 105-307. The Act excuses certain classes of taxpayers from this

annual filing requirement, creating, in effect, a continuing exemption. The provision relevant here is N.C. Gen. Stat. § 105-282.1(a)(3):

> After an owner of property entitled to exemption under . . . 105-278.3 . . . has applied for exemption and the exemption has been approved, such owner shall not be required to file applications in subsequent years except in the following circumstances:
>
> a. New or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or
>
> b. There is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the exemption.

Respondent's assessor purported to remove petitioner from tax exempt status on 14 February 1989, and gave it 30 days to correct its alleged deficiencies or appeal. The Commission held that there is no authority in the Act for such an action. We agree. A county assessor has the power to challenge an exemption once granted by requiring the taxpayer to file a new application if he or she perceives that one of the changes in the property listed in the statute has occurred. Under the plain language of the statute, the application for exemption must be made during the listing period. The Commission reasoned that the county therefore is required to notify the taxpayer before the listing period that such an application will be required for the coming tax year. This did not take place in this case.

While the interpretation given a statute by the agency charged with its administration is not controlling, it is entitled to great consideration. *State Utilities Commission v. The Public Staff-North Carolina Utilities Commission*, 309 N.C. 195, 306 S.E.2d 435 (1984). In this case, the Commission has interpreted the statute in a reasonable way so as to protect the rights of counties to challenge continuing exemptions without doing damage to any of the Act's provisions. Respondent has failed to show that its substantial rights have been prejudiced in any of the ways set out in N.C. Gen. Stat. § 105-345.2. The decision of the Commission is therefore

Affirmed.

Judge GREENE concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

The underlying concern raised by the case before us today is what constitutes a religion for purposes of tax-exempt status. While it is not the focal issue of the case, it compels my discussion. The record reveals that the Church of the Creator was granted corporate status in North Carolina upon submission of the following statement of purpose to the Secretary of State:

> A. The general purpose for which the corporation is organized is for the dissemination, teaching, and promotion of the religious beliefs of the incorporators and the members of the corporation. These beliefs are based on our observation of the Eternal Laws of Nature, on our conclusions drawn from the Lessons of History, and, are based on what we consider plain logic and common sense. It is our objective to bring benefits of our religious techings [sic] and beliefs to all the areas of the world, to establish our new religious creed in all perpetuity; to improve the quality of civilization and the betterment of mankind; to teach same to our individual members and to the community at large; to assist in charitable work of any nature deemed beneficial and to the best interest of our Church and to society as a whole, and to raise funds for carrying same into effect in any manner allowed by the constitution, by by laws of the Church and permitted under the laws of the State of North Carolina and the Constitution of the United States of America.

Carefully couched in this language is the hideous truth revealed by appellant that this "church" exists for the purpose of promoting the idea of "racial supremacy of the white race." This assertion was uncontested by the appellee. Further, this assertion is corroborated by a letter to the North Carolina Property Tax Division from the "church's" leader (the "Pontifex Maximus"), Ben Klassen, the closing of which states: "For a Whiter and Brighter World." Also, printed boldly at the bottom of the "church's" let-

terhead is the slogan: "Racial Loyalty—Racial Expansion—Racial Advancement."

Although it plainly should be a matter of concern as to how this organization achieved tax-exempt status in the first instance, we are not faced with that issue today. Rather, the issue with which we are concerned involves an interpretation of the Machinery Act. Because I believe the Property Tax Commission made an error of law in its interpretation of the Machinery Act, I must respectfully dissent.

The majority correctly states that the interpretation given a statute by the agency charged with its administration, while not controlling, is entitled to great consideration. Nonetheless, our Supreme Court has stated that

> it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes. While the interpretation of the agency responsible for the administration may be helpful and entitled to great consideration when the Court is called upon to construe the statutes, that interpretation is not controlling. (citation omitted). *It is the Court and not the agency that is the final interpreter of legislation.* (citations omitted).

State ex rel. Utilities Comm'n v. Public Staff, 309 N.C. 195, 211-12, 306 S.E.2d 435, 444-45 (1983) (emphasis added).

The cardinal principle of statutory construction is that the intent of the legislature must control. *Id.* at 210, 306 S.E.2d at 443. In effect, the majority's decision allows a taxpayer which has been granted a "continuing" exemption to escape tax liability for any year in which the taxpayer, because of a change in the use or value of its property, has failed to reapply for exempt status during the listing period. I do not agree with the majority that N.C. Gen. Stat. § 105-282.1 plainly requires this result, nor do I believe that the legislature intended it.

North Carolina General Statutes section 105-282.1(a) (1989) provides that "an owner claiming exemption or exclusion [from property taxation] shall annually file an application for [the] exemption or exclusion during the listing period." A "qualified" exception to this annual filing requirement is contained in subsection (a)(3), which provides that,

> After an owner of property entitled to exemption under . . . G.S. 105-278.3 [religious exemption] . . . has applied for such exemption and the exemption has been approved, such owner shall not be required to file applications in subsequent years *except* in the following circumstances:
>
> a. New or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or
>
> b. There is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the exemption.

N.C. Gen. Stat. § 105-282.1(a)(3) (1989) (emphasis added).

By its terms, the above-quoted statute requires even "continuously" exempt taxpayers to file another application for exemption whenever one of the designated changes has occurred. This requirement, however, should not be read to suggest that a county's failure to require the taxpayer to file a new application *prior* to the listing period excuses the taxpayer from tax liability.

First, while the majority implies that it is the county assessor's responsibility "to require" the continuously exempt taxpayer to reapply for exemption, it should be noted that it is the *taxpayer's* responsibility to see that property is and remains properly listed. *See* N.C. Gen. Stat. § 105-308 (1989). If the taxpayer breaches this responsibility, the assessor then has a duty, as discussed below, "to discover" the property.

Second, N.C. Gen. Stat. § 105-282.1(a)(3) must not be read out of context. Individual portions of a statute must be interpreted in the context of the entire statutory scheme and accorded only that meaning which other modifying provisions and the clear intent and purpose of the Act will permit. *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 24, 348 S.E.2d 524, 526 (1986). In the instant case, N.C. Gen. Stat. § 105-282.1(c) goes on to state that "[w]hen an owner of property that may be eligible for exemption . . . neither lists the property nor files an application for exemption . . . , the assessor . . . *shall* proceed to discover the property." In the case of continuously exempt taxpayers, I would interpret this provision as applying to both original and subsequent applications for exemption. Since logically it cannot be determined that a taxpayer has failed to list or seek the exemption of its

property until the listing period has expired, it seems clear that the assessor's duty "to discover" under subsection (c) can arise only *after* the listing period has expired. *See also* N.C. Gen. Stat. § 105-312(b) (1989) (making it the duty of the assessor to see that all property not properly listed *during the regular listing period* be listed, assessed and taxed).

Under N.C. Gen. Stat. § 105-312, "discovering property" is defined as the process by which an assessor lists and appraises property which has not been listed by the taxpayer *during* the regular listing period. *See* N.C. Gen. Stat. § 105-312(a)(3). Once an assessor has listed and appraised "discovered" property, he must notify the taxpayer that the listing and appraisal will become final unless the taxpayer files an exception thereto within 30 days.

In the instant case, the respondent's assessor notified the petitioner that its property did not appear to meet the requirements for exemption any longer and that the county intended to "take the petitioner out of exempt status." The assessor also notified the petitioner that the petitioner had 30 days within which to either supply certain requested information or to appeal. The petitioner responded by letter within the 30 days but did not supply the requested information. Instead, the petitioner responded defiantly, stating that "it was none of [respondent's] damn business . . . ."

Since the respondent's assessor followed the procedures outlined in N.C. Gen. Stat. § 105-282.1(c) and 312, I would reverse the Property Tax Commission's decision as being an error of law, to wit: an erroneous interpretation of the Machinery Act.

DWAYNE LEE MORRISON v. CAROLE DILLARD MORRISON

No. 9023DC1051

(Filed 16 April 1991)

1. Divorce and Separation § 35 (NCI4th)— resumption of marital relations after separation agreement—when executory provisions are terminated

The resumption of marital relations after the execution of a marital agreement terminates the executory provisions of a separation agreement; however, the resumption of marital

relations after the execution of a marital agreement does not necessarily, though it may, rescind the executory provisions of a property settlement agreement, depending upon whether the property settlement is negotiated in "reciprocal consideration" for the separation agreement, and this is true whether the property settlement and the separation agreement are contained in a single document or separate documents.

Am Jur 2d, Divorce and Separation §§ 852-855.

2. **Divorce and Separation § 35 (NCI4th)— separation agreement—property settlement and agreement to live separate and apart integrated—resumption of marital relationship—subsequent separation—wife entitled to equitable distribution**

Defendant wife met her burden of showing that provisions in the parties' separation agreement relating to property settlement and to the parties' agreement to live separate and apart were integrated so that, when the parties resumed the marital relationship, the spousal property rights provision was rescinded to the extent that it remained executory; therefore, defendant wife was entitled to equitable distribution of any marital property acquired subsequent to the resumption of the marital relationship, any property owned by the parties at the time of their separation agreement and not distributed by the agreement, and any active increases in the value of the parties' separate property, which included any executed transfers made pursuant to the separation agreement.

Am Jur 2d, Divorce and Separation §§ 852-855.

APPEAL by plaintiff from judgment entered 28 August 1990 in WILKES County District Court by *Judge Samuel L. Osborne.* Heard in the Court of Appeals 9 April 1991.

Ferree, Cunningham & Gray, P.A., by George G. Cunningham, for plaintiff-appellant.

Hall and Brooks, by John E. Hall, for defendant-appellee.

GREENE, Judge.

The plaintiff (Husband) appeals from the entry of summary judgment for the defendant (Wife).

On 27 June 1988, the Husband filed an action for absolute divorce. On 26 August 1988, the Wife filed a counterclaim requesting equitable distribution. On 7 September 1988, the Husband filed a reply and alleged that the parties had on 16 September 1976 entered into a Deed of Separation (Agreement) and that such Agreement was a bar to the Wife's equitable distribution claim. The Husband then requested that the Wife's counterclaim be dismissed.

On 14 March 1989, the trial court entered a divorce judgment and further ordered:

> 2. That the matters involving the claim for equitable distribution . . . will be heard at a later time and this divorce judgment does not prejudice the rights of either party in regard to equitable distribution.

On 28 March 1990, the Husband moved for summary judgment requesting the court to dismiss the Wife's counterclaim for equitable distribution. On 28 August 1990, the trial court entered the following order:

> 1. That summary judgment is granted in favor of the . . . [Husband] against the . . . [Wife] as to any property that was allocated to either party in the . . . [Agreement] itself and which property was vested at the time of the execution of said . . . [Agreement]. Any increase in value of the property specifically mentioned in the . . . [Agreement] after the parties resumed their marriage would be subject to equitable distribution.
>
> 2. That summary judgment is granted in favor of the . . . [Wife] as to her claim for equitable distribution regarding any property acquired subsequent to the execution of the parties' . . . [Agreement] . . . and in addition thereto any increases in the value of the parties' other property prior to the execution of said agreement; equitable distribution of this property is appropriate.
>
> . . . .

The evidence before the trial court at the summary judgment hearing consisted of the Agreement dated 16 September 1976 and affidavits of the Husband, the Wife, an accountant, and an attorney. The Agreement provided for the division of certain real and per-

sonal properties and required the Husband pay to the Wife the sum of $18,100. The Agreement further provided:

I

IT SHALL BE LAWFUL FOR and it is the understanding, agreement, and covenant on the part of each of the parties hereto, at all times hereafter to live separate and apart, free from all marital control and authority of each other as if he and she were sole and unmarried, each from the other as fully and completely and in the same manner and to the same extent as though they had never been married.

. . . .

IX

AND FOR THE CONSIDERATION AFORESAID, the . . . [Husband] conveys, relinquishes, and quitclaims unto the . . . [Wife] all his rights, interest, and control in and over the person and property of his said wife, and all and every right and claim of whatever kind and nature that he may have acquired by reason of the said marriage in any property that the . . . [wife] now has or may hereafter acquire. . . .

X

AND FOR THE CONSIDERATION AFORESAID, the . . . [Wife] hereby relinquishes, conveys, and quitclaims unto the . . . [Husband] all her rights, title and interest in and to the property of the . . . [Husband], and all and every right to support and maintenance, and all other personal or property rights of whatever kind and nature which she acquired by reason of the said marriage in any property that the . . . [Husband] may now own or may hereafter acquire . . . .

The evidence in the affidavits reveal: That at the time of the Agreement, the parties executed the documents necessary to effectuate the transfer of the real and personal properties; that the Husband paid the $18,100 to the Wife; that the parties "resumed their marriage within less than a year from the date of the separation and lived together for approximately nine or ten years thereafter before separating the second time and a divorce decree being finally entered."

The issue is whether the settlement of spousal property rights in the 16 September 1976 Agreement was nullified when the parties resumed marital relations.

The Wife first argues that since the Agreement was executed on 16 September 1976, prior to the enactment of the equitable distribution statute, the Agreement is ineffective to bar her claim for equitable distribution. We disagree. Valid "marital agreements releasing all spousal property rights will bar claims for equitable distribution—even if those settlements were executed prior to the adoption of equitable distribution under" N.C.G.S. § 50-20 (1987). *Small v. Small*, 93 N.C. App. 614, 623, 379 S.E.2d 273, 278, *disc. rev. denied*, 325 N.C. 273, 384 S.E.2d 519 (1989).

The Husband argues, citing *Small* and *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), that property settlement provisions of a marital agreement are not affected by the reconciliation of the parties and therefore the Wife's waiver of her spousal property rights bars her claim for equitable distribution. The Wife argues, citing *Stegall v. Stegall*, 100 N.C. App. 398, 406, 397 S.E.2d 306, 310 (1990), *disc. rev. denied*, 328 N.C. 274, 400 S.E.2d 461 (1991), that property settlement provisions of a marital agreement are always, except to the extent they are executed, rescinded upon reconciliation of the parties and therefore when the parties reconciled, the spousal property right agreement was nullified. Both parties misread *Small*, *Tucci*, and *Stegall*.

[1] The resumption of marital relations after the execution of a marital agreement terminates the executory provisions of a separation agreement. *In re Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976). However, the resumption of marital relations after the execution of a marital agreement does not necessarily, though it may, rescind the executory provisions of a property settlement agreement. A separation agreement is defined as " 'a contract between spouses providing for marital support rights and is executed while the parties are separated or are planning to separate immediately.' " *Small*, 93 N.C. App. at 620, 379 S.E.2d at 277 (citation omitted). "[T]he heart of a separation agreement is the parties' intention and agreement to live separate and apart forever . . . ." *Adamee*, 291 N.C. at 391, 230 S.E.2d at 545. A property settlement agreement " 'provides for a division of real and personal property held by the spouses. The parties may enter a property

settlement at any time, regardless of whether they contemplate separation or divorce . . . .' " *Small*, 93 N.C. App. at 620, 379 S.E.2d at 277 (citation omitted). A property settlement " 'contains provisions . . . which might with equal propriety have been made had no separation been contemplated . . . .' " *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955) (citation omitted); *see* 1 Family Law and Practice § 9.12[2], at 9-51 (A. Rutkin rel. 1987) (reconciliation does not affect terms of pure property settlement). "It is true that contract provisions covering both support duties and property rights are usually included in a single document which the parties [often] refer to as a 'separation agreement.' . . . However, noting the label attached to a provision of a marital agreement is no substitute for analyzing the provision's intended effect in light of the agreement's express language and purposes." *Small*, 93 N.C. App. at 621, 379 S.E.2d at 277 (citation omitted).

Whether the executory provisions of a property settlement agreement are rescinded upon resumption of marital relations depends on whether the property settlement is negotiated in "reciprocal consideration" for the separation agreement. This is so whether the property settlement and the separation agreement are contained in a single document or separate documents. If the property settlement is negotiated as "reciprocal consideration" for the separation agreement, the agreements are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. If not in reciprocal consideration, the provisions of the property settlement are deemed separate and the resumption of marital relations will not affect either the executed or executory provisions of the property settlement agreement. *Stegall*, 100 N.C. App. at 406, 397 S.E.2d at 310 ("provisions of a separation agreement labeled support *may* . . . constitute reciprocal consideration for property provisions in the same agreement") (emphasis added); *Tucci*, 94 N.C. App. at 437, 380 S.E.2d at 787 (discussing *Small*); *Small*, 93 N.C. App. at 626, 379 S.E.2d at 280 ("where a provision of a marital contract *is* necessarily founded on the parties' agreement to live separate and apart, the parties' resumption of the marital relationship does rescind the provision insofar as the provision is executory . . .").

We therefore reject the suggestion that all agreements, whether in one document or two, relating to support and property rights are reciprocal as a matter of law. *White v. Bowers*, 101 N.C. App.

646, 651-52, 400 S.E.2d 760, 763 (1991) (rejecting "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"). To so hold would prohibit the parties from entering into contracts which do not violate law or public policy. *Fulcher v. Nelson*, 273 N.C. 221, 223, 159 S.E.2d 519, 521 (1968); *see also* 1 A. Lindey & L. Parley, Lindey on Separation Agreements and Antenuptial Contracts Form 9.03, at 9-2 (rel. 1990) (suggesting language that could be placed in contract to the effect that reconciliation would not affect terms of property settlement agreement); J. Oldham, Divorce, Separation and the Distribution of Property § 4.06, at 4-33 (1990) (reconciliation contracts have been accepted). Because contracts providing that a reconciliation will not affect the terms of a property settlement are not contrary to law or public policy, adopting the rule that all agreements relating to support and property rights are reciprocal as a matter of law would impermissibly interfere with the parties' freedom of contract rights. *Fulcher*, 273 N.C. at 223, 159 S.E.2d at 521. On the other hand, contracts which provide that reconciliation will not affect the terms of a separation agreement violate the policy behind separation agreements and are therefore void. *See Adamee*, 291 N.C. at 391, 230 S.E.2d at 545.

Whether the property settlement agreement was negotiated as reciprocal consideration for the separation agreement "requires a determination of the intent of the parties regarding integration or non-integration of" its provisions. *Hayes v. Hayes*, 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990). There exists a presumption that the provisions of a marital agreement are separable and the burden of proof is on the party claiming that the agreement is integrated. *Id.* "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." *Id.* "However, where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs." *Id.; see Tucci*, 94 N.C. App. at 437, 380 S.E.2d at 787 (agreement clearly stated that "the parties' continued separation was *not* a condition to the property settlement provisions of the Agreement," and therefore the resumption of the parties' marital relationship did not rescind the release of a party's right to dissent); *Small*, 93 N.C. App. at 626-27, 379

S.E.2d at 280-81 (where defendant offered no proof that the parties' continued separation was consideration for the settlement of all property rights, the resumption of the parties' marital relationship did not rescind the release of the right to equitable distribution); *see also Stegall*, 100 N.C. App. at 411, 397 S.E.2d at 313 (property settlement provisions given in consideration for an agreement that the parties continue to live separate and apart required termination of executory provisions of property settlement agreement upon resumption of marital relationship).

[2] Here, the Wife has met her burden of showing that the provision relating to property settlement and the agreement to remain separate and apart were integrated. While the Agreement did not contain any specific unequivocal integration or non-integration clause, the Agreement does contain unequivocal integration *language*. The provision in the Agreement relating to the release of spousal property rights includes specific language: AND FOR THE CONSIDERATION AFORESAID. Because the provision in the Agreement that the parties live separate and apart preceded the provisions in the Agreement relating to spousal property rights, the waiver of the parties' spousal property rights was necessarily given in consideration of the parties living separate and apart. *Cf. Rudisill v. Rudisill*, 102 N.C. App. 280, 284, 401 S.E.2d 818, 821-22 (1991) (property settlement given "as a further consideration" for settlement agreement was not "inseparable consideration"). Accordingly, when the parties resumed marital relationships, the spousal property rights provision was rescinded to the extent it remained executory. Therefore, the Wife is entitled to equitable distribution of any marital property acquired subsequent to the resumption of the marital relationship and of any property owned by the parties at the time of the Agreement and not distributed by the Agreement. The Wife is also entitled to equitable distribution of any active increases in the value of the parties' separate property, which separate property includes any executed transfers made pursuant to the Agreement. *Lawing v. Lawing*, 81 N.C. App. 159, 174, 344 S.E.2d 100, 111 (1986). To the extent that the trial court's order of summary judgment for the Wife on her claim for equitable distribution conflicts with this opinion, it is vacated and remanded.

Affirmed in part, vacated in part, and remanded.

Judges PARKER and COZORT concur.

BESSIE C. LOCUS v. FAYETTEVILLE STATE UNIVERSITY; DR. ROBERT LEMONS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS HEAD, DIVISION OF GENERAL STUDIES; MR. JAMES SCURRY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF CAREER PLANNING AND PLACEMENT; DR. CHARLES A. LYONS, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF FAYETTEVILLE STATE UNIVERSITY; VALERIA FLEMING, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS PROVOST AND VICE-CHANCELLOR FOR ACADEMIC AFFAIRS; MATTHEW JARMOND, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF PERSONNEL; ROBERT JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE COORDINATOR OF THE TITLE III PROGRAM; DR. JAMES E. CARSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS VICE CHANCELLOR FOR INSTITUTIONAL DEVELOPMENT; HAROLD L. NIXON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS VICE CHANCELLOR OF STUDENT DEVELOPMENT; AND WILLIAM CLEMENT, INDIVIDUALLY

No. 9012SC381

(Filed 16 April 1991)

1. State § 4 (NCI3d)— action against university and officials— sovereign immunity— dismissal for lack of personal jurisdiction

A dismissal under N.C.G.S. § 1A-1, Rule 12(b)(2) for lack of personal jurisdiction applied to Fayetteville State University and the named defendants in their official capacities under the sovereign immunity doctrine where plaintiff had resigned her position with the University and brought an action against the University and nine individual defendants, eight of whom were named individually and in their official capacities, for intentional infliction of emotional distress, civil conspiracy and constructive discharge. Although it has been recognized that whether sovereign immunity presents a question of subject matter jurisdiction or of personal jurisdiction is unsettled in North Carolina, the Court of Appeals has on at least three occasions treated sovereign immunity as presenting a question of personal jurisdiction and the treatment of the dismissal for lack of personal jurisdiction in this case is consistent with the parties' treatment of this issue in their briefs. Moreover, plaintiff concedes in her brief that the dismissal was proper as applied to the University and the named defendants in their official capacities based upon the principle of sovereign immunity.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 42 et seq.

2. Rules of Civil Procedure § 56 (NCI3d)— summary judgment— converted from 12(b)(6) motion—reasonable opportunity to oppose

The trial court erred in an action arising from plaintiff's resignation of her employment by denying her the opportunity to present materials pertinent to a motion for summary judgment under N.C.G.S. § 1A-1, Rule 56 where the trial court converted defendants' motion for dismissal under Rule 12(b)(6) to a motion for summary judgment when it considered and partially based its decision upon an affidavit and depositions submitted by defendants. The trial judge apparently excluded plaintiff's proffered depositions because plaintiff had not submitted them prior to the motions hearing as instructed. Plaintiff appeared at the motions hearing expecting to oppose a Rule 12(b)(6) motion to dismiss, not a motion for summary judgment; thus, despite the fact that the court had given instructions for the parties to submit all material they wished to be considered prior to the hearing date, it was not unreasonable for plaintiff to have submitted her depositions at the hearing because such extraneous material would have been pertinent only to a motion for summary judgment, which was not raised until the hearing was well under way. The Rules of Civil Procedure do not require one party to anticipate the making of a motion by another party.

Am Jur 2d, Summary Judgment §§ 13, 14, 17, 20, 28.

APPEAL by plaintiff from Order entered 5 December 1989 in CUMBERLAND County Superior Court by *Judge Darius B. Herring, Jr.* Heard in the Court of Appeals 3 December 1990.

James H. Locus for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Associate Attorney General Lars F. Nance, for defendant-appellee.

WYNN, Judge.

In August 1986, the plaintiff, Bessie C. Locus, resigned from her position as an Administrative Assistant in the Career Planning and Placement Office at Fayetteville State University ("the University"). Thereafter, on 2 September 1988, she commenced this action against the University and nine individual defendants, eight of whom were named both individually and in their official capacities

with the University. In her complaint, she asserted claims for intentional infliction of emotional distress, civil conspiracy and constructive discharge, all of which arose out of actions taken by the named defendants.

In essence, the plaintiff alleged that she was the victim of a "civil conspiracy" formed by the defendants and designed to force her to quit her job at the University because she had filed a claim with the Equal Employment Opportunity Commission. The defendants filed an answer to her complaint asserting various defenses, including lack of personal jurisdiction, failure to state a claim upon which relief could be granted, sovereign immunity, qualified immunity and the intra-corporate conspiracy doctrine. The defendants later filed a separate motion to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(2) and 12(b)(6), lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

A hearing on all motions was originally calendared for 6 November 1989, but was continued by the trial court until 27 November 1989 with instructions that the parties submit all material they wished the court to consider prior to the hearing. Subsequent to that instruction, the defendants submitted several depositions in support of their motions to the court. The depositions were also served on the plaintiff. The plaintiff did not make any submissions prior to the hearing.

At the hearing on the motions, the defendants requested the court to convert their 12(b)(6) motion to one for summary judgment under Rule 56 and offered the previously submitted depositions in support of that motion. Thereafter, the plaintiff sought to present the deposition testimony of several of her witnesses. However, the trial court refused to consider the plaintiff's depositions for the reason that the plaintiff had failed to timely submit the depositions prior to the motions hearing date in accordance with the trial court's earlier instructions. The trial court then reviewed the defendants' depositions and entered an order which found that the principle of sovereign immunity shielded both the University and the defendants named in their official capacities from liability and that there were no genuine issues of material fact. The order concluded by dismissing the plaintiff's complaint against all defendants. The plaintiff now appeals.

I

We must note at the outset that since there was no court reporter present to record the proceedings below, our review of this case is limited by the absence of a verbatim transcript. We must therefore rely upon the scant record and the parties' briefs for an explanation of the proceedings below. Secondly, the trial judge's written Order concluded that dismissal was warranted under Rules 12(b)(2) and 12(b)(6); however, it did not set forth which rule applied to the defendants in their official capacities and which applied to defendants in their individual capacities. Thirdly, although the Order found as fact that there were no genuine issues of material fact, it did not conclude by granting summary judgment.

[1] Notwithstanding these imprecisions, we have concluded that the 12(b)(2) dismissal for lack of personal jurisdiction applied to the University and the named defendants in their official capacities under the sovereign immunity doctrine. It has been recognized that whether sovereign immunity presents a question of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina. *Zimmer v. North Carolina Dept. of Transp.*, 87 N.C. App. 132, 133, 360 S.E.2d 115, 116 (1987). Nonetheless, on at least three occasions this court has treated sovereign immunity as presenting a question of personal jurisdiction. *See id.* at 134, 360 S.E.2d at 116; *Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 269 S.E.2d 217 (1980); *Sides v. Cabarrus Memorial Hosp., Inc.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *modified and aff'd*, 287 N.C. 14, 213 S.E.2d 297 (1975). Our treatment of the trial court's 12(b)(2) dismissal as applying to the University and the named defendants in their official capacities is consistent with the parties' treatment of this issue in their briefs. Moreover, the plaintiff concedes in her brief that based upon the principle of sovereign immunity, the trial court's 12(b)(2) dismissal was proper as applied to the University and the named defendants in their official capacities. We therefore need not address the propriety of that ruling.

It follows that this appeal is limited to the defendants in their individual capacities. Correspondingly, in their briefs, the parties addressed the 12(b)(6) motion, and the ruling thereon, as a motion and decision for summary judgment in favor of the named defendants in their individual capacities. We are of the opinion that the parties also correctly treated this issue and will address it accordingly.

II

[2] The plaintiff's sole assignment of error on appeal is that the trial court erred by failing to give her a reasonable opportunity to oppose the defendants' summary judgment motion with the proffered depositions. We agree.

Here, the trial court converted the defendants' 12(b)(6) motion to a motion for summary judgment when it considered and partially based its decision upon an affidavit and depositions submitted by the defendants. This conversion is quite permissible where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim. Our Supreme Court has held that such a motion shall be treated as one for summary judgment under Rule 56. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 229 (1985); *See also* N.C. R. Civ. P. 12(b). Moreover, North Carolina General Statutes section 1A-1, Rule 12(b) states, in pertinent part, that,

> If, on a [12(b)(6)] motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given *reasonable opportunity* to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (1990) (emphasis added).

It is the plaintiff's contention that even though the named defendants may be shielded from liability in their official capacities, they remain *personally* liable for any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties. The truth of this assertion cannot be denied:

> While personal liability for mere negligence turns on the question of whether the individual is a public officer or an employee, this distinction is immaterial if the individual's actions are "corrupt or malicious" or are "outside and beyond the scope of his duties." (citation omitted) Both employees and public officers are liable for damages proximately caused by such actions.

Hare v. Butler, 99 N.C. App. 693, 701, 394 S.E.2d 231, 237, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

The plaintiff further contends that the trial judge erred by denying her a "reasonable opportunity" to present materials which were pertinent to a Rule 56 motion: depositions which would have shown that there were genuine issues of material fact as to whether the defendants' actions were "corrupt, or malicious or outside and beyond the scope of their duties." We agree.

It is undisputed between the parties that the plaintiff was not given an opportunity at the hearing to oppose the defendants' motion for summary judgment with her own depositions. While there is no transcript of the motions hearing, the Order Judicially Settling the Record on Appeal indicates that the reason the plaintiff's proffered depositions were excluded from consideration was because the plaintiff had not submitted them prior to the motions hearing as instructed. As such, the trial court refused to consider the plaintiff's depositions because they were not submitted "in a reasonable, timely fashion." Under these facts, we cannot agree with the trial judge's interpretation of when a party has had a "reasonable opportunity" to present material in opposition to a Rule 12(b)(6) motion which has been converted to a Rule 56 motion for summary judgment.

As the defendants themselves correctly note, what is "reasonable" must be determined by the circumstances of a particular case. In the instant case, the plaintiff appeared at the motions hearing expecting to oppose the Rule 12(b)(6) motion to dismiss, not a motion for summary judgment. The distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a 12(b)(6) motion to dismiss, the trial court need only look to *the face of the complaint* to determine whether it reveals an insurmountable bar to plaintiff's recovery. *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E.2d 682 (1985). By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. *Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 262, 257 S.E.2d 50, 53, *disc. review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979). Summary judgment is proper only when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *Little v. National Servs. Indus., Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986). Thus, despite the fact that the court had given instructions for the parties to submit all material they

wished to be considered prior to the hearing date, it was not unreasonable for the plaintiff to have submitted her depositions at the hearing. Such extraneous material would have been pertinent only to a motion for summary judgment: a motion which was not raised until the hearing was well under way.

The defendants argue that since the plaintiff had been served with "matters outside the pleadings" well in advance of the hearing date, she should have known that the Rule 12(b)(6) motion to dismiss was going to be converted to a Rule 56 motion for summary judgment. We disagree. The Rules of Civil Procedure do not require one party to *anticipate* the making of a motion by another party. Indeed, Rule 12(b) clearly contemplates the case where a party is "surprised" by the treatment of a Rule 12(b)(6) motion as one for summary judgment; it affords such a party a reasonable opportunity to oppose the motion with her own materials made pertinent to such a motion.

The defendants also contend that *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978), mandates a result different from that which we reach. However, *Raintree* is clearly distinguishable from the case at hand in that the plaintiff there was found to have waived his objection to the 10-day notice requirement under Rule 56 by fully participating in the hearing and by not requesting an opportunity to present additional evidence. Here, the plaintiff objected to the Rule 56 hearing, sought to present additional evidence and, further, requested a continuance to obtain additional evidence.

Under the facts of this case, we conclude that the plaintiff was not given a reasonable opportunity to oppose the defendants' Rule 56 motion for summary judgment. For this reason, this case is remanded to the trial court so that the plaintiff may be given such an opportunity.

Reversed and remanded.

Chief Judge HEDRICK and Judge LEWIS concur.

DICK PARKER FORD, INC., PLAINTIFF v. MARY JANE BRADSHAW, DEFENDANT AND THIRD-PARTY PLAINTIFF v. RICHARD DOUGLAS BRADSHAW, THIRD-PARTY DEFENDANT

DICK PARKER FORD, INC., THIRD-PARTY PLAINTIFF v. PRESTON HUGH JUSTICE AND DONALD FRANKLIN LEATHERMAN, THIRD-PARTY DEFENDANTS

No. 903SC861

(Filed 16 April 1991)

Rules of Civil Procedure § 39 (NCI3d)— trial by jury—motion denied—no error

The trial court did not err by denying defendant and third-party plaintiff Mary Bradshaw's motion for a trial by jury where the demand for a jury trial was not timely under N.C.G.S. § 1A-1, Rule 38(b). Even if Bradshaw's counterclaims were compulsory, they were not filed within ten days of service of plaintiff's reply. Although Bradshaw contended that the demand was timely because it was made not later than ten days after service of the answer to plaintiff's third-party complaint, that complaint and answer addressed the issue of indemnification as between those parties. References in those pleadings seemingly directed toward the original claims were extrinsic to the subject matter of indemnification and were superfluous.

Am Jur 2d, Jury §§ 61 et seq.

APPEAL by defendant and third party plaintiff from order entered 21 May 1990 by *Judge James Llewellyn* in CARTERET County Superior Court. Heard in the Court of Appeals 12 March 1991.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by Claud R. Wheatly, Jr., and George L. Wainwright, Jr., for plaintiff-appellee Dick Parker Ford, Inc.

Beaman, Kellum, Hollows & Jones, P.A., by J. Allen Murphy, for defendant and third party plaintiff-appellant Mary Jane Bradshaw.

Hamilton, Bailey, Way & Brothers, by John E. Way, Jr., for third party defendant-appellee Richard Douglas Bradshaw.

PARKER, Judge.

The only issue presented by this appeal is whether the trial court erred in denying defendant and third party plaintiff Mary Jane Bradshaw's motion for trial by jury. For reasons which follow, we hold the trial court did not err in denying the motion.

On 4 May 1989 plaintiff Dick Parker Ford, Inc., filed a complaint against defendant Mary Jane Bradshaw alleging fraud and misrepresentation. Plaintiff's action was based on events which occurred in September 1987, when defendant Mary Jane Bradshaw purchased an automobile from plaintiff and as part of the transaction traded in two other vehicles. By pleadings filed 5 July 1989, defendant answered plaintiff's complaint and raised counterclaims based on fraud and unfair or deceptive trade practices. On 6 July 1989 plaintiff filed a reply generally denying the allegations of defendant's counterclaims. None of these initial pleadings included a demand for jury trial; no such demand was filed by either party within ten days after service of plaintiff's reply.

On 7 July 1989 pursuant to Rule 14 of the North Carolina Rules of Civil Procedure, plaintiff filed a third party complaint against two former employees, Preston Hugh Justice and Donald Franklin Leatherman, claiming indemnification against such loss as plaintiff might sustain as a result of defendant's counterclaims.

On 21 August 1989 defendant filed against Richard Douglas Bradshaw a third party complaint claiming indemnification against such loss as she might sustain as a result of plaintiff's claims against her.

On 8 September 1989 third party defendants Justice and Leatherman moved pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the action against them. The motion came on for hearing at the 6 November 1989 Civil Session of Carteret County Superior Court. By order entered 15 December 1989, the trial court denied the motion to dismiss, ordering Justice and Leatherman to answer the third party complaint against them and allowing them twenty days in which to file the responsive pleading. However, third party defendants Justice and Leatherman did not file an answer until 12 April 1990.

In the meantime, on 1 March 1990, defendant and third party plaintiff Bradshaw filed a demand pursuant to Rule 38(b) of the North Carolina Rules of Civil Procedure for a jury trial on all

triable issues. On the same day, she filed a motion for jury trial pursuant to Rule 39(b) of the North Carolina Rules of Civil Procedure. These pleadings represent the first assertion by any party of the right to trial by jury. Sometime after 20 March, defendant and third party plaintiff Bradshaw, with the consent of third party defendants Justice, Leatherman, and Bradshaw, moved to continue the action, set for trial during the 2 April 1990 session. By its order filed 21 May 1989, the trial court denied the motion for a jury trial, and defendant and third party plaintiff Bradshaw gave notice of appeal.

On appeal, defendant contends that since her demand for jury trial was timely made, the court erred and abused its discretion in denying her motion for jury trial. We disagree.

"The established policy of this State—declared in both the constitution and statutes—is that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless this right is waived." *Cutts v. Casey*, 278 N.C. 390, 421, 180 S.E.2d 297, 314 (1971). An order denying a jury trial is immediately appealable because it affects a substantial right. *In re McCarroll*, 313 N.C. 315, 316, 327 S.E.2d 880, 881 (1985). *Accord Faircloth v. Beard*, 320 N.C. 505, 507, 358 S.E.2d 512, 513 (1987). Notwithstanding the importance of the right to trial by jury, the right must be asserted:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.
>
> . . . .
>
> Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5(d) constitutes a waiver . . . of trial by jury.

N.C.G.S. § 1A-1, Rules 38(b) and (d) (1990). The effect of the enactment of the North Carolina Rules of Civil Procedure on the right to trial by jury has been explained thus

> Under prior North Carolina law, a request for jury trial was not required. G.S. 1-172 (Recompiled 1953) provided, "An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered." G.S. 1-184 (Recompiled 1953) provided that the means for waiver of jury trial were default or consent. However, Rule 38(d) of the new Rules provides that "the failure of a party to serve a demand as required by this rule . . . constitutes a waiver . . . of trial by jury."

Schoolfield v. Collins, 281 N.C. 604, 617, 189 S.E.2d 208, 216 (1972). The federal rules of civil procedure effected the same change: Under pre-rules practice, demand for jury trial in an action at law was not necessary. A jury trial could be waived, but absent express waiver, jury trial followed as a matter of course. The rules, however, adopted the opposite approach: Rule 38(d) creates a waiver unless an affirmative demand is timely made under Rule 38(b). 5 J. Moore, *Moore's Federal Practice* ¶ 38.39[1], at 38-363 (2d ed. Supp. 1991).

In *Schoolfield*, the Court considered whether the trial court erred in denying respondent's motion for a jury trial. The original petition was filed 15 October 1969 and amended 18 December 1969. Respondent's answer, filed 13 January 1970, contained no demand for a jury trial. On 18 February 1970 respondent filed a one-sentence demand for jury trial and on 13 March 1970, a motion pursuant to Rule 39(b) for jury trial. Citing Rules 38(b) and (d), the Court concluded that since the last pleading was filed 13 January 1970, ten days from that date both parties were precluded from demanding a jury trial. 281 N.C. at 618, 189 S.E.2d at 216. The Court held denial of respondent's belated demand for a jury trial was within the discretion of the trial court and no abuse of discretion or error was involved. *Id.* at 617, 189 S.E.2d at 216.

In *Arney v. Arney*, 71 N.C. App. 218, 321 S.E.2d 472 (1984), *disc. rev. denied*, 313 N.C. 173, 326 S.E.2d 31 (1985), this Court considered the meaning of the words "last pleading directed to such issue" in Rule 38(b). Plaintiff's complaint seeking an absolute divorce and custody and support of the parties' minor child was filed 2 December 1983. On 28 December 1983 defendant filed an answer and counterclaim, admitting the facts alleged as the basis for the absolute divorce and counterclaiming for custody and child support. Defendant's pleading did not contain a demand for jury trial. Plaintiff's reply was served on 6 February 1984; it added no new matter. On 9 February 1984, the day scheduled for hearing

plaintiff's action for absolute divorce, defendant filed and served a demand for jury trial on all issues. The trial court denied defendant's demand for jury trial. On appeal, the Court stated, "If the last pleading directed to the issue of absolute divorce is plaintiff's reply, then the defendant's demand for jury trial was timely made; if the last pleading so directed is defendant's answer, then it was not." *Id.* at 219, 321 S.E.2d at 473. The Court went on to conclude

> Clearly, the defendant's answer is directed to the issue of absolute divorce, admitting as it does all allegations relevant to that issue. But is the plaintiff's reply also directed to this issue, thus rendering timely defendant's demand for a jury trial? We are compelled to conclude that it was not. Defendant's answer contains a counterclaim for custody and child support. The language in the section of that pleading denominated "counterclaim" seemingly directed toward the issue of absolute divorce, is extrinsic to the subject matter of the counterclaim and is, therefore, superfluous. As a legal matter, plaintiff's reply addresses only the issues of child custody and child support. Insofar as plaintiff's reply admitted the grounds for absolute divorce, it was only repeating what had been alleged in the complaint and then admitted and realleged in defendant's answer.
>
> There are cases construing the substantially similar federal rule holding that a demand for a jury trial made within ten days of a reply does not necessarily cover issues raised in the complaint and answer, *i.e.*, is not timely made, unless the counterclaim involved arises out of the subject matter of the complaint and is, therefore, compulsory. Custody and child support are manifestly not in the nature of compulsory counterclaims to an action for absolute divorce. Therefore, defendant's demand for a jury trial, not made within ten days of its 28 December 1983 pleading, was not timely. The denial of a belated demand for a jury trial is within the discretion of the judge. The judgment granting plaintiff an absolute divorce is without error.

Id. at 219-20, 321 S.E.2d at 473 (citations omitted).

Under *Arney*, if defendant and third party plaintiff Bradshaw's counterclaims were compulsory, *i.e.*, arose out of the subject matter of plaintiff's complaint, then a demand made not later than ten days after service of plaintiff's reply would constitute a timely

demand under Rule 38(b). Even if it be assumed that the counterclaims were compulsory, to be timely, demand for jury trial had to be made within ten days after service of plaintiff's reply, filed 6 July 1989. Although the record does not reveal when the reply was served, defendant and third party plaintiff Bradshaw does not contend service was other than contemporaneous with the July 1989 filing of the reply. Since the demand for jury trial was not made until 1 March 1990, it was not timely under Rule 38(b).

Under *Schoolfield* and *Arney*, since the demand was a belated demand, whether to grant the motion for jury trial was within the discretion of the trial court. We therefore conclude the trial court did not err in denying the motion for jury trial.

Defendant and third party plaintiff Bradshaw also contends, however, that the demand was timely because (i) plaintiff's third party complaint, by incorporating both plaintiff's original complaint and defendant's answer and counterclaim, addressed issues raised in those two pleadings; (ii) the answer of third party defendants Justice and Leatherman similarly addressed those issues; and (iii) the demand for trial on all issues, made before third party defendants Justice and Leatherman filed an answer, was made not later than ten days after service of their answer to plaintiff's third party complaint. We do not agree that the demand was timely.

Under *Arney*, the pleading alleged to address the issue upon which jury trial is sought must be analyzed to determine what issues it actually addresses. The recital of language directed toward an issue extrinsic to the subject matter of the pleading is deemed superfluous. 71 N.C. App. at 219, 321 S.E.2d at 473.

Applying these principles and looking to the pertinent pleadings, we find plaintiff's third party complaint and the answer of third party defendants Justice and Leatherman addressed the issue of indemnification as between these parties. References, if any, in these pleadings seemingly directed toward fraud, misrepresentation, and unfair or deceptive trade practices, being extrinsic to the subject matter of indemnification, are therefore superfluous. *See also* 5 *Moore's Federal Practice, supra*, ¶ 38.39[2], at 38-367 (demand within ten days after service of reply to third party answer is timely as to issues raised in third party complaint and answer but not as to issues raised in complaint and answer); 2A *Moore's Federal Practice* ¶ 7.04, at 7-12 (2d ed. Supp. 1990) (third party

complaint proceeds on a claim not comprehended in the original complaint).

While in the case *sub judice* it could be argued that defendant and third party plaintiff's demand was timely as to the issue of indemnification, the parties between whom indemnification was an issue had not demanded or moved for a jury trial. Under any view, defendant and third party plaintiff's demand was not timely as to issues raised in the complaint, answer, and reply. For these reasons, we hold the trial court did not err in denying defendant and third party plaintiff Bradshaw's motion for jury trial.

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. MICHAEL LEON WASHINGTON, DEFENDANT

No. 9026SC862

(Filed 16 April 1991)

1. **Criminal Law § 75.7 (NCI3d)— defendant in police car— movement restricted—defendant not in custody—Miranda warnings not required**

Defendant was not entitled to *Miranda* warnings since he was not "in custody" at the time he made statements to police officers, even though he was in the back seat of a police car while the officer was checking a possible traffic violation with the Department of Motor Vehicles and defendant's movement was thus involuntarily restricted.

Am Jur 2d, Criminal Law § 794.

2. **Narcotics § 4 (NCI3d)— felonious possession of cocaine with intent to sell—sufficiency of evidence**

In a prosecution of defendant for felonious possession of cocaine with intent to sell in violation of N.C.G.S. § 90-95, the evidence was sufficient to be submitted to the jury where it tended to show that an officer stopped defendant's car for a suspected traffic violation; when the officer obtained defendant's consent and searched the car, he found a portion of a

brown paper bag in the ashtray containing a plastic bag with ten smaller plastic bags of a white powdery substance which later proved to be cocaine; and defendant claimed that the powder was not his and was only baking soda which he and a friend bagged to make it look like cocaine and to sell it.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 21, 27, 44, 46, 47.

Judge GREENE dissenting.

APPEAL by defendant from judgment entered 2 May 1990 by *Judge Robert E. Gaines* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 21 March 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Teresa L. White, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Allen W. Boyer, for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of felonious possession of cocaine with intent to sell in violation of G.S. 90-95 and sentenced to a prison term of three years. On appeal he argues that the trial court erred in admitting statements he made prior to being advised of his *Miranda* rights and by not granting his motion to dismiss based on the insufficiency of the evidence. Neither argument has merit and we overrule them.

The State's evidence tended to show that: Charlotte Police Officer Casey Carver observed defendant driving a vehicle with a broken headlight and other damage indicating it had recently been involved in an accident, suspected a possible hit and run accident, and stopped the vehicle. Defendant got out of the car and met the officer in front of the patrol car. Defendant did not have a driver's license and the officer placed him in the back seat of the patrol car while checking defendant's identity with the Department of Motor Vehicles. Upon returning to defendant's car Officer Carver looked in the window and saw a "thirty-eight round" (handgun bullet) on the floorboard. The officer then asked defendant, still sitting in the patrol car, where the gun was located; and defendant answered, "Man, there ain't no gun in the car. It's not my car. You can search it, you're not going to find anything." After

Officer R. L. Ferguson arrived at the scene, the two officers searched the vehicle and found a portion of a brown paper bag in the ashtray containing a plastic bag with ten smaller plastic bags of a white powdery substance which was later proved to be cocaine. Officer Carver showed the bag to defendant and said, "Look what I found"; defendant responded that "it was not his [the defendant's] and that it was only baking soda because he and a friend had been flaking." The officer asked defendant what flaking meant and defendant replied that "he [the defendant] had bagged up baking soda to look like cocaine so that he could sell it as cocaine and make a good profit." At that point Officer Carver placed defendant under arrest for possession of cocaine. Officer Ferguson had seen defendant driving the car on several different occasions.

[1] From this evidence the trial court found that although defendant's movement was involuntarily restricted, as he was in the back seat of the police car while the officer was checking a possible traffic violation with the Department of Motor Vehicles, under the decision in *Miranda v. State of Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, *reh'g denied, California v. Stewart*, 385 U.S. 890, 17 L.Ed.2d 121 (1966), and its progeny, defendant was not "in custody" at the time he made the statements to the police officer and the warning established by those decisions was not required. The court's interpretation of the above decisions is correct, and since the findings made are supported by competent evidence they are conclusive. *Lemmerman v. A. T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986).

[2] As to the sufficiency of the evidence argument, when viewed in the light most favorable to the State, the evidence above stated is clearly sufficient to prove all the elements of the crime that defendant was convicted of. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). *Inter alia*, it tends to show that defendant owned, controlled and possessed the cocaine, and that he and his friend intended to sell it.

No error.

Judge PARKER concurs.

Judge GREENE dissents with separate opinion.

Judge GREENE dissenting.

I disagree with the majority's conclusion upholding the trial court's "finding of fact" that the "defendant was not 'in custody' at the time he made the statements to the police officer . . . ." "The determination [of] whether an individual is 'in custody' during an interrogation so as to invoke the requirements of *Miranda* requires an application of fixed rules of law and results in a conclusion of law and not a finding of fact." *State v. Davis*, 305 N.C. 400, 414-15, 290 S.E.2d 574, 583 (1982). I would conclude as a matter of law that the defendant's incriminating statements were the product of custodial interrogation and therefore, under the facts in this case, should not have been admitted into evidence.

"The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police only applies to *custodial interrogation.*" *State v. Braswell*, 312 N.C. 553, 556, 324 S.E.2d 241, 244 (1985) (emphasis added). The determination of whether a suspect was "in custody" is based "upon an objective test" which asks "whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will." *Davis*, 305 N.C. at 410, 290 S.E.2d at 581. The facts of this case differ significantly from routine traffic stop cases where custody is typically not found to have existed. *See State v. Seagle*, 96 N.C. App. 318, 321-23, 385 S.E.2d 532, 533-35 (1989) (short detention during traffic stop). In such stops, "[t]he detained motorist's 'freedom of action . . . [is not] curtailed to "a degree associated with formal arrest." ' " *Pennsylvania v. Bruder*, 488 U.S. 9, 10, 102 L.Ed.2d 172, 176 (1988) (citations omitted) (motorist stopped for erratic driving). Here, the defendant was stopped and placed in the back seat of the officer's police car and his movement was thereby involuntarily restricted. The door handles on the insides of the back seat doors did not work, and consequently, the defendant was not free to leave at will. He was, in effect, incarcerated on the side of the road. A reasonable person in the defendant's position would have believed that he had been taken into custody or otherwise deprived of his freedom in a significant way. Accordingly, I would conclude that the defendant was "in custody" when he made the statements to the police officer.

Not only was he "in custody," but he was interrogated. "Interrogation" may take the form of either "express questioning" or its "functional equivalent." *Pennsylvania v. Muniz*, 496 U.S. ---, ---, 110 L.Ed.2d 528, 551 (1990). The "functional equivalent" form of "interrogation" "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed.2d 297, 308 (1980). However, the intent of the police is relevant, "for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* n.7.

> '[T]he best reading of the *Innis* test is that it turns upon the *objective* purpose *manifested* by the police. Thus, an officer "should know" that his speech or conduct will be "reasonably likely to elicit an incriminating response" when he should realize that the speech or conduct will probably be viewed by the suspect as designed to achieve this purpose. To ensure that the inquiry is entirely *objective*, the proposed test could be framed as follows: if an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer's remarks, infer that the remarks were designed to elicit an incriminating response, then the remarks should constitute "interrogation" '.

1 W. LaFave & J. Israel, Criminal Procedure § 6.7(a) (1984) (quoting White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 Mich. L. Rev. 1209, 1231 n.146 (1980)).

At trial when asked whether he expected to receive a response from his act of showing the defendant the bag and from his words "Look what I've got," Officer Carver testified that he expected a response, "if nothing else [a] denial." After getting the sought after response, Officer Carver then asked the defendant a question concerning the response which resulted in an incriminating statement. Therefore, I conclude that an interrogation took place because the officer knew or should have known that his words and actions were reasonably likely to evoke an incriminating response and because an objective observer would have believed that such action by the officer was designed to elicit an incriminating response.

Because the police officer did not advise the defendant of his *Miranda* warnings prior to the custodial interrogation, it was error to admit the defendant's incriminating statements. *State v. Banks*, 322 N.C. 753, 759, 370 S.E.2d 398, 402 (1988). However, not all errors involving incriminating statements obtained in violation of *Miranda* require new trials. Pursuant to N.C.G.S. § 15A-1443(b) (1988), "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *See State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 437-38 (1989), *death sentence vacated on other grounds*, --- U.S. ---, 108 L.Ed.2d 603 (1990) (applying harmless error analysis to defendant's statement); *see also Howard v. Pung*, 862 F.2d 1348, 1351 (8th Cir. 1988), *cert. denied*, 492 U.S. 920, 106 L.Ed.2d 593 (1989) (applying harmless error analysis to confession); *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987) (applying harmless error analysis to *Miranda* violation); *Bryant v. Vose*, 785 F.2d 364, 367 (1st Cir.), *cert. denied*, 477 U.S. 907, 91 L.Ed.2d 570 (1986); *Martin v. Wainwright*, 770 F.2d 918, 932 (11th Cir. 1985), *modified*, 781 F.2d 185, *cert. denied*, 479 U.S. 909, 93 L.Ed.2d 281 (1986); *United States v. Ramirez*, 710 F.2d 535, 542-43 (9th Cir. 1983); *Harryman v. Estelle*, 616 F.2d 870, 875 (5th Cir.) (en banc), *cert. denied*, 449 U.S. 860, 66 L.Ed.2d 76 (1980). Here, the State has not met its burden.

Without the unlawfully obtained statements, the only evidence of the defendant's guilt is circumstantial. As to the possession element, the only evidence is that the cocaine was found in a car driven by the defendant. However, the car belonged to someone else. The only evidence on the intent to sell element shows that the 2.1 grams of cocaine had been packaged in ten, small, zip-lock bags. Here, I believe that the trial court's error in admitting the defendant's incriminating statements, in light of the less than overwhelming circumstantial evidence, was not harmless error beyond a reasonable doubt. *State v. Robey*, 91 N.C. App. 198, 206, 371 S.E.2d 711, 716, *disc. rev. denied*, 323 N.C. 479, 373 S.E.2d 874 (1988) (citing *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578 (1982) (State may overcome presumption of prejudice by showing that other evidence of guilt is "overwhelming")). Accordingly, I would vacate the defendant's conviction of felonious possession with intent to sell and remand for a new trial.

STATE OF NORTH CAROLINA v. TIMOTHY ALLEN MORRIS, DEFENDANT-APPELLANT

No. 903SC399

(Filed 16 April 1991)

1. **Conspiracy § 5.1 (NCI3d)— hearsay—statements of coconspirator—admissible**

The trial court did not err in a narcotics prosecution by admitting certain out-of-court statements of a coconspirator where the State's evidence tended to demonstrate that defendant was parked on the side of a dirt road in a rural area at approximately 11:00 p.m.; there were no houses or buildings within .1 to .2 miles of this location; the coconspirator, Taylor, pulled in and parked behind defendant's car accompanied by two undercover officers; Taylor left his car and spoke with defendant; defendant gestured in a hitchhiking motion toward the side of the road between the two cars; Taylor then climbed the ditch embankment in the general area defendant had indicated and retrieved a large bag containing fifteen pounds of marijuana; and defendant fled when undercover officers attempted to arrest him. The evidence is sufficient to establish a *prima facie* conspiracy between the witness and defendant.

Am Jur 2d, Conspiracy §§ 46, 48.

2. **Conspiracy § 36 (NCI4th); Narcotics § 4.3 (NCI3d)— narcotics—conspiracy and constructive possession—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of conspiracies to sell and deliver marijuana, and possession with intent to sell or deliver marijuana. The *prima facie* evidence of conspiracy, coupled with the coconspirator's statements, constituted substantial evidence of the two conspiracy charges, and there was sufficient evidence of constructive possession to go to the jury in that defendant was parked alone on the side of an isolated rural dirt road after 11:00 p.m.; he conversed with an individual engaged in a drug transaction; pointed in a direction in which fifteen pounds of marijuana were located; and fled when police officers attempted to arrest him.

Am Jur 2d, Conspiracy §§ 40, 46, 48.

3. Narcotics § 3.1 (NCI3d)— marijuana—chain of custody—exhibits admissible

The trial court did not abuse its discretion in a narcotics prosecution by admitting two bags of marijuana where two officers identified the bags by their appearance and the attached evidence tags; each of the bags had a slit which had been sealed with a piece of tape containing an SBI chemist's initials and case numbers; small holes had been poked in the bags' sides, but otherwise the bags and their contents were unchanged; the chemical analysis was not introduced due to the unavailability of the chemist; and three officers testified that, in their opinion, the substance seized during the arrest was marijuana. A weak link in a chain of custody relates only to the weight to be given the evidence and not to its admissibility, and it has been recognized that a police officer's experience and training may be competent to qualify him as an expert in identifying marijuana.

Am Jur 2d, Evidence §§ 774, 826.

APPEAL by defendant from judgments entered 30 October 1989 by *Judge William C. Griffin* in PITT County Superior Court. Heard in the Court of Appeals 15 January 1991.

The evidence presented by the State tended to show the following: On 2 May 1989 two undercover officers arranged to purchase fifteen pounds of marijuana from Nicky Taylor. Taylor met with the officers shortly before 11:00 p.m. that night. After some discussion Taylor allowed them to accompany him to pick up the marijuana. Taylor said his "man" (supplier) would be waiting in a black Mustang on the side of a rural dirt road and the marijuana would be in a ditch there. At approximately 11:00 p.m. Taylor pulled in behind a black Mustang parked on the side of a rural dirt road.

Taylor left his car and spoke with defendant, who was alone in the black Mustang. Defendant gestured in a hitchhiking motion toward the side of the road between the two cars. Taylor retrieved a large bag containing fifteen pounds of marijuana from this location. When the undercover officers attempted to arrest defendant, he fled. He was stopped and arrested by one of the surveillance teams.

After a trial by jury defendant was convicted of conspiracy to sell in excess of one and one-half ounces of marijuana, conspiracy to deliver in excess of one and one-half ounces of marijuana, and

possession with intent to sell or deliver in excess of one and one-half ounces of marijuana. Upon conviction defendant was sentenced to two years for the consolidated conspiracy charges and two years for the possession charge. From these judgments defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Norma S. Harrell, for the State.

James Hite Avery Clark & Robinson, by Leslie S. Robinson, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant contends the trial court erred in admitting into evidence certain out-of-court statements made by Nicky Taylor pursuant to N.C.R. Evid. 801(d)(E). He argues that the State failed to establish a *prima facie* case of conspiracy independent of these statements, and therefore the out-of-court statements are hearsay and inadmissible. We do not agree.

"One well-recognized exception to the general proscription against the introduction of hearsay evidence is that statements made by coconspirators during the course of and in furtherance of the conspiracy are admissible." *State v. Collins*, 81 N.C. App. 346, 349, 344 S.E.2d 310, 313, *appeal dismissed*, 318 N.C. 418, 349 S.E.2d 601 (1986). There must be a showing that: "(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended." *State v. Conrad*, 275 N.C. 342, 348, 168 S.E.2d 39, 43 (1969).

> Because of the nature of a conspiracy, the State can seldom establish a *prima facie* case of conspiracy by extrinsic evidence before tendering the acts and declarations of the conspirators which link them to the crimes charged. Therefore, our courts often permit the State to offer the acts or declarations of a conspirator before the *prima facie* case of conspiracy is sufficiently established. Of course, the prosecution must properly prove the existence of the *prima facie* case of conspiracy before the close of the State's evidence in order to have the benefit of these declarations and acts.

State v. Polk, 309 N.C. 559, 565-66, 308 S.E.2d 296, 299 (1983). "A conspiracy may be shown by a number of indefinite acts, which, taken individually, might be of little weight, but taken collectively

point to its existence." *Collins*, 81 N.C. App. at 350, 344 S.E.2d at 313-14. "The crime is established upon a showing of an *agreement* to do an unlawful act or to do a lawful act by unlawful means, whether or not overt acts occurred." *Id.* at 350, 344 S.E.2d at 313.

"Ordinarily the factual issue of the existence or nonexistence of a conspiracy is for the jury." *Id.* at 350, 344 S.E.2d at 314. "The State's burden of proof here was only to procure evidence sufficient to permit, but not compel, the jury to find a conspiracy." *State v. Turner*, 98 N.C. App. 442, 446, 391 S.E.2d 524, 526 (1990). "The evidence is considered in the light most favorable to the State." *Collins*, 81 N.C. App. at 350, 344 S.E.2d at 314.

The State's evidence tended to demonstrate that on 2 May 1989 defendant was parked on the side of a dirt road in a rural area at approximately 11:00 p.m. No houses or buildings were within .1 to .2 of a mile of this location. Taylor, who was accompanied by two undercover officers purchasing marijuana, pulled in behind defendant's car and parked. Taylor left his car and spoke with defendant. Defendant gestured in a hitchhiking motion toward the side of the road between the two cars. Taylor then climbed a ditch embankment in the general area where defendant had indicated and retrieved a large bag containing fifteen pounds of marijuana. Defendant fled when the undercover officers attempted to arrest him. We believe that this evidence is sufficient to establish a *prima facie* conspiracy between Taylor and defendant. Therefore the trial court did not err in admitting Taylor's out-of-court statements.

[2] Defendant next contends the trial court erred in denying his motion to dismiss the three charges for insufficient evidence. We are not persuaded by defendant's arguments. When the trial court is ruling on a defendant's motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn from the evidence presented; all contradictions and discrepancies are resolved in the State's favor. *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989); *State v. Abernathy*, 295 N.C. 147, 244 S.E.2d 373 (1978). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 582 (1975).

Two of the charges were conspiracy to sell in excess of one and one-half ounces of marijuana and conspiracy to deliver in excess of one and one-half ounces of marijuana. As discussed above, there was sufficient evidence to establish a *prima facie* case of conspiracy. This evidence, when coupled with Taylor's statements that defendant was his supplier and viewed in the light most favorable to the State, constitutes substantial evidence of the two conspiracy charges.

The final charge was possession with intent to sell and deliver in excess of one and one-half ounces of marijuana. Defendant was not in actual possession of the marijuana. Proof of constructive possession in a prosecution for possession of contraband materials is sufficient and that possession need not always be exclusive. *State v. Narcisse*, 90 N.C. App. 414, 368 S.E.2d 654, *disc. review denied*, 323 N.C. 368, 373 S.E.2d 553 (1988). Constructive possession does not require actual possession of a thing, only that a person has the intent and capability to maintain control and dominion over that thing. *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986).

If the defendant has nonexclusive possession of the place where the marijuana was found, "the State must show other incriminating circumstances before constructive possession may be inferred." *Davis*, 325 N.C. at 697, 386 S.E.2d at 190. Defendant was parked alone on the side of an isolated rural dirt road after 11:00 p.m. He conversed with an individual engaged in a drug transaction, pointed in the direction of where fifteen pounds of marijuana was located, and fled when police officers attempted to arrest him. Constructive possession may be inferred from these circumstances. After reviewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence to go to the jury.

[3] Defendant's final contention is the trial court erred in admitting two of the State's exhibits into evidence because of a failure to establish a chain of custody. Since there are no simple standards for determining the sufficiency of the chain of custody when authenticating real evidence, the trial court "possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition." *Abernathy*, 295 N.C. at 161, 244 S.E.2d at 382.

"Where the articles objected to have been identified as being the same objects seized and in somewhat the same condition, as happened here, proving a continuous chain of custody is unnecessary." *State v. Hart*, 66 N.C. App. 702, 704, 311 S.E.2d 630, 631 (1984). Two police officers identified the two bags containing the marijuana by their appearance and the attached evidence tags as being the same bags sent for chemical analysis. Each of the bags had a slit which had been sealed with a piece of tape containing an SBI chemist's initials and case numbers. Small holes had been poked in the bags' sides, but otherwise the bags and their contents were unchanged.

"[W]eak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *State v. Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984). The chemical analysis of the substance was not introduced into evidence due to the unavailability of the SBI chemist. Three officers testified that in their opinion the substance seized during the arrest was marijuana. In *State v. Clark*, 30 N.C. App. 253, 226 S.E.2d 398 (1976), it was recognized that a police officer's experience and training may be competent to qualify him as an expert in identifying marijuana. We find no abuse of discretion by the trial court in admitting these exhibits.

No error.

Judges JOHNSON and LEWIS concur.

CAROLYN M. CARDWELL AND THOMAS V. CARDWELL, PETITIONERS v. THE TOWN OF MADISON BOARD OF ADJUSTMENT, RESPONDENT

No. 9017SC401

(Filed 16 April 1991)

1. Municipal Corporations § 30.8 (NCI3d)— definition of building— use of building code definition

The record supports the trial court's conclusion that the Board of Adjustment relied on the state building code definition of building when interpreting a zoning ordinance to decide whether a warehouse divided by a fire wall was one or two

buildings where the zoning enforcement officer testified at the public hearing that his decision was based on the state building code, twice replied when asked that it was customary and correct to use definitions from the state building code to interpret local zoning ordinances, the board chairman summarized the contentions of the zoning officer at the end of the hearing and specifically referred to the state building code but did not mention the definition of building in the town zoning ordinance, the motion to uphold the zoning officer's decision referred to the existence of a fire wall, which is not mentioned in the town zoning ordinance but is mentioned in the state building code, and the Board in its order made only a finding to uphold the decision of the zoning officer based on the existence of the fire wall and did not make any findings with regard to the definition of building in the zoning ordinance.

Am Jur 2d, Buildings §§ 1, 18-21; Zoning and Planning §§ 1, 66, 121.

2. Municipal Corporations § 30.8 (NCI3d)— definition of building— use of State building code—erroneous

The trial court's findings of fact support its conclusion that the Board of Adjustment erroneously based a decision on the building code definition of "building" where the town zoning ordinance defines that term. The principle that a statutory definition controls the interpretation of that statute applies to construing a zoning ordinance; moreover, nothing in the record indicates that the town zoning ordinance explicitly adopts the state building code by reference.

Am Jur 2d, Buildings § 1; Zoning and Planning §§ 1, 66.

APPEAL by respondent from judgment entered 17 January 1990 by *Judge Melzer A. Morgan, Jr.* in ROCKINGHAM County Superior Court. Heard in the Court of Appeals 27 November 1990.

This case concerns a zoning enforcement officer's decision regarding permissible uses of petitioners' warehouse located at 407 Academy Street in Madison. The warehouse was built in the 1940's. Approximately three years after it was built, a tenant added a fire wall that divides the building into two sections which are referred to as the east side and the west side. The warehouse is in a neighborhood zoned for residential use. Commercial storage

is permitted in this warehouse as a nonconforming use under the town's zoning ordinance. The zoning ordinance also provides:

> *Discontinuance of Use.* If a non-conforming building is removed or the non-conforming use of such building is discontinued for a continuous period of more than one hundred and eighty (180) days, every future use of such building or land shall be in conformity with the provisions of this ordinance.

On 9 August 1989 the Town of Madison's zoning enforcement officer notified petitioners that he had determined that the warehouse was actually two buildings because of the fire wall. He testified that he based his decision on Section 402.1(b) of the state building code. That section provides: "For the purposes of this Code, each part of a building or structure included within fire walls shall be considered a separate building." He also determined that since the east side of the building had been unoccupied for more than 180 days, petitioners could no longer use that side of the building as a warehouse.

Section 42.4 of the town zoning ordinance defines building as "[a]ny structure having a roof supported by columns or by walls, and intended for shelter, housing or enclosure of persons, animals, or chattel." The town zoning ordinance definition does not mention fire walls.

On 21 August 1989 petitioners appealed the zoning official's ruling to the Town of Madison Board of Adjustment. After a public hearing on the matter, the Board of Adjustment upheld the decision of the zoning enforcement officer. The Rockingham County Superior Court granted petitioners' writ of certiorari and remanded the case to the Board of Adjustment after determining that the Board based its decision on an error of law. The court held that the Board erroneously relied on the definition of "building" in the state building code in making its decision. The Board appeals.

Stern, Graham & Klepfer, by Jerry R. Everhardt and J. Bradley Purcell, for petitioner-appellees.

Wolfe and Collins, P.A., by John G. Wolfe, III and Michael R. Bennett, for the respondent-appellant.

EAGLES, Judge.

[1] After a careful review of the record, we conclude that the Town of Madison Board of Adjustment considered the definition of "building" found in the state building code when interpreting its zoning ordinance. We agree with the Superior Court that the Board's decision was based on an error of law. Accordingly, we affirm the judgment of the Superior Court.

In proceedings to review a city's zoning decision, the task of the appellate courts includes "reviewing the record for errors in law" and "insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record." *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). When reviewing the sufficiency and competency of the evidence to support the action of the town board, the question before us is whether the evidence before the town board was sufficient. The question is not whether the evidence before the Superior Court supported that court's order. *Id.*

Here, the record supports the conclusion that the Board relied on the state building code in making its decision. At the public hearing, the zoning enforcement officer testified that his decision was based on § 402.1(b) of the state building code. He provided each of the board members with a copy of this state building code provision.

During the hearing, one of the Board members asked whether it was "customary practice" to use definitions from the state building code to interpret local zoning ordinances. The zoning enforcement officer replied:

> I'd say probably the majority of the zoning enforcement officers in this state are tied in with the state building code or state Department of Insurance as part of their legal background of going to school. Most of them comes [sic] out of the building inspections field. So, I feel like it's natural to use what resources you have to find an interpretation on the definition of anything.

Near the end of the hearing the same Board member observed that article 4 of the town zoning ordinance defines certain words and terms and provides that terms not otherwise defined "shall have their customary dictionary definition." He also asked again

whether it was customary to use a definition from the state building code to define a word in a local zoning ordinance. The zoning enforcement officer reassured the Board that it was correct to consider the state building code. He said:

> As far as I know, all the building inspectors that I know that deals [sic] with zoning in the same way—in the same situation I'm in will use both of them to determine different things, as far as the definitions go. And I didn't make this decision as being two separate buildings without doing some telephone calling, too. So I've called the County and I've called—also called the Department of Insurance in Raleigh on this.

At the end of the hearing, the Board chairman summarized the contentions of the zoning officer and referred specifically to the state building code. He did not mention the definition of building in the town zoning ordinance. Additionally, when the Board voted on whether to uphold the zoning officer's decision, the motion was phrased as follows: "I hereby will make the motion to uphold the decision of the zoning officer, based on the present existence of a fire wall, the construction thereof effectively and legally creating two buildings." The town zoning ordinance does not mention the term "fire wall." Rather, it is the state building code that provides that "each part of a building or structure included within fire walls shall be considered a separate building."

Similarly, in its order the Board made only a finding to "uphold the decision of the Zoning Officer based on the present existence of a fire wall structure thereof effectively and legally creating two buildings." Nowhere in its order does the Board make any findings with regard to the definition of "building" as defined in the zoning ordinance. We hold that the Board erroneously considered the state building code definition of "building" as the basis for its decision.

[2] Appellant next contends that the evidence and the findings of fact do not support the conclusion that the Board's decision was based on an error of law. We disagree. Here, the town zoning ordinance defines the term "building." When the legislature defines a word used in a statute, "that statutory definition controls the interpretation of that statute." *Pelham Realty Corp. v. Board of Transportation*, 303 N.C. 424, 434, 279 S.E.2d 826, 832 (1981). The same principle applies when construing a zoning ordinance. Additionally, nothing in the record indicates that the town zoning or-

dinance explicitly adopts the state building code by reference. Even if the zoning ordinance did not define "building," we find it unlikely that the state building code's definition of "building" is applicable. The building code concerns construction while the zoning ordinance is directed to land use.

Accordingly, we conclude that the record supports the conclusion that the Town Board erroneously considered the state building code and failed to rely on the town zoning ordinance in deciding to uphold the decision of the zoning enforcement officer. For the reasons stated, the decision of the superior court is affirmed.

Affirmed.

Judges ARNOLD and PARKER concur.

RHONDA THOMAS, PLAINTIFF v. CAROL BARNHILL, DEFENDANT

No. 9014SC478

(Filed 16 April 1991)

Evidence § 50 (NCI3d)— chiropractor—testimony about muscles —admissibility

A chiropractor could properly testify as an expert in a personal injury action with regard to muscle strain, since, pursuant to the 1989 amendment to N.C.G.S. § 90-157.2, a chiropractor may testify about the "physiological dynamics of contiguous spinal structures which can cause neurological disturbances."

Am Jur 2d, Expert and Opinion Evidence § 226.

APPEAL by defendant from judgment entered 7 December 1989 by *Judge Robert H. Hobgood* in DURHAM County Superior Court. Heard in the Court of Appeals 29 November 1990.

This is a personal injury action arising from an automobile accident. On 17 April 1986 plaintiff was driving her car on a rural highway when the car driven by the defendant hit her from behind. At trial plaintiff's witnesses included a chiropractor and a neurosurgeon, both of whom had treated her. The chiropractor

testified about his diagnosis and treatment of the plaintiff and opined that she had received a 5 to 6 percent permanent disability. The neurosurgeon then testified regarding his diagnosis and treatment of plaintiff and answered a hypothetical question regarding her permanent disability. The jury returned a verdict in favor of the plaintiff in the amount of $33,351.00. Defendant appeals.

Michael E. Mauney for the plaintiff-appellee.

Reynolds, Bryant and Patterson, P.A., by Joseph B. Chambliss, Jr., for the defendant-appellant.

EAGLES, Judge.

Defendant first argues that the trial court erred by allowing the chiropractor to testify about matters outside the scope of his field of expertise. We disagree.

Defendant objects to the following diagnosis testimony by the chiropractor:

> Moderate severe strain of the cervical spine with complicating subluxation complex syndrome of the cervical spine with associated radiculitis and myofascitis. Moderate severe strain to the mid thoracic area and moderate strain to the lumbar area with complicating subluxation syndromes of the above areas with associated myofascitis.

We note that myofascitis means "[i]nflammation of a muscle and/or the fascia which covers it." 2 J. Schmidt, Attorneys' Dictionary of Medicine and Word Finder at M-212 (1991). Fascia means "[a] thin but often tough layer of tissue, or membrane, whose chief function is that of covering, or of holding things together, like a sac or capsule. . . . Fascia covers individual muscles, adding to their functional efficiency." *Id.* at F-24. Defendant contends that through this testimony the chiropractor improperly testified about injury to muscle. Defendant relies solely on *Ellis v. Rouse*, 86 N.C. App. 367, 357 S.E.2d 699 (1987). In *Ellis* this Court said that the trial court properly excluded a chiropractor's testimony regarding the strain or sprain of a muscle as beyond the field of chiropractic as defined by statute.

At the time *Ellis* was decided, G.S. 90-157.2 provided:

> A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified,

> may testify in a court of law as to etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic.

Since the *Ellis* decision, the General Assembly has amended G.S. 90-157.2 to read as follows:

> A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to:
>
> (1) The etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic, as defined in G.S. 90-151; and
>
> (2) The physiological dynamics of contiguous spinal structures which can cause neurological disturbances, the chiropractic procedure preparatory to, and complementary to the correction thereof, by an adjustment of the articulations of the vertebral column and other articulations.

In the amended version of G.S. 90-157.2, the General Assembly added language to provide that a chiropractor may testify about the "physiological dynamics of contiguous spinal structures which can cause neurological disturbances." The goal in interpreting any statute is to ascertain the meaning and intention of the legislature. *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988). "Interpretation is of course unnecessary where the words used are so plain and unambiguous that no doubt can exist as to legislative intent and the proper application of the statutory language to a particular factual situation; but when the words used leave reasonable doubt as to what the Legislature intended with respect to a particular factual situation, it is proper to look to legislative history, judicial interpretation of prior statutes dealing with the question, and the changes, if any, made following a particular interpretation." *Ingram v. Johnson*, 260 N.C. 697, 699, 133 S.E.2d 662, 664 (1963).

We think that the legislative history is helpful in interpreting the new language in G.S. 90-157.2. The amendment was entitled in part: "An Act to Clarify the Subjects About Which a Chiropractor May Testify as an Expert Witness." 1989 N.C. Sess. Laws ch. 555. The House Judiciary Committee minutes suggest that the purpose of subsection (2) was "to cure the confusion in the case

law created by the inconsistent decisions" in *Ellis v. Rouse*, 86 N.C. App. 367, 357 S.E.2d 699 (1987), and *Smith v. Buckhram*, 91 N.C. App. 355, 372 S.E.2d 90 (1988), *disc. review denied*, 324 N.C. 113, 377 S.E.2d 236 (1989). Minutes of the House Judiciary Committee (June 29, 1989). In *Ellis v. Rouse* this Court said that the testimony of a chiropractor to the strain or sprain of a muscle was beyond the field of chiropractic as defined by G.S. 90-143. In *Smith v. Buckhram* this Court held that testimony regarding ligaments of the spine was within the scope of chiropractic as defined in G.S. 90-143.

We conclude that by enacting this amendment the General Assembly did not intend to expand the scope of chiropractic but intended merely to clarify the law. Here, the General Assembly added language to the statute that specifically provides that a chiropractor may testify to "[t]he physiological dynamics of contiguous spinal structures which can cause neurological disturbances." The former statute did not contain a similar provision. Additionally, legislative history suggests that the General Assembly intended "to allow chiropractors to testify as to the spinal column and the physical structures that support and/or complement it." Minutes of the House Judiciary Committee (June 29, 1989). The changes in the language of G.S. 90-157.2 and the legislative history lead us to conclude that the General Assembly thought that this Court's decision in *Ellis v. Rouse* was overly restrictive. Here, we hold that the chiropractor's expert testimony was within the scope of G.S. 90-143 and 90-157.2. We believe that this interpretation is consistent with the language of the statutes and the legislative history surrounding the adoption of the 1989 clarifying amendment to G.S. 90-157.2. Accordingly, this assignment of error is overruled.

Defendant's remaining assignments of error are also without merit and are overruled. Defendant argues that the trial court erred by allowing the chiropractor to testify to his opinion on the prognosis for plaintiff's neck and back injuries. Defendant cites no cases to support her position but merely argues that the opinion was supported by "generalities as opposed to specific facts testified to or admitted into evidence." We disagree. A chiropractor is allowed to testify as to prognosis and disability under G.S. 90-157.2(1). Here, the chiropractor had personally examined and treated the plaintiff and had adequate facts and data on which to base his expert opinion.

Defendant also argues that the trial court erred in allowing the neurosurgeon to answer a hypothetical question regarding the permanency of plaintiff's injuries on the grounds that the medical evidence did not support his testimony. "A proper hypothetical question lists facts which counsel hopes will be found by the jury to exist and asks if, assuming that the jury will so find, the expert has an opinion satisfactory to himself on the subject of inquiry." 1 H. Brandis, Brandis on North Carolina Evidence § 137 (3d ed. 1988). A proper question lists only facts that "are directly in evidence or may justifiably be inferred therefrom." *Id.* The transcript indicates that the hypothetical question posed to the neurosurgeon listed only facts that were in evidence or could be inferred from the evidence. We find no error.

Finally, defendant argues that the trial court erred in instructing the jury on permanent injury in that there was no evidence to support a finding of permanent injury. As noted, the testimony of the chiropractor and the neurosurgeon was properly admitted and supported the charge to the jury on permanent injury.

For the reasons stated we find no error.

No error.

Judges ARNOLD and PARKER concur.

WILLIAM H. BROWN v. SABRA NANCE WILKINS

No. 901SC874

(Filed 16 April 1991)

Automobiles and Other Vehicles § 640 (NCI4th)— plaintiff's motorcycle hit from rear—motorcycle partially on travelled portion of highway—no contributory negligence

In an action to recover for personal injuries sustained when defendant hit plaintiff's motorcycle from the rear, plaintiff was not contributorily negligent and the trial court did not err in refusing to instruct the jury on that issue, though plaintiff stopped beside the road to talk to a pedestrian, leaving the back portion of his motorcycle about a foot into the

travelled portion of the highway, since defendant's own testimony indicated that she never saw plaintiff until she hit him, and it therefore would not have made much difference, if any, if plaintiff had been on the travelled portion of the road even more; moreover, all of the other motorists who passed by observed plaintiff and took safety precautions accordingly to avoid hitting plaintiff.

Am Jur 2d, Automobiles and Highway Traffic §§ 277, 422.

APPEAL by defendant from judgment entered 29 March 1990 and signed out of term 30 March 1990 by *Judge Thomas S. Watts* in DARE County Superior Court. Heard in the Court of Appeals 19 February 1991.

In May 1988, plaintiff filed this action against defendant alleging that defendant was negligent in driving her car into the back of plaintiff's motorcycle on 6 August 1987. Plaintiff had stopped his motorcycle to talk to and pick up a passenger on U.S. Highway 64-264 in Manteo. A small portion of plaintiff's motorcycle was sticking out in the travelled portion of the road. As a result of the collision, plaintiff allegedly sustained severe injuries.

Defendant answered and alleged plaintiff's contributory negligence. The case came on for trial on 27 March 1990. A jury returned a verdict in plaintiff's favor on 29 March 1990, and the trial court entered its judgment accordingly.

From this judgment, defendant appeals.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr., for plaintiff-appellee.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr., and David J. Irvine, Jr., for defendant-appellant.

ORR, Judge.

Defendant assigns two errors on appeal. For the following reasons, we find that the trial court did not err and, therefore, affirm its judgment of 29 March 1990.

Defendant first argues that the trial court erred in refusing to instruct the jury on the issue of contributory negligence. We disagree.

It is well established law in this state that if different inferences may reasonably be drawn from the evidence concerning the issue of contributory negligence of one party, then the issue must be submitted to the jury. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970); *Boyd v. Wilson*, 269 N.C. 728, 153 S.E.2d 484 (1967); 9 Strong, N.C. Index 3d, Negligence, § 34, p. 428 (1977). If there is any competent evidence of contributory negligence "or inferences of fact fairly deducible therefrom tending to support the defendant's affirmative defense," the trial court should submit the issue to the jury. 9 Strong, N.C. Index 3d, Negligence, § 34, p. 428.

The defendant bears the burden of proof of contributory negligence. *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 38, 365 S.E.2d 198, 201, *disc. review denied*, 322 N.C. 610, 370 S.E.2d 257 (1988). The evidence must be viewed in the light most favorable to defendant. *Id.* (citations omitted). If the evidence raises only a "mere conjecture" of contributory negligence, the issue should not be submitted to the jury. *Radford v. Morris*, 74 N.C. App. 87, 88, 327 S.E.2d 620, 621, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985) (citation omitted). "However, since negligence usually involves issues of due care and reasonableness of actions under the circumstances, it is especially appropriate for determination by the jury." *Id.* at 88-89, 327 S.E.2d at 621-22. "In 'borderline cases,' fairness and judicial economy suggest that courts should decide in favor of submitting issues to the jury." *Id.* at 89, 327 S.E.2d at 622 (citation omitted).

With these general principles in mind, we now turn to the evidence in the case *sub judice*. The evidence, viewed in the light most favorable to defendant, tends to show that on 6 August 1987, plaintiff stopped his motorcycle next to the curb on the west side of U.S. Highway 64-264 in Manteo. There were three lanes for traffic: northbound, southbound and center lanes. Plaintiff was in the southbound lane. It was daylight and the weather was clear. Plaintiff's motorcycle was approximately five feet long with saddlebags and a plastic trunk case on the rear bumper.

Plaintiff stopped to offer a ride to a pedestrian and became engaged in conversation with the pedestrian for two or three minutes before the accident. Plaintiff's right foot was on the curb, and the motorcycle was almost parallel to the curbing. However, a portion of the rear of plaintiff's motorcycle was in the travelled portion of the southbound lane. An eyewitness, Don Seaton, testified

in his deposition that the rear of plaintiff's motorcycle was at a 25-degree angle to the curbing.

During the period in which plaintiff was stopped at the curb, a number of southbound cars passed plaintiff. In order to pass plaintiff, some of the cars pulled partially into the center lane to pull around plaintiff in a safe manner. Plaintiff perceived no danger in this.

Defendant was travelling south behind a van. The van swerved to the left in front of defendant (to go around plaintiff) and then made a right turn into a driveway just beyond plaintiff's motorcycle. As the van swerved to the left, defendant watched the van and then ran into plaintiff's motorcycle, causing injuries to plaintiff. Defendant testified that she never saw the motorcycle until she hit it.

The investigating police officer testified that the point of impact was approximately one foot onto the asphalt in the lane of traffic. Defendant's vehicle remained on the travelled portion of the road at all times.

The above evidence indicates that there is only one inference that may be drawn on the issue of contributory negligence. That inference is that plaintiff was not contributorially negligent in that he was not an obstruction to any of the other drivers.

First, other cars saw plaintiff and were able to pass safely. Second, defendant testified that she never saw plaintiff until the time of impact. There is no doubt under these circumstances that plaintiff was not contributorially negligent, even if plaintiff was further onto the travelled portion of the road. For example, if a plaintiff had stopped at a traffic light, or for any other legitimate reason, and a defendant "did not see him until she hit him," then the plaintiff could not be held contributorially negligent. We see no difference under the facts in the present case.

Therefore, under the above principles, we hold that defendant was not entitled to have the trial court submit the issue of contributory negligence to the jury. The circumstances in the case before us raise no more than a "mere conjecture" that plaintiff was contributorially negligent. Therefore, we find that the trial court did not err in refusing to instruct the jury on this issue.

We find support for our holding in *Rowe v. Murphy*, 250 N.C. 627, 109 S.E.2d 474 (1959). In *Rowe*, our Supreme Court stated

that a motorist who parks his disabled vehicle partially on a highway in plain view, leaving ample room for traffic to pass, did not violate a highway safety statute and is not negligent. The Court, *citing Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938), stated:

> "Even if it be conceded that defendant's truck was negligently parked on the side of the road, . . . which may be doubted on the facts revealed by the record, . . . still it would seem that the active negligence of the driver of the Bedenbaugh car was the real, efficient cause of the plaintiff's intestate's death."

Id. at 633, 109 S.E.2d at 479.

This is the same situation in the present case. The proximate cause of plaintiff's injuries is defendant hitting plaintiff from the rear. Defendant's own testimony indicates that she never saw plaintiff until she hit him, and it would not have made much difference, if any, if plaintiff had been on the travelled portion of the road even more. Moreover, all of the other motorists observed plaintiff and took safety precautions accordingly to avoid hitting plaintiff. Defendant easily could have done the same thing, had she seen him. Therefore, we hold that the trial court did not err in refusing to submit the issue to the jury.

Defendant's second assignment of error concerns whether the trial court erred in granting plaintiff's *motion in limine* to exclude certain portions of an eyewitness's testimony. We have reviewed this assignment of error and find it without merit.

For the above reasons, we find no error in the judgment of 29 March 1990.

No error.

Judges JOHNSON and PARKER concur.

RUTH E. MASHBURN v. FIRST INVESTORS CORPORATION AND DORCAS ANN BROOKS

No. 9030SC303

(Filed 16 April 1991)

Rules of Civil Procedure § 41 (NCI3d)— trial without jury—directed verdict improper—findings and conclusions required

The trial court erred in a nonjury trial by granting defendant's motion for a directed verdict in an action to determine whether defendant had tendered a valid rescission offer under N.C.G.S. § 78A-56(g)(1) (1987), thereby barring plaintiff from bringing a civil action arising from the fraudulent misrepresentations of defendant's securities broker. The appropriate motion to test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(b). Considered as a Rule 41(b) dismissal, the judgment contains only a bare conclusion and does not rise to the level of separate findings and conclusions required by N.C.G.S. § 1A-1, Rules 41(b) and 52(a).

Am Jur 2d, Trial § 1245.

APPEAL by plaintiff from judgment entered 14 February 1990 in CHEROKEE County Superior Court by *Judge Claude S. Sitton.* Heard in the Court of Appeals 11 December 1990.

Zeyland G. McKinney, Jr., for plaintiff-appellant.

Patla, Straus, Robinson & Moore, P.A., by Harold K. Bennett, for defendant-appellee, First Investors Corporation.

No brief filed for defendant Dorcas Ann Brooks.

WYNN, Judge.

Since the decision of this case turns upon a procedural error, a complete discussion of the facts is not necessary. Summarily, it is undisputed in this appeal that defendant, Dorcas Ann Brooks ("Brooks"), a security broker employed by First Investors Corporation ("First Investors") used a variety of fraudulent misrepresentations to induce the plaintiff, Ruth E. Mashburn, to purchase securities.

The plaintiff discovered Brooks' illegal activities and promptly contacted First Investors. Upon confirming the fraud perpetrated

by Brooks, First Investors tendered, pursuant to the provisions of N.C.G.S. § 78A-56(g)(1), an offer to rescind the securities contract made with the plaintiff. That statute provides as follows:

> No purchaser may sue under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at the legal rate as provided by G.S. 24-1 from the date of payment, less the amount of any income received on the security or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount equal in cash to the damages computed in accordance with subsection (a); and stating that the offer may be accepted by the purchaser at any time within 30 days of its receipt; and the purchaser has failed to accept such offer in writing within the specified period.

N.C. Gen. Stat. § 78A-56(g)(1) (1987).

The plaintiff made a conditional acceptance of First Investors' rescission offer, expressly reserving the right to sue for breach of contract, fraud and punitive damages. Following her acceptance, the plaintiff brought this action, contending that the rescission offer was invalid because it did not comply with the requirements of section 78A-56(g)(1).

At the trial, which was held without a jury, the trial judge granted First Investors' motion for a directed verdict on the ground that the rescission offer tendered by First Investors to the plaintiff had complied with section 78A-56(g)(1) and, therefore, barred the plaintiff from bringing a civil action. The plaintiff now appeals.

Appellant assigns as error the trial court's entry of a directed verdict in favor of the defendant, First Investors Corporation. The appellant correctly contends that since the proceeding in which the parties were engaged was a bench trial, the entry of a directed verdict was improper.

Directed verdicts are proper only in jury cases. *Bryant v. Kelly*, 279 N.C. 123, 181 S.E.2d 438 (1971). When there is a trial by the court, sitting without a jury, the appropriate motion by which a defendant may test the sufficiency of plaintiff's evidence

to show a right to relief is a motion for involuntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(b). *Higgins v. Builders and Finance, Inc.*, 20 N.C. App. 1, 200 S.E.2d 397 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974); *Aiken v. Collins*, 16 N.C. App. 504, 192 S.E.2d 617 (1972). The distinction is more than a mere formality, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before the court and jury than when the court alone is the finder of facts. *Mayo v. Mayo*, 73 N.C. App. 406, 409, 326 S.E.2d 283, 285 (1985) (citing *Neff v. Queen City Coach Co.*, 16 N.C. App. 466, 192 S.E.2d 587 (1972)).

Here, the parties submitted factual stipulations to the judge in a bench trial and the defendant, First Investors Corporation, moved for a directed verdict. This motion was improper.

Even exercising our discretion and considering the defendant's motion as though it were made pursuant to Rule 41(b) affords the defendant no relief here. Rule 41(b) provides that "[i]f the court renders judgment on the merits against plaintiff, the court *shall* make findings as provided in Rule 52(a)." N.C. Gen. Stat. § 1A-1, Rule 41(b)(1983) (emphasis added). Rule 52(a) provides 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.

N.C. Gen. Stat. § 52(a) (1983).

The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980).

The judgment entered in the case *sub judice* does not contain separate findings of fact and conclusions of law. Neither the judgment, nor the stipulations address the propriety of certain monetary deductions made by First Investors in its rescission offer. Our reading of the judgment indicates that it simply makes the bare conclusion that the defendant First Investors tendered a "valid" rescission offer and that, therefore, the plaintiff is barred from bringing suit under the provisions of N.C.G.S. § 78A-56(g)(1) and

under the holding of *Brockmann Industries, Inc. v. Carolina Securities Corp.*, 861 F.2d 798 (4th Cir. 1988). Clearly, this statement by the trial judge does not rise to the level of separate findings of fact and conclusions of law. It follows that the judgment in this case does not comport with the requirements of Rules 41(b) and 52(a).

Reversed and remanded.

Judges PHILLIPS and EAGLES concur.

CLIFTON RAY SELLERS, PLAINTIFF v. CSX TRANSPORTATION, INC., DEFENDANT

No. 9012SC766

(Filed 16 April 1991)

1. **Automobiles and Other Vehicles § 45.6 (NCI3d)— personal injury action—photographs of potholes—admissibility**

In an action to recover for personal injuries sustained while plaintiff was riding a moped where plaintiff alleged that defendant was negligent in failing to repair potholes in its railroad right of way, the trial court did not err in admitting photographs taken five months after the date of the accident, since plaintiff testified that the pictures were a fair and accurate representation of the hole when he first examined it upon his release from the hospital; there was no showing that conditions at the scene had changed between the time of the accident and the time several weeks later when plaintiff first examined the hole; and another witness testified that the hole depicted in the photograph looked the same as when she saw plaintiff on the ground after the accident and that the hole and the general condition of the tracks had remained unchanged for 5 to 6 years prior to the accident.

Am Jur 2d, Evidence §§ 789, 793.

2. **Railroads § 5.2 (NCI3d)— personal injury action—railroad's violation of safety statute—instruction on negligence per se proper**

Since N.C.G.S. § 62-224 imposing on defendant railway the duty to maintain crossings so as not to endanger the passage

of persons across them and a Fayetteville City Ordinance requiring that defendant railway do all things necessary for a smooth, easy, and comfortable crossing by every kind of vehicle were safety statutes, and violation of a duty imposed by a safety statute is negligence per se and conclusive evidence of both the presence of a duty and a breach of it, the trial court in a personal injury action arising from defendant's alleged negligence in failing to repair potholes in its right of way did not err in instructing the jury on negligence per se.

Am Jur 2d, Railroads §§ 480, 481, 483.

Railroad's liability to owner or occupants of motor vehicle for accident allegedly resulting from defective condition of road surface at crossing. 91 ALR2d 10.

3. Railroads § 5.3 (NCI3d)— automobile accident—plaintiff's contributory negligence

In a personal injury action arising from defendant's alleged negligence in failing to repair potholes in its right of way, the trial court did not err in refusing to grant a new trial upon defendant's motion for judgment n.o.v. on the issue of plaintiff's alleged contributory negligence where plaintiff offered evidence that he slowed down on approaching the crossing to assure his safety, and the evidence thus did permit an inference that plaintiff was not contributorily negligent.

Am Jur 2d, Railroads §§ 524, 538.

APPEAL by defendant from a judgment entered 11 January 1990 in Superior Court, CUMBERLAND County, by *Judge E. Lynn Johnson*. Heard in the Court of Appeals 11 February 1991.

Plaintiff instituted this action against CSX Transportation, Inc. to recover damages for personal injury sustained while riding a moped, alleging that his injury was caused by the negligence of CSX Transportation in failing to repair potholes in its right-of-way. The case was tried before a jury in the Superior Court of Cumberland County which returned a verdict for plaintiff in the amount of five hundred thirty-seven thousand six hundred forty-eight dollars. Defendant appeals.

Canady, Person & Britt, by Carl L. Britt, Jr., for plaintiff-appellee.

McLean, Stacy, Henry & McLean, by Everett L. Henry, for defendant-appellant.

LEWIS, Judge.

On 18 September 1987 Clifton Ray Sellers was operating a moped along East Russell Street in Fayetteville at approximately 8:30 a.m. Upon approaching the railroad crossing he slowed down to make sure he crossed the tracks at the proper angle. As he crossed the tracks he struck a hole in the pavement between the tracks and was thrown from the moped, severely injuring his left leg and knee and rendering him permanently disabled. In February of 1988, Mr. Sellers took photographs of the hole. The photographs were admitted into evidence at trial, where Mr. Sellers stated that the pictures were a fair and accurate representation of the hole when he first examined it upon his release from the hospital in October of 1988.

[1] Appellant first argues that the trial court erred in allowing the photographs into evidence when they were taken five months after the date of the accident. Photographs may be used as substantive evidence upon the laying of a proper foundation, N.C.G.S. § 8-97, and may be admitted when they are a fair and accurate portrayal of the place in question and are sufficiently authenticated. *Thomas v. Dixson*, 88 N.C. App. 337, 344, 363 S.E.2d 209, 214 (1988). The trial court admitted the photographs as illustrative evidence only. Where there is conflicting evidence as to the similarity of conditions at the time of the accident and at the time the photographs are made, the admissibility of the exhibits is a matter within the sound discretion of the trial judge. *Id.* We note there is no evidence in the record suggesting that conditions at the crossing had changed between the time of the accident and the time, several weeks later, when Mr. Sellers first examined the hole. Mr. Sellers testified that the photograph represented a fair and accurate depiction of the hole at the time of his first examination of it in October of 1988. Where the exhibits are properly authenticated and there is conflicting evidence as to the similarity of conditions at the time of the accident and at the time the exhibits were made, the issue of accuracy goes to the weight and not the admissibility of the exhibit. *Kepley v. Kirk*, 191 N.C. 690, 693,

132 S.E. 788, 790 (1926). We also note the testimony of witness Harvell, who stated that the hole depicted in the photograph looked the same as when she saw Mr. Sellers on the ground after the accident and that the hole and the general condition of the tracks had remained unchanged for 5 to 6 years prior to the date of the accident. We therefore conclude that the trial judge acted entirely within the scope of his discretion in admitting the photographs into evidence.

[2] The appellant argues that the trial court erred in instructing the jury on negligence per se in that the railroad violated N.C.G.S. § 62-224 and the City Code of Fayetteville, Chapter 25. Appellant mistakenly argues that under North Carolina case law a jury instruction of negligence per se is appropriate only where the statute establishes a standard of strict liability. The statute imposes on the railroad the duty to maintain crossings so not to "endanger the passage or transportation of persons or property along, over or across (the crossing)" and "so that persons may cross and property be safely transported across the same." N.C.G.S. § 62-224. This duty is "prescribed by the statute and has been recognized and enforced by this Court in numerous decisions." *Price v. Railroad*, 274 N.C. 32, 39, 161 S.E.2d 590, 596 (1968). The Fayetteville City Ordinance prescribes that the railroad "do all such . . . things as may be necessary for a smooth, easy and comfortable crossing of track by pedestrians and every kind of vehicle." Both the statute and the city ordinance are designed for the protection of the public and are, consequently, safety statutes. *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 369, 326 S.E.2d 295, 299 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986). Violation of a duty imposed by a safety statute is negligence per se and conclusive evidence of both the presence of a duty and a breach of it. However, recovery still requires proof of proximate cause. *Pearson v. Luther*, 212 N.C. 412, 421, 193 S.E. 739, 747 (1937). The record shows that the trial court did not suggest, in its instructions to the jury, that a violation of either the statute or the city ordinance established strict liability on the part of the defendants. We conclude that the trial court did not err in its instructions to the jury on the issue of negligence per se.

[3] Finally, the appellant argues that the trial court erred in refusing to grant a new trial upon defendant's motion for a judgment notwithstanding the verdict on the issue of plaintiff's alleged contributory negligence. Upon a motion by defendant for a judgment

notwithstanding the verdict, all the evidence of the plaintiff must be taken as true and considered in the light most favorable to him. *Musgrave v. Savings and Loan Assoc.*, 8 N.C. App. 385, 392, 174 S.E.2d 820, 824 (1970). In *Bowen v. Gardner*, 275 N.C. 363, 366, 168 S.E.2d 47, 51 (1969), the Supreme Court held that a motion for judgment notwithstanding the verdict should be denied where opposing inferences are permissible from the plaintiff's evidence regarding the issue of contributory negligence. *Id.* We note that the plaintiff testified that he slowed down on approaching the crossing to assure his safety. We agree with the trial judge that when viewed in the light most favorable to the plaintiff, the evidence does permit the inference that the plaintiff was not contributorily negligent. The trial court did not err in denying the motion for a judgment notwithstanding the verdict. *Id.*

No error.

Chief Judge HEDRICK concurs in the result only.

Judge COZORT concurs.

STATE OF NORTH CAROLINA v. BOBBY JEFFREY MONROE

No. 9016SC784

(Filed 16 April 1991)

Appeal and Error § 81 (NCI4th)— motion for appropriate relief for newly-discovered evidence—new trial granted—State's appeal—interlocutory

An order granting defendant a new trial for newly-discovered evidence was not appealable because the order left the case open for further action by the trial court. N.C.G.S. § 15A-1445(a)(2).

Am Jur 2d, Appeal and Error § 123.

Appeal by state of order granting new trial in criminal case. 95 ALR3d 596.

Judge PARKER concurs in the result only.

Judge COZORT dissenting.

APPEAL by the State from order entered 21 March 1990 in ROBESON County Superior Court by *Judge Coy E. Brewer, Jr.* Heard in the Court of Appeals 23 January 1991.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Murray, Regan and Regan, by Cabell J. Regan, for defendant-appellee.

GREENE, Judge.

The State appeals the trial court's order entered 21 March 1990 granting the defendant's motion for appropriate relief.

The defendant was tried and convicted by a jury of robbery with a firearm at the 21 June 1989 Criminal Session of Robeson County Superior Court. The defendant gave notice of appeal on 26 June 1989. On 12 December 1989, the State filed a motion to dismiss the defendant's appeal. On 19 December 1989, the defendant filed a motion for appropriate relief pursuant to N.C.G.S. § 15A-1415 (1988) on the ground of newly discovered evidence. On 21 March 1990, the trial court granted the defendant's motion and ordered a new trial.

The dispositive issue is whether the State may appeal this new trial order.

"As a general rule the state cannot appeal from a judgment in favor of a defendant in a criminal case, in the absence of a statute clearly conferring that right." *State v. Ward*, 46 N.C. App. 200, 202, 264 S.E.2d 737, 738-39 (1980); *cf. State v. Joseph*, 92 N.C. App. 203, 204, 374 S.E.2d 132, 133 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989) (defendant cannot appeal denial of his motion to dismiss). The statute which authorizes the State's appeal in this case is N.C.G.S. § 15A-1445(a)(2) (1988). It reads in pertinent part:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

(2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

. . . .

Our courts must strictly construe statutes which allow the State to appeal in criminal cases. *Ward*, 46 N.C. App. at 203, 264 S.E.2d at 739.

"Ordinarily in North Carolina an appeal will only lie from a final judgment." *Id.*; *Joseph*, 92 N.C. App. at 204-05, 374 S.E.2d at 133-34; N.C.G.S. § 7A-27(b) (1989) (appeal allowed from superior court to Court of Appeals from final judgment). A final judgment is a judgment which disposes of the case "as to the State and the defendant, leaving nothing to be judicially determined between them in the trial court." *State v. Childs*, 265 N.C. 575, 578, 144 S.E.2d 653, 655 (1965).

Here, the trial court's order of new trial on the basis of newly discovered evidence is interlocutory and not final because the order "leaves the case for further action by the trial court. . . ." *State v. Thompson*, 56 N.C. App. 439, 441, 289 S.E.2d 132, 133 (1982); *Ward*, 46 N.C. App. at 203-05, 264 S.E.2d at 739-40 (state's appeal pursuant to N.C.G.S. § 15A-1445(a)(1) of order dismissing criminal charges without prejudice held interlocutory). Except as otherwise provided by statute, "[t]here is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case . . . ." *State v. Henry*, 318 N.C. 408, 409, 348 S.E.2d 593, 593 (1986); *Joseph*, 92 N.C. App. at 206, 374 S.E.2d at 134; *see* N.C.G.S. § 7A-27(d) (1989) (appeal from interlocutory order granting new trial limited to civil actions); N.C.G.S. § 15A-979(c) (1988) (appeal by state prior to trial of a superior court order granting motion to suppress); N.C.G.S. § 15A-1432(d) (1988) (defendant may appeal interlocutory order entered by superior court finding error in district court's dismissal of criminal charges). Accordingly, the order granting the defendant a new trial is not appealable and this appeal is

Dismissed.

Judge PARKER concurs in the result only.

Judge COZORT dissents.

Judge COZORT dissenting.

I read N.C. Gen. Stat. § 15A-1445(a)(2) (1988) to provide for an immediate right of appeal by the State if the trial court grants defendant's motion for a new trial on the ground of newly discovered evidence. In my view, allowing an immediate appeal in this specific situation to determine whether a new trial should be conducted promotes judicial economy.

Thus, instead of dismissing the appeal, I would consider the merits of the appeal. On the merits, I affirm the trial court's discretionary decision to grant a new trial.

JIMMIE C. HIGGINS AND WIFE, JUDY HIGGINS v. TOWN OF CHINA GROVE, A MUNICIPAL CORPORATION WITH JAMES F. MORTON AS MAYOR

No. 9019SC964

(Filed 16 April 1991)

Appeal and Error § 368 (NCI4th)— failure to settle record—appeal dismissed

An appeal was dismissed where plaintiffs never served their proposed record on defendants, the record was not settled by agreement of the parties pursuant to Rule 11(a) of the North Carolina Rules of Appellate Procedure, plaintiffs violated Rule 12(a) of the North Carolina Rules of Appellate Procedure, which requires that the appellant file the record with the Court of Appeals fifteen days after it has been settled, and the plaintiffs also violated Rule 9(a)(1)i of the North Carolina Rules of Appellate Procedure, which requires that the record include a copy of any agreement, notice of approval, or orders settling the record on appeal.

Am Jur 2d, Appeal and Error §§ 444, 450, 451.

APPEAL by plaintiffs from order entered 13 July 1990 in ROWAN County Superior Court by *Judge Lester P. Martin, Jr.* Heard in the Court of Appeals 21 March 1991.

Corriher, Dooley & Locklear, by Richard D. Locklear, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Angela L. DeMent, for defendant-appellee.

GREENE, Judge.

Plaintiffs appeal the trial court's order entered 13 July 1990 in which the trial court granted the defendant's motion for summary judgment.

The defendant urges this Court to dismiss the plaintiffs' appeal on the ground that the plaintiffs "have substantially failed to comply with the North Carolina Rules of Appellate Procedure . . . ." Specifically, the defendant argues that, among other things, the plaintiffs did not settle the record on appeal prior to filing it with this Court.

This appeal must be dismissed because the plaintiffs did not follow at least three of our Rules of Appellate Procedure.

First, "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." *Richardson v. Bingham*, 101 N.C. App. 687, 689, 400 S.E.2d 757, 759 (1991). The thirty-five day time limit may be extended. N.C.R. App. P. 11(f). We note that although this case is decided pursuant to the Rules of Appellate Procedure in effect as of 13 July 1990, the thirty-five day time limit remains unaffected by the 1990 Amendment which became effective 1 October 1990. Here, the record was not settled by agreement of the parties pursuant to Rule 11(a), and even though the trial court extended to fifty days the time allowed the plaintiffs to serve their proposed record, it was never served upon the defendant pursuant to Rule 11(b). Furthermore, since the plaintiffs' notice of appeal was filed on 18 July 1990, the time for settling the record has now expired.

Second, N.C.R. App. P. 12(a) provides that the appellant shall file the record with this Court fifteen days after it has been settled. We note that this fifteen day time limit has not been altered by

the 1990 Amendment. Because the record was never settled and the time for settling the record has expired, the plaintiffs have violated N.C.R. App. P. 12(a).

Third, because there was no settlement of the record, the plaintiffs have also violated N.C.R. App. P. 9(a)(1)(i) which requires that the record include a copy "of any agreement [Rule 11(a)], notice of approval [Rule 11(b)], or order settling the record on appeal [Rule 11(c)]. . . ."

Accordingly, because the Rules of Appellate Procedure are mandatory, the plaintiffs' appeal is dismissed. N.C.R. App. P. 25(b) and 34(b)(1); *see also Richardson*, 101 N.C. App. at 690-91, 400 S.E.2d at 760.

Dismissed.

Judges PHILLIPS and PARKER concur.

DAVID SEELEY v. DEBORAH SEELEY

No. 9014DC650

(Filed 16 April 1991)

Appeal and Error § 68 (NCI4th)— reduction of attorney fees— appeal by attorney—dismissed

An appeal was dismissed where the attorney fees awarded in a child support action were subsequently reduced and the attorney appealed on her own behalf. North Carolina law does not permit the taking of an appeal by one who is not a party to the action, and an attorney is not a party to an action brought on behalf of her client. N.C.G.S. § 1-271 (1983).

Am Jur 2d, Appeal and Error § 195.

APPEAL by attorney for defendant from order entered 5 February 1990 in DURHAM County District Court by *Judge Carolyn D. Johnson*. Heard in the Court of Appeals 23 January 1991.

No brief filed for the parties.

Laurie Bradsher Preddy, pro se.

WYNN, Judge.

In this appeal, defendant's attorney, Laurie Bradsher Preddy ("Ms. Preddy"), acting on her own behalf, seeks to overturn the order reducing the amount of attorney's fees that the plaintiff, David Seeley ("Mr. Seeley"), had been previously ordered (by another district court judge) to pay her. For the reasons which follow, we dismiss this appeal.

I

Ms. Preddy had represented Mrs. Seeley in an action against Mr. Seeley for enforcement of court-ordered child support. On 5 June 1987, District Judge Orlando Hudson (now "Superior Court Judge") ordered Mr. Seeley to pay $1552.90 in attorney's fees which Mrs. Seeley incurred in prosecuting the action. Despite a later contempt citation, he failed to comply with the order to pay Mrs. Seeley's attorney's fees.

In January 1990, at a show cause hearing, District Court Judge Carolyn Johnson, upon motion of Mr. Seeley's attorney, reduced the attorney's fees previously ordered by Judge Hudson from $1552.90 to $575.00. From Judge Johnson's order of reduction, Ms. Preddy appealed on her own behalf.

II

Notwithstanding the meritorious nature of Ms. Preddy's argument, we are constrained to dismiss her attempt to appeal this issue because she has appealed on her own behalf and not on behalf of her client, Mrs. Seeley. Clearly, North Carolina law does not permit the taking of an appeal by one who is not a party to the action. N.C. Gen. Stat. § 1-271 (1983) provides: "Any *party* aggrieved may appeal in the cases prescribed in this Chapter." (Emphasis added.) An attorney is not a party to an action brought on behalf of her client.

The record in this case shows that Ms. Preddy filed a notice of appeal on her own behalf to overturn the order of Judge Johnson. The record further shows without qualification over her signature that the appeal was not taken by either of the parties to this action, but by "Laurie Bradsher Preddy, Movant." Since Ms. Preddy is not a party to this action, this appeal is,

Dismissed.

Judges PHILLIPS and EAGLES concur.

PEGGY JACKSON (HAWKS), PLAINTIFF v. HARVEY JACKSON, DEFENDANT

No. 9010DC641

(Filed 16 April 1991)

Divorce and Separation § 448 (NCI4th)— child support—disabled child—discontinuance of support

The trial court correctly set aside an order requiring defendant to support his disabled nineteen-year-old child even though plaintiff contended that defendant had agreed to do so in a consent judgment, because the parties had only agreed that they were obligated under the law to continue supporting the child. Defendant's obligation to continue supporting the child beyond its minority has been abrogated by the General Assembly, and he has not contracted to continue the payments apart from that obligation.

Am Jur 2d, Divorce and Separation §§ 1022, 1049.

APPEAL by plaintiff from order entered 23 March 1990, *nunc pro tunc* 13 March 1990, by *Judge Stafford G. Bullock* in WAKE County District Court. Heard in the Court of Appeals 13 December 1990.

Plaintiff's appeal is from an order that holds in effect that defendant is not required to support the parties' daughter, Sharon Marie Jackson, who has been paralyzed from her rib cage down since her birth in August, 1969. In 1977 when they were divorced the parties entered into a consent judgment which required defendant to pay $250 a month for the support and medical expenses of their two minor children until the older child reached the age of 18 years and provided that at that time the payments "may be reduced by agreement of the parties or may be subject to further Orders of the Court." The older child became 18 in 1980 and is not involved in the appeal. In April, 1989 when the child Sharon was 19 years old and defendant was paying $225 a month

toward her support, the court upon plaintiff's motion increased defendant's payments to $435 per month. In February, 1990, under the provisions of Rule 60(b)(5) and (6), N.C. Rules of Civil Procedure, defendant moved for relief from that order upon the ground that it was entered under the mistaken impression that our law still obligates a parent to support a child who is mentally or physically incapable of supporting itself regardless of age. In ruling on the motion the court recognized that G.S. 50-13.8, which required parents to continue supporting their disabled children beyond their minority when the consent judgment was entered, was amended in 1979 to eliminate that obligation, *Yates v. Dowless*, 93 N.C. App. 787, 379 S.E.2d 79, *aff'd*, 325 N.C. 703, 386 S.E.2d 200 (1989), and vacated the order on 23 March 1990. Plaintiff's appeal is from the latter order.

Young, Moore, Henderson & Alvis, P.A., by Harold G. Hall and Catherine T. Rockermann, for plaintiff appellant.

William E. Brewer, Jr. for defendant appellee.

PHILLIPS, Judge.

Plaintiff concedes that nothing else appearing our law does not now require parents to support their disabled children after they are of age. Her contention is that the order requiring defendant to support the child was erroneously vacated because by the consent judgment he had contracted to continue supporting the child and that under *Layton v. Layton*, 263 N.C. 453, 139 S.E.2d 732 (1965), *Harding v. Harding*, 29 N.C. App. 633, 225 S.E.2d 590, *disc. review denied*, 290 N.C. 661, 228 S.E.2d 452 (1976), and other decisions of our Courts, the trial court had authority to modify the consent judgment as changing circumstances warranted. That a parent can contract, either by a consent judgment or otherwise, to support a child beyond its minority is well established; but in our opinion defendant did not so contract by the following consent judgment provision that plaintiff relies upon:

> I. It is understood and agreed that nothing in this Judgment shall effect [sic] the obligation of either party to provide for the continued support and/or necessary medical expenses and necessities of Sharon Marie Jackson beyond the age of her majority and that all matters pertaining to her support and maintenance are subject to further Orders of the Court.

The only thing that the parties agreed to in this provision, it seems to us, was that they were obligated under the law to continue supporting the child; it cannot be construed as an agreement to continue supporting her independent of that obligation. Since defendant's obligation to continue supporting the child beyond its minority had been abrogated by the General Assembly and he had not contracted to continue the payments apart from that obligation, the order requiring him to continue supporting the child had no legal basis, as the trial court correctly ruled in setting it aside.

Affirmed.

Judges EAGLES and WYNN concur.

STATE OF NORTH CAROLINA v. ROGER DALE WOODY

No. 9024SC419

(Filed 16 April 1991)

1. **Searches and Seizures § 11 (NCI3d)— driving while license revoked—evidence seized from stopping defendant's vehicle—denial of motion to suppress**

The trial court properly denied defendant's motion to suppress in an action for driving with a revoked license where no evidence pertinent to defendant's conviction was obtained from the stop and the officer had reasonable grounds to suspect that defendant was driving while impaired and while his license was revoked.

Am Jur 2d, Searches and Seizures §§ 16, 99.

2. **Criminal Law § 73.2 (NCI3d)— order revoking driver's license—admissible—public records exception to hearsay rule**

The trial court did not err in a prosecution for driving with a revoked license by admitting into evidence the civil part of the revocation order. The order was admissible under the public records exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(8)(A).

Am Jur 2d, Automobiles and Highway Traffic § 148.

3. Automobiles and Other Vehicles § 144 (NCI4th)— driving with revoked license—evidence sufficient

Defendant's motion to dismiss a prosecution for driving with a revoked license was properly overruled. The State was required to prove that defendant operated a motor vehicle on a public highway while his operator's license was suspended or revoked and that he had knowledge of the suspension or revocation; the first two elements were supported by an officer's testimony and the last two by the prior revocation order.

Am Jur 2d, Automobiles and Highway Traffic § 148.

APPEAL by defendant from judgment entered 4 January 1990 by *Judge Chase B. Saunders* in WATAUGA County Superior Court. Heard in the Court of Appeals 15 January 1991.

Defendant appeals his conviction of driving while his license was revoked in violation of G.S. 20-28. In substance, the State's evidence was as follows: Officer Redmond of the Boone Police Department testified that on 4 December 1988 at about 3:30 a.m. while on patrol at the intersection of U.S. Highway 321 and N.C. Highway 105 Extension in the Town of Boone that he recognized defendant's van, saw that defendant was driving it, and when it pulled into the Wendy's parking lot he stopped it, because he had been present in the Magistrate's office about two hours earlier when defendant was cited for driving while impaired and that he suspected that defendant was still impaired and that the Magistrate had revoked his license for a few days as the statute requires when the chemical tests indicate impairment. The civil portion of a revocation order issued that morning by a Watauga County Magistrate was received for the limited purpose of establishing that defendant's license to drive was revoked at the time and that he had knowledge of it; it revoked defendant's driving privileges for at least ten days under the provisions of G.S. 20-16.2 and G.S. 20-16.5 and stated that defendant personally appeared before the Magistrate and surrendered his license to the court.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard L. Griffin, for the State.

Robert T. Speed for defendant appellant.

PHILLIPS, Judge.

Defendant assigns as error the trial court's denial of his motion to suppress the evidence seized from stopping his vehicle, which he contends was unlawful; the admission into evidence of the order revoking his driver's license; and the denial of his motion to dismiss at the close of the State's evidence. None of the defendant's assignments has merit and we find no error in the trial.

[1] Defendant's motion to suppress evidence was properly overruled for two reasons: First, no evidence pertinent to his conviction was obtained from the stop; second, the stop was not unlawful because the officer had reasonable grounds to suspect that defendant was driving while impaired and while his license was revoked. *State v. Trapper*, 48 N.C. App. 481, 269 S.E.2d 680, *appeal dismissed*, 301 N.C. 405, 273 S.E.2d 450 (1980), *cert. denied* by *Trapper v. North Carolina*, 451 U.S. 997, 68 L.Ed.2d 856 (1981).

[2] Instead of being error, receiving the civil part of the revocation order into evidence to show that defendant's driver's license was revoked and he knew it was authorized by the public records exception to the hearsay rule, Rule 803(8)(A), N.C. Rules of Evidence.

[3] Defendant's motion to dismiss the prosecution at the end of the State's evidence was properly overruled. To sustain the charge against him the State had to prove that (1) he operated a motor vehicle, (2) on a public highway, (3) while his operator's license was suspended or revoked, and (4) had knowledge of the suspension or revocation. *State v. Chester*, 30 N.C. App. 224, 226 S.E.2d 197 (1976). The first two elements of the offense were supported by Officer Redmond's testimony; the last two by the revocation order.

No error.

Judges EAGLES and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 APRIL 1991

BLACKWELDER v. SCOTT No. 9020DC411	Moore (88CVD507)	Affirmed in part and reversed in part
CHRISTENSEN v. PRICE No. 9014SC916	Durham (89CRS1359)	Affirmed
EVERETT v. DUKE UNIVERSITY No. 908SC322	Lenoir (87CVS916)	Reversed and remanded
GIBSON v. KENNEDY No. 9026SC1223	Mecklenberg (90CVS7515)	Appeal Dismissed
HANKS v. N.C. DIV. OF MOTOR VEHICLES No. 9027SC1192	Gaston (90CVS913)	Affirmed
HIMES v. HIMES No. 9030DC1173	Cherokee (88CVD14)	Affirmed
HOLMES v. N.C. DEPT. OF CRIME CONTROL No. 9010SC814	Wake (89CVS08836)	Affirmed
IN RE BARKER No. 9014DC1111	Durham (90-J-1)	Affirmed
IN RE BUNTON No. 9024DC881	Mitchell (88CVD218) (88CVD219)	Reversed in part, affirmed in part and remanded
JOHNSON v. PINNACLE GROUP, INC. No. 9026SC893	Mecklenberg (88CVS4816)	Reversed and remanded
LENTZ TRANSFER AND STORAGE CO. v. RHODES No. 9021DC578	Forsyth (87CVD3290)	Affirmed in part; reversed & remanded in part
ROBINSON v. MOSES H. CONE MEMORIAL HOSPITAL No. 9020SC714	Moore (89CVS192) (89CVS508)	Affirmed
SHELTON v. SHELTON No. 9021DC1212	Forsyth (82CVD3521)	Affirmed
SIZEMORE v. E. I. DUPONT DE NEMOURS & CO. No. 9029SC839	Transylvania (88CVS249)	Affirmed

STATE v. BARBER No. 9018SC1150	Guilford (89CRS63666)	No Error
STATE v. BURNS No. 9016SC612	Robeson (89CRS7287) (89CRS7288)	No Error
STATE v. CRANFORD No. 9022SC971	Davidson (87CRS12525) (90CRS303)	Affirmed
STATE v. EVANS No. 9010SC1136	Wake (89CRS60640) (89CRS60644)	No Error
STATE v. FORD No. 9026SC1165	Mecklenberg (89CRS55214)	No Error
STATE v. FORD No. 9012SC1214	Cumberland (89CRS42025) (89CRS42026) (89CRS42027) (89CRS42123)	No Error
STATE v. GOINS No. 9027SC1256	Gaston (89CRS5395) (89CRS5396) (89CRS5397)	No Error
STATE v. HARRIS No. 904SC1151	Onslow (90CRS5967)	No Error
STATE v. HUNT No. 9016SC927	Robeson (90CRS212) (90CRS213) (90CRS215)	No Error
STATE v. IVEY No. 906SC705	Hertford (88CRS4493) (88CRS4494) (89CRS959)	No Error
STATE v. LEACH No. 9025SC1228	Burke (90CRS4049)	No Error
STATE v. LOCKLEAR No. 9016SC1020	Robeson (89CRS16877)	Remanded for resentencing
STATE v. McCLAIN No. 9026SC1084	Mecklenberg (89CRS41072-01) (89CRS41072-02)	No Error
STATE v. McKINNEY No. 9024SC1236	Mitchell (88CRS63)	No Error

STATE v. MURPHY No. 905SC1115	New Hanover (90CRS3489) (90CRS3490) (90CRS3491) (90CRS3492) (90CRS5402)	Affirmed
STATE v. OSBORNE No. 9025SC1194	Caldwell (89CRS1674) (89CRS9013)	Attempted second degree sexual offense, #89CRS9013—reversed; Taking indecent liberties with a minor, #89CRS1674—no error
STATE v. RASH No. 9026SC981	Mecklenburg (89CRS86394) (89CRS86395) (89CRS86396) (89CRS5987)	Affirmed
STATE v. RUBIN No. 9026SC1141	Mecklenburg (89CRS66954)	No Error
STATE v. RUFFIN No. 907SC1260	Edgecombe (89CRS1152) (89CRS1153) (89CRS1154)	No Error
STATE v. SOUTHERN No. 9017SC1278	Caswell (90CRS194)	Remanded for resentencing
STATE v. SOWELL No. 9014SC1179	Durham (89CRS15779)	No Error
STATE v. STOKES No. 9029SC1270	Rutherford (89CRS7873)	No Error
STATE v. STRAITE No. 9026SC1186	Mecklenburg (89CRS81870) (89CRS81872) (89CRS81874)	No Error
STATE v. WILSON No. 9026SC1253	Mecklenburg (89CRS72280) (89CRS78328)	No Error
STATE v. WILSON No. 9026SC1120	Mecklenburg (90CRS19047)	Appeal Dismissed
STATE v. WITHERS No. 9019SC1204	Rowan (89CRS000591) (89CRS000592)	No Error

STATE EX REL. MAHBOUB v. MAHBOUB No. 9011DC723	Harnett (89CVD12)	Reversed & remanded
TOWN OF BAKERSVILLE v. WOODY No. 9024DC537	Mitchell (90CVD26)	Affirmed
WATKINS v. WATKINS No. 9015DC528	Orange (71CVD4)	Affirmed

FILED 16 APRIL 1991

EAST COAST MILLWORK DISTRIBUTORS v. JOSEPH No. 9017SC965	Surry (89CVS73)	Affirmed
GRAVES v. LANGFORD No. 9018SC1231	Guilford (89CVS2077)	Dismissed
JONES v. UNITED AMERICAN FREE WILL BAPTIST DENOMINATION No. 903SC706	Pitt (89CVS1218)	Dismissed
PHILLIPS v. PHILLIPS No. 9012DC657	Cumberland (79CVD0306) (88CVD3305)	Affirmed
SELLERS v. KWIK WAY TRUCKING CO. No. 9010IC866	Ind. Comm. (860364)	Affirmed
SIMON v. YOUNG No. 9021SC816	Forsyth (90CVS609)	Affirmed in part & reversed in part
STATE v. DEAN No. 9021SC810	Forsyth (89CRS6563)	No Error
STATE v. NEWTON No. 905SC795	New Hanover (89CRS21013)	No Error
STATE v. STEWARD No. 9012SC649	Cumberland (88CRS24031)	No Error
STATE v. TUTTLE No. 9021SC872	Forsyth (89CRS35801)	No Error
TROXLER-CERQUA v. JAMES No. 9015DC850	Orange (88CVD1249)	Dismissed
WACHOVIA BANK AND TRUST CO. v. TOMS No. 9029SC304	Henderson (88CVS538)	Affirmed

HART v. IVEY

[102 N.C. App. 583 (1991)]

SANDRA L. HART AND ROGER J. HART, PLAINTIFFS v. HOWARD L. IVEY, JR. AND JOHN ROSENBLATT AND DAVID KING AND DAVID HOWELL AND MIKE'S DISCOUNT BEVERAGE, INC., DEFENDANTS AND JOHN DENNIS LITTLE, JR. AND JOHN DENNIS LITTLE, SR., DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. HOWARD L. IVEY, JR., THIRD-PARTY DEFENDANT

No. 8926SC1192

(Filed 7 May 1991)

1. **Intoxicating Liquor § 24 (NCI3d) — furnishing alcohol to underaged driver — liability of social host**

The trial court erred by dismissing plaintiffs' claim under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs alleged that John Little, Jr. had consumed beer while under age at a party hosted by defendants Ivey, Rosenblatt, King and Howell before driving across a double yellow line into plaintiff Sandra Hart's vehicle. The statutory scheme as set out in the present chapter 18B of the General Statutes prohibits *any* sale, possession or giving of alcohol or malt beverages to an underaged person or aiding and abetting the sale or possession whether by a legally licensed commercial vendor, the county bootlegger, or a neighbor down the street. Because plaintiffs are members of the class of persons Chapter 18B (a public safety statute) is intended to protect, a violation is negligence *per se*, and the facts in this case more than adequately set forth the proximate cause element of plaintiffs' claim for purposes of a Rule 12(b)(6) motion. Nothing in the Dram Shop Act would eliminate or abrogate other causes of action arising either statutorily or by common law. N.C.G.S. § 18B-302(a), N.C.G.S. § 18B-121.

Am Jur 2d, Intoxicating Liquors §§ 553 et seq.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

2. **Intoxicating Liquor § 24 (NCI3d) — social host — alcohol furnished to underaged guests — no common law negligence**

Plaintiffs did not state a claim upon which relief could be granted under a common law theory of negligence where a social host provided beer to an underaged guest who subsequently drove across the centerline into plaintiffs. Our courts to date have not articulated any common law duty existing between a third party furnishing alcohol to underaged persons and the public at large.

Am Jur 2d, Intoxicating Liquors §§ 553 et seq.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

Judge LEWIS dissenting.

APPEAL by plaintiffs, Sandra L. Hart and Roger J. Hart, from judgment entered 1 August 1989 by *Judge Frank W. Snepp* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 2 May 1990.

Appeal by third-party plaintiffs, John Dennis Little, Jr. and John Dennis Little, Sr., from judgment entered 4 August 1989 by Judge Frank W. Snepp in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 1990.

The claims of plaintiffs and third-party plaintiffs were dismissed under Rule 12(b)(6) of the N.C. Rules of Civil Procedure for failure to state a claim upon which relief could be granted.

On 15 October 1986, plaintiffs filed a complaint (and subsequently filed an amended complaint) against John D. Little, Sr. and John D. Little, Jr. (hereinafter Little, Jr.) alleging that Little, Jr. had consumed beer at a party at the residence of Howard L. Ivey, Jr. (Ivey). The party was hosted by Ivey, John Rosenblatt (Rosenblatt), David King (King) and David Howell (Howell). Plaintiffs allege that defendants "charged all male guests . . . Two Dollars ($2.00) per person to drink beer." There are no allegations, however, that defendants were acting as "vendors" requiring a permit or license under the Alcohol Beverage Control statutes. All of the hosts and Little, Jr. were 18 years old at the time of the party, and therefore underage for purposes of possessing and consuming alcoholic beverages in violation of N.C. Gen. Stat. § 18B-300 *et seq.* (1983).

Plaintiffs alleged that Little, Jr. left the party and drove a vehicle (owned by Little, Sr.) under the influence of alcohol. Little, Jr. drove said vehicle across a double yellow line into the oncoming traffic, negligently colliding with plaintiff Sandra Hart's vehicle and causing substantial injuries to her.

Plaintiffs' amended complaint included claims for damages against defendants Ivey, Rosenblatt, King and Howell for negligence in hosting the party and providing beer to Little, Jr., in violation

of N.C. Gen. Stat. § 18B-302, and against Mike's Discount Beverage, Inc., for negligence in selling beer to Ivey, Jr., Rosenblatt, King and Howell in violation of N.C. Gen. Stat. § 18B-302. Defendants Little, Jr. and Little, Sr. also filed third-party actions for contribution against defendant Ivey based upon the same theories of negligence.

Defendants moved to dismiss plaintiffs' claims under Rule 12(b)(6) of the N.C. Rules of Civil Procedure. Such motions were granted in favor of Ivey, Rosenblatt, King and Howell on 1 August 1989. The trial court denied a similar motion by defendant Mike's Discount Beverage, Inc. Plaintiffs' negligence claim against Little, Jr. and Little, Sr. was unaffected by the trial court's ruling. The third-party complaints were dismissed on the same grounds on 4 August 1989. From the orders of 1 August 1989 and 4 August 1989, plaintiffs and third-party plaintiffs appeal.

Olive-Monnett, P.A. & Associates, by Terry D. Brown, for plaintiff-appellants.

Horack, Talley, Pharr & Lowndes, by Neil C. Williams, for defendant/third-party plaintiff-appellant John Dennis Little, Sr.

Goodman, Carr, Nixon and Laughrun, by Michael P. Carr, for defendant/third-party plaintiff-appellant John Dennis Little, Jr.

Kennedy, Covington, Lobdell & Hickman, by F. Fincher Jarrell, for defendants/third-party plaintiff-appellants John Dennis Little, Sr. and John Dennis Little, Jr.

Golding, Meekins, Holden, Cosper & Stiles, by John G. Golding and Terry D. Horne, for defendant-appellee Howard L. Ivey, Jr.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson and John P. Barringer, for defendant-appellee John Rosenblatt.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendant-appellee David King.

Underwood Kinsey & Warren, P.A., by C. Ralph Kinsey, Jr. and Richard L. Farley, for defendant-appellee David Howell.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in dismissing plaintiffs' claim for relief under Rule 12(b)(6) of the N.C.

Rules of Civil Procedure. For the reasons below, we hold that the trial court erred.

Under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1983), the question is whether the complaint, liberally construed, states a claim upon which relief may be granted under any theory. An incorrect choice of legal theory upon which the claim is based does not bar the claim if the allegations are sufficient under any other legal theory. *Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E.2d 69 (1981); *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

In deciding a motion under this rule, the trial court must treat the allegations of the complaint as true. *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984), *aff'd in part, rev'd in part*, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 107 S.Ct. 131, 93 L.Ed.2d 75 (1986). A claim may be dismissed under this rule if there is no law to support the claim, if there is an absence of fact to make a good claim, or if there is a disclosure of fact which will defeat the claim. *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988). In ruling upon a Rule 12(b)(6) motion, however, this Court is not limited to review of the issues briefed. *Brewer*, 52 N.C. App. at 605, 274 S.E.2d at 71.

Plaintiff's claims against Ivey, Rosenblatt, King and Howell in the present action are based upon: (1) a negligence *per se* violation of N.C. Gen. Stat. § 18B-302, and (2) common law negligence. Under either theory of negligence, this Court must decide if a cause of action can be maintained in North Carolina against a social host who provides alcoholic beverages to an underage person for consumption, resulting in impaired driving by the underage person and injuries to an innocent third-party.

I. Negligence *Per Se*

A. *Statutory Background and Analysis*

[1] Plaintiffs allege in their complaint that all four defendants violated N.C. Gen. Stat. § 18B-302 (1983) and are therefore negligent *per se*. Defendants counter that § 18B-302 deals only with commercial vendors and has no application in a social host situation. We disagree.

As early as 1935, it was unlawful under the laws regulating intoxicating liquors in this state for any person to ". . . deliver, furnish, purchase or possess any intoxicating liquor except as

authorized. . . ." N.C. Code of 1935 § 3411(b). This provision was separate from the Beverage Control Acts of 1933 and 1939. By 1943, this statute became N.C. Gen. Stat. § 18-2 (1943) and still was not included under the Beverage Control Acts. The Beverage Control Act of 1939 was amended in 1943, however, to include N.C. Gen. Stat. § 18-78.1, which regulated the sale of alcoholic beverages to minors.

Therefore, by 1943, the General Statutes contained two separate provisions, in addition to § 18-2, dealing with the sale of alcoholic beverages to *minors*. N.C. Gen. Stat. § 18-78.1 (1943) states: "No holder of a license authorizing the sale at retail of beverages, as defined in § 18-64 . . . shall . . . '(1) knowingly sell such beverages to any person under eighteen (18) years of age.' " Violation of the act resulted in the potential suspension or revocation of the license to sell. (N.C. Gen. Stat. § 18-46 also dealt with the sale of alcoholic beverages to minors by an ABC store.)

Under the same Article 4, "Beverage Control Act of 1939," N.C. Gen. Stat. § 18-90.1 (the predecessor to § 18B-302) stated: "It shall be unlawful for any person, firm, or corporation to sell or give any of the products authorized to be sold by this article to any minor under eighteen years of age." N.C. Gen. Stat. § 18-90.1 (1943).

It is therefore evident that in the early period of the development of alcoholic beverage control laws, the Legislature provided for specific penalties for commercial licensees and ABC stores for selling to minors (N.C. Gen. Stat. § 18-78.1) *and* for *any* person, firm or corporation who sold or gave alcohol to minors. (N.C. Gen. Stat. § 18-90.1). Since no entity was legally entitled to sell alcoholic beverages without a license, N.C. Gen. Stat. § 18-77 (1943), N.C. Gen. Stat. § 18-90.1 clearly was intended to cover situations involving non-licensees.

Over the years, the Alcoholic Beverage Control laws of the state have been repeatedly amended and rewritten. In 1971, a major rewrite of Chapter 18 occurred. Section 18-2, which had been part of the laws carried forward from Prohibition days, became § 18A-3 under Article I, "General Provisions." This statute stated, "(a) No person shall . . . deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this Chapter." N.C. Gen. Stat. § 18A-3 (1971). *See also* 1971 N.C. Sess. Laws. c. 872

s. 1. N.C. Gen. Stat. § 18-90.1 became § 18A-8. 1971 N.C. Sess. Laws. c. 872 s. 1.

In 1981, Chapter 18A was rewritten and recodified as Chapter 18B. 1981 N.C. Sess. Laws c. 412 s. 2. Section 18A-3 (General Prohibition) was recodified as § 18B-102, in essentially the same form. *Id.* The remaining statute (§ 18A-8) became § 18B-302. *Id.* Under this statute, the one before us in the present case:

> **Sale to or purchase by underage persons.**
>
> (a) Sale.—It shall be unlawful for any person to:
>
> (1) Sell or give malt beverages or unfortified wine to anyone less than 19 years old; . . . .
>
> (2) Sell or give fortified wine, spiritous liquor, or mixed beverages to anyone less than 21 years old.
>
> (b) Purchase or Possession.—It shall be unlawful for:
>
> (1) A person less than 19 years old to purchase, to attempt to purchase, or to possess malt beverages or unfortified wine; or
>
> (2) A person less than 21 years old to purchase, to attempt to purchase, or to possess fortified wine, spiritous liquor, or mixed beverages.
>
> (c) Aider and Abettor.
>
> (1) By Underage Person.—Any person who is under the lawful age to purchase and who aids or abets another in violation of subsection (a) or (b) of this section shall be guilty of a misdemeanor punishable by a fine up to five hundred dollars ($500.00) or imprisonment for not more than six months, or both, in the discretion of the court.

N.C. Gen. Stat. § 18B-302 (1983) (emphasis added). This statute now appears under Article 3, "Sale, Possession, and Consumption."

N.C. Gen. Stat. § 18-78.1, dealing with sale to minors by licensees, was deleted in its previous form as was any reference to the sale to minors by ABC stores (N.C. Gen. Stat. § 18-46). The effect of § 18-78.1 was perpetuated, however, through the language of N.C. Gen. Stat. § 18A-43: "If any permittee violates any of the provisions of this chapter, or Chapter 105, or any rule or regulation pro-

mulgated under authority of either chapter . . . his permit may be revoked or suspended. . . ." The statutory scheme of § 18A-43 has been carried forward to the present in Chapter 18B, Article 10 "Retail Activities" (N.C. Gen. Stat. § 18B-1005), which states in part: "It shall be unlawful for a permittee . . . to knowingly allow any of the following kinds of conduct to occur on his licensed premises: (1) Any violation of this Chapter." N.C. Gen. Stat. § 18B-1005 (1983). Therefore, a sale to an underaged individual by a permittee under N.C. Gen. Stat. § 18B-302 (the statute directly before us) is also a violation of § 18B-1005. Moreover, a violation of any of these statutes is a violation of the "general prohibition" under § 18B-102(a).

Statutory analysis and common sense dictate that the Legislature did not intend to punish sales to underaged persons by legally licensed permittees, and not to punish unlicensed "persons" who sell or give alcohol or malt beverages to those underaged. The statutory scheme as set out in the present Chapter 18B and discussed above prohibits *any* sale, possession or giving of alcohol or malt beverages to an underaged person or aiding and abetting the sale or possession whether by a legally licensed commercial vendor, the county bootlegger or a neighbor down the street. Therefore, under our statutory analysis and the facts of this case, N.C. Gen. Stat. § 18B-302(a) dealing with "sales" applies to the issues presented in the present case.

We note also that even though it was not specifically alleged in the pleadings, defendants are potentially liable for violating § 18B-302(c) which states that it is unlawful for *"[a]ny person* who is under the lawful age to purchase and who aids or abets another in violation of subsection (a) or (b) of this section. . . ." (Emphasis added.)

B. *Violation of public safety statutes is negligence per se.*

"It is well-settled law in this jurisdiction, that when a statute imposes upon a person a specific duty for the protection of others, that a violation of such statute is negligence *per se.*" *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955). To make a case for actionable negligence, the plaintiff must establish the additional element of proximate cause. *Id.* (citations omitted). *See Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983), for a comprehensive discussion of the development in the law in

this area. (The statute in question should be designed to promote safety; the plaintiff must be a member of the class protected by the statute and the defendant must be a person who has specific duties under the statute.) *See also* W. Prosser, *The Law of Torts*, § 36 (5th ed. 1984).

We now turn to whether a violation of § 18B-302 is negligence *per se*. Plaintiffs allege in the complaint that defendants Ivey, Rosenblatt, King and Howell "purchased two kegs of beer" and subsequently hosted a party and served Little, Jr. a quantity of beer, allegedly causing Little, Jr. to become intoxicated. Because of his intoxication, Little, Jr. allegedly caused plaintiff's injuries.

Taking these allegations as true as we are required to do under Rule 12(b)(6), it is clear that defendants violated § 18B-302(b) in that they possessed malt beverages. Their potential culpability to plaintiffs, however, arises out of a violation of subsections (a) and (c), which they also violated according to the pleadings, by virtue of selling or providing malt beverages to Little, Jr. and aiding and abetting him in possessing it. Because plaintiff is a member of the class of persons Chapter 18B (a public safety statute) is intended to protect, a violation of this statute is negligence *per se*.

The *Hutchens* Court held that the general purpose of N.C. Gen. Stat. § 18A-34 (now § 18B-305(a)) is "(1) the protection of the customer from adverse consequences of intoxication and (2) the protection of the community at large from the injurious consequences of contact with an intoxicated person." 63 N.C. App. at 16, 303 S.E.2d at 593. The court further held that the requirements of § 18A-34 were the minimum standard of conduct for defendant-licensees and that a violation of the statute could give rise to a negligence action against the licensee by a member of the public injured by the intoxicated customer. *Id.* While § 18A-34 is not the statute involved in the case *sub judice*, the public policy and general purposes as set forth above are equally applicable to other provisions within the current Chapter 18B.

Therefore, we hold that N.C. Gen. Stat. § 18B-302 sets forth the minimum standard of conduct for the citizens of North Carolina in selling or providing or aiding in an underaged individual's possession and consumption of alcoholic beverages. We need not recite at any length the record of carnage on our public highways caused by drivers (particularly those underage) who have consumed intoxicating beverages. Needless to say, the public, as evidenced by

the actions of our Legislature, has increasingly focused on the need to curtail and punish the illegal consumption of alcoholic beverages by underage persons.

We therefore hold that a violation of N.C. Gen. Stat. § 18B-302 is negligence *per se*. *See Freeman v. Finney and Zwigard v. Mobil Oil Corp.*, 65 N.C. App. 526, 309 S.E.2d 531 (1983), *disc. review denied*, 310 N.C. 744, 315 S.E.2d 702 (1984). In *Freeman*, this Court stated that N.C. Gen. Stat. § 18A-8 (now § 18B-302)

> imposes a duty or obligation not to sell beer to minors. The purpose of this statute is to protect both the minor and the community at large from the possible adverse consequences of the minor's intoxication. *See Hutchens, supra.* When a statute, such as the one in this case, imposes upon a person a specific duty for the protection of others, a violation of such statute constitutes negligence *per se*.

65 N.C. App. at 529, 309 S.E.2d at 534 (citations omitted).

The court in *Freeman* further pointed out "[d]efendants . . . were negligent as a matter of law when they failed to conform to the standard imposed by G.S. 18A-8. It is up to plaintiffs, however, to prove that defendants' negligence was a proximate cause of their injuries." *Id.*

C. *Proximate Cause*

Historically, the rule of *non-liability* of a provider of alcohol to an individual who subsequently injured a third-party has rested on the two rationales quoted in *Hutchens*.

> First, the proximate cause of both the patron's intoxication and the subsequent injury to the third party was held to be the consumption of liquor, not its sale or furnishing. Second, even if the sale or furnishing were found to have caused the patron's intoxication, the subsequent injury to a third party was held to be an unforeseeable result of the furnishing of the intoxicating beverage.

63 N.C. App. at 7, 303 S.E.2d at 588.

Without repeating the extensive discussion in *Hutchens* as to the development of the law in regard to proximate cause in this type of situation, suffice it to say that the court in *Hutchens*

has enunciated the law in North Carolina that we are bound to follow. The *Hutchens* court stated:

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and forseen; . . . .

Id. at 10, 303 S.E.2d at 590, *quoting, Rappaport v. Nichols*, 31 N.J. 188, 202, 156 A.2d 1, 8 (1959).

The Court then agreed with the reasoning of the Supreme Court of California in *Vesley v. Sager*, 5 Cal.3d 153, 163-64, 95 Cal. Rptr. 623, 630-31, 486 P.2d 151, 158-59 (1971).

> To the extent that the common law rule of nonliability is based on concepts of proximate cause, we are persuaded by the reasoning of the cases that have abandoned that rule . . . [A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct . . .
>
> . . . Moreover, "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." . . .
>
> . . . Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication. Under the above principles of proximate cause, it is clear that the *furnishing* of an alcoholic beverage to an intoxicated person *may be a proximate cause* of injuries inflicted by that individual upon a third person. *If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent.* (Citations omitted.) (Emphasis supplied.)

Id. at 11-12, 303 S.E.2d at 591.

The *Hutchens* court thus states the law in North Carolina to permit a claim as in the case *sub judice* to go forward upon proper pleading of facts showing proximate cause.

The case before us requires only a minor extension of *Hutchens* and *Freeman* which dealt with commercial furnishing of alcohol. The allegations show that the defendants illegally purchased beer and provided it to defendant Little, Jr., thus aiding and abetting his possession. Little, Jr. became intoxicated and subsequently drove his vehicle into the plaintiff's vehicle. For purposes of a Rule 12(b)(6) motion, the facts in this case more than adequately set forth the proximate cause element of plaintiff's claim. "The question of whether defendants should have foreseen the injurious consequences from their negligent conduct and whether their conduct was a substantial cause of plaintiff's injuries cannot be discarded as a matter of law on a motion to dismiss or for judgment on the pleadings." *Freeman*, 65 N.C. App. at 529, 309 S.E.2d at 534.

D. *Effect of "Dram Shop" Legislation*

Finally, we need to address the contention raised by defendants that the 1983 enactment by the Legislature of Article 1A "Compensation for Injury Caused by Sales to Underage Persons" (Dram Shop Act) expresses the legislative intent to limit recovery in civil actions to circumstances provided for in Article 1A. We do not agree with defendants' interpretation.

By virtue of enacting Article 1A, the Legislature created a statutory cause of action limited to the specific circumstances involving a permittee's or ABC Board's sale of alcoholic beverages to an underaged person. N.C. Gen. Stat. § 18B-121 (1983). Specific requirements and limitations relating to damages were included in the Act. N.C. Gen. Stat. § 18B-123 (1983). Absolutely nothing is indicated in the Act which would eliminate or abrogate other causes of action arising either statutorily or by common law. Absent obvious legislative intent to preclude causes of action against any persons other than permittees and ABC Boards, this Court cannot dismiss plaintiffs' claim as to these defendants.

In summary, we hold consistent with *Hutchens* and *Finney* that violations of N.C. Gen. Stat. § 18B-302 establish negligence *per se*. Therefore, the trial court erred in dismissing plaintiffs' cause of action arising out of a violation of N.C. Gen. Stat. § 18B-302 and stating sufficient allegations of proximate cause.

II. Common Law Negligence

[2] Plaintiffs also argue that they have a claim against defendants under a theory of common law negligence because they furnished Little, Jr. with alcoholic beverages. We disagree.

A review of the common law of this State reveals no precedent for the existence of such a cause of action. Our courts to date have not articulated any common law duty existing between a third-party furnishing alcohol to underaged persons and the public at large. This Court is therefore not prepared to establish any such common law duty under the facts of this case, especially since our Legislature has already addressed the issue by virtue of enacting certain public safety statutes as previously discussed giving rise to a statutory duty and thus the negligence *per se* cause of action advocated by plaintiffs.

In summary, we hold that under the facts in the case before us, plaintiffs have alleged a negligence *per se* cause of action against the social hosts (defendants) who allegedly provided malt beverages to an underaged person for consumption, resulting in his impaired driving and subsequent injuries to a third-party. Plaintiffs may therefore proceed under § 18B-302.

To hold otherwise would be contrary to North Carolina law and the public policy in this State. Likewise, such determination would potentially insulate negligent parties from civil responsibility in a situation where there is potential joint and several liability as well as violation of a public safety statute. This Court declines to determine that such insulation is the law in this State.

In conclusion, we can anticipate concern over this extension of liability to social hosts. The facts of this case are limited to the providing of alcoholic beverages to underaged persons in contravention of the law. Alcoholic beverages are strictly controlled by the laws of our State and are provided to individuals under specific regulatory provisions. Just like innocent third-parties who take their chances by being on the highway at the same time as the intoxicated underaged driver, those who decide to provide alcohol to underaged persons must take their chances to suffer the financial consequences of their acts.

Reversed and Remanded.

Judge GREENE concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I dissent because I believe the majority is legislating.

The majority extends *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983), in holding that N.C.G.S. § 18B-302 imposes liability in tort on non-commercial social hosts who provide alcoholic beverages to minors. N.C.G.S. § 18B-302(a)(1) in pertinent part provides:

> Sale to or purchase by underage persons
>
> (a) Sale—It shall be unlawful for any person to
>
> (1) Sell or give malt beverages or unfortified wine to anyone less than 19 years old; . . .

The majority alternatively bases the defendant's liability on the fact that section (b) of the statute prohibits any underaged minor from "possession" of an alcoholic beverage and section (c) prohibits "any person" from aiding or abetting a minor in violating section (b). N.C.G.S. § 18B-302.

On close reading of this statute, I cannot conclude that the statute unambiguously prohibits non-commercial social hosts from providing malt beverages to underaged persons. In interpreting any statute, legislative intent is controlling and can be ascertained from the phraseology of the statute, the nature and purpose of the act, and the consequences which would flow from its interpretation. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987). This particular statute is part of Chapter 18B of the North Carolina General Statutes which addresses "Regulation of Alcoholic Beverages." The purpose of Chapter 18B is "to establish a uniform system of control over the sale, purchase, transportation, manufacture, consumption and possession of alcoholic beverages in North Carolina. . . ." N.C.G.S. § 18B-100. The section at issue, 18B-302, is entitled "Sale to or purchase by underage persons." The specific subsection being addressed in this case is entitled "Sale." N.C.G.S. § 18B-302(a)(1). Furthermore, subsection

(d) of 18B-302 provides statutory defenses for a "seller" of alcoholic beverages but no such defenses are indicated for a social host.

In 1983 this statute was amended by the legislature as part of an extensive modification of the statutes regulating alcoholic beverages and the related problems of intoxicated drivers. The Safe Roads Act includes the Dram Shop Act, N.C.G.S. § 18B-120, *et seq*. This Act does allow a potential claim against the individual who sold or furnished the alcohol, but only against the "permittee" or "Local Alcohol Beverage Control Board." N.C.G.S. § 18B-121. It specifically excludes holders of Special Occasion Permits, Limited Special Occasion Permits, and Special One-Time Permits. N.C.G.S. § 18B-125. These frequently include social hosts. An incongruous result of the majority opinion is that social hosts can insulate themselves by obtaining one of these special or limited permits.

Words and phrases of a statute may not be interpreted out of context; rather, individual expressions must be interpreted as part of a composite whole, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute. *Jolly v. Wright*, 300 N.C. 83, 86, 265 S.E.2d 135, 137 (1980) (citations omitted). In the context of the statutory structure as a whole the prohibition against the providing of alcohol to a minor by "any person" in N.C.G.S. § 18B-302 (a)(1), as well as the prohibition against aiding and abetting any minor in the possession of alcohol in section (c), are at best ambiguous in application to non-commercial social hosts. It is a longstanding rule of construction in this jurisdiction that criminal statutes are to be strictly construed against the state and any ambiguity is to be resolved in favor of a defendant. *State v. Martin*, 7 N.C. App. 532, 534, 173 S.E.2d 47, 48 (1970) (citations omitted). Where a statute does not apply for the purpose of criminal liability it cannot serve as the basis for liability in tort. *See Hutchens v. Hankins*, 63 N.C. App. 1, 16, 303 S.E.2d 584, 593-94 (1983).

Where a statute specifies the acts to which it applies, an intention to exclude all others from its operation may be inferred. *Jolly v. Wright*, 300 N.C. 83, 89, 265 S.E.2d 135, 140 (1980). In holding otherwise, the majority is extending the application of the statute to a class of persons to which the statute cannot clearly be held to apply. The rationale employed by the majority can be applied to extend liability to social hosts who serve alcoholic beverages to intoxicated adults under N.C.G.S. § 18B-305(a), even though

that statute is entitled "Sale to Intoxicated Person" and applies to social hosts no more than any other statute of this section. In the absence of clear legislative intent, statutes imposing penalties should not be extended by judicial construction. *Winston Salem Joint Venture v. City of Winston Salem*, 54 N.C. App. 202, 205, 282 S.E.2d 509, 511 (1981).

In *Skinner v. Whitley*, 281 N.C. 476, 484, 189 S.E.2d 230, 235 (1972), in which the administrator for an unemancipated minor sought the abolition of parent-child immunity, a unanimous court held that "piecemeal abrogation of established law by judicial decree is like partial amputation, ordinarily unwise and usually unsuccessful." In the same opinion, the court said: "the simplest way to effectuate a change in the law is to enact a statute doing so. The courts have frequently said that the question of public policy is to be determined by the legislature and not by the court." *Id.*

I agree entirely with the majority that it is reprehensible for anyone to give or sell alcoholic beverages to minors. I abhor the devastating loss of life attributable so patently to intoxication. But I am even more strongly of the opinion that the three branches of Government must be separately maintained in order to preserve the strength and independence of each. As Justice Huskins wrote in deciding *Skinner v. Whitley, supra*, "[W]e think innovations upon the established law in this field should be accomplished *prospectively* by legislation rather than retroactively by judicial decree. Such changes may be accomplished more appropriately by legislation. . . . Certainly that course is much preferred over judicial piecemeal changes in a case by case approach." *Id.*

If I were Governor or in the legislature, I would build a platform and take my stand. While the majority opinion is a fine blueprint for legislation, this Court has no such authority.

I would uphold the able trial judge.

STATE OF NORTH CAROLINA v. NORMA PRICE ALLEN

No. 902SC14

(Filed 7 May 1991)

1. Criminal Law § 75.1 (NCI3d)— maintaining building for keeping marijuana—illegal arrest—subsequent statements admissible

The trial court did not err in a prosecution for knowingly maintaining a building for keeping marijuana by admitting defendant's statements to officers where officers arrived at defendant's residence with a search warrant but not an arrest warrant; defendant was detained while officers walked through the house and searched a nearby barn; a room with marijuana plants, track lighting, timers, potting soil and other gardening paraphernalia was found in the barn; and defendant subsequently made a statement to officers. The State did not appeal the trial court's order concluding that the search warrant was invalid as to defendant's house, so that the law of the case was that the officers did not have probable cause to search the house and entered it illegally; defendant was arrested when she was confined to a single area soon after officers entered her home; the officers who arrested defendant had information implicating her husband in a marijuana growing scheme, but no information about defendant, so that she was arrested without probable cause; even assuming probable cause after marijuana was found growing in the barn, defendant's arrest inside her house without a warrant was fatally defective under the Fourth Amendment to the U. S. Constitution; defendant's statements were not the product of the illegal arrest because approximately an hour and a half elapsed between the illegal intrusion into defendant's home and the giving of her statements; although defendant was held separately from her husband, not allowed to speak with him, and was in the presence of one or more officers most of the time, she was permitted to bathe and change clothes in private; defendant was thirty-five years old on the day of her arrest and licensed as a registered nurse; and there is nothing in the record showing any misconduct on the part of the officers or intent to violate the defendant's rights.

Am Jur 2d, Evidence § 613.

2. Narcotics § 4 (NCI3d)— knowingly maintaining building for marijuana—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of knowingly maintaining a building for the keeping of marijuana where, in addition to defendant's inculpatory statements, the State presented evidence that defendant and her husband held title to the property on which the barn in which marijuana was growing was situated; defendant obtained the building permit for the barn; defendant contacted the tax collector to find out whether it could be listed in her name on a separate listing; electric power to the house and barn were metered separately; the charges for the barn for February, March, and April of 1988 were low relative to the house, but much higher in August, September and October of 1988; and defendant paid the electric utility bill between 12 February 1988 and 13 September of 1988 with checks drawn on a joint bank account with her husband.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 44, 49.

Judge WELLS dissenting.

APPEAL by defendant from Judgment of *Judge Thomas S. Watts* entered 17 August 1989 in WASHINGTON County Superior Court. Heard in the Court of Appeals 25 September 1990.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General E. H. Bunting, Jr., for the State.

Kirby, Wallace, Creech, Sarda, Zaytoun and Cashwell by Narley L. Cashwell for defendant appellant.

COZORT, Judge.

The defendant was convicted of knowingly maintaining a building used for the keeping of marijuana. On appeal she contends, *inter alia*, that inculpatory statements used against her at trial were obtained in violation of the Fourth Amendment. We find no error.

At approximately 10:50 a.m. on 28 October 1988, State Bureau of Investigation (SBI) Special Agents K. L. Bazemore and D. L. Ransome, Washington County Deputy Sheriff D. B. Spickett, and Plymouth Police Officer G. H. Hassell arrived at the residence of William Allen and defendant Norma Allen. The officers brought with them a search warrant authorizing them to search the premises

located at "Rt. 1 Box 286, Plymouth N. C." The officers did not have a warrant for the defendant's arrest.

"[D]ressed in a nightgown and robe," the defendant answered the door. Special Agent Bazemore identified himself and the other officers. At trial he testified that he told

> Mrs. Allen that we had a search warrant for her arrest and the outbuilding that had been issued by the Resident Superior Court Judge, William Griffin, and that we were going . . . were intending to search the residence that . . . I also told her that Special Agent D. M. Barrington and a Washington County Deputy Sheriff [Janice Spruill] had been dispatched to Weyerhaeuser to pick up her husband to return him to the residence also. At that time I provided her with a copy [of the search warrant].

With guns drawn, Special Agents Bazemore and Ransome walked through the house; Deputy Sheriff Spickett and Officer Hassell remained with the defendant in the den. After completing his sweep of the house, Bazemore walked approximately sixty to seventy-five feet from the residence to the "two story barn shaped outbuilding" described in the search warrant. Inside this "dutch-style" barn he found a concealed staircase leading to an upstairs room where he discovered marijuana plants, track lighting, timers, potting soil, and other gardening paraphernalia.

After Bazemore returned to the house, the defendant asked for and received permission to shower and dress. Bazemore and Ransome escorted the defendant to her bedroom, where she selected clothing under the supervision of the officers. The defendant was escorted to the bathroom, which was searched again, and she was instructed to knock on the door after she had showered and dressed so that she could be escorted back to the den. After an interval of "fifteen or twenty minutes" the defendant was taken back to the den.

At approximately 11:40 a.m. the defendant's husband, William Allen, arrived in the custody of Deputy Sheriff Spruill and Special Agent Barrington. William Allen was taken into the kitchen and advised of his constitutional rights. Shortly after questioning of William Allen began, he "indicated he did not want to make a statement; that he wanted a lawyer." At approximately 12:25 p.m. Special Agent Bazemore advised Norma Allen of her constitutional

rights from a form provided by the SBI. She consented to interrogation, which concluded at 1:53 p.m. Defendant and her husband could see each other during his brief, and her more lengthy, interrogation, but they were held and questioned separately.

At trial Bazemore's voir dire testimony indicated that he regarded Mrs. Allen as having "not been arrested" when her interrogation began. He testified, however, that, except for the period when she was showering and dressing, "there was an officer, one of us, or two or three of us, in her presence the entire time." Moreover, he testified that at no time was Norma Allen free to leave the custody of the officers.

Although characterized by Special Agent Bazemore as a "statement" taken from the defendant, no transcript of the interview between Bazemore and defendant was made. The exchange consisted of questions from Bazemore and Ransome and answers from the defendant. The "statement" introduced against the defendant at trial consisted of a synopsis of the interview based on Bazemore's notes. At trial Bazemore testified that the "only thing in this report that I'm saying are her words are those things that I have in quotes and I actually quoted at the time she said it to me."

Agent Bazemore testified that defendant initially denied any involvement in the marijuana growing operation. She later admitted knowing what her husband was doing, and she begged him not to do it. Her husband informed her that money for construction of the barn came from a man in Plymouth, who later supplied "grow lights" and 20 to 25 marijuana plants. She would not say where her husband obtained the other 170 plants. On at least three occasions, she was unable to pay the large electric bill for the barn. Her husband obtained cash from the man in Plymouth. She put the cash in her checking account and wrote a check to pay the bill. She knew the plan was that her husband would grow and harvest the marijuana and provide it to the man in Plymouth at a preset price. After expenses, what she and her husband had left was their profit.

On approximately 15 March 1989, William Allen pled guilty to manufacturing marijuana and maintaining a building used for the keeping of marijuana. He received a suspended sentence of two years in prison and was placed on probation for two years.

Defendant Norma Allen was indicted for manufacturing a controlled substance and for maintaining a building for the keeping of a controlled substance (marijuana), violations of N.C. Gen. Stat. §§ 90-95(a)(1) and 90-108(a)(7), respectively. She pled not guilty to both charges. On 3 March 1989, the defendant moved to suppress all evidence seized in the search of the house and the barn on the grounds that Special Agent Bazemore's affidavit did not establish probable cause to search either the house or the barn and that no exigent circumstances existed at the time of the officers' arrival to justify a warrantless entry and search of either building. After a hearing on that motion, the trial court concluded that the affidavit was "sufficient to establish probable cause to search the barn located on the [Allens'] property but not the residence." Accordingly, on 14 March 1989, the court entered an order allowing the defendant's motion as to the house and denying it as to the barn. The State objected to that portion of the order suppressing evidence seized from the house but did not perfect an appeal on that issue.

On 2 June 1989, the defendant moved to suppress all evidence, "including but not limited to any and all statements by the Defendant, documents, notes, personal and business records," which could be traced "directly or indirectly to the invalid search" of her residence. On 5 June 1989, the defendant moved to suppress "any and all statements by the Defendant, which . . . can be traced to or resulted from the invalid seizure of her person at her residence." After a hearing the trial court, on 15 August 1989, entered an order denying the "defendant's objection to the admissions [*sic*] of the statement and her Motion to Suppress the same."

On 14 August 1989, the case below came to trial. On 17 August 1989, the defendant was found not guilty of manufacturing marijuana but guilty of knowingly maintaining a building used for the keeping of marijuana. Upon conviction of the second charge, the defendant was sentenced to imprisonment for two years (suspended except for an active term of ninety days) and to pay a fine of $4,500; she was placed on probation for five years and required to surrender her license as a registered nurse, among other conditions.

[1] On appeal the defendant assigns error to the trial court's denial of her motion to suppress her inculpatory statements. She contends that the statements were the fruit of an illegal entry

and arrest. We find no error in the trial court's decision to admit the defendant's statements made to Agent Bazemore.

Relying on *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441 (1963), this Court has stated that, "[a]s a general rule, evidence obtained following an illegal intrusion into a defendant's home is 'tainted' by the original illegal entry and is therefore inadmissible." *State v. Yananokwiak*, 65 N.C. App. 513, 518, 309 S.E.2d 560, 564 (1983). *Wong Sun*, like the case below, presented the question of whether incriminating statements were the fruit of an illegal entry and arrest. In *Wong Sun* federal narcotic agents, with neither an arrest warrant nor a search warrant, forcibly entered a laundry, followed James Wah Toy down a hall through his living quarters and into his bedroom, "placed him under arrest and handcuffed him." *Wong Sun*, 371 U.S. at 474, 9 L.Ed.2d at 447. Although a search of Toy's quarters uncovered no narcotics, Toy, in response to questions from the officers, made a number of incriminating statements. The court held that verbal evidence which derives immediately from an unlawful entry and an unauthorized arrest "is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." *Id.* at 485-86, 9 L.Ed.2d at 454. In cases like that of *Wong Sun*, suppression of tainted evidence turns on " 'whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Id.* at 488, 9 L.Ed.2d at 455 (quoting Maguire, Evidence of Guilt, 221 (1959)).

We note initially that the State did not appeal the trial court's order of 14 March 1989, concluding *inter alia* that the officers' search warrant was invalid as to the defendant's house. Thus the law of the case is that the officers did not have probable cause to search the defendant's house, and they entered it illegally. The defendant was confined to a single area soon after the officers entered her home. Moreover, she was kept continuously in the presence of one or more officers, and at no time was she free to leave. Bearing in mind that there is rarely if ever a litmus test "for determining when a seizure exceeds the bounds of an investigative stop," *Florida v. Royer*, 460 U.S. 491, 506, 75 L.Ed.2d 229, 242 (1983), we conclude that the defendant was arrested when, or very shortly after, the officers entered her home. *INS v. Delgado*, 466 U.S. 210, 215, 80 L.Ed.2d 247, 255 (1984) (seizure within the

meaning of the Fourth Amendment occurs "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.") The officers who arrested Mrs. Allen had information implicating her husband in a marijuana growing scheme, but they had no information about her. Thus, she was arrested without probable cause.

Following the defendant's motion to suppress her statements and *voir dire* testimony of Agent Bazemore, the trial court made findings of fact and conclusions of law. It concluded that after the "discovery of the marijuana growing operation in the barn adjacent to the defendant's residence ample probable cause existed for her arrest . . . ; that none of the constitutional rights, Federal or State, of the defendant were violated by the entry into her residence, by her arrest, by her detention, by her interrogation or by the statement made by her to Special Agent Bazemore . . . ." Upon a motion to suppress inculpatory statements, findings of fact, supported by competent evidence, are binding and conclusive; the "trial court's conclusions of law, however, are fully reviewable by appellate courts." *State v. Corley*, 310 N.C. 40, 52, 311 S.E.2d 540, 547 (1984); *accord, State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985).

The trial court included the following statement in its findings of fact: "although not 'formally' arrested until some time considerably later in the day Mrs. Allen was deprived of her liberty shortly after the arrival of the officers and the discovery of the ongoing growing operation." In its conclusions the trial court did not expressly state when, for Fourth Amendment purposes, Mrs. Allen was arrested. The trial court's conclusions imply, however, that Mrs. Allen was arrested only after the search of the barn. Assuming, without deciding, that probable cause to arrest Mrs. Allen existed after marijuana was discovered growing in the barn, her arrest inside her house without a warrant was fatally defective under the Fourth Amendment.

In *Payton v. New York*, the United States Supreme Court reiterated, as " 'a basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." 445 U.S. 573, 586, 63 L.Ed.2d 639, 651 (1980). Warrantless arrests in public places are valid, but

> "[t]o be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity

> of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present."

Id. at 588, 63 L.Ed.2d at 652 (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978), *cert. denied sub nom. Goldsmith v. United States*, 439 U.S. 913, 58 L.Ed.2d 259 (1978)).

This Court was required to apply *Payton* in *State v. Yananokwiak*, 65 N.C. App. 513, 309 S.E.2d 560 (1983). The facts of *Yananokwiak* involved the arrest of one Mark Klouda for sale of cocaine. Klouda agreed to help officers arrest his drug supplier, a man he identified as Mark Yananokwiak. Klouda, equipped with a concealed microphone, entered the defendant's home. Police

> heard Klouda say, "they want another ounce; here's your money," followed by the sounds of someone counting money and shaking something. Police next heard Klouda ask, "[i]s that enough for a whole ounce? Is it as good as the other stuff? . . . What's that?" A voice identified as defendant's responded, "[the] [c]ut."
>
> The waiting undercover agents then rushed into the kitchen of defendant's home, where they found defendant bending over a scale, mixing white powder with a playing card. Defendant was arrested and, after about five minutes, agreed to permit officers to search the home, resulting in the discovery of drugs and paraphernalia in a back bedroom.

Id. at 514, 309 S.E.2d at 561. Noting that several hours elapsed between Klouda's arrest and the police's entry of the defendant's home, "giving them ample time in which to obtain a warrant," the Court held that "there was insufficient evidence of exigent circumstances to excuse the warrantless entry into defendant's home." *Id.* at 515, 517, 309 S.E.2d at 562-63.

Our Supreme Court has noted that "it appears to be the essence of 'exigent circumstances' that there was 'the lack of time to obtain a warrant without thwarting the arrest or making it more dangerous.' " *State v. Johnson*, 310 N.C. 581, 586, 313 S.E.2d 580, 583 (1984) (quoting Latzer, Enforcement Workshop: Police Entries to Arrest—*Payton v. New York*, 17 Crim. L. Bull. 156, 165 (1981)). Although it is difficult to state a general rule regarding exigent circumstances which may excuse a warrantless entry, among the important factors courts consider are the following: (1) hot pursuit

of a suspect, *see, e.g., United States v. Santana*, 427 U.S. 38, 49 L.Ed.2d 300 (1976); (2) likelihood that the suspect will escape if entry is delayed, *see, e.g., State v. Wallace*, 71 N.C. App. 681, 323 S.E.2d 403 (1984), *disc. review denied*, 313 N.C. 611, 332 S.E.2d 82 (1985); and (3) danger to law enforcement officers or the public if entry is delayed, *see, e.g., Warden v. Hayden*, 387 U.S. 294, 18 L.Ed.2d 782 (1967). In the case below none of those factors was present. The house had been secured, the defendant, at the least, was being detained while investigation of the barn proceeded, and no danger to the officers or the public would have been presented by delaying the arrest of defendant long enough to obtain a warrant.

As an alternative basis to support its denial of the defendant's motion to suppress her statements, the trial court concluded "that if the statements made to Special Agent Bazemore were deemed to be 'fruit of the poisonous tree' the effect of any unlawful conduct by the officers was sufficiently attenuated by intervening events, including both [*sic*] the passage of time, the arrival of female officers, the arrival of the defendant's husband, permitting the defendant to bathe and dress," to break the connection between the illegal conduct and the defendant's inculpatory statements. The court concluded further that the defendant's statements, given after the *Miranda* warnings, were "made freely, voluntarily, and understandingly." We agree.

In *Brown v. Illinois*, the United States Supreme Court supplemented the "principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded." 422 U.S. 590, 597, 45 L.Ed.2d 416, 423 (1975). The defendant in *Brown* had been arrested in violation of the Fourth Amendment; however, the Supreme Court of Illinois held that "the giving of the Miranda warnings [to defendant] . . . served to break the causal connection between the illegal arrest and the giving of the statements [by defendant]." 56 Ill. 2d 312, 317, 307 N.E.2d 356, 358 (1974). In overruling the Illinois judgment, the United States Supreme Court held:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, . . . the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that

> evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. . . .
>
> * * * *
>
> . . . The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. . . . The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson v. Louisiana*, 406 US 356, 365, 32 L Ed 2d 152, 92 S Ct 1620 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

Brown, 422 U.S. 590, 602-04, 45 L.Ed.2d 416, 426-27.

Upon review of the facts in the case below in light of the factors pronounced in *Brown v. Illinois*, we conclude that defendant's statements to Agent Bazemore were not the product of defendant's earlier illegal arrest. Approximately an hour and a half elapsed between the illegal intrusion into defendant's home and the giving of her statements. Although she was held separately from her husband, not allowed to speak with him, and was in the presence of one or more officers most of the time, she was permitted to bathe and change clothes in private. On the date of her arrest, defendant was 35 years old and licensed as a Registered Nurse. There is nothing in the record showing any misconduct on the part of the officers or intent to violate the defendant's rights. We hold the trial court correctly held the defendant's statements were freely, voluntarily and understandingly made after the giving of the *Miranda* warnings and were not the fruit of the illegal arrest.

[2] We next consider defendant's argument that the trial court erred by denying her motion at the close of all evidence to dismiss the charge of knowingly maintaining a building used for the keeping of marijuana. "[W]hile not conceding the sufficiency of the evidence of knowledge, . . . [the defendant] chooses to concentrate her argument on the sufficiency of the evidence of keeping or maintaining." She contends that the only act which constituted evidence of "keep-

ing or maintaining" the barn was her payment of electric utility bills. We disagree.

Violation of the statute at issue is a misdemeanor, unless the State alleges and proves "that the violation was committed intentionally," in which case the offense is a Class I felony. N.C. Gen. Stat. § 90-108(b) (1990). The defendant was convicted of a misdemeanor violation, the elements of which are (1) knowingly keeping or maintaining (2) a building, vehicle, or other place (3) being resorted to by persons unlawfully using controlled substances, or being used for unlawfully keeping or selling controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (1990). Upon a motion to dismiss a criminal charge, all the evidence admitted must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable inference that could be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The trial court must then "decide whether there is substantial evidence of each element of the offense charged." *Id.*

Maintain means to "bear the expense of; carry on . . . hold or keep in an existing state or condition." Black's Law Dictionary 859 (5th ed. 1979). As this Court noted in *State v. Alston*, § 90-108(a)(7) "does not require residence, but permits conviction if a defendant merely keeps or maintains a building for the purpose of keeping or selling controlled substances." 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988). In *State v. Locklear*, the defendant was convicted of keeping or maintaining a dwelling for keeping or selling controlled substances and with keeping or maintaining a vehicle for keeping or selling controlled substances, and this Court held

> whether or not defendant lived in or owned the trailer is relevant to the element of the crime that defendant "keep or maintain" the dwelling for unlawful purposes . . . . Likewise, the evidence as to title and ownership of the vehicle would help to establish whether or not defendant "kept or maintained" the vehicle for unlawful use . . . .

84 N.C. App. 637, 643, 353 S.E.2d 666, 670 (1987).

In the case below, in addition to the defendant's inculpatory statements, the State presented evidence that (1) the defendant and her husband held title to the property on which the barn was situated; (2) the defendant obtained the building permit for the barn; (3) the defendant contacted the tax collector for Washington

County to find out whether "it [the barn] could be listed in her name on a separate listing"; (4) electric power to the house and barn was metered separately; (5) the charges for the barn (in February, March, and April of 1988) were $7.34, $8.11, and $28.36, while charges for the house were $139.02, $119.30, and $127.92, respectively, yet in August, September, and October of 1988 charges for the barn were $182.61, $246.89, and $200.36, while those for the house were $218.58, $198.75, and $123.42; and (6) during the period 12 February 1988 through 13 September 1988, the defendant paid the electric utility bill with checks drawn on a joint bank account with her husband. This Court has held that a "person knows of an activity if he is aware of a high probability of its existence." *State v. Bright*, 78 N.C. App. 239, 243, 337 S.E.2d 87, 89 (1985), *disc. review denied*, 315 N.C. 591, 341 S.E.2d 31 (1986). We hold that the trial court below correctly concluded there was sufficient evidence of each element of the offense charged to allow the case to go to the jury.

The defendant's remaining assignment has been reviewed and found to be without merit.

No error.

Judge LEWIS concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I believe that defendant's statements to Agent Bazemore were the result of the illegal entry into her home. The majority's conclusion that she was wrongfully arrested either at that time or shortly thereafter strengthens my opinion that these statements were improperly obtained, and are tainted by these improprieties. I am not convinced that those factors relied on by the trial court and cited by the majority purge these statements of the primary taint. Therefore, I vote to grant a new trial.

IN THE MATTER OF: SUZANNE ELIZABETH KRING CAFIERO, R.N. CERTIFICATE NO. 97857, PETITIONER v. NORTH CAROLINA BOARD OF NURSING, RESPONDENT

No. 9010SC405

(Filed 7 May 1991)

1. **Physicians, Surgeons and Allied Professions § 6 (NCI3d)—nurse—negligence—license suspended**

The superior court did not err in affirming the Board of Nursing's determination that petitioner violated N.C.G.S. § 90-171.37(4) in connecting a patient to a monitor in a way that resulted in an electrical shock to the patient. Petitioner's argument that the statute was not intended to apply to a single act of negligence overlooks the fact that a single act may have very serious consequences, and whether petitioner's conduct in the incident at issue is viewed as a single act or a series of acts, her conduct was within the meaning of the statute. The board had the authority to suspend her license even though the record shows that her nursing performance before and after the incident was exemplary.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 101.

Revocation of nurse's license to practice profession. 55 ALR3d 1141.

2. **Physicians, Surgeons and Allied Professions § 6.2 (NCI3d)—nurse—negligence—license suspended—standard of care**

The Board of Nursing, when considering the revocation of a nursing license, was not required under the particular facts of this case to establish a standard of care by expert testimony nor to apply a statewide standard of care because the dangers of live electrical cords are within the realm of common knowledge. The trial court's findings and conclusions are supported by substantial competent evidence.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 101.

Revocation of nurse's license to practice profession. 55 ALR3d 1141.

APPEAL by petitioner from Order entered 21 November 1989 by *Judge Donald W. Stephens* in WAKE County Superior Court. Heard in the Court of Appeals 27 November 1990.

Yates, McLamb & Weyher by Dan J. McLamb, Barbara B. Weyher and Andrew A. Vanore, III, for petitioner appellant.

Howard A. Kramer for respondent appellee.

Attorney General Lacy H. Thornburg by Assistant Attorney General J. Charles Waldrup, for The University of North Carolina Hospitals at Chapel Hill, amicus curiae.

COZORT, Judge.

Pursuant to N.C. Gen. Stat. § 150B-45 (1987), petitioner sought judicial review in Wake County Superior Court of a final agency decision of the North Carolina Board of Nursing (the Board) suspending her license as a registered nurse. The superior court affirmed in part the Board's decision, and petitioner appealed. We affirm.

The case below arose out of an incident that occurred in the course of petitioner Suzanne Cafiero's nursing care of an infant. On 5 October 1987, the parents of two-month-old Jamie Lynn Moss brought her to North Carolina Memorial Hospital for diagnostic tests related to "GER and apnea." At the Gastrointestinal Clinic a pH probe was inserted into Jamie Moss's stomach; she was then checked into a room and assigned as a patient to Ms. Cafiero. As a matter of hospital procedure, infants of Jamie's age were connected to cardiorespiratory monitors. Ms. Cafiero's conduct in connecting Moss to a monitor resulted in an electrical shock to Jamie, which led to disciplinary action against her and subsequently to an administrative hearing pursuant to N.C. Gen. Stat. §§ 150B-38 through -42 (1987 & Cum. Supp. 1990).

As petitioner Cafiero conceded at the hearing before the Board, she "was unfamiliar with" and had never used "the older model of the Hewlett-Packard monitor" which she connected to Jamie Moss. Testimony before the Board differed as to whether the petitioner was instructed by charge nurse Gretchen Baughman to wait for her assistance before attaching the monitor. Baughman testified as follows:

Q Did [Cafiero] indicate to you that she did not know how to set it up on her own?

A She wanted help. We were going to—we were going to work on it together.

Ms. Cafiero testified:

I went to the closet, and there was a monitor there, this particular monitor. . . . I did not recognize it as one that I had worked with. And I went to Gretchen Baughman, who was busy with a patient, and told her that there was a monitor there but it was one that I was unfamiliar with. And she told me that I should take—take the monitor and set it up and that it was like all of the others that we have used on the floor and she felt confident that I would be able to—to hook her up to it.

Accounts of the accidental electrical shock of Jamie Moss differed in a number of details. Joanie Moss, mother of the infant, testified as follows:

I walked to the door of the room. [Nurse Cafiero] called me back, asked me to stand by the crib so she wouldn't have to put the side up while she set the—the neonatal monitor. I was standing over Jamie. There was a click. Jamie immediately went up in a ball in the fetal position. She was trembling. Her eyes were real big. She was a red color. . . . I screamed. I told her to turn the monitor off because it was shocking her. Nurse Cafiero said, no, it's not. She's okay. She's okay. I continued to scream. I saw the—a black cord on the bed—on the crib beside Jamie that her three lead wires were attached to. I unplugged her three lead wires from the black cord. Jamie fell back on the bed with her head turned to the right side. Her eyes were closed. Her mouth was open. She had a blue tint. I then ran out of the room yelling for help, asking for a doctor.

Q Take your time.

A Okay, when I came back into the room, there was a nurse, who I later found out was the charge nurse, resuscitating Jamie. I left the room again. When I came back, there were doctors, nurses around her, and they were resuscitating her. I couldn't really see Jamie, and then I was ushered out of the room.

Petitioner Cafiero testified as follows:

> I plugged this into the outlet. And I heard the mother screaming, the baby is being shocked. I turned around to see what was going on. As I got about halfway from this extension, I looked and I just reached down. I did not go back to the outlet. And I pulled this out to see what was going on because the mother seemed to be screaming.
>
> [Q] And at the same time, did the mother pull the cable from the—
>
> A I was not aware—
>
> Q —power cord that you—
>
> A I was not aware of that. I went immediately to the baby's bedside.
>
> * * * *
>
> Q And what happened after that?
>
> A The mother ran out into the hallway, and she started screaming that I had shocked her baby. And I was standing at the bedside trying to assess the patient's condition. Jamie was slightly floppy. I don't recall her being arching. I do not recall any arching at all. If anything, she was a little floppy. And I was looking—I was checking her breathing. I was checking her pulse. And Gretchen came immediately into the room and kind of pushed me aside and looked. And she started to get cyanotic around her mouth, and Gretchen started to do mouth-to-mouth resuscitation.

Julie Phipps, clinical nurse coordinator for pediatrics and neonatal nursing, testified that she heard

> someone scream, she shocked my baby. And I went to see what was happening.
>
> Q Did you go into the room?
>
> A Yes, I did. I looked immediately to see what was going on. And there was a monitor beside the bed that was unplugged from the wall. . . .

Q Did you observe whether the monitor was, in addition to being unplugged at the wall when you entered the room, whether the leads to the patient cable were also unplugged?

A Yes, they were, because after I went back in the room, I got the monitor out and—so that we could call med. engineering.

After hearing testimony from three other staff members of North Carolina Memorial Hospital and considering a number of exhibits, the Board made the following pertinent findings of fact and conclusions of law:

[FINDINGS]

(6) Ms. Cafiero put the leads on Jami's [*sic*] chest, and inserted the end of the leads into a cord attached to the back of the monitor. Ms. Cafiero then plugged the machine into the wall. A click was heard, and Jami [*sic*] was noted to be balled up in a fetal position, trembling, with a red color, and "looked hard." Mrs. Moss screamed and told Ms. Cafiero to turn the monitor off, that she was shocking her baby. Ms. Cafiero told her everything would be o.k. in a minute. Mrs. Moss then saw a black cord on the bed next to Jami [*sic*] and she unplugged the leads from this black cord. Jami [*sic*] then fell back on the bed. Ms. Moss went into the hall calling for assistance from a physician.

Gretchen Baughman, RN, Charge Nurse on this shift, came to the room and initiated cardio-pulmonary resuscitation. Jami [*sic*] was successfully resuscitated, and transferred to the Pediatric Intensive Care Unit (PICU). She did sustain two burns on her chest and one burn on her stomach from this incident. Jamie's parents were later told by the Risk Manager that Jami [*sic*] was electrocuted by the Neonatal Monitor;

(7) an investigation into this incident was initiated by the Hospital. The monitor had been immediately removed from the patient's room by Julie Phipps, Clinical Nurse Coordinator for Pediatrics and Neonatal Nursing, and a medical engineer was called to check the monitor. Ms. Phipps said she initially thought the machine had malfunctioned.

Ms. Cafiero explained to the engineer exactly how she hooked up the monitor. It was determined she placed the patient leads directly into an electrical cord and not a patient cable, resulting in an electrical shock being delivered to the patient.

* * * *

Ms. Cafiero approached Ms. Baughman, her Charge Nurse, and asked her for assistance in hooking up the monitor. Ms. Baughman told Ms. Cafiero she was busy at the moment, but that she (Ms. Baughman) would come down and help her (Ms. Cafiero) set up the monitor.

Ms. Baughman was not aware Ms. Cafiero had attempted to set up the monitor unassisted, until she entered Jami's [*sic*] room following the mother's scream. Ms. Baughman stated she thought that she and Ms. Cafiero were going to set the monitor up together.

The Hospital's investigation showed Ms. Cafiero requested direction from another nurse, but did not wait for the nurse to assist her with the procedure. . . .

* * * *

[CONCLUSIONS]

* * * *

(5) the licensee has violated G.S. 90-171.37(4) in that she engaged in conduct that endangered the public health, as evidenced by the fact she had inadequate knowledge and skills to use a particular monitor, she recognized she did not know how to use this particular monitor and she proceeded to hook up the monitor without waiting for assistance, which resulted in a patient injury; and,

(6) the licensee has violated G.S. 90-171.37(5) in that she is incompetent to practice nursing by reason of a deliberate and negligent act as evidenced by the fact she had inadequate knowledge and skills to use a particular monitor, she recognized she did not know how to use this particular monitor and she proceeded to hook up the monitor without waiting for assistance, which resulted in a patient injury.

The Board then ordered that Ms. Cafiero's license to practice as a registered nurse be suspended for thirty days and assessed costs

of the disciplinary action against her. Ms. Cafiero petitioned the superior court for review of the Board's Order of 9 December 1988.

On 21 November 1989, having reviewed the record submitted to it, the superior court concluded

> (4) That the findings of fact of the Nursing Board were based upon substantial competent evidence contained in the whole record and consistent with a reasonable and proper interpretation of that evidence;
>
> * * * *
>
> (6) That the Nursing Board's conclusions of law were proper and supported by the findings of fact, except as to Board Conclusion of Law #6; the evidence of record overwhelmingly shows that Petitioner engaged in a single act of negligence that seriously endangered the life and health of a patient in violation of G.S. 90-171.37(4); however, the Court rules as a matter of law that such single act of negligence is insufficient, standing alone, to constitute "incompetence to practice nursing" under G.S. 90-171.37(5) and therefore this conclusion of law by the Nursing Board upon the evidence of record is erroneous and is reversed;
>
> (7) That the disciplinary action taken by the Nursing Board in suspending Petitioner's nursing license for 30 days and in assessing costs is clearly supported by the Board's findings of fact and the proper conclusion of law found by the Board that Petitioner had "engaged in conduct that endangered the public health"; and
>
> (8) That Petitioner was not prejudiced by the Nursing Board's error in concluding that she was also in violation of G.S. 90-171.37(5); the disciplinary action taken by the Board clearly shows that Petitioner was disciplined for a single negligent act that endangered a patient's health and not for any other conduct and therefore the Board's erroneous Conclusion of Law #6 did not in any way affect the sanction imposed by the Board in this case.

The Superior Court granted Ms. Cafiero's application for a stay of its order, and she appealed that order to this Court.

We note initially that North Carolina follows the "rule that it is for the administrative body, in an adjudicatory proceeding,

to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *State ex rel. Com'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980). We note further that N.C. Gen. Stat. § 150B-51(b) (1987) provides that

> the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Appeal from the decision of the court which, pursuant to § 150B-51, has initially reviewed a final agency decision, is provided by N.C. Gen. Stat. § 150B-52 (1987) and "the scope of review to be applied by the appellate court under Section 150B-52 of the APA is the same as it is for other civil cases." *Henderson v. Dep't of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988).

The standard of review known as the "whole record" test "does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Where, however, the "issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *In re Appeal of North Carolina Savings & Loan League*, 302 N.C. 458,

466, 276 S.E.2d 404, 410 (1981), *accord Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 581-82, 281 S.E.2d 24, 29-30 (1981). With these principles in mind, we turn to the merits of petitioner's appeal.

[1] We address first the petitioner's second assignment of error pursuant to which she contends that the trial court erred in affirming the Board's conclusion that she violated G.S. 90-171.37(4). At the time of the incident from which the case below arose, § 90-171.37 of the Nursing Practice Act read in pertinent part as follows:

> In accordance with the provisions of Chapter 150B of the General Statutes, the Board may require remedial education, issue a letter of reprimand, restrict, revoke, or *suspend any license to practice nursing* in North Carolina or deny any application for licensure if the Board determines that the nurse or applicant:
>
> (1) Has given false information or has withheld material information from the Board in procuring or attempting to procure a license to practice nursing;
>
> (2) Has been convicted of or pleaded guilty or nolo contendere to any crime which indicates that the nurse is unfit or incompetent to practice nursing or that the nurse has deceived or defrauded the public;
>
> (3) Has a mental or physical disability or uses any drug to a degree that interferes with his or her fitness to practice nursing;
>
> (4) Engages in conduct that endangers the public health;
>
> (5) Is unfit or incompetent to practice nursing by reason of deliberate or negligent acts or omissions regardless of whether actual injury to the patient is established;
>
> (6) Engages in conduct that deceives, defrauds, or harms the public in the course of professional activities or services; or
>
> (7) Has willfully violated any provision of this Article or of regulations enacted by the Board.
>
> The Board may take any of the actions specified above in this section when a registered nurse approved to perform medical acts has violated rules governing the performance of medical acts by a registered nurse; provided this shall not

> interfere with the authority of the Board of Medical Examiners to enforce rules and regulations governing the performance of medical acts by a registered nurse. (Emphasis added.)

The petitioner maintains that under § 90-171.37 "discipline is warranted for past actions *only* when they involve wilfullness or criminal conduct." (Emphasis in original.) From the General Assembly's use of the present tense in subsections (4) and (6), the petitioner infers that "sanctions are permissible for a violation *only* if the violation is continuing at the time of the hearing." (Emphasis in original). We disagree.

In 1981 the Nurse Practice Act was renamed the Nursing Practice Act, extensively rewritten, and recodified. 1981 N.C. Sess. Laws ch. 360, § 1. The Nursing Practice Act (the Act) includes § 90-171.37 (formerly § 90-163). The language of the second paragraph of that section was amended slightly in 1981, and, except for recodification and a technical amendment related to recodification, the section has not been altered since. 1981 N.C. Sess. Laws ch. 360, § 1; ch. 852, § 3; 1987 N.C. Sess. Laws ch. 827, § 1.

Petitioner cites no case construing § 90-171.37, and we are aware of none. The primary rule of statutory construction is that the intent of the Legislature controls. *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). Among other indicia of intent, courts look to the context and purpose of the statute taken as a whole. *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978). Words and phrases "must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 210, 69 S.E.2d 505, 511 (1952).

When the Legislature ratified Article 9A of Chapter 90 (the Nursing Practice Act), it found "that mandatory licensure of all who engage in the practice of nursing is necessary to ensure minimum standards of competency and *to provide the public safe nursing care*." N.C. Gen. Stat. § 90-171.19 (1990) (emphasis added). To this end the Board of Nursing was empowered, *inter alia*, to

> (1) Administer this Article;
>
> (2) Issue its interpretations of this Article;

(3) Adopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of this Article;

* * * *

(7) Cause the prosecution of all persons violating this Article; . . .

N.C. Gen. Stat. § 90-171.23(b)(1)(2)(3)(7) (1990). The Board was also empowered to revoke, suspend, or deny licensure as provided in § 90-171.37 (quoted above).

In view of the regulatory and disciplinary as well as licensing functions of the Board, we hold that the superior court did not err in affirming the Board's determination that petitioner violated § 90-171.37(4). Petitioner's argument that § 90-171.37(4) was not intended to apply to a single act of negligence overlooks the fact that a single act may have very serious consequences. A single act may endanger health or even life. Negligently delivering an electrical shock to a patient is such an act. Petitioner's inference from the use of the present tense in § 90-171.37(4) that a sanction is permissible "only if the violation is continuing at the time of the hearing" would lead to absurd results. Applied to the facts of the case below that interpretation would prohibit the Board from acting unless a nurse caused a series of accidents, regardless of their severity, which continued to the eve of the Board's hearing. Indeed the petitioner's reliance on the use of the present tense in § 90-171.37(4) would dictate that the conduct at issue be coterminous with the hearing itself. That construction is untenable. The "language of a statute will be interpreted so as to avoid an absurd consequence." *Hobbs v. Moore County*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966).

Petitioner maintains that the Board misinterpreted § 90-171.37(4) not only with regard to "engages" but also with regard to "conduct." She contends that "one isolated act" cannot meet the definition of conduct. We disagree.

Conduct may include "any positive or negative act." Black's Law Dictionary 268 (5th ed. 1979). Whether the petitioner's conduct in the incident at issue is viewed as a single act or a series of acts, for example, failing to follow Nurse Baughman's instructions to wait for assistance and incorrectly connecting the monitor, we hold that her "conduct" was within the meaning of that word as intended by the statute. Accordingly, the Board had the authority

to suspend her license even though the record shows her nursing performance, both before and after the incident at issue, has been exemplary.

[2] We turn next to the petitioner's first assignment of error: the "trial court's Findings and Conclusions . . . were not supported by substantial competent evidence contained in the whole record." Observing that the Board had before it no "evidence of a uniform statewide standard [of care] against which to measure . . . [a] licensee's actions," the petitioner contends that the Board lacked substantial evidence upon which to base sanctions. The petitioner contends further that such a standard could only be established by expert testimony. We disagree.

Under the particular facts presented by the case below the Board was not required to establish a standard of care by expert testimony nor to apply a statewide standard of care to the petitioner's actions. Where the "evidence of lack of ordinary care is patent and such as to be within the comprehension of laymen, requiring only common knowledge and experience to understand and judge it, expert testimony is not required." *Wilson v. Hospital*, 232 N.C. 362, 366, 61 S.E.2d 102, 105 (1950). The dangers of live electrical cords are within the realm of common knowledge. The record contains ample evidence that the petitioner did not exercise ordinary care in connecting Jamie Moss to the monitor she obtained from the storage closet. Having examined the whole record, we find that the trial court's findings and conclusions are supported by substantial competent evidence.

Turning to the petitioner's remaining assignment of error, we note that it is not presented nor discussed in her brief. Accordingly, it is deemed abandoned. N.C.R. App. P. 28.

The trial court's order of 21 November 1989 is

Affirmed.

Judges WELLS and JOHNSON concur.

JUDITH COKER COLEMAN NEWELL, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, STATE CAPITAL INSURANCE COMPANY, MICHAEL BLACKMON AND ROBERT LEE BLACKMON, DEFENDANTS

No. 9019SC98

(Filed 7 May 1991)

1. **Insurance § 87.1 (NCI3d)— automobile liability insurance— resident of same household—condition of bail—insured driver**

The twenty-year-old driver of a vehicle owned by his father was a resident of his father's household and was thus a "family member" covered under an automobile policy issued to the father where he had been living in his father's house for three weeks prior to the accident in question as a condition of his pretrial release from jail on a murder charge.

Am Jur 2d, Automobile Insurance §§ 189, 247.

Who is "resident" or "member" of same "household" or "family" as named insured, within liability insurance provision defining additional insureds. 93 ALR3d 420.

2. **Insurance § 87.2 (NCI3d)— automobile liability insurance— reasonable belief exclusion—inapplicable to family member**

An exclusion of coverage under an automobile liability policy for "any person" using the vehicle without a reasonable belief that he was entitled to do so did not apply to a "family member."

Am Jur 2d, Automobile Insurance §§ 251-253.

Judge LEWIS dissenting.

APPEAL by defendant Nationwide Mutual Insurance Company from judgment entered 13 November 1989 by *Judge Russell G. Walker, Jr.* in RANDOLPH County Superior Court. Heard in the Court of Appeals 29 August 1990.

This is a declaratory judgment action whereby plaintiff seeks a judgment "declaring the rights, duties and obligations of the defendant, Nationwide Mutual Insurance Company [hereinafter Nationwide], under the liability insurance policy issued to the defendant, Michael Blackmon, and of the defendant, State Capital Insurance Company [hereinafter State Capital], under the automobile

liability insurance policy issued to the plaintiff, for attorney fees, for costs, and all other appropriate relief."

On 9 February 1987, plaintiff was injured when she was struck by a 1977 Ford truck being driven by defendant Robert Blackmon and owned by defendant Michael Blackmon. At the time of the accident, defendant Robert Blackmon was twenty years old and did not have a valid North Carolina driver's license. As a result of the accident, defendant Robert Blackmon was convicted of driving while impaired and driving while license was revoked.

After the accident, defendant Robert Blackmon stated to an investigating officer that his address was Route 1, Box 172, Franklinville, North Carolina, which was the same as his father's, defendant Michael Blackmon. Before the accident, defendant Robert Blackmon had been charged with second degree murder. He was released "about the middle of January 1987" to the custody of defendant Michael Blackmon pending his trial on the condition that he remained in the custody of his father at his father's residence.

At the time of the accident, defendant Nationwide had issued to defendant Michael Blackmon and his wife, Nan Blackmon, a personal auto policy, which was in full force and effect. The policy provided uninsured/underinsured motorist coverage in the amount of $50,000.00/100,000.00/10,000.00. Plaintiff had a personal auto policy with defendant State Capital. The policy was in effect at the time of the accident and provided bodily injury liability and uninsured motorists coverages. After defendants Nationwide and State Capital denied coverage for the accident, plaintiff filed this declaratory judgment action and also filed a separate tort action against the individual defendants. The parties to the tort action then entered into a consent order staying proceedings in that action pending the outcome of the declaratory judgment action. Defendant State Capital also consented to the stay.

The trial court entered summary judgment for defendant State Capital against plaintiff on 30 October 1989. This order was not appealed by any of the parties. The trial court entered summary judgment for plaintiff against defendant Nationwide on 7 November 1989 and denied Nationwide's motion for summary judgment. Nationwide appeals.

Nichols, Caffrey, Hill, Evans & Murrelle, by Joseph R. Beatty, for defendant-appellant.

O'Briant, O'Briant & Bunch, by Lillian B. O'Briant, for plaintiff-appellee.

EAGLES, Judge.

Defendant first assigns as error the trial court's entry of summary judgment in favor of plaintiff on the grounds that all of the evidence showed that its policy did not provide coverage for defendant Robert Blackmon. Defendant contends that plaintiff was not entitled to summary judgment because Robert Blackmon was driving Michael Blackmon's truck without a reasonable belief that he was entitled to do so and the question of whether Robert Blackmon was a resident of Michael Blackmon's household presented a genuine issue as to a material fact. Defendant argues that if Robert Blackmon was not a resident of Michael Blackmon's household, he was not covered under the policy.

Initially we note that

> "[s]ummary judgment is granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." The burden is upon the party moving for summary judgment to show, in order to be entitled to judgment, that no questions of fact remain to be resolved.

Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co., 326 N.C. 771, 774, 392 S.E.2d 377, 379 (1990) (citations omitted). After careful review of the record, we find that the dispositive issues in this case are whether defendant Robert Blackmon was a resident of his father's household and if so, whether the reasonable belief exclusion would apply to a family member. Here based upon the admitted facts of all the parties we conclude that plaintiff has met her burden of showing that no issues of fact exist.

> "The avowed purpose of the Financial Responsibility Act, of which Sec. 279.21 is a part, is to compensate the innocent victims of financially irresponsible motorists." *American Tours v. Liberty Mutual Insurance Company*, 315 N.C. 341, 346, 338 S.E.2d 92, 96 (1986). "When a statute is applicable to the terms of a policy of insurance, the provisions of that statute become

> part of the terms of the policy to the same extent as if they were written in it." *Id.* at 344, 338 S.E.2d at 95.

Crowder v. N.C. Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 553-54, 340 S.E.2d 127, 129, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986).

G.S. 20-279.21(b)(2) provides:

> Such owner's policy of liability insurance: (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles[.]

"Defendant is liable to the plaintiff only if its liability accrues under the provisions set out in the contract of insurance between defendant and its insured[.]" *Younts v. State Farm Mutual Automobile Ins. Co.*, 281 N.C. 582, 584-85, 189 S.E.2d 137, 139 (1972). "In the absence of any provision in the Financial Responsibility Act broadening the liability of the insurer, such liability must be measured by the terms of the policy as written." *Id.* at 585, 189 S.E.2d at 139.

Plaintiff concedes in her brief that defendant Robert Lee Blackmon was not operating the vehicle "with the express or implied consent of the defendant Michael Blackmon."

Here, the policy in question obligates Nationwide to pay for damages for bodily injury or property damage for which any "covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages." The policy defines covered person as the following: "1. You or any family member for the ownership, maintenance or use of any auto or trailer. 2. Any person using your covered auto. 3. For your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part. 4. For any auto or trailer, other than your covered auto, any person or organization, but only with respect to legal responsibility for acts or omissions of you or any family member

for whom coverage is afforded under this Part. This provision applies only if the person or organization does not own or hire the auto or trailer." (The underlined statements appear in bold type in the policy.) Family member is defined in the policy as "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child."

By the policy's express terms there are several groups of covered persons among which are included family members and any person using the covered auto. Here the policy does not define the term "resident." Where the term "resident" is not defined in the insurance policy, "[s]uch term, if not defined, is capable of more than one definition and is to be construed in favor of coverage." *Fonvielle v. South Carolina Insurance Co.*, 36 N.C. App. 495, 497, 244 S.E.2d 736, 738, *disc. rev. allowed*, 295 N.C. 465, 246 S.E.2d 215 (1978), *motion to withdraw petition for disc. rev. allowed* 15 August 1978.

> The interpretation of the terms "resident of your household" or "resident of the same household" or similar terms in insurance policies has been the subject of numerous appellate court decisions. *See generally* 96 A.L.R. 3d 804 (1979) (no-fault and uninsured motorist coverage) and 93 A.L.R. 3d 420 (1979) (liability insurance); *see, e.g., Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*, 266 N.C. 430, 146 S.E.2d 410 (1966); *Newcomb v. Insurance Co.*, 260 N.C. 402, 133 S.E.2d 3 (1963); *Barker v. Insurance Co.*, 241 N.C. 397, 85 S.E.2d 305 (1954) [sic]; *Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 331 S.E.2d 744 (1985); *Fonvielle v. Insurance Co.*, 36 N.C. App. 495, 244 S.E.2d 736, *disc. rev. allowed*, 295 N.C. 495 [sic], 246 S.E.2d 215 (1978), motion to withdraw petition for disc. rev. allowed 15 August 1978. As observed by our courts, the words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. *Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co., supra.* "Residence" as many shades of meaning, from mere temporary presence to the most permanent abode. *Id.* It is difficult to give an exact or even satisfactory definition of the term "resident," as the term is flexible, elastic, slippery and somewhat ambiguous. *Id.* Definitions of "residence" include "a place of abode for more than a temporary time" and "a permanent and established home" and the definitions range between these two

> extremes, *Barker v. Insurance Co., supra.* This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection. *Jamestown v. Nationwide, supra; Davis v. Maryland Casualty Co., supra.*

Great American Ins. Co. v. Allstate Ins. Co., 78 N.C. App. 653, 655-56, 338 S.E.2d 145, 147, *disc. rev. denied*, 316 N.C. 552, 344 S.E.2d 7 (1986). "Intent to remain at a place seems determinative, although not intent to remain permanently. It is clear that the intent necessary to show residence is not that necessary to show domicile." *Fonvielle v. Insurance Co.*, 36 N.C. App. at 498, 244 S.E.2d at 738.

In *Jamestown, supra,* the insured's twenty-nine year old son, who had been previously married and served in the Army, returned to his father's home to stay until he found a residence more convenient to his place of employment. The son did not intend to stay in his father's house permanently but had no time as to when he was going to leave. The son had been living in his father's home only two weeks before the accident occurred. Our Supreme Court held that defendant son was " 'a resident of the same household' as his father." 266 N.C. at 439, 146 S.E.2d at 417.

[1] Here, in an affidavit, defendant Michael Blackmon, stated that "[a]bout the middle of January, 1987, he [Robert Blackmon] was released in my custody, pending his trial in February. The judge told him he had to stay with me to get bond." Defendant Robert Blackmon had been living in his father's house approximately three weeks before the accident occurred. He was a member of defendant Michael Blackmon's family and resided in the household as a condition of his pre-trial release from jail. On these facts, defendant Robert Blackmon was a resident of defendant Michael Blackmon's home and as a result was a "named insured" under the policy issued by defendant Nationwide.

Since Robert Blackmon is a family member who resided in the household of his father, defendant Michael Blackmon, at the time of the accident it is not necessary to reach the question of whether Robert Blackmon used the vehicle without a reasonable belief that he was entitled to do so. The Nationwide policy by its express terms provides that the company "will pay damages

for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." "Covered person" was defined as the named insured or a family member and "family member" was defined as "a person related to you [named insured] by blood, marriage or adoption who is a resident of your household." The Exclusions section of the policy lists the classes of persons for whom the policy does not provide liability coverage. The policy does not attempt to exclude coverage for a family member.

[2] We note that in its brief, defendant has cited several cases for the proposition that the reasonable belief exclusion applies to a family member. We find those cases unpersuasive here in light of other cases holding that the reasonable belief exclusion does not apply to a family member. *See e.g. Economy Fire & Casualty Co. v. Kubik*, 142 Ill. App. 3d 906, 492 N.E.2d 504 (1986).

In *Economy, supra*, the policy in question provided coverage for a family member but did not provide coverage " '[f]or any person using a vehicle without a reasonable belief that the person is entitled to do so.' " 142 Ill. App. 3d at 908, 492 N.E.2d at 506. There the Illinois appellate court stated that selective use of "family member" and "any person" throughout the policy's exclusions created the impression that the terms referred to mutually exclusive classes. The court stated that the use of the terms became "ambiguous through the manner in which those terms are used throughout the policy." *Id.* at 910, 492 N.E.2d at 507. The court stated that since the policy considered "family member" and "any person" as exclusive classes and since the exclusion in question did not specifically include the term "family member," "an ambiguity is created with regard to whether a 'family member' is barred from coverage by exclusion No. 11." *Id.* The appellate court held that in construing the policy in a light most favorable to the insured Economy was required to "defend and/or indemnify" Kubik. *Id.* at 911, 492 N.E. 2d at 508.

In *State Auto. Mutual Ins. Co. v. Ellis*, 700 S.W.2d 801 (Ky. App. 1985), a fourteen year old girl drove her father's truck without his permission or consent and was subsequently involved in an accident. State Auto denied coverage "because of an exclusion stating that the policy did not provide coverage for any person '[u]sing a vehicle without a reasonable belief that that person is entitled to do so.' " 700 S.W.2d at 802. The Kentucky Court of Appeals

stated that the daughter, who was included in the class of "family members," would have been afforded coverage but for the questioned exclusion which denied coverage for any person using the vehicle without a reasonable belief that the person was entitled to do so. The Kentucky court further stated that "[w]hen an attempt is made to apply the general exclusion to a family member such as Andrea, an ambiguity arises." 700 S.W.2d at 802. The court stated that "[i]f an insurance contract allows two reasonable constructions, the one most favorable to the insured prevails. Ambiguities in the contract language are resolved in the insured's favor." 700 S.W.2d at 803.

Here, the Nationwide policy uses "covered person," "family member," and "any person" selectively throughout the policy and more specifically in the Exclusions section of the policy. The Nationwide policy even highlights the terms "covered person" and "family member" whenever they are used in the policy. Under the express terms of the policy, "any person" is not an "all inclusive" term; it does not include family members. The policy establishes mutually exclusive classes. The selective use of these terms creates an ambiguity. "[W]hen there is an ambiguity and the policy provisions are susceptible to two interpretations, one of which imposes liability on the company and the other does not, the provisions will be construed in favor of coverage and against the insurer." *First National Bank v. Nationwide Insurance Co.*, 303 N.C. 203, 216, 278 S.E.2d 507, 515 (1981). Accordingly, the trial court correctly concluded that there was coverage and properly entered summary judgment for plaintiff.

Defendant next assigns as error the trial court's denial of its motion for summary judgment because all of the evidence showed that there was no coverage for Robert Lee Blackmon. For the reasons stated above, this assignment of error is overruled.

The decision of the trial court is affirmed.

Affirmed.

Judge WELLS concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent.

The Nationwide policy under which Michael Blackmon was insured contained the following exclusion: "We do not provide liability coverage for any person . . . using a vehicle without a reasonable belief that that person is entitled to do so." Nationwide's policy included another term indicating coverage for any family member who is "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." I believe a genuine issue of material fact exists as to whether Robert Lee Blackmon was a resident of Michael Blackmon's household at that time.

All of the uncontradicted evidence tends to show that the owner of the vehicle both knew Mr. Blackmon had no license and expressly denied Mr. Blackmon the right to operate any of his vehicles. I do not believe that even if Robert Lee Blackmon were found to be a resident that he would thereby automatically always have consent, express or implied, of the owner, his father, to operate a vehicle. This would indeed be an extremely dangerous precedent to set. For these reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. ROBERT CORNELIUS PICHE

No. 9010SC759

(Filed 7 May 1991)

1. Homicide § 21.7 (NCI3d) — second degree murder — evidence sufficient

There was substantial evidence from which the jury could conclude that an assault was likely to cause death or serious bodily injury where the evidence indicates that defendant struck the victim on the head with a handgun with such force that the victim was knocked instantly to the pavement; the victim hit the pavement with sufficient force to shatter a bottle and cause punctures to his face and to cause bone fragments to enter his brain; and the victim at the time of the autopsy was five feet six inches tall and weighed only ninety-eight pounds.

Am Jur 2d, Homicide §§ 53, 245.

2. Homicide § 30.3 (NCI3d)— instruction on involuntary manslaughter denied—no evidence to negate intentional killing

The trial court did not err in a homicide prosecution by denying defendant's request for a jury instruction on involuntary manslaughter where there was no evidence to negate the intentional killing element of second degree murder. The evidence reveals a blow to the head of such force that it knocked the victim to the ground and that the injury causing death could reasonably be attributed only to the victim's face striking and shattering a beer bottle. The focus is not on the actual injury but upon the act of assault itself and whether such an assault is likely to cause death or serious bodily injury.

Am Jur 2d, Homicide §§ 70, 531.

3. Constitutional Law § 287 (NCI4th)— homicide—motion for appointment of new counsel—denied—no error

The trial court in a homicide prosecution did not err by denying defendant's motion for a new counsel where defendant did not show that his counsel's representation was deficient or that there was a reasonable possibility that there would have been a different result but for counsel's inadequate representation.

Am Jur 2d, Criminal Law § 985.

4. Criminal Law § 78 (NCI4th)— homicide—motion for change of venue—denied—no error

The trial court in a homicide prosecution did not err by denying defendant's motion for a change of venue where defendant did not show that jurors had prior knowledge concerning the case, that defendant exhausted peremptory challenges, and that a juror objectionable to defendant sat on the jury.

Am Jur 2d, Criminal Law §§ 378 et seq.

5. Criminal Law § 1216 (NCI4th)— second degree murder—mitigating factor—acting under threat—evidence insufficient

The trial court did not err when sentencing defendant for second degree murder and assault with a deadly weapon by failing to find in mitigation that defendant acted under a threat insufficient to constitute a defense but which significantly reduced his culpability. The evidence indicates that defendant was the initial and only aggressor; there is no credible

evidence that the victim or any of his friends ever threatened defendant; the evidence indicates that the victim's friends were afraid of defendant; and defendant opened his automobile trunk and took out a shotgun once he had reached his car rather than leave, and returned to the car for a handgun when the shotgun broke.

Am Jur 2d, Criminal Law §§ 598, 599.

6. **Criminal Law § 1259 (NCI4th)— second degree murder and assault—mitigating factor—voluntary acknowledgment of wrongdoing—acknowledgment after arrest**

The trial court did not abuse its discretion when sentencing defendant for second degree murder and assault by failing to find in mitigation that defendant voluntarily acknowledged wrongdoing where defendant made his statement after he was arrested. To be absolutely entitled to a finding of this mitigating factor, defendant must make his confession prior to the issuance of a warrant or information, prior to the issuance of a true bill of indictment or presentment, or prior to arrest, whichever comes first; otherwise, it is for the trial court to determine in its discretion whether the statement was made at a sufficiently early stage.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from judgments entered 19 March 1990 in WAKE County Superior Court by *Judge Howard E. Manning, Jr.* Heard in the Court of Appeals 18 January 1991.

Lacy H. Thornburg, Attorney General, by Mary Jill Ledford, Assistant Attorney General, for the State.

John T. Hall for defendant-appellant.

GREENE, Judge.

Defendant, Robert Cornelius Piche, was charged on 29 July 1989 with second-degree murder and assault with a deadly weapon. On 19 March 1990, the jury returned verdicts of guilty of both offenses. Defendant was sentenced to thirty-five years imprisonment for second-degree murder, and two years imprisonment for assault with a deadly weapon to begin at the expiration of the thirty-five year term. Defendant appeals.

Before trial, defendant moved for a change of venue and for the appointment of a new attorney. Both motions were denied.

The evidence presented by the State at trial tends to show that on 29 July 1989 the victim, Ming Hai Loo (Loo), met his friend, Minh Van Lam, at a club called the Cue N Spirits. They began playing pool, and over a short period of time they were joined by Jim Ta, Lanh Tang, Tai Trong Le, Ton That Thainguyn, and Hong Thanh Nguyen.

At some point, defendant's brother, Lloyd Piche, approached Loo and Lam and challenged them to a game of pool. Loo and Lam refused the invitation. Over an unspecified period of time, defendant, sometimes with and sometimes without Lloyd, repeatedly went to Loo's table and made threatening and racial comments. Defendant stated he was going to "finish you," and that "your ass is grass." Defendant cursed often, and told the Asians he did not like them, stating that "because of you people all brothers and friends went to Vietnam [and] never came back. . . ." At one point, defendant stood face to face with Tang and began cursing him. The bartender pushed defendant back and defendant pointed at Tang and said, "You're not leaving anywhere, we're going to finish you off tonight," and that "sooner or later the bar is going to close and we're going to have to leave so there is not way [sic] we [sic] can escape."

Hong decided to call the police and he and Loo approached the bar. Defendant and Lloyd confronted Loo, and defendant had removed his belt and wrapped it around his hand with the buckle hanging down. Defendant stated that he wanted to go outside and fight. Jim Ta testified that they tried to leave, and that after they were outside he told defendant they were going home.

Once outside, defendant went to his car and obtained a shotgun. Defendant pointed the gun at Tang, who started walking backward as defendant approached him with the gun. Defendant then swung the gun at Tang and missed him. As Tang was walking backward, Lloyd approached Tang from behind and tried to pin his head down to the hood of a car. Tang escaped and began walking backward again. Defendant turned the gun around, holding the barrel end, and ran toward Tang. Defendant then "took the hardest swing I had ever seen," but Tang ducked away and was not hit. The gun fell out of defendant's hand and broke when it hit the pavement.

Defendant then returned to his car and obtained a handgun. Defendant chased Tang down the sidewalk with the gun in his hand.

When defendant returned from chasing Tang, Loo and Ta were standing by a bench in front of the club. Defendant approached them and hit Loo in the head with the gun. Loo fell and hit his head on a beer bottle he had been holding, shattering the bottle. Hong testified that, after Loo had fallen, he noticed that the beer bottle was broken and that Loo's eye was bloody.

The State presented the testimony of Dr. Danosi who was working in the emergency room of Wake Medical Center when Loo was admitted. Dr. Danosi testified that he noticed an injury to Loo's left eye. A CT scan and x-rays were ordered. The scan revealed bleeding in the brain tissue and what appeared to Dr. Danosi to be bone fragments in the frontal areas of the brain.

Dr. Boone, a neurosurgeon, testified that he was called to the emergency room to examine Loo and that he ultimately performed an operation on Loo. Dr. Boone testified that based upon his examination he diagnosed severe brain injury resulting from trauma. While Dr. Boone could not state what the trauma was, he testified that his review of the CT scan revealed that bone fragments had been driven up through the nasal sinuses and into the base of the brain and into both frontal lobes of the brain. Though surgery was performed, Loo died.

The State then presented the testimony of Dr. Scarborough who conducted an autopsy in this case. At the time of the autopsy, Loo was five feet, six inches tall, and weighed ninety-eight pounds. Dr. Scarborough noticed much bruising around the left eye. He further observed a "stab wound" which was approximately one-half inch long in the corner of the eye. There was also a small cut on top of the head, and there was a small amount of hemorrhaging on the top surface of the brain. Dr. Scarborough testified that he saw no other injury which could have caused death other than the stab wound to the front of Loo's face. On cross-examination by defendant, Dr. Scarborough testified that the small amount of hemorrhaging on the top surface of the brain could have been caused by the stab wound to the eye, by a fall, or by a blow to the head. The cut on top of Loo's head was approximately four-tenths of an inch long and was superficial in that it did not extend down to bone. Dr. Scarborough further testified that the hemorrhaging on the top surface of the brain would not generally be

considered lethal, and that the cut on top of Loo's head would not generally be considered a serious injury by itself.

Defendant presented no evidence.

During the charge conference, defendant requested and was denied a jury instruction on involuntary manslaughter. The trial court instructed the jury on second-degree murder and voluntary manslaughter.

During sentencing, the trial court found as an aggravating factor that "defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement." The trial court found no mitigating factors.

The issues are: (I) whether the trial court erred by denying defendant's motion to dismiss the charge of second-degree murder based on insufficiency of evidence; (II) whether the trial court erred by denying defendant's request to instruct the jury on the offense of involuntary manslaughter; (III) whether the trial court erred by denying defendant's motion for appointment of new counsel; (IV) whether the trial court erred by denying defendant's motion for change of venue; and (V) whether the trial court erred by failing to find mitigating factors during the sentencing phase.

We first observe that defendant's assignments of error are defective in that they fail to assert the legal basis upon which error is assigned as required by N.C.R. App. P. 10(c)(1). Nonetheless, we suspend the rules as provided by N.C.R. App. P. 2 and address the merits of the appeal.

I

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charge of second-degree murder. In determining whether the evidence is sufficient to support a verdict of second-degree murder, the evidence is viewed in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn from the evidence. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). The court must determine whether there is substantial evidence of each essential element of the crime charged, and if so, the motion to dismiss must be denied and the case submitted to the jury. *State v. Autry*, 101 N.C. App. 245, 251, 399 S.E.2d 357, 361 (1991). Substantial evidence

is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

The essential elements the State must prove to support a verdict of guilty of second-degree murder are: (1) an intentional killing; (2) committed with malice; and (3) proximately causing death. *State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980); *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E.2d 905, 917 (1978). In this case, defendant argues only that there was insufficient evidence of an intentional killing. Specifically, while defendant concedes this element does not require a specific intent to kill, defendant contends that under the factual circumstances of this case defendant must have committed a felony assault to establish the element of an intentional killing.

The applicable rule in this case is that one commits an "intentional killing," for purposes of the offense of second-degree murder, if one commits "an act of assault which in itself amounts to a felony *or* is likely to cause death or serious bodily injury." *Ray* at 158, 261 S.E.2d at 794 (emphasis added). It is, therefore, not necessary in all cases to establish felonious assault.

The evidence in this case indicates that defendant struck the victim on the head with a handgun with such force that the victim was knocked instantly to the pavement, and that the victim hit the pavement with sufficient force to shatter a bottle and cause punctures to the victim's face, and to cause bone fragments to enter the victim's brain. The record also indicates that the victim, at the time of autopsy, was five feet, six inches tall, and weighed only ninety-eight pounds. Even assuming, *arguendo*, that the assault did not amount to a felony assault, an issue we need not decide, there is substantial evidence from which the jury could conclude that the assault was one "likely to cause death or serious bodily injury" and was, therefore, an "intentional killing." *Ray*. We therefore find no error in the trial court's denial of defendant's motion to dismiss based on an insufficiency of evidence to support the element of an "intentional killing."

II

[2] In a related assignment of error, defendant contends the trial court erred in denying his request for a jury instruction on involuntary manslaughter. Involuntary manslaughter is a lesser included offense of second-degree murder. *State v. Thomas*, 325 N.C. 583,

591, 386 S.E.2d 555, 559 (1989). Regarding the submission of lesser included offenses to the jury, our Supreme Court has stated:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense [charged] . . . and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of [the lesser included offense].

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *modified on other grounds*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

Defendant argues that there was some evidence which negates the element of intentional killing. We disagree.

The evidence reveals that the blow to the head was of such force that it knocked Loo to the ground. The evidence from the autopsy report indicates that the cause of death was the injury to Loo's eye and face. These injuries could reasonably be attributed only to the fact that Loo's face, subsequent to the assault, struck and shattered the beer bottle. However, the focus here is not on the actual injury suffered by Loo, or upon the severity of the actual injury, but upon the act of assault itself and whether such an assault is likely to cause death or serious bodily injury. It must be noted that while Dr. Scarborough testified that the hemorrhaging on the top surface of the brain and the cut on top of Loo's head would not generally be considered serious injuries, there was no evidence to show that the act of striking another person in the head with a handgun with sufficient force to knock that person to the ground is not an assault likely to cause death or serious bodily injury. *See State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980) (intentional killing is committed where one commits an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury).

We therefore find no evidence to negate the intentional killing element of second-degree murder. Accordingly, the trial court's denial of defendant's request for a jury instruction on involuntary manslaughter was not error.

III

[3] Defendant next argues that the trial court erred in denying his motion for the appointment of new counsel. Defendant's motion can be summarized as allegations that defendant and his attorney did not communicate well, that his attorney was not fully dedicated to his case, and that his attorney did not prepare a defense. Defendant's primary concern, from reviewing the motion, was that his attorney often advised him to plead guilty because he felt a jury would convict defendant.

In order to obtain a new trial based on ineffective assistance of counsel, a defendant must show that his counsel's representation was deficient and that there is a reasonable possibility that, but for counsel's inadequate representation, there would have been a different result. *State v. Austin*, 75 N.C. App. 338, 341, 330 S.E.2d 661, 663 (1985). Defendant has shown neither requirement in this case. "Disagreement over trial tactics and communication problems generally do not make the assistance of counsel ineffective." *State v. Callahan*, 93 N.C. App. 579, 582, 378 S.E.2d 812, 814, *disc. rev. denied*, 325 N.C. 274, 384 S.E.2d 521 (1989). Defendant has not pointed to any prejudicial error of counsel, nor referred to any defense which would have changed the outcome of defendant's trial.

IV

[4] Defendant next argues the trial court erred in denying his motion for a change of venue. Defendant's motion alleged "that there exists in the Tenth Judicial District so great a prejudice against the defendant that he cannot obtain a fair and impartial trial because of pretrial publicity." *See* N.C.G.S. § 15A-957 (1988).

A motion for change of venue based upon unfavorable publicity is addressed to the sound discretion of the trial judge, and will not be disturbed on appeal absent abuse of discretion. *State v. Corbett*, 307 N.C. 169, 177, 297 S.E.2d 553, 559 (1982). The burden is on the defendant to show that pretrial publicity precluded him from receiving a fair trial, and in meeting that burden he "must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury." *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 348 (1983). We do not find in the record, nor does defendant argue in his brief, that these prerequisites

to finding defendant did not receive a fair trial have been met. We therefore find no abuse of discretion in the trial court's denial of defendant's motion for a change of venue.

V

Defendant's final argument is that the trial court erred in failing to find mitigating factors in sentencing defendant. Defendant contends the trial court should have found as mitigating factors that defendant (A) committed the offense under a threat which was insufficient to rise to the level of a defense but which significantly reduced his culpability in the matter, N.C.G.S. § 15A-1340.4(a)(2)(b), and (B) that at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer, N.C.G.S. § 15A-1340.4(a)(2)(l).

The burden of proving the existence of a mitigating factor is on the defendant. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). It is error for the trial court to fail to find a mitigating factor which is uncontradicted, substantial, and where there is no reason to doubt its credibility. *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987).

A

[5] In support of his position that he acted under threat, defendant argues that at various times he was surrounded by the victim's friends, that they were following him once they all went outside, and that he was, therefore, in a threatened position.

We reject this argument. The evidence indicates that defendant was the initial and only aggressor. There is no credible evidence that the victim or any of his friends ever threatened defendant. The evidence indicates instead that the victim's friends were afraid of defendant, not that they wanted to challenge him. Furthermore, once defendant reached his car in the parking lot, rather than leave he opened his trunk and took out a shotgun. When the shotgun broke, he returned to his car and obtained a handgun. We find no manifestly credible evidence to indicate defendant acted under threat.

B

[6] In support of his argument that defendant voluntarily acknowledged wrongdoing, defendant refers to a statement made

by defendant to police during an interview in which defendant stated he was "sorry the man died. I wish I could change it."

Defendant's statement was made on 31 July 1989, several hours after the victim died. Defendant was arrested, however, on 29 July 1989. In order to be absolutely entitled to a finding of this mitigating factor, defendant must make his confession prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first. *State v. Thompson*, 314 N.C. 618, 625, 336 S.E.2d 78, 82 (1985). If defendant does not establish he is absolutely entitled to a finding of this factor, it is for the trial judge to determine, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor. *Thompson* at 626, 336 S.E.2d at 82. Since defendant made his statement after his arrest, he is not absolutely entitled to a finding of this mitigating factor. Furthermore, we find no abuse of discretion by the trial court in failing to find this mitigating factor. Therefore, we find no error in the court's failure to find this factor as a mitigating factor.

No error.

Judges PARKER and COZORT concur.

STATE OF NORTH CAROLINA v. LENN EDWARD SPIVEY

No. 9010SC648

(Filed 7 May 1991)

1. Constitutional Law § 248 (NCI4th)— discovery—delivery of exculpatory statement delayed—no denial of due process

A defendant in a homicide prosecution was not denied due process by the delivery to him of an exculpatory statement by a witness the week the trial began. The statement was not suppressed, rather, its delivery to defendant was delayed; defendant received the statement on 25 August and requested and received on 29 August a continuance until 30 August; the defense announced on 30 August that it was ready to proceed; the statement was used to elicit both impeaching

and exculpatory statements during the cross-examination of the witness; and defendant's cross-examination pertaining to the prior statement constitutes at least fifteen pages of the trial transcript.

Am Jur 2d, Depositions and Discovery §§ 428, 450-454.

2. Criminal law §§ 329, 334 (NCI4th)— severance of offenses and defendants—denied—no error

Defendant waived any right to severance of the offenses of rape and murder by not renewing his motion to sever at any time after his pretrial motion was denied. There was no merit to his assignment of error to the joining of defendants. N.C.G.S. § 15A-927(a) (1987).

Am Jur 2d, Trial §§ 9, 17-24.

3. Homicide § 30 (NCI3d)— second degree murder—evidence of elements of first degree murder—no error

The trial court did not err by submitting second degree murder to the jury, even assuming that the evidence establishes all of the elements of first degree murder. A defendant in a capital case is not prejudiced when the State elects to abandon the capital offense. An indictment for murder includes both first and second degree murder, and there is no error as long as there is substantial evidence supporting the offense submitted.

Am Jur 2d, Homicide §§ 525 et seq.

4. Homicide § 21.7 (NCI3d)— second degree murder—evidence sufficient

There was sufficient evidence of second degree murder where the evidence supported a finding that defendant and two others acted in concert to commit acts, specifically the repeated striking of the victim's face, which evidenced wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and minds regardless of social duty and deliberately bent on mischief.

Am Jur 2d, Homicide §§ 53, 245.

APPEAL by defendant from judgment entered 6 September 1989 in WAKE County Superior Court by *Judge J. B. Allen, Jr.* Heard in the Court of Appeals 18 January 1991.

Lacy H. Thornburg, Attorney General, by John R. Corne, Special Deputy Attorney General, for the State.

McMillan, Kimzey & Smith, by Duncan A. McMillan, for defendant-appellant.

GREENE, Judge.

On 9 December 1988, defendant was charged with first-degree rape and first-degree murder. At the close of the State's evidence at trial, the State voluntarily dismissed the charge of first-degree rape, and further informed the court that it would dismiss the charge of first-degree murder and proceed with second-degree murder. On 6 September 1989, the "death qualified" jury found defendant guilty of second-degree murder. Defendant appeals from a judgment entered 6 September 1989, imposing a prison term of not less than forty-five years nor more than fifty years.

The victim's body was found on 9 July 1979 in the weeds around a cul-de-sac off Turf Grass Road in Wake County. At trial the State presented the testimony of Dr. Hudson, an expert in forensic pathology who, in July of 1979, was the Chief Medical Examiner for the State of North Carolina. Dr. Hudson assisted in the investigation of the victim's death and also conducted the autopsy on the body. He testified that there were at least four superficial cuts on each of the victim's thighs, and that, in his opinion, the cuts were made near the time of death. In Dr. Hudson's opinion the cuts were caused by a sharp object, most likely a knife. Dr. Hudson further testified that the victim had sustained multiple fractures to the right side of her face and extending to the left cheek. In his opinion, these fractures were caused by a blunt object and could have been caused by a person's fist or by the butt of a stout knife. Dr. Hudson stated that it was difficult to believe such injuries could be caused by a single blow. The cause of death, in Dr. Hudson's opinion, was a blunt force injury to the head.

In the fall of 1987, Phillip Bruce Price contacted the Wake County Sheriff's Department contending he had witnessed the events leading up to the victim's death. At trial, Price testified that in late June or early July of 1979, he had been fishing and was walking home along a path. He was crossing over some boulders in the path when he heard a woman who "sounded like she was upset." Price saw a car parked on the pavement of the cul-de-sac. The

car doors were open and inside Price saw the defendant and Sylvester Holden in the front seat, with defendant in the driver's seat. Dwight Goodson and the victim were in the back seat. The victim was naked from the waist down. Price knew defendant, Holden and Goodson because he had attended school with them.

Price testified that he saw Holden get on his knees on the front seat, facing the back seat. He then saw "hands flying like, as if fists were being thrown," and he stated that "[t]his went on for probably ten to fifteen seconds." He specifically remembered seeing Holden's "hands flying." During this time, the victim was on her back in the back seat, and "it looked as if [Goodson] was holding her legs to keep her from getting away or whatever, because it looked to me like she wanted to get away." "Then [Holden], after there was an exchange of blows with her in the upper body region, reached in the glove compartment and took out a knife. . . ." Holden handed the knife to defendant who turned around and "made a motion like he was striking at her."

Defendant and Goodson then pulled the victim from the car and dragged her into the weeds. They then got back in the car and drove away. After they were gone, Price walked to within ten feet of the victim's body. She was still naked from the waist down, and Price observed a lot of blood about her body. Price then walked home and told no one of what he had seen until the Fall of 1987 because he was "scared to death."

The State also presented the testimony of Sylvester Holden. Holden was also charged with first-degree murder and first-degree rape, but was not joined as a defendant in this trial. Holden testified that defendant picked him up in his car on the day in question, and then picked up Goodson. Defendant was driving, Holden was in the front on the passenger side, and Goodson was in the back seat. They went to a club called Dunn's Disco, and Holden stayed in the car while defendant and Goodson went inside. Shortly, defendant and Goodson walked out of the club with a female who was unknown to Holden. Goodson and the female got in the back seat and defendant got in the driver's seat of the car. After driving some distance, defendant pulled off the road. Defendant and Goodson then took turns having sexual intercourse with the female in the back seat. Defendant then got out of the car as he obtained a knife from the floorboard. He told the female to get out of the car, and "he slapped her up side the head as she was getting

out." Defendant and the female then walked to the back of the car and defendant began "arguing with the female and, and I noticed that he had slapped her head." Holden heard defendant say that "he was going to leave her down there." Defendant and Goodson, who had been standing beside the car, got back in the car and defendant began to drive away. As they were driving off, defendant said "that, that that bitch, that old bitch won't shit no way, ain't shit no way but an old whore. . . ."

Dwight Anthony Goodson was also charged with first-degree rape and first-degree murder, and he was joined as a defendant with defendant Spivey. Goodson was found guilty of second-degree murder. Goodson appealed separately and his conviction was upheld by this Court in *State v. Goodson*, 101 N.C. App. 665, 401 S.E.2d 118 (1991). The present appeal concerns only defendant Spivey.

Neither defendant offered evidence at trial.

The issues are: (I) whether defendant was prejudiced by the State's failure to provide defendant with impeaching and exculpatory information in its possession until the week of trial; (II) whether the trial court erred by allowing the State's motion to join defendants Spivey and Goodson and by denying defendant's motion to sever offenses; (III) whether there was sufficient evidence to submit second-degree murder to the jury; (IV) whether the trial court erred in allowing the State to seek a conviction of second-degree murder with a "death qualified" jury; (V) whether the trial court erred in allowing the State to impeach its own witness, Sylvester Holden; (VI) whether the trial court erred in allowing the jury to consider Price's testimony; and (VII) whether the State's choice to submit to the jury second-degree murder instead of first-degree murder constituted the dismissal of charges against defendant such that the trial court was without jurisdiction to try this case.

I

[1] Defendant first argues that he was denied due process in that the State withheld exculpatory and impeaching evidence in violation of the holdings in *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342 (1976), after defendant made a "*Brady* motion" for discovery of such evidence. *Brady* holds "that the suppression by the prosecution of evidence favorable to an accused upon request

violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* at 87, 10 L.Ed.2d at 218.

Defendant refers specifically to a recorded statement made by Price during a police interview in which Price stated that Spivey did not physically do anything to the victim, and that Goodson was the one who used a knife on the victim. Defendant does not argue that the State suppressed this statement. In fact, the statement was offered into evidence and read at trial by the State. Instead, defendant argues that the State was not timely in providing the statement to defendant in that defendant received the statement on 25 August 1989, shortly before defendant's trial which began during the 25 August 1989 session of the Superior Court of Wake County.

> Recently, *United States v. Agurs*, [427] U.S [97], 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), resolved several of the questions left unanswered by *Brady*. . . . Under *Agurs*, it appears the prosecutor is constitutionally required to disclose only *at trial* evidence that is favorable and material to the defense. Due process is concerned that the suppressed evidence might have affected the outcome at trial and not that the suppressed evidence might have aided the defense in preparing for trial. *United States v. Agurs, supra.*

State v. Hardy, 293 N.C. 105, 127, 235 S.E.2d 828, 841 (1977).

The federal courts have also noted that the test is not merely whether the evidence would have aided the defendant in the preparation of his case, but whether defendant was prejudiced.

> Assuming that all of this information was material within the meaning of *Brady*, the delay in disclosing it only requires reversal if "the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." *United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir.), *cert. denied*, 426 U.S. 924, 96 S.Ct. 2634, 49 L.Ed.2d 379 (1976).

United States v. Shelton, 588 F.2d 1242, 1247 (9th Cir. 1978), *cert. denied*, 442 U.S. 909, 61 L.Ed.2d 275 (1979) (where defendant received 500 pages of allegedly impeaching information the day before trial, defendant was unable to show how this delay prejudiced the preparation of his case).

> While we strongly disapprove of delayed disclosure of *Brady* materials, that alone is not always grounds for reversal. "As long as ultimate disclosure is made before it is too late for the defendant[ ] to make use of any benefits of the evidence, Due Process is satisfied." *United States v. Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031, 100 S.Ct. 701, 62 L.Ed.2d 667 (1980); *accord United States v. Allain*, 671 F.2d 248, 255 (7th Cir. 1982); *Alberico*, 604 F.2d at 1319; *United States v. Hemmer*, 561 F. Supp. 386, 391 (D. Mass. 1983), *aff'd*, 729 F.2d 10 No. 83-1379 (1st Cir. 1984).

United States v. Warhop, 732 F.2d 775, 777 (10th Cir. 1984). Another factor for consideration in determining whether defendant has been prejudiced by the belated discovery of *Brady* material is whether defendant requested a continuance when the material was discovered during the course of trial. *Gorham v. Wainwright*, 588 F.2d 178, 180 (5th Cir. 1979) (where prosecution revealed certain *Brady* material for first time at trial, and counsel introduced the information into evidence after requesting and receiving a ten-minute recess, court stated that defendant's failure to request a continuance "undercuts the present argument of prejudice," that being that had defendant known of the information earlier "he would have more fully prepared to exploit their exculpatory possibilities").

In the present case, the only *Brady* material defendant refers to in his brief is the prior statement made by Price to the police. However, this statement was revealed at trial and read into evidence by the State. Defendant contends that "the state's failure to provide such information until the eleventh hour" prejudiced defendant and denied him of his constitutional rights. Though defendant does not expressly make the assertion, we infer from his brief that defendant's basis for claiming prejudice is that defendant could have better prepared his case by earlier discovery of Price's statement.

The record indicates that any impeaching or exculpatory remarks made by Price were put before the jury during the State's case in chief. Furthermore, Price's statement was not suppressed but its delivery to defendant was merely delayed. Defendant received Price's statement on 25 August 1989. On 29 August 1989, before trial started, defendant requested and received a continuance until 30 August 1989. On 30 August 1989, before the jury was

empaneled and while its members were absent, the following exchange occurred:

> COURT: Let the record show that both the defendants and all the attorneys for both the defendants and the State are present. Is the State ready to empanel the jury and have opening statements and proceed with evidence?
>
> MS. LAMBERT: Yes, Your Honor, the State is.
>
> . . . .
>
> COURT: And is Defendant Spivey, Mr. Dodd, and Mr. McMillan ready to proceed?
>
> MR. DODD: He is, Your Honor, and we would also anticipate doing that. I'll do that on behalf of Mr. Spivey.

Finally, the transcript indicates that both Goodson and defendant used Price's prior statement at trial to elicit impeaching and exculpatory statements during cross-examination of Price, and that defendant's cross-examination pertaining to Price's prior statement constitutes at least fifteen pages of the trial transcript. For these reasons, we fail to find any prejudice to defendant by the State's failure to provide defendant with the statement until 25 August 1989. Accordingly, defendant was not denied due process on this ground.

II

[2] Defendant next argues the trial court erred in granting the State's motion to join defendants and in denying defendant's motion to sever offenses.

The issue of joinder of defendants in this case was raised by Goodson in his appeal at *State v. Goodson*, 101 N.C. App. 665, 401 S.E.2d 118 (1991). Defendant here raises no argument which would require additional analysis. Therefore, we find no merit to this assignment of error for the reasons stated by this Court in *Goodson*.

As to the severance of offenses, the applicable statute provides:

> (1) A defendant's motion for severance of offenses must be made before trial as provided by G.S. 15A-952, except as provided in G.S. 15A-953, and except that a motion for severance may be made before or at the close of the State's evidence

if based upon a ground not previously known. Any right to severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. *Any right to severance is waived by failure to renew the motion.*

. . . .

N.C.G.S. § 15A-927(a) (1988) (emphasis added).

The record and transcript indicate that defendant failed to renew his motion to sever offenses at any time after his pretrial motion for same was denied. By statute he has, therefore, waived any right to severance of offenses. *See State v. Silva*, 304 N.C. 122, 128, 282 S.E.2d 449, 453 (1981).

III

Defendant next argues that the evidence at trial supports only a verdict of either first-degree murder or of not guilty, and that the trial court erred in submitting second-degree murder to the jury. In the alternative, defendant argues there was insufficient evidence to support a verdict of guilty of second-degree murder.

[3] We first reject defendant's argument that the trial court erred by submitting the charge of second-degree murder to the jury on the basis that all the evidence supports only first-degree murder. In support of this argument, defendant cites *State v. Arnold*, 98 N.C. App. 518, 392 S.E.2d 140, *disc. rev. allowed*, 327 N.C. 484, 397 S.E.2d 223 (1990). In *Arnold*, defendant was convicted of second-degree murder where both first-degree murder and second-degree murder were submitted to the jury. *Arnold* holds that, under such circumstances, a defendant's due process rights are violated where the evidence establishes all the elements of first-degree murder and there is no evidence to negate premeditation or deliberation.

In the present case, even if we assume that all the evidence does establish all the elements of first-degree murder, we find no error. *Arnold* is not applicable to the present case because the trial court submitted only second-degree murder, and the jury could only find defendant guilty or not guilty of that offense. The rule generally applicable in the present situation is that "a defendant in a capital case is not prejudiced when the State elects to

abandon the capital offense, which is equivalent to a verdict of not guilty on the more serious charge, and proceeds on a lesser offense included in the bill of indictment." *State v. Mulwee*, 27 N.C. App. 366, 368, 219 S.E.2d 304, 306, *disc. rev. denied*, 288 N.C. 732, 220 S.E.2d 622 (1975). An indictment of murder includes both first-degree murder and second-degree murder, *State v. Roseboro*, 276 N.C. 185, 196, 171 S.E.2d 886, 893 (1970), *rev'd on other grounds*, 403 U.S. 948, 29 L.Ed.2d 860 (1971), and as long as there is substantial evidence supporting the offense submitted there is no error.

[4] We furthermore find sufficient evidence in the record to support a conviction of second-degree murder. Second-degree murder is the unlawful killing of another with malice, but without premeditation and deliberation. *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984).

> While an intent to kill is not a necessary element of second degree murder, the crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death. . . . [A]ny act evidencing [ ]wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person[ ] is sufficient to supply the malice necessary for second degree murder. Such an act will always be accompanied by a 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.

State v. Wilkerson, 295 N.C. 559, 580-81, 247 S.E.2d 905, 917 (1978).

The jury could find from the evidence in this case that Goodson and defendant took turns having sexual intercourse with the victim. Afterward, Goodson held the victim in the back seat while Holden repeatedly struck the victim's upper body. Defendant then obtained a knife, either from Holden or from the floorboard of the car, and struck the victim in the head, either with his hand or with the handle of the knife, as she was getting out of the car. The victim sustained multiple fractures to her face which were caused by a blunt object. The evidence places the knife in defendant's hand, and the victim was found to have multiple cuts to her legs which, according to the Chief Medical Examiner, were made near the time of death and caused by a sharp object, most likely a

knife. The Medical Examiner also stated that the cause of death was a blunt force injury to the head and that it would be difficult to believe such an injury could be caused by a single blow.

This evidence supports a finding that defendant, Goodson and Holden acted in concert to commit acts, specifically, repeatedly striking the victim's face, which evidence wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and minds regardless of social duty and deliberately bent on mischief. Thus, the jury could find from the evidence that defendant acted in concert to unlawfully kill another with malice and, therefore, committed second-degree murder.

Issues IV, V, VI and VII were raised by Goodson in his appeal at *State v. Goodson*, 101 N.C. App. 665, 401 S.E.2d 118 (1991). Defendant in the present case makes the same arguments as those made by Goodson. Furthermore, there are no factual distinctions which would require different or additional analysis. We therefore find no error in regard to these issues for the reasons stated by this Court in *Goodson*.

No error.

Judges PARKER and COZORT concur.

EVELYN GRACE COLEMAN, ADMINISTRATRIX FOR THE ESTATE OF MONICA AVIS COBB AND MARION ANNETTE COLEMAN, PLAINTIFF v. KATHY LUNCEFORD COOPER (FORMERLY KATHY LUNCEFORD), WAKE COUNTY DEFENDANTS

No. 9010SC386

(Filed 7 May 1991)

1. Public Officers § 9 (NCI3d)— liability of Social Services worker—public official defense—summary judgment for defendant—improper

The trial court erred by granting summary judgment for defendant Cooper, a Social Services employee, based on the public official defense in a wrongful death action arising from the murder of two children by their father while a sexual abuse investigation was in progress. The Court of Appeals

stated in *Coleman v. Coleman*, 89 N.C. App. 188, that a violation of N.C.G.S. § 7A-544, which provides for the protection of abused or neglected juveniles, could give rise to an action for negligence, and defendant Cooper was an employee of Wake County and could be subject to liability in the performance of her official duties.

Am Jur 2d, Public Officers and Employees § 375.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody. 60 ALR4th 942.

2. Counties § 124 (NCI4th)— wrongful death action—against Social Services employee—Tort Claims Act

The trial court did not err in a wrongful death action against a Social Services employee in Wake County arising from the murder of two alleged sexual abuse victims by their father by granting Wake County's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(1) because the action should have been brought before the Industrial Commission. Wake County was acting as an agent of the Social Services Commission and Department of Human Resources in its delivery of protective services to decedents; a cause of action originating under the Tort Claims Act against Wake County as a subordinate division of the State must be brought before the Industrial Commission.

Am Jur 2d, Public Officers and Employees § 612.

Judge ARNOLD concurring in the result.

APPEAL by plaintiff from orders entered 28 February 1990 by *Judge Robert L. Farmer* in WAKE County Superior Court. Heard in the Court of Appeals 27 November 1990.

This is the second appeal of this matter. In this action, plaintiff seeks damages for the wrongful deaths of her two minor daughters. On 3 April 1985, plaintiff's two deceased daughters, Marion Coleman and Monica Cobb, were stabbed and murdered by Melvin Coleman. Prior to the daughters' deaths, defendant Kathy Lunceford Cooper was an employee of the Wake County Department of Social Services (hereinafter Wake County). She had conducted a sexual abuse investigation on or about 28 February 1985 after a school nurse made a neglect report to Wake County after examining Marion

Coleman and discovering that she had venereal disease. Marion had told the school nurse that she and her half-sister Monica Cobb were involved in sexual relations with a male relative.

On 28 February 1985, defendant Cooper interviewed Marion who informed her that she had been sexually abused by her father, Melvin Coleman, beginning when she was approximately eight years of age. Marion informed defendant Cooper that she had had vaginal intercourse with her father many times. Marion also told defendant Cooper that Melvin Coleman had sexually abused his step-daughter, Monica Cobb. She also reported incidents of physical abuse.

Defendant Cooper then interviewed Monica. Monica told defendant Cooper that she had been sexually abused since the age of six or seven. She stated that at age eight or nine she engaged in sexual intercourse with Melvin Coleman. During each respective interview, both Marion and Monica told defendant Cooper that they had told their mother about the sexual activity during Christmas of 1983. They stated that eventually Ms. Coleman would not allow the girls to stay with Melvin Coleman alone but the sexual abuse still continued and that Mrs. Coleman was afraid to do anything about it because Melvin Coleman had physically abused her in the past.

During an interview Ms. Coleman told defendant Cooper that she was aware of the sexual abuse and that she was afraid of her husband's reaction to the investigation. Ms. Coleman stated that she had confronted Melvin Coleman about his sexual abuse of the two girls during Christmas of 1983 and that he had stayed away from the family for approximately four months. Defendant Cooper informed Ms. Coleman that she would be referring the matter to law enforcement so that they could conduct their investigation. Subsequently medical examinations were conducted on both girls. Defendant Cooper also informed school officials that Melvin Coleman was not to have any contact with the girls.

On 7 March 1985, defendant Cooper called Melvin Coleman and requested a meeting with him. At the meeting she confronted him with the sexual abuse allegations. Melvin Coleman denied the allegations. On 2 April 1985, Melvin Coleman's attorney informed him that indictments had been handed down by the grand jury. Rather than turn himself in, on 3 April 1985, Melvin Coleman went to the trailer where the girls were living, broke in, stabbed and murdered the girls. Afterwards, he fire-bombed the trailer.

Plaintiff, as administrator of the estates of Monica Cobb and Marion Coleman, filed a complaint on 12 February 1986 against Kathy Cooper, Wake County, the City of Raleigh and the City of Raleigh Police Department seeking damages for the wrongful death of her decedents. On 27 May 1987, the trial court granted summary judgment for defendants Cooper and Wake County. Thereafter on 5 June 1986 the trial court granted summary judgment for defendants City of Raleigh and the City of Raleigh Police Department. On appeal, in *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), this court reversed the trial court's summary judgment order as to the negligence of defendants Cooper and Wake County. On remand, defendants filed amended answers. On 26 January 1990, defendant Cooper filed another motion for summary judgment and on 29 January 1990 along with defendant Wake County filed a motion to dismiss pursuant to Rule 12(b)(1) of the N.C. Rules of Civ. Pro. On 2 February 1990, defendant Cooper and defendant Wake County filed an additional motion to dismiss pursuant to N.C. Rules of Civ. Pro. 12(b)(2) and on 5 February 1990, defendant Cooper filed an additional motion to dismiss pursuant to N.C. Rules of Civ. Pro. 12(b)(6). On 28 February 1990 the trial court entered an order granting Wake County's motion to dismiss pursuant to Rule 12(b)(1) of the N.C. Rules of Civ. Pro. and denied defendant Wake County's other motions. The trial court also entered an order granting defendant Cooper's motion for summary judgment and denied her motions to dismiss. Plaintiff appeals.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams and Anna Neal Blanchard, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr. and Susan K. Burkhart, for defendant-appellees.

EAGLES, Judge.

Initially we note that

> [i]nvestigations by a social service agency of allegations of child sexual abuse are in the nature of governmental functions. Such activities are performed for the public good. Thus a county normally would be immune from liability for injuries caused by negligent social services employees working in the course of their duties. The General Assembly, however, has authorized counties through a statute to waive the defense

> of immunity for negligent actions that occur in the performance of governmental functions through the purchase of liability insurance. Under this law, . . .; the DSS, as a County agency; and the County employees may be liable for negligent or intentional actions carried out in the performance of their social services duties. *McNeill v. Durham County ABC Board*, 87 N.C. App. 50, 359 S.E.2d 500 (1987), *modified on other ground*, 322 N.C. 425, 368 S.E.2d 619, *reh'g denied*, 322 N.C. 838, 371 S.E.2d 278 (1988).

Hare v. Butler, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235-36, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). We now address the liability of each defendant in light of these principles.

I. Defendant Cooper

[1] Plaintiff first assigns as error the trial court's entry of judgment in favor of defendant Cooper based upon the public official defense. Plaintiff argues that in our prior opinion, *see Coleman, supra*, we established that defendant Cooper "does not have the status or protection of a 'public official.'"

> When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability. *Harwood v. Johnson*, 92 N.C. App. 306, 309, 374 S.E.2d 401, 401 (1988). A public officer sued individually is normally immune from liability for "mere negligence." *Id.* An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury. *Id.; Givens v. Sellars*, 273 N.C. 44, 159 S.E.2d 530 (1968).
>
> A public officer is someone whose position is created by the constitution or statutes of the sovereign. *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power." *Id.* Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from

> fixed and designated facts." *Jensen v. S.C. Dept. of Social Services*, 297 S.C. 323, 377 S.E.2d 102 (1988).

Hare, 99 N.C. App. at 699-700, 394 S.E.2d at 236.

In our prior decision, we specifically stated that a violation of G.S. 7A-544, which provides for the protection of abused or neglected juveniles, "[could] give rise to an action for negligence." 89 N.C. App. at 197, 366 S.E.2d at 8. In *Coleman*, defendant Cooper was classified as an employee of Wake County and as a result could be subject to liability in the performance of her official duties. Accordingly, the *Coleman* court reversed the trial court's entry of summary judgment in favor of defendants Cooper and Wake County on the grounds of sovereign immunity. "Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983). Since the trial court's entry of summary judgment in favor of defendant Cooper was erroneously entered on the grounds that she was a public official, we reverse and remand this cause for trial.

II. Defendant Wake County

[2] Plaintiff next contends that the trial court erred in granting defendant Wake County's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Plaintiff argues that this court in *Coleman, supra*, previously "recognized that Wake County [had] waived sovereign immunity to the extent it purchased liability insurance." Plaintiff contends that the liability of Wake County is "based upon respondeat superior for the negligence of defendant Cooper" and the "failure of the Defendant Wake County to have appropriate safety procedures." Plaintiff contends that the Wake County Superior Court is the proper forum for this claim and that the trial court erred in holding that the claim should be brought before the Industrial Commission. We disagree.

> A county's liability for the torts of its officers and employees depends on whether the activity involved is "governmental" or "proprietary" in nature. Traditionally, a county was immune from torts committed by an employee carrying out a governmental function, but was liable for torts committed while engaged in a proprietary function. The North Carolina Supreme Court has distinguished between the two as follows:

> Any activity . . . which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than to itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.
>
> Often making this distinction proves difficult. Certain activities are clearly governmental such as law enforcement operations and the operation of jails, public libraries, county fire departments, public parks and city garbage services. Non-traditional governmental activities such as the operation of a golf course or an airport are usually characterized as proprietary functions. Charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary. [Citations omitted.]

Hare, 99 N.C. App. at 698-99, 394 S.E.2d at 235.

> Under The Tort Claims Act the North Carolina Industrial Commission (Commission) is "constituted a court for the purpose of hearing and passing upon tort claims against the . . . departments, institutions, and agencies of the State." G.S. 143-291. The Commission is authorized to determine "whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." *Id.*

Vaughn v. Dept. of Human Resources, 296 N.C. 683, 685, 252 S.E.2d 792, 794 (1979). "Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. State Ports Authority*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983).

In *Vaughn, supra*, the claimant brought an action before the North Carolina Industrial Commission against the Department of Human Resources alleging that the Director of Durham County Social Services and five of his caseworkers were negligent in plac-

ing a foster child in her home carrying the cytomegalo virus when they knew that the claimant was attempting to become pregnant. The Department of Human Resources moved to dismiss the action before the North Carolina Industrial Commission on the grounds that "the Durham County Department of Social Services is not a State department and the Director and employees thereof are not State employees within the meaning of G.S. 143-291." *Id.* at 684, 252 S.E.2d at 794. The Full Commission and the Court of Appeals determined that the Industrial Commission had jurisdiction to hear and determine the claim. The Supreme Court allowed discretionary review.

In *Vaughn*, the North Carolina Supreme Court stated that "[i]n order for the Commission to assert jurisdiction over this claim there must be a showing that the Director of the Durham County Department of Social Services and his staff were acting as the 'involuntary servants or agents' of a 'State Department' under circumstances in which the State, if a private person, would be liable for the negligent acts of the named servants or agents." *Id.* at 685, 252 S.E.2d at 794, citing G.S. 143-291. The *Vaughn* court further stated that "[a]pplication of the principles of agency law and respondeat superior to the statutory scheme for the delivery of foster care services leads us to conclude that liability may exist and that the Industrial Commission may therefore 'hear and pass upon' the merits of this claim pursuant to the provisions of the Tort Claims Acts." *Id.* at 686, 252 S.E.2d at 795. We note that the *Vaughn* court stated that it "express[ed] no opinion on whether the Department of Human Resources might also be liable for negligent acts of the County Director outside the scope of his obligation to place children in foster homes. In every instance the liability of the Department of Human Resources depends upon application of the principles of agency and respondeat superior to the facts in the case under consideration." *Id.* at 692, 252 S.E.2d at 798, citing *Snow v. DeButts*, 212 N.C. 120, 193 S.E. 224 (1937).

G.S. 108A-1 requires that "[e]very county shall have a board of social services which shall establish county policies for the programs established by this Chapter in conformity with the rules and regulations of the Social Services Commission and under the supervision of the Department of Human Resources." G.S. 108A-14(5) provides that the director of social services shall "act as agent of the Social Services Commission and Department of Human Resources in relation to work required by the Social Services Com-

mission and Department of Human Resources in the county[.]" G.S. 108A-14(11) further provides that the director of social services shall "investigate reports of child abuse and neglect and to take appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 44 of Chapter 7A[.]" "The Director of the Department of Social Services shall submit a report of alleged abuse or neglect to the central registry under the policies adopted by the Social Services Commission." G.S. 7A-548(a). The central registry of abuse and neglect cases is maintained by the Department of Human Resources. G.S. 7A-552. Finally, "a subordinate division of the state, or agency exercising statutory governmental functions like a city administrative unit, may be sued only when and as authorized by statute." *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952).

In the instant case, Wake County was acting as an agent of the Social Services Commission and the Department of Human Resources in its delivery of protective services to the decedents. A cause of action originating under the Tort Claims Act against Wake County as a subordinate division of the State, must be brought before the Industrial Commission. Accordingly, the trial court did not err in dismissing the action against Wake County. Because we have affirmed the trial court on this issue, we need not address defendants' cross assignment of error.

In summary, with respect to defendant Cooper, we reverse the entry of summary judgment in her favor and remand this cause for trial. With respect to defendant Wake County, we affirm the superior court's dismissal of this action.

Affirmed in part; reversed and remanded in part.

Judge PARKER concurs.

Judge ARNOLD concurs in part and concurs in the result as to defendant Cooper by separate opinion.

Judge ARNOLD concurring in the result.

In regard to defendant Cooper, while I agree that we are bound by the result of the Court's prior panel on the question of this defendant's liability, I strongly question the reasoning of that prior decision. Its anomalous rationale appears to allow a

claim against an employee in an individual capacity while conferring immunity from liability in a governmental capacity. Defendant's actions were clearly within this scope.

In addition to the above, parents "have the duty to take every step reasonably possible under the circumstances . . . to prevent harm to their children." *Coleman v. Cooper*, 89 N.C. App. 188, 198-99, 366 S.E.2d 2, 9, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988) (citing *State v. Walden*, 306 N.C. 466, 475, 293 S.E.2d 780, 786 (1982)). Failure to perform this duty is negligence. From the forecast of evidence before us plaintiff was contributorily negligent as a matter of law.

TRAVCO HOTELS, INC., PLAINTIFF v. PIEDMONT NATURAL GAS COMPANY, INC., DEFENDANT, AND K & W RESTAURANT, INC., PLAINTIFF v. PIEDMONT NATURAL GAS COMPANY, INC., DEFENDANT v. TRAVCO HOTELS, INC., THIRD PARTY DEFENDANT

No. 9021SC437

(Filed 7 May 1991)

1. **Appeal and Error § 111 (NCI4th)— partial summary judgment—refusal to dismiss punitive damages claim—no immediate appeal**

An order denying defendant's motion to dismiss plaintiff's claim for punitive damages does not affect a substantial right and is not immediately appealable.

Am Jur 2d, Appeal and Error §§ 62, 103.

2. **Appeal and Error § 134 (NCI4th)— refusal to disqualify attorney—order not immediately appealable**

Although a substantial right of defendant was affected by the trial court's order denying defendant's motion to disqualify plaintiff's counsel because of confidential information allegedly obtained by counsel during representation of defendant in a previous matter, the order was not immediately appealable since the deprivation of that right will not injure defendant if not corrected before a final judgment because defendant will not lose its right to appeal the denial of the motion after final judgment.

Am Jur 2d, Appeal and Error §§ 47, 48, 86; Attorneys at Law § 184.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by defendant Piedmont Natural Gas Company, Inc., from the orders entered 11 January 1990 by *Judge William H. Freeman* in FORSYTH County Superior Court. Heard in the Court of Appeals 28 November 1990.

This action arises out of one of numerous actions alleging that defendant Piedmont Natural Gas Company, Inc. (hereinafter Piedmont) was negligent in causing a large natural gas explosion which destroyed a hotel and restaurant building owned by Travco Hotels, Inc. (hereinafter Travco) and leased by the K & W Cafeterias, Inc. On 12 May 1989, the Chief Justice of the North Carolina Supreme Court declared these cases "exceptional" under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and designated Judge William Freeman to preside over all cases.

On 11 September 1989, Piedmont filed a motion to disqualify one of Travco's counsel, Womble Carlyle Sandridge & Rice (hereinafter Womble Carlyle), alleging that Womble Carlyle previously represented Piedmont in another action substantially related to the present action. Piedmont subsequently filed a motion for partial summary judgment on 27 October 1989.

On 17 November 1989, Judge Freeman heard both of Piedmont's motions. The trial court heard extensive evidence on the motion to disqualify. On 11 January 1990, the trial court entered two separate orders, one denying Piedmont's motion for partial summary judgment, and one 66-page order denying Piedmont's motion to disqualify Womble Carlyle.

From the orders of 11 January 1990, Piedmont appeals.

Womble Carlyle Sandridge & Rice, by Jimmy H. Barnhill, Michael E. Ray and Jack B. Hicks, for plaintiff-appellee TRAVCO Hotels, Inc.

Wyatt, Early, Harris, Wheeler & Hauser, by Kim R. Bauman, for plaintiff-appellee TRAVCO Hotels, Inc.

Bailey & Thomas, by David W. Bailey, Jr., for plaintiff-appellee TRAVCO Hotels, Inc.

McKenzie & McPhail, by Jefferson C. McConnoughey, for K & W Restaurant, Inc.

McCall & James, by Randolph M. James, for K & W Restaurant, Inc.

Hedrick, Eatman, Gardner & Kincheloe, by J. A. Gardner III, Scott M. Stevenson and Brian D. Lake, for defendant-appellant Piedmont Natural Gas Company, Inc.

ORR, Judge.

The dispositive issue on appeal is whether Piedmont's appeal is interlocutory. For the reasons below, we hold that it is and grant Travco's motion to dismiss the appeal.

On 22 June 1990, Travco filed a motion to dismiss the appeal on several grounds, including that the appeal is interlocutory. Because the trial court filed two separate orders on Piedmont's two separate motions, we shall address them separately for purposes of finding the appeal of both orders interlocutory.

A. Motion for Partial Summary Judgment

[1] Piedmont contends that the trial court erred in denying its motion for partial summary judgment on the issue of punitive damages.

Under N.C. Gen. Stat. §§ 1-277 and 7A-27, an order is immediately appealable if the order affects a substantial right and the loss of that right will injure the party appealing if not corrected prior to final judgment. *Horne v. Nobility Homes, Inc.*, 88 N.C. App. 476, 363 S.E.2d 642 (1988). Further, this Court has held that an order denying a defendant's motion to dismiss a plaintiff's claim for punitive damages does not affect a substantial right, and the party appealing is not injured if it cannot appeal until after the final judgment. *Williams v. East Coast Sales*, 50 N.C. App. 565, 274 S.E.2d 276 (1981).

We are bound by this rule and therefore hold that defendant's appeal of the order denying its motion for partial summary judgment on the issue of punitive damages is interlocutory.

B. Motion to Disqualify Womble Carlyle

[2] In deciding whether an appeal is interlocutory, §§ 1-277 and 7A-27 require this Court to apply a two-part test: (1) does the trial court's order affect a substantial right; and (2) if so, will the loss of that right injure the party appealing if it is not corrected

prior to final judgment. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979); *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987); *Robins & Weill v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984).

To determine what constitutes a "substantial right," this Court must look at the facts of each case individually, as well as the procedural history of the order from which the appealing party seeks relief. *Patterson v. DAC Corp.*, 66 N.C. App. 110, 112, 310 S.E.2d 783, 785 (1984) (citation omitted).

In *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 279, 300 S.E.2d 230, 232, *aff'd in part and rev'd in part*, 309 N.C. 695, 309 S.E.2d 193 (1983), this Court held that a denial of the motion to disqualify plaintiffs' attorneys "affect[s] [a] substantial right[s] which will work injury to the appellants if not corrected before an appeal from a final judgment." We must assume that this holding applied only to the facts in *Lowder*, in view of the general rule stated above that this Court must determine each alleged interlocutory appeal on a case by case basis. 66 N.C. App. at 112, 310 S.E.2d at 785. *See also J & B Slurry Seal Co.* (for a thorough analysis of the conflicting decisions applying this rule in determining interlocutory appeals).

In *Lowder*, the law firm defendant sought to disqualify from representing plaintiffs had represented W. Horace Lowder in the criminal appeal of a conviction for tax evasion. One of the attorneys involved in that appeal then sought to associate a related law firm to represent Lowder's brother against Lowder in a related corporate matter. 60 N.C. App. at 279-80, 300 S.E.2d at 233. Lowder alleged that the attorney furnished the associated law firm with confidential information gleaned from the criminal trial. *Id.* After a thorough analysis of the N.C. Code of Professional Responsibility, the *Lowder* Court found, however, that the trial court did not abuse its discretion in denying Lowder's motion because of the extensive findings of fact, including that the "exchanges of information with the [attorney's] firm were confined to matters of public record or matters not related to the present action." *Id.* at 280, 300 S.E.2d at 233. Therefore, the order denying Lowder's motion to disqualify his former attorney was affirmed. *Id.* at 282, 300 S.E.2d at 234.

The present case is substantially different. Here, defendant maintains that because Womble Carlyle represented defendant in previous matters of a similar nature (but not involving plaintiff), Womble Carlyle could not represent plaintiff in the present matter. Defendant alleged that in the previous action, Womble Carlyle became privy to information concerning personnel, operational procedures, technical records and defendant's general attitude as a corporate gas utility.

Piedmont further argues that it has a substantial right to prevent prior counsel from using confidential information gleaned from a prior representation and utilizing it against the client in subsequent litigation in alleged violation of the N.C. Rules of Professional Conduct. We agree with Piedmont that this is a substantial right in the present case.

We cannot find, however, that the deprivation of this right would injure Piedmont if not corrected before a final judgment. Piedmont will not lose its right to appeal the denial of the motion to disqualify Womble Carlyle after final judgment. *See In re Condemnation of Lee*, 85 N.C. App. 302, 354 S.E.2d 759, *disc. review denied*, 320 N.C. 513, 358 S.E.2d 520 (1987) (this Court considered a party's appeal of a trial court's denial of its motion to disqualify opposing counsel who had represented the appealing party in a prior related case after the trial of the action). Second, if Piedmont loses at trial, it can still challenge the verdict and assign as error the trial court's denial of its motion to disqualify Womble Carlyle.

Therefore, we hold that Piedmont's appeal of the trial court's order denying its motion to disqualify Womble Carlyle is interlocutory. We note, however, that here, the cases involved are much less related to each other than those in *Lowder*, where this Court held that the trial court did not abuse its discretion. The trial court in the present case concluded that the scope of the previous case (in which Womble Carlyle was involved representing Piedmont) was limited, that the Womble Carlyle attorneys were not privy to any information about Piedmont that was unusual, unexpected or unique and that no true secrets or real confidences were involved.

For the above reasons, we grant Travco's motion to dismiss the appeal.

Appeal dismissed.

Judge GREENE concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

The majority opinion is based upon mistaken premises and I dissent from it, while agreeing that the order denying defendant's motion to dismiss plaintiff's claim for punitive damages does not affect a substantial right and is not immediately appealable.

The dispositive issue is not whether the appeals are interlocutory—both manifestly are, since neither order finally determines any aspect of the case; there is no two-part test for determining whether an appeal or order is interlocutory; some of the discussion of these mistaken issues and premises is unnecessary as well as incorrect; the dispositive issue is whether either interlocutory order appealed from affects a substantial right, for if an interlocutory order affects a substantial right it is immediately appealable, otherwise it is not, and the issue has been clearly and succinctly answered for us by previous decisions of our courts.

One order appealed from refused to dismiss plaintiff's claim against Piedmont for punitive damages and in *Williams v. East Coast Sales, Inc.*, 50 N.C. App. 565, 274 S.E.2d 276 (1981), it was held without qualification that an order denying a similar motion did not affect a substantial right. Though not discussed by the Court, the reason that a refusal to dismiss a meritless claim in advance of trial does not affect a substantial right is that such claims come to nothing in due course anyway. I would dismiss the appeal from that order without further ado or discussion.

The other order refused to disqualify plaintiff's attorney because of confidential information allegedly obtained while representing defendant Piedmont, and in *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 300 S.E.2d 230, *aff'd in part, reversed in part*, 309 N.C. 695, 309 S.E.2d 193 (1983), it was held that an order refusing to disqualify the plaintiff's attorney because of confidential information allegedly obtained while representing the movant in another matter affects such a right and is immediately appealable. The substantial right that was endangered in *Lowder* and that the order in this case endangers—not to be at a disadvantage in a case because of a former lawyer's violated confidence—is basic to the integrity of our adversary system. In *Lowder* the likeli-

hood of the movant establishing that this right would be prejudiced was apparently not a factor in determining whether the order was appealable, as this Court upheld appealability, but affirmed the order, and that ruling was not reviewed by the Supreme Court. The decision in *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990), is clearer on this point, as the Supreme Court determined that an interlocutory order which disqualified plaintiff's chief trial counsel because of confidential information obtained from defendant's former employee about the turnover propensity of the motor vehicle model involved affected a substantial right, though plaintiff's other lawyers could effectively handle the case, but left the merits of the appeal to us. These and other decisions indicate to me that contrary to the loose and unnecessary language in some of the other cases the appealability of an interlocutory order that affects a fundamental right does not depend upon the likelihood, much less the certainty, that the right will be lost, but upon the character of the right that is endangered and the type of prejudice that can result. Which is as it should be; because the effect upon a lawsuit of violated confidence or losing the services of one's chosen lawyer cannot be determined without considering the merits of the appeal, and both practicality and prudence require that the extent of a threat to a substantial right of a litigant be determined while there is still time to prevent or minimize it, rather than after the damage is beyond correction. The conclusion that defendant's substantial right will not be affected by permitting the lawyers to stay in the case, since a new trial can be obtained if prejudice is established, is both groundless and unrealistic in my opinion. The signing of a new trial order is not likely to obliterate the information that caused the order to be entered. Since the unfairness and violated confidence issue is serious enough to require a sixty-seven page order by the trial judge, it should be set at rest now either by determining that no significant prejudice is likely and affirming the trial court, or by determining that prejudice to the right is likely and requiring the law firm to withdraw.

And, in my view, the implication in the majority opinion that the circumstances of every fragmentary appeal that comes here must be analyzed before determining whether a substantial right is affected is incorrect and misleading. For it has been established that some orders affect such a right and that others do not, and analyzing the circumstances in cases that involve such orders can

lead only to pointless appeals and arguments and irreconcilable opinions that confuse and mislead the profession. No circumstance, for example, is going to make an order refusing to dismiss a claim for punitive damages immediately appealable or an order depriving a party of its right to a jury trial unappealable.

MELISSA S. JUHAN (FORMERLY MELISSA NEEDHAM) v. WILEY H. COZART AND RUTH G. COZART, C. W. RUSSUM, INDIVIDUALLY, AND C. W. RUSSUM AND ASSOCIATES

No. 9010SC435

(Filed 7 May 1991)

1. **Fraud § 12.1 (NCI3d)— absence of knowledge and representations—insufficient evidence of fraud**

Plaintiff's claim for fraud in the sale of a house with a sewer line under it was properly dismissed by summary judgment where the materials before the trial court established that defendants did not know that a sewer line was under the house and made no representations about a sewer line.

Am Jur 2d, Fraud and Deceit §§ 158, 162, 201.

2. **Deeds § 24 (NCI3d)— deed to husband and wife—covenant against encumbrances—enforcement by wife**

Plaintiff could enforce a covenant against encumbrances in a deed to plaintiff and her husband as tenants by the entirety after the marriage failed and the husband's interest was conveyed to her.

Am Jur 2d, Covenants, Conditions, and Restrictions § 289.

3. **Deeds § 24 (NCI3d)— covenant against encumbrances—municipal sewer line not encumbrance**

A municipality's underground sewer line across property conveyed by warranty deed did not constitute an encumbrance within the covenant against encumbrances in the deed where there was no recorded easement for the sewer line and the evidence did not reveal that the municipality has any right or color of right to maintain the sewer line across the property.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 83, 85, 236.

Judge GREENE concurring in part and dissenting in part.

Judge ORR concurs in part and dissents in part.

APPEAL by plaintiff from judgment entered 17 November 1989 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 28 November 1990.

Plaintiff's claims against defendants Cozart for breach of warranty against encumbrances, fraud and breach of contract in selling a house to her and her former husband that had a sewer main of the Town of Fuquay-Varina under it were dismissed by summary judgment and plaintiff's motion for summary judgment on the warranty against encumbrances claim was denied. The dismissal of the breach of contract claim and the denial of her motion for summary judgment were not appealed, and her claim against defendant Russum and his surveying business for not discovering and reporting the sewer line when they surveyed the property incident to the purchase is still pending. When the motions were heard the court refused to receive all but one of the several notarized statements that plaintiff offered, including two that she signed, because they were deemed not to be affidavits and when the record on appeal was settled the court refused to include plaintiff's original verified complaint because it was not offered as evidence during the hearing and was replaced as a pleading by an unverified amended complaint.

The materials that the court did receive and consider—(the pleadings, plaintiff's requests for admission, defendants' affidavits, the deed to the Cozarts when they acquired the property in 1953, their deed conveying the property to the Needhams, Russum's survey, the deed of plaintiff's former husband conveying his interest in the property to her, and the affidavit of David J. Hooks, the vice-president of Hare Pipeline Construction Inc., which plaintiff submitted)—when viewed in the light most favorable to the plaintiff, establish the following facts without contradiction: The property that is the subject of the case, approximately an acre of land on Angier Road in the Town of Fuquay-Varina with a house situated on it, was owned by the Cozarts from 1953 until 17 December 1979, when they conveyed it to plaintiff and her former husband by a general warranty deed that contained a cove-

nant against encumbrances. Russum's survey showed a sewer easement running along the western half of the property some distance from the house and defendants' deed stated that the conveyance was subject to that easement. Before closing the transaction defendants made no oral representations to the Needhams concerning the property and did not know that a sewer line was under the house; the femme defendant did not participate in the negotiations leading to the sale and did not discuss any sewer line with either of the Needhams; the male defendant had heard a rumor that a sewer line was under the house and told plaintiff's husband, who did not investigate it. On 11 October 1982, incident to their approaching divorce, plaintiff's former husband conveyed his interest in the property to her by a warranty deed which stated that its purpose was "to terminate the tenancy by the entirety held by Harlan L. Needham and wife, Melissa S. Needham and to convey all of the husband's interest in said property to his wife . . . ." In October, 1987 the parties learned that a live sewer line of the Town of Fuquay-Varina was under the house and had been in place when defendants acquired the property in 1953. In January, 1988, at plaintiff's request, Hare Pipeline Construction Inc. removed the sewer main from under the house and rerouted it, for which it was paid $9,810.40 by plaintiff. The action was filed on 27 February 1989.

Monroe, Wyne, Atkins & Lennon, P.A., by George W. Lennon, for plaintiff appellant.

Maupin Taylor Ellis & Adams, P.A., by John C. Cooke and William J. Brian, Jr., for defendant appellees.

PHILLIPS, Judge.

[1] Since the materials before the trial court establish without contradiction that defendants Cozart did not know that a sewer line was under the house they sold to plaintiff and her husband and that they made no oral representations to them about it, plaintiff's fraud claim was properly dismissed and we affirm that part of the judgment.

But plaintiff's claim for breach of warranty against encumbrances stands on a different and stronger footing. For neither the grantor's ignorance of an encumbrance nor the grantee's knowledge of it will bar the enforcement of a covenant against encumbrances, *Gragg v. Wagner*, 71 N.C. 316 (1874); *Gerdes v.*

Shew, 4 N.C.App. 144, 166 S.E.2d 519 (1960), and instead of the materials before the court showing that this claim is unenforceable they establish the two elements of the claim as a matter of law. Defendants' deed to the Needhams establishes that the warranty or covenant was made and their admission that the sewer line was there when the property was conveyed to them more than 35 years earlier, along with the other evidence to the same effect, and that it was still there when they conveyed the property to the Needhams establishes that the warranty was breached upon the delivery of the deed. *Philbin Investments, Inc. v. Orb Enterprises, Limited*, 35 N.C.App. 622, 242 S.E.2d 176 (1978). Though, technically, plaintiff's right to an adjudication that the claim has been established is not before us, since the denial of her motion for partial summary judgment was not appealed, inasmuch as defendants' own materials indisputably establish that the claim has been established, to return the question to the trial court would only compound the errors already made there and prolong the litigation to no purpose. Thus, we reverse the court's rulings as to this claim, hold that the validity of the claim for breach of the covenant or warranty against encumbrances has been established as a matter of law, and remand the claim to the trial court for a determination of plaintiff's damages.

Defendants argue that the claim was properly dismissed for two reasons, the first of which is that the sewer line under the house was not an "encumbrance" as that word was used in their deed conveying the property to plaintiff and her husband. An encumbrance within the meaning of such a covenant is "any burden or charge on the land and includes any right existing in another whereby the use of the land by the owner is restricted." *Gerdes v. Shew*, 4 N.C.App. at 148, 166 S.E.2d at 522. Any easement that materially affects or interferes with the full use or enjoyment of the land conveyed is an encumbrance. *Waters v. North Carolina Phosphate Corp.*, 310 N.C. 438, 312 S.E.2d 428 (1984). Quoting from *Abernathy v. Stowe*, 92 N.C. 213 (1885), P. Hetrick, *Webster's Real Estate Law in North Carolina* Sec. 217 (rev. ed. 1988), states:

> 'Encumbrances' as used in the covenant against encumbrances has been said to mean 'such as have some foundation in right, or at least color of right, such as would require in some proper way an expenditure of money to remove them, and not such as may be set up arbitrarily and groundlessly by a pretender.'

The municipal sewer line situated under the house met all the requirements of an encumbrance under these authorities. It was a burden upon the land conveyed; it restricted the use of the property; and it had to be removed at substantial expense.

Defendants further argue that the sewer line was not an encumbrance because no document presented to the court establishes that the line is there under "any right, or claim of right, by a third party." This argument disregards both reality and the burden they had as movants to establish that the claim is unenforceable. Since their forecast of proof did not even suggest that the sewer line was there without any claim or color of right, plaintiff was under no compulsion to show otherwise. *Lynch v. Newsom*, 96 N.C.App. 53, 384 S.E.2d 284 (1989), *disc. review denied*, 326 N.C. 48, 389 S.E.2d 90 (1990). Defendants' affidavit merely showed that no public record of the easement was found. It did not attempt to show that the Town does not claim the line was rightfully there. Nevertheless, though no document shows that the line was rightfully there other evidence presented does; evidence of the same force as the proverbial trout in the milk, which prompted Henry David Thoreau to observe that, "Some circumstantial evidence is very strong." Bartlett, *Familiar Quotations* p. 515 (1951). For sewer lines in towns or cities which have authority under the provisions of G.S. 160A-312 and its predecessors to construct, operate and regulate sewerage collection systems do not just happen; they have to be installed at great cost and inconvenience and installing them is not the kind of thing that mere "pretenders" or trespassers are apt to do; and this sewer line had been there long enough, 35 or more years, to establish an enforceable right, if not authorized to start with.

[2] The other reason that justifies the dismissal of the claim, so defendants argue, is that plaintiff, now the sole owner of the property, cannot enforce the covenant because a covenant against encumbrances is personal to the covenantee and does not run to a successor or assign of the original grantee, *Lockhart v. Parker*, 189 N.C. 138, 126 S.E. 313 (1925), and defendants' covenant was made to plaintiff and her husband by the entireties, not to plaintiff individually. This argument would overturn reality with fancy. It has been aptly said of an estate by the entireties: "The estate rests upon the doctrine of the unity of person, and upon the death of one the whole belongs to the other, not solely by right of survivorship, *but also by virtue of the grant which vested the entire*

estate in each grantee." Carter v. Continental Insurance Company of New York, 242 N.C. 578, 580, 89 S.E.2d 122, 123 (1955). (Emphasis in original). The same thing occurs, in our opinion, when a tenancy by the entireties terminates by the failure of the marriage and one spouse's interest is conveyed to the other. Plaintiff has been a grantee and covenantee under defendants' deed since it was delivered; she did not cease to be one because her interest was increased or joined by that of her former husband.

Still another argument—though without standing since no authority is cited for it, and without foundation since it is contradicted by the clear wording of their own deed—is that in excepting from the covenant against encumbrances the "sewer line easement across the western half of said lot," they also excepted the sewer line that ran under the house, if it is ruled to be an encumbrance, which they deny.

Plaintiff's argument that the court also erred in refusing to receive and consider the other notarized statements that she submitted and the original verified complaint need not be determined, for the claim has been established by the other materials and the facts asserted by the rejected materials are merely cumulative or explanatory. For example, the affidavit of the Bowlings, who contracted to purchase the property from plaintiff, explained that the presence of the line was discovered by their surveyor and that they refused to complete the purchase until the encroaching sewer line was rerouted at no expense to them and to the Town's satisfaction; and the affidavit of their surveyor states that he ascertained from searching the Town's records that the line was designed in the 1940's and installed in the early 1950's. These and other statements were refused because the Notary's certification did not expressly state that the statements were subscribed and sworn to before the Notary. The statements were labeled affidavits; each stated over the maker's signature, "I . . . being first duly sworn, do depose and say" and concluded with "Further, the Affiant sayeth not"; and each jurat over the signature and seal of the Notary Public stated, "I . . . do hereby certify that [so and so] personally appeared before me this day and acknowledged the due execution of the foregoing instrument." Whether such statements qualify as affidavits apparently has not been decided by our Courts or any others, as neither party referred us to a decision involving a similar document.

As is apparent from the opinion of Judge Greene that follows, that opinion, concurred in by Judge Orr, is the majority opinion on the issue of the sewer line not being an encumbrance, and this opinion is a dissent on this issue. On all the other issues, this opinion is the opinion of the Court. Thus, the holding of the majority of this Court is that the summary judgment entered by the trial court for the Cozarts is affirmed.

Affirmed.

[3] Judge ORR concurs in the above opinion except for the holding that the sewer line is an encumbrance, and as to that issue he concurs with the dissenting opinion of Judge GREENE.

Judge GREENE concurs in part and dissents in part with separate opinion.

Judge GREENE concurring in part and dissenting in part.

[3] Contrary to the opinion of Judge Phillips, I do not believe that the underground sewer line is an encumbrance.

At the hearing on summary judgment, there was no dispute in the evidence material to a resolution of the issue in question. On the date the plaintiff and her husband purchased the property from Wiley H. Cozart and Ruth G. Cozart (Cozarts), there existed underneath the house on the property a Fuquay-Varina sewer line for which there was no recorded easement.

Because this undisputed evidence does not reveal that the Town of Fuquay-Varina has any "right, or . . . color of right" to maintain the sewer line across the property in question, there exists no encumbrance. *Abernathy v. Stowe*, 92 N.C. 213, 220 (1885); R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 11.13 (1984) (encumbrance is outstanding right or interest in third party); 7 G. Thompson, Commentaries on the Modern Law of Real Property § 3183 (repl. 1962) (unfounded claims not encumbrances). The mere presence of an underground sewer line is not an encumbrance on the land through which it passes. Whether the Town of Fuquay-Varina has some prescriptive right by virtue of adverse possession was not an argument asserted by the plaintiff, and in any event her failure to present evidence on this issue at the summary judgment hearing is a bar to its consideration by this Court.

Therefore, my vote is to affirm summary judgment for the Cozarts on the plaintiff's claim for breach of warranty against encumbrances. I join with Judge Phillips in his resolution of the remaining issues.

JANETT B. MASON, GUARDIAN AD LITEM FOR JUSTIN CHET MASON, A MINOR v. CAROL STANIMER, EXECUTRIX AND DEVISEE UNDER THE LAST WILL AND TESTAMENT OF THEODORE WILLIAM STANIMER

No. 9011SC736

(Filed 7 May 1991)

Wills § 65 (NCI3d)— pretermitted child—included in class gift in will

The trial court correctly held that Justin Mason had no interest in the estate of his father under N.C.G.S. § 31-5.5 because he had been included in his father's will where the parties agreed that Justin was a child of the testator who was born after execution of the will, but disagreed as to whether the will made some provision for Justin. The will left the entire estate to the wife, who was still living, with a trust in favor of the testator's children in the event his wife predeceased him. Because the class gift donor is said to be group minded, the class gift is one in which the donor intends that the number of donees is subject to fluctuation. The testator chose not to name his children individually but made provision for them as a group or class. The language of N.C.G.S. § 31-5.5(a)(1) is both clear and absolute; as long as a testator makes some provision in the will for the child, whether adequate or not, the after-born child has no right to take an intestate share of the testator's estate.

Am Jur 2d, Wills §§ 1200, 1203.

Pretermitted heir statutes: what constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to render statute inapplicable. 83 ALR4th 779.

APPEAL by plaintiff from judgment entered 22 March 1990 in LEE County Superior Court by *Judge Wiley F. Bowen.* Heard in the Court of Appeals 24 January 1991.

Kennedy & Teddy, by David R. Teddy, for plaintiff-appellant.

Love & Wicker, by Jimmy L. Love, for defendant-appellee.

WYNN, Judge.

Plaintiff brought this action on behalf of her minor son, Justin Chet Mason, seeking to have the child, who was born after the execution of his father's will, declared a pretermitted child capable of taking an intestate share of his father's estate under the provisions of N.C.G.S. § 31-5.5. The pertinent facts are as follows.

On 20 November 1979, the decedent, Theodore Stanimer, (hereinafter referred to as "the testator"), executed his Last Will and Testament naming his wife, Carol Stanimer, executrix. By the terms of his will, the testator bequeathed his personal effects to his wife in the event she survived him; but if she failed to survive him, the personal property was to be distributed "in shares of equal value to our surviving children." The will further provided that after the disposition of the personal effects, the wife would receive the residue of his estate, again only if she survived him and failing that contingency, the residue would be left in trust "for the primary benefit of those of my children who survive me."

The testator died on 7 August 1988 leaving his wife and two children of his marriage, and the petitioner, Justin Chet Mason, who was born outside of his marriage on 5 August 1985 and was legally established as the testator's son in 1986.

This action was initiated upon a petition before the Clerk of the Superior Court of Lee County by Justin's mother and natural guardian, Janett B. Mason, who asserted on his behalf that Justin was entitled to an intestate share of Mr. Stanimer's estate pursuant to N.C.G.S. § 31-5.5, as a child of the testator born after the execution of the testator's will, and neither provided for by the will nor intentionally omitted from the will. The Clerk, finding that Justin was a natural heir of the testator, concluded that he did not have jurisdiction to determine if Justin was a "pretermitted heir." Following the Clerk's order, the plaintiff filed an action for declaratory judgment in the Superior Court of Lee County. From the judgment of the Superior Court holding that Justin "has no interest in the estate of his father . . ." under N.C.G.S. § 31-5.5, the petitioner appealed to this Court.

The plaintiff contends that the trial court erred by failing to find that her son, Justin, is a pretermitted child capable of taking an intestate share of his father's estate under the provisions of N.C.G.S. § 31-5.5. That statute provides, in pertinent part, as follows:

> (a) A will shall not be revoked by the subsequent birth of a child to the testator, or by the subsequent adoption of a child by the testator, or by the subsequent entitlement of an after-born illegitimate child to take as an heir of the testator pursuant to the provisions of G.S. 29-19(b), but any after-born, after-adopted or entitled after-born illegitimate child shall have the right to share in the testator's estate to the same extent he would have shared if the testator had died intestate unless:
>
> > (1) The testator made some provision in the will for the child, whether adequate or not, or
> >
> > (2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child.

N.C. Gen. Stat. § 31-5.5(a) (Cum. Supp. 1990).

At trial, the parties agreed that Justin Mason was a child of the testator who was born after the execution of the testator's will; however, they disagreed as to whether the testator's will "made some provision" for Justin, within the meaning of N.C.G.S. § 31-5.5. The will directed the following relevant dispositive provisions:

> ARTICLE III
>
> **BEQUEST OF TANGIBLE PERSONAL PROPERTY.** I give and bequeath my personal effects, automobiles and all of my other tangible personal property to my spouse, CAROL ANN STANIMER, if living at my death, or if my spouse predeceases me, in shares of equal value to our surviving children . . . .
>
> ARTICLE IV
>
> **RESIDUE.** All the rest, residue and remainder of my estate, both real and personal property, of whatsoever kind and wheresoever situated, I hereby devise and bequeath unto my spouse, CAROL ANN STANIMER, if living at my death.

ARTICLE V

> **TESTAMENTARY TRUST FOR SURVIVING CHILDREN.** In the event my wife, CAROL ANN STANIMER, should predecease me, and any child or children of mine survive me, I direct my Executor to deliver and convey all of my said residuary estate to my Trustee in trust for the uses and purposes hereinafter set forth, and I direct that my residuary estate so passing to my Trustee shall be administered and disposed of as follows:
>
> Section 1. The trust shall be held and administered for the primary benefit of those of my children who survive me . . . .

The trial court recognized that since the will made specific provisions for the testator's "children," Justin was a member of a class of beneficiaries for which the will provided. The trial court reasoned that Justin had been "provided for" in the 1979 will and was thereby precluded from entitlement to an intestate share of his father's estate.

Since Carol Stanimer survived her husband, she received the entire estate pursuant to the terms of Articles III and IV of the will. It is presumably for this reason that following the admission of the decedent's will to probate on 25 August 1988, the plaintiff brought this action seeking a declaration that her son, Justin, is a pretermitted heir capable of taking a share of his father's estate.

Under Article V of the will, a trust is established in favor of Mr. Stanimer's "children" in the event his wife, Carol, predeceases him. The parties to this action agree that Theodore Stanimer created a "class gift" when he provided for the creation of a trust in favor of his children. A "class gift" is created when the donor intends to benefit a group or a class of persons, as distinguished from specific individuals. T. Bergin & P. Haskell, Preface to Estates in Land and Future Interests 138 (1966) [hereinafter Bergin & Haskell]. Here, the testator designated a group of persons, his children, as beneficiaries of the trust; he did not designate specific individuals as the beneficiaries.

Having conceded that the gift of the trust was intended to be a class gift, the plaintiff urges this court to hold that the preferred method of determining whether a class gift constitutes a "provision for" an after-born child is for the court to make a two-pronged inquiry. This approach which the plaintiff contends is the law of another jurisdiction, would require the trial court to determine first, whether the after-born child is one the testator intended

to provide for in making the gift, and then second, whether the devise or bequest is a future or contingent interest. The plaintiff asserts that if an analysis of either of these two prongs indicates that the testator did not intend to benefit the after-born child with the class gift, then the after-born child must be allowed to take an intestate share of the testator's estate. With this approach in mind, it is the plaintiff's position that Theodore Stanimer did not intend to benefit his son, Justin, with the contingent bequest to his children, thereby allowing Justin to assert a claim under N.C.G.S. § 31-5.5.

Whatever merit there may be in the approach espoused by the plaintiff, it is not the approach used by our courts. Indeed, the case which the plaintiff cites for the above proposition is not only contrary to the weight of authority, but also of questionable control in the jurisdiction in which it was rendered. *See Haskins v. Skinner*, 31 Ky. 170 (1833) (supporting plaintiff's proposition); *Lamar v. Crosby*, 162 Ky. 320, 172 S.W. 693 (1915) (reaching the opposite conclusion on similar facts).

Long ago, our Supreme Court was called upon to consider whether a gift to a class to which an after-born child belonged qualified as a "provision" for the after-born child sufficient to preclude her from taking an intestate share of her father's estate. *See Meares v. Meares' Executors*, 26 N.C. (4 Ired.) 192 (1843) (decided under the act of 1808, Rev. Stat., ch. 122, sec. 16, an early predecessor to N.C.G.S. § 31-45 which was later rewritten and replaced by our current "pretermitted heir" statute, N.C.G.S. § 31-5.5.).

In *Meares*, the testator executed his will on 15 October 1838. The will directed that certain property be held in trust for the benefit of "[his] children" until the year 1851, at which point the trust corpus was to be divided among the testator's children then living. The testator had eight sons at the time the will was executed. Seven months later, however, a daughter was born to the testator. When the testator died in 1841, an action was commenced on behalf of his after-born daughter wherein it was alleged that the daughter was entitled to an intestate share of her father's estate because her father had failed to provide for her. The statute forming the basis of the action provided, in part, as follows:

> [W]hen a child shall be born after the making of the parent's will, and such parent shall die without having made *provision for* said child, the child shall be entitled to such portions of

> the personal and real estates of the parent in value as he or she would have been entitled to had the parent died intestate.

Meares, 26 N.C. at 195 (emphasis added).

The Court in *Meares* first concluded that a class comprised of the testator's children included his after-born daughter. The court stated that,

> courts are always anxious to effectuate the intentions of testators, when there is a gift to a class of persons, as to children, by including in it as many persons answering the description as possible . . . . [I]n construing a father's will, . . . a gift to his own children will be held to include all of them in being at his death, unless it be evident upon the will that the testator meant the provision only for those living at the date of the will; for the law presumes he intended to fulfill his natural duty by providing for each one . . . .

Id. at 197.

The Court went on to hold that the gift to the class comprised of the testator's children was a "provision for" the after-born child within the meaning of the act of 1808. The court stated:

> [T]he statute only provides for the case where the parent dies without having made provision for the child, which means, without making *any* provision; for the act does not mean to judge between the parent and child as to the adequacy of the provisions he may choose to make, but only to supply his accidental omission to make any . . . .

Meares at 197-98 (emphasis added).

More than a century after the *Meares* decision, our Supreme Court came to the same conclusion regarding the operation of our pretermitted heir statute when the only provision for an after-born child lies in a class gift. In *Sheppard v. Kennedy*, 242 N.C. 529, 88 S.E.2d 760 (1955) (decided under former N.C.G.S. § 31-45, the predecessor to our current "pretermitted heir" statute, N.C.G.S. § 31-5.5), testator executed his will in July, 1948. At the time the will was executed, the testator had only one child, a 19 year-old son. The testator died in May, 1950, and, approximately eight and one-half months later, his widow gave birth to a baby girl. The testator's will contained a residuary clause which directed that the property remaining, after certain other devises and bequests

had been made, be distributed among the testator's "next of kin and heirs at law."

Sometime after the testator's death, an action was brought to determine the rights of his after-born child under the will. It was alleged on behalf of the minor child that the testator's will failed to include a provision for the after-born child and that, therefore, the child was entitled to an intestate share of her father's estate under the provisions of N.C.G.S. § 31-45. That statute, which is similar to our current N.C.G.S. § 31-5.5, provided, in pertinent part, as follows: "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, ..."

In concluding that the testator's will had provided for the after-born child, the Court in *Sheppard* relied upon the fact that the testator had made substantial provision for a class of beneficiaries (i.e. "next of kin and heirs at law") to which the after-born child belonged. The court stated:

> It is true the will makes no direct, specific provision for the child, and it is also true that the testator at the time of his death did not know the child had been conceived. However, on this record neither of these factors is of controlling importance. Here the testator has made substantial provision for a class of beneficiaries to which the posthumous child belongs.

Sheppard at 531, 88 S.E.2d at 761.

We think the rationale employed by the *Meares* court almost one and one-half centuries ago and followed in *Sheppard*, is equally applicable today. Because the class gift donor is said to be "group-minded," the class gift is one in which the donor intends that the number of donees, from the time of the execution of the will, is subject to fluctuation by way of increase, decrease, or both, depending on the circumstances. The possibility of fluctuation in the number of intended donees is what distinguishes the class gift from a gift to individuals. Bergin & Haskell at 138-139.

Moreover, it is significant to note that there is a presumption that a donor who does not intend a fluctuation in the number of intended beneficiaries will designate specific individuals as beneficiaries rather than a group or class. *Id.; See also Newbern v. Barnes*, 3 N.C. App. 521, 165 S.E.2d 526 (1969) (persons who

are named specifically in a will by name or other personal or particular designation will take as individuals, not as a class). Had the testator named his children individually, there would be support for the plaintiff's assertion that Theodore Stanimer intended to benefit only his children existing on the date of the execution of his will. However, the testator chose not to name his children individually. Instead, he made provision for his "children" as a group or class. As such, the gift to his children constitutes a class gift. We conclude that the testator's son, Justin Mason, was intended to be a member of that class.

The language of N.C.G.S. § 31-5.5(a)(1) is both clear and absolute. As long as a testator "[makes] some provision in the will for the child, whether adequate or not," the after-born child has no right to take an intestate share of the testator's estate. For this reason, we are constrained to hold not only that Justin Mason is a member of the class of beneficiaries for which Theodore Stanimer provided, but also that such provision, even though contingent, meets the requirements of N.C.G.S. § 31-5.5(a)(1). In short, we conclude that Justin Mason is not entitled to take an intestate share of his father's estate.

We are cognizant of the fact that the decision reached here today may work hardship upon after-born children, such as Justin, whose only interest under the parent's will is contingent upon events beyond the child's control. Nevertheless, as the Court in *Sheppard* noted: "Whether [the after-born child] statute should be amplified so as to deal more specifically with the rights of a posthumous child who takes only as a member of a class of beneficiaries is a question which might well be pondered by the lawmaking body." *Sheppard* at 531, 88 S.E.2d at 762.

For the reasons set forth above, the judgment rendered in the court below is

Affirmed.

Judges PHILLIPS and EAGLES concur.

MARVIN E. COBB, PETITIONER-APPELLANT v. ROCKY MOUNT BOARD OF EDUCATION, RESPONDENT-APPELLEE

No. 907SC908

(Filed 7 May 1991)

Rules of Civil Procedure § 58 (NCI3d) — time of entry of judgment — notice of appeal timely

Entry of judgment did not occur on 2 April 1990 when the trial judge announced his ruling in open court and the clerk noted the ruling in the minutes but occurred on 30 April when the trial judge signed the written order that had been drafted by respondent's counsel at the judge's direction, and petitioner's notice of appeal filed on 22 May 1990 was thus timely. Paragraph one of Rule 58 was inapplicable because the trial judge made a "contrary direction" when he directed respondent's counsel to prepare the order; paragraph two of Rule 58 was inapplicable because the judge did not direct the clerk to make a notation of the judgment in the minutes; and paragraph three of Rule 58 did not apply because it deals only with cases in which judgment is not rendered in open court. Entry of judgment did not occur on 2 April because the date was not clearly identifiable as the time the court entered judgment, there was no fair notice to the parties on 2 April that entry of judgment had occurred, and the entry of judgment was not final on 2 April in that the findings of fact and conclusions of law in the order were not set forth until the signing of the order of 30 April.

Am Jur 2d, Appeal and Error §§ 69, 303; Judgments § 57.

Judge GREENE concurring.

Judge WELLS dissenting.

APPEAL by petitioner from Order entered 14 June 1990 in EDGECOMBE County Superior Court by *Judge Richard B. Allsbrook.* Heard in the Court of Appeals 20 February 1991.

East Carolina Legal Services, Inc., by Wesley Abney, for petitioner-appellant.

Poyner & Spruill, by Michael S. Colo, Ernie K. Murray and Steven A. Rowe, for respondent-appellee.

WYNN, Judge.

The issue on appeal in this case is whether the trial court erred in dismissing the petitioner's appeal for failure to give timely notice of appeal.

The petitioner initially appealed to the Superior Court of Edgecombe County following a denial by the Rocky Mount Board of Education of his request to be reinstated as a school employee. On 2 April 1990, after conducting a hearing on the matter, Judge Richard B. Allsbrook announced in open court that he was denying the relief sought by the petitioner on the ground that the petitioner had been employed at-will by the respondent. Respondent's counsel was directed by Judge Allsbrook to prepare a written Order consistent with his open-court announcement. The record indicates that the clerk of court noted Judge Allsbrook's decision in the court minutes of 2 April 1990.

On 30 April 1990, the trial judge signed the written Order prepared by the respondent's counsel. The petitioner filed a Notice of Appeal to this court on 17 May 1990. On 22 May 1990, the respondent filed a Motion to Dismiss the petitioner's appeal for the reason that the petitioner had failed to timely file his Notice of Appeal. The trial judge found that the Order denying the petitioner's relief was entered on 2 April 1990 and, therefore, dismissed the petitioner's appeal as being untimely. From the Order dismissing his appeal, the petitioner appeals.

I

The dispositive issue in this case is when did the entry of Judgment take place—on 2 April 1990 when the trial judge announced his ruling in open court, which ruling was noted in the minutes by the clerk of court, or, on 30 April 1990 when the trial judge signed the written order that had been drafted by respondent's counsel. For the reasons which follow, we find that the Order from which the petitioner sought to appeal was entered on 30 April 1990 and, therefore, conclude that the petitioner's appeal was timely made.

This case is controlled by the recent decision of *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991), wherein our Supreme Court provided guidance as to when entry of judgment occurs for purposes of determining the timeliness of an appeal. In *Stachlowski*, the Court held that where the procedures of Rule

58 are followed, the entry of judgment occurs when the Clerk of Court makes a notation in the minutes; however, when the "case does not fit squarely within the rubric of Rule 58," the entry of judgment is determined by the "spirit and purpose of the rule." 328 N.C. at 279, 401 S.E.2d 642.

We turn first to a consideration of whether Rule 58 was followed in this case. Rule 58 provides as follows:

> 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 the rules.
>
> 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. Gen. Stat. § 1A-1, Rule 58 (1990) (emphasis added).

Applying the mandates of Rule 58 to this case, we find that paragraph one of Rule 58 is inapplicable here because the trial judge made a "contrary direction" when he directed the respondent to prepare the order. *Stachlowski*, 328 N.C. at 280, 401 S.E.2d at 641. Paragraph two is also inapplicable to this case because although the clerk made a notation in the minutes, the record fails to indicate that such entry was made upon the judge's direction. In fact, in the order dismissing the petitioner's appeal as untimely, the trial judge found as a fact that the court's ruling was "noted in the minutes by the Clerk of Court without instructions by the Court." *See generally id.* at 280-81, 401 S.E.2d at

641; *See also Behar v. Toyota of Fayetteville*, 90 N.C. App. 603, 605, 369 S.E.2d 618, 620 (1988). Finally, paragraph three does not apply to this case because it deals with cases where judgment is not rendered in open court.

Having determined above that this case does not "squarely fit within the rubric of Rule 58," we now turn to a consideration of this case in light of the spirit and purpose of Rule 58. In *Stachlowski*, the Court set forth three relevant factors in this part of the analysis: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review. 328 N.C. at 287, 401 S.E.2d at 645.

In considering the factors outlined in *Stachlowski*, we find first that 2 April 1990 is not *clearly identifiable* as the time that the court entered judgment. The record indicates that the trial judge announced his decision in open court on that date. However, he did not direct the clerk to enter the judgment and further, he directed the counsel for the prevailing party to prepare the written order. These facts do not support an entry of judgment on 2 April 1990. Nor do we find there to have been *fair notice* to the parties on 2 April 1990 that the entry of judgment had occurred. Here, the trial judge directed the respondent to prepare an order which was to contain findings of fact and conclusions of law that were needed to prepare the record on appeal. In *Stachlowski*, the Court summed the applicability of this factor to cases such as the one at hand by stating: "Thus, in cases where entry of judgment cannot be determined from the express language of Rule 58, fair notice concerns indicate that 'entry' occurs only after draft orders or judgments are submitted to and adopted by the court." 328 N.C. at 283, 401 S.E.2d at 643. Lastly, we conclude that the entry of judgment was not *final* on 2 April 1990. The findings of fact and conclusions of law in Judge Allsbrook's order were not set forth until the signing of the order on 30 April 1990. Again, in *Stachlowski*, the Court stated with respect to this factor that "[I]n cases where Rule 58 does not expressly apply, considerations of finality and fair notice to the parties militate against finding entry of judgment prior to adoption of the requisite findings." 328 N.C. at 286, 401 S.E.2d at 644.

In conclusion, we find that the entry of judgment occurred when the trial judge signed the order on 30 April 1990. As such, petitioner's notice of appeal was timely given and he may now cause the record of appeal to be settled and certified as provided by Rule 11 of the Appellate Rules of Procedure. His appeal shall be considered taken as of the date of the mandate of this opinion.

Reversed and remanded.

Judge GREENE concurs in a separate opinion.

Judge WELLS dissents.

Judge GREENE concurring.

I agree with the majority that entry of judgment in this case occurred when the trial judge signed the judgment on 30 April 1990, and that petitioner's notice of appeal is, therefore, timely. I write separately to make clear that entry of judgment does not necessarily occur when the trial judge signs the proposed judgment.

When judgment is rendered in open court, and no findings of fact and conclusions of law are required, entry of judgment occurs under paragraphs one and two of Rule 58 provided the requirements of those particular paragraphs are met.

When judgment is not rendered in open court, entry of judgment occurs under paragraph three of Rule 58 when the order is signed by the judge, delivered to the clerk of the superior court, filed by the clerk, and the clerk mails a notice of filing to all parties.

When (1) judgment is rendered in open court and findings of fact and conclusions of law are required, or (2) judgment is rendered in open court and no findings of fact or conclusions of law are required but there is a failure to comply with paragraphs one or two of Rule 58, or (3) when judgment is not rendered in open court but there is a failure to comply with paragraph three of Rule 58, then entry of judgment "occurs only after draft orders or judgments are submitted to and adopted by the court," and upon notice of entry to all other parties. *Stachlowski v. Stach*, 328 N.C. 276, 283, 401 S.E.2d 638, 643 (1991). Therefore, entry of judgment cannot occur before the judgment is signed by the

court. However, entry does not occur until all the parties have notice that the judgment has been signed by the trial judge. *Stachlowski* at 287, 401 S.E.2d at 645 (relevant factor in determining entry is whether the party had fair notice of the court's judgment). The burden is on the party claiming the appeal to be untimely to show the date on which notice was received by all parties. This burden can be met and entry deemed complete when the signed judgment is filed with the clerk and the clerk mails notice of its filing to all parties. *Cf.* N.C.G.S. § 1A-1, Rule 58 (similar provision giving rise to entry of judgment for judgments not rendered in open court). In the absence of any evidence of actual notice or a mailing by the clerk, a party filing notice of appeal within thirty days of the signing of the judgment is deemed to have received notice of the signing of the judgment, and entry is deemed to have occurred on the date of the signing of the judgment.

In the present case, the order was rendered in open court and findings of fact and conclusions of law, though made, were not required. *See Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 316, 283 S.E.2d 495, 498 (1981) (applicable standard of review for appeal from local board of education to court is found under N.C.G.S. § 150A-51, now recodified under § 150B-51); *Faulkner v. North Carolina State Hearing Aid Dealers and Fitters Bd.*, 38 N.C. App. 222, 225, 247 S.E.2d 668, 670 (1978) (findings of fact not required in judicial review under N.C.G.S. § 150A-51, now recodified under § 150B-51). Therefore, entry would normally occur under paragraphs one or two of Rule 58 in this situation. However, by directing respondent's counsel to prepare an order, the trial judge gave a "contrary direction" precluding entry under paragraph one. *Stachlowski* at 280, 401 S.E.2d at 641. Paragraph two is inapplicable because the trial judge did not direct the clerk to make a notation in the minutes. Therefore, entry occurred after the trial judge signed the order and fair notice of the signing of the order was given to all parties.

The trial judge signed the order on 30 April 1990, and notice of appeal was filed on 17 May 1990. Even though there is no affirmative evidence of notice, the appeal was made within thirty days after the order was signed and all parties are, therefore, deemed to have received notice of the execution of the order by the trial judge on the day of its execution and the order is deemed to have been entered at that time.

Judge WELLS dissenting.

Within the spirit of *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991), on which the majority relies, I perceive that the spirit and purpose of Rule 58 of the North Carolina Rules of Civil Procedure will be better served in this case by affirming Judge Allsbrook's order of dismissal of this appeal.

Judge Allsbrook, sitting in review of the Board of Education's order, announced in open court his decision to deny plaintiff any relief and gave his reason for that decision. What remained to be done was the mere ministerial act of signing a written judgment *reflecting that decision.* His direction to counsel to draft such order or judgment was not a contrary direction *to the clerk* not to enter judgment on the minutes, as contemplated by Rule 58. In my opinion, entry of judgment took place on 2 April 1990 in open court, and for that reason, this appeal was not timely perfected.

STATE OF NORTH CAROLINA v. JAMES HENRY WOODARD

No. 9012SC53

(Filed 7 May 1991)

1. Rape and Allied Offenses § 4.1 (NCI3d)— cross-examination of defendant—defendant's adultery—not admissible before defendant's character testimony—harmless error

Defendant was not prejudiced by error in a prosecution for burglary, rape, and first degree sexual offense in allowing the prosecutor to cross-examine defendant about an adulterous affair and in requiring defendant to read love letters concerning the affair before defendant put character witnesses on the stand. Evidence of a person's character is not as a general rule admissible to prove that a person acted in conformity with that character, but is admissible if the accused offers evidence of a pertinent trait. Other testimony regarding the affair could be used because defendant had by then presented evidence that he was a law abiding citizen. Even the evidence erroneously admitted was harmless because there was no reasonable possibility of a different result at trial. N.C.G.S. § 8C-1, Rule 404(a)(1).

Am Jur 2d, Rape § 65.

Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence. 56 ALR4th 402.

2. Rape and Allied Offenses § 4 (NCI3d)— sexual aid—admitted—pornography—erroneously admitted—harmless error

The trial court did not err in a prosecution for burglary, rape, and sexual offense by allowing the State to cross-examine defendant concerning a sexual aid found in his bedroom. Testimony from the victims indicated that their attacker had difficulty maintaining an erection and was a sexual deviant, while defendant was portrayed as a family man and minister who did not have problems with impotence. An inference by the jury that defendant "James Woodard" owned or used the sexual aid found in his home would directly contradict defendant's theory that James Woodard was a personality separate and distinct from "Johnny Gustud." Although the court erred in admitting pornographic videos and magazines also found in defendant's home, this error was harmless.

Am Jur 2d, Rape § 65.

Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence. 56 ALR4th 402.

3. Criminal Law § 97.2 (NCI3d)— multiple personalities—emergence of alternate personality—court's refusal to reopen evidence

The trial court did not err in a prosecution for burglary, rape, and first degree sexual offense by refusing to reopen the evidence when defendant's alleged alter personality appeared during the charge conference and informed the court that he wanted to testify. Defense witnesses had testified that they were capable of bringing out the other personality, and defense counsel admitted that they had made the tactical decision not to elicit testimony from the alternate personality. Whether to reopen the evidence was within the discretion of the trial court and the court did not abuse its discretion.

Am Jur 2d, Trial § 158.

4. Criminal Law §§ 355, 365 (NCI4th)— multiple personalities—emergence of alternate personality—refusal to remove defendant—no error

The trial court did not err in a prosecution for burglary, rape and sexual offense by refusing to remove defendant from the courtroom when his alleged alter personality emerged. Defendant was no longer disruptive once he was shackled and the court could not instruct the jury, as defendant requested, that the person sitting at the defense table was not defendant. The court in so doing would have expressed an opinion on whether defendant in fact had multiple personalities.

Am Jur 2d, Trial § 39.

5. Constitutional Law § 342 (NCI4th)— multiple personalities—emergence of alternate personality—defendant's presence

The trial court did not err in a prosecution for burglary, rape and sexual offense by continuing the trial after defendant's alternate personality emerged, even though defendant contended that he was no longer present.

Am Jur 2d, Trial § 1103.

6. Criminal Law § 863 (NCI4th)— unconsciousness defense—instruction on involuntary commitment—denied—no error

The trial court did not err in a prosecution for burglary, rape and sexual offense by refusing to instruct the jury that defendant would be subject to a civil commitment proceeding if found not guilty because of unconsciousness based on a mental disorder. Whether or not defendant would have been subject to involuntary commitment proceedings was pure speculation.

Am Jur 2d, Trial §§ 573 et seq.

7. Criminal Law § 773 (NCI4th)— multiple personalities—defense of unconsciousness—instructions—burden of persuasion

The trial court did not err in a prosecution for burglary, rape, and sexual offense by instructing the jury that the burden of persuasion was on defendant to show that he was unconscious at the time of the commission of the crimes. Unconsciousness is an affirmative defense and the burden is on defendant to prove its existence to the satisfaction of the jury.

Am Jur 2d, Trial § 742.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case. 17 ALR3d 146.

8. **Criminal Law § 50.2 (NCI3d)— multiple personalities—sleeping defendant—lay opinion of police officer—admissible**

The trial court did not err in a prosecution for burglary, rape and sexual offense in which defendant claimed to have multiple personalities by admitting the testimony of an officer that defendant "pretended" to be asleep and awoke as a different personality. Lay opinions are allowed when they are rationally based on the perception of the witness and are helpful to a clear understanding of the testimony or the determination of the fact in issue. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Rape § 100.

9. **Rape and Allied Offenses § 6.1 (NCI3d)— first degree rape and sexual offense—unloaded gun—no instruction on lesser offense**

The trial court did not err in a prosecution for first degree rape and first degree sexual offense by not instructing the jury on second degree rape and second degree sexual offense based on the gun not being loaded. An unloaded gun used in the commission of rape to threaten the victim into submission is an article which the other person reasonably believes to be a dangerous or deadly weapon and is sufficient to meet the definition of first degree rape. Although defendant attempted to argue on appeal the new theory that there was insufficient evidence that a deadly weapon was used, the defendant may not change his position from that taken at trial. N.C.G.S. § 14-27.2(a)(2)a, N. C. Rules of App. Procedure, Rule 10(b)(1).

Am Jur 2d, Rape § 110.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

10. **Rape and Allied Offenses § 6 (NCI3d)— rape and sexual offense—instructions—multiple offenses**

The trial court did not err by instructing the jury on two counts of first degree sexual offense for each of four

victims where there was no basis on which the jury could have found defendant guilty of one continuing sex offense.

Am Jur 2d, Rape § 108.

11. Rape and Allied Offenses § 7 (NCI3d)— rape and sexual offenses—two consecutive life sentences—not cruel and unusual

The imposition of two consecutive life sentences was not cruel and unusual punishment where defendant was convicted of four first degree burglaries, three first degree rapes, and eight first degree sexual offenses.

Am Jur 2d, Rape §§ 114, 115.

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

APPEAL by defendant from a judgment entered 20 July 1989 by *Judge Darius B. Herring, Jr.* in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 22 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Lawrence Reeves, Jr., for the State.

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

LEWIS, Judge.

Defendant was indicted on 15 February 1988 for four counts of first degree burglary, four counts of first degree rape, and eight counts of first degree sexual offense. Defendant was convicted of all charges and sentenced to two consecutive life sentences. Defendant appeals.

I. Evidence of Defendant Woodard's Sexual Habits

[1] Defendant first assigns as error the denial of his motion in limine to restrict the State's cross-examination of the defendant regarding an adulterous relationship he had with Ms. Thompson. On cross-examination, the defendant admitted that he knew Ms. Thompson, but denied ever having any sort of sexual relationship with her. The State then submitted to the defendant several "love" letters which impeached the defendant's prior denial of involvement with Ms. Thompson in an affair. The defendant denied any knowledge

of the letters which were found in his desk drawer at his office, but nonetheless was required to read them to the jury. The defendant cites Rule 608(b) which restricts cross-examination using prior acts of misconduct to those acts which relate to truthfulness or untruthfulness. N.C.G.S. § 8C-1, Rule 608. We agree. Rule 608(b) limits the State in its inquiry to types of the defendant's misconduct, which involve truthfulness or untruthfulness. We note that Rule 608(b) does not allow the use of extrinsic evidence concerning that misconduct to impeach a witness. Adultery is not the type of misconduct which falls under Rule 608(b). *See State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 90 (1986).

The prosecution cross-examined the defendant concerning his affair before the defendant put character witnesses on the stand to testify as to his law-abidingness. The trial court erred in allowing the prosecution to ask the defendant about his adultery before the defendant put his witness on the stand. N.C.G.S. § 1C-1, Rule 404(a)(1) states that as a general rule evidence of a person's character is not admissible to prove that a person acted in conformity with that character. However, evidence of a person's character is admissible if the accused offers evidence of a pertinent trait or the prosecution offers evidence to rebut the same. N.C.G.S. § 8C, Rule 404(a)(1).

Here, it was only proper for the prosecution to refer to the defendant's illegal adulterous affair in order to rebut the defendant's contention that James Woodard was a law-abiding citizen. Therefore, we find that the trial court erred in allowing the prosecution to cross-examine the defendant concerning the adulterous affair and to require the defendant to read the "love" letters concerning the affair on cross-examination. Defendant also contends that the trial court erred in allowing Ms. Thompson to testify regarding the affair. Here, the evidence could be used because by then the defendant had presented evidence that James Woodard was a law-abiding citizen. N.C.G.S. § 1C-1, 404(a)(1).

As to the evidence of the adulterous relationship which the court admitted, we hold that the error is harmless and that there is no "reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at trial." N.C.G.S. § 15A-1443(a).

[2] The defendant further objected to the questions posed by the State on cross-examination regarding the presence of "Sta-hard"

cream and pornographic videos and magazines found in the defendant's bedroom. Testimony of the victims indicated that their attacker had difficulty maintaining an erection during the rapes and that the "Johnny Gustud" personality (who supposedly committed the crimes) was a sexual deviant who said he only wanted to make the women he raped "feel good." This character was contrasted to that of James Woodard, who was portrayed as a family man and minister and testified that he did not have problems with impotence.

We hold that the State's inquiry into the defendant's (James Woodard's) use of the "Sta-hard" cream was a proper area for cross-examination to allow the jury to infer, if it chose to, that the defendant did not suffer from a multiple personality disorder. The cream was found in the defendant's home where he, as James Woodard, lived with his wife free of any problems of impotence. If the jury inferred that "James Woodard" owned or used the cream found in his home, this would directly contradict the defendant's theory that James Woodard was a personality separate and distinct from that of Johnny Gustud. The evidence tends to show that Woodard and "Gustud" were not separate personalities but one and the same and Woodard was conscious at the time the crimes were committed and that he was aware of his actions. We find no error as to the admission of the evidence of the cream.

We find that the court erred in admitting the evidence of the pornographic videos and magazines found in the defendant's home. We hold that this error, however, was harmless and would not create a reasonable possibility that the jury would have reached a different result at trial. N.C.G.S. § 15A-1443(a).

II. Problems Arising from the "Appearance" of an Alter Personality at the Close of All of the Evidence.

[3] Defendant next argues that the court "erred in not protecting defendant from prejudice arising out of the conduct of Johnny Gustud." During the charge conference, "Johnny Gustud" made his first "appearance" in the courtroom. Defense counsel made a motion to re-open the evidence in order to allow "Johnny Gustud" to testify. He informed the court that "he" wanted to testify and that this testimony would tend to exculpate the defendant James Woodard. The court refused to re-open the case. At this point, "Johnny Gustud" became very disruptive and eventually had to be taken out of the courtroom and shackled. Defendant now con-

tends that he is entitled to a new trial (1) because the trial court did not re-open the evidence to allow "Gustud" to testify; (2) because the trial court denied the defendant's motion to remove "Gustud" from the courtroom; and (3) because the trial court finished the trial without waiting for "Gustud" to resume the personality of James Woodard. We will address each of these exceptions in turn.

First, we do not find that the trial court erred in refusing to re-open the evidence to allow "Gustud" to testify. Whether or not to re-open the evidence in a case is a matter within the sound discretion of the trial court. *State v. Mutakbbic*, 317 N.C. 264, 273, 345 S.E.2d 154, 158 (1986). Defense counsel admitted that they had made a tactical decision not to elicit testimony from the "Gustud" personality during its case-in-chief because they feared that it might appear to the jury as a "Hollywood ploy." In fact, the defendant's own witnesses testified that they were capable of "calling out" the "Gustud" personality. The defense attorneys chose not to do this during the trial, and the trial court did not abuse its discretion in refusing to re-open the evidence when "Gustud" appeared.

[4] Likewise, we do not find that the trial court erred in refusing to remove the defendant from the courtroom. The transcript reveals that once he was shackled, the defendant was no longer disruptive. The trial court also could not, as the defense requested, instruct the jury that the person sitting at the defense table was not James Woodard, but instead was Johnny Gustud. If the judge had done so, he would have impermissibly expressed his opinion as to whether the defendant in fact had multiple personalities. We find no error.

[5] Third, the defendant argues that the court should not have continued the trial without his being "present." The "Gustud" personality made it very clear that unless he was allowed to testify, he would not allow the defendant "to come back." We find that under these circumstances, the trial court did not err in proceeding with the trial. There was only one person accused of rape. We find the defendant's presence in the courtroom sufficient. The trial court did not err in proceeding with the trial.

III. Refusal by the Trial Court to Instruct on Involuntary Commitment Proceedings if the Defendant was found Not Guilty.

[6] In his next assignment of error the defendant argues that the trial court erred in refusing to instruct the jury that if they found him not guilty because of unconsciousness based on a mental

disorder, he would be subject to a civil commitment proceeding. The defendant cites no statutory or case law requiring him to instruct the jury about the possibility of the defendant being subjected to involuntary commitment proceedings. In fact, the judge indicated that he was not certain what he would do if the jury returned a verdict finding the defendant not guilty by reason of unconsciousness. Whether the defendant would have been subject to involuntary commitment proceedings at that point was pure speculation. We reject this assignment of error.

IV. Placing the Burden of Persuasion on the Defendant regarding the Question of Unconsciousness.

[7] Defendant contends that the trial court erred in instructing the jury that the burden of persuasion was on the defendant to show that he was unconscious at the time of the commission of the crimes. The trial court gave the following instruction to the jury:

> If the defendant was unable to act voluntarily at the times in question, he would not be guilty of any offense. As to the defense of unconsciousness, or automatism, the burden rests upon the defendant, James Henry Woodard, to establish this defense, not beyond a reasonable doubt, but merely to the satisfaction of the jury.

"Unconsciousness is an affirmative defense and the burden is on the defendant to prove its existence to the satisfaction of the jury." *State v. Jerrett*, 309 N.C. 239, 265, 307 S.E.2d 339, 353 (1983); *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 370 (1975). We reject this assignment of error.

V. Testimony that the Defendant "Pretended" to be Asleep.

[8] The defendant excepts to the testimony of Lieutenant Binder, a witness for the State, that while driving "Johnny Gustud" to possible crime scenes, the defendant "pretended" to be asleep and then woke up as "James Woodard." The defendant contends that testimony by Lt. Binder that the defendant "pretended" is an inadmissible opinion and that the trial court erred in overruling the objection. We disagree. N.C.G.S. § 8C-1, Rule 701 allows lay opinions when they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of the fact in issue." We find that Lt. Binder's opinion that the defendant "pretended" to be asleep in the patrol car meets the criterion set forth above. We find no error.

VI. Failure of the Trial Court to Instruct on Second Degree Rape and Second Degree Sexual Offense.

[9] Defendant argues that with regard to one of the victims in the case, the trial court erred in failing to instruct the jury on the offenses of second degree rape and second degree sexual offense, on the grounds that an unloaded gun is not a "deadly weapon." On appeal, the defense adopts a new theory, arguing that there was insufficient evidence that a deadly weapon was used because the victim only testified that she heard a "clicking" noise which could have been a knife or a gun. Rule of Appellate Procedure 10(b)(1) requires that in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make. N.C.R. App. P. 10(b)(1). Here, counsel stated to the court that he was objecting to the denial of its request for an instruction on second degree rape and second degree sexual offense because he did not believe that an unloaded gun was a "deadly weapon." The defendant may not change his position from that taken at trial to obtain a "steadier mount" on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Defendant never objected or gave any indication that the basis for the request was because the jury could find that the defendant did not use any weapon in the commission of the rape. "The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). A gun which is used in the commission of rape to threaten the victim into submission, if not known to be unloaded, is an "article which the other person reasonably believes to be a dangerous or deadly weapon" and is sufficient to meet the definition of first degree rape. N.C.G.S. § 14-27.2(a)(2)a; *See State v. McKinnon*, 306 N.C. 288, 293 S.E.2d 118 (1988). We find no merit to this assignment of error.

VII. Entry of Two Counts of Sexual Offense as to Each Victim

[10] Each of the four victims testified that the defendant performed cunnilingus on them. For each of the four victims, the trial court instructed the jury on two counts of first degree sexual offense. The defendant appeals because the trial court did not instruct in such a way as to make it clear which of the two alleged sex acts went with the indictment. After reviewing the transcripts we find that there is no basis upon which the jury could have

found the defendant guilty of one continuing sex offense. Each of the victims testified to at least two separate sex offenses. We reject this assignment of error.

VIII. Imposition of Two Consecutive Life Sentences

[11] The defendant contends that the imposition of two consecutive life sentences in this case constitutes cruel and unusual punishment in violation of our State and Federal Constitutions. We disagree. The defendant was convicted of four first-degree burglaries, three first-degree rapes, and eight first-degree sexual offenses. The sentence imposed is authorized under the statutes. We find that the sentence imposed is not disproportionate to the crimes committed.

IX. Conclusion

For the reasons stated above, we find that the defendant received a fair trial, free of prejudicial error.

No prejudicial error.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. GREGORY DEVON SPELLER

No. 903SC845

(Filed 7 May 1991)

1. **Criminal Law §§ 50.1, 89.1 (NCI3d); Rape and Allied Offenses § 4 (NCI3d)— sexual abuse—expert testimony that victim molested—admissible**

The trial court did not err in a sexual abuse prosecution by admitting the testimony of an expert in clinical and psychological education that the victim had been molested. The testimony was not that the victim was believable or that defendant was guilty or innocent, but related to the witness's expert knowledge of abused children in general and her personal examination of the victim.

Am Jur 2d, Rape § 100.

2. Rape and Allied Offenses § 4 (NCI3d)— sexual abuse—victim's statements—admissible

The trial court did not err in a sexual abuse prosecution by allowing an expert witness to repeat the victim's statements that defendant had sexually abused her. The testimony was derived from information obtained in the course of the victim's treatment and evaluation; furthermore, the victim identified defendant at trial, so that the expert testimony was properly admitted as corroborative.

Am Jur 2d, Rape §§ 94 et seq.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 ALR4th 120.

3. Criminal Law § 50.1 (NCI3d)— sexual abuse—expert testimony—reaction of mothers of abused children—admissible

The trial court did not err in a sexual abuse prosecution by admitting expert testimony that the mothers of abused children usually do not believe the child, and that it was a good sign for the victim to have told her grandmother that defendant abused her. Although defendant contended that this undercut the testimony of the mother and bolstered the testimony of the grandmother, the testimony was admissible under N.C.G.S. § 8C-1, Rule 702 since a lay jury could be expected to be unfamiliar with parental responses to allegations of abuse and the responses of abused children to those to whom they look for help.

Am Jur 2d, Rape §§ 94 et seq.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 ALR4th 120.

4. Criminal Law § 50.1 (NCI3d)— sexual abuse—expert testimony—anatomically correct dolls

The trial court did not err in a sexual abuse prosecution by allowing an expert to base her opinion in part on the performance of the victim with anatomically correct dolls where it was clear that the dolls were used only to confirm the activities that the child had already verbally described.

Am Jur 2d, Rape § 104.

5. Criminal Law § 904 (NCI4th)— sexual abuse of child— instructions—unanimous verdict

Defendant in a prosecution for taking indecent liberties with a child, first degree sexual offense, and first degree rape was not denied a unanimous verdict because the jurors were free under the instructions to determine which of the various acts testified to by the victim could support the convictions. The evidence at trial tended to show that defendant performed various acts upon the victims; there is no indication of confusion within the jury; and the instructions were properly tailored to the evidence of the case.

Am Jur 2d, Rape § 111.

6. Rape and Allied Offenses § 6 (NCI3d)— rape and first degree sexual offense—definition of sexual offense—no error

There is no error in a prosecution for first degree sexual offense and rape where the trial court did not exclude rape from the definition of a sexual act in its instruction on sexual offense. Given the distinction within the same instruction between a "male sexual organ" and an "object," there was no reasonable possibility that a juror would incorrectly equate the two.

Am Jur 2d, Rape § 108.

7. Rape and Allied Offenses § 19 (NCI3d)— indecent liberties— one count dismissed—no instruction as to acts to disregard

There was no error in a prosecution for indecent liberties where one count was dismissed at the close of the evidence, but there was no indication that the jury was instructed as to what acts, if any, it should disregard. Defendant did not object at trial or request such an instruction.

Am Jur 2d, Rape § 108.

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

A mandatory life sentence for first degree sexual offense did not constitute cruel and unusual punishment.

Am Jur 2d, Rape §§ 114, 115.

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

APPEAL by defendant from judgment entered 14 March 1990 by *Judge Frank R. Brown* in PITT County Superior Court. Heard in the Court of Appeals 20 March 1991.

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

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

JOHNSON, Judge.

Defendant was indicted on two counts of taking indecent liberties with a child, one count of first-degree sexual offense and one count of first-degree rape. At the close of all the evidence, the trial court dismissed one count of indecent liberties. Defendant was convicted of the other charges and sentenced to life imprisonment for rape, life imprisonment for sexual offense and ten years for indecent liberties, all to run concurrently.

The evidence presented at trial showed that in the week or so following a move with her mother from her grandmother's house to a house on Bonner Lane, the six year old victim was sexually abused on several occasions by the defendant, her mother's boyfriend. The victim told her kindergarten teachers and her grandmother that defendant "came to [her] bed every night." He put his "thing" in her "bottom" and "in front." She testified that this happened about five times. She also testified that while riding with defendant in his car, defendant put his finger inside her "bottom." She also said that he kissed her and put his tongue on her tongue. Defendant threatened her with a beating if she told anyone about the assaults. A social worker for the Department of Social Services investigated the victim's complaints and made arrangements for her to return to her grandmother's house. At trial before a jury, the trial court admitted expert testimony about which defendant complains. Additional evidence will be set forth as necessary in the discussion of the issues.

I.

By his first Assignment of Error, defendant contends that the trial court erred in allowing the State's expert witness to testify to several opinions regarding sexual abuse.

Dr. Betty Robertson was tendered by the State and accepted by the court as an expert in clinical and psychological education. She testified that she conducted a psychological evaluation of the victim at the request of the Department of Social Services. Her examination consisted of several interviews with the victim, her grandmother and her mother. She administered standard tests including an IQ test, a visual motor integration and achievement test, drawing test, children's apperception test and the projected storytelling test. Her final interview with the victim was a sexual abuse interview at the end of which she used anatomically correct dolls "for verification, to make sure that we have not misunderstood what activity went on."

Dr. Robertson testified as to her testing of the child, her findings as to her intelligence, memory and verbal skills. She explained how young children in general are able to communicate with regard to sexual abuse. She repeated the victim's description to her of what defendant had done to her. In response to the State's question as to her diagnostic impressions, Dr. Robertson stated her conclusion that the child suffered from an adjustment disorder with mixed emotional features, a diagnosis consistent with the history of sexual abuse that she related.

[1] Defendant first complains that Dr. Robertson's testimony was improper because she testified not merely to the general characteristics of child abuse but that the victim herself had been molested and that this had the effect of expressing an opinion on the ultimate issue in the case and the credibility of the child witness. We disagree. The testimony of an expert to the effect that a prosecuting witness is believable, credible or telling the truth is not admissible. *State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987); *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986); *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986). But where the expert's testimony relates to a diagnosis derived from the expert's examination of the witness in the course of treatment, it is not objectionable because it supports the credibility of the witness (*State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988)); or identifies the perpetrator (*State v. Smith*, 315 N.C. 76, 85, 337 S.E.2d 833, 840 (1985)); or states an opinion that abuse has occurred (*State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987)).

In the instant case, Dr. Robertson's testimony was not that the victim was believable or that the defendant was guilty or inno-

cent. Her testimony related to her expert knowledge of abused children in general and her personal examination of the victim. This contention is without merit.

[2] In the course of her testimony, Dr. Robertson repeated the victim's statements to her that the defendant had sexually abused her. Defendant contends that Dr. Robertson's testimony was improper because it was to the effect that defendant was the perpetrator. This objection is without merit. The testimony at issue was derived from information obtained by Dr. Robertson in the course of the victim's treatment and evaluation and is admissible. *Smith*, 315 N.C. 76, 337 S.E.2d 833; *Aguallo*, 318 N.C. 590, 350 S.E.2d 76. Furthermore, the victim testified at trial and identified defendant as the perpetrator. Therefore, Dr. Robertson's testimony corroborates her testimony and was properly admitted on that ground. *Smith*, 315 N.C. 76, 337 S.E.2d 833.

[3] Defendant next objects to Dr. Robertson's testimony that "mothers of abused children usually do not believe the child, and that it was a good sign for [the victim] to have told her grandmother that defendant abused her." Defendant complains that this improperly undercuts the testimony of the mother who did not believe her daughter and bolsters the testimony of the grandmother who did believe her. We find that this testimony was proper under G.S. § 8C-1, Rule 702 as being "specialized knowledge [which would] assist the trier of fact to understand the evidence" since a lay jury could be expected to be unfamiliar with the parental responses to allegations of abuse and the responses of abused children to those to whom they look for help. As such, this evidence was helpful to the jury in understanding the evidence and well within the expertise of the witness. *Bailey*, 89 N.C. App. 212, 365 S.E.2d 651.

[4] Defendant next complains that Dr. Robertson improperly based her opinion in part on the performance of the victim with "anatomically correct" dolls. Dr. Robertson testified that in her last interview with the victim she talked to the child about what had happened to her and only after she had obtained the details verbally did she bring out the dolls so that the victim could give her a visual demonstration of what had happened. We find no error in this. This is essentially the same use of anatomically correct dolls as was described in *State v. Deanes*, 323 N.C. 508, 374 S.E.2d 249 (1988), *cert. denied*, 490 U.S. 1101, 104 L.Ed.2d 1009 (1989). In the case *sub judice*, it is clear that the dolls were used only to confirm

the activities that the child had already verbally described. This objection is without merit.

II.

By his second Assignment of Error, defendant makes three related arguments: (1) that he was denied a unanimous jury verdict on the sexual offense and indecent liberties charges, (2) that the instruction on sexual offense allowed the jury to convict him on grounds of genital penetration by *any object* thus allowing the jury to convict him of both sexual offense and rape for the same act and (3) that a juror may have based his guilty vote for indecent liberties on the act that formed the basis of the dismissed count.

[5] Defendant first alleges that the instructions allowing conviction if the jury found that defendant had committed any indecent liberty upon the child, denied him a unanimous verdict because the several jurors were free to determine for themselves which of the various acts testified to by the victim could support the conviction. This issue was recently decided in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) and *State v. McCarty*, 326 N.C. 782, 392 S.E.2d 359 (1990). *See also State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984). The *Hartness* Court explained:

> As [G.S. § 14-202.1(1981)] indicates, the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial[.]

Hartness, 326 N.C. at 567, 391 S.E.2d at 180.

> Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

Id. at 565, 391 S.E.2d at 179.

In the case *sub judice*, the trial judge instructed the jury:

> For you to find the defendant guilty of taking an indecent liberty with a child, the State must prove three things beyond a reasonable doubt. First, that the defendant willfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper or indecent touching by the defendant upon the child.

He also instructed the jury that to convict on first-degree sexual offense the State must prove that defendant engaged in a sexual act with the victim.

> A sexual act means anal intercourse, which is any penetration, hwoever [sic] slight, of the anus of any person by the male sexual organ of another, or any penetration, however slight, by an object into the genital opening of a person's body.

The trial judge further instructed that a conviction for first-degree rape required, *inter alia*, that the jury find the defendant engaged in vaginal intercourse with the victim where "vaginal intercourse is the penetration, however slight, of the female sex organ by the male sex organ."

Finally, the judge instructed the jury that "a verdict is not a verdict until all twelve of the jurors agree unanimously as to what your decision shall be, and you may not render a verdict by a majority vote." There is no indication in the record as to any confusion within the jury as to these instructions.

The evidence at trial tended to show that defendant performed various acts upon the victim including kissing her on her mouth; putting his tongue on hers; inserting his finger in her vagina and anus; inserting his penis in her anus and in her vagina.

We find that the instructions were properly tailored to the evidence of the case and do not result in an impermissible non-unanimous verdict. *Hartness*, 326 N.C. 561, 391 S.E.2d 177.

[6] Defendant next contends that the jury could have convicted him of both sexual offense and rape on the basis of the same act. The trial judge instructed the jury that rape consists of a penetration of the female sex organ by the male sex organ. He also instructed the jury that a sexual act which comprises a sexual offense means "anal intercourse . . . *or* any penetration, however slight, by an object into the genital opening of a person's body."

The judge *did not* include in his instruction the language in the statute which excludes vaginal intercourse from the definition of "sexual act." *See* G.S. § 14-27.1(4) (which defines "sexual act" as cunnilingus, fellatio, analingus, or anal intercourse, *but not vaginal intercourse*, and also includes the penetration by any object into the genital or anal openings of another person's body). Defendant essentially argues that because rape was not excluded from the definition of a sexual act, the jury could have found defendant guilty of a sexual offense if they found that he inserted his penis (any object) into the vagina (the genital opening) of the victim. This act, of course, constitutes rape, for which defendant was also convicted. We disagree with defendant's argument. The trial judge's instructions defined a "sexual act" in the disjunctive as being (1) anal intercourse, the penetration of the anus of one person by the male sexual organ of another *or* (2) the penetration by an object into the genital opening of a person's body. Given this distinction within the same instruction between a "male sexual organ" and an "object" we believe that there is no reasonable possibility that a juror would incorrectly equate the two.

[7] Defendant next contends that it is possible that at least one juror based his vote of guilty for indecent liberties on the act that formed the basis of the dismissed count. The trial judge dismissed one count of indecent liberties at the close of all the evidence and the record shows only that he announced the dismissal by saying "[t]he Court is going to allow the motion in 89-CRS-20271 and deny the motion in the other three cases. All right. Bring the jury back." There is no indication in the record that the jury was instructed as to what acts, if any, were associated with the dismissed charge and thus what acts, if any, it should disregard when considering whether defendant was guilty of the remaining charge. Defendant did not object at trial to this omission and did not request that such an instruction be given. This objection is overruled.

[8] By his last assignment of error, defendant contends that a mandatory life sentence for first-degree sexual offense constitutes cruel and unusual punishment as a matter of law. Our Supreme Court has recently held against defendant on this issue. *State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988); *State v. Cooke*, 318 N.C. 674, 351 S.E.2d 290 (1987). This assignment is overruled.

No error.

Judges ARNOLD and WYNN concur.

CATHERINE CORN EDWARDS, PLAINTIFF v. ROBERT GREGG EDWARDS, DEFENDANT

No. 9018DC899

(Filed 7 May 1991)

1. **Divorce and Separation § 39 (NCI4th)— separation agreement—alimony—arrearages and prospective amounts—ability to pay—procedure not erroneous**

Although the trial court stated that it "will allow specific performance" of the alimony provisions of a separation agreement prior to hearing any evidence of defendant's present ability to pay, the procedure followed by the court complied with prior case law where the court then had a discussion with counsel for both parties concerning evidence it would hear to determine defendant's present ability to pay; the court thereafter heard defendant's testimony concerning his present ability to pay alimony arrearages and admitted defendant's affidavit setting forth his monthly expenses and income; after hearing all the evidence, the court made findings as to defendant's income and expenses and his ability to pay the arrearages; and the court subsequently ordered specific performance of the alimony provisions by the payment of arrearages and prospective alimony.

Am Jur 2d, Divorce and Separation § 652.

2. **Divorce and Separation § 39 (NCI4th)— separation agreements—alimony—present ability to pay—expenses—erroneous findings and conclusions**

The trial court erred in its findings and conclusions as to defendant's present ability to pay alimony arrearages and prospective alimony required by a separation agreement where the court understated defendant's monthly expenses by nearly $500.00 and failed to include that amount in its calculation

of defendant's present ability to pay arrearages and prospective alimony.

Am Jur 2d, Divorce and Separation §§ 426, 660.

3. Rules of Civil Procedure § 60.2 (NCI3d)— alimony—specific performance—miscalculation of expenses—not clerical error

The trial court's miscalculation of defendant's expenses in an order of specific performance of the alimony provisions of a separation agreement was not a mere clerical error which could be corrected under N.C.G.S. § 1A-1, Rule 60(b) without affecting the result of the order.

Am Jur 2d, Divorce and Separation §§ 426, 660.

4. Divorce and Separation § 307 (NCI4th)— alimony arrearages—home equity loan not required by order

The trial court did not improperly order defendant to obtain a $1500.00 home equity loan in order to make a partial payment of his alimony arrearages but only made findings of the amount of defendant's assets and available credit, including a finding that he can borrow an additional $1500.00 under his home equity line of credit, and then ordered defendant to pay $1500.00 based upon its findings.

Am Jur 2d, Divorce and Separation § 750.

5. Divorce and Separation § 520 (NCI4th)— separation agreement—alimony—specific performance—attorney fees

The trial court did not err in awarding attorney fees to plaintiff in an action for specific performance of the alimony provisions of a separation agreement where the parties specifically contracted for indemnification of such fees in their separation agreement. The general rule disallowing attorney fees unless statutorily authorized does not apply in this situation. N.C.G.S. § 52-10.1.

Am Jur 2d, Divorce and Separation §§ 598, 599.

APPEAL by defendant from judgment entered 28 March 1990 by *Judge J. Bruce Morton* in GUILFORD County District Court. Heard in the Court of Appeals 12 March 1991.

On 7 December 1989, plaintiff filed this action seeking specific performance of certain provisions of the separation agreement be-

tween plaintiff and defendant. The agreement stated that defendant would pay plaintiff rehabilitative alimony of $300.00 per month beginning 1 October 1986, and continue for six years or until plaintiff's death or remarriage, whichever occurs first. Defendant ceased making these payments in April 1989.

The trial court entered its judgment in plaintiff's favor on 28 March 1990. Defendant appeals.

Wyatt Early Harris Wheeler & Hauser, by A. Doyle Early, Jr., and Lee M. Cecil, for plaintiff-appellee.

Byerly & Byerly, by W. B. Byerly, Jr., for defendant-appellant.

ORR, Judge.

Defendant assigns three errors on appeal. For the following reasons, we affirm in part, vacate in part and remand to the trial court.

[1] Defendant first argues that the trial court erred in ordering specific performance of the alimony provisions of the separation agreement. Specifically, defendant argues that the trial court did not make the appropriate findings of fact required by law concerning defendant's present ability to pay alimony arrearages before it entered its order. We disagree.

Under N.C. Gen. Stat. § 52-10.1 (1984):

> Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer . . . .

Under the statute, both parties to a divorce may enter into such agreement to settle the question of alimony, and the terms of the agreement are binding and may be modified only with the consent of both parties. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982). Further, a separation agreement not incorporated into a final divorce decree (as in the present case) may be enforced through the equitable remedy of specific performance. *Harris v. Harris*, 50 N.C. App. 305, 274 S.E.2d 489, *disc. review denied and appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981).

In *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 23 (1986), our Supreme Court held that "when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance."

In the present case, after hearing some evidence, the trial court stated that it "will order specific performance." The court then had a lengthy exchange with attorneys for plaintiff and defendant concerning the evidence it would hear to determine defendant's present ability to pay. The trial court stated:

> Let me say this. Before this day is over, we are going to hear all of the evidence, and I am going to dictate an order, and it will do whatever it does. And no order has been entered yet. I think we're using up time discussing that, because I need to hear evidence on his ability. And whether you call that before or after the fact of specific performance, I've got to hear that evidence.

The trial court then heard defendant's testimony concerning his ability to pay his alimony arrearages and accepted into evidence defendant's affidavit (Exhibit 3) concerning his monthly expenses and income. After hearing all of the evidence, the trial court recited defendant's income and expenses in findings 7 through 10 and then made findings of fact 11 through 14 regarding defendant's ability to pay the arrearages. The trial court subsequently ordered specific performance of the alimony provision in the separation agreement. We find that the trial court's procedure in ordering specific performance is well within the requirements stated in *Cavenaugh* and affirm this portion of the judgment.

[2] Defendant next contends that the trial court erred in its findings of fact and conclusions of law that defendant has the present ability to pay alimony arrearages and prospective alimony. We agree.

The trial court correctly calculated defendant's net income at $2,032.00 per month. However, defendant argues that the trial court erroneously calculated his itemized monthly expenses to total $2,087.00, when the correct calculation is $2,513.00.

[3] Plaintiff concedes that the trial court's calculation of monthly expenses is erroneous but maintains that this is a "clerical" error

which may be corrected under Rule 60 of the N.C. Rules of Civil Procedure without affecting the result of the judgment. We disagree.

Under N.C. Gen. Stat. § 1A-1, Rule 60(a) (1990):

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

This rule allows correction of clerical errors, but does not permit errors of a serious or substantial nature. *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989). We find that the trial court's miscalculation in this situation is of a substantial nature. The trial court understated defendant's monthly expenses by approximately $500.00 per month and failed to include that amount in its calculation of the amount of defendant's present ability to pay alimony arrearages and prospective alimony. While this miscalculation may have no effect on the trial court's order of specific performance, it may have an effect on the amount defendant can reasonably afford to pay plaintiff on a monthly basis. The trial court based its award on defendant's expenses of $2,087.00 per month, not the actual expenses of $2,513.00 per month.

Plaintiff further argues that the trial court's error in the present case does not prejudice defendant because the trial court did not include defendant's $3,000.00 bonus for the year or a $3,000.00 tax refund in its calculation of defendant's income. There is no evidence before this Court that either of the above income sources for the year may be considered regular income and therefore included in calculating defendant's net monthly income. *See Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E.2d 29, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982) (a spouse's ability to pay alimony is usually determined by his income at the time the award is made). Moreover, there is evidence that the income tax refund is a joint refund to both defendant and his present wife; therefore, for the purposes of the case before us, it would appear that defendant would be entitled to only half of such refund. We find that the trial court's miscalculation of defendant's expenses relative to his

monthly income is a prejudicial error and therefore must be addressed by the trial court.

[4] Defendant also contends that the trial court erred in finding that defendant had the present ability to increase the equity loan on the home owned by him and his current wife by $1,500.00. We disagree.

Defendant cites no authority in support of his argument on this issue in violation of Rule 28(b)(5) of the N.C. Rules of Appellate Procedure. We have, however, reviewed defendant's argument and the law in this State and find no merit to defendant's contentions.

In its order, the trial court made the following findings concerning defendant's ability to incur additional debt to pay his alimony arrearages:

> 8.
>
> . . . . The defendant has a line of credit on the equity loan of $10,000.00, and the defendant can borrow approximately an additional $1,500.00. The defendant owns a 1988 Jeep Cherokee valued at approximately $10,000.00, and the defendant has about three years of payments left on said Jeep. The defendant and his wife have a joint savings account of approximately $600.00, and the defendant has an IRA account in his name alone in the amount of approximately $1,800.00. As of the date of this hearing, the defendant has between $2,800.00 and $3,000.00 in his personal checking account, out of which he is committed to pay his living expenses. The defendant had a check in Court for $493.64 dated December, 1988 for the plaintiff's share of his profit-sharing plan, and the defendant has delivered the check to the plaintiff and the plaintiff has received the check. The defendant has not deliberately depressed his income or dissipated his resources.
>
> . . . .
>
> 13.
>
> The defendant has the present ability to increase the equity loan on his home by $1,500.00 within a week and to pay this amount directly to the plaintiff on or before Wednesday, April 4, 1990, as a partial payment upon his arrears.

The trial court then concluded:

> (5) The defendant has not deliberately depressed his income or dissipated his resources. The defendant has the present ability to pay $493.64 to the plaintiff immediately as her 25% share of the profit-sharing plan, has the present ability to pay to the plaintiff $1,500.00 of the alimony arrearage on or before April 4, 1990, has the present ability to resume the alimony payments of $300.00 per month beginning April 1, 1990 and continuing on the first of each consecutive month thereafter until they are paid and satisfied in full in accordance with the Separation Agreement of the parties, ...

The trial court further ordered: "The defendant shall pay to the plaintiff on or before April 4, 1990 the sum of $1,500.00 to be applied upon the alimony arrearage."

Defendant maintains that the trial court specifically ordered him to take a home equity loan for $1,500.00. On the contrary, we find that the trial court made findings of the amount of defendant's assets and available credit and then ordered defendant to pay $1,500.00 and other sums, based upon its findings. Although defendant may choose to use a home equity loan for the lump sum payment of arrearages, defendant is not prevented by the trial court's order from obtaining that amount from other sources.

[5] Defendant's remaining assignment of error concerns whether the trial court erred in awarding attorney's fees in a specific performance action. We hold that the trial court did not err.

Defendant is correct that attorneys' fees are generally not allowable unless expressly authorized by statute. *Buck v. Proctor & Gamble*, 58 N.C. App. 804, 805, 295 S.E.2d 243, 244 (1982), *cert. denied*, 308 N.C. 543, 304 S.E.2d 236 (1983) (citation omitted). In the present case, however, defendant and plaintiff specifically contracted for attorneys' fees in the separation agreement under paragraph 16, entitled "Indemnity."

> If either party hereto for any reason fails to perform his or her financial or other obligations to the other party or their child, and as a result thereof incurs any expense, including reasonable attorney's fees, to collect the same or otherwise enforce his or her rights with respect thereto, the defaulting party shall indemnify and hold the other harmless from any such expense.

Based upon this agreement, the trial court found as fact that "the plaintiff is entitled to indemnification and recovery of reasonable attorneys' fees as a result of the failure of the defendant to comply with the provisions of the Separation Agreement." The trial court then found the specific amount of attorneys' fees based upon the hourly rate and the amount of time and effort expended.

Under § 52-10.1, separation agreements are "binding in all respects" so long as they are "not inconsistent with public policy" and executed according to the directives of the statute. We find nothing inconsistent with public policy in the above indemnity clause, and the agreement was executed pursuant to the statute. Therefore, it is "binding in all respects" including the indemnity clause.

To hold otherwise would, in effect, hold that parties cannot contract for indemnification for attorneys' fees unless specifically authorized to do so by statute. We find that the general rule disallowing attorneys' fees unless statutorily authorized does not encompass this situation where the parties voluntarily contracted for indemnification for such fees. Therefore, we hold that the trial court did not err in allowing attorneys' fees.

For the above reasons, we affirm in part, vacate in part and remand to the trial court for further findings not inconsistent with this opinion.

Affirmed in part; vacated in part and remanded.

Judges JOHNSON and PARKER concur.

JOYCE MORLEY v. E. K. MORLEY

No. 9029SC331

(Filed 7 May 1991)

1. Judgments § 55 (NCI3d)— motion to determine interest due on judgment—jurisdiction of superior court

A superior court judge had jurisdiction to rule on plaintiff's motion for a determination of the amount of interest due on a judgment against defendant by answering a question

of law as to how the clerk of superior court should allocate payments to principal and interest.

Am Jur 2d, Interest and Usury § 59.

2. Judgments § 54 (NCI3d) — allocation of payments to principal and interest

When payment on a judgment which has accumulated interest is not sufficient to satisfy both the principal and interest, the clerk should first allocate the payment to the interest due and then allocate the remainder to the principal. A payment equivalent to the principal amount originally due does not halt the accrual of interest on the amount of principal remaining due after the payment has been properly allocated.

Am Jur 2d, Interest and Usury §§ 96, 99.

Chief Judge HEDRICK dissenting.

APPEAL by defendant from *Judge Hollis M. Owens*. Judgment entered 28 December 1989 in Superior Court, HENDERSON County. Heard in the Court of Appeals 3 December 1990.

The record before us discloses the following: On 30 September 1986, Judge Snepp in Superior Court entered a judgment that "the plaintiff have and recover of the defendant the sum of $29,245.00, together with interest thereon, at the rate of 8% per annum from June 21, 1985 until paid."

Pursuant to that order, the plaintiff received $29,245.00 as full payment of the principal due on or about 3 October 1986, through the clerk's office. The defendant appealed that part of the judgment ordering payment of the statutory interest of 8% per annum. The defendant did not prevail in that appeal. The defendant paid $3,006.22 on 23 March 1988.

The plaintiff contends that the defendant owed $29,245.00 principal and $3,006.22 interest on 3 October 1986 so that when he paid $29,245.00, $3,006.22 of that should have been credited toward interest. Plaintiff argues that the balance left was $3,006.22 of which accumulated 8% interest until 23 March 1988, amounting to $350.28. From that judgment, the defendant appeals.

John E. Shackelford for plaintiff appellee.

E. K. Morley, pro se, for defendant appellant.

LEWIS, Judge.

Jurisdiction

[1] Though neither party raises the issue, the dissent finds this Court without jurisdiction. We believe the case is properly before us.

The only dispute in this case is how to compute the interest on the judgment by Judge Snepp which was filed in the clerk's office on 30 September 1990. After the judgment was filed and $29,245.00 was paid into the clerk's office on 3 October 1986, the clerk applied all of the payment to principal, allocating none to the $3,006.22 then due and owing in interest. Later on 23 March 1988, the defendant tendered the $3,006.22 as full interest due. The plaintiff wrote the clerk informing him that additional interest was due. The record contains a letter from the clerk to the plaintiff containing in part, the following: "[a]s I disagree with your definition [of simple interest], I feel it imperative that you bring this matter before the Superior Court Judge for an order to settle our differences."

The plaintiff filed a motion asking the Superior Court to determine the amount of interest due on the judgment. The motion was calendared before Judge Owens, Resident Superior Court Judge in Henderson County, at the request of the defendant. The motion was heard on 21 August 1989. Judge Owens signed a judgment 28 December 1989 which was filed 5 January 1990. The judgment ordered the defendant to pay the plaintiff an additional $350.28.

Although the motion filed by the plaintiff also asked the court to require the clerk to issue execution, the motion in its final prayer to the court only asked the court to determine the amount of interest due. The amount of interest due would determine if the defendant owed an additional amount of money to the plaintiff. Thus, the court's final decision impacted both named parties. In his order, Judge Owens did not require execution on the judgment but only addressed the issue of the amount of interest due on the judgment, as that was the issue in controversy. Therefore, we note that this case does not involve an appeal of a refusal of the clerk to issue execution, but instead, a dispute over the correct way to calculate interest. *See Huntley v. Hasty*, 132 N.C. 279, 43 S.E. 844 (1903). We also note that we need not address whether the plaintiff properly appealed from a judgment of the

clerk in compliance with N.C.G.S. § 1-272, as we do not consider the clerk's calculations to be an "order or judgment of the clerk."

We are mindful of *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C. App. 257, 362 S.E.2d 870 (1987) (holding that a Superior Court judge had no authority to construe or interpret a specific provision of a consent judgment pursuant to defendants' motion in the cause), but find it distinguishable. Here, the Superior Court Judge answered a question of law as to how the clerk of superior court should calculate interest on judgments. Although the duty to keep record of judgments owing lies first with the clerk pursuant to Chapter 7A of the North Carolina General Statutes, when a dispute arises over the correct method that the clerk should implement such a commonly performed ministerial duty, recourse should be available to the plaintiff to return to Superior Court to construe the order. We are well aware that no judge can change, abrogate or overrule another judge of the same court. This case does not involve such action.

The Proper Method of Calculation

[2] The defendant contends that the trial court erred in allowing the plaintiff to collect "interest on interest." The trial judge ordered that the original order, requiring interest of eight percent per annum, included an additional $350.28 covering the interest due on the remaining balance. This case presents us with a question of how one should allocate the funds when payment is made on a debt which has accumulated interest but the payment is not high enough to satisfy the principal and interest. The defendant claims that since the payment on 3 October 1986 was equivalent to the principal amount originally due ($29,245.00), that such payment should halt the accrual of interest. We disagree. In order to encourage debtors to pay the entire amount due and in the interest of fairness, when payments are made on a judgment debt, the clerk should first allocate the payment to the interest due. The remainder of the payment should be allocated to the principal. In the case at hand, we find the following calculations to be the correct manner:

Due June 21, 1985 ..... $29,245.00
(interest begins accruing)

Due October 3, 1986 ..... $32,251.22

($29,245.00 principal & $3,006.22 interest: 469 days total interest at $6.409863 per day = $3,006.2257 in interest)

October 3, 1986 defendant paid.....$29,245.00

(allocate $3,006.22 to the interest on total debt and allocate remaining $26,238.78 to principal, leaving $3,006.22 in principal on which interest begins accruing)

Due March 23, 1988.....$3,359.38

($3,006.22 principal & $353.16 interest: 536 days total interest at $.6588975 per day = $353.16906 in interest)

March 23, 1988 defendant paid.....$3,006.22

(allocate $353.16 to interest on the debt and allocate remaining $2653.06 to principal, leaving $353.16 in principal on which interest begins accruing)

The trial court's ruling that $350.28 balance due remained owing is within three dollars of our calculations. We hold that the difference is negligible and perhaps due to the factoring in of a leap year or calculating to the nearest decimal. Thus, we affirm the trial court's ruling.

The defendant contends that the trial court failed to make the required findings of fact and thus, made an unsubstantiated conclusion of law. We hold that the finding that $350.28 was due and owing was sufficient.

Affirmed.

Judge WYNN concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

The majority seems to dismiss the jurisdictional question by stating, "[a]lthough the duty to keep record of judgments owing lies first with the clerk pursuant to Chapter 7A of the North Carolina General Statutes, when a dispute arises over the correct method that the clerk should implement such a commonly performed ministerial duty, recourse should be available to the plaintiff to return to Superior Court to construe the order." I note the majority cites no authority for the foregoing sentence.

The motion in the cause filed 12 July 1988 giving rise to the judgment from which defendant appealed appears in the record as follows:

> NOW COMES the Plaintiff herein and moves the Court for an Order requiring of the Clerk that they issue execution herein for the collection of the balance of the Judgment, and in support of said Motion, shows unto the Court as follows:
>
> 1. That a Judgment was heretofore entered herein requiring of the Defendant to pay the sum of $29,245.00 together with interest thereon from June 21, 1985.
>
> 2. That the Plaintiff contends that as of March 1, 1988, there was due the sum of $3,404.83, and the Defendant contends that there was due on said date the sum of $3,006.22, and has paid said amount into the Court.
>
> 3. That the Clerk of the Superior Court of Henderson County has advised the Plaintiff's attorney that he will not issue execution for the remaining amount due.
>
> 4. That said action on the part of the Defendant and the Clerk of the Superior Court is without justification and is done in an attempt to deprive the Plaintiff of her rights and has necessitated the Plaintiff hiring attorneys to pursue this matter.
>
> 5. That said conduct, together with the conduct of the Defendant herein in failing to previously pay this Judgment and taking advantage of his position as an attorney in this Court and in appealing this matter is flagrant and willful and constitutes an abuse of process, and therefore the Defendant should be required to pay the Plaintiff's attorney's fees.
>
> WHEREFORE, the Plaintiff prays that the Court determine the amount of interest due on said Judgment; that the Defendant be required to pay the Plaintiff's attorney's fees; for such other and further relief as to the Court seems just and proper.

Neither plaintiff in its motion, nor the majority in its opinion refers us to any rule pursuant to which the motion was made. I am unaware of any rule authorizing any judge, pursuant only to a motion in the cause, to interpret or construe a judgment entered more than 21 months before the motion in the cause was filed, and to enter another judgment "that the Plaintiff have and

recover of the Defendant the additional sum of $350.28." *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C. App. 257, 262 S.E.2d 870 (1987). *Roach v. Smith*, see opinion filed 2 April 1991.

The record clearly discloses that defendant paid to the clerk the full amount of the judgment including the interest as calculated by the clerk. The clerk wrote plaintiff that he had collected the full principal sum and interest, but plaintiff disagreed with the amount of the interest. At that point the controversy was between plaintiff and the clerk of superior court. Defendant had absolutely nothing to do with it. Plaintiff did not pay the fees and request the clerk to issue execution to collect the judgment as provided by G.S. 1-305, plaintiff instead filed the motion in the cause heretofore set out. The judgment appealed from interferes with the ministerial duties of the clerk. In my opinion the judge of the superior court had no authority to entertain and allow the motion in the cause. When notice of appeal is timely given from a judgment, or if notice of appeal is not timely given and the time for giving notice of appeal expires, the trial court is *functus officio* to alter, interpret, or enter another judgment in the same case except pursuant to a motion made under Rule 60. The motion made here by plaintiff was not pursuant to Rule 60.

I vote to vacate the judgment from which this appeal was taken.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, PLAINTIFF v. FAY L. NAYLOR, CROSS PLAINTIFF v. JOEL LYNN GOODMAN, CROSS DEFENDANT

No. 9019DC894

(Filed 7 May 1991)

1. Divorce and Separation § 37 (NCI4th)— separation agreement—breach of contract claim—bankruptcy discharge

In an action arising from the failure of the third-party defendant (husband) to pay a marital debt pursuant to a separation agreement, the wife's breach of contract claim against the husband survived the husband's bankruptcy discharge where the husband did not list the wife as a creditor and there

is no evidence in the record to show that she had notice or actual knowledge of his bankruptcy petition.

Am Jur 2d, Bankruptcy § 3120.

2. **Contracts § 91 (NCI4th)— separation agreement—bankruptcy—anticipatory breach of contract**

Summary judgment for the wife was proper in an indemnity action arising from the husband's failure to pay a marital debt and subsequent bankruptcy where the wife's duty to pay in full a note to the husband was a condition precedent to the husband's duty to assume debts and indemnify the wife, but the wife was relieved of her duty because the husband's bankruptcy discharge amounted to an anticipatory breach of contract.

Am Jur 2d, Contracts §§ 686, 733.

3. **Contracts § 168 (NCI4th)— breach of separation agreement—indemnity action—calculation of damages**

The trial court's order was remanded for recalculation of damages where the wife brought an indemnity action against the husband arising from his failure to pay a marital debt pursuant to a separation agreement and his subsequent discharge in bankruptcy, the bank obtained a judgment against the wife, the wife brought an action against the husband, the court granted summary judgment for the wife, and the husband was ordered to pay the wife the amount awarded to the bank. The court did not take into account the amount the wife would save because she was no longer required to perform her obligations under the separation agreement.

Am Jur 2d, Damages §§ 43 et seq.

APPEAL by cross-defendant Goodman from order and judgment entered 12 June 1990 in DAVIE County District Court by *Judge Robert W. Johnson.* Heard in the Court of Appeals 20 February 1991.

Carlyle Sherrill for cross plaintiff-appellee.

Woodson, Linn, Sayers, Lawther, Short & Wagoner, by Donald D. Sayers, for cross defendant-appellant.

GREENE, Judge.

The third party defendant, Joel Goodman (Husband), appeals the trial court's order of summary judgment in favor of the third party plaintiff, Fay Naylor (Wife).

Viewed in the light most favorable to the Husband, the evidence tends to show the following: On 29 August 1985, while married, the Wife and Husband entered into a separation agreement. The pertinent part of that agreement reads as follows:

> In consideration of the Husband's assumption of all of the secured debt referred to hereinabove, Wife has agreed to execute and pay in full a note to Husband in her own name in the principal sum of $16,100.00, payable in 60 equal monthly installments . . . . Upon the said note . . . being paid in full to Husband . . . Husband agrees to assume and pay all of the remaining secured and unsecured indebtedness of the parties . . . and will indemnify and save Wife harmless from any obligation therefor. Should Wife fail to pay said note . . . in full, then this assumption and indemnification by Husband shall be null and void.

The Wife was also required to join in the execution of necessary documents whenever the Husband decided to refinance any of the parties' debts and was required "to keep in force a policy of life insurance with Husband as beneficiary in an amount equal to the balance owing on said note during its entire term." The parties modified this agreement on 30 May 1986 to lower the monthly payments due the Husband by the Wife.

One of the parties' mutual, unsecured debts which the Husband had agreed to assume was a debt to First Union National Bank (Bank). In late 1986 and early 1987, the Wife began receiving letters from the Bank which stated that she was behind in her payments on the debt. Pursuant to the separation agreement, the Wife continued making monthly payments of $275.00 to the Husband until June of 1988, the time when she learned that the Husband had filed bankruptcy under Chapter 7 on 24 June 1987 and subsequently had received a discharge with regard to the Bank debt.

On 6 July 1989, the Bank filed suit against the Wife seeking an award representing the amount of the outstanding debt, interest, court costs, and attorney fees. The Wife answered and filed a cross-claim against the Husband seeking to have the Husband in-

demnify the Wife for the amount, if any, awarded to the Bank as against the Wife. The Husband answered the cross-claim alleging that the Wife had breached their separation agreement and that the Husband's discharge prohibited the Wife's cross-claim. On 1 February 1990, the Bank filed a motion for summary judgment against the Wife. The trial court granted the Bank's motion on 14 March 1990 and ordered the Wife to pay the debt, interest, court costs, and attorney fees. The Wife has not appealed this order.

On 4 October 1989 and on 23 March 1990, the Husband and the Wife, respectively, filed motions for summary judgment. On 12 June 1990, the trial court entered its order granting the Wife's motion and denying the Husband's motion. The amount of the award equalled the amount awarded the Bank under the 14 March 1990 order.

The issues presented are (I) whether the Husband's discharge in bankruptcy relieves him of any obligation on the Wife's breach of contract claim; (II) whether the Husband's adjudication of bankruptcy constitutes a breach of contract; and (III) whether in awarding damages for breach of contract, consideration must be given to the expenses saved by the non-breaching party as a consequence of the breach.

I

[1] "Pursuant to 11 U.S.C. § 727(a), a Chapter 7 debtor who complies with the Bankruptcy Code requirements receives a discharge of all pre-petition debts . . . ." *In re McCauley*, 105 B.R. 315, 318 (E.D. Va. 1989). Therefore, if the Husband had complied with the applicable requirements of the Bankruptcy Code, he would have been entitled to a discharge on the Wife's breach of contract claim. Of course, if the Wife's contractual rights were in the nature of alimony, maintenance, or support, an issue which we need not decide, the rights would not be dischargeable. *See Long v. Long*, 102 N.C. App. 18, 24, 401 S.E.2d 401, 404 (1991). Furthermore, we need not address any argument concerning the dischargeability of equitable distribution claims. *See In re Sanderfoot*, 899 F.2d 598 (7th Cir.), *cert. granted*, --- U.S. ---, 112 L.Ed.2d 519 (1990); *Perlow v. Perlow*, No. 90-583 Civ. 5 BR (E.D.N.C. filed April 17, 1991). However, the Husband did not comply with 11 U.S.C.S. § 521(1) (Law. Co-op. 1986) which requires, among other things,

the debtor to list his creditors. Assuming that the Wife is a creditor, the Husband's failure to list her as a creditor triggers an exception to discharge, 11 U.S.C.S. § 523(a)(3)(A) (Law. Co-op. 1986), which provides in pertinent part that

> [a] discharge under section 727 . . . does not discharge an individual debtor from any debt . . . neither listed nor scheduled under section 521(1) . . . with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit . . . timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing. . . .

Here, the Husband did not list the Wife as a creditor, and there is no evidence in the record to show that she had notice or actual knowledge of the Husband's bankruptcy petition. Therefore, she was unable to protect her unsecured claim by filing a timely proof of claim. *See* Bankr. R. 3002(c)(4) (Law. Co-op. Supp. 1990) (time for filing claim arising from rejection of executory contract). Accordingly, the Wife's breach of contract claim survived the Husband's bankruptcy discharge, and the Wife was entitled to proceed with her breach of contract action outside of bankruptcy.

II

[2] "A condition precedent is an act or event, other than a lapse of time, which [unless excused] must exist or occur before a duty to perform a promised performance arises." J. Calamari & J. Perillo, The Law of Contracts § 11-5 (3d ed. 1987); *see also Craftique, Inc. v. Stevens and Co.*, 321 N.C. 564, 566, 364 S.E.2d 129, 131 (1988); Restatement of Contracts § 250(a) (1932). "Conditions precedent are not favored by the law. . . . Absent plain language, a contract ordinarily will not be construed as containing a condition precedent. . . . The use of language such as 'when,' 'after,' and 'as soon as' clearly indicates that a promise will not be performed except upon the happening of a stated event, i.e., a condition precedent." *Craftique*, 321 N.C. at 566-67, 364 S.E.2d at 131 (citations omitted). Here, the contractual language "[u]pon the said note . . . being paid in full" indicates in plain language a condition precedent. Therefore, the Wife's duty to pay the note in full to the Husband was a condition precedent to the Husband's duty to assume the debts and indemnify the Wife. The Husband argues that because the Wife did not pay in full the promissory note to the Husband, his duty to assume the marital debts and in-

demnify the Wife never arose. The Wife argues that she was relieved of her contractual duty to pay the note in full once the Husband was discharged in bankruptcy because the discharge amounted to an anticipatory breach of contract.

"The doctrine of anticipatory breach is well known: when a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party." *Dixon v. Kinser and Kinser v. Dixon*, 54 N.C. App. 94, 101, 282 S.E.2d 529, 534 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E.2d 805 (1982). Because "the law does not require the doing of vain things," a non-breaching party is relieved of his obligation of performing conditions precedent when faced with an anticipatory repudiation. *Pee Dee Oil Co. v. Quality Oil Co.*, 80 N.C. App. 219, 223, 341 S.E.2d 113, 116, *disc. rev. denied*, 317 N.C. 706, 347 S.E.2d 438 (1986). "It is enough that plaintiff's evidence tends to show that . . . [the plaintiff] could have performed the contract if defendant had not repudiated it; . . . [the plaintiff is] not required to show that . . . [the plaintiff] had performed." *Id.; see also* Restatement (Second) of Contracts § 254(1) comment a (1979) (duty to pay damages discharged where it appears that injured party would have totally failed to perform).

As a general rule, "proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement . . . . *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581, 592, 60 L.Ed. 811, 816 (1916); *see also* 6 S. Williston, A Treatise on the Law of Contracts § 880 (3d ed. 1962) (party to a contract who is bankrupt probably will be unable to carry it out); 17A Am. Jur. 2d *Contracts* § 743 (1991) (general rule). "[I]t must be deemed an implied term of every contract that the promisor will not permit himself, through . . . acts of bankruptcy, to be disabled from making performance . . . ." *Central Trust*, 240 U.S. at 591, 60 L.Ed. at 815; *see also* 17A Am. Jur. 2d *Contracts* § 743. Here, because the Husband received a discharge in bankruptcy, he anticipatorily breached his contract with the Wife. Having continued to make payments due under the note for a year after the Husband filed his petition in bankruptcy, the Wife's uncontroverted evidence tends to show that she could have performed her duty under the contract had the Husband not committed a breach of contract. Accordingly, the Wife was relieved of her duty to pay in full the note to the Husband.

There being no genuine issue of material fact regarding the Husband's breach, summary judgment for the Wife was proper.

III

[3] The trial court, having granted the Wife's summary judgment motion, ordered the Husband to pay damages equal to the amount awarded the Bank in its suit against the Wife. Because the trial court did not apply the proper breach of contract damages formula, we vacate and remand its order.

"For a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed." *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 259 N.C. 400, 415, 131 S.E.2d 9, 21 (1963). The interest being protected by this general rule is the non-breaching party's "expectation interest," and in so doing, the injured party receives the "benefit of the bargain." Restatement (Second) of Contracts § 344(a) comment a (1979).

> Subject to [various] limitations . . . [such as rules on avoidability, foreseeability, and certainty of damages], the injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts § 347 (1979); *Ward v. Zabady*, 85 N.C. App. 130, 135, 354 S.E.2d 369, 373, *disc. rev. denied*, 320 N.C. 177, 358 S.E.2d 71 (1987) (plaintiff may only recover actual losses in breach of contract action).

In merely ordering the Husband to pay the Wife the amount awarded the Bank in its suit against the Wife, the trial court failed to take into consideration the amount, if any, the Wife will save in consequence of the Husband's breach of their contract. Because of the Husband's breach, the Wife is no longer required to perform her obligations under the contract. *See Millis Constr.*

Co. v. Fairfield Sapphire Valley, Inc., 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (anticipatory breach discharges non-breaching party's remaining duties to perform); *Pee Dee*, 80 N.C. App. at 223, 341 S.E.2d at 116. On remand, damages must be established by taking into consideration the contractual obligations the Wife has avoided as a consequence of the Husband's breach.

We have reviewed the Husband's remaining argument and find it to be without merit. Accordingly, the trial court's order of summary judgment is

Affirmed in part, vacated in part, and remanded.

Judges WELLS and WYNN concur.

SHELBY TYNDALL, PLAINTIFF, EMPLOYEE v. WALTER KIDDE CO., EMPLOYER AND NATIONAL UNION, CARRIER, DEFENDANTS

No. 9010IC815

(Filed 7 May 1991)

1. **Master and Servant § 68 (NCI3d)— machinist—dermatitis—occupational disease—not personal sensitivity**

In a workers' compensation action where claimant machinist claimed that she had contracted an occupational disease, dermatitis, caused by a chemical with which she came into contact in the course of her employment, any reduction in her capacity to earn wages was the result of her occupational disease where the parties stipulated that she had an occupational disease and all of the evidence supported the conclusion that claimant's incapacity was the result of her occupational disease. Although respondent argued personal sensitivity under *Sebastian v. Hair Styling*, 40 N.C.App. 30, *Sebastian* applies only to those situations where an occupational disease does not exist.

Am Jur 2d, Workmen's Compensation §§ 229, 317.

2. **Master and Servant § 68 (NCI3d)— machinist—dermatitis—failure to prove reduction in earning capacity**

A machinist claiming dermatitis in a workers' compensation case failed to prove any reduction in her earning capacity

where her post-injury earnings were less than her pre-injury earnings, but the employer offered uncontested evidence that other jobs were available which paid wages equivalent to the pre-injury wages and which did not require exposure to the problem chemicals.

Am Jur 2d, Workmen's Compensation § 348.

3. **Master and Servant § 93.3 (NCI3d) — workers' compensation — machinist's dermatitis — expert testimony in labor market analysis — admissible**

The testimony of an expert in labor market analysis with particular emphasis on job analysis and evaluation and compensation rates was admissible in a workers' compensation action arising from claimant machinist's dermatitis where there was no dispute regarding claimant's capability to work in an environment free of the offending chemicals. The expert was competent to offer his opinion on claimant's capability of obtaining other employment where there would be no exposure to those chemicals.

Am Jur 2d, Workmen's Compensation § 528.

APPEAL by plaintiff from Opinion and Award of North Carolina Industrial Commission entered 1 May 1990. Heard in the Court of Appeals 13 February 1991.

Lore & McClearen, by R. Edwin McClearen and F. Scott Templeton, for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by Dean Webster and Dana Davis, for defendant-appellees.

GREENE, Judge.

Shelby Tyndall (Claimant) appeals from an "Opinion and Award" of the Industrial Commission denying her claim for compensation.

The undisputed facts reveal that the Claimant in 1983 received a job with Walter Kidde Co. (Employer) as a machinist "C" "and with time and experience, became elevated to the position of machinist "B" at $8.51 per hour." The findings of fact adopted by the Commission state in part:

4. [Employer] . . . manufactures fire control systems. Many of the parts are small and intricate. Precision gauges are used to measure these parts. As a part of [Claimant]'s duties she worked with machines which used cutting oils to lubricate and cool the tools in the metal process. The oil was applied by a spray device when a drill press was used. On the larger machines that were involved in several operations, a cooling system was in place that sprayed the cooling liquid from all directions on the part as well as the tool. A drain system is installed to catch the excess coolant that splashes off the part and recycles it through the cooling oil system.

5. Not only [Claimant], but other workers would often get this cooling oil on their hands or body as a necessary part of their job duties. Solcut 50 was a water-soluble coolant used in the machine shop. Also, a blue Monroe cooling solution was used in the machine shop as well. Different machines used different cooling solutions. Some used cutting oils.

6. In the spring of 1987, [Claimant] began to notice that she was developing dermatitis on her hands and arms. This rash looked like poison oak or ivy, and caused an itching sensation. Small blisters or bumps developed.

The Claimant sought treatment from her family doctor and was referred to Dr. Edward Burton (Dr. Burton), a Raleigh dermatologist. Dr. Burton determined that Claimant had "a chronic hand eczema which seems to be definitely accentuated by chemical exposure at work and is greatly improved when the patient ceases to work." Dr. Burton told Claimant that if she continued "to be exposed to these chemicals she [could] . . . expect to continue to have trouble with her hands probably for an indefinite period of time." Dr. W. Stacy Miller (Dr. Miller) also diagnosed Claimant as having a "chronic eczema" which he determined to be "related to chemicals she comes in contact with at work." Dr. Miller performed some tests on Claimant which revealed "positive skin test reactions to the blue Monroe and undiluted Solcut 50 solutions." Dr. Miller advised that Claimant "should *not* come into contact with these chemicals." He concluded that Claimant was "fully capable of working in another capacity where exposure to these chemicals will not be necessary." At some point after Claimant was examined by Dr. Miller and Dr. Burton, Claimant was told by Employer that there was a machinist "C" position open and Claimant re-

quested a transfer to this position. On 1 September 1987, Claimant began working as a machinist "C" and was paid at the rate of $6.98 per hour. This work did not expose her to the irritating chemicals and coolants that she had been exposed to as a machinist "B." In April, 1989, Claimant quit her job with Employer and began working at the Johnston County Alcohol and Substance Abuse Facility earning $6.01 per hour. There is no evidence in the record that Claimant had "further experience of dermatitis after September 1, 1987 when her exposure" to blue Monroe and Solcut 50 ceased.

Employer offered the testimony of Joseph G. Kearney (Kearney) who testified that he specialized in "job evaluation: wage and salary administration and benefit analysis and compensation." He further stated that his work involved the "collecting of data and providing data in conjunction with compensation surveys and on the status of the labor market." He admitted that he was not an expert in the field of vocational evaluations. Kearney was accepted by the trial court as "an expert in labor market analysis with particular emphasis on job analysis and evaluation and compensation analysis." Kearney was asked on direct examination for his opinion as to whether Claimant, with her experience and qualifications, "would have the ability and opportunity to contract a job [in the area] paying a wage of at least $8.50 per hour" which did not expose her to "the Solene Solcut 50 cutting oil type substances." Claimant objected to the question on the ground that the question was outside "the range of [Kearney's] . . . expertise" and because Kearney did not do "vocational assessments with respect to [individuals] . . ." regarding that individual's capabilities and vocational potential. The trial court overruled the objection. Kearney testified that there were jobs available in the immediate area for persons with the experience of Claimant which would not have involved exposure to "Solcut 50 cutting oil type substances" and that those jobs paid at least $8.50 to $9.00 per hour. Claimant presented no evidence that she sought any employment at any place "where her extensive machinist skills and experience might [have been] . . . transferred."

At the hearing before the Industrial Commission on Claimant's claim, the parties stipulated that Claimant contracted an occupational disease, namely dermatitis, caused by a chemical which Claimant came into contact with in the course and scope of her employment with Employer.

The Commission determined that Claimant was not entitled to compensation for two distinct reasons. First, Claimant did not have a compensable disability because her alleged incapacity "was the result of her personal sensitivity to chemicals used in her work rather than from an occupational disease." Second, even if the disability was compensable, Claimant incurred no reduction in her earning capacity because she could have earned the same wages at other firms in the area where she lived without being exposed to the problem chemicals.

The issues are: (I) whether Claimant has a compensable disability; (II) whether Claimant incurred a reduction in earning capacity; and (III) whether Kearney was competent to testify as to the capabilities of Claimant to obtain other employment.

Every employer, as that term is defined in N.C.G.S. § 97-2(3) is obligated to pay compensation "for personal injury or death by accident arising out of and in the course of his employment. . . ." N.C.G.S. § 97-3. "Disablement or death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident. . . ." N.C.G.S. § 97-52. "Disablement" is defined as the equivalent of "disability." N.C.G.S. § 97-54. "Disability" is defined as an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9).

Therefore, an employee is entitled to compensation under the Workers' Compensation Act (Act) if there is an "incapacity ['resulting from an occupational disease'] to earn wages which the employee was receiving at the time [the occupational disease developed] . . . in the same or any other employment." Thus, Claimant's post-injury earning capacity is the determinative factor in assessing disability. A claimant's "actual post-injury earnings will create a presumption of earning capacity commensurate" with the post-injury earnings. 2 Larson's Workmen's Compensation Law § 57.21(d), 10-113. However, this presumption may be rebutted by either party. *Id.* If the post-injury earnings are equal to the pre-injury earnings, the claimant may attempt to explain "away the post-injury earnings as an unreliable basis for estimating capacity." *Id.* at 10-125. If the post-injury earnings are less than the pre-injury earnings, the employer may present evidence that there are other available jobs for which the claimant is qualified and which pay equivalent to

or greater than the claimant's pre-injury earnings. *See American Metals Climax, Inc. v. Cisneros*, 195 Colo. 163, 576 P.2d 553 (1978).

The burden of proof rests upon the claimant to prove the "existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). Relevant on these issues is evidence that the claimant may be unsuited for particular employment "due to characteristics peculiar to him." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982).

I

[1] Employer, relying on *Sebastian v. Hair Styling*, 40 N.C. App. 30, 251 S.E.2d 872, *disc. rev. denied*, 297 N.C. 301, 254 S.E.2d 921 (1979) (claimant's incapacity was result of personal sensitivity not occupational disease), argues that Claimant's incapacity, if any, was the result of a personal sensitivity to chemicals not the result of an occupational disease. We disagree. *Sebastian* applies only in those situations where an occupational disease does not exist. *See Thomas v. Hanes Printables*, 91 N.C. App. 45, 50, 370 S.E.2d 419, 422 (1988) (court in *Sebastian* was unconvinced that claimant's "personal sensitivity" met the definition of an occupational disease). The issue of whether Claimant's dermatitis was an occupational disease is not here presented because the parties stipulated that the Claimant had an occupational disease. Therefore, *Sebastian* is not here applicable. Furthermore, all the evidence supports a conclusion that Claimant's incapacity, if any, was the result of her occupational disease. It is undisputed that the Claimant could not continue to work as a machinist "B" because it exposed her to chemicals that caused dermatitis. Therefore, any reduction in Claimant's capacity to earn wages was the result of Claimant's occupational disease.

II

[2] Employer argues that Claimant has failed in her ultimate burden of proving any reduction in her earning capacity. We agree. When Claimant presented evidence of her "post-injury" earnings, a presumption was created that her earning capacity was consistent with those earnings. 2 Larson's Workmen's Compensation Law § 57.21(d), at 10-113. In that her "post-injury" earnings were less than her "pre-injury" earnings, there was proof of a reduction in Claimant's earning capacity. However, Employer offered un-

contested evidence that other jobs were available which Claimant was capable of getting and which paid wages equivalent to her "pre-injury" wages and that these jobs did not require exposure to the problem chemicals. *Kennedy v. Duke University Medical Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (after claimant meets initial burden, burden on employer to "show not only that suitable jobs are available, but also that the plaintiff is capable of getting one . . ."). With the introduction of this evidence by Employer, it was incumbent upon Claimant to dispute this evidence or show that she had unsuccessfully sought such other employment. *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400, 368 S.E.2d 388, 390, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988) (the ultimate question is whether the claimant can obtain the job). Here, Claimant presented no evidence contesting the availability of other jobs or her suitability for those jobs and furthermore presented no evidence that she sought employment at any of these places. Accordingly, Employer offered sufficient evidence to rebut the presumption that Claimant sustained a reduction in her earning capacity. The Commission found facts consistent with the Employer's evidence and those findings support the conclusions of the Commission that there did not exist any disability. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684 (if competent evidence in the record to support findings, appellate court is bound).

III

[3] Claimant argues that Employer's evidence offered through Kearney regarding Claimant's capability of obtaining other employment was incompetent in that his testimony was "an excursion well beyond his bounds of expertise in 'labor market analysis with particular emphasis on job analysis and evaluation and compensation rates.' " We disagree.

Since there was no dispute regarding Claimant's capability to work in an environment free of the offending chemicals, Kearney was competent to offer his opinion on Claimant's capability of obtaining other employment where there would be no exposure to the offending chemicals.

We have reviewed Claimant's additional assignments of error and find them to be without merit.

Affirmed.

Judges WELLS and WYNN concur.

KEITH G. FINCH, PLAINTIFF v. J. J. BARNES, JR., DEFENDANT

No. 9011SC824

(Filed 7 May 1991)

1. **Limitation of Actions § 4 (NCI3d); Principal and Surety § 10 (NCI3d) — action for contribution among sureties — statute of limitations**

The statute of limitations applicable to an action for contribution among co-indemnitors or sureties is N.C.G.S. § 1-52(2), which provides that an action upon a liability created by statute must be brought within three years. Although this action has a common law origin, it has been a statutory right since 1807.

Am Jur 2d, Contribution § 101.

What statute of limitations covers action for indemnity. 57 ALR3d 833.

2. **Principal and Surety § 10 (NCI3d); Limitation of Actions § 4 (NCI3d) — action for contribution among sureties — statute of limitations**

The trial court erred by not granting defendant's motion to dismiss an action for contribution among sureties where the evidence showed that if plaintiff paid Mid-South's debt, he did so by making loans to Mid-South; the last of those loans was made on 7 September 1984; and this action was filed on 15 April 1988. It is clear that plaintiff's claim arose when he paid the debts of his principal, Mid-South, and there is no legal authority that would toll the statute of limitations because plaintiff's loans kept Mid-South afloat and cut the potential losses, or because the amount of the loss could not be known until Mid-South's losses were settled.

Am Jur 2d, Contribution § 101.

What statute of limitations covers action for indemnity. 57 ALR3d 833.

Judge GREENE dissenting.

APPEAL by defendant from judgment filed 16 February 1990 in HARNETT County Superior Court by *Judge Coy E. Brewer, Jr.* Heard in the Court of Appeals 13 February 1991.

Plaintiff brought this action to recover funds allegedly due him from defendant pursuant to an indemnity agreement. The action was tried before the court without a jury. Following trial, the court made findings of fact, entered conclusions of law and entered judgment for plaintiff.

At trial, the evidence tended to show the following circumstances and events. On 31 January 1978 Mid-South Construction, Inc., [hereinafter Mid-South], entered into a contract with plaintiff and defendant whereby plaintiff and defendant agreed to assist Mid-South to acquire bonding for certain construction contracts. In exchange for their assistance, Mid-South agreed to pay plaintiff and defendant four percent (4%) of the contract price for each contract obtained. In 1981 Mid-South decided to apply for a public construction project in Charlotte which required a surety bond. On 20 March 1981 plaintiff, defendant, and Mid-South executed an application for a performance and payment bond and indemnity agreement to Seaboard Surety Company, [hereinafter Seaboard], in the amount of $3,942,700.00. Plaintiff, defendant, and Mid-South agreed to jointly and severally indemnify and save harmless Seaboard from any loss it might sustain by reasons of having executed the performance and payment bond. Seaboard executed and delivered to the Charlotte Housing Authority a performance and payment bond for Mid-South guaranteeing the payment of creditors and guaranteeing the performance of the Charlotte project.

Mid-South began to lose money during the course of constructing the Charlotte project and was unable to pay certain bills owed to bonded creditors. As a result, several creditors filed lawsuits against Mid-South and Seaboard. From 7 September 1982 until 19 September 1984, plaintiff made a series of loans to Mid-South which Mid-South used to pay its bonded creditors and prevent Seaboard from taking over the Charlotte project, including $100,000.00 to cover the $100,000.00 Mid-South borrowed from one of its other construction projects in Raleigh to pay creditors of

the Charlotte project. Although plaintiff requested defendant to do the same, defendant made no such loans. Mid-South repaid plaintiff all but the sum of $140,000.00. Plaintiff and defendant each paid $27,815.04 to indemnify Seaboard in settling these lawsuits. The parties settled the last suit on 22 November 1985. Mid-South also filed a lawsuit for breach of contract against the City of Charlotte alleging damages of $300,000.00. Mid-South settled its suit against the City of Charlotte in December 1985 for $91,000.00. After paying costs and attorneys fees, Mid-South divided the remaining $50,000.00 settlement proceeds between plaintiff and defendant. Thereafter, Mid-South went out of business and its assets were sold to satisfy Mid-South's indebtedness to various banks. The net proceeds of $54,000.00 were paid to the plaintiff.

Mid-South's CPA testified that the Charlotte project lost $231,524.32. The president of Mid-South also testified that without plaintiff's loans, the surety would have taken over the project at a loss to the parties of over $500,000.00.

On 15 April 1988 plaintiff filed this action for contribution, seeking reimbursement from defendant as co-indemnitor for the funds loaned to Mid-South. In a judgment filed 16 February 1990, the trial court found that plaintiff's loans to Mid-South inured to defendant's benefit and represented the most commercially efficient means of minimizing Mid-South's loss on the Charlotte project. Plaintiff's loans allowed Mid-South to operate as a going concern and complete the Charlotte project. Had plaintiff not made these loans to Mid-South, Mid-South would have defaulted in its contract and Seaboard would have taken over the project at a loss to Mid-South of over $400,000.00. The court found that plaintiff had paid unreimbursed funds to Mid-South in the amount of $140,000.00. The court concluded that defendant was entitled to a credit of $27,000.00, representing one-half of the proceeds paid to plaintiff after liquidation of Mid-South's assets. The court ordered that defendant pay to plaintiff $43,000.00 plus interest from 1 December 1985. Defendant appeals.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for plaintiff-appellee.

Barfield and Jenkins, P.A., by K. Douglas Barfield, for defendant-appellant.

WELLS, Judge.

The dispositive question presented in this appeal is whether the trial court erred in not allowing defendant's motion to dismiss because the evidence at trial showed that plaintiff's claim was barred by the three-year statute of limitations set out in N.C. Gen. Stat. § 1-52 (1983). We agree and reverse the trial court's judgment.

[1] The initial inquiry is whether G.S. § 1-52 is applicable. While the right to contribution among co-indemnitors or sureties has common law origin, *Insurance Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963), since 1807 it has been a statutory right in this state under the provisions of G.S. § 26-5, *Contributions among sureties* (1986). In *Lancaster v. Stanfield*, 191 N.C. 340, 132 S.E. 21 (1926), a contribution among sureties case, our Supreme Court recognized (without discussion) that the three-year statute of limitations applied in that case. We therefore hold that the applicable statute in this case is G.S. § 1-52(2), which provides that an action upon a liability created by statute must be brought within three years.

[2] The next inquiry is when the statute began to run against plaintiff's claim. In *Lancaster v. Stanfield, supra*, the court stated the applicable rule as follows: "Whether or not plaintiffs' action for contribution is barred by the statute of limitations depends upon the date on which the [plaintiffs'] cause of action accrued, to wit, the date on which plaintiffs paid the amount for which they demand . . . contribution." In an analogous case, *Insurance Co. v. Gibbs, supra*, our Supreme Court held that a surety's right to recover for the payments of the debt of his principal accrues at the time of payment [of his principals' debt]. This Court has held that an action for indemnity may not be commenced against a third party until payment and satisfaction of the debt. *See Hager v. Equipment Co.*, 17 N.C. App. 489, 195 S.E.2d 54 (1973), and cases cited and relied upon therein. *See also Bumgarner v. Tomblin*, 63 N.C. App. 636, 306 S.E.2d 178 (1983). Thus, it is clear that plaintiff's claim in this action accrued or arose so as to start the running of the statute of limitations when he paid the debt or debts of his principal, Mid-South.

The evidence at trial showed that if plaintiff paid Mid-South's debt, he did so by making loans to Mid-South. The last of those loans was made on 7 September 1984. This action was filed on 15 April 1988, more than three years after plaintiff's claim accrued

and his claim is therefore barred. The trial court erred in not granting defendant's motion to dismiss and the trial court's judgment must be reversed.

Plaintiff contends that his good business judgment in loans kept Mid-South afloat and thereby cut the potential losses to himself and defendant and that the amount of Mid-South's losses could not be known until its lawsuits were settled. Accepting this factual posture to be supported by the evidence at trial does not change the outcome of this case. We can find no authority in the law of this state that such events or circumstances would operate to toll the statute of limitations as to plaintiff's claim for contribution.

It is not necessary for us to discuss defendant's other assignments of error.

Reversed.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that the plaintiff's claim is barred by the statute of limitations. However, before reaching the statute of limitations issue, it must first be determined that plaintiff has a legal or equitable right to seek contribution from defendant.

> 'The general rule is that one who is *compelled* to *pay* or satisfy the whole or to bear more than his just share of a *common* burden or *obligation*, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. In other words, when any burden ought, from the relationship of the parties or in respect of property held by them, to be equally borne and each party is *in aequali jure*, contribution is due if one has been compelled to pay more than his share.'

Nebel v. Nebel, 223 N.C. 676, 684-85, 28 S.E.2d 207, 213 (1943) (citation omitted) (emphases added). The defendant contends that plaintiff's "loans" to Mid-South made during the construction proj-

ect were not "payments" of a "common obligation," but instead were "loans" that enured solely to the benefit of plaintiff. This argument presents issues of fact which were resolved by the trial court when it determined that the loans were in payment of creditors' claims on the Charlotte Housing Authority Project and "enured to defendant's benefit." In that there was competent evidence in the record to support these findings, this Court is bound. It is unnecessary to address the question of whether plaintiff's payments to Mid-South were "compelled," as defendant does not argue they were not compelled. Accordingly, on this record plaintiff has an equitable right to seek contribution from the defendant.

On the issue of the statute of limitations, I conclude that the plaintiff brought his claim in a timely fashion. " '[T]he statute of limitations does not begin to run against a claim for contribution *until* [the] plaintiff has discharged the common debt or has paid more than his share of it.' " *Lancaster v. Stanfield*, 191 N.C. 340, 344, 132 S.E. 21, 24 (1926) (citation omitted) (emphasis added); 54 C.J.S. *Limitations of Actions* § 206 (1987). It would have been impossible to determine whether the plaintiff had discharged the common debt or had paid more than his share of the debt prior to the final settlement of all the claims of the debts incurred by Mid-South in conjunction with the Charlotte Housing Authority Project. That settlement did not occur until November, 1985, and that was the date on which plaintiff's claim of contribution against the defendant accrued. Because the amount of the loss could not have been determined prior to the completion of the housing project and settlement of all claims arising from the construction of the project, any claim for contribution made prior to November, 1985, would have been premature. Therefore, plaintiff's claim for contribution, filed on 15 April 1988, was timely.

I have reviewed the defendant's remaining assignments of error and find them to be without merit. I would therefore affirm the judgment of the trial court.

M. B. ELLIS, EARL D. ELLIS, ARTHUR F. ELLIS, FRANK D. ELLIS, DOROTHY ELLIS HALL, JESSIE ELLIS GRIMM AND MARGARET ELLIS MONDOZZI v. CLARA ELLIS VESPOINT

No. 9026SC939

(Filed 7 May 1991)

1. **Trusts § 18 (NCI3d)— parol trust—conversations—admissible**

The trial court did not err in an action to establish a parol trust in land by allowing plaintiff Frank Ellis to testify after he admitted that he did not know the exact date of discussions concerning the transfer of the property to defendant to hold for the benefit of the Ellis children. Frank testified that the discussions occurred before the conveyance of the land to defendant, and the evidence was relevant to the requirements for an express parol trust.

Am Jur 2d, Trusts §§ 627 et seq.

2. **Rules of Civil Procedure § 50 (NCI3d)— directed verdict—evidence subsequently presented—directed verdict waived**

Defendant waived her directed verdict motion made at the close of plaintiffs' evidence by putting on evidence of her own.

Am Jur 2d, Motions, Rules, and Orders §§ 9 et seq.

3. **Trusts § 19 (NCI3d)— parol trust—evidence sufficient**

Plaintiffs' evidence was sufficient to survive defendant's directed verdict motion in an action to establish a parol trust in land where the evidence, viewed in the light most favorable to the non-movants, discloses circumstances which indicate with a reasonable certainty that the grantor, Ellis, intended to create a trust in favor of the Ellis children, and proof of fraud, mistake, or undue influence was not required because the trust was not created in favor of the grantor.

Am Jur 2d, Trusts §§ 635 et seq.

APPEAL by defendant from judgment entered 2 May 1990 in MECKLENBURG County Superior Court by *Judge C. Walter Allen.* Heard in the Court of Appeals 19 March 1991.

William G. Robinson for plaintiff-appellees.

Goodman, Carr, Nixon & Laughrun, by Michael P. Carr, for defendant-appellant.

GREENE, Judge.

The defendant appeals from a judgment entered 2 May 1990 in which the trial court ordered that title to certain real property be vested in the plaintiffs.

Prior to the introduction of any evidence, the parties stipulated that witnesses at trial were prohibited from testifying as to statements made by Queen Ellis (Ellis). The parties complied with this stipulation. Viewed in the light most favorable to the plaintiffs, the evidence tends to show the following: In January of 1962, Ellis owned approximately forty acres of land in Mecklenburg County. Ellis was the plaintiffs' and defendant's mother. Two of the plaintiffs, Frank Ellis (Frank) and M. B. Ellis (Pete), and the defendant wanted to borrow $5,000 from Ellis to purchase some equipment for a business which the two plaintiffs and the defendant's husband were operating. Frank, Pete, and the defendant went to their mother and explained their desires. During the discussions, Frank, Pete, and the defendant decided that the best way to get the loan would be to have Ellis transfer title to the defendant, and then have the defendant get the loan by using the forty acres of land as collateral. They thought that title should be placed in the defendant's name because she was the wisest of the three children. They also discussed what would happen to the land if anything ever happened to their mother. Frank and Pete testified that the defendant promised Ellis to take title to the land, make sure that the loan was repaid, and that if anything happened to their mother, she would divide the land equally among Ellis' children.

At some time after the discussions, Pete took Ellis to her attorney where she transferred title to the land to the defendant. The defendant later obtained the loan using the land as collateral. Pursuant to the agreement, the defendant repaid the loan. Ellis remained on the land until her death in 1972. From 1962 to Ellis' death, the defendant paid all of the property taxes on the land, made all general repairs to it, and received all of the farming income from it. Frank testified that during either 1982 or 1983, the defendant assured him that the land would remain in the Ellis

name. Pete testified that the defendant told him on numerous occasions that the Ellis children would all get their equal shares of the land.

In June of 1988, a boundary dispute arose between Earl Ellis, a plaintiff, and the defendant's son. From this dispute there arose questions about the existence of an alleged oral trust for the benefit of the Ellis children. The defendant denied its existence, and the plaintiffs filed suit. A jury trial followed resulting in a verdict for the plaintiffs.

The issues are (I) whether the trial court erred in allowing Frank to testify about the sequence of events during which an alleged parol trust was created; (II) whether the trial court erred in denying the defendant's directed verdict motion made at the close of the plaintiffs' evidence; and (III) whether (A) the plaintfffs produced sufficient evidence of intent to create a trust to withstand a directed verdict motion; (B) the plaintiffs were required to produce evidence of fraud, mistake, or undue influence to establish the alleged parol trust.

I

[1] When asked on direct examination if he remembered the exact date that he, Pete, Ellis, and the defendant discussed conveying the property to the defendant to hold for the benefit of the Ellis children, Frank testified that he did not. However, he testified that after their discussions, Ellis transferred title to the land to the defendant. The defendant argues that the trial court erred in allowing Frank to testify after admitting that he did not know the exact date of the discussions. We disagree.

In North Carolina, express trusts may be written or oral. Because North Carolina "has never adopted the Seventh Section of the English Statute of Frauds which requires all trusts in land to be manifested in writing," real property may be made the subject of parol trusts. *Bryant v. Kelly*, 279 N.C. 123, 129, 181 S.E.2d 438, 441 (1971); *see also Graves v. Walston*, 302 N.C. 332, 340-41, 275 S.E.2d 485, 490 (1981). "[O]ur courts have 'always upheld parol trusts in land in the "A to B to hold in trust for C" situation' even when there is no consideration to support the transfer." *Ferguson v. Ferguson*, 55 N.C. App. 341, 344, 285 S.E.2d 288, 291, *disc. rev. denied*, 306 N.C. 383, 294 S.E.2d 207 (1982) (quoting *Bryant*,

279 N.C. at 129-30, 181 S.E.2d at 442); *see also* G. Bogert, The Law of Trusts and Trustees § 64 (rev. 2d ed. 1984); Restatement (Second) of Trusts §§ 17(b) & 39 (1957); Lord & Van Hecke, *Parol Trusts in North Carolina*, 8 N.C.L. Rev. 152 (1930). "Evidence of the establishment of a parol trust is required to be clear, cogent, and convincing; a mere preponderance of the evidence is not sufficient." *Bryant*, 279 N.C. at 130, 181 S.E.2d at 442. The facts of this case present the "A to B to hold land in trust for C" situation.

The requirements of an express, parol trust in the "A to B to hold land in trust for C" situation are (1) sufficient words or circumstances showing that the settlor intended to create a trust, (2) definite trust property, (3) an ascertained beneficiary, and (4) a promise by the trustee to hold the trust property in trust for the beneficiary at or before acquiring the legal title to the trust property. *See Wells v. Dickens*, 274 N.C. 203, 211, 162 S.E.2d 552, 557 (1968) (fourth requirement); *Colwell Elec. Co. v. Kale-Barnwell Realty & Constr. Co.*, 267 N.C. 714, 719, 148 S.E.2d 856, 859-60 (1966) (fourth requirement); *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 126, 120 S.E.2d 588, 591 (1961) (second and third requirements); *Williams v. Mullen*, 31 N.C. App. 41, 45, 228 S.E.2d 512, 514-15 (1976) (first requirement). The defendant's first argument raises a question involving only the fourth requirement.

Here, Frank testified that although he did not know the exact date of the discussions, he knew they occurred before Ellis conveyed the land to the defendant. This evidence was relevant to the issue raised by the fourth requirement for an express, parol trust because it shows that the discussions in which the defendant allegedly promised to keep the land for the benefit of the Ellis children occurred before title to the land passed to the defendant. Accordingly, the trial court did not err in allowing Frank to continue testifying after the defendant's objection.

II

[2] The defendant argues that the trial court erred in denying her directed verdict motion made at the close of the plaintiffs' evidence. We do not address the merits of this argument. After the trial court denied the defendant's motion, the defendant put on evidence. By doing this, the defendant waived her directed verdict motion made at the close of plaintiffs' evidence. *Rice v. Wood*, 82 N.C. App. 318, 322, 346 S.E.2d 205, 208, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 599 (1986).

III

[3] The defendant argues that the trial court erred in denying her directed verdict motion made at the close of all of the evidence. The defendant did not argue this motion to the trial court, rather, she simply renewed her earlier directed verdict motion without specifically stating the grounds for her renewed motion. Therefore, the grounds argued for her first directed verdict motion are considered to be the grounds for her second directed verdict motion. *Hodges v. Hodges*, 37 N.C. App. 459, 464, 246 S.E.2d 812, 815 (1978). The only grounds asserted for the defendant's first directed verdict motion were that the plaintiffs had neither produced sufficient evidence of Ellis' intent to create a trust nor had they produced any evidence of fraud, mistake, or undue influence. Accordingly, these are considered to be the grounds for the second directed verdict motion.

Furthermore, "grounds not asserted in the trial court [for a directed verdict motion] may not be asserted on appeal." *Broyhill v. Coppage*, 79 N.C. App. 221, 225, 339 S.E.2d 32, 36 (1986); *see also Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 297-302, 271 S.E.2d 385, 388-90 (1980). On this appeal, the defendant argues that the trial court should have granted her second directed verdict motion on one of four grounds, two of which were not asserted in the trial court. Accordingly, we only consider the denial of the defendant's second directed verdict motion with regard to the grounds asserted before the trial court.

A

The defendant argues that the second directed verdict motion should have been granted on the ground that the plaintiffs did not produce sufficient evidence of Ellis' intent to create a trust.

> The purpose of a motion for directed verdict is to test the legal sufficiency of the evidence for submission to the jury and to support a verdict for the non-moving party. . . . In deciding the motion, the trial court must treat non-movant's evidence as true, considering the evidence in the light most favorable to non-movant, and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence. . . . Non-movant's evidence which raises a mere possibility or conjecture cannot defeat a motion for directed

> verdict. . . . If, however, non-movant shows more than a scintilla of evidence, the court must deny the motion.

McFetters v. McFetters, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990) (citations omitted).

Pursuant to the first requirement for express, parol trusts, " '[t]he intention to create a [parol] trust must be sufficiently expressed, and the declaration of trust must show the intention with reasonable certainty. It must be clear that a trust was intended. It is necessary that there be a definite, unequivocal, explicit declaration of trust, *or circumstances which show with reasonable certainty . . . that a trust was intended to be created.*' " *Williams*, 31 N.C. App. at 45, 228 S.E.2d at 515 (citation omitted) (emphases added). Here, the plaintiffs' evidence shows that Frank, Pete, and the defendant discussed in front of Ellis the best way for them to get the needed business loan, and that Frank, Pete, and the defendant agreed that the best way would be to have Ellis transfer the land to the defendant to hold for the benefit of the Ellis children. Frank and Pete testified that the defendant promised Ellis to hold the land for the benefit of the Ellis children. According to this understanding, Ellis transferred the land to the defendant. This evidence, viewed in the light most favorable to the non-movants, discloses circumstances which indicate with reasonable certainty that Ellis intended to create a trust in favor of the Ellis children. Accordingly, the plaintiffs' evidence was sufficient to withstand the defendant's directed verdict motion.

B

The defendant argues that her directed verdict motion should have been granted because the plaintiffs failed to produce any evidence of fraud, mistake, or undue influence. The defendant argues that without this evidence, this parol trust cannot exist. We disagree.

The defendant relies on the following principle which states:

> [E]xcept in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the *grantor* upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass.

Day v. Powers, 86 N.C. App. 85, 87, 356 S.E.2d 399, 401, *disc. rev. denied*, 320 N.C. 791, 361 S.E.2d 73 (1987) (quoting *Gaylord v. Gaylord*, 150 N.C. 222, 227, 63 S.E. 1028, 1031 (1909)) (emphasis added); *see also Willetts v. Willetts*, 254 N.C. 136, 143-44, 118 S.E.2d 548, 553 (1961). The defendant's reliance on this principle is misplaced. These cases require proof of fraud, mistake, or undue influence when a trust is created in favor of a grantor. *See Ferguson*, 55 N.C. App. at 344, 285 S.E.2d at 291 (parol trust valid in absence of fraud). Here, the trust was created not in favor of Ellis, but in favor of Ellis' children. Accordingly, this argument is without merit.

No error.

Judges PHILLIPS and PARKER concur.

BELMONT LAND AND INVESTMENT COMPANY, A CORPORATION, AND WEYMOUTH MANAGEMENT CORPORATION, A CORPORATION, D/B/A AVON ASSOCIATED WAREHOUSE COMPANY, A PARTNERSHIP, PLAINTIFFS v. THE STANDARD FIRE INSURANCE COMPANY, A CORPORATION, A MEMBER OF THE AETNA LIFE AND CASUALTY GROUP, OF HARTFORD, CONNECTICUT; WATSON INSURANCE AGENCY, INC.; AND HUGH CAMPBELL, DEFENDANTS

No. 9027SC643

(Filed 7 May 1991)

1. **Unfair Competition § 1 (NCI3d)— unfair insurance claim settlement practices—insufficient allegations**

Plaintiffs failed to establish a claim for unfair insurance claim settlement practices in violation of N.C.G.S. § 58-63-15 where they failed to allege that defendant agents engaged in acts prohibited by the statute "with such frequency as to indicate a general business practice."

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

2. **Unfair Competition § 1 (NCI3d)— unfair business practice—insufficient evidence of deception**

Summary judgment was properly entered for defendants on plaintiffs' claim for an unfair and deceptive business prac-

tice in violation of N.C.G.S. § 75-1.1 where plaintiffs' forecast of evidence was insufficient to show any deception by defendant insurance agent which could have caused them to believe that their building was insured for full replacement cost rather than actual cash value in the event of a partial loss by fire.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

3. **Appeal and Error § 342 (NCI4th)— purported cross-assignment—error not related to order appealed**

The Court of Appeals did not address defendants' purported cross-assignment of error where the error did not relate to the order from which appeal was taken by plaintiffs as required by Appellate Rule 10(d) but related to an interlocutory and nonappealable order denying summary judgment.

Am Jur 2d, Appeal and Error § 104.

APPEAL by plaintiffs from Order entered 14 March 1990 by *Judge Robert W. Kirby* in GASTON County Superior Court. Heard in the Court of Appeals 6 December 1990.

Whitesides, Robinson, Blue, Wilson and Smith, by Henry M. Whitesides and Terry Albright Kenny, for plaintiff appellants.

Kennedy Covington Lobdell & Hickman, by Wayne Huckel for Watson Insurance Agency, Inc., and Hugh Campbell, defendant appellees.

COZORT, Judge.

Plaintiffs brought a declaratory judgment action against defendant Standard Fire Insurance Company (Standard Fire); by a second amendment to their complaint, plaintiffs, with a claim alleging negligence, added Watson Insurance Agency, Inc. (Watson Insurance), and Hugh Campbell as defendants. By a final amendment to their complaint, plaintiffs added a claim of unfair and deceptive business practices against Watson Insurance and Campbell. On that claim the trial court granted summary judgment for defendants Watson Insurance and Campbell. We affirm.

On 17 October 1984 defendant Hugh Campbell, one of Watson Insurance's agents, wrote to Earl Groves, President of plaintiff Weymouth Management Corporation, one of two general partners

owning Avon Associated Warehouses Company (Avon), enclosing the "renewal of [Avon's] Package policy" providing "liability and property coverage on [Avon's] various locations." Campbell's letter noted that the policy being renewed provided coverage which "required [Avon] to carry 90 percent of the actual cash value [ACV] as respects buildings and contents."

In the summer of 1985 Groves met with Campbell, who recommended that the buildings covered by the recently renewed policy be appraised. Following Campbell's recommendation Avon had these buildings appraised by General Adjustment Bureau (GAB). At the time of the appraisal the warehouse located at 927-935(R) W. Airline Ave. (the warehouse) in Gastonia was insured for $863,300. GAB appraised the warehouse's depreciated reproduction cost basis (another term for actual cash value) at $1,319,423. Based on GAB's appraisal Groves authorized, effective in August 1985, an increase in coverage on most of their buildings, including the warehouse. Coverage on the warehouse was set at $1,187,480, representing 90 percent of the buildings ACV "with plaintiffs being co-insurers for the remaining 10 percent." On 12 July 1986 the warehouse was partially destroyed by fire. It was uncontested that the reasonable cost of repair was "$428,673.00 plus temporary repairs of $17,623.00 and possibly up to $50,000.00 for the replacement of steel beams when . . . the need for steel beams has been determined." The amount payable under the coverage provided by Standard Fire's policy was disputed. Defendant Standard Fire, pursuant to the terms of the insurance policy, demanded "an appraisal of the amount of the covered loss." The appraisers agreed that the actual cash value loss payable under the policy was $361,500 plus $50,000 if new steel beams proved necessary.

Plaintiffs initiated the case below with a complaint filed 11 June 1987. Watson Insurance and Campbell were added as defendants on 10 February 1988. On 12 February 1990 plaintiffs moved to be allowed "to amend their complaint at the close of all evidence" to "allege a claim for unfair and deceptive business practices." The trial court treated the motion as one to amend prior to trial and entered an order allowing the amendment. The new claim alleged in pertinent part

> 9. That defendants misrepresented pertinent facts and/or insurance policy provisions relating to the coverages at issue in the new policy sold to plaintiffs.

10. That defendants knew that plaintiffs were uninformed concerning these coverages and were relying on the representations of defendants.

On 15 February 1990 defendants Watson Insurance and Campbell moved for summary judgment on the unfair and deceptive business practices claim. On 14 March 1990 the trial court entered an order granting that motion and subsequently amended the order to certify it for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

On appeal plaintiffs contend that the trial court erred in granting summary judgment for defendants on the unfair and deceptive business practices claim. Their claim is tenable, plaintiffs maintain, under either N.C. Gen. Stat. § 58-63-15 (1989) or N.C. Gen. Stat. § 75-1.1 (1988). We disagree.

The standard for summary judgment is well known. It is to be granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191 (1990).

[1] Citing *Pearce v. American Defender Life Insurance Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986), plaintiffs state that our Supreme Court has recognized that a violation of N.C. Gen. Stat. § 58-63-15 "constitutes a Chapter 75-1.1 violation 'as a matter of law.' " *Pearce* held "that a violation of N.C.G.S. § 58-54.4 as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1." *Pearce*, 316 N.C. at 470, 343 S.E.2d at 179. In 1987 and 1988 the General Assembly mandated that former Chapter 58, among other chapters dealing with insurance, be renumbered, rearranged, and consolidated, and present § 58-63-15 was derived from former § 58-54.4. Plaintiffs rely specifically on § 58-63-15(11)(a), which provides as follows:

(11) Unfair Claim Settlement Practices.—Committing or performing *with such frequency as to indicate a general business practice* of any of the following: Provided, however, that no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner:

> a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue; . . .

Plaintiffs did not allege that defendants Watson Insurance and Campbell violated any of the acts prohibited by § 58-63-15(11) "with such frequency as to indicate a general business practice." Accordingly, they failed to establish a claim premised on violation of that statute, and judgment dismissing their claim was properly entered as to that issue. *Beasley v. National Savings Life Ins. Co.*, 75 N.C. App. 104, 109, 330 S.E.2d 207, 210 (1985), *disc. review improvidently allowed*, 316 N.C. 372, 341 S.E.2d 338 (1986); *accord Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 60, 370 S.E.2d 695, 698 (1988).

[2] Plaintiffs allege that, even in the absence of a violation of § 58-63-15, the conduct of Watson Insurance and Campbell constituted a violation of § 75-1.1. Section 75-1.1 provides in pertinent part that

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

The burden of plaintiffs' argument is that Campbell as the agent of Watson Insurance deceived Groves into believing that, in the event of a partial loss, Avon was insured for full replacement cost rather than actual cash value. The forecast of evidence, however, shows no factual dispute as to Campbell's statements regarding Avon's policy and nothing in those statements which, taken in the light most favorable to plaintiffs, supports an inference of deception.

It is uncontroverted that Avon's policy providing coverage at actual cash value was in effect for several years before Campbell took over the Avon account. Campbell's letter to Groves of 17 October 1984 read in pertinent part as follows:

> We are pleased to enclose herewith the renewal of your Package policy which provides liability and property coverage on your various locations. As we discussed during our meeting, you are to advise us of any changes to make as respects the amounts of insurance on your buildings, also the amount shown on the gross earnings endorsement. As you know, you are required to carry 90 percent of the actual cash value as respects buildings and contents. *Actual cash value is defined as cost*

> *new, less depreciation. Actual cash value is not replacement cost*; and as we discussed, it will probably not be in your best interests to insure on a replacement cost basis. If we do not hear from you, we will assume that the amounts of insurance for each location are correct as shown on the enclosed policy.
>
> Should you have any questions regarding this policy, please do not hesitate to give me a call. (Emphasis added.)

On 27 September 1985, after Avon's buildings had been appraised by GAB, Campbell again wrote to Groves

> enclosing herewith the renewal of your Package Insurance Policy which provides coverage on your buildings as well as Comprehensive General Liability coverage. This policy was renewed prior to our requesting the increase in values. There will, therefore, be an endorsement showing the new values, and this will naturally create a substantial additional premium.
>
> * * * *
>
> If we need to make any changes in this policy other than the values of the buildings, please give me a call.

Finally, Groves testified as follows during his deposition:

> Q. Mr. Groves, it is not your testimony today, is it, that Mr. Campbell ever told you that in partial loss situations such as the one in July of 1986 that you would be paid full replacement cost, is it?
>
> A. *I don't think he said that. I think he said that we would be protected against a partial loss.*
>
> Q. And he never told you, I take it, then, that depreciation would not be taken into consideration in a partial loss situation, did he, meaning he didn't mention it one way or the other?
>
> A. *No; I don't think he did mention it.* All I recall is that there would be a new basis of depreciation based on that appraisal, [by GAB] but whether any distinction was made between whole or partial, I don't recall. (Emphasis added.)

The forecast of evidence does not support the plaintiffs' allegation of deception on the part of Campbell. Moreover, the evidence

shows that plaintiffs received exactly the insurance coverage for which they contracted. On the question presented the trial court correctly concluded that defendants Watson and Campbell were entitled to judgment as a matter of law.

[3] Defendants Watson Insurance and Campbell included in the record a purported cross-assignment of error to the trial court's order of 18 December 1989 denying their motion for summary judgment as to all claims. Without taking an appeal an appellee may make a cross-assignment of error by the trial court "which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(d). The error assigned by defendants does not relate to the order of 14 March 1990 from which appeal has been taken. Moreover, even if defendants had appealed from the order to which they now attempt to assign error, an order, like that of 18 December 1989, denying summary judgment is ordinarily interlocutory and nonappealable. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 230 (1985). Hence, we do not address defendants' purported cross-assignment of error.

The trial court's order of 14 March 1990 is

Affirmed.

Judges WELLS and JOHNSON concur.

COMBUSTION SYSTEMS SALES, INC., PLAINTIFF v. HATFIELD HEATING & AIR CONDITIONING CO., INC., DEFENDANT

No. 9018SC652

(Filed 7 May 1991)

Process § 14.3 (NCI3d)— South Carolina corporation—long-arm statute—minimum contacts

The trial court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction where defendant was a South Carolina corporation which entered into a contract with a North Carolina corporation regarding a construction contract on a South Carolina military base. There is no question

that the valves, seals, pumps, etc. which plaintiff Combustion Systems sent to defendant pursuant to defendant's purchase order constituted goods shipped from North Carolina by the plaintiff to the defendant on the defendant's order or direction, so that the case clearly falls within the language of the long-arm statute, N.C.G.S. § 1-75.4. Defendant had sufficient minimum contacts to justify the exercise of personal jurisdiction over defendant without violating the due process clause because the non-resident defendant sent a purchase order for a boiler system to plaintiff's Greensboro office where it was accepted by plaintiff; plaintiff subsequently spent considerable time and energy in its North Carolina offices engineering and designing a boiler system for defendant; although the installation of the boiler system took place in South Carolina, plaintiff shipped a laundry list of parts and equipment from its North Carolina offices to defendant's facility in South Carolina; plaintiff sent several service technicians to South Carolina to supervise installation and to train the facility's boiler operators; and it was defendant who suggested that the parties use defendant's Fayetteville motel rooms/offices to discuss the formation of the contract in dispute.

Am Jur 2d, Courts § 146.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

APPEAL by defendant from Order entered 7 March 1990 in GUILFORD County Superior Court by *Judge James A. Beaty, Jr.* Heard in the Court of Appeals 13 December 1990.

Richard M. Warren, for plaintiff-appellee.

Tuggle, Duggins, Meschan & Elrod, P.A., by J. Reed Johnston, Jr., for defendant-appellant.

WYNN, Judge.

This is an appeal from an order denying defendant's motion to dismiss a complaint for lack of personal jurisdiction. We affirm for the following reasons.

I

The record shows that the defendant, Hatfield Heating & Air Conditioning Company, Inc. (hereinafter "Hatfield Heating"), is a South Carolina corporation with its principal place of business located in Sumter, South Carolina. Plaintiff, Combustion Systems Sales, Inc. (hereinafter "Combustion Systems"), is a North Carolina corporation with its principal place of business located in Greensboro, North Carolina. Prior to its dealings with the plaintiff, Hatfield Heating had previous business ties with North Carolina. Between 1985 and 1988, the defendant performed a construction contract at Fort Bragg, a military installation near Fayetteville, North Carolina.

In 1988, Paul C. Plybon, president of Combustion Systems, called Hatfield Heating's president, Fred Hatfield, Sr., in Sumter, South Carolina. Mr. Plybon inquired about the possibility of Combustion Systems' supplying a boiler system for a construction project which Hatfield Heating was seeking to obtain on a South Carolina military base. Mr. Plybon offered to make a presentation in South Carolina, but he and Mr. Hatfield agreed that it would be best for the two to meet in one of several motel rooms in Fayetteville, North Carolina, which Hatfield Heating had rented to use as "offices" for the supervision of the Fort Bragg project. Although there is some disagreement between the parties as to where the contract was formed, it is clear that after meeting at the motel, Combustion Systems sent a design proposal to Hatfield Heating's South Carolina place of business. Responding to this proposal, Hatfield Heating mailed a purchase order for the boiler system from its place of business in South Carolina to the plaintiff's Greensboro office. Pursuant to this purchase order, the boilers, which were manufactured in and shipped from Michigan, were sent to the defendant. In addition, Combustion Systems shipped several pieces of equipment from North Carolina to Myrtle Beach Air Force Base in South Carolina. Included in this equipment were valves, seals, pumps, steam traps, chemicals and boiler parts. Not only did Combustion Systems provide the equipment, but they also sent service technicians to South Carolina to supervise the installation of the boiler system and to train the Myrtle Beach facility's boiler operators.

After the Myrtle Beach construction had been completed, Hatfield Heating failed to pay for the work performed by Combustion Systems. As a result, Combustion Systems brought this suit

in the Superior Court of Guilford County, alleging breach of contract by the defendant.

In a pre-answer motion, Hatfield Heating moved to dismiss the plaintiff's complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(2): lack of personal jurisdiction. The trial judge denied the defendant's motion and defendant immediately appealed.

II

From the outset, we note that the basis for jurisdiction of this interlocutory appeal lies in North Carolina General Statutes section 1-277(b) (1983), which states in pertinent part: "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." Thus, defendant's immediate appeal prior to the determination of the underlying controversy is properly before this court.

III

Defendant's sole assignment of error is that the trial judge erred in denying its motion to dismiss the complaint for lack of personal jurisdiction. With this, we disagree.

Under North Carolina case law a two-step inquiry and analysis is necessary to determine whether a non-resident defendant is subject to the *in personam* jurisdiction of our courts: (1) does the transaction which gave rise to the underlying action fall within the language of the State's "long-arm" statute; and (2) if so, does the decision to exercise personal jurisdiction violate the due process clause of the fourteenth amendment to the United States Constitution. *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citing *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985)).

A

Long-Arm Statute

There are several provisions of our General Statutes applicable to this case which grant our courts the authority to exercise personal jurisdiction over a non-resident defendant. However, it is necessary to address only one of these provisions to conclude that the trial judge's denial of the defendant's motion to dismiss was correct.

Our long-arm statute, North Carolina General Statutes section 1-75.4, provides in pertinent part as follows:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> (d) Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]

N.C. Gen. Stat. § 1-75.4(5)(d) (1983).

The instant case clearly falls within the language of section 1-75.4(5)(d). There is no question that the valves, seals, pumps, etc. which Combustion Systems sent to defendant pursuant to defendant's purchase order, constituted "goods . . . shipped from this State by the plaintiff to the defendant on [the defendant's] order or direction." Since plaintiff's present action for breach of contract relates to those goods, G.S. § 1-75.4(5)(d) plainly provides a statutory basis for this State's exercise of personal jurisdiction over the non-resident defendant, Hatfield Heating.

B

Due Process Requirements

Turning now to the second part of the two-step inquiry, due process prohibits our state courts from exercising jurisdiction unless defendant has had certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Tom Togs, Inc., supra,* at 365, 348 S.E.2d at 786. In each case, "it is essential that there be some act by which [the] defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *CFA Medical, Inc.*, 95 N.C. App. 391, 394, 383 S.E.2d 214, 216 (1989) (quoting *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986)). "[O]nly then will the nonresident have acted in such a way that 'he can reasonably anticipate being haled into

court [in the forum state]' " *Id.* at 394-395, 383 S.E.2d at 216 (quoting *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 297, 62 L.Ed. 2d 490, 501 (1980)).

The state is exercising "specific jurisdiction" in cases where the underlying controversy arises out of the non-resident defendant's contacts with the forum state. *Tom Togs, Inc., supra*, at 366, 348 S.E.2d at 786. Where specific jurisdiction is involved, the focus of the minimum contacts inquiry is on the relationship among the defendant, the forum state and the cause of action. *Buck v. Heavner*, 93 N.C. App. 142, 145, 377 S.E.2d 75, 77 (1989) (citing *Shaffer v. Heitner*, 433 U.S. 186, 204, 53 L.Ed. 2d 683, 698 (1977)).

Although the existence of a contractual relationship between a North Carolina resident and an out-of-state defendant will not *automatically* establish the minimum contacts necessary to exercise personal jurisdiction over the non-resident defendant, a single contract can provide a sufficient basis for the exercise if the contract has a substantial connection with this State. *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E.2d at 786.

In the instant case, the contract did have the necessary substantial connection. The non-resident defendant sent a purchase order for a boiler system to the plaintiff's Greensboro office where it was accepted by the plaintiff. Subsequently, plaintiff spent considerable time and energy in its North Carolina offices engineering and designing a boiler system for defendant. Although the installation of the boiler system took place in South Carolina, plaintiff shipped a laundry list of parts and equipment from its North Carolina offices to the defendant's facility in South Carolina. In addition, plaintiff sent several of its service technicians to South Carolina to supervise installation and to train the Myrtle Beach facility's boiler operators. Together, plaintiff's technicians logged over two thousand miles in travel between North and South Carolina. Based on this evidence, we must conclude that the contract between the defendant and plaintiff did indeed have a substantial connection with the State of North Carolina.

It is also important to note the fact that it was the defendant who suggested that the parties use the defendant's Fayetteville motel rooms/"offices" to discuss the formation of the contract in dispute. We believe defendant's use of the rented motel rooms as "offices," in which at least one known business deal was discussed or negotiated, supports the conclusion that defendant pur-

posefully availed itself of the privilege of conducting business activities in this State.

After reviewing the evidence and examining the relationship among defendant, the forum, and the cause of action, we conclude that the defendant has sufficient minimum contacts to justify this State's exercise of personal jurisdiction over defendant without violating the due process clause. For this reason, the decision of the trial court denying defendant's motion to dismiss for lack of personal jurisdiction is affirmed.

Affirmed.

Judges PHILLIPS and EAGLES concur.

CLAIRE CLUGH, EMPLOYEE-PLAINTIFF v. LAKEWOOD MANOR, EMPLOYER-DEFENDANT AND TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANT

No. 9010IC904

(Filed 7 May 1991)

Master and Servant § 77.2 (NCI3d)— workers' compensation— second claim for change of condition—timeliness

Where both compensation and medical expenses were originally awarded to plaintiff on 17 July 1984, plaintiff received her last compensation payment pursuant to this award on 15 January 1986, plaintiff timely filed her first claim for a change of condition and was awarded only continued medical payments on 5 February 1987, plaintiff filed her second request for a change of condition hearing on 12 December 1988, and it was stipulated that defendants made medical payments to plaintiff within the twelve months preceding the filing of the second change of condition claim, it was *held* that plaintiff's second change of condition claim was timely filed because N.C.G.S. § 97-47 required that it be filed within twelve months from the date of payment of the last medical bills pursuant to the 5 February 1987 award rather than within two years from the last payment of compensation pursuant to the original award.

Am Jur 2d, Workmen's Compensation §§ 382-384, 482-484.

Judge GREENE dissenting.

APPEAL by defendants from opinion and award filed 16 April 1990 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 1991.

The record shows that following a compensable injury to plaintiff's back on 17 November 1983, all parties entered into an agreement, followed by a supplemental memorandum, for disability compensation. This agreement became an award of the Industrial Commission upon approval by the Commission on 17 July 1984. Plaintiff received her last compensation payment pursuant to this agreement and award immediately following 15 January 1986.

Plaintiff timely filed for her first change of condition hearing pursuant to N.C. Gen. Stat. § 97-47 (1985). Following a hearing on 20 August 1986, Deputy Commissioner Scott M. Taylor filed an opinion and award dated 5 February 1987 finding and concluding that plaintiff had not undergone a change of condition and was therefore not entitled to additional compensation. However, Deputy Commissioner Taylor awarded plaintiff continued medical expenses so long as those treatments effected a cure or gave relief or tended to lessen her disability. Neither party appealed from that order.

Plaintiff filed for her second change of condition hearing on 12 December 1988. Defendants responded by asserting that plaintiff's requested hearing was untimely filed pursuant to G.S. § 97-47. The parties stipulated that defendants had made medical payments pursuant to Deputy Commissioner Taylor's 5 February 1987 opinion and award within twelve months preceding the 12 December 1988 second request for a change of condition hearing. Without reaching the merits of the case, Deputy Commissioner John Charles Rush found and concluded in an opinion and award filed 26 May 1989 that plaintiff's request was untimely filed and denied plaintiff's request.

Plaintiff appealed the Deputy Commissioner's 26 May 1989 opinion to the Full Commission. In an opinion and award filed 16 April 1990, the Full Commission ruled that Deputy Commissioner Rush had misinterpreted G.S. § 97-47 and ordered that this matter be set for hearing. Defendants appeal.

Waymon L. Morris for plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Louise Critz Root, for defendants-appellants.

WELLS, Judge.

Initially we note that the order from which defendants have appealed does not finally determine plaintiff's entitlement to compensation and is therefore interlocutory. There is no right of appeal from an interlocutory order of the Industrial Commission. *See Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 282 S.E.2d 543 (1981) and cases cited therein. Because we view the question presented appropriate for consideration on the merits, and because doing so will expedite the disposition of plaintiff's claim on its merits, we exercise our discretion to treat defendants' appeal as a petition for certiorari and allow it. Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure.

Defendants assign error to the Commission's order that this matter be set for hearing and conclusion that Deputy Commissioner Rush misapplied G.S. § 97-47. In setting this case for hearing on plaintiff's entitlement to further compensation, the Commission entered the following and dispositive conclusions of law:

> 1. Though at its inception, plaintiff's case was one for which compensation and medical bills were paid, subsequent to Deputy Commissioner Taylor's award, plaintiff's case became one in which "only medical or other treatment bills were paid."
>
> 2. N.C.G.S. [§] 97-47 should be interpreted in the present tense rather than applying the statute to the case in its original stage, thereby allowing for a [§] 97-47 hearing. N.C.G.S. [§] 97-47.

N.C. Gen. Stat. § 97-47 (1985) provides:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the

last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

Defendants contend that the proper application of G.S. § 97-47 bars review of plaintiff's original award because over two years lapsed between plaintiff's final compensation payment in January 1986 and the filing of her second request for a change of condition hearing. Defendants further contend that plaintiff's first request for change of hearing and Deputy Commissioner Taylor's opinion and award filed 5 February 1987 and awarding medical treatment only, does not alter the outcome because the 5 February 1987 opinion is a mere continuation of the same case.

Since G.S. § 97-47 applies only whenever there has been a previous award of the Commission, *Watkins v. Motor Lines*, 279 N.C 132, 181 S.E.2d 588 (1971), an award pursuant to G.S. § 97-47 will always be a "mere continuation of the same case" as suggested by defendants. In effect, defendants contend that the time limitations set out in G.S. § 97-47 should always be measured from the original award. Defendants offer no authority to support this interpretation and we think such an interpretation is inconsistent with G.S. § 97-47's recognition that a change in condition may require a modification of a previous award in workers' compensation cases, either a previous award for compensation or a previous award for medical bills only. Defendants cite and rely on *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E.2d 627 (1976). We note that *Shuler* is resolved on the principle that plaintiff failed to show a change of condition and any expressions in *Shuler* regarding time limitations are dicta and not binding in this case.

We hold that the Full Commission correctly concluded that plaintiff timely filed her request for change of condition hearing and ordered this matter set for hearing.

Affirmed.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that the plaintiff has filed a timely request for a change of condition hearing.

The last compensation payment made under the award in question occurred shortly after 15 January 1986. Therefore, the plaintiff had two years from that date to file a " 'claim for further compensation upon an alleged change of condition.' " *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 666, 75 S.E.2d 777, 782 (1953) (citation omitted). On 12 December 1988, the plaintiff made a claim for further *compensation* based on changed conditions. This claim is therefore barred by N.C.G.S. § 97-47 because it was made more than two years from the date of the last payment of *compensation.*

This is not a case "in which *only* medical or other treatment bills are paid. . . ." N.C.G.S. § 97-47 (emphasis added). In such a case, the injured employee is entitled to seek an initial award of compensation within twelve "months from the date of the last payment of bills for medical or other treatment. . . ." N.C.G.S. § 97-47. To the contrary, this is a case where both compensation and medical expenses have been previously awarded, and therefore, the injured employee had two years " 'from the last payment of compensation pursuant to the award in which to file [a] claim for further compensation upon an alleged change of condition.' " *Biddix*, 237 N.C. at 666, 75 S.E.2d at 782 (citation omitted).

FRANK GEORGE, D/B/A FRANK GEORGE ELECTRIC, INC. v. HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 9030SC930

(Filed 7 May 1991)

1. Principal and Surety § 10 (NCI3d) — laborers' and materialmen's lien — contractor's bond discharging lien — accrual of action against surety

Where a surety bond filed by the general contractor discharging a subcontractor's lien pursuant to N.C.G.S. § 44A-16(6) obligated defendant surety to pay the full amount of the lien claim "as established in any appropriate court proceeding," the three-year statute of limitations of N.C.G.S.

§ 1-52(1) for the subcontractor's claim against the surety on the bond did not begin to run when the lien was discharged by the filing of the bond but began to run when the amount of the lien claim was established by an arbitrator's award.

Am Jur 2d, Suretyship §§ 141, 142.

2. Principal and Surety § 10 (NCI3d)— subcontractor's lien— judgment establishing amount—binding effect on surety

A judgment obtained by a subcontractor against the general contractor establishing the amount of the subcontractor's lien for labor and materials was conclusive and binding on the surety on the bond filed by the general contractor discharging the lien pursuant to N.C.G.S. § 44A-16(6).

Am Jur 2d, Suretyship §§ 25, 159.

Judge PARKER dissenting.

APPEAL by defendant from order entered 17 July 1990 by *Judge James U. Downs* in MACON County Superior Court. Heard in the Court of Appeals 13 March 1991.

On 10 July 1984, plaintiff subcontractor filed a "Notice of Claim of Lien by First Tier Subcontractor" in the amount of $18,464.22 on property owned by V. Glenn Arnette, III and wife, Shannon P. Arnette. The general contractor on the construction project was Burke Engineering, Inc. (hereinafter "Burke"). On 27 August 1984, plaintiff filed an action against Burke and the Arnettes to recover the indebtedness and for the enforcement of the lien. Pursuant to a motion by Burke, a consent order was filed 18 February 1985 to stay the proceedings pending arbitration. On 23 April 1985, Burke as principal and defendant Hartford Accident and Indemnity Company as surety filed a bond discharging the lien pursuant to N.C. Gen. Stat. § 44A-16(6). On 6 January 1986, Burke filed a Petition in Bankruptcy. On 6 May 1987, a Bankruptcy Judge for the United States Bankruptcy Court for the Eastern District of Tennessee lifted the automatic stay which it had previously issued. On 25 May 1988, the arbitrator entered an award in favor of plaintiff against Burke in the amount of $13,278.60 plus expenses. On 26 August 1988, the trial court entered an order confirming the award in arbitration.

Plaintiff brought this action 13 February 1989 against defendant to recover $13,278.60 and actual and punitive damages based

on defendant's issuance of its bond. On 6 April 1990, plaintiff moved for partial summary judgment on the issue of defendant's liability upon the bond, and on 21 May 1990 defendant filed a cross-motion for summary judgment. On 17 July 1990, the trial court filed an order granting plaintiff's motion for summary judgment, denying defendant's cross-motion for summary judgment, and stating there is no just reason for delaying entry of final judgment against defendant on the issue of liability of the defendant on the bond and the amount of liability.

From this order, defendant appeals.

Creighton W. Sossomon for plaintiff-appellee.

Martin, Cavan & Andersen, P.C., by C. Walker Ingraham; and Alley, Hyler, Killian, Kersten, Davis & Smathers, by Patrick U. Smathers, for defendant-appellant.

ORR, Judge.

Defendant contends that the trial court erred in granting plaintiff's motion for partial summary judgment and denying defendant's cross-motion for summary judgment. "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).

[1] Defendant first assigns as error the failure of the trial court to hold the statute of limitations had run on plaintiff's claims against defendant. Liens of mechanics, laborers, and materialmen may be discharged in several ways including the following:

> Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the lien or liens claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said lien or liens, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the lien or liens of record.

N.C. Gen. Stat. § 44A-16(6) (1984).

Here plaintiff's lien was discharged pursuant to the above statute. The bond discharging the lien stated in relevant part:

> KNOW ALL MEN BY THESE PRESENTS: That the undersigned Burke Engineering, Inc., . . ., as Principal, and Hartford Accident and Indemnity Company, . . ., as Surety, are held and firmly bound unto Frank George Electric, Inc. ("Lien Claimant") in the sum of $23,080.28, the same being one and one-fourth times the amount claimed in the Mechanic and Materialman's lien ("Lien Claim") hereinafter referred to for the payment of which the undersigned bind themselves . . . .
>
> The condition of the above obligation is:
>
> Burke Engineering, Inc., as Principal, and Hartford Accident and Indemnity Company, as Surety, will pay the full amount of the Lien Claim as established in any appropriate court proceeding, plus any court costs and attorneys' fees awarded the Lien Claimant, but in no event shall the liability of the Principal or Surety under this Bond exceed the bond penalty of $23,080.28.
>
> The liabilities of the parties hereunder shall be binding until the Lien Claim of the Lien Claimant shall have been fully discharged by final judgment of a court of competent jurisdiction or voluntarily released by Lien Claimant, its successors or assigns, or until the Lien Claim is barred by applicable statute of limitations.

N.C. Gen. Stat. § 1-52(1) (1983), which provides for a three year statute of limitations, applies. *Adams v. Bass*, 88 N.C. App. 599, 364 S.E.2d 194 (1988), *cert. denied*, 326 N.C. 363, 389 S.E.2d 810 (1990); *Bernard v. Ohio Casualty Ins. Co.*, 79 N.C. App. 306, 339 S.E.2d 20 (1986).

Defendant argues that the three year statute of limitations began to run upon defendant's filing of the bond discharging the lien on 23 April 1985, and therefore plaintiff's complaint which was filed 13 February 1989 was not timely. Plaintiff argues that because the bond states that Burke as principal and defendant as surety "will pay the full amount of the Lien Claim as established in any appropriate court proceeding . . . ," the defendant was not under any obligation to pay until an amount was established. The earliest date that an amount was established was the date of the award of the arbitrator, 25 May 1988, and the award did not become a judgment until 26 August 1988. Therefore, plaintiff contends 26 August 1988 is the appropriate date for commencement

of the running of the three year statute of limitations, and plaintiff's claim is timely.

> A cause of action on a bond accrues immediately on the breach of any of its conditions. The liability of a surety, as a general rule, accrues at the same time as that of the principal; a breach of the bond is essential to bind the surety. If the parties have stipulated that the surety's liability is contingent on the performance of some act or the happening of some event, their agreement will, of course, control. Thus, where a demand or a judgment against the principal is necessary to fix the liability of the surety, the cause of action does not accrue until the making of a demand or the rendition of a judgment in accordance with the agreement.

74 Am. Jur. 2d *Suretyship* § 141 at 101 (1974).

In *Bernard* we stated:

> Although the surety's obligation depends upon a valid obligation of the principal, the surety may be sued immediately when the principal becomes liable to a third party on an obligation covered by the suretyship contract, *unless the suretyship contract or a statute provides otherwise. . . .* It is also recognized that "the statute of limitations begins to run in favor of a surety from the time that he is subject to suit."

79 N.C. App. at 310, 339 S.E.2d at 23 (citations omitted and emphasis added).

Here the bond obligates defendant to "pay the full amount of the Lien Claim as established in any appropriate court proceeding." Therefore, under the clear wording of the bond, the defendant's liability did not accrue until the amount was "established in any appropriate court proceeding." The amount was established in the award of the arbitrator on 25 May 1988 and became a final judgment 26 August 1988. Thus plaintiff's claim filed 13 February 1989 is timely.

[2] Next defendant contends that the judgment obtained against the principal in a separate action to which the surety was not a party was not conclusive and binding upon the surety and that the surety was entitled to raise its own defenses or impeach the judgment rendered against its principal.

> Where the very condition of the bond is the performance of a judgment against the principal, or that the surety will pay all damages that may be awarded in an action brought against the principal, or will answer for the principal in respect to some charge which the law lays on him, there is no question as to the conclusiveness, as against the surety, of a judgment against the principal, if binding upon the latter and free from fraud and collusion, assuming, of course, that it is the kind of judgment contemplated by the surety's undertaking. It has been said that there is no reason why parties should not be allowed to obligate themselves to abide by the result of a suit between others; and if the contract can be fairly construed as imposing such an obligation, there is no hardship in enforcing it.

74 Am. Jur. 2d *Suretyship* § 153 at 109-10.

Here the bond clearly obligates the surety to pay the amount of the lien claim as established. We conclude that the trial court did not err in granting summary judgment.

Affirmed.

Judge JOHNSON concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

I respectfully dissent. In my view under the principles enunciated in *Bernard v. Ohio Casualty Ins. Co.*, 79 N.C. App. 306, 339 S.E.2d 20 (1986), plaintiff's claim against defendant on defendant's surety bond was barred by the applicable three year statute of limitation, N.C.G.S. § 1-52(1). Plaintiff's cause of action against defendant surety accrued when the lien was discharged. The contract language obligating defendant to "pay the full amount of the lien claim as established in any appropriate court proceeding" governed only the extent of defendant's liability. The statute of limitation was not tolled pending judicial determination of the amount of the liability. Therefore, I vote to reverse the summary judgment entered for plaintiff and to enter summary judgment for defendant.

R. KENT WEBB, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, COASTAL RESOURCES COMMISSION, RESPONDENT

No. 905SC282

(Filed 7 May 1991)

1. Administrative Law and Procedure § 44 (NCI4th)— rejection of administrative law judge's findings—reasons sufficient

The Coastal Resources Commission did not err in rejecting an administrative law judge's recommended decision regarding a bulkhead. Although petitioner argued that the Commission's generalized assertion that the evidence does not support "several" of the administrative law judge's findings was insufficient to comply with N.C.G.S. § 150B-51(a), the statute does not require a point-by-point refutation of the administrative law judge's findings and conclusions. The reasons stated here were quite specific and went to the heart of the case.

Am Jur 2d, Administrative Law §§ 158 et seq.

2. Administrative Law and Procedure § 44 (NCI4th)— permit for bulkhead—Coastal Resources Commission decision—evidence sufficient

An order of the Coastal Resources Commission permitting a specific bulkhead placement was supported by testimony of an Assistant Director, a field representative, and a professor, despite the presence of conflicting evidence. Furthermore, the order was not arbitrary or capricious since the conclusion that the bulkhead alignment was consistent with CAMA standards was also well based.

Am Jur 2d, Administrative Law §§ 167, 172.

3. Waters and Watercourses § 7 (NCI3d)— bulkhead—mean high water—determination

The evidence supported a Coastal Resources Commission finding that a bulkhead alignment approximated mean high water where there was testimony that "mean high water" was determined based on the presence of natural indicators and observation of an actual high tide rather than a survey of mean high water. No particular method for locating mean high water has been established.

Am Jur 2d, Administrative Law §§ 167, 172.

APPEAL by petitioner from order entered 20 December 1989 by *Judge Ernest B. Fullwood* in NEW HANOVER County Superior Court. Heard in the Court of Appeals 11 December 1990.

The Division of Coastal Management (Division) granted Terry Turner, Inc. (Turner) a Coastal Area Management Act (CAMA) Major Development/Dredge and Fill Permit to construct a bulkhead to stabilize shoreline erosion of a residential lot on Banks Channel in Wrightsville Beach, North Carolina. The permit, issued under the CAMA general permit standards for bulkhead construction pursuant to Title 15 of the N.C. Administrative Code, now Title 15A, authorized Turner to construct the bulkhead at or landward of the alignment staked by the Division approximately one foot landward of the surveyed mean high water line as identified on the application. Immediately after receiving the permit Turner constructed the bulkhead approximately one foot landward of the alignment staked by the Division and two feet landward of the surveyed mean high water line. The petitioner, R. Kent Webb, who owns the residential lot immediately south of the Turner lot, appealed the issuance of the permit by requesting a contested case hearing before the Office of Administrative Hearings. After the hearing Administrative Law Judge Beecher R. Gray issued a recommended decision in which it was concluded that the permit authorized the bulkhead to be constructed waterward of the mean high water line in violation of coastal management rules and recommended that the Coastal Resources Commission (Commission) modify the permit to require that the bulkhead be removed and reconstructed several feet landward of the originally permitted alignment.

The Commission, after reviewing the evidence, rejected the Administrative Law Judge's recommended decision and upheld the permitted bulkhead alignment; and this decision when reviewed by the New Hanover County Superior Court was affirmed.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker and John J. Butler, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith, for respondent appellee.

PHILLIPS, Judge.

In appealing from the Superior Court's affirmance of the Commission's decision, the appellant petitioner in effect makes three

contentions. None has merit and we affirm the order of the Superior Court.

[1] Petitioner's first contention is that the Commission's decision rejecting the Administrative Law Judge's recommended decision is erroneous as a matter of law because the reasons stated for rejection are either not specific or manifestly inaccurate. In making this contention, and the next one as well, petitioner fails to take into account the conflicts in the evidence and the Commission's prerogatives to determine the credibility of witnesses and the weight of evidence, and to find facts therefrom. *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). When an agency does not adopt an Administrative Law Judge's recommended decision, G.S. 150B-51(a) requires that the reviewing court determine whether the agency's decision stated "specific reasons" why it did not and if the court determines the agency did not state specific reasons it shall reverse the decision or remand the case to the agency to enter the specific reasons. The Commission adopted as its rationale for declining to adopt the Administrative Law Judge's recommended decision the reasons set forth in petitioner's Exceptions to the Administrative Law Judge's Proposed Decision dated 18 May 1989, which are not a part of the record before us, and two additional reasons of its own:

> 1. The greater weight of the evidence in the record as a whole does not support several of the Administrative Law Judge's findings of fact. Some of the findings rely on evidence that was not properly weighted in view of the totality of the evidence; other findings contain selective statements of fact and fail to reflect the record as a whole. One of the key findings of fact—the finding that DCM staff relied on the surveyed mean high water line to establish the permitted bulkhead alignment—has no real basis in the record and directly contradicts the testimony of DCM staff as to the origin of the DCM alignment.
>
> 2. The basic premises of the Recommended Decision are flawed in that the Administrative Law Judge framed the issue as a conflict between the surveyed mean high water line and a mean high water line based on natural indicators. The uncontroverted evidence is that CAMA Major Development/Dredge and Fill Permit 181-88 authorized bulkhead construction at

> an alignment staked by DCM staff based on observation of the high water level on the property and did not authorize construction at the surveyed MHW line; the permitted alignment was approximately one (1) foot landward of the surveyed MHW line and the bulkhead was constructed approximately one foot landward of the permitted alignment.

The court determined that: "In compliance with NCGS 150B-36, the agency's final decision states the specific reasons why the agency did not adopt the Administrative Law Judge's recommended decision." Petitioner argues that the Commission's generalized assertion that the evidence does not support "several" of the Administrative Law Judge's findings of fact is insufficient to comply with the requirements of G.S. 150B-51(a), as the particular findings of fact are not identified and no explanation is given why they are not supported. But the statute does not require a point-by-point refutation of the Administrative Law Judge's findings and conclusions and the reasons stated, the flawed premises of the recommended decision as to the mean high water line, are quite specific indeed and go to the heart of the case.

[2] Petitioner's next contention is that the Commission's findings of fact, conclusions of law and final decision are not supported by substantial evidence in view of the entire record and that the order is arbitrary and capricious. The standard for judicial review is set forth in G.S. 150B-51(b), which states in pertinent part:

> [T]he court reviewing a final decision may affirm . . . or remand . . . . It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

In reviewing the Commission's decision for the errors cited, the court properly applied the "whole record" test. *Brooks, Commissioner of Labor v. Rebarco, Inc.*, 91 N.C.App. 459, 372 S.E.2d 342 (1988). The "whole record" test takes into account the specialized expertise of the staff of the administrative agency, *High Rock*

Lake Association, Inc. v. North Carolina Environmental Management Commission, 51 N.C.App. 275, 276 S.E.2d 472 (1981), does not allow the reviewing court to substitute its evaluation of the evidence for that of the agency, *Clark Equipment Co. v. Johnson*, 261 N.C. 269, 134 S.E.2d 327 (1964), and requires the court to look at the entire record and determine if substantial evidence exists to support the agency's decision. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 95 L.Ed. 456 (1951). Petitioner's argument that the Commission's "key finding that the permitted bulkhead was aligned at mean high tide is unsupported by substantial evidence in view of the entire record as submitted" has no basis. Supporting the finding is the testimony of Assistant Director Preston Pate, field representative C. Robert Stroud, Jr., and Dr. Paul Hosier, Professor of Biological Sciences at UNC-Wilmington, as to the location of the bulkhead alignment. That this testimony was contradicted by that of Dr. Bruce Kenney, a research associate at Duke University Marine Lab, is immaterial in view of the Commission's prerogatives as finder of the facts. Since the record supports the Commission's finding that the bulkhead alignment approved by the Division approximates mean high water the conclusion that it is consistent with CAMA standards is also well based, and the further argument that the order is arbitrary and capricious fails.

[3] Petitioner's final contention is that the Division's determination of approximate mean high water based on observation or high tide during a single inspection of the site was erroneous as a matter of law. CAMA regulations require only that a bulkhead alignment for the purpose of shoreline stabilization "must approximate mean high water or normal water level." 15A N.C. Admin. Code 7H.0208(b)(7)(A). The term "mean high water" is not defined by the regulations, nor is its method of computation prescribed. In the context of property ownership, our Supreme Court defined the term as "a mean or average high-tide, and not as the extreme height of the water," *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970), but did not indicate what method should be used to locate "mean high water." Both Assistant Director Preston Pate and DCM field consultant Robert Stroud testified that DCM practice, in applying coastal management rules, is to determine the approximate location of MHW based on the presence of natural indicators of high water and observation of actual high tide rather

than to rely on a survey of mean high water. In the present case, Mr. Stroud, who has assisted in the alignment of approximately 2000 bulkheads on North Carolina's estuarine shoreline, staked the approved Turner bulkhead alignment based on his observation of conditions on the site and particularly the location of high water on the property at the time of the site visit. No particular method for locating "mean high water" having been established, we are of the opinion and so hold that this evidence supports the Commission's finding that the bulkhead alignment in fact "approximates mean high water."

Affirmed.

Judges EAGLES and WYNN concur.

JOHN HUGGARD, ADMINISTRATOR OF THE ESTATE OF BOBBY L. BROWN, DECEASED v. WAKE COUNTY HOSPITAL SYSTEM, INC., DOUGLAS T. MILLER, WARREN NEWTON, MICHELE HUMLAN, DAVID L. INGRAM, MURTHY G.K. MANNE AND DOE TWO THROUGH DOE TEN

No. 9010SC1083

(Filed 7 May 1991)

Limitation of Actions § 12.3 (NCI3d)— filing of "John Doe" suit— statute of limitations not tolled

The statute allowing a defendant to be sued in a fictitious name, N.C.G.S. § 1-166, does not toll the statute of limitations upon the filing of a suit against a "John Doe" defendant so as to permit the complaint to be amended to substitute a specifically named defendant after the applicable limitation period has expired.

Am Jur 2d, Limitation of Actions §§ 153, 289.

Relation back of amended pleading substituting true name of defendant for fictitious name used in earlier pleading so as to avoid bar of limitations. 85 ALR3d 130.

APPEAL by plaintiff from order entered 14 February 1990 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 17 April 1991.

Grover C. McCain, Jr. and Kenneth B. Oettinger for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by Joseph W. Williford and Josephine R. Darden, for defendant Murthy G.K. Manne.

JOHNSON, Judge.

This case requires that we consider G.S. § 1-166 (1983), the statute which allows a defendant to be sued in a fictitious name. The issue is whether the filing of a "John Doe" complaint tolls the statute of limitations.

The sequence of events which form the basis for this appeal are as follows. Eight year old Bobby Brown was admitted to defendant Wake County Hospital ("Wake") on 22 December 1985 where he was treated by the five named individual defendants, all doctors. Bobby was discharged on 25 December with a diagnosis of resolving aseptic meningitis. He was readmitted on 27 December and a CT scan revealed a cerebral hemorrhage secondary to an arteriovenous malformation. Despite immediate corrective surgery, Bobby's condition deteriorated and he died on 30 December 1985.

Plaintiff, administrator of Bobby's estate, filed suit on 29 December 1987, one day before the expiration of the two year statute of limitations for wrongful death in G.S. § 1-53(4). The named defendants in the original action were Wake, physicians Miller, Newton, Humlan and Ingram, and Doe One through Ten. On 11 February 1988, Alias and Pluries Summonses were issued for defendants Wake, Miller, Newton, Humlan, Ingram and Doe One through Ten. Defendants Wake, Miller, Newton, Humlan and Ingram were properly served between 16 February and 11 March 1988 and they timely answered the complaint.

Discovery proceeded and depositions were taken of Bobby's parents on 8 August 1988, Dr. Newton on 19 September 1988, and Drs. Humlan and Ingram on 28 April 1989. It was during the deposition of Dr. Newton that plaintiff first became aware of the existence and significance of Dr. Manne, who was Bobby's attending physician, and whose signature appears frequently in Bobby's medical records. Dr. Manne was deposed on 4 May 1989. On 2 June 1989, plaintiff moved to amend his complaint under G.S. § 1A-1, Rule 15 and G.S. § 1-166 by substituting Dr. Manne for Doe One as a named defendant. On 3 July 1989, plaintiff's

motion was allowed and the clerk was ordered to issue a summons and complaint to Dr. Manne. Plaintiff filed an amended complaint on 27 July 1989 and the clerk issued the civil summons, which was served on 2 August 1989. On 28 August 1989, Dr. Manne filed and served his answer alleging the defenses of lack of personal jurisdiction, insufficiency of process and the running of the statute of limitations.

On 13 February 1990, Judge Bailey dismissed the action as to Dr. Manne, with prejudice. On 25 July 1990, pursuant to a settlement agreement, plaintiff took a voluntary dismissal with prejudice as to Wake, Miller, Newton, Humlan and Ingram. Plaintiff took a voluntary dismissal without prejudice as to Doe Two through Ten.

Plaintiff contends on appeal that the trial court erred in granting defendant Manne's motion to dismiss because the court had personal jurisdiction over the defendant, there was sufficiency of process as to the defendant and the claim was not barred by the statute of limitations. Because we find that the claim was time barred, we need not discuss plaintiff's other contentions.

The issue is whether the filing of a suit against a "John Doe" defendant pursuant to G.S. § 1-166, tolls the statute of limitations such that at some time after the running of the statutory period, the complaint can be amended to name the now-identified defendant and the suit is not subject to dismissal by the fact that the limitations period has expired.

General Statutes § 1-166 provides:

> When the plaintiff is ignorant of the name of the defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly.

While this statute clearly allows for the filing of a "John Doe" complaint and the subsequent amendment to properly name the identified defendant, it does not expressly or impliedly require the result plaintiff contends.

We can find no North Carolina case that speaks to the issue before us. Plaintiff relies on *Wall Funeral Home, Inc. v. Stafford*, 3 N.C. App. 578, 165 S.E.2d 532 (1969) for the proposition that G.S. § 1-166 tolls the statute of limitations. In that case, the original defendant in a tort action attempted to use § 1-166 to set up a

cross action against a John Doe tort-feasor for contribution. The *Wall* Court held that § 1-166 could not be used for that purpose because by its express language it applies to *plaintiffs*, not defendants. In what is certainly *dictum*, the court opined that "[t]he obvious purpose of G.S. 1-166 is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant." *Id.* at 580, 165 S.E.2d at 533. This statement was not necessary to a determination of the case and therefore we are not bound by it. General Statutes § 1-166 has been interpreted by a federal court to be simply a rule of civil procedure and not a tolling statute. *See Denny v. Hinton*, 110 F.R.D. 434 (M.D.N.C. 1986). As an interpretation of state law by a federal court, this holding is not binding on us; however, we find its analysis persuasive.

General Statutes § 1-166 does not by its terms contain a tolling provision. Specific situations in which our legislature has expressly provided for such a result can be found in Chapter 1, Subchapter II, Limitations: e.g. G.S. § 1-17 (minority and insanity toll statute of limitations); G.S. § 1-21 (statute tolled by absence of defendant from state); G.S. § 1-22 (effect of death of plaintiff before limitations period expires); G.S. § 1-23 (when commencement of an action is stayed by injunction or prohibition); G.S. § 1-24 (effect of probate of will on running of statute). *Cf.* Cal. Civ. Proc. Code § 583.210 (plaintiff has up to three years after filing of complaint under fictitious name statute in which to identify and serve John Doe defendant, thus one year limitations for personal injury is effectively extended for up to four years; *see Brennan v. Lermer Corp.*, 626 F. Supp. 926 (N.D.Cal. 1986). While our legislature has the power to explicitly provide for such a tolling under the "John Doe" statute, it has not done so.

Further, Rule 15(c) of the North Carolina Rules of Civil Procedure provides relief under certain situations. Rule 15(c) states:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

G.S. § 1A-1, Rule 15.

As stated in *Ring Drug Co. v. Carolina Medicorp Ent.*, 96 N.C. App. 277, 385 S.E.2d 801 (1989):

> [W]hether a complaint will relate back with respect to a party defendant added after the applicable limitations period depends upon whether that new defendant had notice of the claim so as not to be prejudiced by the untimely amendment. If some nexus among defendants will permit the trial judge to infer that the new defendant had notice of the original claim so as not to be prejudiced by the amendment, Rule 15(c) will allow a complaint to be amended so as to add a new party, expiration of the limitations period notwithstanding (citation omitted).

Id. at 283, 385 S.E.2d at 806. *See also Teague v. Asheboro Motor Co.*, 14 N.C. App. 736, 189 S.E.2d 671 (1972); *Callicutt v. Motor Co.*, 37 N.C. App. 210, 245 S.E.2d 558 (1978); *Stevens v. Nimocks*, 82 N.C. App. 350, 346 S.E.2d 180, *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986).

We note that plaintiff does not argue that his amendment should relate back under Rule 15(c). He relies entirely on the alleged tolling effect of § 1-166 to support his argument.

The recognized purpose of statutes of limitation is to afford security against stale claims. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970). Were we to hold that § 1-166 is a tolling statute as plaintiff contends, the effect would be to preserve claims against John Doe defendants for some unlimited period of time or perhaps until some period after a plaintiff determines their true identity. This effect cannot have been intended by the legislature and we will not read it into the statute as written.

We hold that G.S. § 1-166 is not a tolling statute. The dismissal of plaintiff's amended complaint substituting Dr. Manne for Defendant Doe One, filed three and a half years after the cause of action arose, is proper, as being barred by the two year statute of limitations.

Affirmed.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. EDDIE BEN HAYES

No. 9012SC690

(Filed 7 May 1991)

1. **Criminal Law § 84 (NCI3d)— cocaine—Posse Comitatus Act—dismissal denied**

The trial court did not err by failing to dismiss charges of conspiracy to traffic and trafficking in cocaine based on violations of the Posse Comitatus Act where the Fort Bragg Criminal Investigation Unit investigated an AWOL soldier for drugs; a CID agent met with the soldier to set up a drug purchase; the soldier told him he could acquire cocaine from a person he knew from the military; and CID and City-County Bureau of Narcotics investigators coordinated a drug purchase, after which defendant was arrested. There was no violation of the Posse Comitatus Act because the investigation began with the involvement of an AWOL soldier, and it has been held that investigations into the illicit drug dealings of military personnel are of direct concern to Army CID in performing their duties. Also, this is a case of the military calling the civilian agency, rather than the civilian agency asking for military assistance.

Am Jur 2d, Drugs, Narcotics, and Poisons § 44.

2. **Criminal Law § 1133 (NCI4th)— cocaine—sentencing—aggravating factor—position of leadership**

The trial court did not err when sentencing defendant for trafficking in cocaine by finding as an aggravating factor that defendant had occupied a position of leadership in the commission of the offense where there was testimony that an undercover agent complained about the amount of drugs he was receiving, defendant looked at one of the participants and nodded toward the door, and that man left and returned with another half-ounce of cocaine. Leadership over one of the participants in an offense is sufficient to support this aggravating factor.

Am Jur 2d, Drugs, Narcotics, and Poisons § 48.

APPEAL by defendant from judgment entered 28 February 1990 in CUMBERLAND County Superior Court by *Judge Henry V. Barnette, Jr.* Heard in the Court of Appeals 18 March 1991.

Defendant was charged with conspiracy to traffic in a controlled substance, trafficking by possession of at least 28 grams but less than 200 grams of cocaine, trafficking by sale of at least 28 grams but less than 200 grams of cocaine, and trafficking by delivery of at least 28 grams but less than 200 grams of cocaine.

At trial, the State's evidence tended to show that the Fort Bragg United States Army Criminal Investigation Detachment (CID) was investigating John Lucio, an AWOL soldier, for involvement with drugs. Stephen Maxwell, a CID agent, met with Lucio on 21 August 1989 to attempt to set up a drug purchase. Lucio told him that he could acquire cocaine from a person he knew from the military. Two days later, Maxwell and other CID investigators met with several members of the City-County Bureau of Narcotics Office (CCBN) to coordinate a drug purchase. Maxwell was fitted with a wire, and surveillance teams consisting of CCBN and CID personnel were set up. Maxwell and a CCBN officer then went to meet Lucio.

Lucio drove with Maxwell and the agent to an apartment where they met with a woman who told them they would be doing business with her rather than defendant Hayes. This was the first time defendant's name had been mentioned to Maxwell. Defendant then entered the apartment. They went into the living room area and defendant told them to sit down. Defendant then informed Maxwell that he was in the military. A man came in and went into the kitchen with the drugs. Lucio and Maxwell were then summoned to come into the kitchen. The cocaine was in seven individual bags. Maxwell discovered that it was one half-ounce short. The woman then called for Hayes. Defendant looked at the man who had last entered and nodded toward the door. The man left and returned with another half-ounce. Maxwell paid with money from CID, and the cocaine was bagged up and carried out by Lucio. Shortly thereafter, CCBN officers arrested Lucio and simulated an arrest of Maxwell and the other officer. A CCBN officer took custody of the drugs. A CCBN officer with CID officers then secured the apartment where the other participants in the transaction were located, including defendant. Maxwell was brought back to identify the participants, who were arrested.

Defendant moved to dismiss at the close of the State's evidence based on a violation of the Posse Comitatus Act, which was denied. Defendant then put on evidence tending to show that he knew the transaction was going to take place in the apartment on that day but did not participate in it in any way. The motion to dismiss was renewed and denied at the close of the defendant's evidence. The jury returned a verdict of guilty on all counts. The offenses were consolidated and defendant was sentenced to ten years in prison. Defendant appeals.

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

Tally & Tally, by John C. Tally, for defendant-appellant.

WELLS, Judge.

[1] Defendant brings forward two assignments of error contending that the trial court erred in failing to dismiss the charges against defendant based on alleged violations of the Posse Comitatus Act (18 U.S.C. § 1385) and in finding as an aggravating factor that the defendant occupied a position of leadership concerning the other participants in the commission of the offense. We find no error.

18 U.S.C. § 1385 provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The statute, originally enacted during Reconstruction, has become the subject of increasing litigation in recent years. *See U.S. v. Thompson*, 30 M.J. 570 (1990), *review granted in part*, 32 M.J. 5 (1991). It is clarified in part by 10 U.S.C. § 371 *et seq.*, and the regulations codified in 32 C.F.R. § 213. *Id.* 32 C.F.R. § 213.10(a)(3) defines the phrase "as a posse comitatus or otherwise to execute the laws" to include (i) interdiction of a vehicle, vessel, aircraft or other similar activity, (ii) a search or seizure, (iii) an arrest, stop and frisk, or similar activity, and (iv) use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

This list of actions lends support to defendant's contention that we must look to whether the military assistance complained of is best defined as active or passive. The results of such an inquiry do not, however, settle the issue of whether the Posse Comitatus Act has been violated. The intent and purpose for which the military became involved is of crucial import. C.F.R. § 213.10(a)(2) provides that certain activities involving direct assistance to civilian law enforcement do not violate the Posse Comitatus Act. Section 213.10(a)(2)(i) includes among those actions:

> Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities. This provision must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of the Posse Comitatus Act. Actions under this provision may include the following, depending on the nature of the DoD interest and the specific action in question:
>
> (A) Actions related to enforcement of the Uniform Code of Military Justice (10 U.S.C. Chapter 47).
>
> . . .
>
> (F) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

These regulations are consistent with case law interpretations of the Act, including that of our own Supreme Court. *See State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed.2d 282 (1980). After considering the level of military involvement in this operation and its purpose, we hold that no violation of the Posse Comitatus Act occurred in this case. Maxwell began an investigation of Lucio, an AWOL soldier, for involvement with drugs. Lucio told Maxwell that he could acquire cocaine from someone he knew in the military. Possession and distribution of cocaine are violations of the Uniform Code of Military Justice. U.C.M.J. Article 112a. This Court has previously noted that investigations into the illicit drug dealings of military personnel are of direct concern to the Army CID in performing their duties. *State v. Trueblood*, 46 N.C. App. 541, 265 S.E.2d 662 (1980). The investigation and CID involvement in the drug transaction did not "pervade the activities of civilian officials, and did not subject the

citizenry to the regulatory exercise of military power." *U.S. v. Bacon*, 851 F.2d 1312 (11th Cir. 1988).

We also note that this case does not involve a civilian agency asking for military assistance. The military called the civilian agency to handle those matters which only it could. "The fact that the Navy's (in this case Army's) internal investigation happened to uncover wrongs by civilians does not bring the case within the scope of 18 U.S.C. § 1385 or render the Navy (in this case Army) agents incompetent as witnesses." *State v. Maxwell*, 328 S.E.2d 506 (W.Va. 1985).

Defendant's argument is based primarily on the contention that evidence acquired as a result of a violation of the law should be excluded at trial. In *Taylor v. State*, 645 P.2d 522 (Okl. Cr. 1982), the court refused to extend a *per se* exclusionary rule to cases involving violation of the Act but held that remedies should be determined on a case by case basis. In *U.S. v. Walden*, 490 F.2d 372 (4th Cir. 1974), *cert. denied*, 416 U.S. 983, 40 L.Ed.2d 760, *rehearing denied*, 417 U.S. 977, 41 L.Ed.2d 1148 (1974), the court held that it would not fashion an exclusionary rule absent more evidence of a need to deter violations. We note that while our appellate courts have stated that a violation of the Act does not call for invocation of the exclusionary rule, these statements appear to be *dicta*. *See State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, *cert. denied*, 454 U.S. 973, 70 L.Ed.2d 392 (1981), *Nelson, supra; Trueblood, supra*. Since we have found no violation of the Act, we need not determine the exclusion question.

[2] Defendant next assigns error to the trial court's finding as an aggravating factor that he occupied a position of leadership concerning the other participants in the commission of the offense. In order to be valid, an aggravating factor must be supported by sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence. *State v. Baynard*, 79 N.C. App. 559, 339 S.E.2d 810 (1986). The trial court should be permitted wide latitude, however, in arriving at the truth as to the existence of aggravating and mitigating factors, for it alone observes the demeanor of the witnesses and hears the testimony. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

In this case, Maxwell testified that after he complained about the amount of drugs he was receiving, defendant looked at one of the participants and nodded toward the door. The man (Jerry

Hollingsworth) left and returned shortly thereafter with another half-ounce of cocaine. There was testimony from defendant and others attempting to refute this and indicating various levels of involvement by defendant in the transaction. Hollingsworth himself, however, testified that when the dispute over the amount was occurring, defendant entered the kitchen and "motioned" him to go and get another half-ounce of cocaine. Evidence tending to show that a defendant occupied a position of leadership over *one* of the participants in the offense is sufficient to support this aggravating factor, regardless of whether the evidence also shows that others exercised leadership or control in the commission of an offense. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). The evidence in this case was sufficient to support the finding that defendant occupied a position of leadership. This assignment of error is overruled.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

SHARON AMOS, KATHY HALL AND EARLINE MARSHALL v. OAKDALE KNITTING COMPANY, AND WALTER MOONEY, III

No. 8917SC770

(Filed 7 May 1991)

Master and Servant § 10.2 (NCI3d)— employment at will—public policy exception—statutory remedy

The trial court properly granted defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs alleged that they had been hourly employees of defendant; plaintiffs learned after completing their workweek that their pay had been reduced substantially below the minimum wage rate; defendant Mooney told plaintiffs they had to work at the reduced pay rate or be fired; plaintiffs refused to work under those conditions and were terminated; and plaintiffs filed an action seeking damages for wrongful discharge. *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, adopted the public policy exception to the employee at will doctrine, but that exception does not apply here because there is a statutory

remedy in the North Carolina courts. Plaintiffs could have continued working and pursued their remedy under N.C.G.S. § 95-25.22.

Am Jur 2d, Master and Servant §§ 54, 60, 82, 89.

Validity of minimum wage statutes relating to private employment. 39 ALR2d 740.

Judge JOHNSON dissenting.

APPEAL by plaintiffs from judgment entered 6 April 1989 by *Judge Melzer Morgan, Jr.*, in SURRY County Superior Court. Heard in the Court of Appeals 18 January 1990.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellants.

Allman Spry Humphreys Leggett & Howington, P.A., by W. Thomas White and W. Rickert Hinnant, for defendant-appellees.

PARKER, Judge.

Plaintiffs Sharon Amos, Kathy Hall and Earline Marshall appeal from a judgment dismissing their action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim on which relief can be granted. Plaintiffs instituted this action seeking damages for wrongful discharge arising out of their employer's alleged violation of the North Carolina Wage and Hour Act, N.C.G.S. §§ 95-25.1 *et seq.* In their complaint plaintiffs alleged that prior to their termination, they were employed by defendant Oakdale Knitting Company in Surry County, North Carolina. On 25 February 1988, after completing their workweek, plaintiffs learned that their pay had been reduced to $2.18 per hour, substantially below the North Carolina minimum wage rate of $3.35 per hour. When plaintiffs returned to work on 29 February 1988, they asked their supervisor why their pay had been reduced below minimum wage. The supervisor referred them to Walter Mooney, III, one of the owners of defendant company. Defendant Mooney told plaintiffs they either had to work at the reduced pay rate or they were fired. Plaintiffs refused to work under these conditions and were terminated.

Before filing answer, defendants moved to dismiss plaintiffs' complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). In the order granting defendants' motion, the trial judge stated that discharging

an at will employee for refusing to work for substantially less than the minimum wage offended the court and appeared to violate the public policy of the State as set out in N.C.G.S. § 95-25.3, but that under the decision in *Coman v. Thomas Manufacturing Co.*, 91 N.C. App. 327, 371 S.E.2d 731 (1988), the public policy exception to the doctrine of employment at will was "limited specifically to instances where an employee [sic] attempts to interfere with testimony in a legal proceeding" and, therefore, plaintiffs' action had to be dismissed.

In reviewing a dismissal pursuant to Rule 12(b)(6) we accept as true all allegations of fact. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Dismissal under Rule 12(b)(6) is proper when any one of the following conditions is satisfied: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985)).

At the outset we note that defendants contend that plaintiffs' action is preempted by the federal Fair Labor Standards Act, 29 U.S.C. app. §§ 201 *et seq.* The issue of preemption is a constitutional question arising under the supremacy clause. U.S. Const. art. VI, cl. 2. Nothing in the record suggests that defendants raised the issue of preemption before the trial court and the trial court did not rule on this issue in granting the motion to dismiss. For this reason, we will not review defendants' contentions with regard to this issue. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980).

On appeal plaintiffs contend that our Supreme Court in reversing the Court of Appeals' decision in *Coman v. Thomas Manufacturing Co.*, 91 N.C. App. 327, 371 S.E.2d 731 (1988), *rev'd*, 325 N.C. 172, 381 S.E.2d 445 (1989), adopted the public policy exception to the employment at will doctrine and that their complaint now states a claim for relief for wrongful termination. No question exists as to whether plaintiffs were employees at will.

We agree with plaintiffs that *Coman* adopted the public policy exception to the employee at will doctrine. *Id.* at 175, 381 S.E.2d at 447. The question, therefore, is whether this judicially adopted exception applies in the case at bar thereby entitling plaintiffs

to maintain their action for wrongful discharge. For the reasons stated herein, we hold that it does not.

Without question, payment of the minimum wage is the public policy of North Carolina. N.C.G.S. § 95-25.1(b) states:

> The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry.

N.C.G.S. § 95-25.1(b) (1985). To this end the legislature has mandated that effective 1 January 1983 every employer who is not exempt from the legislation will pay a minimum wage of at least three dollars and thirty-five cents ($3.35) per hour. N.C.G.S. § 95-25.3(a) (1985). Moreover, in furtherance of this policy the legislature provided a remedy for the employee in the event the employer failed to comply with mandates of the Wage and Hour Act. N.C.G.S. § 95-25.22 provides that an employee may maintain an action in the General Court of Justice to recover unpaid minimum wages with interest thereon; that the court may in its discretion award exemplary damages in the amount of the recovery; and that the court may award costs and reasonable attorneys' fees to the employee. N.C.G.S. §§ 95-25.22(a), (b) and (d) (1985). The legislature also provided a remedy in the event the employer retaliates against the employee for exercising this right. N.C.G.S. § 95-25.20(a).

Thus unlike the plaintiff in *Coman*, plaintiffs in this case have available to them a statutory remedy in the North Carolina court. In *Coman* plaintiff had been directed to violate United States Department of Transportation regulations by driving more hours than allowed by the regulations and to falsify his logs. Our Supreme Court recognized that plaintiff might have an additional remedy in federal court but ruled that North Carolina could not fail to provide a forum under the open courts clause of the North Carolina Constitution. N.C. Const. art. I, § 18 (1986). *Coman*, 325 N.C. at 174, 381 S.E.2d at 446.

Plaintiffs argue that they were terminated before they had an opportunity to file a complaint. The complaint in this action alleges, however, that they were told "they either had to work

under the conditions of the reduced pay or they were fired. The Plaintiff[s] refused to work for $2.18 an hour and [were] thereby terminated from [their] employment by the Defendants." Plaintiffs thus had two options: (i) to continue working and pursue their remedy under N.C.G.S. § 95-25.22, which would have made them whole, or (ii) to refuse to work and be fired. Plaintiffs chose the latter. They were not terminated in retaliation for filing a complaint. N.C.G.S. § 95-25.20(a), therefore, has no applicability.

The General Assembly in enacting the Wage and Hour Act expressly recognized that the general welfare of the people necessitated a balancing of the employee's right to earn acceptable wages and the competitive position of North Carolina business and industry. N.C.G.S. § 95-25.1(b). The statutory remedy making the employer potentially liable for up to twice the amount due plus the costs and expenses incurred by the employee in pursuing the claim reflects this balancing.

By this opinion we do not in any way condone an employer's violation of the minimum wage law with the resultant hardship and inconvenience to its employees, and we expressly denounce such unlawful coercive attempts to deprive employees of the wages to which they are lawfully entitled. The legislature having expressed its intent, however, we decline to extend the public policy exception to the employment at will doctrine to afford a cause of action in addition to that provided by statute. Relegating an employee to his statutory remedy is, in our view, a sound policy where, as here, the employee has not been required to engage in unlawful conduct and the employer's statutory violation does not threaten the public safety. *See Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985).

Moreover, limitation of the public policy exception to situations where there is no statutory redress finds support in other jurisdictions. *See, e.g., Wehr v. Burroughs Corp.*, 438 F. Supp. 1052 (E.D. Pa. 1977), *aff'd as modified*, 619 F.2d 276 (3d Cir. 1980), and cases cited therein, in which the district court declined to recognize a separate breach of contract action for age discrimination in violation of the Pennsylvania Human Relations Act, now 43 Pa. Cons. Stat. Ann. §§ 951 *et seq.* (Purdon 1991). Noting that the public policy exception had been applied only where the employee had no other

remedy and a valuable social policy would go unvindicated, the court concluded:

> It is clear then that the whole rationale undergirding the public policy exception is the vindication or the protection of certain strong policies of the community. If these policies or goals are preserved by other remedies, then the public policy is sufficiently served. Therefore, application of the public policy exception requires two factors: (1) that the discharge violate some well-established public policy; and (2) that there be no remedy to protect the interest of the aggrieved employee or society.

438 F. Supp. at 1055.

For the foregoing reasons, we hold that plaintiffs' complaint as a matter of law does not state a cause of action for wrongful termination.

Affirmed.

Judge GREENE concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent. I agree with the majority that plaintiffs' complaint as a matter of law does not state a cause of action for wrongful termination. I believe, however, that under notice pleading the complaint sufficiently states a cause of action pursuant to N.C.G.S. § 95-25.22. I would reverse the dismissal to allow plaintiffs to pursue their remedy under that statute.

JEFFREY KRUGER, PLAINTIFF APPELLANT v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT APPELLEE

No. 904SC1155

(Filed 7 May 1991)

Insurance § 82 (NCI3d)— automobile insurance—coverage for non-insured auto—owned by spouse at time of marriage

The trial court properly denied insurance coverage for William Baker in favor of Jeffrey Kruger where William Baker and Jeffrey Kruger were in a collision on 3 December 1985; a judgment was entered against William Baker in favor of Jeffrey Kruger; William Baker and Rebecca Grady had been married on 23 November 1985; Rebecca at that time owned an automobile which was covered by an insurance policy issued by defendant; William at that time owned an automobile which was not covered by that or any other policy and which he was driving in the collision with Kruger; and William was a covered person under Rebecca's policy, but his car was not a covered automobile because it was not listed in the declarations of the policy, it did not replace a car listed in the declarations and he did not acquire it as a spouse of a named insured.

Am Jur 2d, Automobile Insurance § 172.

APPEAL by plaintiff from judgment entered 29 August 1990 in ONSLOW County Superior Court by *Judge Ernest B. Fullwood.* Heard in the Court of Appeals 17 April 1991.

Brumbaugh, Donley & Mu, by Richard A. Mu, for plaintiff-appellant.

Wallace, Morris, Barwick & Rochelle, P.A., by Paul A. Rodgman and Martha B. Beam, for defendant-appellee.

GREENE, Judge.

The plaintiff appeals from a judgment entered 29 August 1990 wherein the trial court concluded that the defendant had no contractual obligation to satisfy a judgment entered against William Baker (William) in favor of Jeffrey Kruger (plaintiff).

On 23 November 1985, William and Rebecca Grady (Rebecca) were married. At that time, Rebecca owned an automobile which

was covered by an insurance policy (Policy) issued by the defendant, State Farm Mutual Automobile Insurance Company (State Farm). William also owned a car which he purchased in August of 1985, but his car was not listed as a covered automobile on Rebecca's Policy or any other insurance policy.

On 3 December 1985, the plaintiff was driving his motorcycle on U.S. Highway 258 in Lenoir County, North Carolina. William was also on that highway, driving his car. William's car and the plaintiff's motorcycle collided. At the time of the collision, William and Rebecca were living together as a married couple. On 4 December 1985, William applied for an automobile insurance policy with State Farm.

As a result of the collision, the plaintiff sued William, received a jury trial, and a judgment was entered in favor of the plaintiff against William on 8 September 1988 for $35,000 plus costs and interest. Because State Farm denied coverage for William, the plaintiff filed suit against State Farm seeking to obtain a judicial determination that State Farm was obligated to provide coverage for William pursuant to the Policy. In a non-jury trial, the trial court determined that because William's car was not a covered automobile under the Policy, the Policy excluded coverage for William arising from the collision, even though William was a "covered person" under the Policy.

The issue is whether the Policy excludes coverage for William arising from his collision with the plaintiff.

"[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). "[T]he intention of the parties controls any interpretation or construction of the contract, and intention must be derived from the language employed." *Id.* Our courts have a "duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used. . . . The duty is a solemn one, for it seeks to preserve the fundamental right of freedom of contract." *Id.* at 380-81, 348 S.E.2d at 796 (citation omitted).

"The words used in . . . [an insurance] policy having been selected by the insurance company, any ambiguity or uncertainty

as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). "When the policy contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise. . . . In the absence of such definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise. . . . If such a word has more than one meaning in its ordinary usage and if the context does not indicate clearly the one intended, it is to be given the meaning most favorable to the policyholder, or beneficiary, since the insurance company selected the word for use." *Id.* (citations omitted). When construing coverage provisions of an automobile insurance policy, provisions "which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). Furthermore, provisions excluding coverage "are to be construed strictly so as to provide the coverage, which would otherwise be afforded by the policy." *Wachovia*, 276 N.C. at 355, 172 S.E.2d at 522-23.

"[T]he burden of proving coverage under a policy of insurance is on the party claiming benefits under the policy, but the burden of showing an exclusion or exception to policy coverage is on the insurer." *Walker v. Durham Life Ins. Co.*, 90 N.C. App. 191, 193, 368 S.E.2d 43, 45 (1988). The Policy provides that State Farm "will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident." Both parties agree that William was a "covered person" under the Policy. William was found by a jury in a separate lawsuit to be legally responsible for damages to the plaintiff as a result of his collision with the plaintiff. Therefore, the plaintiff met his burden of showing coverage under the policy, and the burden was on State Farm to show application of an exclusion.

The defendant argues that it met its burden by showing that William's car was not a "covered auto" under the Policy, and therefore, its denial of coverage was proper. We agree.

The pertinent provisions of exclusion provide:

We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than **your covered auto**, which is:

   a. owned by you; or

   b. furnished for your regular use.

2. Any vehicle, other than **your covered auto**, which is:

   a. owned by any **family member**; or

   b. furnished for the regular use of any **family member**.

An exception to this exclusion exists. However, this exception was not argued nor does it apply on these facts. From the clear language of these provisions of exclusion, if William's car was not a "covered auto," State Farm is not liable to the plaintiff for any coverage.

The Policy provides that the terms "you" and "your" refer throughout the Policy to the named insured and her spouse, if the spouse resides in the same household as the named insured. At the time of the collision, William was residing in the same household as Rebecca. The Policy defines "your covered auto" in pertinent part as follows:

1. Any vehicle shown in the Declarations.

2. Any of the following types of vehicles on the date you become the owner:

   a. a private passenger auto; . . .

   If the vehicle you acquire replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.

   If the vehicle you acquire is in addition to any shown in the Declarations, it will have the broadest coverage we now provide for any vehicle shown in the Declarations, if you

   a. acquire the vehicle during the policy period; and

   b. ask us to insure it:

      (1) during the policy period; or

      (2) within 30 days after you become the owner.

William's car was not listed in the Declarations of the Policy. Therefore, for it to be classified a "covered auto," it must fall within the second definition listed above.

The second definition lists the two methods by which a car not shown in the Declarations will be classified a "covered auto." The first method occurs when the car shown in the Declarations is replaced with another car. A replacement did not occur in this case. William's car did not replace Rebecca's car, and the parties stipulated to this fact.

The second method occurs when a car is acquired by the named insured or her spouse *during* the policy period *and* there is a timely request that the car be insured. The word "acquire" means "to come into possession, control, or power of disposal of. . . ." Webster's Third New International Dictionary 18 (1968). Here, William came into possession, control, and power of disposal of his car in August of 1985. At that time, William was not a spouse of a named insured under the Policy. Because William did not acquire his car as a spouse of a named insured, even assuming he acquired it during the policy period, his car cannot be considered a "covered auto" under the second method. Because William's car is not a "covered auto" under the Policy, the Policy's exclusion of coverage applies, and the trial court properly denied coverage for William arising from his collision with the plaintiff.

Affirmed.

Judges PHILLIPS and PARKER concur.

VIVIAN S. BAKER v. HERBERT S. BAKER

No. 9017DC598

(Filed 7 May 1991)

Rules of Civil Procedure § 52.1 (NCI3d)— alimony—court sitting without jury—improper sequence of findings and conclusions

A new trial was ordered in an action for alimony and divorce where a trial began during the 28 October 1985 session of court; the judge took the case under advisement at the

close of all evidence; the case came before the court again on 8 October 1987; the court announced its ultimate findings, including adultery by defendant and alimony; and, after a conversation with counsel and a motion for a mistrial by defendant, the court directed that its order have the findings previously dictated, excluding adultery but not alimony. The judge, sitting without a jury, initially found that defendant had committed adultery, then deleted that finding without reconsidering his conclusions, including permanent alimony. That process violated the sequence required by N.C.G.S. § 1A-1, Rule 52.

Am Jur 2d, Divorce and Separation §§ 412, 426.

APPEAL by defendant from Judgment entered 11 January 1990 by *Judge Peter M. McHugh* in ROCKINGHAM County District Court. Heard in the Court of Appeals 6 December 1990.

Shope, McNeil & Maddox by Larry W. McNeil; and Gwyn, Gwyn & Farver by Julius J. Gwyn for plaintiff appellee.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence by Martha A. Geer for defendant appellant.

COZORT, Judge.

In the action below, the trial court granted plaintiff a divorce from bed and board two years after the matter was tried. Another two years passed before the trial court entered an order awarding plaintiff $1,250.00 per month in permanent alimony plus attorneys' fees and costs. Finding prejudice in the long delays between hearing and final resolution, we remand the case to the trial division for a new trial.

Plaintiff and defendant were married on 31 August 1972. Plaintiff filed the complaint initiating this action on 6 February 1985, seeking alimony and divorce from bed and board. Defendant's answer and counterclaim of 27 March 1985 also sought divorce from bed and board. Plaintiff's reply to the counterclaim was filed 29 October 1985.

During the course of trial which began during the 28 October 1985 session of court, plaintiff's counsel asked defendant: "[Y]ou were paying two alimony payments at the time of your marriage [to plaintiff?]" Defendant's counsel objected and moved for a mistrial.

The trial judge denied the motion, and, after conferring with counsel for both parties, the judge instructed the jury to disregard the question. After another conference between the court and counsel, both parties waived jury trial, and the case proceeded without a jury. At the close of all evidence, the trial judge denied cross motions for dismissal and took the case under advisement.

The case came before the court again on 8 October 1987 "with consent of counsel for Plaintiff and Defendant for entry of . . . judgment from the October 1985 Session of Court." The transcript of that hearing discloses that it was actually devoted largely to argument over whether to grant defendant's motion to release funds from the marital estate to pay allegedly marital debts. The transcript also discloses that the trial judge reviewed and discussed alternative judgments submitted by counsel. After announcing the substance of his findings and conclusions, the trial judge denied the defendant's motion for a mistrial and entered judgment that plaintiff was entitled to permanent alimony; the defendant gave notice of appeal of that judgment. After hearings in July, August, and September of 1989, the trial judge, on 11 January 1990, entered judgment regarding the amount of permanent alimony and attorneys' fees.

Pursuant to his first assignment of error, the defendant contends that at the October 1987 hearing to enter judgment the trial judge could no longer accurately recall the evidence presented at the October 1985 bench trial. Specifically, defendant contends that the "trial court erred in substantially altering its findings of fact without reconsidering its conclusions of law." We agree.

In the course of the hearing on 8 October 1987 the following exchange occurred:

> COURT: I'm going to tell you what ultimate findings I believe are appropriate in view of my assessment of the evidence after that hearing. We can then go through the varying orders and I will identify which findings of fact I think will support my ultimate findings.
>
> I found in the order that I related to each counsel early on, that Dr. Baker had withdrawn his society from his wife; that he had over the course of years and the latter part of the marriage, become isolated and distant from her; *he had ultimately, and I think the evidence is overwhelming, engaged*

in a course of adultery with the nurse in his office. I also believed following the evidence, that through the last at least several years of the marriage, Mrs. Baker had accused Dr. Baker of being lazy, a spendthrift; that she had engaged in a course of badgering him and had accused him on various instances of misconduct and some of those unjustified accusations. At no time did I feel, again, that her misconduct or fault that I just referred to, constituted sufficient provocation for the acts committed by Dr. Baker which led to my indication to you that Mrs. Baker would be entitled to permanent alimony.

Now you have there gentlemen, a statement as clearly as I can make it as to what I feel the ultimate findings in this case should be. We will now go through the various orders and I'll identify for you specific findings of fact.

MCNEIL: If it please the Court, Your Honor, for purposes of appeal in this case, which I assume is going to happen, I would ask Your Honor if you would to take a moment and look at that and your assessment as to the adultery and refer to your notes and the record and see if that in fact was what you had determined in this case. I don't think that it was, but I would certainly ask the Court's indulgence for you to reflect on that.

COURT: Un-huh.

(PAUSE FOR REVIEWING DOCUMENTS)

* * * *

MCNEIL: If I may Your Honor, in light of your earlier statement as to your ultimate findings of fact, I would request the Court consider record before finding the adultery or defer to Your Honor, but I would ask you to defer to that rather than to make that finding.

COURT: You're worried about your offer of evidence . . .

MCNEIL: Yes sir.

CURTIS: I move for a mistrial.

COURT: Why?

CURTIS: Because the Court has concluded that Dr. Baker committed adultery. There is so little evidence of it that even

Mr. McNeil doesn't want it in there, and now he's trying to get Your Honor's order changed with reference to that, but it's bound to affect Your Honor's thinking. And I move for a mistrial.

COURT: The motion is denied. I'm going to direct that the order have the findings of fact that I directed you to put into it.

MCNEIL: Including or excluding adultery?

COURT: Excluding it. (Emphasis added.)

When jury trial is waived, Rule 52 of the North Carolina Rules of Civil Procedure requires the trial judge: "(1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly." *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). Evidentiary facts must support ultimate facts (those "required to establish the plaintiff's cause of action or the defendant's defense.") *Id.* at 342, 218 S.E.2d at 372. Rule 52 necessarily contemplates that facts be found before conclusions can be reached: "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

In the case below, the trial judge, reviewing his assessment of evidence heard almost two years earlier, announced as an ultimate finding that the defendant "engaged in a course of adultery with the nurse in his office." Plaintiff's counsel subsequently indicated his opinion that the evidence would not support such a finding and requested the judge to delete that finding from his order. The judge complied with that request, but there is no indication of record that he reconsidered the conclusions and judgment presumably based, at least in part, on his original finding. The judgment decreed that the plaintiff was entitled to permanent alimony, one of the statutory grounds for which is that the "supporting spouse has committed adultery." N.C. Gen. Stat. § 50-16.2(1) (1987).

In the case below, to determine whether the dependent spouse was entitled to alimony and, if so, in what amount, the trial judge

was required to weigh evidence of adultery by the supporting spouse as well as evidence of indignities offered by both the supporting and the dependent spouse. N.C. Gen. Stat. §§ 50-16.2(1), (7) and 50-16.5(b) (1987). The judge initially found that defendant had committed adultery; the judge then deleted that finding without reconsidering his conclusions, including the conclusion that plaintiff was entitled to permanent alimony. That process violated the sequence required by Rule 52 to the prejudice of the defendant. "Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. . . . Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto." *Coble*, 300 N.C. at 714, 268 S.E.2d at 190. Where, as in the case below, an order's rationale is tainted by a process that violates Rule 52, a new trial of the issues is required.

In view of our holding above we need not reach the defendant's remaining assignments of error.

New trial.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. KEVIN RICHARD BENNETT

No. 904SC286

(Filed 7 May 1991)

1. **Constitutional Law § 318 (NCI4th)— counsel on appeal—failure to comply with Anders v. California**

Defendant's counsel failed to satisfy the requirements of *Anders v. California*, 386 U.S. 738, in an appeal from convictions for two narcotics offenses where the attorney filed a brief stating that he had reviewed the trial transcript and could find no basis for arguing reversible error; the attorney brought forth two possible assignments of error without supporting argument or citations of authority; the attorney filed an inadequate record on appeal which contained no judgment or commitment for one case and no order denying a motion

to suppress an in-court identification; although defendant's attorney sent to defendant by certified mail the transcript, his brief, the state's brief, the record as originally constituted, and a letter informing defendant of his right to file a brief, the record sent to defendant did not contain sufficient court documents to permit defendant to conduct his own review of the case; and the attorney has failed to comply with directives by the Court of Appeals to correct the defects in the record on appeal and to serve on defendant the addendum to the record on appeal.

Am Jur 2d, Criminal Law §§ 732 et seq.; 807, 809.

Supreme Court's views as to accused's federal constitutional right to counsel on appeal. 102 L.Ed. 2d 1049.

2. **Appeal and Error § 510 (NCI4th)— Anders v. California appeal—attorney's failure to file proper record—sanctions—denial of fee—payment of costs**

An attorney who filed a brief referring to two possible assignments of error without argument pursuant to *Anders v. California*, 386 U.S. 738, was subject to sanctions under Appellate Rule 34 for his gross disregard of the requirements of a fair presentation of the issues to the Court of Appeals where the attorney filed in the Court of Appeals a defective record on appeal that failed to include the judgment and commitment for one case and the order denying suppression of identification testimony, and the attorney failed to respond to an explicit directive by the Court of Appeals to cure the defects in the original record on appeal and to serve the addendum to the record on the defendant. Therefore, the attorney is directed pursuant to Appellate Rule 34 to show cause in writing as to why he should not be denied any fee for his representation of defendant in this appeal and required to reimburse the state for any fees already paid to him, and the costs of the appeal are taxed personally against the attorney pursuant to Appellate Rule 35(a).

Am Jur 2d, Attorneys at Law §§ 56 et seq.; 243.

APPEAL by defendant from judgment entered 7 November 1989 in ONSLOW County Superior Court by *Judge James R. Strickland*. Heard in the Court of Appeals 14 November 1990.

Defendant was arrested and charged with sale and delivery of cocaine and possession of cocaine with intent to manufacture, sell and deliver. Defendant offered a plea of guilty to the charges, which was not accepted by the court after defendant responded negatively when the judge asked him whether he was in fact guilty.

At trial, the State's evidence tended to show that defendant approached a volunteer informant who was sitting in a car on 6 August 1988 and drove with him to meet another man. Defendant spoke with this other man briefly, then returned to the car with three rocks of crack cocaine. The police informant gave defendant forty dollars and was given the rocks. Defendant then left the car, and was arrested after the informant radioed a description to police officers.

Defendant's evidence tended to show that the informant and arresting officer did not describe defendant's clothing on the night of the arrest with complete accuracy. Defendant also testified that he had never met or seen the informant before. He had been drinking that night, but he did not use or sell drugs. An alibi witness also testified, corroborating defendant.

The jury returned a verdict of guilty on both counts. After a sentencing hearing in which the court found defendant's prior history of arrests to be a factor in aggravation and no factors in mitigation, defendant was sentenced to a total of ten years in prison for the two offenses. From judgment on the verdict, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Joseph P. Dugdale, for the State.

Popkin and Associates, by Samuel S. Popkin, for defendant-appellant.

WELLS, Judge.

[1] Defendant's attorney has filed a brief with this Court in which he states: "The undersigned has reviewed said trial transcript and could find no basis for arguing any reversible errors." He has brought forth two assignments of error, but has not argued them or cited any authority dealing with these points of law, stating he "could find no basis for arguing in support" of these assignments.

The first issue before us, then, is whether this appeal complies with the requirements of appellate advocacy in criminal cases as set out in *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, *reh'g denied*, 388 U.S. 924, 18 L.Ed.2d 1377 (1967), and further defined in *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), and *State v. Noble*, 326 N.C. 581, 391 S.E.2d 168 (1990). In *Kinch* and *Noble*, our Supreme Court held that the filing of a brief which referred only to possible assignments of error without argument was sufficient notice that counsel had determined the appeal to be frivolous, and was asking for permission to withdraw and have the Court conduct an independent inquiry into whether the appeal was in fact frivolous. Counsel in this case has filed such a brief. Despite two orders from this Court, however, he has yet to file an adequate record for review, or provide sufficient evidence that he has adequately notified his client of his intentions by supplying him with the necessary documents to conduct his own review of the case.

Though the transcript reveals that defendant was found guilty and received a three-year sentence, the record before us does not contain the judgment and commitment in case number 89CRS13752 on the charge of possession with intent to manufacture, sell and deliver a controlled substance. More importantly, the record only indicates that defendant's counsel sent the transcript, his brief, the State's brief and the record as originally constituted by certified mail along with a letter informing defendant of his right to file a brief. This record did not contain the pertinent court documents for the two charges defendant was found guilty of, and in fact contained the judgment disposing of case number 89CRS13753, in which the trial court directed a verdict of not guilty. It also failed to include a court order denying a motion to suppress an in-court identification (we are aware that the transcript states that the order is attached to it, but no such order is attached). These documents are vital to any consideration of whether this appeal has any arguable merit. According to the record transmitted to defendant, we are being asked to consider the merits of an appeal from a charge of which he has been found not guilty.

"Where counsel decides that an appeal would be frivolous, he still has the duty to inform petitioner and the court of his decision and to be of more assistance to his client and the court." *Pless v. State*, 502 F. Supp. 438 (W.D.N.C. 1980), *aff'd*, 673 F.2d 1315 (4th Cir. 1982). *Anders*, as interpreted by *Kinch* and *Noble*, imposes certain requirements on an attorney before a request to

withdraw from an appeal may be granted. One of these requirements must be to serve on this Court and the defendant-appellant a minimally adequate record for review. Counsel in this case has not done so. We therefore decline to rule on whether this appeal is frivolous.

On 7 February 1991, this Court issued the following order:

> This Court, having reviewed the record, transcript, and briefs submitted by counsel and having determined that they are insufficient for appellate review and do not comply with the requirements of *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493 (1967), DOES HEREBY ORDER *ex mero motu* the following: Within fifteen days of the date of this order, counsel for defendant shall file with this Court an addendum to the record which shall contain the judgment and commitment in case number 89CRS13572 [sic] on the charge of possession with intent to manufacture, sell and deliver a controlled substance and which shall contain the order overruling defendant's objection to the in-court identification by Donald Gray.
>
> It is further ORDERED that within fifteen days of the date of this order, counsel for defendant shall serve upon defendant and opposing counsel copies of the above ordered addendum and the addendum to the record filed with this Court on 26 October 1990. Additionally, counsel for defendant shall within fifteen days of this order serve upon defendant a copy of this order. Proof of service on defendant of these documents shall be filed by counsel with this Court.
>
> Defendant shall have forty-five days from the date of the service of the documents listed above to file a *pro se* brief with this Court.

Defendant's counsel has filed a copy of the required order, and the judgment in case number 89CRS13752 on the charge of sale and delivery of cocaine, which had already been filed with this Court. The required proofs of service on defendant have not been filed. Due to counsel's failure to adhere to this last order of this Court, we remand this case to the Superior Court of Onslow County for a hearing at which Samuel S. Popkin shall appear to show cause why he should not be removed as counsel, and substitute counsel appointed. *See State v. Lewis*, 348 S.E.2d 347 (1986). Substitute counsel shall have sixty days from the date of appointment to serve a proposed record on appeal, and the State shall

have thirty days in which to respond. The appeal shall then proceed in accord with the the North Carolina Rules of Appellate Procedure.

[2] Finally, we deem it appropriate in this case to sanction defendant's counsel for his gross disregard of the requirements of a fair representation of the issues to the Court in the initial filing of this appeal, and his failure to respond to an explicit directive of this Court to cure the defect. Pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure, we direct that within not more than thirty days from the certification of this opinion, Samuel S. Popkin shall show cause in writing as to why he should not be denied any fee for his representation of defendant in this appeal and be required to reimburse the State of North Carolina for any fees he may have been paid for his representation of defendant in this appeal. *See Commonwealth v. McFarland*, 386 Pa. Super. 91, 562 A.2d 369 (1989).

Pursuant to Rule 35(a) of the North Carolina Rules of Appellate Procedure, the costs of this appeal incurred in the Court of Appeals shall be taxed personally against Samuel S. Popkin, attorney for the defendant-appellant.

Remanded.

Judges JOHNSON and COZORT concur.

DANIEL MARTIN AND JOHN DUKE, D/B/A STAR PHOTO, PLAINTIFFS v. JEFF SHEFFER AND J&S DISTRIBUTORS, INC., DEFENDANTS

No. 9014SC848

(Filed 7 May 1991)

Sales § 10.1 (NCI3d)— remedies—specific peformance

The trial court correctly granted summary judgment for defendants on a counterclaim for specific performance where plaintiffs ordered a printer from defendant J&S Distributors; plaintiffs refused the machine when it arrived and were refused the return of their deposit; plaintiffs sued for breach of contract, fraud, breach of good faith and unfair and deceptive trade practices; and defendants counterclaimed for full

performance under a clause in the contract. A contractual provision expanding the seller's damages upon breach by the buyer will be upheld where the contractual provision is reasonable and in good faith. N.C.G.S. § 25-1-102.

Am Jur 2d, Contracts § 344.

APPEAL by plaintiffs from a judgment entered 26 February 1990 by *Judge Anthony M. Brannon* in DURHAM County Superior Court. Heard in the Court of Appeals 18 February 1991.

Kenneth J. Duke for plaintiffs-appellants.

King, Walker, Lambe & Crabtree, by Daniel Snipes Johnson, for defendant-appellee.

LEWIS, Judge.

In December of 1987 Daniel Martin and John Duke contracted with J&S Distributors, Inc. to purchase a KIS Magnum Speed printer for $17,000.00. The parties agreed that Martin and Duke would send one-half of the money as a deposit and would pay the balance upon delivery. On 28 December 1987 the KIS machine arrived in Georgia but Duke and Martin refused to accept it, stating that the delivery was five days late and they had purchased a substitute machine elsewhere. The plaintiffs requested return of their deposit and were refused.

On 6 September 1988 Duke and Martin sued Jeff Sheffer and J&S Distributors for breach of contract, fraud, breach of good faith and unfair and deceptive trade practices. Defendants answered and counterclaimed for full performance of the contract pursuant to a clause in the contract which provides:

> 7. In the event of non-payment of the balance of the purchase price reflected herein on due date and in the manner recorded or on such extended date which may be caused by late delivery on the part of DIS, the Customer shall be liable for
>
> 7.1 immediate payment of the full balance recorded herein; and
>
> 7.2 payment of interest at the rate of 12% per annum calculated on the balance due, when due, together with any attorney's fees, collection charges and other necessary expenses incurred by DIS.

On 8 August 1989 both defendants moved for summary judgment regarding plaintiffs' claim for return of the deposit; motion was granted on 1 November 1989. On 8 January 1990 defendants moved for summary judgment on their counterclaim. The trial court granted this motion and ordered specific performance of the contract, costs and attorney's fees.

Appellants argue that the trial court erred in ordering them to accept delivery of the KIS machine and pay the entire balance of the contract. They contend that the determination of seller's damages is controlled by U.C.C. § 2-708 and is limited to lost profits. N.C.G.S. § 25-2-708. Appellants fail to take note of N.C.G.S. § 25-1-102(3) and (4) which provide:

> (3) The effect of provisions of this chapter may be varied by agreement except as otherwise provided in this chapter and except that the obligations of good faith, diligence, reasonableness and care prescribed by this chapter may not be disclaimed by agreement . . .
>
> (4) The presence in certain provisions of this chapter of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

The official comment to Subsection 25-1-102(4) expressly states the general rule that all provisions of the UCC may be varied by contract. Finally, N.C.G.S. § 25-2-719(1)(a) provides that a contract for sale of goods "may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, . . ." *Id.* The official comment to this subsection states that "parties are free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are given effect." Official Comment to N.C.G.S. § 25-2-719.

A contractual provision expanding seller's damages upon breach of the buyer will therefore be upheld where the contractual provision is reasonable and in good faith. N.C.G.S. § 25-1-102. Appellants have signed a contract agreeing to a specific performance clause upon breach. Appellants do not argue in their brief that they were fraudulently induced into signing the contract, that the clause authorizing specific enforcement is ambiguous or a mistake, or that

the seller breached the contract by failing to deliver at the time promised.

The appellants argue that the clause should be struck as an "unconscionable and oppressive" liquidated damages clause pursuant to N.C.G.S. § 25-2-718. A contractual clause authorizing specific performance is different in kind from a liquidated damages clause. Even were this not the case, enforcement of the price the appellant freely agreed to pay for the KIS machine cannot be considered unreasonable or a penalty. *See Tobacco Growers Co-op Ass'n v. Jones*, 185 N.C. 266, 117 S.E. 174 (1923).

Neither do we find this contractual clause to be otherwise unreasonable or contrary to public policy. N.C.G.S. § 25-1-102(3). To find unconscionability there must be an absence of meaningful choice on part of one of the parties together with contract terms which are unreasonably favorable to the other. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 695, 220 S.E.2d 361, 366 (1975), *affirmed*, 290 N.C. 502, 226 S.E.2d 321 (1976). Appellant does not argue that he lacked meaningful choice in negotiating the terms of the contract. As a merchant, appellant is presumed to be familiar with the terms and practices of contracts for the purchase of the tools of his trade; as such "it is rare that a limitation of remedy will be held unconscionable in a commercial setting since the relationship between business parties is usually not so one-sided as to force an unconscionable limitation on a party." *Byrd Motor Lines v. Dunlop Tire and Rubber Corp.*, 63 N.C. App. 292, 296, 304 S.E.2d 771, 776 (1983). The contractual clause authorizing specific performance does not undermine the essential purpose of the contract.

While this is a case of first impression in this jurisdiction, cases from other jurisdictions serve as guidance and explanation as to the purpose of the Uniform Commercial Code, which is "to make uniform the law among the various jurisdictions." *Evans v. Everett*, 10 N.C. App. 435, 437, 179 S.E.2d 120, 122, *rev'd on other grounds*, 279 N.C. 352, 183 S.E.2d 109 (1971). Accordingly, in *Frank LeRoux v. Burns*, 4 Wash. App. 165, 480 P.2d 213 (1971), the Washington Court of Appeals upheld a similar clause which gave the seller the option of demanding the balance of payments on the contract in the case of any delinquent payment for the goods. The Court held that the parties were free to shape their remedies according to their particular needs, and that an expansion of the

seller's remedies beyond those specified in the Uniform Commercial Code to include specific performance is neither unreasonable nor unconscionable. *Id.* The same rationale applies to the case before us.

Appellants have asked us to reduce attorney's fees if we reduce the judgment. Insofar as we have affirmed the judgment as is, we see no reason to address this issue.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

IN THE MATTER OF: TRANSPORTATION OF JUVENILES

No. 9018DC857

(Filed 7 May 1991)

Courts §§ 6, 12 (NCI4th)— district court—no action or proceeding filed—absence of jurisdiction to enter order—no inherent power

A district court judge had no jurisdiction under N.C.G.S. § 7A-291(6) or N.C.G.S. § 7A-574(d) to enter an order ex mero motu requiring the Guilford County Sheriff's Department to transport delinquent or undisciplined juveniles who were in secured custody to and from court where no action or proceeding had been filed with the court. Nor did the court have the inherent power to enter this order as being necessary for the efficient exercise of the administration of justice where the court lacked jurisdiction in the first instance.

Am Jur 2d, Courts §§ 91, 94.

APPEAL by Guilford County Sheriff's Department from Order entered 13 July 1990, *nunc pro tunc* 29 June 1990 in GUILFORD County District Court by *Judge Laurence C. McSwain.* Heard in the Court of Appeals 19 February 1991.

Deputy County Attorney J. Edwin Pons, for appellant, Guilford County Sheriff's Department.

No appellee's brief filed.

WYNN, Judge.

I

On 13 July 1990, Guilford County District Court Judge Laurence C. McSwain entered an order, *ex mero motu* and without an action or proceeding having been filed, directing the Guilford County Sheriff's Department to "transport any delinquent or undisciplined juvenile from the Guilford County Detention Center to the designated Juvenile Court in High Point, North Carolina, or Greensboro, North Carolina, by 9:30 a.m. on days required and to transport any designated delinquent or undisciplined juvenile from the Juvenile Courtroom in High Point, North Carolina, or Greensboro, North Carolina, to the Guilford County Juvenile Detention Center." Prior to the entry of the district court's order, the practice in Guilford County was that juvenile court counselors transported designated delinquent or undisciplined juveniles who were in secure custody to and from court.

The Guilford County Sheriff's Department now appeals from the entry of Judge McSwain's order.

II

Judge McSwain's order cites N.C.G.S. §§ 7A-291(6), 7A-574(d) and "the inherent power of a District Court Judge to enter orders necessary for the efficient exercise of the administration of justice" as authorizing the entry of the order below. We shall address these propositions *seriatim*.

North Carolina General Statutes section 7A-291(6) provides as follows:

> "Additional powers of district court judges"
>
> In addition to the jurisdiction and powers assigned in this chapter, a district court judge has the following powers:
>
> . . . .
>
> (6) To issue all process and orders necessary or proper in the exercise of his powers and authority, and to effectuate his lawful judgments and decrees.

N.C. Gen. Stat. § 7A-291(6) (1989).

We do not believe this statute was intended to give a district court judge the power to enter an order *ex mero motu* when no

action is before the court. A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, only if it is presented in the form of a proper pleading. 20 Am. Jur. 2d *Courts* § 94 (1965). Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question. *Id.* *See Carolina Freight Carriers Corp. v. Local 61, International Bhd. of Teamsters*, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971) (holding that "the filing of a complaint or the issuance of summons pursuant to G.S. 1A-1, Rule 3, [was] a condition precedent to the issuance of an injunction or restraining order." 11 N.C. App. at 161, 180 S.E.2d at 463). *See also* N.C. Gen. Stat. § 7A-193 (1989) (stating in pertinent part, that, "A civil action is commenced by filing a complaint with the court.").

It is clear in this case that no action or proceeding had been commenced. We conclude that without an action pending before it, the district court was without jurisdiction to enter an order pursuant to N.C.G.S. § 7A-291(6).

For similar reasons, N.C.G.S. § 7A-574(d) does not provide a sufficient ground for entering the order below. Section 7A-574(d) falls under the Juvenile Code which requires that the trial court have jurisdiction before exercising the powers granted thereunder. Since the district court was without jurisdiction because there was no action before it, we must conclude that section 7A-574(d) does not provide the necessary basis for the entry of Judge McSwain's order.

We likewise conclude that the court below lacked the inherent power to enter its order. Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice *within the scope of their jurisdiction.* 20 Am. Jur. 2d *Courts* § 78 (1965) (emphasis added). Inherent powers are limited to those powers which are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction. *State v. Gravette*, 327 N.C. 114, 124, 393 S.E.2d 865, 871 (1990) (citing *Hopkins v. Barnhardt*, 223 N.C. 617, 27 S.E.2d 644 (1943)). Since the trial court lacked jurisdiction in the first instance, there could be no concomitant inherent power which was necessary to the orderly and efficient exercise of its jurisdiction.

We are acutely aware of the dilemma in which Guilford County Juvenile Court Counselors and Judge McSwain have found themselves. Delinquent or undisciplined juveniles who are ordered into secure custody often prove to be recalcitrant, unpredictably volatile, and even violent. In many cases, law enforcement is clearly better equipped to handle the transportation of such individuals from their secure facilities to designated courtrooms and vice versa. Nonetheless, Judge McSwain lacked the jurisdiction to enter the order made in this case. The order entered below is therefore

Vacated.

Judges WELLS and GREENE concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT, IN THE MATTER OF A FILING DATED JULY 1, 1987 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

No. 9010INS647

(Filed 7 May 1991)

1. **Insurance § 79.1 (NCI3d)— automobile insurance rate case—refusal to distribute escrow funds—no immediate appeal**

An order of the Commissioner of Insurance refusing to release funds placed in escrow pursuant to N.C.G.S. § 58-36-25 pending judicial review of an automobile rate case was interlocutory and not immediately appealable.

Am Jur 2d, Appeal and Error § 47.

2. **Insurance § 79.1 (NCI3d)— automobile insurance rate case—disapproval of filing—funds in escrow—appellate decision remanding case—no final determination**

A decision of the Court of Appeals vacating an order disapproving an automobile insurance rate filing and remanding the case for additional findings did not constitute a "final determination" requiring the Commissioner of Insurance to distribute funds placed in escrow pursuant to N.C.G.S. § 58-36-25. As used in that statute, "final determination" means all pro-

ceedings arising out of a disapproval order in a rate filing, including proceedings on remand.

Am Jur 2d, Appeal and Error § 59.

3. Insurance § 79.1 (NCI3d)— automobile insurance rate case— funds in escrow—standing of Rate Bureau to appeal order

The N.C. Rate Bureau has standing in its capacity as the representative of its members to appeal an order of the Commissioner of Insurance refusing to distribute funds placed in escrow in an automobile insurance rate case pursuant to N.C.G.S. § 58-36-25.

Am Jur 2d, Appeal and Error §§ 172 et seq.; Insurance § 59.

APPEAL by the North Carolina Rate Bureau from order dated 1 March 1990 by the Commissioner of Insurance. Heard in the Court of Appeals 13 December 1990.

On 1 July 1987 the North Carolina Rate Bureau filed for revised private passenger automobile insurance rates pursuant to Article 12B (now recodified as Article 36) of Chapter 58 of the General Statutes. The Commissioner of Insurance entered an order on 1 February 1988 disapproving in part the 1 July 1987 filing. The Commissioner ordered into effect rates lower than those filed. The Commissioner's action was based on his adoption of expense trends and underwriting profit and contingency provisions lower than those used by the Bureau. The Rate Bureau appealed. As provided by G.S. 58-36-25 the Bureau members used a higher rate and placed in escrow the portion of the premium that the Commissioner had disapproved.

On 15 August 1989, this Court vacated the 1 February 1988 order of the Commissioner and remanded the action to the Commissioner to make findings to "show *how* he has resolved the conflicting evidence, what adjustments he found necessary to make, and what calculations he considered more reliable." *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 95 N.C. App. 157, 381 S.E.2d 801 (1989).

On 26 January 1990 the Rate Bureau filed a motion requesting that the Commissioner order that the funds held in escrow be distributed to the Bureau's member companies. The Commissioner denied the motion for the release of the funds held in escrow. The Rate Bureau appeals.

Young, Moore, Henderson & Alvis, P.A., by Charles H. Young, Jr., Marvin M. Spivey, Jr., and R. Michael Strickland for appellant.

Hunter, Wharton & Lynch, by John V. Hunter III; and Parker, Sink & Powers by E. Daniels Nelson for appellee.

EAGLES, Judge.

[1] The sole question presented here is whether the Commissioner of Insurance erred in failing to order the release of funds placed in escrow pending judicial review of the Commission's 1 February 1988 order. Because this appeal is interlocutory, we dismiss it.

The Rate Bureau appeals from the order of the Commissioner dated 1 March 1990 that denied its motion for the release of funds held in escrow under G.S. 58-36-25. "Fragmentary, piecemeal appeals from interlocutory orders are not usually permitted in this state; they are authorized only when it appears that a substantial right of the appellant will be lost if the order is not reviewed before the case has finally run its course in the trial court." *Shuping v. NCNB National Bank*, 93 N.C. App. 338, 339-40, 377 S.E.2d 802, 803 (1989). The Supreme Court has defined final and interlocutory orders as follows:

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . 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. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

Here, the effect of the order denying the release of the funds is temporary and not permanent. The Commissioner's order only determines that the funds are not to be released now. It does not purport to determine who is entitled to the money. For these reasons, we hold that the appeal is interlocutory.

The order of the Commissioner is not immediately appealable under either G.S. 1A-1 Rule 54(b) or G.S. 1-277 and 7A-27(d). The Rate Bureau has not shown that it will lose any right here that the law regards as substantial. We fail to see how appellants will

be prejudiced if the order remains in effect until the Commissioner concludes the proceedings in this rate filing. Accordingly, this appeal is dismissed.

[2] Additionally, we note that even though an appeal is fragmentary and premature, the appellate court may exercise its discretionary power to express an opinion upon the question which appellant has attempted to raise. *Cowart v. Honeycutt*, 257 N.C. 136, 140, 125 S.E.2d 382, 385 (1962). Here, we find appellant's reading of G.S. 58-36-25 unpersuasive. Appellant contends that this Court's decision in *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 95 N.C. App. 157, 381 S.E.2d 801 (1989), constitutes a "final determination" within the meaning of G.S. 58-36-25. We disagree.

G.S. 58-36-25(b) provides:

> Whenever a Bureau rate is held to be unfairly discriminatory or excessive and no longer effective by order of the Commissioner issued under G.S. 58-36-20, the members of the Bureau, in accordance with rules and regulations established and adopted by the governing committee, shall have the option to continue to use such rate for the interim period pending judicial review of such order, provided each such member shall place in escrow account the purportedly unfairly discriminatory or excessive portion of the premium collected during such interim period. Upon a final determination by the Court, the Commissioner shall order the escrowed funds to be distributed appropriately . . . .

Appellant argues that "[j]udicial review of the Commissioner's disapproval Order has been completed and the Order has been vacated." We think that "final determination" in G.S. 58-36-25 means *all* proceedings arising out of a disapproval order in a rate filing, including proceedings on remand.

In our earlier decision in this matter we vacated and remanded the Commissioner's order so that he could make additional findings. The Commissioner has indicated that he will receive additional evidence when he reconsiders the filing pursuant to our 15 August 1989 decision remanding the matter. Until the Commissioner has concluded his proceedings, there is no final determination as to the validity or invalidity of the Commissioner's order. At this point, it has yet to be decided who is entitled to receive the funds being

held in escrow. We believe appellant's reading of "final determination" is contrary to the express language of the statute and frustrates the purpose of holding the funds in escrow. It would be illogical to distribute the funds when the issue of whether they belong to the policyholders or the insurance companies has not yet been decided. Had the Rate Bureau not attempted this interlocutory appeal, that ultimate question might well have been decided before now.

[3] Finally, we note that the Commissioner of Insurance challenges the Rate Bureau's standing to bring this appeal. We find the Commissioner's argument on this question without merit. We note that the Rate Bureau is a "party aggrieved" within the meaning of G.S. 58-2-80. Accordingly, it may challenge orders and decisions of the Commissioner that disapprove premium rates. We see no reason to conclude that the Rate Bureau has standing in this context but not in the context of challenging the distribution of funds under G.S. 58-36-25. Under the Administrative Procedure Act, a "person aggrieved" is defined as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." G.S. 150B-2(6). Under the Judicial Review Act, the predecessor to the Administrative Procedure Act, the Supreme Court said: "The expression 'person aggrieved' has no technical meaning. What it means depends on the circumstances involved." *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963). Here, we think that the Rate Bureau has standing in its capacity as the representative of its members collectively.

For the reasons stated, we dismiss this appeal as interlocutory.

Appeal dismissed.

Judges PHILLIPS and WYNN concur.

LANDINGHAM PLUMBING AND HEATING OF N.C., INC. v. BARRY FUNNELL; WEHRAN ENERGY OF NORTH CAROLINA, INC.; ANAEROBIC ENERGY RESOURCES, INC.; AND E. T. ENERGIES, INC.

No. 9018SC725

(Filed 7 May 1991)

Appeal and Error § 206 (NCI4th)— time for appeal—tolling by motion—motion withdrawn

The trial judge erred by dismissing defendant's appeal under Rule 25 of the North Carolina Rules of Appellate Procedure where the jury returned a verdict against defendant Funnell but not against the corporate defendants; the judgment was signed on 22 December 1989 and filed on 27 December 1989; plaintiff made a motion for a new trial as to the corporate defendants on 2 January 1990 and withdrew the motion on 8 March 1990; defendant Funnell filed written notice of appeal on 23 March 1990; and plaintiff filed a motion to dismiss the appeal on 3 April 1990. In order for the exception to the thirty-day requirement under Rule 3 of the Rules of Appellate Procedure to have any effect, the opposing party's time for appeal is tolled when a party makes a motion enumerated in the rule. If the motion is withdrawn, the opposing party has thirty days from the withdrawal to file an appeal.

Am Jur 2d, Appeal and Error § 306.

APPEAL by defendant, Barry Funnell, from order entered 16 May 1990 by *Judge James A. Beaty, Jr.*, in GUILFORD County Superior Court. Heard in the Court of Appeals 11 March 1991.

Douglas, Ravenel, Hardy, Crihfield & Moseley, by Richard H. Hicks, Jr. and David W. McDonald, for plaintiff-appellee.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Norman B. Smith, for defendant-appellant.

LEWIS, Judge.

This case presents the Court with the primary issue of whether the trial court erred in granting the plaintiff's motion to dismiss the defendant's appeal under Rule 25 of the North Carolina Rules of Appellate Procedure.

The plaintiff, Landingham Plumbing and Heating of N.C., Inc. instituted an action against Barry Funnell, Wehran Energy of North Carolina, Inc., Anaerobic Energy Resources, Inc., and E.T. Energies, Inc. The complaint alleged that the plaintiff, a mechanical subcontractor, had rendered its services, labor and equipment to the defendants for a methane gas extraction project at a Winston-Salem landfill in 1987. The plaintiff alleged that the defendants owed the plaintiff money on three alternative grounds: account, contract or quantum meruit. The defendants denied liability.

At trial before a jury, the defendants moved for a directed verdict at the close of the plaintiff's evidence. The trial judge allowed the motion as to the account claim, but not as to the contract and quantum meruit claims. On 15 December 1989, the jury returned a verdict against the defendant Funnell for $36,199.59, but did not return a verdict against the corporate defendants. After the verdict, the decision was made in court for the winning attorney to draft the written judgment. The trial judge signed the judgment on 22 December 1989. The judgment was filed on 27 December 1989.

On 2 January 1990, the plaintiff made a motion for a new trial as to the corporate defendants. On 8 March 1990, the plaintiff withdrew its new trial motion. The defendant Funnell filed written notice of appeal from the original judgment on 23 March 1990. On 3 April 1990, the plaintiff filed a motion to dismiss the defendant Funnell's appeal. The trial judge granted the plaintiff's motion based on Rule 25 of the North Carolina Rules of Appellate Procedure. Defendant Funnell appeals the order granting the dismissal.

Rule 25 of the North Carolina Rules of Appellate Procedure allows the trial court to dismiss an appeal if the appellant failed to give notice of appeal within the time allowed by the Appellate Rules. The trial court in this case based his dismissal on the defendant's failure to comply with the requirements of Rule 3(c) of the North Carolina Rules of Appellate Procedure. Rule 3(c) provides:

> Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the

> full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:
>
> . . .
>
> (4) a motion under Rule 59 for a new trial.

N.C.R. App. P. 3(c).

The plaintiff argues that *Landin Ltd. v. Sharon Luggage Ltd.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985) is controlling in this case. In *Landin*, after entry of judgment occurred on 26 July 1984, the defendants filed a motion to amend the judgment. The defendants later withdrew their motion to amend the judgment. The defendants argued that Rule 3 of the North Carolina Rules of Appellate Procedure allowed the time required for the defendants to appeal to be tolled until the withdrawal of the motion. The Court of Appeals held that:

> Withdrawal of their motion does not entitle defendants to ten (10) days from their withdrawal to file notice of appeal from the 26 July 1984 judgment. To hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent Rule 58, N.C. Rules Civ. P. to wit: to give all interested parties a definite fixed time of *judicial determination* they can point to as the time of entry of judgment.

Landin Ltd. v. Sharon Luggage Ltd., 78 N.C. App. at 564, 337 S.E.2d at 689 (emphasis added). Therefore, in *Landin* the Court of Appeals affirmed the trial court's dismissal of the defendants' appeal for failure to give timely notice of appeal.

We find *Landin* distinguishable from the case at hand. Here, the party who made the motion listed under Rule 3 is not the same party that seeks to make the appeal. In order for the exception to the thirty day requirement under Rule 3 of the Appellate Rules of Procedure to have any effect, when a party makes a motion enumerated in the rule, the opposing party's time for appeal is tolled. If the motion is withdrawn, the *opposing* party has thirty days from the withdrawal to file an appeal. To hold otherwise would be to thwart the tolling provision of Rule 3 and to make the exception unmeaningful, as there would always be the possibility that the party who made the motion could withdraw that motion. Therefore, the trial judge erred in dismissing the defendant's appeal.

Reversed.

Chief Judge HEDRICK and Judge COZORT concur.

RONALD MACK MASON, SR. AND CAROL NIFONG MASON, PLAINTIFFS v. KENNETH YONTZ, T/D/B/A YONTZ & SONS, GENERAL CONTRACTORS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. HARVEY MCGEE AND MARTY LOWE, T/D/B/A M AND L MASONRY CONTRACTORS, THIRD-PARTY DEFENDANTS

No. 9022SC907

(Filed 7 May 1991)

Contracts § 156 (NCI4th)— negligent construction of a swimming pool—instruction on damages

The trial court erred in an action for the negligent construction of a swimming pool by instructing the jury on the negligence method of recovery rather than the contract method of recovery because the facts of the case do not fall within any of the four situations in which a promisee may sue a promisor for the negligent performance of a contract.

Am Jur 2d, Contracts § 732.

APPEAL by defendant and third-party plaintiff from judgment entered 15 February 1990 in DAVIDSON County Superior Court by *Judge Thomas W. Seay, Jr.* Heard in the Court of Appeals 20 February 1991.

Ted S. Royster, Jr., for plaintiff-appellees.

Stoner, Bowers and Gray, P.A., by Carl W. Gray, for defendant-appellant.

GREENE, Judge.

The defendant appeals from a judgment entered 15 February 1990 ordering the defendant to pay $18,000 to the plaintiffs on their claim for the negligent construction of a pool.

In May of 1987, the plaintiffs contracted with the defendant for the construction of a swimming pool on the plaintiffs' property

for $12,000. When the pool was roughly 80% completed, the plaintiffs paid the defendant the contract price. After the pool was filled with water, the plaintiffs noticed, among other things, that the pool leaked and was not level. The plaintiffs informed the defendant of their concerns, and the defendant made arrangements for repairs. However, the plaintiffs were not satisfied with the repair work and instructed the defendant to stop work.

The plaintiffs brought suit for negligent construction of the pool, breach of warranty, and fraud. After all of the evidence was presented, the plaintiffs chose to submit their case to the jury only on a tort theory with the issue being whether the defendant had negligently performed the contract. The jury returned a verdict for the plaintiffs and awarded them $18,000 as damages.

The dispositive issue is whether the trial court correctly instructed the jury as to the measure of damages.

At the charge conference, the defendant requested that the trial court instruct the jury that damages should be determined on a contract method of recovery. The trial court denied the defendant's request and instead submitted an instruction based on a negligence method of recovery. For the following reasons, the instruction on damages based on a negligence method of recovery was error requiring a new trial.

The parties agree in their pleadings that they entered into a contract for the construction of a pool. Generally, a breach of contract does not give rise to damages based on a negligence method of recovery even where the breach "was due to negligence or lack of skill." *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 81-83, 240 S.E.2d 345, 350-51 (1978); *see also Warfield v. Hicks*, 91 N.C. App. 1, 9-10, 370 S.E.2d 689, 694, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988) (claim for negligent construction of a house). However, such damages are appropriate for a breach of contract in four situations. A promisee may sue a promisor for the negligent performance of a contract where injury (1) occurs "to the person or property of someone other than the promisee," (2) occurs "to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee," (3) "was loss of or damage to the promisee's property, which was the subject of the

contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee," or (4) "was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor." *Roofing*, 294 N.C. at 82, 240 S.E.2d at 350-51. The facts of this case do not fall into any of these four situations. Accordingly, on remand, if the plaintiff is successful in showing a breach of contract or warranty, the proper measure of damages in this case would be either "(1) the difference between the value of the . . . [pool] as warranted or contracted for and its value as actually built," or "(2) the cost of repairs required to bring the property into compliance with the warranty or contract." *Warfield*, 91 N.C. App. at 11, 370 S.E.2d at 695.

New trial.

Judges WELLS and WYNN concur.

LORI A. FOX AND BOB G. BRINKLEY, CO-ADMINISTRATORS OF THE ESTATE OF SHERRY R. BRINKLEY, PLAINTIFFS v. KELLY E. KILLIAN AND PATRICIA GALE KILLIAN, DEFENDANTS

No. 9025SC959

(Filed 7 May 1991)

Automobiles and Other Vehicles § 672 (NCI4th)— agency of driver for defendant—sufficiency of complaint

Plaintiffs' complaint stated a claim against defendant for wrongful death on the theory that the negligent driver of an automobile involved in a collision was acting as the agent of defendant where it alleged that defendant had solicited the services of the driver to transport her daughter to elementary school; the driver's main purpose for operating his vehicle on the road where the accident occurred was to transport defendant's child to school; and the driver was the agent of defendant and was acting in furtherance of her business with her knowledge, permission and consent.

Am Jur 2d, Automobiles and Highway Traffic § 1085.

APPEAL by plaintiffs from order entered 17 April 1990 by *Judge J. Marlene Hyatt* in CATAWBA County Superior Court. Heard in the Court of Appeals 21 March 1991.

Corne, Pitts, Corne, Grant & Edwards, P.A., by Robert M. Grant, Jr. and Linda J. Hatcher, for plaintiff appellants.

Mitchell, Blackwell & Mitchell, P.A., by Hugh A. Blackwell and Keith W. Rigsbee, for defendant appellees.

PHILLIPS, Judge.

Plaintiffs' appeal is from an order dismissing their complaint against defendant Patricia Gale Killian under the provisions of Rule 12(b)(6), N.C. Rules of Civil Procedure, for failing to state a claim upon which relief can be granted. The action is for wrongful death and the complaint alleges that their intestate, Sherry R. Brinkley, died on 11 December 1987 as a result of a collision on Oxford School Road in Catawba County between her automobile and an automobile owned and negligently operated by Kelly E. Killian as the agent for defendant Patricia Gale Killian. No insurmountable bar to recovery appears on the face of the complaint, and its allegations are obviously sufficient to give defendant notice of the nature and substance of the claim, including "the transactions, occurrences or series of transactions or occurrences intended to be proved showing that the pleader is entitled to relief," as Rule 8(a)(1), N.C. Rules of Civil Procedure requires. The complaint against Patricia Gale Killian was dismissed because the court apparently was of the opinion that the allegations as to the agency principal relationship between Kelly E. Killian and Patricia Gale Killian are not sufficient to show that that relationship existed.

The agency relationship must be established, of course, before plaintiffs can recover of Patricia Gale Killian for the negligence of Kelly E. Killian, and with respect thereto the complaint alleges in pertinent part that: The collision occurred at 8:20 a.m.; appellee Patricia Gale Killian had "solicited the services of Defendant, Kelly Killian, to transport her daughter. . . to Oxford Elementary School"; that his "main purpose for operating his vehicle on Oxford School Road" was to transport appellee's child to Oxford Elementary School; and that "Kelly Killian was the agent of Patricia Gale Killian and was acting in furtherance of her business with her knowledge, permission and consent." Under our system of notice pleadings these allegations, in our opinion, adequately state a legally en-

forceable claim against the appellee based upon a principal agency relationship with Kelly E. Killian, the alleged tortfeasor.

In arguing that the allegations are insufficient and that all the facts establishing the relationship had to be alleged defendant quotes from *Braun v. Glade Valley School, Inc.*, 77 N.C.App. 83, 334 S.E.2d 404 (1985). But the quotation relied upon pertains to allegations of fraud, one of the few things that must be averred by stating the circumstances that constitute it "with particularity." Rule 9(b), N.C. Rules of Civil Procedure. Such particularity is not required of an agency allegation; all that is required is notice of the claim in compliance with Rule 8(a)(1) and the allegations meet that requirement. A complaint's function and purpose is not to prove but to allege; the sufficiency of the allegations does not depend upon a showing that they can be proved. Whether plaintiffs can produce evidence sufficient to prove that Kelly Killian was appellee's agent on the occasion involved is a question for another day. It is enough to resist defendant's motion that it does not appear to a certainty that plaintiffs cannot prove the allegation. *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970).

Reversed.

Judges PARKER and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 MAY 1991

ADAMS v. COLDWELL BANKERS No. 9028DC783	Buncombe (88CVD2773)	As to defendant Bowers—appeal dismissed. As to defendant Jackson & Associates—new trial. As to defendant Blue—judgment affirmed except as to attorney's fees. As to the award of attorney's fee—reversed
ANDREATOS v. WELLONS No. 903SC526	Carteret (89CVS458)	Dismissed
BAKER CONSTRUCTION CO. v. PHILLIPS No. 9021SC949	Forsyth (90CVS415)	Affirmed
BERNICKI v. DAVIS No. 9016SC519	Robeson (88CVS248)	No Error
BROWN v. BROWN No. 9026DC720	Mecklenburg (86CVD8092) (87CVD1247)	Affirmed
BROWN v. N.C. NATURAL GAS CORP. No. 905SC197 GLISSON v. N.C. NATURAL GAS CORP. No. 905SC198 LEBLANC v. N.C. NATURAL GAS CORP. No. 905SC199 GEBBIA v. N.C. NATURAL GAS CORP. No. 905SC200	New Hanover (89CVS1393) (89CVS2935) (89CVS536) (89CVS113)	Dismissed
CITY OF FAYETTEVILLE v. E & J INVESTMENTS, INC. No. 9012SC974	Cumberland (87CVS680)	Affirmed
CLARK v. WHITE No. 9014SC1009	Durham (88CVS4028)	Affirmed

ESTATE OF MINCEY v. HILEWITZ No. 9026SC1050	Mecklenburg (87CVS13094)	Appeal Dismissed
GADDY v. JONES No. 9028SC1093	Buncombe (88CVS3902)	No Error
HEDRICK v. LOWE No. 9019SC937	Randolph (89CVS671)	Reversed
HELTON v. TURNER CONSTRUCTION No. 9010IC876	Ind. Com. (818270)	Affirmed
IN RE AMBURN No. 9025DC517	Catawba (88J173)	Reversed
IN RE ESTATE OF NORTON No. 8916SC698	Scotland (86E36)	Affirmed
IN RE GOULDING No. 9026DC446	Mecklenburg (88-J-756) (88-J-757) (88-J-758)	Affirmed
McNEILL v. HICKS No. 903SC691	Carteret (89CVS1048)	Appeal Dismissed
MENNICUCCI v. N.C. DEPT. OF CONTROL & PUBLIC SAFETY No. 8910IC1023	Ind. Comm. (TA8714)	Affirmed
MYOKINETEX, INC. v. MXI GROUP, INC. No. 9010SC842	Wake (87CVS6538)	Affirmed
NCNB v. ROYSTER No. 8910SC426	Wake (87CVS6796)	Affirmed
NATIONS v. NATIONS No. 9027DC989	Gaston (88CVD2553)	Dismissed
NORRIS v. KOMENDA No. 9012DC292	Cumberland (89CVD346)	Affirmed
RIVERSIDE BLDG. SUPPLY, INC. v. CULLER No. 9021DC883	Forsyth (86CVD5950)	Affirmed
SAUNDERS v. BARNETT No. 8919SC386	Rowan (87CVS910)	Vacated
SCHRIER v. K-MART CORP. No. 9026SC902	Mecklenburg (89CVS15463)	Affirmed

STATE v. HARP No. 9018SC746	Guilford (89CRS53187)	No Error
STATE v. INMAN No. 9018SC952	Guilford (89CRS57248)	No Error
STATE v. McCORMICK No. 9016SC771	Robeson (88CRS11800)	Affirmed
STATE v. MYERS No. 8922SC1221	Iredell (88CRS4593) (88CRS4594)	No Error
STATE v. PHILLIPS No. 9015SC565	Alamance (89CRS23556)	No Error
STATE v. SELLARS No. 9017SC624	Rockingham (78CRS8783)	No Error
STATE v. SHEPPEARD No. 9019SC1106	Cabarrus (88CRS7133) (88CRS7134)	No Error
STATE v. SITTON No. 9029SC924	Transylvania (89CRS1926) (89CRS1927) (89CRS1929)	No Error
STATE v. SMALLWOOD No. 906SC800	Bertie (90CRS910) (90CRS913) (90CRS915) (90CRS918) (90CRS921) (90CRS523)	Affirmed in part, vacated in part & remanded for resentencing
STATE v. WETHERINGTON No. 9022SC1049	Iredell (89CRS16461) (89CRS16462)	No Error
STATE v. WILLIAMS No. 9026SC877	Mecklenburg (89CRS72681)	No Error
STATE ex rel. COMR. OF INS. v. N.C. RATE BUREAU No. 9010INS864	Ins. Comm. (535)	Affirmed in part; reversed in part and remanded
YANDLE-WITHERSPOON SUPPLY, INC. v. PRICE MECHANICAL, INC. No. 9026DC745	Mecklenburg (89CRD8953)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION

ADMINISTRATIVE LAW

APPEAL AND ERROR

APPEAL AND ERROR—Continued

§ 118 (NCI4th). Appealability of denial of summary judgment

The denial of a motion for summary judgment is a non-appealable interlocutory order. *Messer v. Laurel Hill Associates*, 307.

§ 119 (NCI4th). Appealability where summary judgment granted

The third party plaintiffs' appeal from an order of summary judgment dismissing their claim that, in buying their hotel, third party defendants agreed to assume their obligations to plaintiff under a lease of televisions for the hotel is premature since third party plaintiffs' liability to plaintiffs for the lease of televisions has not been established. *Telerent Leasing Corp. v. Barbee*, 129.

§ 134 (NCI4th). Orders relating to attorneys or representation by attorney

Although a substantial right of defendant was affected by the trial court's order denying defendant's motion to disqualify plaintiff's counsel because of confidential information allegedly obtained by counsel during representation of defendant in a previous matter, the order was not immediately appealable since the deprivation of that right will not injure defendant if not corrected before a final judgment. *Travco Hotels v. Piedmont Natural Gas Co.*, 659.

§ 149 (NCI4th). Preserving question for appeal; parties entitled to object

A directed verdict in favor of defendant on a claim for false imprisonment was affirmed because a party has no right to appeal from a judgment on his own motion. *Shillington v. K-Mart Corp.*, 187.

§ 206 (NCI4th). Tolling of time

The trial court erred by dismissing defendant's appeal; in order for the exception to the thirty-day requirement under Rule 3 of the Rules of Appellate Procedure to have any effect, the opposing party's time for appeal is tolled when a party makes a motion enumerated in that rule. *Landingham Plumbing and Heating v. Funnell*, 814.

§ 330 (NCI4th). Transcript generally

Appellants are encouraged to submit a written transcript rather than videotapes. *Shillington v. K-Mart Corp.*, 187.

§ 341 (NCI4th). Failure to properly assign error

Plaintiff's assignments of error were ineffective to challenge the sufficiency of the evidence to support the court's findings of fact where the assignments used the "clearly erroneous" rather than the proper "any competent evidence" standard. *Weston v. Carolina Medicorp, Inc.*, 370.

§ 342 (NCI4th). Cross-assignments of error by appellee

The Court of Appeals did not address defendants' purported cross-assignment of error where the error did not relate to the order from which appeal was taken by plaintiffs but related to a nonappealable order denying summary judgment. *Belmont Land and Investment Co. v. Standard Fire Ins. Co.*, 745.

§ 368 (NCI4th). Settling record on appeal by agreement

An appeal was dismissed where plaintiffs never served their proposed record on defendants, the record was not settled by agreement of the parties, and plaintiffs violated appellate rules requiring the filing of the record fifteen days after it has been settled and that the record include a copy of the agreement, notice, or orders settling the record. *Higgins v. Town of China Grove*, 570.

APPEAL AND ERROR—Continued

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

A directed verdict in favor of defendant on a claim for false imprisonment was affirmed where plaintiff presented no argument on appeal as to one claim and voluntarily dismissed the other. *Shillington v. K-Mart Corp.*, 187.

§ 447 (NCI4th). Issue first raised on appeal

The plaintiff in a legal malpractice action was not entitled to argue for the first time on appeal a theory of non-client third-party liability based upon nonprivity of contract between plaintiff and defendant. *Broyhill v. Aycock & Spence*, 382.

§ 510 (NCI4th). Frivolous appeals in appellate division

An attorney who filed a brief referring to two possible assignments of error without argument pursuant to *Anders v. California* was subject to sanctions denying him a fee for his gross disregard of the requirements of a fair presentation of the issues to the Court of Appeals where the attorney filed a defective record on appeal and failed to respond to an explicit directive by the Court of Appeals to cure the defects in the original record and to serve the addendum to the record on the defendant. *S. v. Bennett*, 797.

§ 559 (NCI4th). Trial court action at variance with law of case

The trial court erred by granting summary judgment for defendants in a medical malpractice action where summary judgment had previously been entered and the Court of Appeals had held that the evidence presented genuine issues of material fact and remanded for trial. *Metts v. Piver*, 98.

ARBITRATION AND AWARD

§ 19 (NCI4th). Particular actions as constituting waiver

Plaintiff waived its right to compel arbitration where defendants were prejudiced by plaintiff's use of judicial discovery procedures and defendants expended significant amounts of money in defense of plaintiff's suit before plaintiff belatedly demanded arbitration. *Prime South Homes v. Byrd*, 255.

§ 43 (NCI4th). Appeals generally

An order denying arbitration is immediately appealable. *Prime South Homes v. Byrd*, 255.

ASSAULT AND BATTERY

§ 17 (NCI4th). Sufficiency of evidence of assault with a deadly weapon

Evidence that the victim was hit with something harder than a fist and that human blood was found on defendant's shoes was sufficient to justify an inference that the assault was in part committed with defendant's feet, and there was thus no fatal variance between the indictment alleging assault with a deadly weapon, defendant's feet, and the offense proven. *S. v. Shubert*, 419.

§ 85 (NCI4th). Sufficiency of evidence of secret assault

There was sufficient evidence of a specific intent to kill to support a charge against defendant of secret assault by shooting the victim while hiding in the bushes. *S. v. Lyons*, 174.

ASSAULT AND BATTERY—Continued

§ 86 (NCI4th). Instructions on secret assault

Defendant is entitled to a new trial on a charge of secret assault where the indictment charged that defendant committed the crime "upon Douglas Jones and Preston Jones" and the trial court instructed that the jury could return a guilty verdict if it found that defendant committed the crime against one and/or the other. *S. v. Lyons*, 174.

§ 116 (NCI4th). Particular circumstances not requiring submission of lesser degrees of offenses

The trial court in prosecution for assault with a deadly weapon with intent to kill inflicting serious injury did not err in failing to instruct on the lesser offense of assault inflicting serious injury where the uncontradicted evidence showed that defendant's fists and feet were used as deadly weapons. *S. v. Shubert*, 419.

ATTORNEYS AT LAW

§ 44 (NCI4th). Proof of malpractice; burden and sufficiency

The trial court in a legal malpractice action erred in entering summary judgment for defendant attorneys where a genuine issue of material fact existed as to whether there was a contract of employment between plaintiffs and defendants such that defendants represented plaintiff in the real estate transaction at issue. *Broyhill v. Aycock & Spence*, 382.

§ 45 (NCI4th). Proof of malpractice; applicable standard of care

The trial court properly entered summary judgment for plaintiffs on the issue of defendants' legal malpractice where the forecast of uncontroverted evidence was that defendant attorney failed to estimate the value of plaintiff's claim against a negligent automobile driver, failed to make an independent evaluation of the driver's assets, failed to consult plaintiffs about the driver's offer of judgment and to inform them of the entry of judgment pursuant to Rule 68 until more than six months had passed, and failed to appeal the trial court's order which terminated plaintiffs' claims to underinsured motorist coverage. *Patrick v. Williams*, 355.

§ 49 (NCI4th). Professional malpractice; proof of damages

Plaintiffs' forecast of evidence in a legal malpractice action was sufficient to support submission of an issue as to punitive damages based on gross negligence by defendants in their representation of plaintiffs in a negligence action arising out of an automobile accident. *Patrick v. Williams*, 355.

§ 54 (NCI4th). Contingent fee contract

The trial court did not err by declaring void a contingent fee contract between plaintiff attorney and his client in an action for child support and alimony. *Townsend v. Harris*, 131.

§ 55 (NCI4th). Reasonableness of fee; burden of proof

The trial court erred in awarding plaintiffs attorney fees in an amount equal to 15% of the amount of their debt to defendants without making findings as to the actual hours expended collecting the debt and the reasonable value of those services. *West End III Limited Partners v. Lamb*, 458.

AUTOMOBILES AND OTHER VEHICLES

§ 45.6 (NCI3d). Competency of accident reports, photographs, charts and tables

The trial court did not err in admitting photographs of potholes in a railroad crossing taken five months after the date of an accident. *Sellers v. CSX Transportation, Inc.*, 563.

§ 144 (NCI4th). Driving while license suspended or revoked; sufficiency of evidence

Defendant's motion to dismiss a prosecution for driving with a revoked license was properly overruled. *S. v. Woody*, 576.

§ 179 (NCI4th). Canceling or threatening to cancel franchise

The trial court did not err by concluding that the Commissioner of Motor Vehicles correctly determined that the termination of petitioner's heavy duty truck franchise was for good cause and was undertaken in good faith. *Carolina Truck & Body Co. v. General Motors Corp.*, 262.

§ 613 (NCI4th). Contributory negligence of persons crossing in crosswalk or at intersection

The trial court did not err by concluding as a matter of law that the place where plaintiff crossed the highway at an intersection was neither a marked nor an unmarked crosswalk and in refusing to charge the jury on the right-of-way of a pedestrian in an unmarked crosswalk. *Tucker v. Bruton*, 117.

§ 640 (NCI4th). Contributory negligence in momentary stopping

A plaintiff whose motorcycle was struck from the rear by defendant was not contributorily negligent in leaving the back portion of his motorcycle about a foot into the traveled portion of the highway when he stopped beside the road to talk to a pedestrian. *Brown v. Wilkins*, 555.

§ 672 (NCI4th). Allegations of respondeat superior

Plaintiff's complaint stated a claim against defendant for wrongful death on the theory that the negligent driver of an automobile involved in a collision was acting as the agent of defendant in driving defendant's daughter to school when the accident occurred. *Fox v. Killian*, 819.

BAILMENT

§ 20 (NCI4th). Sufficiency of evidence

The trial court did not err by granting summary judgment for defendant in a wrongful death action arising from the severing of a cable being installed across a highway where plaintiff contended that defendant Coast to Coast was liable as a bailor for defects in the equipment but Coast to Coast was not liable under a bailment theory for the subcontractor's failure to exercise due care in the use of the bailed equipment. *Bramlett v. Overnite Transport*, 77.

BANKRUPTCY AND INSOLVENCY

§ 12 (NCI4th). Debts and liens discharged

The trial court had jurisdiction to decide whether defendant's bankruptcy discharged his contractual obligation to pay alimony. *Long v. Long*, 18.

A federal statute precludes a discharge in bankruptcy of debts to a spouse or child which are actually "in the nature of alimony, maintenance or support." *Ibid.*

CONSPIRACY – Continued

§ 32 (NCI4th). Sufficiency of evidence of conspiracy to assault

The evidence was sufficient to show that defendant conspired with two others to commit the offense of assault with a deadly weapon with intent to kill inflicting serious bodily injury. *S. v. Lyons*, 174.

§ 36 (NCI4th). Conspiracies involving drugs

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of conspiracies to sell and deliver marijuana and possession with intent to sell and deliver marijuana. *S. v. Morris*, 541.

CONSTITUTIONAL LAW

§ 88 (NCI4th). Freedom from private discrimination

Plaintiff doctor had no claim for discrimination under 42 U.S.C.S. § 1983 based on defendant hospital's revocation of plaintiff's staff privileges because no state action was involved in the hospital's actions. *Weston v. Carolina Medicorp, Inc.*, 370.

§ 105 (NCI4th). Property rights or interest protected by due process

A private, nonprofit hospital did not engage in state action and thus did not violate plaintiff doctor's due process rights in revoking his hospital staff privileges. *Weston v. Carolina Medicorp, Inc.*, 370.

§ 172 (NCI4th). Attachment of jeopardy; punishment for violation of administrative rule or regulation

A conviction under a federal statute followed by disciplinary sanctions by the Board of Chiropractic Examiners pursuant to a state statute for the same conduct does not violate the double jeopardy clause. *In re Cobb*, 466.

§ 248 (NCI4th). Discovery; production of witnesses' statements or reports

A defendant in a homicide prosecution was not denied due process by the delivery to him of an exculpatory statement the week the trial began. *S. v. Spivey*, 640.

§ 266 (NCI4th). Particular acts or circumstances as infringing on right to counsel

The trial court denied defendant his constitutional right to counsel of his choice by disqualifying defendant's attorney from representing him during pretrial proceedings on the ground that it appeared likely that the State would call the lawyer as a witness in the case. *S. v. Shores*, 473.

§ 287 (NCI4th). Failure to remove counsel at defendant's request

The trial court did not err in denying defendant's request to remove his court-appointed attorney and replace him with another attorney. *S. v. Shubert*, 419.

The trial court in a homicide prosecution did not err by denying defendant's motion for a new counsel where defendant did not show that his representation was deficient or that there was a reasonable possibility of a different outcome. *S. v. Piche*, 630.

§ 318 (NCI4th). Effective assistance of counsel on appeal generally

Defendant's counsel failed to satisfy the requirements of *Anders v. California* in an appeal from convictions for two narcotics offenses wherein the attorney filed a brief stating that he had reviewed the trial transcript and could find no basis for arguing reversible error where the attorney filed an inadequate record

COUNTIES

§ 124 (NCI4th). Immunity; governmental acts and functions

The trial court did not err in a wrongful death action against a Social Services employee arising from the murder of two alleged sexual abuse victims by their father by granting the county's motion to dismiss because the action should have been brought before the Industrial Commission. *Coleman v. Cooper*, 650.

COURTS

§ 6 (NCI4th). Requirements for jurisdiction

A district court judge had no statutory jurisdiction to enter an order *ex mero motu* requiring the Guilford County Sheriff's Department to transport delinquent or undisciplined juveniles who were in secured custody to and from court where no action or proceeding had been filed with the court. *In re Transportation of Juveniles*, 806.

§ 12 (NCI4th). Effect of lack of jurisdiction

A district court judge did not have the inherent power to enter an order requiring the Guilford County Sheriff's Department to transport delinquent or undisciplined juveniles to and from court where the court lacked jurisdiction in the first instance. *In re Transportation of Juveniles*, 806.

§ 83 (NCI4th). Jurisdiction to review rulings of another judge; motions to dismiss

The trial court was bound by another superior court judge's ruling that defendant had waived his right to a statutory speedy trial and could not dismiss the case, with or without prejudice, on that basis. *S. v. Lyons*, 174.

CRIMINAL LAW

§ 34 (NCI3d). Evidence of defendant's guilt of other offenses; inadmissibility

The trial court erred in permitting a defendant charged with first degree sexual offense against a minor child to be cross-examined about photographs depicting him in women's clothing, a dildo, lubricants, vibrators, and sexual books found in his home. *S. v. Hinson*, 29.

§ 34.7 (NCI3d). Admissibility of evidence of other offenses to show knowledge or intent

A defendant charged with first degree sexual offense against a minor child was properly cross-examined about a catalogue of condoms found in his home to show proof of intent, preparation, plan, knowledge and absence of mistake. *S. v. Hinson*, 29.

§ 43.4 (NCI3d). Gruesome, inflammatory or otherwise prejudicial photographs

Photographs of an assault victim taken at the hospital were properly admitted for illustrative purposes. *S. v. Shubert*, 419.

§ 50.1 (NCI3d). Opinion of expert

The trial court did not err in a sexual abuse prosecution by admitting the testimony of an expert in clinical and psychological education that the victim had been molested. *S. v. Speller*, 697.

The trial court did not err in a sexual abuse prosecution by admitting expert testimony that the mothers of abused children usually do not believe the child,

CRIMINAL LAW—Continued

§ 365 (NCI4th). Expression of opinion on evidence during trial; generally

The trial court did not err by not instructing the jury as requested that the person sitting at the defense table was not defendant because in so doing the court would have expressed an opinion on whether defendant in fact had multiple personalities. *S. v. Woodard*, 687.

§ 773 (NCI4th). Instructions on unconsciousness and intoxication

The trial court did not err by instructing the jury that the burden of persuasion was on defendant to show that he was unconscious at the time of the commission of the crimes. *S. v. Woodard*, 687.

§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence, generally

The trial court did not err by instructing the jury that defendant could be convicted of possession with intent to sell and deliver cocaine and sale and delivery of cocaine if it found that defendant had committed both offenses either individually or in concert. *S. v. Cotton*, 93.

§ 863 (NCI4th). Instruction on commitment for acquittal by reason of insanity

The trial court did not err by refusing to instruct the jury that defendant would be subject to a civil commitment proceeding if found not guilty because of unconsciousness based on a mental disorder. *S. v. Woodard*, 687.

§ 904 (NCI4th). Denial of right to unanimous verdict

Defendant in a prosecution for taking indecent liberties, first degree sexual offense, and rape was not denied a unanimous verdict because the jurors were free under the instructions to determine which of the various acts testified to by the victim would support the convictions. *S. v. Speller*, 697.

§ 1098 (NCI4th). Prohibition on use of evidence of element of offense as aggravating factor

The aggravating factor that defendant took advantage of a position of trust or confidence could not be used to increase a sentence for involuntary manslaughter when the manslaughter conviction could have been based either on the predicate crime of misdemeanor child abuse, which has as an element that the defendant was a parent of the victim, or on a finding that defendant committed a criminally negligent act. *S. v. Darby*, 297.

§ 1133 (NCI4th). Aggravating factors; position of leadership; facts indicative of defendant's role

The trial court did not err when sentencing defendant for trafficking in cocaine by finding as an aggravating factor that defendant had occupied a position of leadership in the commission of the offense. *S. v. Hayes*, 777.

§ 1216 (NCI4th). Mitigating factors; duress, coercion, threat, or compulsion generally

The trial court did not err when sentencing defendant for second degree murder and assault with a deadly weapon by failing to find in mitigation that defendant acted under a threat which significantly reduced his culpability. *S. v. Piche*, 630.

CRIMINAL LAW—Continued

§ 1259 (NCI4th). Mitigating factors; acknowledgment of wrongdoing; acknowledgment after arrest

The trial court did not abuse its discretion when sentencing defendant for second degree murder and assault by failing to find in mitigation that defendant voluntarily acknowledged wrongdoing where defendant made his statement after he was arrested. *S. v. Piche*, 630.

§ 1283 (NCI4th). Indictment charging defendant as an habitual felon

The trial court erred in sentencing defendant as an habitual felon on a conviction for sale of cocaine where the felonious sale of cocaine was not alleged as an underlying felony in the habitual felon indictment. *S. v. Moore*, 434.

§ 1284 (NCI4th). Ancillary nature of habitual felon indictment

The trial court erroneously sentenced defendant as an habitual felon where the underlying crime of possession of less than one gram of cocaine was a misdemeanor at the time it was committed. *S. v. Moore*, 434.

DAMAGES

§ 161 (NCI4th). Mitigation of damages; avoidable consequences

The trial court did not err in refusing to instruct the jury in an action for tortious interference with a covenant not to compete that plaintiff had to mitigate its damages where defendant failed to meet its burden of proving that plaintiff did not act reasonably. *United Laboratories, Inc. v. Kuykendall*, 484.

§ 178 (NCI4th). Generally; excessive or inadequate award

The trial court did not abuse its discretion in a negligence action by failing to grant defendant's motion for remittitur. *Kremer v. Food Lion, Inc.*, 291.

DEEDS

§ 24 (NCI3d). Covenants against encumbrances

Plaintiff could enforce a covenant against encumbrances in a deed to plaintiff and her husband as tenants by the entirety after the marriage failed and the husband's interest was conveyed to her. *Juhan v. Cozart*, 666.

A municipality's underground sewer line across property conveyed by warranty deed did not constitute an encumbrance within the covenant against encumbrances in the deed. *Ibid.*

§ 74 (NCI4th). Subdivision restrictive covenants; mobile homes

A structure placed on defendants' subdivision lot was a modular home permitted by the restrictive covenants rather than a prohibited double-wide mobile home. *Forest Oaks Homeowners Assn. v. Isenhour*, 322.

DIVORCE AND SEPARATION

§ 18 (NCI4th). Spousal support; child custody and support

Any procedural irregularities did not cause sufficient prejudice to defendant to reverse a partial summary judgment for plaintiff for arrearages in child support and alimony, increases in both, and specific performance. *Nisbet v. Nisbet*, 232.

DIVORCE AND SEPARATION—Continued

§ 137 (NCI4th). Date of evaluation

The trial court did not err in an equitable distribution action by allowing two experts to testify to the value of the personal and real property where those experts examined the property some eighteen months after the separation date. *Atkins v. Atkins*, 199.

§ 145 (NCI4th). Income and earning potential

The trial court erred in an equitable distribution action by not considering evidence that the wife earned a larger income than the husband. *Atkins v. Atkins*, 199.

§ 147 (NCI4th). Liabilities

There was sufficient evidence in an equitable distribution action to classify debts as marital where those funds were used to purchase various items for the home and clothing for the parties, but there was no evidence regarding the purposes for which money from another debt was expended and there was insufficient evidence to support classification of that debt as marital. *Atkins v. Atkins*, 199.

§ 148 (NCI4th). Post separation payments on marital debts

The trial court erred in an equitable distribution action by not considering evidence that the husband paid homeowner's insurance premiums on the marital home between the date of separation and the date of trial. *Atkins v. Atkins*, 199.

§ 155 (NCI4th). Maintenance or development of property after separation

The trial court erred in an equitable distribution action by not considering evidence that the husband was primarily responsible for maintaining and preserving the marital property between the date of separation and the date of trial. *Atkins v. Atkins*, 199.

§ 158 (NCI4th). Other factors

The trial court erred in an equitable distribution action by considering as a distributional factor that the husband had received an inheritance of significant value and by considering that the party with the burden of proof had the property appraised. *Atkins v. Atkins*, 199.

§ 162 (NCI4th). Agreements dividing property generally; separation agreements

The trial court erred in allowing plaintiff's motion for judgment on the pleadings on the issue of equitable distribution where there was a factual issue as to whether separation and property settlement agreements fully disposed of the parties' marital property. *Rabon v. Rabon*, 452.

§ 165 (NCI4th). Distributive awards generally

It was within the trial court's discretion in an equitable distribution action to refuse to allow the husband to pay a distributive award in installments. *Atkins v. Atkins*, 199.

§ 185 (NCI4th). Effect of divorce decree; rights under separation agreement

Plaintiff's failure to file a claim for alimony before divorce did not bar enforcement of a contractual alimony obligation contained in a separation agreement. *Long v. Long*, 18.

§ 290 (NCI4th). Which awards may be modified or terminated

The trial court did not err by increasing the amount of spousal support. *Rudisill v. Rudisill*, 280.

DIVORCE AND SEPARATION—Continued

§ 307 (NCI4th). Enforcement of alimony generally; exclusivity of statutory remedies

The trial court did not improperly order defendant to obtain a $1500.00 home equity loan in order to make a partial payment of his alimony arrearages but only made findings of the amount of defendant's assets and available credit, including a finding that he can borrow an additional $1500.00 under his home equity line of credit. *Edwards v. Edwards*, 706.

§ 377 (NCI4th). Visitation in general

There was ample evidence to support the trial judge's modification of a visitation schedule. *Savani v. Savani*, 496.

§ 394 (NCI4th). Child support; consideration of and findings as to particular matters in general

The trial court did not err in awarding prospective child support where there was evidence to support the court's findings of the parties' incomes and plaintiff's reduction in her expenses. *Savani v. Savani*, 496.

The trial judge did not abuse his discretion in a child support action by requiring defendant to provide plaintiff with information concerning accident and health insurance on the child. *Ibid.*

§ 397 (NCI4th). Child's needs; past and present expenses

There were sufficient findings to support a trial court's order of retroactive child support where plaintiff presented an affidavit of expenses and the court made a finding of the child's expenses based on the affidavit. *Savani v. Savani*, 496.

§ 399 (NCI4th). Parents' ability to support child; generally

A contention that defendant was financially unable to make child support payments called for in a separation agreement was relevant only to future payments and could be considered only after the defendant filed a motion in the cause. *Nisbet v. Nisbet*, 232.

§ 409 (NCI4th). Construction of separation agreements

The trial court did not err by granting a partial summary judgment for plaintiff on the issue of child support arrearages where defendant had alleged that plaintiff had violated provisions of the separation agreement. *Nisbet v. Nisbet*, 232.

§ 448 (NCI4th). Termination of support obligation generally

The trial court correctly set aside an order requiring defendant to support his disabled nineteen-year-old child even though plaintiff contended that defendant had agreed to do so in a consent judgment. *Jackson v. Jackson*, 574.

§ 520 (NCI4th). Counsel fees for enforcement of separation agreement

The trial court did not err in awarding attorney fees to plaintiff in an action for specific performance of the alimony provisions of a separation agreement where the parties specifically contracted for indemnification of such fees in their separation agreement. *Edwards v. Edwards*, 706.

§ 551 (NCI4th). Sufficiency of evidence and findings to support award of counsel fees generally

The trial court did not abuse its discretion in a child support action by awarding attorney fees to plaintiff. *Savani v. Savani*, 496.

EASEMENTS

§ 8.2 (NCI3d). Rights of servient tenement owner

Where an express conveyance of an easement was silent on whether the servient owner had a right to require the dominant owner to keep the gate across the easement closed, the relative advantage to the servient estate and the relative disadvantage to the dominant estate determined whether plaintiffs could require defendants to keep the gate closed and presented a question for the jury. *Williams v. Abernethy*, 462.

ELECTION OF REMEDIES

§ 2 (NCI3d). When plaintiff may waive one remedy and pursue the other

The trial court did not err in allowing plaintiff to elect between the punitive damages awarded on its claim for tortious interference with a contract and trebled damages for unfair trade practices. *United Laboratories, Inc. v. Kuykendall*, 484.

§ 4 (NCI3d). Acts constituting election and effect of election

Plaintiff's election of punitive damages for tortious interference with a covenant not to compete rather than trebled damages for unfair trade practices did not constitute an election against the Chapter 75 award in its entirety so as to prohibit the trial court from awarding attorney fees to plaintiff under G.S. 75-16.1 in the unfair trade practices action. *United Laboratories, Inc. v. Kuykendall*, 484.

EVIDENCE

§ 33 (NCI3d). Hearsay evidence in general

Respondent had adequate notice of the content of hearsay statements made by his children to child abuse experts for the statements to be admitted under Rule 803(24). *In re Krauss*, 112.

§ 36 (NCI3d). Admissions and declarations by agents or representatives

Statements by a grocery store manager after a customer's fall were admissible in the subsequent negligence action as a hearsay exception for admissions of the agent of a party opponent. *Kremer v. Food Lion, Inc.*, 291.

§ 50 (NCI3d). Testimony by medical experts in general

A chiropractor could properly testify as an expert in a personal injury action with regard to muscle strain pursuant to the 1989 amendment to G.S. 90-157.2. *Thomas v. Barnhill*, 551.

FRAUD

§ 12.1 (NCI3d). Nonsuit

Plaintiff's claim for fraud in the sale of a house with a sewer line under it was properly dismissed by summary judgment. *Juhan v. Cozart*, 666.

HOMICIDE

§ 21.7 (NCI3d). Sufficiency of evidence of second degree murder

There was substantial evidence from which the jury could conclude that an assault was likely to cause death or serious bodily injury. *S. v. Piche*, 630.

There was sufficient evidence of second degree murder. *S. v. Spivey*, 640.

HOMICIDE—Continued

§ 30 (NCI3d). Submission of guilt of lesser degrees of the crime generally

The trial court did not err by submitting second degree murder to the jury, even assuming that the evidence established all the elements of first degree murder. *S. v. Spivey*, 640.

§ 30.3 (NCI3d). Submission of guilt of lesser degrees of the crime; guilt of manslaughter; involuntary manslaughter

The trial court did not err in a homicide prosecution by denying defendant's request for a jury instruction on involuntary manslaughter where there was no evidence to negate the intentional killing element of second degree murder. *S. v. Piche*, 630.

HOSPITALS

§ 6 (NCI3d). Regulation of physicians and other personnel

Plaintiff doctor was not given the absolute discretion by G.S. 130A-143 to decide whether to divulge information about HIV test results, and defendants did not act wrongfully in revoking plaintiff's hospital staff privileges because of his failure to follow hospital policy on identifying persons infected with the HIV virus. *Weston v. Carolina Medicorp, Inc.*, 370.

INDICTMENT AND WARRANT

§ 17.3 (NCI3d). Variance; place, persons and names

The trial court did not err in not dismissing a prosecution for possession and sale of cocaine due to a fatal variance between the crime charged and the evidence presented as to the person to whom the cocaine was sold where the State produced substantial evidence that defendant knew that the person who bought the cocaine was acting as a middleman and that the cocaine was actually being sold to an undercover SBI agent. *S. v. Cotton*, 93.

INSURANCE

§ 6 (NCI3d). Construction and operation of parties generally; intention of parties

The trial court erred by granting summary judgment for plaintiff in an action to determine the beneficiary under an insurance policy where, although plaintiff argued that the failure to list it on the policy was an oversight, the policy is not ambiguous and does not include plaintiff on the list of insureds. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 59.

§ 69 (NCI3d). Protection against injury by uninsured or underinsured motorists generally

In reducing underinsured motorist coverage liability in a business automobile insurance policy by amounts paid to the insured as workers' compensation benefits, the amounts paid as compensation benefits are to be calculated after the compensation insurance carrier has been reimbursed by insurance proceeds from the tortfeasor's liability insurance carrier. *Manning v. Fletcher*, 392.

§ 79.1 (NCI3d). Automobile liability insurance rates; approval or disapproval by Commissioner of Insurance

An order of the Commissioner of Insurance refusing to release funds placed in escrow pursuant to G.S. 58-36-25 pending judicial review of an automobile rate

case was interlocutory and not immediately appealable. *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 809.

A decision of the Court of Appeals vacating an order disapproving an automobile insurance rate filing and remanding the case for additional findings did not constitute a "final determination" requiring the Commissioner of Insurance to distribute funds placed in escrow pursuant to G.S. 58-36-25. *Ibid.*

The N.C. Rate Bureau has standing in its capacity as the representative of its members to appeal an order of the Commissioner of Insurance refusing to distribute funds placed in escrow in an automobile insurance rate case. *Ibid.*

§ 82 (NCI3d). Vehicles covered by policy

The trial court properly denied insurance coverage where William Baker was a covered person under his wife's policy, but his car was not a covered automobile. *Kruger v. State Farm Mut. Auto. Ins. Co.*, 788.

§ 87.1 (NCI3d). "Omnibus" clause in automobile policy; drivers insured

The twenty-year-old driver of a vehicle owned by his father was a resident of his father's household and was thus a family member covered under an automobile policy issued to the father where he had been living in his father's house for three weeks as a condition of his pretrial release from jail on a murder charge. *Newell v. Nationwide Mut. Ins. Co.*, 622.

§ 87.2 (NCI3d). Proof of permission to use vehicle

An exclusion of coverage under an automobile liability policy for "any person" using the vehicle without a reasonable belief that he was entitled to do so did not apply to a family member. *Newell v. Nationwide Mut. Ins. Co.*, 622.

INTEREST

§ 2 (NCI3d). Time and computation

No judge is authorized, pursuant to a motion made in the cause, to order the payment of prejudgment interest or postjudgment interest on a judgment entered more than four years before the motion in the cause is made. *Roach v. Smith*, 482.

INTOXICATING LIQUOR

§ 24 (NCI3d). Dram shop

The trial court erred by dismissing plaintiffs' claim where plaintiffs alleged that a minor had consumed beer while under age at a party hosted by defendants before driving across a yellow double line into plaintiffs' vehicle; the statutory scheme as set out in Chapter 18B of general statutes prohibits any sale, possession or giving of alcohol or malt beverages to an underaged person or aiding and abetting the sale or possession. However, plaintiffs did not state a claim under a common law theory of negligence. *Hart v. Ivey*, 583.

JUDGES

§ 5 (NCI3d). Disqualification of judges

The trial judge did not err by refusing to recuse himself in an action for child support, attorney's fees and modified visitation where the judge had presided

over earlier hearings between the parties and had shared office space with plaintiff's counsel when in private practice. *Savani v. Savani*, 496.

JUDGMENTS

§ 2 (NCI3d). Time and place of rendition

The trial court's attempt on 6 April 1990 to enter an order *nunc pro tunc* to 17 October 1988 was ineffective where judgment was not rendered on 17 October 1988. *Long v. Long*, 18.

§ 54 (NCI3d). Payment and discharge generally

When payment on a judgment which has accumulated interest is not sufficient to satisfy both the principal and interest, the clerk should first allocate the payment to the interest due and then allocate the remainder to the principal. *Morley v. Morley*, 713.

§ 55 (NCI3d). Right to interest

A superior court judge had jurisdiction to rule on plaintiff's motion for a determination of the amount of interest due on a judgment against defendant by answering a question of law as to how the clerk of superior court should allocate payments to principal and interest. *Morley v. Morley*, 713.

LIBEL AND SLANDER

§ 10 (NCI3d). Particular communications as qualifiedly privileged

Plaintiff failed to show that defendant employer exceeded the scope of its qualified privilege by communicating the details of his discharge for suspected drug involvement to all employees in the Greensboro facility and to those away at the Cincinnati facility. *Harris v. Procter & Gamble*, 329.

§ 16 (NCI3d). Sufficiency of evidence and nonsuit

The trial court correctly granted a directed verdict for defendant in an action for slander arising from plaintiff's arrest for looting and trespass following a tornado. *Shillington v. K-Mart Corp.*, 187.

LIMITATION OF ACTIONS

§ 4 (NCI3d). Accrual of right of action and time from which statute begins to run in general

The statute of limitations applicable to an action for contribution among co-indemnitors or sureties is G.S. 1-52(2), which requires the action to be brought within three years. *Finch v. Barnes*, 733.

The trial court erred by not granting defendant's motion to dismiss an action for contribution among sureties. *Ibid.*

§ 12.3 (NCI3d). Amendment of process and new parties

The statute allowing a defendant to be sued in a fictitious name does not toll the statute of limitations upon the filing of a suit against a "John Doe" defendant so as to permit the complaint to be amended to substitute a specifically named defendant after the applicable limitation period has expired. *Huggard v. Wake County Hospital System*, 772.

MALICIOUS PROSECUTION

§ 13 (NCI3d). Sufficiency of evidence, nonsuit and directed verdict generally

The trial court did not err by granting a directed verdict in favor of defendant on plaintiff's malicious prosecution claim arising from plaintiff's arrest for looting and trespass following a tornado. *Shillington v. K-Mart Corp.*, 187.

MASTER AND SERVANT

§ 10.2 (NCI3d). Actions for wrongful discharge

The trial court properly granted defendant's motion for dismissal of plaintiffs' action for wrongful discharge where plaintiffs' pay was reduced below the minimum wage, because there was a statutory remedy. *Amos v. Oakdale Knitting Co.*, 782.

§ 11.1 (NCI3d). Competition with former employer; covenants not to compete

Defendant employer engaged in an unfair trade practice by paying legal fees and costs to induce defendant employee to breach his covenant not to compete with his former employer, by offering to subsidize the income, draw, and expenses of defendant employee in the event of an injunction, and by using defendant employee's customer information to divert accounts from his former employer. *United Laboratories, Inc. v. Kuykendall*, 484.

§ 35.2 (NCI3d). Admissibility and sufficiency of evidence; questions of law and fact

The trial court properly granted a directed verdict for defendant on a claim for negligent supervision following plaintiff's arrest for looting and trespass following a tornado. *Shillington v. K-Mart Corp.*, 187.

§ 50 (NCI3d). Independent contractors

A company which owned houses under construction in a subdivision and which hired a partnership not covered by workers' compensation insurance to do framing work on the houses was not liable under G.S. 97-19 for workers' compensation for an employee of the partnership injured on the job since the company was not a principal contractor, the partnership was an independent contractor, and the company thus did not sublet any contract for performance of the work to the partnership. *Mayhew v. Howell*, 269.

§ 68 (NCI3d). Occupational diseases

Any reduction in claimant's capacity to earn wages was the result of her occupational disease, dermatitis, where the parties stipulated that claimant had an occupational disease and all of the evidence supported that conclusion. Personal sensitivity applies to those situations where an occupational disease does not exist. *Tyndall v. Walter Kidde Co.*, 726.

A machinist claiming dermatitis failed to prove any reduction in her earning capacity. *Ibid.*

§ 69 (NCI3d). Amount of workers' compensation generally

Defendant employer was not entitled under G.S. 97-42 to a credit or setoff against a temporary total disability award for accumulated compensatory time, vacation and sick leave benefits paid to plaintiff during the period of his disability. *Estes v. N.C. State University*, 52.

MASTER AND SERVANT—Continued

§ 77.1 (NCI3d). Grounds for modification of award; change of conditions or circumstances

The Industrial Commission could modify its previous award for total disability because of changed circumstances where the earlier award was based on plaintiff's depression from permanent partial disability to both legs, the earlier award was limited to the plaintiff's disabling depression, and the evidence indicated that plaintiff's depression was no longer of disabling severity. *Hill v. Hanes Corp.*, 46.

§ 77.2 (NCI3d). Modification of award; time for application

Where plaintiff was originally awarded both compensation and medical expenses but was awarded only continued medical payments upon her first claim for a change of condition, plaintiff's second change of condition claim was not required by G.S. 97-47 to be filed within two years from the last payment of compensation pursuant to the original award and was timely where it was filed within twelve months from the date of payment of compensation of the last medical bills pursuant to the first change of condition award. *Clugh v. Lakewood Manor*, 757.

§ 91 (NCI3d). Filing of claim generally

Defendants were equitably estopped from asserting plaintiff's failure to file a timely claim where plaintiff was at all times represented by counsel of her choice, and defendants neither directly nor indirectly told plaintiff that they would take care of her claim. *Reinhardt v. Women's Pavilion*, 83.

§ 91.1 (NCI3d). What constitutes filing of claim

A letter from defendant insurance carrier to the Industrial Commission did not constitute the filing of a workers' compensation claim because it made no demand for compensation and did not request a hearing. *Reinhardt v. Women's Pavilion*, 83.

§ 93.3 (NCI3d). Expert evidence

The testimony of an expert in labor market analysis with particular emphasis on job analysis and evaluation and compensation rates was admissible in a workers' compensation action arising from claimant machinist's dermatitis. *Tyndall v. Walter Kidde Co.*, 726.

§ 96.6 (NCI3d). Specific instances where findings not supported by evidence

There was no competent evidence to support the Industrial Commission's finding that plaintiff was "suffering no significant back or leg discomfort," and the case is remanded for a finding as to whether plaintiff was permanently and totally disabled. *Cratt v. Perdue Farms, Inc.*, 336.

§ 108.1 (NCI3d). Unemployment compensation; effect of misconduct

Respondent was not discharged for misconduct or substantial fault connected with her work so as to disqualify her for unemployment compensation where she continued to leave her work station after being requested not to do so, she left to deliver phone messages and was in pursuit of her job duties when she did so, and she was not aware that her job was jeopardized by this conduct. *Guilford County v. Holmes*, 103.

§ 114 (NCI3d). Occupational Safety and Health Act

In order to establish the impossibility defense in an OSHA proceeding based on economic infeasibility, the employer must show that the safety devices are

extremely costly and that such costs would financially imperil the employer's existence. *Brooks v. Austin Berryhill Fabricators*, 212.

A decision by the OSHA Review Board that it was technologically and economically feasible to place guards on the points of operation of three press brakes in respondent's custom metal fabrication shop and that respondent failed to prove the defense of impossibility was supported by substantial evidence. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 32.1 (NCI3d). Restriction of deficiency judgments respecting purchase-money mortgages and deeds of trust

When a mortgagee holding two mortgages on the secured property purchases at its own foreclosure sale, its ability to successfully maintain a deficiency action is governed by G.S. 41-21.36 regardless of whether it brings the deficiency action to collect on its first or second mortgage. *NCNB v. O'Neill*, 313.

When a mortgage on partnership property is foreclosed, each general partner has a sufficient property interest to invoke the protection of the anti-deficiency statute. *Ibid.*

MUNICIPAL CORPORATIONS

§ 2.1 (NCI3d). Compliance with statutory requirements for annexation

Petitioners failed to show that the metes and bounds description of a proposed annexation published in the newspaper varied from the metes and bounds description contained in the annexation ordinance. *Matheson v. City of Asheville*, 156.

§ 2.3 (NCI3d). Compliance with other requirements for annexation

A city was not required to extend the boundaries of a proposed annexation area to include ridge lines where to do so would have defeated the city's compliance with other mandatory portions of the annexation statute. *Matheson v. City of Asheville*, 156.

§ 2.4 (NCI3d). Remedies to attack annexation or annexation proceedings

The trial court did not err in allowing opinion testimony of the fire chief that the city could provide adequate fire protection to an annexed area, in allowing into evidence letters that the chief wrote in an effort to negotiate a contract with a volunteer fire department for provision of fire protection services to the annexed area, or in refusing to allow a lay witness to testify as to whether there could be an adequate response by city fire trucks to a certain destination in a hypothetical situation. *Matheson v. City of Asheville*, 156.

§ 2.6 (NCI3d). Extension of utilities to annexed territory

A city's plans to provide fire protection services for an annexed area met statutory requirements where they included plans to negotiate a contract with a volunteer fire department and alternative plans to provide services from its existing facilities. *Matheson v. City of Asheville*, 156.

A city's plan to increase its police force proportional to the increase in the population attributable to annexation was a sufficiently sophisticated plan for the provision of police protection to meet statutory requirements. *Ibid.*

Petitioners failed to show that a city's plan to provide garbage collection services to persons in the area to be annexed who lived on city or state streets

NARCOTICS – Continued

§ 4.2 (NCI3d). Sufficiency of evidence in cases involving sale to undercover narcotics agent

Evidence tending to show that a third person acted as a go-between to effect the sale of cocaine by defendant to an undercover officer was sufficient for the jury in a prosecution for sale of cocaine. *S. v. Moore*, 434.

§ 4.3 (NCI3d). Sufficiency of evidence of constructive possession; cases where evidence was sufficient

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of conspiracies to sell and deliver marijuana and possession with intent to sell or deliver marijuana. *S. v. Morris*, 541.

§ 4.5 (NCI3d). Instructions generally

The trial court erred in instructing the jury that simply moving cocaine from inside the house to the porch constituted trafficking in cocaine by transportation. *S. v. Greenidge*, 447.

NEGLIGENCE

§ 30.1 (NCI3d). Particular cases where nonsuit is proper

The trial court did not err by granting defendant's motion for summary judgment in a wrongful death action arising from the severing of a cable being installed across a highway. *Bramlett v. Overnite Transport*, 77.

§ 57.5 (NCI3d). Defective or obstructed floors

The trial court did not err by denying defendant's motions for a directed verdict and judgment n.o.v. in an action arising from plaintiff's fall in defendant's grocery store. *Kremer v. Food Lion, Inc.*, 291.

The trial court did not err by not setting aside a negligence verdict where there was sufficient evidence to support the verdict. *Ibid.*

§ 58 (NCI3d). Nonsuit for contributory negligence of invitee

The trial court did not err by denying defendant's motions for a directed verdict and judgment n.o.v. based on plaintiff's contributory negligence in an action arising from plaintiff's fall in defendant's grocery store. *Kremer v. Food Lion, Inc.*, 291.

PARENT AND CHILD

§ 2.2 (NCI3d). Child abuse

The trial court's finding that respondent's two children were abused and neglected was supported by testimony by expert witnesses and the children's foster mother that the children told them that respondent had tied the children up and had sexually abused them. *In re Krauss*, 112.

The trial court did not err in placing respondent's children with the DSS without finding that DSS was fit to maintain custody and that it was in the best interest of the children to remain with DSS where the court had made such findings in earlier proceedings. *Ibid.*

The trial court did not err in allowing DSS to amend its petition to allege that both children were neglected and that both children were abused. *Ibid.*

PARTNERSHIP

§ 4 (NCI3d). Rights and liabilities of partners as to third persons ex contractu

When a mortgage on partnership property is foreclosed, each general partner has a sufficient property interest to invoke the protection of the anti-deficiency statute. *NCNB v. O'Neill*, 313.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 6 (NCI3d). Revocation of licenses generally; grounds

The superior court did not err in affirming the Board of Nursing's determination that petitioner violated statutory standards in connecting a patient to a monitor in a way that resulted in electrical shock to the patient. *In re Cafiero v. N.C. Board of Nursing*, 610.

§ 6.2 (NCI3d). Revocation of licenses generally; evidence

The Board of Nursing, when considering the revocation of a nursing license, was not required under the particular facts of the case to establish a standard of care nor to apply a statewide standard of care because the dangers of live electrical cords are within the realm of common knowledge. *In re Cafiero v. N.C. Board of Nursing*, 610.

§ 16 (NCI3d). Presumptions; applicability of doctrine of res ipsa loquitur

The doctrine of res ipsa loquitur was inapplicable in an action to recover for an unrepairable tear received by plaintiff in the rear wall of the uterus while defendant obstetrician was undertaking to deliver her child by caesarean section. *Grigg v. Lester*, 332.

PLEADINGS

§ 10.1 (NCI3d). Affirmative defenses; new matter in avoidance

Defendants did not waive their right to argue that the plaintiff was not an insured or a beneficiary in an action to determine an insurance beneficiary by failing to raise the matter as an affirmative defense in their answer. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 59.

PRINCIPAL AND SURETY

§ 10 (NCI3d). Private construction bonds

The statute of limitations applicable to an action for contribution among co-indemnitors or sureties is G.S. 1-52(2), which requires an action to be brought within three years. *Finch v. Barnes*, 733.

The trial court erred by not granting defendant's motion to dismiss an action for contribution among sureties. *Ibid.*

The statute of limitations for a subcontractor's claim against the surety on a bond filed by the general contractor discharging the subcontractor's lien under G.S. 44A-16(6) did not begin to run when the lien was discharged by the filing of the bond but began to run when the amount of the lien claimed was established by an arbitrator's award. *George v. Hartford Accident and Indemnity Co.*, 761.

A judgment obtained by a subcontractor against the general contractor establishing the amount of the subcontractor's lien for labor and materials was conclusive and binding on the surety on the bond filed by the general contractor discharging the lien under G.S. 44A-16(6). *Ibid.*

PROCESS

§ 4 (NCI3d). Proof of service

Even if summons did not issue within five days of filing of the complaint, the second summons commenced a new action on the date it was issued. *Duncan v. Duncan*, 107.

§ 14 (NCI3d). Service of process on foreign corporation by service on Secretary of State

The trial court did not err in a products liability action by denying defendant's motion to dismiss under G.S. 1A-1, Rule 12(b)(2). *Warzynski v. Empire Comfort Systems*, 222.

§ 14.3 (NCI3d). Sufficiency of evidence; contacts within this state

The trial court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction where defendant was a South Carolina corporation which entered into a contract with a North Carolina corporation regarding a construction contract on a South Carolina military base. *Combustion Sys. Sales v. Hatfield Htg. and Air Conditioning*, 751.

PUBLIC OFFICERS

§ 9 (NCI3d). Personal liability of public officers to private individuals

The trial court erred by granting summary judgment for a Social Services employee based on the public official defense in a wrongful death action arising from the murder of two children by their father while a sexual abuse investigation was in progress. *Coleman v. Cooper*, 650.

QUASI CONTRACTS AND RESTITUTION

§ 2.1 (NCI3d). Sufficiency of evidence in action on implied contract

The trial court erred in awarding plaintiff $25,200.00 for breach of an implied contract for her services during the fourteen years the parties cohabited together, held themselves out as married, jointly remodeled defendant's mobile home, and began a mobile home park on land defendant owned prior to cohabitation. *Thomas v. Thomas*, 127.

RAILROADS

§ 5.2 (NCI3d). Defects in and obstructions of crossings

The trial court properly instructed the jury that a railroad's breach of its duty under a statute and a city ordinance to maintain its crossing by failing to repair potholes at a crossing would constitute negligence per se. *Sellers v. CSX Transportation, Inc.*, 563.

§ 5.3 (NCI3d). Contributory negligence; duty of operators of vehicles

The evidence did not disclose contributory negligence by plaintiff in an action to recover for injuries sustained when plaintiff's moped struck a pothole at defendant railroad's crossing. *Sellers v. CSX Transportation, Inc.*, 563.

RAPE AND ALLIED OFFENSES

RETIREMENT SYSTEMS

§ 4 (NCI3d). Contributions

The trial court properly found that defendant town funded the mandatory two percent contribution to police officers' Supplemental Retirement Income Plan from a three and one-half percent pay increase for town employees in violation of G.S. 143-166.50. *Abeyounis v. Town of Wrightsville Beach*, 341.

RULES OF CIVIL PROCEDURE

§ 4 (NCI3d). Process

The trial court correctly held in a products liability action that a Spanish heater manufacturer was subject to the jurisdiction of North Carolina Courts where the court had before it an affidavit of addressing and mailing from the clerk of court and an affidavit from a representative of Federal Express that complied with the requirements of G.S. 1-75.10(4). *Warzynski v. Empire Comfort Systems*, 222.

§ 8.2 (NCI3d). General rules of pleadings; answer

Plaintiff impliedly consented to the late filing of defendant's answer by relying in the trial court on defendant's answer in asking the court to grant a divorce. *Rabon v. Rabon*, 452.

§ 11 (NCI3d). Signing and verification of pleadings

The trial court was not deprived of jurisdiction to determine the appropriateness of attorney fees as a sanction because the plaintiffs filed a voluntary dismissal with prejudice. *Bryson v. Sullivan*, 1.

The discretionary decision of whom to sanction generally depends upon the type of sanctionable conduct which has occurred, namely law, fact, or improper purpose. *Ibid.*

Defendants were not entitled to sanctions against plantiff's attorney where defendants never requested sanctions nor did the trial court upon its own initiative seek sanctions. *Ibid.*

The denial of sanctions against the clients based upon knowledge of legal bars to the claims asserted was remanded for determination of whether the clients undertook a reasonable inquiry into the law and, based upon the results of the inquiry, whether plaintiffs reasonably believed that their complaint was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Ibid.*

A trial court order denying Rule 11 sanctions against the client for filing a pleading for an improper purpose was vacated and remanded where the trial court apparently determined that reliance on counsel precluded an order of sanctions based upon improper purpose. *Ibid.*

The trial court did not err in an action for conversion of stock by denying defendant's motion for attorney fees as a Rule 11 sanction where review of the complaint, in conjunction with the answer, counterclaim and reply, reveals a complaint presenting facially plausible claims. *dePasquale v. O'Rahilly*, 240.

Plaintiff's voluntary dismissal did not deprive the trial court of jurisdiction to impose Rule 11 sanctions upon him. *Higgins v. Patton*, 301.

Defendants were entitled to request Rule 11 sanctions against plaintiffs' attorney as signer of the complaint and against both plaintiffs as represented parties regardless of whether plaintiffs signed the complaint. *Ibid.*

RULES OF CIVIL PROCEDURE—Continued

The trial court erred in imposing sanctions on the erroneous assumption that a complaint which is well grounded in fact and warranted by the existing law may nonetheless be filed for an improper purpose. *Ibid.*

To impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the Rule 11 legal or factual certification requirements. *Ibid.*

Plaintiffs' complaint met the legal certification requirement of Rule 11 where it facially presented a plausible claim for trespass, but it was impossible to determine from the record whether the complaint met the factual certification requirement of Rule 11 where the trial court did not determine whether plaintiff undertook a reasonable inquiry into the facts or whether plaintiff reasonably believed that his position was well grounded in fact. *Ibid.*

§ 13 (NCI3d). Counterclaim and crossclaim

Plaintiff insurer's claim against the insured for reimbursement of expenses incurred by it in defending a third party's claim arising from a plane crash was not a compulsory counterclaim required to be asserted in a previous action to determine whether plaintiff's policy provided coverage for the third party's claim. *U.S. Fire Ins. Co. v. Southeast Airmotive Corp.*, 470.

§ 14 (NCI3d). Third-party practice

The trial court in a divorce and equitable distribution action properly dismissed defendant's third-party complaint against a bank from which plaintiff allegedly fraudulently obtained an equity line of credit secured by a deed of trust on the marital home. *McCollum v. McCollum*, 347.

§ 15 (NCI3d). Amended and supplemental pleadings generally

The trial court did not err in denying defendants' motion to amend their answer to deny one of plaintiff's crucial allegations which the original answer had admitted where defendants filed the motion almost a full year after filing the answer and after both parties had conducted extensive discovery. *Patrick v. Williams*, 355.

§ 39 (NCI3d). Trial by jury or by the court

The trial court did not err by denying defendant and third-party plaintiff's motion for a trial by jury where the demand for jury trial was not timely. *Dick Parker Ford, Inc. v. Bradshaw*, 529.

§ 41 (NCI3d). Dismissal of action; generally

The trial court erred in a nonjury trial by granting defendant's motion for a directed verdict where the appropriate motion was for involuntary dismissal and the judgment contained only a bare conclusion, insufficient for an involuntary dismissal. *Mashburn v. First Investors Corp.*, 560.

§ 41.1 (NCI3d). Voluntary dismissal; dismissal without prejudice

A Rule 41(a)(1) notice of voluntary dismissal could not be amended pursuant to a Rule 15(a) motion. *Carter v. Clowers*, 247.

Plaintiff's voluntary dismissal of his equitable distribution claim was not invalid because it was entered without notice to defendant where defendant had filed no pleadings at the time plaintiff filed the voluntary dismissal. *Carter v. Carter*, 440.

Where plaintiff sought to set aside a separation and property settlement agreement and equitable distribution of the marital property, and defendant joined in

driver where defendants' answer specifically admitted allegations in plaintiffs' complaint with regard to the driver's negligence. *Patrick v. Williams*, 355.

§ 58 (NCI3d). Entry of judgment

Entry of judgment occurred when the jury returned a verdict in open court for a sum certain and the clerk made a notation of "jury verdict" in the official minutes, not when the judgment was later signed by the trial judge, and defendant's notice of appeal filed 32 days after the jury verdict was untimely. *Reed v. Abrahamson*, 318.

Entry of judgment did not occur on 2 April 1990 when the trial judge announced his ruling in open court and the clerk noted the ruling in the minutes but occurred on 30 April when the trial judge signed the written order that had been drafted by respondent's counsel at the judge's direction, and petitioner's notice of appeal filed on 22 May 1990 was thus timely. *Cobb v. Rocky Mount Board of Education*, 681.

§ 60 (NCI3d). Relief from judgment or order

Plaintiff's Rule 15(a) motion to amend a notice of voluntary dismissal of both defendants with prejudice to show a dismissal of one defendant without prejudice was properly treated as a Rule 60(b) motion for relief from a final "proceeding," and relief was ordered on the ground that the dismissal of one defendant with prejudice was an inadvertent mistake made by plaintiff's counsel due to excusable neglect. *Carter v. Clowers*, 247.

The court could not nullify one of the legal effects of a divorce decree, i.e., preclusion of adjudication of any equitable distribution claim, while leaving the divorce judgment itself intact. *Carter v. Carter*, 440.

§ 60.2 (NCI3d). Grounds for relief from judgment or order

The trial judge did not err by refusing to set aside a judgment approving a settlement agreement where a structured settlement was agreed upon but the annuity company used the wrong birth date and the cost of the annuity was more than the amount projected by defendants. *Goodwin v. Cashwell*, 275.

The trial court's miscalculation of defendant's expenses in an order of specific performance of the alimony provisions of a separation agreement was not a mere clerical error which could be corrected under Rule 60(b) without affecting the result of the order. *Edwards v. Edwards*, 706.

SALES

§ 10.1 (NCI3d). Actions for purchase price

The trial court correctly granted summary judgment for defendants on a counterclaim for specific performance where defendants counterclaimed for full performance under a clause of the contract. *Martin v. Sheffer*, 802.

§ 22.3 (NCI3d). Cases involving heaters

The trial court erred by granting summary judgment for defendant Empire based on the sealed container defense in a products liability action involving a gas heater. *Warzynski v. Empire Comfort Systems*, 222.

SEARCHES AND SEIZURES

§ 11 (NCI3d). Search and seizure of vehicles

The trial court properly denied defendant's motion to suppress in an action for driving with a revoked license where no evidence pertinent to defendant's conviction was obtained from the stop. *S. v. Woody*, 576.

STATE

§ 4 (NCI3d). Actions against the State; sovereign immunity

A dismissal for lack of personal jurisdiction applied to Fayetteville State University and the named defendants in their official capacities under the sovereign immunity doctrine. *Locus v. Fayetteville State University*, 522.

§ 12 (NCI3d). State Personnel Commission authority and actions

The State Personnel Commission was arbitrary and capricious in its decision not to award back pay to respondent employee who had been dismissed without just cause and without following proper procedure. *N.C. Dept. of Transportation v. Davenport*, 476.

TAXATION

§ 22 (NCI3d). Property of religious, charitable, and educational institutions

The procedures used by a county tax office in revoking petitioner's tax exempt status for church property violated the Machinery Act. *In re Appeal of Church of the Creator*, 507.

§ 25.11 (NCI3d). Judicial redress

The County's notice of appeal from a decision of the Property Tax Commission was not timely under G.S. 105-345, which clearly establishes that the appealing party has 30 days after the entry of the final order or decision to file its notice of appeal and exceptions. *In re Appeal of General Tire*, 38.

TORTS

§ 3.1 (NCI3d). Right of indemnity or contribution

A plaintiff who was injured in an automobile accident arising from the negligence of defendant's employee during the course of his employment and who settled his claim against the employee was not entitled to recover against defendant employer under the Uniform Contribution among Tort-feasors Act. *Yates v. New South Pizza, Ltd.*, 66.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

The trial court properly granted a directed verdict on a claim for intentional infliction of emotional distress arising from plaintiff's arrest for trespass and looting following a tornado. *Shillington v. K-Mart Corp.*, 187.

TRUSTS

§ 4 (NCI3d). Charitable trusts; construction, operation and modification

The trial court erred in a declaratory judgment action to determine the appropriate distribution of trust funds by applying the *cy pres* doctrine and failing

to conclude that Barium Springs is the proper beneficiary where the testator's intention was clearly that the funds were to go to Barium Springs in the event that Davis Hospital ceased to operate and the will does not specify any condition requiring Barium Springs to continue to function in the identical capacity in which it operated as of the death of the testator. *Trustees of Wagner Trust v. Barium Springs Home for Children*, 136.

§ 4.1 (NCI3d). Cy pres doctrine

The trial court erred in a declaratory judgment action to determine the proper beneficiary of a trust by finding and concluding that the testator manifested a general charitable intent and by applying the *cy pres* doctrine. *Trustees of Wagner Trust v. Barium Springs Home for Children*, 136.

§ 8 (NCI3d). Income and persons entitled thereto

The trial court erred in a declaratory judgment action to determine the proper beneficiary of a trust by concluding that the trust was mandatory, erred by concluding that income not actually paid to a beneficiary was constructively delivered, and did not err by concluding that income not actually paid to another beneficiary was constructively distributed. *Trustees of Wagner Trust v. Barium Springs Home for Children*, 136.

§ 10 (NCI3d). Duration and termination of trusts

A charitable trust did not fail and the funds did not pass to the next of kin where the alternate beneficiary still existed. *Trustees of Wagner Trust v. Barium Springs Home for Children*, 136.

§ 10.3 (NCI3d). Interests of beneficiary; transfer of interest

The trial court did not err in concluding that capital gains from trust principal had been constructively distributed to a beneficiary. *Trustees of Wagner Trust v. Barium Springs Home for Children*, 136.

§ 18 (NCI3d). Actions to establish resulting and constructive trusts; competency and relevance of evidence

The trial court did not err in an action to establish a parol resulting trust in land by allowing plaintiff to testify after he admitted that he did not know the exact date of discussions concerning the transfer of the property for the benefit of the Ellis children. *Ellis v. Vespoint*, 739.

§ 19 (NCI3d). Actions to establish resulting and constructive trusts; sufficiency of evidence

Plaintiffs' evidence was sufficient to survive defendant's directed verdict motion in an action to establish a parol trust in land. *Ellis v. Vespoint*, 739.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

Defendant employer engaged in an unfair trade practice by paying legal fees and costs to induce defendant employee to breach his covenant not to compete with his former employer, by offering to subsidize the income, draw, and expenses of defendant employee in the event of an injunction, and by using defendant employee's customer information to divert accounts from his former employer. *United Laboratories, Inc. v. Kuykendall*, 484.

WILLS – Continued

§ 65 (NCI3d). Afterborn children

The trial court correctly held that Justin Mason had no interest in the estate of his father under G.S. 31-5.5 because he had been included in his father's will. *Mason v. Stanimer*, 673.

WORD AND PHRASE INDEX

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