NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 103

21 MAY 1991

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20 AUGUST 1991

RALEIGH
1991

CITE THIS VOLUME

103 N.C. App.

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OF
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EUGENE H. PHILLIPS[2]

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RALPH A. WHITE, JR.

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H. JAMES HUTCHESON

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1. Appointed and took office 11 October 1991.
2. Retired 30 September 1991.

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1. Appointed 11 October 1991 to replace J. Herbert Small who retired 31 August 1991.

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	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

1. Appointed Chief Judge of a new district 1 October 1991.
2. Appointed 5 September 1991 to replace Charles E. Rice who became Chief Judge.
3. Appointed 6 September 1991 to replace James A. Harrill, Jr. who became Chief Judge.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. ANGELA CLAYTON WEST

No. 9010SC900

(Filed 21 May 1991)

1. Parent and Child § 2.2 (NCI3d)— expert testimony—cause of death—abuse of child—testimony admissible

In a prosecution of defendant for felony child abuse and murder, the trial court did not err in allowing expert testimony by the emergency room physician, the treating physician at Duke University Medical Center where the child was transferred, and the doctor who performed the autopsy concerning the sodium level in the child's blood, water's effect on the concentration of various substances in the body, the amount of water normally ingested by a child, the amount of water required to reduce the sodium level to that of the victim, their opinions that a child would not ingest that amount of fluid voluntarily and that the child's injury was the result of an intentional physical injury, and bruises on the child's body inconsistent with normal childhood activity. Such testimony was admissible pursuant to rules for admissibility of expert testimony summarized in *State v. Huang*, 99 N.C. App. 658.

Am Jur 2d, Homicide §§ 398, 399.

2. Parent and Child § 2.2 (NCI3d); Criminal Law § 34.4 (NCI3d)— felony child abuse and murder charges—previous acts of child abuse—admissibility of evidence

In a prosecution of defendant for felony child abuse and murder where the evidence tended to show that defendant forced her son to drink a large amount of water, the trial court did not err in allowing evidence of alleged acts of misdemeanor child abuse which defendant and her boyfriend had been charged with four months before the incident in question, since there was no merit to defendant's contention that the incidents testified to were too dissimilar; acts which occurred only four months before were not too remote; the testimony revealed a pattern of severe discipline over a period of several months which would support an inference that defendant's behavior then was still relevant at the time of the offense; and the evidence was not unduly prejudicial.

Am Jur 2d, Homicide §§ 310 et seq.

3. Homicide § 21.9 (NCI3d)— involuntary manslaughter—child forced to drink water—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for involuntary manslaughter where a reasonable inference could be drawn that defendant's child was forced by defendant to drink such a large amount of water in such a short period of time that it made him violently ill and resulted in his death.

Am Jur 2d, Homicide §§ 425 et seq.

4. Criminal Law § 1148 (NCI4th)— involuntary manslaughter—aggravating factor of especially heinous or atrocious crime—ample supporting evidence

The trial court did not err in finding as a factor in aggravation for involuntary manslaughter that the offense was especially heinous, atrocious, or cruel where the evidence tended to show that defendant forced her child to drink a large amount of water; the child vomited many times in a short time frame, screamed in pain, and experienced seizures; and this was ample evidence to support a conclusion that the offense involved excessive physical pain not normally associated with the offense of involuntary manslaughter.

Am Jur 2d, Homicide § 70.

APPEAL by defendant from judgment entered 30 October 1989 in WAKE County Superior Court by *Judge J. Milton Read, Jr.* Heard in the Court of Appeals 8 April 1991.

Defendant was indicted for felony child abuse and murder of her son, Christopher, in Alamance County. A change of venue was granted, and the trial was held in Wake County.

At trial, the State's evidence tended to show that Christopher died from hyponatremia (a deficiency of sodium in the blood) caused by excessive absorption of water into his system. He had ingested a large amount of water, with testimony indicating that it could have been as much as seven to nine quarts, in a matter of a few hours. Defendant's sometime live-in boyfriend took Christopher to the hospital and told the doctor that he had suffered a seizure and had vomited "dozens" of times. Christopher was flown to Duke University Medical Center, but they were unable to save him. The State also presented evidence from many witnesses tending to show that defendant and her boyfriend would often harshly discipline the child.

Defendant's evidence tended to show that she did tell her son to drink a lot of water but disputed the State's evidence as to the amount which was actually consumed. She testified that Christopher complained that he was not feeling well, so she gave him an aspirin dissolved in tea. She was particularly concerned about a rash she had noticed, so she called the hospital, and then her mother. Her mother told her to give him a lot of liquids. She then discovered that Christopher had eaten some sherbet which she felt might have been tainted. Her boyfriend told her that Christopher might have food poisoning and that they should wash out his system. Christopher vomited several times while in the process of drinking slightly over two quarts of water and complained of a headache. She gave him another aspirin, and when he complained that he could not see, she went to her neighbor's house to call for an ambulance. Her boyfriend wrapped the child in a blanket and took him to the hospital himself.

Defendant was convicted of involuntary manslaughter and non-felonious child abuse. After a sentencing hearing on the involuntary manslaughter charge, the trial court found as factors in aggravation that the victim was very young, the defendant took advantage of a position of trust or confidence to commit the offense, and the offense was especially heinous, atrocious or cruel. It found

as factors in mitigation that the defendant had no previous record of convictions, she exhibited genuine remorse over the death of her son, and she had presented no disciplinary problems since her incarceration. It then sentenced her to ten years in prison, a sentence in excess of the presumptive. Defendant was also sentenced to two years on the non-felonious child abuse conviction.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debra C. Graves, for the State.

Craig T. Thompson for defendant-appellant.

WELLS, Judge.

Defendant brings forward fifteen assignments of error for our review. She has not addressed her first, second, seventh, eleventh, or twelfth assignments in her brief, and we therefore deem them abandoned. N.C.R. App. P., Rule 28. Her remaining assignments deal with the propriety of certain expert testimony, testimony dealing with prior acts of conduct, the failure of the trial court to dismiss the charges at the end of the State's evidence and at the close of all the evidence, and the trial court's finding that the offense was especially heinous, atrocious, or cruel. We find no error.

Expert Testimony

[1] In *State v. Huang*, 99 N.C. App. 658, 394 S.E.2d 279, *disc. review denied*, 327 N.C. 639, 399 S.E.2d 127 (1990), we summarized the rules regarding the admissibility of expert testimony. The following are relevant to those errors assigned by defendant:

1. The expert must be better qualified than the jury to render the opinion regarding the particular subject based on his knowledge, skill, experience, training, or education.

2. The testimony of the expert must be helpful.

3. The expert's scientific technique on which he bases his opinion must be reliable.

4. The evidence must be relevant.

5. Its probative value must not be outweighed by the dangers of unfair prejudice, confusion, misleading the jury, or needless presentation of cumulative evidence.

6. The expert's opinion is not inadmissible solely because it embraces an ultimate issue, but the expert must not be allowed to testify that a particular legal conclusion or standard has or has not been met. (Citations omitted).

We will apply these principles to the testimony of each expert and the errors defendant has assigned *seriatim.*

Dr. Paul Mele

Dr. Mele was the emergency room physician who first treated Christopher. He was tendered and received by the court without objection as an expert "in the field of medicine specializing in emergency medicine." He testified that his treatment of Christopher revealed that he had a sodium level of 116, and that the normal range is between 135 and 145. After testifying in detail as to water's effect on the concentration of various substances in the body, Dr. Mele stated that in his opinion, Christopher had absorbed four liters or quarts of water into his body, and that he would have had to ingest a large amount of water in a very short time to achieve that level of absorption in light of the normal urinary processes and the fact that Christopher had been vomiting. In his opinion, no child or adult would ingest that amount of fluid voluntarily.

Defendant contends that the court erred in admitting this testimony and that Dr. Mele was allowed to speculate based on unknown or incorrect variables. Our review of Dr. Mele's testimony does not persuade us that the opinions he expressed were "speculation." He explained in great detail how water affects the concentration of the different substances which make up the body, particularly sodium. He also explained how water could be removed from the body, or the thirst mechanism activated, in order to maintain proper levels. His opinion as to the amount of water absorbed was the result of "a fairly straightforward, mathematical calculation" based on these principles, a method of calculating which has been "established for a long time and shown to be rather valid through use in daily practice of medicine." Defendant's contention that Dr. Mele admitted to speculating by stating that the figure was a relatively educated guess is without merit. The use of the word "guess" does not render an opinion inadmissible. *State v. Clayton*, 272 N.C. 377, 158 S.E.2d 557 (1968). We view Dr. Mele's choice of words as merely indicating that there was a margin of error (somewhere between ten and twenty percent) in his calcula-

tions. The existence of this margin of error also does not affect the admissibility of his testimony. *State v. Pridgen*, 313 N.C. 80, 326 S.E.2d 618 (1985); *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985), *disc. review denied*, 316 N.C. 380, 344 S.E.2d 1 (1986).

Defendant's contention that Dr. Mele's testimony should have been excluded as based on incorrect assumptions is also without merit. Defendant points to Dr. Mele's testimony that Christopher had produced only about three tablespoons of urine in roughly two hours in the emergency room as evidence that his kidneys were not functioning properly. We do not perceive this testimony as compelling the conclusion that Christopher had a renal problem. This factor would also support the inference that his kidneys were beginning to fail *at that time*. Defendant's reliance on the fact that Christopher's tests revealed that his glucose was high and that he had an increased white blood count also does not render this testimony inadmissible, despite the fact that the prosecuting attorney phrased his questions in terms of "normal functions" in "normal, healthy children." Defendant did not demonstrate either at trial or before this Court how these factors rendered Dr. Mele's testimony inherently unreliable or unhelpful to the jury. This also applies to defendant's reliance on the fact that Christopher was connected to I.V. fluids when he entered the emergency room. The injection he notes contained 5 grams of dextrose in 100 cc's of water (roughly 3-4 ounces). At most, these factors would affect the weight to be given the doctor's opinions, rather than their admissibility.

Finally, defendant contends that the court erred in allowing Dr. Mele to testify that a child would not drink enough water to result in the amount which Christopher absorbed "voluntarily." Dr. Mele testified on cross-examination that "voluntarily" to him meant as the result of the thirst mechanism. As noted earlier, Dr. Mele testified at great length about the thirst mechanism, and the body's tendency to adjust water level to maintain the proper concentration of substances such as sodium. We find this evidence to be well within the doctor's area of expertise and helpful to the jury. We note that the prosecuting attorney's efforts to have the doctor state that one method by which a child could be made to drink so much water was by physical force was excluded by the trial court. Those assignments of error relating to Dr. Mele's testimony are overruled.

Dr. John Boyd

Dr. Boyd testified much to the same effect as Dr. Mele. He treated Christopher at Duke University Medical Center. He was tendered and accepted as an expert in "medicine specializing in pediatric critical care." Dr. Boyd testified variably that Christopher absorbed four quarts, six quarts, and from four to six quarts of water to reduce his sodium level to 116. He also testified that, based on this figure, and the history given to him by defendant, Christopher ingested from seven to nine quarts over a two to three hour period, and perhaps more depending on how much was vomited. He stated that the usual requirement in a child Christopher's age was roughly 1½ quarts a day, and opined that no child would drink that much water voluntarily. Finally, he stated that in his opinion, Christopher's condition was the result of an intentional physical injury.

Defendant challenges Dr. Boyd's testimony on much the same grounds as she does Dr. Mele's. While Dr. Boyd's testimony was not as well developed as Dr. Mele's, we find it also not speculative. Dr. Boyd testified about the effect of excess water in the body, and stated that he was basing his opinion as to the amount absorbed on Christopher's serum sodium level when he was admitted to Alamance County Hospital compared with the normal low level of sodium of 135, his estimated weight (Christopher's physical condition at the time he was treated precluded actually weighing him), and the distribution of sodium throughout the body. He modified his original statement of four quarts after factoring in the fact that Christopher's serum sodium level increased to 144 while he was in the hospital, which indicated a normal sodium level of 142-146. He based his estimate of the time and amount of liquid ingested on the history of events given him by defendant and the body's normal excretion rate of one quart per hour. We perceive no error in admitting these statements of opinion. *See Powell v. Parker*, 62 N.C. App. 465, 303 S.E.2d 225, *disc. review denied*, 309 N.C. 322, 307 S.E.2d 166 (1983). Defendant's contention that these opinions were based on inadequate facts and data is untenable. Dr. Boyd knew when defendant claimed to have begun giving Christopher water to drink, knew approximately how much water Christopher's body had absorbed, and knew how fast the body could excrete water.

Defendant also contends that Dr. Boyd's opinions were based on inaccurate assumptions. He testified, however, that the examina-

tion performed at Duke showed that Christopher had no kidney problems. The other alleged health problems and the effect (if any) of the injection of the glucose solution again would go to the weight accorded to Dr. Boyd's testimony, rather than its admissibility.

We are more troubled by the following excepted-to exchange:

Q. Dr. Boyd, based on the history you obtained, your examinations of Christopher West and his course while in the hospital at Duke University Medical Center, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty whether Christopher's condition on arrival at Duke University Medical Center was the result of intentional physical injury?

A. Yes, I do.

Q. What is that opinion?

A. I believe that his injury was the result of an intentional injury.

Defendant strenuously contests this exchange as allowing the doctor to give his expert opinion as to her guilt or innocence, and in the alternative as unduly more prejudicial than probative. Our appellate courts have held that, based on a child's clinical presentation and history, a medical expert may testify that the wounds presented are inconsistent with accidental origin. *See State v. Brown*, 300 N.C. 731, 268 S.E.2d 201 (1980); *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1979). The question and answer in this case falls under this general rule. The assignments of error related to Dr. Boyd's testimony are overruled.

Dr. Thomas Clark

Dr. Thomas Clark performed the autopsy. He was tendered and received as "an expert medical doctor specializing in the field of forensic pathology." Dr. Clark testified about many bruises he found on the body, and opined that they were not consistent with normal childhood activity. Defendant contends that this testimony was irrelevant, inflammatory, and beyond the witness' area of expertise.

The testimony was relevant to the State's theory that Christopher died as the result of one act in a continuing pattern of child abuse. The trial court exercised control over the testimony by refusing to allow the admission of a photograph of bruises visible

under the rolled back skin of the child's skull. Finally, Dr. Clark testified that he had performed over 800 autopsies, including some on children. He explained his opinions as based on the location and severity of the bruises. This testimony was properly admitted. *See Wilkerson, supra.*

Prior Acts Testimony

[2] Defendant moved before trial to exclude evidence of any alleged acts of misdemeanor child abuse with which she and her boyfriend had been charged in June 1988. The charges were dismissed in August for lack of evidence. N.C. Gen. Stat. § 8C-1, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

This rule is a general rule of inclusion of such evidence, subject to an exception if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). The State contends that this evidence was relevant to show defendant's intent and motive when she had Christopher drink the water. When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403. *State v. Richardson*, 100 N.C. App. 240, 395 S.E.2d 143, *disc. review denied*, 327 N.C. 641, 399 S.E.2d 332 (1990); N.C. Gen. Stat. § 8C-1, Rule 403.

Intent is a mental attitude seldom provable by direct evidence. *See State v. Wilson*, 315 N.C. 157, 337 S.E.2d 470 (1985). Our courts have consistently held that past incidents of mistreatment are admissible to show intent in a child abuse case. *See State v. Hitchcock*, 75 N.C. App. 65, 330 S.E.2d 237, *disc. review denied*, 314 N.C. 334, 333 S.E.2d 493 (1985); *State v. Vega*, 40 N.C. App. 326, 253 S.E.2d 94, *disc. review denied*, 297 N.C. 457, 256 S.E.2d 809, *cert. denied*, 444 U.S. 968, 62 L.Ed.2d 382 (1979). Defendant contends that the testimony in this case should have been excluded as refer-

ring to incidents which were remote, dissimilar to the act she was alleged to have committed at trial, not amounting in law to child abuse, and unfairly prejudicial. We disagree.

We note initially that prior acts testimony need not involve incidents for which the defendant was actually convicted of a crime. *State v. Suggs*, 86 N.C. App. 588, 359 S.E.2d 24, *cert. denied*, 321 N.C. 299, 362 S.E.2d 786 (1987). Defendant's contention that the incidents testified to were too dissimilar is also without merit. The State was attempting to prove that defendant forced Christopher to drink so much water as a form of discipline. Evidence of the way defendant had treated the child in the past was certainly relevant, despite the fact that no witness testified that defendant had ever attempted this particular action before.

Defendant also contends that the events were too remote. The passage of time must play an integral part in the initial balancing process which the trial court undertakes in determining admissibility of such evidence. *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988). In this case, the bulk of the testimony concerned acts which occurred before defendant was arrested and charged with child abuse in June 1988, four months before these events. In *State v. Faircloth*, 99 N.C. App. 685, 394 S.E.2d 198 (1990), we allowed prior acts testimony of three incidents which had occurred within 28 months before the act complained of. In this case, defendant had been counselled as to how to improve her parenting skills and alternative forms of discipline, which would tend to support an inference that the acts testified to were a problem from her past which she had overcome. The testimony in this case, also, however, revealed a pattern of severe discipline over a period of several months, which would support an inference that her behavior then was still relevant. While the better practice would be to make findings of fact in a case such as this which would better reveal the trial court's reasoning, defendant has not made the lack of these findings the basis of an assignment of error. *See Suggs, supra.* We hold that this evidence was not so remote as to mandate its exclusion.

Finally, defendant contends that this evidence was unduly prejudicial, and should have been excluded for that reason. Having found that the evidence was not too dissimilar or remote to require its exclusion, we also note that the trial court went to great lengths to balance the need of the State to corroborate the testimony

of its witnesses with the rights of the defendant by excluding cumulative testimony, evidence related to her treatment of her other children, and evidence of her boyfriend's actions which she witnessed, but did not participate in. Those assignments of error related to testimony of prior acts are overruled.

Remaining Assignments

[3] Defendant contends that the trial court erred in failing to dismiss the charges of involuntary manslaugher against her due to insufficient evidence at the close of the State's evidence and at the close of all the evidence. Since defendant presented evidence, we deal only with the ruling on the motion to dismiss at the close of all the evidence. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). A motion to dismiss presents the questions of whether there is substantial evidence of each essential element of the crime charged or of a lesser included offense, and whether the defendant was the perpetrator. *State v. Scott*, 323 N.C. 350, 372 S.E.2d 572 (1988). The evidence must be considered in the light most favorable to the State, with the State receiving the benefit of every reasonable inference to be drawn from it. *Bullard, supra.*

Defendant was originally charged with murder. She was acquitted of first and second degree murder and convicted of involuntary manslaughter. Any error in submitting the charges of first and second degree murder was thereby rendered harmless, absent some showing how submitting these charges prejudiced defendant in some way. *State v. Berkley*, 56 N.C. App. 163, 287 S.E.2d 445 (1982). Defendant has made no such showing.

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *See State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985) and cases cited therein; *State v. Lawrence*, 94 N.C. App. 380, 380 S.E.2d 156, *disc. review denied*, 325 N.C. 548, 385 S.E.2d 506 (1989). Involuntary manslaughter has also been defined as the unintentional killing of a human being without malice proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *Greene, supra, citing State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976). "It is the absence of malice, premeditation, deliberation, intent to kill, and *intent* to inflict serious bodily injury that separates involuntary man-

slaughter from murder and voluntary manslaughter." *Greene, supra.* (Emphasis added).

From the evidence in this case, a reasonable inference could be drawn that Christopher was forced to drink such a large amount of water in such a short period of time that it made him violently ill and resulted in his death. This evidence was sufficient to establish the culpable negligence required to submit the charge of involuntary manslaughter to the jury. Defendant's contention that this charge should not have been submitted because the cause of death is rare is completely without merit. We also note that defendant does not argue the sufficiency of the evidence to support the conviction for non-felonious child abuse in her brief. A violation of the misdemeanor child abuse statute proximately resulting in death would support a conviction of involuntary manslaughter. *State v. Darby*, 102 N.C. App. 297, 401 S.E.2d 791 (1991). This assignment of error is overruled.

[4] Finally, defendant assigns error to the trial court's finding as a factor in aggravation of the involuntary manslaughter conviction that the offense committed was especially heinous, atrocious, or cruel. Defendant contends that the trial court made no findings to support this finding, and there was insufficient evidence presented at trial which would support it. We disagree.

There is no requirement that the trial court set out particularized findings in support of those factors which it finds in aggravation. *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982), *modified and affirmed*, 308 N.C. 379, 302 S.E.2d 230 (1983). Each factor must be supported by a preponderance of the evidence. *Id.* The evidence in this case tended to show that Christopher vomited many times in a short time frame, screamed in pain, and experienced seizures. This was ample evidence to support a conclusion that the offense involved excessive physical pain not normally associated with the offense of involuntary manslaughter. *See State v. Shadrick*, 99 N.C. App. 354, 393 S.E.2d 133 (1990). This assignment of error is overruled.

For the above-stated reasons, we find

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

PAMELA B. FOX (ROGERS), PLAINTIFF v. JERRY P. FOX, DEFENDANT

No. 9026DC153

(Filed 21 May 1991)

1. **Divorce and Separation § 162 (NCI4th)— equitable distribution—stipulation as to personal property—inclusion in marital estate—application of stipulated credit—error**

Where the parties stipulated to a division of their personal property which resulted in plaintiff receiving approximately $10,500 worth of property and defendant receiving approximately $3,000 worth of property, and they further stipulated that defendant would receive a $5,000 credit, the trial court erred in including the personal property in its calculation of the marital estate, dividing the estate, determining how much plaintiff needed to pay defendant to make the division equal, and then giving defendant the $5,000 credit.

Am Jur 2d, Divorce and Separation §§ 930-936.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 168 (NCI4th)— equitable distribution—retirement interest—failure to make findings—error**

In an equitable distribution proceeding, an issue of fact existed as to whether defendant had vested retirement benefits, and the trial court erred in failing to make findings of fact or conclusions of law about defendant's retirement interest.

Am Jur 2d, Divorce and Separation § 921.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses. 94 ALR3d 176.

3. **Divorce and Separation § 112 (NCI4th)— equitable distribution—leased car not marital asset**

The trial court in an equitable distribution proceeding did not err in failing to classify, value, and distribute a leased car as a marital asset.

Am Jur 2d, Divorce and Separation §§ 878 et seq.

4. Divorce and Separation § 140 (NCI4th)— equitable distribution—value of partnership—determination proper

In an equitable distribution proceeding, the trial court did not err in valuing defendant's partnership interest in an accounting firm where the court used the withdrawal formula found in the partnership agreement as the basis for its determination.

Am Jur 2d, Divorce and Separation § 944.

Valuation of goodwill in accounting practice for purposes of divorce court's property distribution. 77 ALR4th 609.

5. Divorce and Separation § 155 (NCI4th)— equitable distribution—one party's payment of mortgage, taxes, insurance—consideration by court proper

In an equitable distribution proceeding, the trial court properly considered plaintiff's making of mortgage payments, payment of property taxes, and payment of homeowner's insurance premiums in its distribution of marital property.

Am Jur 2d, Divorce and Separation § 893.

6. Divorce and Separation § 137 (NCI4th)— equitable distribution—current fair market value of assets considered—no error

There was no merit to plaintiff's contention in an equitable distribution proceeding that the trial court erred in failing to consider the current fair market value of all the marital assets.

Divorce and Separation §§ 937 et seq.

7. Divorce and Separation § 143 (NCI4th)— equitable distribution—equal division proper

In an equitable distribution proceeding, the trial court did not err in making an equal division of marital property where the court made sufficient findings to show that it considered the evidence that was presented under the distributional factors of N.C.G.S. § 50-20, and it was clear from the court's order that it considered each of the factors in determining that an equal division of property was equitable.

Am Jur 2d, Divorce and Separation §§ 870 et seq.

Divorce: excessiveness or adequacy of trial court's property award—modern cases. 56 ALR4th 12.

8. Rules of Civil Procedure § 59 (NCI3d)— amendment of judgment—power of court to amend on own initiative

The trial court has the power to amend its judgment on its own initiative within the ten-day period provided by N.C.G.S. § 1A-1, Rule 59(e).

Am Jur 2d, Judgments §§ 681, 682.

APPEAL by plaintiff from judgment entered 14 September 1989 and amended judgment entered 19 September 1989 by *Judge Richard D. Boner* in MECKLENBURG County District Court. Heard in the Court of Appeals 15 November 1990.

Tucker, Hicks, Hodge, and Cranford, P.A., by Fred A. Hicks and Edward P. Hausle for plaintiff-appellant.

Garland & Wren, P.A., by Melissa A. Magee for defendant-appellee.

EAGLES, Judge.

Plaintiff wife appeals from an equitable distribution judgment. The parties were married 28 June 1969, separated on 1 July 1986, and divorced on 17 August 1987.

At the beginning of the equitable distribution hearing, the parties filed a stipulation concerning the division of the parties' household furnishings. Under the stipulation, the plaintiff received approximately $10,599 worth of personal property and defendant received approximately $3,035. The stipulation also provided, "The parties agree that the husband shall receive a credit in the equitable distribution action in the amount of $5,000."

During the hearing, plaintiff contended that the parties' interest in a Porsche automobile and defendant's right to receive retirement payments under the partnership agreement with his accounting firm were subject to equitable distribution. The trial court found that the "[d]efendant had no distributive interest in the automobile for equitable distribution purposes" but made no findings regarding the retirement account.

Additionally, both parties offered expert evidence of the value of defendant's interest in the accounting firm where he was a partner. Plaintiff's expert used the book value approach and arrived at a value of $160,921. Defendant's expert used the withdrawal

formula in the partnership agreement. In his opinion letter he arrived at an "upper range value" of $54,963.73. The trial court followed the withdrawal valuation method used by defendant's expert except that the court declined to consider the effect of income taxes in valuing the partnership interest. The court valued the defendant's interest in the partnership at $70,694.91.

After the equitable distribution judgment was entered, the trial court amended its judgment. The judgment entered 14 September 1989 required plaintiff to pay $35,954.14 at 8% interest in 60 monthly installments. The amended judgment entered 19 September 1989 required plaintiff to pay the same amount in 42 monthly installments. Plaintiff appeals.

[1] In her first assignment of error, plaintiff argues that the trial court erred in applying the $5000 credit that was provided for in the stipulation. We agree.

The stipulation provided:

> 1. The items of personal property formerly used by the parties in making a home together are listed on Exhibit A and Exhibit B attached to this stipulation.
>
> 2. The parties stipulate and agree that each party shall take as their distributive share those items set forth on Exhibit A to the husband at the values listed and on Exhibit B to the wife at the values listed.
>
> 3. The parties agree that the husband shall receive a credit in the equitable distribution action in the amount of $5,000.

Under the stipulation, plaintiff received approximately $10,599 worth of personal property and defendant received approximately $3,035 worth of personal property.

In its order the trial court included this property in its calculation of the marital estate. The court divided the marital estate, determined how much plaintiff needed to pay defendant to make the division equal, and then gave the defendant the $5000 credit. The trial court specifically found in its order that the stipulation did not limit the manner in which the court was to apply the credit. The plaintiff argues that the purpose of the stipulation was to take the listed property out of the marital estate. Plaintiff contends that the court should not have included this property

in the marital estate but should have divided the remainder of the property and added the credit.

The division of marital property is a matter within the discretion of the trial court. "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). We hold that the trial court abused its discretion in misapplying the $5000 credit. The parties agreed (1) that certain property would be divided unequally and (2) that the husband would receive less personal property but would receive a $5000 credit. Here, the trial court applied the credit but in effect ignored the remainder of the stipulation by including the property listed in exhibits A and B when it divided the marital estate equally. In calculating the distributive shares, the trial court should have excluded from the property being distributed the personal property referred to in the stipulation and should have given defendant a credit in the amount of $5,000.

[2] Plaintiff also argues that the trial court erred in failing to classify defendant's retirement account as a marital asset. We agree that the trial court erred by failing to classify the retirement account as either marital or separate property. Article XII of the Partnership Agreement concerns retirement. It provides as follows: "Anyone who was an Equity Partner on November 21, 1980, shall be fully vested at age fifty-five (55) for retirement purposes." Both plaintiff's expert and defendant's expert testified about the value of the retirement interest. The trial court's order makes no findings of fact or conclusions of law about defendant's retirement interest. We hold that an issue of fact existed as to whether defendant had vested retirement benefits and remand to the trial court for appropriate findings.

Because we find that the trial court failed to determine the status of defendant's retirement interest, we hold that the trial court erred in signing, filing, and entering the equitable distribution order of 14 September 1989. "[A]n equitable distribution judgment that fails to list all of the parties' properties and make appropriate findings with respect to them is defective." *Bowman v. Bowman*, 96 N.C. App. 253, 255, 385 S.E.2d 155, 156 (1989).

Plaintiff's remaining assignments of error are without merit.

[3] Plaintiff first argues that the trial court erred in failing to classify, value, and distribute a leased car as a marital asset. We disagree and find plaintiff's argument disingenuous. Here, the evidence shows that defendant leased a 1984 Porsche automobile during the parties' marriage. After the separation date, defendant returned the car to the leasing company. Defendant received no money when he returned the car because he had no equity in it. Plaintiff relies on *Black v. Black*, 94 N.C. App. 220, 379 S.E.2d 879 (1989), for the proposition that the fair market value of the lease of the car and the car were two separate items of marital property. We note that in *Black*, the plaintiff owned the truck and leased it out to someone else. Unlike this case, plaintiff in *Black v. Black received* rental payments as income. Plaintiff's argument is without merit. Accordingly, this assignment of error is overruled.

[4] Plaintiff also argues that the trial court erred in valuing defendant's partnership interest in the accounting firm of Cherry, Bekaert & Holland. We disagree.

Our task on review is to determine whether the approach used by the trial court reasonably approximates the net value of the partnership interest. *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985). "Partnership agreements often furnish a useful method for calculating the partnership interest's value, particularly when they do not penalize, or place a premium on the holdings of a particular partner. When the terms of a partnership agreement are used, however, the value of the interest calculated is only a *presumptive* value, which can be attacked . . . as not reflective of the true value." *Id.* at 412, 324 S.E.2d at 917 (citations omitted). Additionally, this Court has noted that valuation depends on the particular facts and circumstances of each case and that the form of the practice, that is whether the practice is a corporation, professional association, partnership or sole proprietorship, makes no difference for valuation purposes. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).

In *Weaver v. Weaver, supra*, this Court approved the trial court's use of withdrawal value to value an accountant's partnership interest. There, the trial court added the value of defendant's capital account to the remainder of defendant's partnership interest. The remainder of the partnership interest was calculated using a per-

centage based on partner's prior contribution to fees. This percentage was applied to profits earned for five years from the partner's withdrawal date. This Court determined that this amount accurately reflected his interest in the partnership.

Here, the trial court determined the defendant's partnership interest by using the withdrawal formula found in Cherry, Bekaert & Holland's partnership agreement:

> 38. The value of defendant's partnership interest is computed as follows:
>
> | | | |
> |---|---|---|
> | Present value of monthly payments of $701.59 discounted at 8.45% to July 3, 1986 assuming 240 monthly payments commencing October 20, 2007 | | $13,600.74 |
> | Cash basis capital at 4-30-87 | $40,999 | |
> | Less: Amount contributed during F/Y/E 4-30-87 | (1,500) | |
> | Net assumed paid on May 1, 1987 and discounted at 8.42% to July 3, 1986 | 38,500 | $35,917.49 |
> | Excess of accrual basis capital over cash basis capital ($11,217.39) payable in 60 equal monthly installments with 6% interest and discounted at 8.42% to July 3, 1986 | | $ 9,904.68 |
> | Drawing account balance on July 3, 1986 | | $11,272.00 |
> | | | $70,694.91 |

In its order the trial court found:

> The formula used by the Court in the paragraph above values the defendant's interest in the partnership by taking into account defendant's interest in common with other partners in partnership assets through consideration of the cash basis capital account and accrual basis capital account and also takes into account the defendant's share of the goodwill of the firm by considering his years of service and his peak earnings. Use of this formula also assures that the defendant is not penalized nor given a premium for his interest in the firm since the withdrawal formula is applicable to all the partners in the firm.

We note that the first item in the trial court's calculation was based on the following provision of the partnership agreement:

> The Partnership shall pay to a withdrawing or expelled Partner with five (5) or more years of service as a Partner the following payments from the beginning date until his death, however, payments shall be made for a period of no less than one hundred and twenty (120) and no more than two hundred and forty (240) months, beginning on the latter of the twentieth (20th) day of the month following the effective date of withdrawal or expulsion or on the twentieth (20th) day of the month following the withdrawing or expelled Partner's sixtieth (60th) birthday in an amount computed as follows:
>
> (i) Determine the average of the three (3) highest years' accrual earnings during a period of up to ten (10) years prior to withdrawal or expulsion while a Partner in the Partnership.
>
> (ii) Determine the vested portion of the withdrawing or expelled Partner's payments by multiplying the number of years of service as a Partner (as defined in Paragraph 2.23 herein) by one and six tenths percent (1.6%), however, the vested portion may not exceed forty percent (40%).
>
> (iii) Multiply the vested portion by one twelfth (1/12) of the amount determined in (i) above to determine the monthly payment amount.

We hold that the method used by the trial court reasonably approximates the net value of defendant's interest in the partnership. Under *Weaver* the withdrawal formula is presumptively correct, though it may be attacked if not reasonably representative of the value of the defendant's interest. Additionally, the trial court's approach meets the factors set out in *Poore*. It considers fixed assets, other assets including accounts receivable and the value of work in progress, goodwill, and liabilities. *Poore*, 75 N.C. at 419, 331 S.E.2d at 270. Accordingly, this assignment of error is overruled.

[5] Next, plaintiff argues that the trial court erred by failing to credit plaintiff with reducing the mortgage on the marital home and paying for taxes and insurance. We disagree.

Here, the trial court found that plaintiff made mortgage payments on the property since the date of separation, paid proper-

ty taxes on the residence in 1988, and paid homeowner's insurance premiums for 1986, 1987, and 1988. The court also considered these facts as a distributional factor. Payment by one spouse on a marital home mortgage after the date of separation is a factor appropriately considered by the trial court under G.S. 50-20(c)(11a) and (c)(12) in determining what division of marital property is equitable. *Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990). We hold that the court properly considered these factors in its distribution of the property.

[6] Plaintiff also argues that the trial court erred in failing to consider the current fair market value of all the marital assets. Plaintiff's argument is without merit. G.S. 50-21(b) provides that "[f]or purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties." Plaintiff contends that she was prejudiced because she received bank accounts that appreciated at a lower rate than those received by the defendant and an automobile that depreciated between the date of separation and the date of trial. Where there is evidence of active or passive appreciation of the marital assets after the date of separation, the court must consider the appreciation of the asset as a factor under G.S. 50-20(c)(11a) or (12). *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988). Here, the trial court made specific findings regarding the current balance of all bank accounts. The court also considered as a distributional factor "[t]he current disparity in the incomes of the parties, the disparity in earning potential and their current liabilities and assets." Accordingly, this assignment of error is overruled.

[7] Plaintiff next argues that the trial court erred in attempting to divide the marital estate equally by net value. Plaintiff argues that the equal division of property was not supported by sufficient findings of fact. Plaintiff concedes that the trial court made findings of fact regarding the factors the court considered. However, plaintiff contends that the court did not explain how it balanced these factors.

The trial court must make findings and conclusions to support its division of marital property. However, the trial court is not required to recite in detail the evidence it considered in determining what division is equitable. *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). "The purpose for the requirement of specific findings of fact that support the court's conclusion of law

is to permit the appellate court on review 'to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)).

Here, the court made sufficient findings to show that it considered the evidence that was presented under the distributional factors of G.S. 50-20. It is clear from the trial court's order that the court considered each of these factors in determining that an equal division of property was equitable. We hold that the findings of fact sufficiently address the statutory factors and support the division ordered.

[8] Plaintiff's final assignment of error is that the trial court erred in amending the 14 September 1989 judgment. This assignment of error is without merit.

We note that before the Rules of Civil Procedure were adopted in North Carolina, the trial court could amend its judgments and orders in both civil and criminal cases only during the term in which they were made. W. Shuford, North Carolina Civil Practice and Procedure, Section 59-18 (3d ed. 1988). "Until the expiration of the term the orders and judgments of the court are *in fieri*, and the judge has power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice. . . ." *State v. Godwin*, 210 N.C. 447, 449, 187 S.E. 560, 561 (1936). Rule 59 now governs the amendment of judgments. Plaintiff contends that because Rule 59 does not specifically grant the court the power to amend a judgment on its own initiative, the court has no power to amend its judgment except upon a motion by a party to the action.

Our research disclosed no North Carolina cases that specifically address this point. However, Moore's Federal Practice provides:

> Rule 59(e) is silent on the power of the court to alter or amend a judgment on its own initiative. It could, therefore, be argued that the court lacks power to do so. We believe, that such a position is not sound. The authorizations in Rules 60(a) and 59(d) for the court to act on its own motion are only declaratory examples of the general power of a court to act on its own initiative. We conclude that the court has the power on its own motion to alter or amend a judgment, but if the alteration

> or amendment is of a substantial character, so that it does not fall fairly within the purview of Rule 60(a), that the court's action to be valid under Rule 59 must be taken by it not later than ten days after the entry of judgment in order to comply with Rule 59.

6A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 59.12[4] (1991). The authors also note:

> There is another compelling reason why the power to alter a judgment on its own initiative should be recognized in the trial court. Clearly it has the power, within the ten-day period, to grant a new trial on its own initiative under 59(d), and may do so for error of law. The trial court could then grant a new trial because of legal error in the judgment and immediately thereafter grant a summary judgment, basing its action upon the prior record, and frame the new judgment exactly as it would have amended or altered the former judgment. The Rules should not be interpreted to require such circuity.

Id. at n. 3 (citations omitted). We are persuaded by this reasoning and hold that the trial court has the power to amend its judgment within the ten-day period provided by Rule 59(e). Here, the initial judgment was entered 14 September 1989 and the amendment was entered 19 September 1989. This assignment of error is overruled.

In summary, we hold that the trial court erred in applying the $5000 credit and in failing to make any findings in regard to defendant's retirement interest. Plaintiff's remaining assignments of error are overruled. Accordingly, the order below is affirmed in part and reversed in part and the matter is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed and remanded in part.

Judges ARNOLD and PARKER concur.

PAMLICO TAR RIVER FOUNDATION, INC., PETITIONER-APPELLANT v. COASTAL RESOURCES COMMISSION OF THE STATE OF NORTH CAROLINA, RESPONDENT-APPELLEE, AND WEYERHAEUSER REAL ESTATE COMPANY, INTERVENOR-RESPONDENT-APPELLEE

No. 902SC769

(Filed 21 May 1991)

1. **Administrative Law and Procedure § 56 (NCI4th)— petitioner not likely to prevail in contested case hearing—petitioner not entitled to contested case hearing**

Petitioner was not entitled to a contested case hearing based upon the record before respondent on 28 September 1989 where there was no evidence which would support a finding that petitioner would have had a substantial likelihood of prevailing if a contested case hearing were held; furthermore, there was no merit to petitioner's contention that the permit in question had to include findings reflecting consideration of the factors which the Division of Coastal Management had to consider before issuing the permit. N.C.G.S. § 113A-121.1(b).

Am Jur 2d, Administrative Law §§ 571 et seq.

2. **Administrative Law and Procedure § 40 (NCI4th)— petitioner seeking contested case hearing—new evidence—finding required as to whether evidence should have been presented earlier**

Where petitioner sought a contested case hearing with regard to issuance of a permit to build a marina in the open waters of Chocowinity Bay, petitioner's new evidence, consisting of the affidavit of a landscape architect that the marina could be constructed on an upland basin site which would require no alteration of wetlands or estuarine habitat, was relevant, material, and not cumulative; however, the case is remanded for the trial court to determine whether the new evidence should "reasonably have been presented" to respondent before, or during the course of, petitioner's petition for a contested case hearing.

Am Jur 2d, Administrative Law § 748.

APPEAL by petitioner from order entered 6 April 1990 in BEAUFORT County Superior Court by *Judge William C. Griffin, Jr.* Heard in the Court of Appeals 12 February 1991.

Derb S. Carter, Jr. and Lark Hayes for petitioner-appellant.

Lacy H. Thornburg, Attorney General, by Robin W. Smith, Assistant Attorney General, for the State.

Kenneth M. Kirkman for intervenor-respondent-appellee.

GREENE, Judge.

On 28 September 1989, petitioner, Pamlico Tar River Foundation, Inc. (PTRF), requested that respondent, Coastal Resources Commission (CRC), grant a contested case hearing to PTRF regarding Major Development Permit No. 181-89, which permitted intervenor, Weyerhaeuser Real Estate Company (Weyerhaeuser), to build a marina in the open waters of Chocowinity Bay. PTRF was denied a contested case hearing and petitioned the Superior Court of Beaufort County for judicial review of CRC's decision. The court affirmed CRC's decision by an order filed 6 April 1990. PTRF appeals.

Weyerhaeuser owns a tract of land containing approximately 874 acres along the shoreline of a relatively undeveloped portion of Chocowinity Bay in Beaufort County. Weyerhaeuser proposes to construct on this property 865 residential units. In the adjacent waters of Chocowinity Bay, Weyerhaeuser proposes to construct a 302 slip marina, these slips to be sold to the owners of the residential units. The construction of the marina is the only portion of the project relevant to this appeal.

In April, 1989, pursuant to the Coastal Area Management Act, N.C.G.S. § 113A-100 *et seq.*, Weyerhaeuser applied with the Division of Coastal Management (DCM), the agency to which CRC has delegated its permitting authority, for a permit for the construction of the marina. DCM received comments from numerous state and federal agencies and from other entities, including PTRF, regarding the advisability of issuing the permit requested by Weyerhaeuser. A permit was issued on 11 September 1989, listing twenty-five conditions to the permit, fifteen of which pertain specifically to the construction and operation of the marina.

On 28 September 1989, PTRF submitted to CRC a request for a contested case hearing. On 26 October 1989, the chairman of CRC executed an order denying the request for a contested case hearing. The relevant basis for the denial was PTRF's failure to make any showing that the permit was in violation of any applicable statutes or agency rules, and that PTRF had not met

its burden of showing that it had a substantial likelihood of prevailing at a contested case hearing, a prerequisite to obtaining a contested case hearing under N.C.G.S. § 113A-121.1(b).

On 29 November 1989, PTRF petitioned the Superior Court of Beaufort County for judicial review of the decision of CRC's chairman. PTRF also requested that the superior court allow PTRF to present additional evidence, and further moved the court to remand the case for a contested case hearing and for the taking of additional evidence. The additional evidence proffered is in the form of an affidavit by a licensed landscape architect stating that there are feasible alternative sites for the marina. The affidavit was executed on 16 November 1989. After a hearing, and by order dated 5 April 1990, the superior court ordered that "the decision of the Coastal Resources Commission, acting through its Chairman, be and the same is hereby AFFIRMED." The order did not address PTRF's request to present additional evidence.

The issues are: (I) whether PTRF was entitled to a contested case hearing based upon the record before CRC on 28 September 1989; and (II) whether PTRF is entitled to present new evidence to CRC on the issue of its entitlement to a contested case hearing.

I

The administrative review of a permit decision of DCM is governed by a statute which provides in part:

> A person other than a permit applicant or the Secretary who is dissatisfied with a decision to deny or grant a minor or major development permit may file a petition for a contested case hearing only if the Commission determines that a hearing is appropriate. A request for a determination of the appropriateness of a contested case hearing shall be made in writing and received by the Commission within 20 days after the disputed permit decision is made. A determination of the appropriateness of a contested case shall be made within 15 days after a request for a determination is received and 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.

If the Commission determines a contested case is appropriate, the petition for a contested case shall be filed within 20 days after the Commission makes its determination. 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.

N.C.G.S. § 113A-121.1(b) (1989).

For the purposes of this appeal, we find three important provisions in this statute. First, if a party other than the applicant or Secretary, such as PTRF, is dissatisfied with the decision to issue a permit, the party may request a contested case hearing. Second, in requesting a contested case hearing, the party requesting the hearing has the burden of *alleging* that the permit decision is contrary to a statute or rule, of *showing* that the party is directly affected by the permit decision, and of *showing* that the party has a substantial likelihood of prevailing in a contested case. Third, the denial of a contested case hearing is a final agency decision, and such denial is subject to judicial review under Article 4 of Chapter 150B. Here, CRC determined that PTRF had alleged that the permit decision was contrary to a statute or rule and had shown that they were affected by the permit decision. No party to this appeal questions those determinations by CRC. PTRF complains only of CRC's determination that it was not entitled to a contested case hearing.

The applicable statute pertaining to the standard of judicial review, found under Article 4 of Chapter 150B, provides in relevant 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:

(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, 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51 (1987).

[1] For purposes of this appeal, this statute instructs us that in order to obtain a modification or reversal of an agency decision, the party alleging error has the burden of showing that the agency's final decision may have prejudiced that party's substantial rights in that the agency's findings, inferences, conclusions, or decisions are defective because of one of the six reasons stated under N.C.G.S. § 150B-51.

Our review on this appeal is of CRC's decision to deny PTRF a contested case hearing. Our review, however, is limited to the assignments of error and issues raised by PTRF. *Walls & Marshall Fuel Co. v. N.C. Dept. of Revenue*, 95 N.C. App. 151, 154, 381 S.E.2d 815, 817 (1989). Here, PTRF's essential basis for asserting error is in its contention that CRC's finding that PTRF failed to show a substantial likelihood of prevailing in a contested case hearing is unsupported by substantial evidence. Under N.C.G.S. § 150B-51(5), we review CRC's decision according to the "whole record" test. *Id.* "The 'whole record' test requires the reviewing court to examine all the competent evidence and pleadings which comprise the 'whole record' to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. . . . 'Substantial evidence' is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.*

Our review of the "whole record" before CRC reveals no evidence that would support a finding that PTRF would have had a substantial likelihood of prevailing if a contested case hearing were held. This absence of evidence supports CRC's finding that PTRF had no substantial likelihood of prevailing in a contested case hearing, and PTRF is therefore entitled to no relief under

N.C.G.S. § 150B-51(5). PTRF nonetheless argues that it is entitled to a contested case hearing because the permit itself does not include findings reflecting consideration of the factors DCM must consider before issuing the permit. *See* N.C. Admin. Code tit. 15A, r.7H.0208(a)(2) (before issuing a permit "there shall be a finding that the applicant has complied with" nine "standards"). We disagree. Formal findings are not required when a permit is issued. *Cf.* N.C.G.S. § 113A-120 (1989) (formal findings required if permit is *denied*). The "finding" referred to in 15A, r.7H.0208(a)(2) requires only that there be evidence in the record to support DCM's decision to issue the permit. Nevertheless, the failure to include such evidence in the DCM record is not relevant on the issue before CRC of whether PTRF is entitled to a contested case hearing. *See* N.C.R. Evid. 401 (to be relevant, evidence must have some "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"). The only relevant evidence on this issue is evidence of whether there has been a violation of some substantive statute, rule or regulation. For example, relevant evidence would be evidence tending to show that one of the standards found under 15A, r.7H.0208(a)(2) has been violated, or that some other substantive requirement has been violated. PTRF offered no such evidence to CRC.

II

[2] In the alternative, PTRF argues that if the record before CRC on 28 September 1989 did not support a contested case hearing, then it has new evidence which supports such a hearing. Specifically, PTRF contends that the affidavit of a landscape architect executed on 16 November 1989 establishes that the marina can be constructed on an upland basin site which would require no alteration of wetlands or estuarine habitat. PTRF contends that in light of this new evidence, the pertinent regulation mandates the construction of the marina in the upland basin site rather than in an open water site as approved by DCM in the permit it issued. The regulation asserted by PTRF does require siting marinas in accordance with the following priorities:

> (i) an upland basin site requiring no alteration of wetland or estuarine habitat and providing adequate flushing by tidal or wind generated water circulation;

> (ii) an upland basin site requiring dredging for access when the necessary dredging and operation of the marina will not result in the significant degradation of existing fishery, shellfish, or wetland resources and the basin design shall provide adequate flushing by tidal or wind generated water circulation;
>
> (iii) an open water site located outside a primary nursery area which utilizes piers or docks rather than channels or canals to reach deeper water; and
>
> (iv) an open water marina requiring excavation of no intertidal habitat, and no dredging greater than the depth of the connecting channel.

N.C. Admin. Code tit. 15A, r.7H.0208(b)(5)(A). The landscape architect's affidavit has the tendency of making the existence of a violation of this substantive regulation more probable than it would be without the evidence. The evidence is, therefore, relevant to the issue of whether PTRF is entitled to a contested case hearing. However, in that the affidavit was not presented to CRC before, or in the course of, PTRF's petition for a contested case hearing, the issue is whether CRC must reopen the case and reconsider PTRF's petition in light of this new evidence.

On 29 November 1989, pursuant to N.C.G.S. § 150B-49 (1987), PTRF requested the superior court to remand the case to CRC for the taking of the new evidence. The statute provides in pertinent part:

> An aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. . . . After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. . . .

N.C.G.S. § 150B-49. Accordingly, if the evidence is "material," "not merely cumulative," and "could not reasonably have been presented at the administrative hearing," the superior court must remand the case to CRC for the taking of PTRF's new evidence.

We have already determined that PTRF's new evidence is relevant, and therefore "material," in that it indicates the feasibility

of a marina falling under a higher priority than that approved by the permit. *See* Commentary to N.C.R. Evid. 401 (definition of relevancy includes materiality). Furthermore, in that the record does not reveal any evidence similar to that now proffered by PTRF, PTRF's new evidence is "not merely cumulative." The question of whether the new evidence should "reasonably have been presented" to CRC before, or during the course of, PTRF's petition for a contested case hearing is a question which cannot be determined from this record and therefore must be remanded to the superior court for determination.

If on remand, the superior court finds the new evidence could not reasonably have been presented to CRC before, or during the course of, PTRF's petition for a contested case hearing, the case is to be remanded to CRC which, upon hearing the new evidence, must determine whether PTRF would have a "substantial likelihood of prevailing in a contested case hearing." If such a determination is made by CRC, then PTRF would be entitled to a contested case hearing.

This matter is therefore remanded for further proceedings consistent with this opinion.

Remanded.

Judges WELLS and WYNN concur.

NELLIE CHRISTINE HINES, PLAINTIFF v. ROSA E. ARNOLD, DEFENDANT

No. 903SC1076

(Filed 21 May 1991)

Partnership §§ 1.2, 4 (NCI3d)— existence of partnership—note executed by one partner as agent of partnership—defendant liable on note—jury question

In an action to recover the balance due on a note, the trial court erred in granting defendant's directed verdict motion where plaintiff produced substantial evidence that defendant and her husband, plaintiff's nephew, entered into a partnership and that defendant's husband executed the note to plaintiff

as an agent of the alleged partnership, thereby making defendant liable on the note.

Am Jur 2d, Partnership §§ 279 et seq.

APPEAL by plaintiff from order entered 3 May 1990 in PAMLICO County Superior Court by *Judge James D. Llewellyn.* Heard in the Court of Appeals 16 April 1991.

Beswick, Graham & Barnhill, P.A., by K. Michael Barnhill, for plaintiff-appellant.

S. Henri Johnson for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an order entered 3 May 1990 wherein the trial court granted the defendant's directed verdict motion made at the close of the plaintiff's evidence.

Viewed in the light most favorable to the plaintiff, the evidence tends to show the following: In 1967, Rosa Arnold (defendant) married William Arnold (William). Nellie Hines (plaintiff) is William's aunt. In February, 1972, William and the defendant acquired real property in Pamlico County as tenants by the entirety. From early 1980 until 1985, William and the defendant worked together in the commercial fishing business. They also operated a store and marina on their homestead. In the latter part of that time period, they worked together building construction trucks and hauling for hire. During this time period, William was unable to read or write anything other than his name. William testified that he and the defendant ran these family businesses together as partners. The defendant kept the businesses' checkbooks and deposited the money earned from the businesses in William's and the defendant's joint bank account from which the defendant paid their living expenses.

At some time prior to 1980, William and the defendant bought a trawler named "Miss Tiny." They used this trawler in their commercial fishing business until it sank in 1985. Although "Miss Tiny" was titled in William's name alone, he was not aware of this fact. With regard to the other vehicles and equipment that William and the defendant purchased for their businesses, some of them were titled in William's name alone and some of them were titled in the defendant's name alone. Throughout this time period, the parties did not form a corporation to conduct their

businesses nor did they execute a written contract regarding their alleged partnership.

Between March, 1980 and January, 1981, the plaintiff made three loans by checks to William and the defendant for their businesses totaling $26,883.16. The plaintiff made the three checks out to both William and the defendant. The plaintiff made the first loan for $5,000 in response to a request for money by William and the defendant to help them pay for repairs to and maintenance of their fishing boat. On 14 August 1980, the plaintiff made the second loan to William and the defendant in the amount of $18,883.16. The plaintiff made the third loan of $3,000 to William and the defendant in January, 1981. The plaintiff testified that only the defendant requested this particular loan and furthermore that this loan be in the form of a certified check. The plaintiff complied with the defendant's request.

Between 29 October 1980 and 23 December 1982, the defendant wrote the plaintiff many letters which, among other things, described her active role in their businesses and her desire to pay their debts to the plaintiff. In a letter dated 4 February 1981, the defendant wrote that she and William were in "the Commercial fishing business." In a letter dated 22 May 1981, the defendant wrote that she hoped that the fishing business would pick up so that she could send the plaintiff some money "because I really hate not being able to take care of our debts. . . ." In a letter dated 8 October 1981, the defendant described the preceding summer as having not been profitable. In a letter dated 26 January 1982, the defendant wrote, "[W]e appreciate all you've ever done for us and we'll pay you back just as soon as we can." In a letter dated 27 October 1982, the defendant wrote that she and William were going to "try to make some money to pay you first." Between 1980 and 1982, William and the defendant paid to the plaintiff $650 towards the total loan amount owed to the plaintiff.

In March, 1982, William executed a "FIRST PREFERRED SHIP MORTGAGE PROMISSORY NOTE" and a "FIRST PREFERRED MORTGAGE" against "Miss Tiny" for the plaintiff's benefit in the amount of $26,883.16. The note was payable at no interest on or before 1 April 1987. The defendant did not sign either the note or the mortgage. However, the defendant talked with William about having the note and mortgage drafted and wrote the check to pay for their drafting.

As of 1 April 1987, the plaintiff had received $650 towards the balance due her on the note of March, 1982. She made demands of William and the defendant for payment after 1 April 1987, but William and the defendant did not make further payments to her. On 7 December 1988, the plaintiff filed suit against William and the defendant seeking the balance due on the note. On 20 March 1989, the plaintiff obtained an Entry of Default against William, and on 27 March 1989, she obtained a Default Judgment against William. The plaintiff's suit against the defendant went to trial, and at the close of the plaintiff's evidence, the defendant made a motion for directed verdict, which motion the trial court granted.

The issue is whether the plaintiff produced substantial evidence (A) showing the existence of a partnership between William and the defendant and, if so, (B) showing that the defendant is liable on the March, 1982 note.

> 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) (emphasis added). "More than a scintilla of evidence" means the same as "substantial evidence." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Accordingly, if the non-movant presents such relevant evidence as a reasonable mind might accept as adequate to support the elements of the non-movant's claim or defense, the trial court must deny a motion for a directed verdict.

The plaintiff argues that the trial court erred in granting the defendant's directed verdict motion at the close of the plaintiff's evidence because the plaintiff produced substantial evidence showing that William and the defendant entered into partnership and that William executed the note to the plaintiff as an agent of the alleged partnership thereby making the defendant liable on the note. We agree.

A

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." N.C.G.S. § 59-36 (1989). According to our Supreme Court,

> 'A contract, express or implied, is essential to the formation of a partnership.' . . . 'Partnership is a legal concept but the determination of the existence or not of a partnership . . . involves inferences drawn from an analysis of "all the circumstances attendant on its creation and operation," . . . .'
>
> Not only may a partnership be formed orally, but 'it may be created by the agreement or conduct of the parties, either express or implied,' . . . . 'A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such.' . . .
>
> Where the fact at issue is the existence of partnership the admissions against interest of the person denying the partnership are significant in establishing it.

Eggleston v. Eggleston, 228 N.C. 668, 674-75, 47 S.E.2d 243, 247 (1948) (citations omitted). "The fact that one partner owns certain property in the business, or provides the capital, while the other performs certain services, does not mean that they are not co-owners of the *business." Peed v. Peed*, 72 N.C. App. 549, 555, 325 S.E.2d 275, 280, *cert. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985) (emphasis in original) (husband and wife dairy farm operation). Furthermore, "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business . . . ." N.C.G.S. § 59-37 (1989).

When all of the circumstances are viewed in the light most favorable to the plaintiff, there is substantial evidence that William and the defendant established a partnership. The defendant's conduct from 1980 until 1985 is such that a reasonable mind would accept it as adequate to support the conclusion that there existed the contractual, voluntary association of two persons to carry on as co-owners businesses for profit needed to form a partnership. Along with William, the defendant owned real property on which they operated a store and marina. From that location, they operated a trawler. They also built trucks and hauled for hire. William testified that they were partners. The defendant had control of the businesses' checkbooks and money. She used the money they earned from these endeavors to pay their expenses. They purchased the trawler, vehicles, and equipment for their businesses. Finally and of great significance are the defendant's letters to the plaintiff wherein the defendant admitted that she and William were in "the Commercial fishing business," and that the summer of 1981 had not been too profitable for their businesses. Accordingly, the issue of whether there existed a partnership between William and the defendant should be resolved by a jury.

B

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

N.C.G.S. § 59-39(a) (1989). "All partners are jointly and severally liable for the acts and obligations of the partnership." N.C.G.S. § 59-45 (1989).

"Partnership contracts are not usually made in the names of the individual partners. The usual way for a partnership to indicate its liability for money borrowed is to execute the note in its name." *Brewer v. Elks*, 260 N.C. 470, 473, 133 S.E.2d 159, 162 (1963). Nevertheless, when an instrument is not signed in the partnership name and does "not on its face purport to be for the benefit of the partnership," "[t]o establish liability [against the non-signing part-

ner], plaintiff must show that the [signing] partner was acting on behalf of the partnership in . . . [executing the instrument] and was authorized to so act; or that the . . . [defendant], with knowledge of the transaction, thereafter ratified" the signing partner's acts. *Id.* at 472-73, 133 S.E.2d at 162; *see also In the Matter of Oxford Plastics v. Goodson*, 74 N.C. App. 256, 261-62, 328 S.E.2d 7, 11 (1985).

Here, William did not sign either the promissory note or mortgage in the name of the alleged partnership. Therefore, the plaintiff had the burden of showing either (1) that William was acting on behalf of the partnership when he executed the note and mortgage and that the defendant had authorized his acts, or (2) that the defendant, with knowledge of the note and mortgage, ratified his acts. With regard to whether William acted on behalf of the alleged partnership when he executed the instruments, William testified that because he and the defendant wanted to make sure the plaintiff would be paid the money that William and the defendant had borrowed from her, William executed the instruments. With regard to the defendant's authorization of William's acts, the plaintiff's evidence shows that the defendant actively sought the loans represented by the promissory note and mortgage. Furthermore, the defendant talked with William about having the note and mortgage drafted and wrote the check to pay for their drafting. With regard to the defendant's ratification of William's acts, the plaintiff's evidence shows that after the instruments had been executed, the defendant wrote the plaintiff a letter stating that she and William were going to "try to make some money to pay you first." The plaintiff's evidence is such that a reasonable mind would accept it as adequate to support the conclusion that William was acting on behalf of the partnership when he executed the instruments and that the defendant authorized and ratified William's acts. Therefore, these issues must be resolved by a jury.

We do not reach the merits of the defendant's statute of limitations argument because she did not raise this affirmative defense in her pleadings or at the trial court. "Where a defendant does not raise an affirmative defense in his pleadings or in the trial, he cannot present it on appeal. *Delp v. Delp*, 53 N.C. App. 72, 76, 280 S.E.2d 27, 30, *disc. rev. denied*, 304 N.C. 194, 285 S.E.2d 97 (1981). Furthermore, we do not address the merits of the plaintiff's argument regarding alleged fraudulent conveyances because she violated N.C.R. App. P. 28(b)(5) in that she failed to reference in her brief the assignment of error supporting the argument. This

part of the plaintiff's appeal is dismissed. N.C.R. App. P. 25(b) and 34(b)(1).

Dismissed in part, reversed in part, and remanded.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE FRANKLIN GREEN

No. 9012SC277

(Filed 21 May 1991)

1. **Appeal and Error § 447 (NCI4th)— standing to challenge constitutionality of search and seizure—no raising of issue for first time on appeal**

The State was precluded from raising for the first time on appeal the issue of defendant's lack of standing to allege a violation of his Fourth Amendment right to be free from unreasonable searches and seizures, though defendant did not own the car which was searched and which yielded controlled substances.

Appeal and Error § 159.

2. **Searches and Seizures § 9 (NCI3d)— warrantless search of glove compartment—illegal search and seizure**

The trial court erred in denying defendant's motion to suppress cocaine and heroin seized from his car as the fruit of an illegal search and seizure where the officer who had stopped defendant because his car was weaving had already frisked defendant and the car for weapons and identification and had ceased to search for weapons at the time he opened the glove compartment, and opening the glove compartment amounted to more than minimal intrusion.

Am Jur 2d, Searches and Seizures §§ 16, 33, 58, 103.

Lawfulness of search of motor vehicle following arrest for traffic violation. 10 ALR3d 314.

APPEAL by defendant from judgments entered 13 December 1989 by *Judge George R. Greene* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 13 November 1990.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Ralph B. Strickland, Jr., for the State.

Public Defender Mary Ann Tally, by Assistant Public Defender Michael G. Howell, for defendant-appellant.

PARKER, Judge.

Indicted for possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, driving while impaired, and driving without an operator's license, defendant moved to suppress evidence obtained as a result of the search of his automobile. From an adverse ruling, defendant gave notice of intent to appeal pursuant to N.C.G.S. § 15A-979(b) and then entered a plea of guilty to all four charges. For the offense of possession with intent to sell or deliver heroin the court sentenced defendant to a term of imprisonment of four years. For the offense of possession with intent to sell or deliver cocaine, defendant was sentenced to a term of imprisonment of six years, to begin at the expiration of the four year sentence and suspended for five years upon condition that defendant remain on supervised probation. For the offenses of driving while impaired and without an operator's license, defendant was sentenced to a term of imprisonment of six months, suspended concurrently with his six year sentence. Defendant appeals from the denial of his motion to suppress and the entry of these judgments.

The facts giving rise to this appeal are uncontroverted. Around 11:45 a.m. on 9 January 1989, Trooper Kevin Rittenhouse, a seven year veteran of the North Carolina Highway Patrol, was on routine patrol on North Carolina Highway 87, south of Fayetteville. A light rain was falling. He saw a white 1981 Toyota automobile travelling about fifty miles per hour in the left southbound lane of the four lane highway. As he approached the car from behind, it weaved into the right southbound lane twice. No other traffic was on the highway.

Suspecting the driver was impaired, Trooper Rittenhouse activated his light and siren. Twice the driver leaned over toward the front passenger seat, but louvers over the rear window prevented

Rittenhouse from seeing exactly what the driver was doing. The driver, who had returned to the left southbound lane, pulled over to the left and brought his car to a stop in the grassy median. At the suppression hearing, Rittenhouse testified he stopped the car only because of its weaving. He had no information that the car was stolen; he had received no tips, broadcasts, or other information about the driver; nor did he recognize the car.

Trooper Rittenhouse parked his patrol car behind the Toyota and approached the driver, who sat completely still. When the driver, later identified as the defendant, Willie F. Green, rolled down his window, Rittenhouse explained he had stopped defendant for weaving and asked to see his driver's license and proof of registration. Defendant replied that he had swerved because he spilled a drink on his trousers and that he did not have his wallet or license with him. He did not carry them about because he had the habit of losing them. Although defendant was holding a soft drink bottle, Rittenhouse did not see a wet spot on his trousers or the car seat.

Trooper Rittenhouse asked defendant to get out of the car and step away from it; defendant followed these instructions and submitted to a pat-down search. Feeling an object in defendant's pocket, Rittenhouse asked what it was. Defendant answered it was money, produced it for inspection, and was permitted to return it to his pocket. Rittenhouse asked defendant to step further away from the car while he looked on the floor and around the driver's seat for a weapon or proof of identification.

Although he found nothing, Trooper Rittenhouse still thought defendant had identification with him. Rittenhouse asked defendant to sit in the front passenger seat of the patrol car while he determined the status of defendant's license. He asked defendant for the name, date of birth, and address on his driver's license. Defendant stated, "Frederick Green, May 13, 1952, 406 Clay Street, Wilmington, North Carolina." Rittenhouse radioed this information, with the car's tag number, to the Elizabethtown patrol station for verification.

At this point, Trooper Rittenhouse had observed defendant, looked in his car, and talked with him briefly. The defendant looked orderly and there was nothing unusual about his appearance or speech. His eyes were red and glassy; but never having seen defendant before, Rittenhouse did not know the usual appearance

of his eyes. Rittenhouse had detected no odor of alcohol or drugs on or about defendant or his car and had seen no weapons, alcoholic beverage containers, or contraband. After defendant sat in his patrol car, Rittenhouse no longer suspected him of driving while impaired.

After no more than ten minutes, having received no response to his call for information, Trooper Rittenhouse again called the patrol station and was told to stand by. He asked defendant his age, and defendant said he was thirty-five. Based on the birthdate defendant had furnished earlier, Rittenhouse suspected defendant had been untruthful about all the information he supplied. Having asked defendant to remain in the patrol car, Rittenhouse walked to the passenger side of the Toyota, intending to look for a driver's license, identification, or proof of registration. First he opened the door; then he opened the glove box. He discovered two plastic bags containing what was later identified as heroin and cocaine.

Trooper Rittenhouse returned to the patrol car, arrested the defendant for possession of controlled substances, handcuffed him, and read him the *Miranda* rights. After he called for assistance, Rittenhouse asked defendant several questions and elicited the information that his license was expired and he had used controlled substances that morning. Rittenhouse received no other information about the status of defendant's license. Based on defendant's statements, Rittenhouse decided to charge him with driving while impaired and without an operator's license.

Other patrol members were summoned and a drug dog sniffed defendant's car; no controlled substances were found other than those Trooper Rittenhouse had seen. Later Rittenhouse found defendant's North Carolina identification card between the passenger seat and console of the Toyota. The card indicated defendant's name was Willie Franklin Green, his date of birth was 14 May 1953, and he resided at 109 North Seventh Street, Wilmington, North Carolina. Rittenhouse later determined the Toyota was registered to Mendell Harper, who resided at 109 Seventh Street, Wilmington, North Carolina; but defendant was not charged with improper registration.

[1] The State attempts to raise for the first time before this Court the issue of defendant's lack of standing to allege a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. State now contends that because defendant did not own the 1981 Toyota, he had no legitimate expectation of privacy

in the car or its contents. *See Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed.2d 387 (1978). Since "[t]here is no affirmative indication in the record that the State intended to, or tried to, rely upon defendant's lack of an expectation of privacy in the [car] to defeat his Fourth Amendment claim at the suppression hearing in the lower court," the State is precluded from raising the argument before this Court. *State v. Cooke*, 306 N.C. 132, 138, 291 S.E.2d 618, 621-22 (1982).

[2] Defendant's sole contention on appeal is that the trial court erred in denying his motion to suppress the cocaine and heroin seized from his car as the fruit of an illegal search and seizure. We agree.

The court below conducted a hearing on the motion to suppress pursuant to N.C.G.S. § 15A-977(d). In its final order the court concluded as follows:

> 1. Trooper Rittenhouse had a reasonable belief that the defendant was driving without a license.
>
> 2. Important governmental interests in protecting the citizens of this State against unlicensed drivers outweighs [sic] the minimal intrusion into the defendant's privacy interest in the glove compartment of the vehicle.
>
> 3. Trooper Rittenhouse used the least intrusive means to determine ownership of the vehicle and to find identification of the defendant and vehicle identification.
>
> 4. Based on the information known to Trooper Rittenhouse at that time, Trooper Rittenhouse had a duty to investigate further to find out the identification of this defendant.
>
> 5. [T]he search of the glove compartment was a reasonable search within the meaning of the United States Constitution and the North Carolina Constitution.

Under General Statutes, Chapter 20, Article 2, operating a motor vehicle without being licensed by the Division of Motor Vehicles is a misdemeanor. N.C.G.S. §§ 20-7(a), (o) (1989). This same statute also makes failure to carry one's license at all times when engaged in operating a motor vehicle a misdemeanor. N.C.G.S. §§ 20-7(n), (o) (1989). Members of the State Highway Patrol are authorized to arrest without warrant any person who in their presence is engaged in the violation of any laws of the State

regulating travel and the use of vehicles upon the highways. N.C.G.S. § 20-188 (1989).

Under Article 3 of Chapter 20 it is unlawful to operate an unregistered vehicle. N.C.G.S. § 20-111(1) (1989). A registration card must be carried at all times in the vehicle to which it refers. N.C.G.S. § 20-57(c) (1989). Members of the highway patrol have the power of peace officers for the purpose of enforcing the provisions of Article 3. Patrol members may (i) arrest on sight any person found violating the provisions of Article 3 and (ii) stop any motor vehicle on a North Carolina highway to determine whether the vehicle is being operated in violation of any provision of Article 3. N.C.G.S. § 20-183(a) (1989).

Nevertheless, the power to stop a vehicle does not include power to search. *State v. Blackwelder*, 34 N.C. App. 352, 355, 238 S.E.2d 190, 191-92 (1977). Persons stopped pursuant to § 20-183 may not be indiscriminately searched or arrested without probable cause, in contravention of recognized constitutional principles. *State v. Allen*, 282 N.C. 503, 511, 194 S.E.2d 9, 15 (1973). Even "the power to arrest does not necessarily include the authority to search a motor vehicle in the absence of probable cause." *State v. Braxton*, 90 N.C. App. 204, 208, 368 S.E.2d 56, 59 (1988).

The Fourth Amendment by its terms prohibits unreasonable searches and seizures; but there is no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. A police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, justifiably warrant the intrusion. This test generally means searches must be conducted pursuant to a warrant backed by probable cause. *New York v. Class*, 475 U.S. 106, 116-17, 89 L.Ed.2d 81, 92 (1986).

In discussing and applying principles of Fourth Amendment law, this Court has said:

> [An] exception to the rule against warrantless searches was approved in *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). This so-called "stop and frisk" rule allows an officer investigating suspicious behavior by an individual at close range to determine whether the suspicious person is armed and to neutralize any threat if the officer has a reasonable belief that the suspect is armed or presently

> dangerous. This "stop and frisk" exception to unreasonable search and seizure has been extended to automobiles. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). In *Long*, the Court acknowledged that investigative detention of persons in automobiles presents a danger to police officers. The Court then held that those areas of a passenger compartment of a motor vehicle where weapons might be hidden may be searched if the facts, coupled with rational inferences drawn therefrom, reasonably warrant an officer's belief that a suspect is dangerous and may gain control of weapons.

State v. Braxton, 90 N.C. App. at 208-209, 368 S.E.2d at 58. The *Braxton* court went on to say the facts before it did not warrant the officer's belief that the suspect was dangerous or might gain control of weapons; it was "uncontroverted that defendant could not obtain any weapon or other item from the car." *Braxton*, 90 N.C. App. at 209, 368 S.E.2d at 59.

The *Class* court considered whether the action of a police officer, who in order to check a Vehicle Identification Number, reached into the passenger compartment of a vehicle to remove papers obscuring the number after the driver was stopped for a traffic violation, violated the Fourth Amendment. After restating the rule against warrantless searches, the Court cited the exception for searches which have as their immediate object a weapon, in which significant interest in the safety of police officers is considered sufficient justification for warrantless searches based only on a reasonable suspicion of criminal activity. The Court noted that when an officer's safety is less directly served by a detention, something more than objectively justifiable suspicion is necessary to justify an intrusion. Three factors in particular influenced the Court to hold the search at issue was reasonable: (i) "the safety of the officers was served by the governmental intrusion"; (ii) "the intrusion was minimal"; and (iii) "the search stemmed from some probable cause focussing suspicion on the individual affected by the search." *Class*, 475 U.S. at 117-18, 89 L.Ed.2d at 93.

In the case before us safety of an officer was not served by governmental intrusion; Trooper Rittenhouse had already made a *Terry* style frisk of both defendant and the car for weapons and identification and had ceased to search for weapons at the time he opened the glove compartment. The intrusion was not minimal under *Class*; that case explicitly distinguished the opening

of an automobile glove compartment: "The officer did not root about the interior of the respondent's automobile before proceeding to examine the VIN. *He did not reach into any compartments or open any containers.*" *Class*, 475 U.S. at 118, 89 L.Ed.2d at 93 (emphasis added).

An officer's safety, rather than "important governmental interests in protecting a state's citizens against unlicensed drivers," may justify governmental intrusion. Because Trooper Rittenhouse's safety was not at issue and because under *Class*, his intrusion was not minimal, we conclude his search violated Fourth Amendment principles. We, therefore, hold the trial court erred in denying defendant's motion to suppress the evidence against him.

Reversed.

Judges ARNOLD and EAGLES concur.

ANNER F. EVANS, EMPLOYEE, PLAINTIFF, APPELLANT v. AT&T TECHNOLOGIES, SELF-INSURED, EMPLOYER, DEFENDANT, APPELLEE

No. 8910IC774

(Filed 21 May 1991)

1. **Master and Servant § 55 (NCI3d)— workers' compensation— fall on paper in factory aisle—injury compensable**

Evidence was sufficient to support the findings and conclusions of the Industrial Commission that plaintiff suffered an injury by accident under the Workers' Compensation Act when she slipped on a piece of paper on a factory aisleway and fell to the floor, that she was unable to work during the periods of temporary total disability, and that she had a 10% permanent partial disability of the back and both legs.

Am Jur 2d, Workmen's Compensation §§ 227, 245, 297, 298.

2. **Master and Servant § 69 (NCI3d)— workers' compensation— type of credit employer is entitled to for payments made**

In paying plaintiff the workers' compensation awarded, defendant employer was entitled to a "week-by-week" rather than "dollar-for-dollar" credit for payments it made to plaintiff

under its sickness and disability plan while she was unable to work and her right to workers' compensation was being contested. N.C.G.S. § 97-42.

Am Jur 2d, Workmen's Compensation §§ 407 et seq.

APPEAL by plaintiff and cross-appeal by defendant from Opinion and Award filed 14 March 1989 and amended 30 March 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 1990.

Daniel S. Walden for plaintiff appellant/appellee.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Clayton M. Custer, for defendant appellee/cross-appellant.

PHILLIPS, Judge.

The following holdings of the Industrial Commission's Opinion and Award are contested by either the appeal or cross-appeal: (1) That under our Workers' Compensation Act plaintiff employee is entitled to receive compensation for disabilities that she sustained due to an on-the-job accident while in defendant's employment. (2) Because of wage payments that defendant made to plaintiff under its private Sickness and Disability Plan while she was disabled from her injuries and before her right to compensation was either admitted or established "the case of *Foster v. Western Electric*, 320 N.C. 113, entitles the defendant to a dollar-for-dollar credit on the compensation awarded herein and not on a week-to-week credit." The first holding is challenged by defendant's cross-appeal, the second by plaintiff's appeal. Since no credit of any kind can possibly be due defendant unless it owes the employee workers' compensation, we determine its cross-appeal first.

DEFENDANT'S CROSS-APPEAL

[1] The cross-appeal is without basis for several reasons. In determining that plaintiff is entitled to receive workers' compensation from defendant the Commission found, by detailed and exhaustive findings of fact, that on 20 February 1986 plaintiff employee suffered an injury by accident under the Workers' Compensation Act when she slipped on a piece of paper on a factory aisleway and fell to the floor, and that as a result of the fall plaintiff was unable to work during the periods of temporary total disability stated below and has had a 10% permanent partial disability of the back

and both legs since the end of the last temporary total disability period. The findings of fact are conclusive because defendant did not except to any of them, *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E.2d 27 (1960); and they are supported by competent evidence in any event, *Brice v. Robertson House Moving, Wrecking and Salvage Company*, 249 N.C. 74, 105 S.E.2d 439 (1958); and they clearly support the Commission's conclusions of law that plaintiff is entitled to the workers' compensation awarded. Against these established facts and the conclusions of law that they properly lead to, defendant argues only that: Its evidence on the accident, injury, and causation issues is more credible than plaintiff's and shows that plaintiff's fall was due to an idiopathic condition and did not contribute to her disabilities in any event because any disabilities that she has are due to preexisting arthritis. The arguments are out of place here. In workers' compensation cases our Courts only review errors of law; the credibility and weight of evidence is determined by the Industrial Commission. G.S. 97-86; *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965). Furthermore, the arguments are not supported by an appropriate cross-assignment of error; the cross-assignments cited concern other matters. *See*, Rule 10(b), (c) and (d), N.C. Rules of Appellate Procedure.

PLAINTIFF'S APPEAL

[2] The only question for determination is—In paying plaintiff the workers' compensation awarded, what credit is due defendant employer for the payments it made to plaintiff while she was unable to work and her right to workers' compensation was being contested? That defendant is entitled to some credit is conceded; the dispute is whether the credit due is "dollar-for-dollar" as the Commission ordered, or "week-by-week" as plaintiff contends. The only authority for allowing an employer in this state any credit against workers' compensation payments due an injured employee is the following provision of G.S. 97-42:

> 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 laudable purpose of the statute—to encourage voluntary payments to workers while their claims to compensation are being disputed and they are receiving no wages—has been discussed in several cases. *See Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987); *Moretz v. Richards & Associates, Inc.*, 316 N.C. 539, 342 S.E.2d 844 (1986). And that the statute does not apply to obligatory payments made to employees in compliance with their terms of employment has been intimated, if not recognized, *Ashe v. Barnes*, 255 N.C. 310, 121 S.E.2d 549 (1961), and would seem to be obvious from its terms in any event. In most of the cases that have construed the statute the dispute was whether the payments were "due and payable" and any credit was due the employer. In this case the problem is simplified to some extent, as plaintiff concedes that some credit or offset is due defendant, not so much though because defendant is entitled thereto for making the payments, but because plaintiff is not entitled to compensation for receiving them.

The established facts from which the Commission concluded that under *Foster v. Western-Electric Co., supra*, defendant is entitled to a dollar-for-dollar credit, rather than a week-by-week credit, for all the payments made during the period plaintiff was unable to work follow:

> Because of her accidental on-the-job injury plaintiff was temporarily totally disabled for 43 weeks altogether in two different periods, the first from 21 February 1986 to 3 March 1986, and the second from 6 February 1987 until 23 November 1987. Since the latter date she has had a 10% permanent partial disability of her back and both legs. For each week that plaintiff was temporarily totally disabled she is entitled to receive compensation of $294.00 and because of her permanent partial disabilities she is entitled to the same weekly compensation for an additional 70 weeks beginning on 23 November 1987. While denying that plaintiff was injured by accident and entitled to workers' compensation, defendant paid plaintiff her full wage of $474.25 a week during the first period of temporary total disability, and paid her full weekly wage of $495.88 during the part of the second temporary total disability period from 6 February 1987 until 1 August 1987, and

> has made no payments since then. All the payments were made under a Sickness and Disability Plan that defendant maintained for all employees. Under the plan all employees unable to work because of either sickness or injury, whether sustained on-the-job or elsewhere, receive their full wages for certain periods according to their years of service. The plan "was intended to be coordinated with potential worker's compensation benefits so as to avoid duplication thereof. Based on her years of service plaintiff was entitled to receive" all the wage payments that she received.

Thus, as is manifest or easily computable from the foregoing facts and figures, the wage payments that defendant made to plaintiff during the 27 weeks involved amounted to approximately $12,966.10, the compensation awarded plaintiff for the 43 weeks that she was temporarily totally disabled amounts to approximately $12,642.00, and allowing defendant a dollar-for-dollar credit, rather than a week-by-week credit, would conflict with plaintiff's ownership of the payments and produce an incongruous result.

Crediting defendant with the payments made under its Sickness and Disability Plan on a "week-by-week" basis, as plaintiff argues is proper, would simply offset the compensation that is due plaintiff for the 27 weeks in which payments were made, and would not affect the remaining $180 to $200 of each wage payment defendant received, or the compensation that defendant owes plaintiff for the remaining 16 weeks she was temporarily totally disabled or the compensation owed for her permanent disabilities beginning on 23 November 1987. On the other hand, crediting defendant on a "dollar-for-dollar" basis for the payments made to plaintiff under its plan would have the following effect: The workers' compensation due plaintiff not only for the 27 weeks in which the payments were made, but for the additional 16 weeks after 1 August 1987 that she was temporarily totally disabled and part of the first week of her permanent disability would all be offset by the wage payments received; of each wage payment so received plaintiff would not retain a cent for her own use, as $294 of each payment would be applied against the workers' compensation due for that week and the remaining $180 to $200 would be applied against the workers' compensation due after 1 August 1987. Such an offset conflicts with the Commission's finding that plaintiff was entitled to the wage payments, and offsetting all of the payments against the workers' compensation owed plaintiff would enable defendant

to satisfy its obligation to plaintiff with her own funds. Nothing in defendant's plan, G.S. 97-42, *Foster v. Western-Electric Co.*, *supra*, or any other provision of our law authorizes, much less requires, any such thing.

If defendant's payments to plaintiff had been loans or even gratuities, a dollar-for-dollar credit might be authorized, but they were neither. According to the Commission's findings, the payments were owed to plaintiff under the terms of defendant's Sickness and Disability Plan because of her long service in its employment. Obviously the plan, which entitled employees when disabled for any reason to receive their full wages for a certain period, served two main purposes; one primarily beneficial to the employees by preventing them from suffering need and hardship when disabled, and the other primarily of benefit to defendant employer by encouraging its trained, experienced employees to continue in its service. Since the wage payments belonged to plaintiff, using them to offset defendant's obligations to pay her compensation for other weeks is not authorized by G.S. 97-42 and would be confiscatory if it was. But though the wage payments were hers, offsetting them against compensation awarded her for the same weeks is authorized for two reasons: First, no compensation is due plaintiff for the weeks that her wages were paid because disability under the Workers' Compensation Act is based upon decreased earnings, G.S. 97-2(9); *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 25 S.E.2d 865 (1943), and she had sustained no wage loss; and second, plaintiff cannot collect workers' compensation for the weeks that her wages were paid because of the policy against employees receiving duplicating payments at the employer's expense. *Moretz v. Richards & Associates, Inc.*, 316 N.C. 539, 342 S.E.2d 844 (1986). Contrary to defendant's argument, crediting each wage payment against the compensation due plaintiff for that same week would not conflict with defendant's intent under the plan to coordinate the payments with workers' compensation so as to avoid duplication of benefits. It would not be a duplication of payments for plaintiff to keep the weekly wages she was entitled to under the plan and not receive any workers' compensation for the same weeks; or for her to receive only her wages for one period and only her workers' compensation payments for another period. But offsetting all of plaintiff's wage payments under the plan against the workers' compensation that defendant owes her would conflict with the declared purpose of the plan to provide wage substitution payments

to all disabled workers, as her so-called wages would be but an early payment of some of the workers' compensation that she is entitled to.

That *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), does not entitle defendant to a dollar-for-dollar credit in this case seems plain to us. Though the employer's plan was similar to the one in this case, the question presented was not the kind of credit that was due the employer, but whether the employer was entitled to any credit against compensation for the payments made. And in deciding that the employer was entitled to a credit, the Court did not mention either the dollar-for-dollar or week-by-week concept, though it did say that denying the employer "full credit for the amount paid" would be improper. *Id.* at 117, 357 S.E.2d at 673. But the circumstances of that case are materially different from those in this case and the "full credit" allowed there is no mandate for a dollar-for-dollar credit here. In both cases payments were made to an injured employee under a company disability plan before the employer's liability for compensation was admitted or established; but in *Foster*, apparently, unlike in this case, there was no finding that the plaintiff was entitled to the payments received. Another material difference between the cases is that the weekly wage substitution payments *Foster* received (amounting to $7,598.16) and the compensation that the Commission awarded (amounting to $6,741.96) "encompassed the same time period." *Id.* at 114, 357 S.E.2d at 671. Thus, the "full credit" allowed was not a "dollar-for-dollar" credit that extended beyond the period in which the payments were made, it was only a credit against the compensation awarded for the same period and thus a week-by-week or period-by-period credit that is usually allowed in situations like this, according to the leading authority in this field. 2 A. Larson, *The Law of Workmen's Compensation* Sec. 57.47 (1986).

In discussing the policy reasons for allowing a credit—relieving hardship and avoiding duplication of benefits—the Court in *Foster* did state that denying "full credit for the amount paid . . . would inevitably cause employers to be less generous and the result would be that the employee would lose his full salary at the very moment he needs it most." *Id.* at 117, 357 S.E.2d at 673. While the denial of full credit under the circumstances of the *Foster* case might cause employers similarly situated to change or abolish their sickness and disability plans, we think it unlikely that denying a dollar-for-dollar credit in this case would have any such effect. For allowing

such a credit in this case would in effect be a holding that: Under such sickness and disability plans employees disabled while in the employer's service are less favored than those disabled while about their own affairs because under defendant's plan workers disabled while about their own affairs get to keep their wages, while under the Commission's holding workers disabled on the job cannot keep any wages paid them as long as their employers still owe them any workers' compensation. That any employer would terminate or change its wage benefit plan for all disabled workers because all the wages paid an employee disabled on the job were not offset against the workers' compensation owed does not seem likely to us.

Thus, the Commission's Opinion and Award allowing a dollar-for-dollar credit for the wage payments involved is reversed and the matter remanded to the Industrial Commission for the entry of an Opinion and Award allowing a week-by-week credit in accord with this opinion.

Reversed and remanded with instructions.

Chief Judge HEDRICK and Judge EAGLES concur.

LENETTE D. MICKENS, PLAINTIFF v. SHEILA D. ROBINSON, DEFENDANT

No. 9021DC991

(Filed 21 May 1991)

1. **Automobiles and Other Vehicles § 45.6 (NCI3d)— running of red light—accident—officer's testimony from report proper**

In an action to recover damages sustained in an automobile accident where there was a question of fact as to whose vehicle entered the intersection improperly by running a red light, the trial court did not err in allowing the investigating officer to testify in detail as to what he found at the scene, including testimony tending to show that defendant's vehicle ran into plaintiff's vehicle in the intersection, where the officer made no reference to the stoplight other than that there was one in operation at the intersection, and it was clear that the officer was either referring to or reading from his accident report prepared as a result of his investigation.

Am Jur 2d, Automobiles and Highway Traffic §§ 1068 et seq.

2. Damages § 16.4 (NCI3d)— damages award supported by evidence

The trial court did not abuse its discretion in failing to set aside as excessive and unsupported by the evidence a verdict of $6,000 for personal injury damages where defendant's evidence tended to show that she suffered damages including lost wages of $225 and medical bills of $155, that she experienced soreness for seven to ten days after the accident, and that her leg was severely bruised.

Am Jur 2d, Damages §§ 864, 878, 880, 1017 et seq.

3. Costs § 30 (NCI4th)— defendant successful on counterclaim— fees for attorney appropriate

There was no merit to plaintiff's contention that the legislature did not intend for defendants to be able to collect attorney fees under N.C.G.S. § 6-21.1 fees when they have prevailed on counterclaims for less than the stated amount; furthermore, the trial court was not required to make findings of fact allocating the time spent on this case between work required to defend against plaintiff's claim and that required to forward her counterclaim.

Am Jur 2d, Costs §§ 72 et seq.

APPEAL by plaintiff from judgment and order entered 22 February 1990 in FORSYTH County District Court by *Judge William B. Reingold.* Heard in the Court of Appeals 15 April 1991.

Plaintiff brought this action for damages arising out of an automobile collision with a vehicle driven by defendant. Defendant answered, denying all negligence, and counterclaimed for damages alleged to have been incurred as a result of plaintiff's negligence.

The collision at issue took place at an intersection governed by a traffic signal. The primary point of contention at trial was which party entered the intersection improperly by running a red light.

Plaintiff testified that the light was green in her direction when she entered the intersection. She also presented testimony from an individual who claimed to have been behind defendant's

car at the time of the collision which tended to show that defendant entered the intersection against a red light. She also presented testimony from Officer John Turner, who investigated the accident.

Defendant testified that she approached the intersection at a "crawl" because the light was red in her direction. The light turned green before she came to a complete stop, and she proceeded into the intersection. Defendant also presented testimony from two individuals claiming to have been passengers in the car next to hers tending to show that defendant proceeded with the green light. The driver of this car also testified that she began to go through the intersection when the light turned green, but stopped when she observed plaintiff's car and determined that plaintiff was not going to stop for the red light. Finally, defendant presented evidence from an individual who claimed that he followed plaintiff out of a nightclub near the intersection after she had an altercation with her boyfriend, saw her drive off, and enter the intersection against a red light.

Plaintiff presented testimony from the boyfriend on rebuttal. He claimed to have been following plaintiff home from the nightclub, and saw her enter the intersection with a green light.

The jury found against the plaintiff on her claim for negligence and for the defendant on her counterclaim. It awarded defendant $6000.00 for "personal injury" and found that she was entitled to compensation for property damage for "all incurred." This amount was stipulated to be $1500.00. The trial court also awarded attorney's fees to defendant of $5000.00 pursuant to N.C. Gen. Stat. § 6-21.1. Plaintiff appeals.

F. Kevin Mauney for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Reid C. Adams and Ellis B. Drew, III, for defendant-appellee.

WELLS, Judge.

Plaintiff brings forward six assignments of error for our review. Assignments of error 2 and 6 are not argued in her brief and are therefore deemed abandoned. N.C.R. App. P. Rule 28. She contends that the trial court erred in admitting certain testimony from Officer John Turner, in awarding attorney's fees to defendant, and in failing to set aside the verdict as excessive in light of the evidence and order a new trial. We find no error.

[1] Officer Turner was called as plaintiff's first witness. His testimony revealed that he investigated the accident, arriving on the scene within a few minutes of the collision. He testified in detail as to what he found at the scene, including testimony tending to show that defendant's vehicle ran into plaintiff's vehicle in the intersection, but he made no reference to the stoplight other than that there was one in operation at the intersection. Questions and answers on direct show clearly that Officer Turner was either referring to or reading from his accident report prepared as a result of his investigation.

On cross-examination of Officer Turner, the following exchange took place:

Q. Officer Turner, in the course of your investigation, did you make a factual determination as to the cause of the accident?

MR. MOLITORIS: Objection.

COURT: Repeat the question, please, sir.

Q. All right. During and after your investigation, did you make a factual determination as to the cause of the accident?

MR. MOLITORIS: Objection.

COURT: Overruled.

A. Yes, sir.

Q. And what was the cause of the accident?

MR. MOLITORIS: Objection.

COURT: Overruled.

MR. MOLITORIS: May I be heard on that?

COURT: Approach the bench. (Counsel approach the bench.)

COURT: The objection is overruled.

MR. DREW: May I approach the witness, Your Honor?

COURT: Yes, sir.

Q. Officer Turner, do you have a copy of your accident report with you?

A. Yes, sir. I do.

Q. Did you make a notation as to the results of your investigation, your conclusions as to the cause of the accident on your accident report?

A. Yes, sir. I did.

Q. Would you please read that to the jury?

MR. MOLITORIS: Objection.

COURT: Overruled.

A. I'd like to clarify. Do you want me to read what I've got described as what happened?

Q. Please.

A. Okay. I said, "Vehicle #1 traveling east on West Sixth Street failed to stop for a red light and was involved in an accident with Vehicle #2 traveling north on Main Street. Account given. . . .

MR. MOLITORIS: Objection.

COURT: Your objection is noted. It is overruled. I will give you a line objection as to anything pertaining to this information.

A. (continuing) "Account given by disinterested witness."

MR. MOLITORIS: Motion to strike.

COURT: Denied.

On redirect, the following took place:

Q. You, of course, personally did not observe this collision?

A. No, sir.

Q. And you don't know how or why it occurred?

MR. DREW: Objection, Your Honor. He's testified how and why it occurred.

COURT: Overruled.

Q. Officer, you don't know how or why this collision occurred, do you? Of your own knowledge.

A. Of my own knowledge? No. Not other than my investigation.

Q. And your investigation indicated that Vehicle #2 drove into Vehicle #1?

A. Yes, sir.

On recross, the following took place:

Q. One last question, Officer Turner. When Vehicle #2 proceeded into the intersection, did you conclude during any of your investigation that she drove into the intersection because she had a green light?

MR. MOLITORIS: Objection.

COURT: Sustained.

Q. Rephrase it. Vehicle #2 have the right of way when it drove into the intersection, Officer Turner?

MR. MOLITORIS: Objection.

COURT: Sustained.

Based on this record, we cannot agree with defendant's contention that Officer Turner was erroneously allowed to state his conclusion as to what caused the accident and was allowed to tell the jurors "what result to reach." Under this Court's ruling in *Mobley v. Hill*, 80 N.C. App. 79, 341 S.E.2d 46 (1986), the trial court obviously should have sustained plaintiff's objection to defendant's "conclusion as to the cause of the accident" question because *the question* invited Officer Turner to express an opinion as to fault clearly prohibited by *Mobley*. We perceive Officer Turner as having saved the situation, however, by limiting his response to repeating from his report what he had been told about what happened. The sum total of Officer Turner's testimony was to disavow any assessment or attribution of fault, and thus the error of the trial court in not sustaining plaintiff's original objection was rendered non-prejudicial.

While not dispositive in this case, we deem it helpful to note that the U.S. Supreme Court established a very broad rule for our federal courts in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 102 L.Ed.2d 445 (1988), which would appear to allow such opinion testimony from investigative reports under Rule 803(8)(C) of the Federal Rules of Evidence:

> [P]ortions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report.

Thus it appears that in the federal courts hearsay may provide the basis for opinion testimony as to fault, in contrast to our holding in *Mobley* that an eyewitness may not express such an opinion.

[2] Plaintiff next assigns error to the denial of her motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure on the grounds that the verdict was excessive and not supported by the evidence. Defendant testified that she suffered damages including lost wages of $225.00 and medical bills of $155.00. She also experienced soreness for seven to ten days after the accident and her leg was severely bruised. The jury returned a verdict of $6000.00 for personal injury damages. "It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). We perceive no such manifest abuse in this record. *See Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E.2d 231, *disc. review denied*, 301 N.C. 239, 283 S.E.2d 135 (1980).

[3] Finally, plaintiff assigns error to the trial court's award of attorney's fees to defendant. N.C. Gen. Stat. § 6-21.1 provides in pertinent part:

> In any personal injury or property damage suit . . . instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit. . . .

The statute refers to "the litigant obtaining a judgment." We therefore reject plaintiff's contention that the legislature did not intend for defendants to be able to collect attorney's fees when they have prevailed on counterclaims for less than the stated amount.

We also decline to adopt plaintiff's argument that the trial court was required to make findings of fact allocating the time spent on this case between work required to defend against plaintiff's claim and that required to forward her counterclaim. We see little way for the trial court to have made such a differentiation in this case. Much of the investigation and presentation of evidence necessarily overlapped. Defendant's attorneys presented evidence tending to show that they were entitled to a fee of $8000.00 for their work in this case. The trial court, after "having carefully reviewed the petitioner's hours," awarded $5000.00. There was no abuse of discretion in this award. The assignments of error relating to the award of attorney's fees are therefore overruled.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

ROBIN G. BROWN, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL S. BROWN, PLAINTIFF v. TRUCK INSURANCE EXCHANGE, A CALIFORNIA CORPORATION, DEFENDANT

No. 9015SC713

(Filed 21 May 1991)

Insurance § 69 (NCI3d) — underinsured motorist coverage — deceased not named insured — no coverage for a social passenger in third party's vehicle

A vehicle insurance policy issued to a company which leased trucks owned by deceased and the services of deceased did not provide underinsured motorist coverage for the deceased who was killed while a social passenger in a car owned by a third party. An endorsement providing that liability coverage would apply to the owner of a vehicle hired by the named insured if the actual use of the automobile is in the business of the named insured did not make the deceased a "named insured" within the meaning of N.C.G.S. § 20-279.21(b)(3), and the voluntary additional insurance provided by the endorsement did not apply to deceased while riding in a third party's car.

Am Jur 2d, Automobile Insurance §§ 293 et seq.

Who is "named insured" within meaning of automobile insurance coverage. 91 ALR3d 1280.

APPEAL by plaintiff from judgment entered 27 March 1990 by *Judge D. B. Herring, Jr.* in ORANGE County Superior Court. Heard in the Court of Appeals 24 January 1991.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by J. William Blue, Jr. and Jo Ann Ragazzo Woods, for plaintiff-appellant.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr. and E. Elizabeth Lefler, for defendant-appellee.

JOHNSON, Judge.

This is an appeal from judgment by the court without a jury concluding as a matter of law that an insurance policy issued by defendant does not provide underinsured motorists coverage for Carl Brown. The court made, *inter alia*, the following findings of fact, to which plaintiff does not except.

On 29 June 1985, Carl Brown was a passenger in a car owned by a third party when it was struck by a vehicle driven by Terri Tripp. Mr. Brown sustained fatal injuries. Robin G. Brown, the personal representative of his estate, brought suit against Terri Tripp and obtained a jury verdict in the amount of $326,485.14. Plaintiff received a total of $170,000.00 from various insurance carriers in partial satisfaction of that judgment.

Prior to his death, Brown was engaged in the trucking business and had entered into an "Independent Contractor Operating Agreement" with Schneider National Carriers, Inc. ("Schneider") whereby Brown leased his services and certain tractor truck units which he owned to Schneider. The agreement required Brown to pay all operating expenses, permits and workers' compensation insurance coverage. Schneider was legally obligated to maintain insurance coverage for the protection of the public pursuant to 49 U.S.C. § 10927 and regulations of the Interstate Commerce Commission.

Forms from the Division of Motor Vehicles were entered into evidence listing Schneider as applicant on a "North Carolina Registration Application." An "Owners Certificate for Eligibility to Renew

Registration" form certified that for the motor vehicles so described on the application [being three trucks owned by Brown and leased to Schneider], Schneider had financial responsibility as required by law with Truck Insurance Exchange, Inc., on policy No. 8-03-00-73. Schneider was listed as named insured on the declarations page of the policy. Registration tags were issued in the name of Schneider National Carriers, Inc., covering the tractor truck units leased to Schneider by Brown.

Policy No. 8-03-00-73 was in full force and effect on the date that Brown was killed. At the time of the accident Carl Brown was not engaged in the business covered by the "Independent Contractor Operating Agreement" and was not in one of his three leased trucks. The trial court concluded that the policy did not provide underinsured motorists coverage for Carl Brown.

Policy No. 8-03-00-73 contains Endorsement No. 4 which states:

SPECIAL ADDITIONAL INSURED ENDORSEMENT

In consideration of the premium it is agreed that such insurance as is afforded by this policy for Bodily Injury Liability and for Property Damage Liability with respect to any automobile hired by the named insured shall also apply to the owner thereof, provided the actual use of the automobile is in the business of the named insured.

On page seven of the policy, under "Conditions" is the following, in pertinent part:

FINANCIAL RESPONSIBILITY LAWS: When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law.

The definitions section of the policy states:

INSURED means (1) the named insured or a relative, (2) any other person while occupying an insured motor vehicle, and (3) any person with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (1) or (2) above.

> NAMED INSURED: If the insured named in item 1 of the Declarations is an individual, the term "named insured" includes his spouse if a resident of the same household.

Plaintiff argues that Carl Brown is a "named insured" under Endorsement 4 and that under this Court's decision in *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986), he is covered under the policy regardless that he was killed while riding in a vehicle other than one of his trucks while engaged in the business of transporting freight.

Defendant argues that Carl Brown is not the "named insured" because he is not listed as such on the declarations page of the policy but is an "additional insured" under Endorsement 4 and therefore coverage as to him is limited by the terms of the endorsement.

"When examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47 (1991). Thus, we must first determine whether Carl Brown is a covered person under the relevant statutory provisions and if not, whether he is covered under the terms of the insurance contract.

Carl Brown died on 29 June 1985, therefore the relevant statute is G.S. § 20-279.21 (1983). The type of insurance at issue here, underinsured motorist coverage (UIM), is governed by § 20-279.21(b)(4) which incorporates by reference the definition of "persons insured" that is found in § 20-279.21(b)(3), dealing with uninsured motorists (UM) coverage. Thus, for both UM and UIM coverage, "persons insured" means

> the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

G.S. § 20-279.21(b)(3). *Smith*, 328 N.C. 139, 143, 400 S.E.2d 44, 47.

In *Crowder*, 79 N.C. App. 551, 340 S.E.2d 127, this Court interpreted subsection (b)(3) as establishing two classes of "persons insured":

> (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Id. at 554, 340 S.E.2d at 129-130. Members of the first class are "persons insured" regardless of whether the insured vehicle is involved in their injuries. Members of the second class are "persons insured" only when the insured vehicle is involved in the insured's injuries. *Id.* at 554, 340 S.E.2d at 130; *Smith*, 328 N.C. at 143, 400 S.E.2d at 47. Under the facts of this case, Carl Brown would be a "person insured" under the statute only if he were a "named insured."

Plaintiff argues that Mr. Brown is a "named insured" by virtue of Endorsement 4 and is therefore covered under the statute as being within the first class of "persons insured" as defined in *Crowder*. We disagree.

The declaration page of the policy at issue lists Schneider as the "named insured." Carl Brown is not listed as the "named insured." We can find no case, and plaintiff cites none to us, which in any way expands the term "named insured" beyond its explicit common sense meaning. The term appears frequently in the statute at issue in such a way as to distinguish the "named insured" from other covered persons. *See*, e.g., G.S. § 20-279.21(b): "Such owner's policy of liability insurance: . . . (2) shall insure the person named therein and any other person[.]" G.S. § 20-279.21(b)(3): "For purposes of this section 'persons insured' means the named insured and . . . ."

We find that Carl Brown is not a "named insured" under the statute. Neither is he a "named insured" as defined in the policy. Thus Carl Brown is not a "person insured" under G.S. § 20-279.21(b)(4). The question remains whether Carl Brown was covered under the terms of the insurance contract.

Endorsement 4 provides that certain coverage "with respect to any automobile hired by the named insured [Schneider] shall also apply to the owner [Carl Brown] thereof, *provided the actual use of the automobile is in the business of the named insured.*" The issue is whether the limitation is valid so as to exclude Carl Brown when he was killed while a social passenger in a third party's vehicle. We find that it is.

The provisions of the Financial Responsibility Act are written into every automobile liability policy as a matter of law and where the provisions of the policy conflict with the provisions of the statute, the statute prevails. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). But coverage which is in addition to the mandatory requirements of the statute are voluntary and are not subject to the requirements of the Act. *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973). Voluntary coverage must be measured by the terms of the policy as written. *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972). The policy at issue insures the owner of the vehicle hired by the named insured only if the actual use of the automobile is in the business of the named insured. Such coverage is beyond the requirements of the Financial Responsibility Act and is voluntary additional coverage. As such, it is to be applied according to its terms and limitations. Carl Brown, the owner of the leased trucks, was killed while a social guest in a third party's vehicle. The limitation in the terms of the policy therefore excludes him from coverage.

Because Carl Brown was not an "insured person" under the relevant statute nor was he covered by the terms of the voluntary provisions of the policy, we affirm the judgment of the trial court finding that policy No. 8-03-00-73 did not provide underinsured motorists coverage for him. The judgment below is

Affirmed.

Judges ARNOLD and LEWIS concur.

ROBERT A. GRIFFIN v. ALMEDA S. GRIFFIN (NOW ROUSE)

No. 903DC716

(Filed 21 May 1991)

Divorce and Separation § 421 (NCI4th)— child support arrearages— garnishment of wages proper

The trial court could properly enter an order to withhold plaintiff's wages to collect child support arrearages which had been reduced to judgment, since reducing the arrearages to judgment and withholding income are not inconsistent enforcement remedies; income withholding was proper, notwithstanding plaintiff's contention that the judgment did not meet the requirements of N.C.G.S. § 110-136.5, as plaintiff was delinquent in paying the support ordered in the 1974 divorce decree; and there is no distinction between a parent who owes both arrearages and current support payments and one whose total support obligation consists of arrearages. N.C.G.S. § 50-13.4(f).

Am Jur 2d, Divorce and Separation § 1060.

APPEAL by plaintiff from order entered 11 May 1990 by *Judge W. Russell Duke, Jr.* in CARTERET County District Court. Heard in the Court of Appeals 15 January 1991.

This case arises from a divorce decree entered 27 March 1974, which required plaintiff to pay $200 per month in child support. On 13 August 1987, the defendant initiated an action to reduce child support arrearages to judgment. The trial court held that the defendant was equitably estopped from reducing her ex-husband's child support arrearages to judgment. On 21 November 1989, this Court reversed the trial court's order and remanded the matter for entry of judgment for the appropriate amount of child support arrearages. *Griffin v. Griffin*, 96 N.C. App. 324, 385 S.E.2d 526 (1989). Upon remand the trial court reduced the arrearage to judgment and also entered an order to withhold plaintiff's wages to pay the child support arrearages. Plaintiff appeals.

Bennett, McConkey, Thompson, Marquardt & Wallace, P.A., by James Q. Wallace, III for plaintiff-appellant.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by George L. Wainwright, Jr. for defendant-appellee.

EAGLES, Judge.

The sole issue here is whether the trial court erred in entering an order to withhold plaintiff's wages to collect child support arrearages that had been reduced to judgment. We hold that the trial court did not err.

G.S. 50-13.4(f)(8) provides:

> A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

Plaintiff argues that the portion of the statute following the semicolon constitutes an election of remedies. Plaintiff contends that once the arrearages were reduced to judgment, the defendant-appellee in attempting to collect the judgment was limited to the execution procedures provided by G.S. 1-302. We disagree.

The trial court has broad discretion under G.S. 50-13.4(e) in providing for payment of child support. *Moore v. Moore*, 35 N.C. App. 748, 242 S.E.2d 642 (1978). Additionally, this Court has held that the methods of payment listed under G.S. 50-13.4(e) are not mutually exclusive. *Warner v. Latimer*, 68 N.C. App. 170, 314 S.E.2d 789 (1984). We see no reason to conclude that the enforcement provisions under G.S. 50-13.4(f) are by contrast mutually exclusive. It would be illogical to conclude that the General Assembly would give the trial court broad discretion in ordering methods of payment of child support and then restrict the court to only one remedy to ensure payment.

The language in G.S. 50-13.4(f) also supports this interpretation. G.S. 50-13.4(f)(1) provides:

> The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

Additionally, G.S. 50-13.4(f)(11) provides: "The specific enumeration of remedies in this section shall not constitute a bar to remedies

otherwise available." The broad language of the statute suggests that the legislature intended to expand, not limit, the trial court's remedies in enforcing payment of child support.

Further, we note that the doctrine of election of remedies "does not apply to co-existing and consistent remedies." *Richardson v. Richardson*, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964). "The 'whole doctrine of election [of remedies] is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and choice of one is held to be an election not to pursue the other'. . . . It is the inconsistency of the demands which makes the election of one remedial right an estoppel against the assertion of the other . . . ." *Id.* (quoting *Standard Sewing Machine Co. v. Owings*, 140 N.C. 503, 53 S.E. 345 (1906)). Reducing the arrearage to judgment and withholding income are not inconsistent enforcement remedies.

Plaintiff also contends that income withholding was improper here because the judgment does not meet the requirements of G.S. 110-136.5, which governs the steps necessary to implement withholding. Plaintiff argues that he "was not delinquent in the current payment of any child support nor was he under any order, at the time of the motion, to provide child support payments." We disagree. Here, plaintiff was ordered to pay child support in the amount of $200 per month in a divorce decree entered 27 March 1974. On 14 February 1990 the trial court concluded that plaintiff owed arrearages totalling $16,120 plus 8 percent interest from the date defendant filed the motion to have the arrearages reduced to judgment. G.S. 110-136.3 concerns the applicability of income withholding procedures. G.S. 110-136.3(c) provides that "[n]otwithstanding any other provision of law, the income withholding provisions of this Article shall apply to any civil or criminal child support order, entered or modified before, on, or after October 1, 1986." Here, plaintiff is currently delinquent in paying the support ordered in the 1974 divorce decree. Accordingly, we find plaintiff's argument without merit.

Also G.S. 110-136.3(b)(2) provides:

> In non-IV-D cases, an obligor shall be subject to income withholding on the earliest of:

a. The date on which the obligor fails to make legally obligated child support payments in an amount equal to the support payable for one month; or

b. The date on which the obligor requests withholding; or

c. The date on which the court determines, pursuant to a motion or independent action filed by the obligee under G.S. 110-136.5(a), that the obligor is or *has been delinquent in making child support payments.*

(Emphasis added). Subpart (c) specifically provides that the withholding provisions apply when the court determines that the obligor *is or has been* delinquent. This language reveals that the legislature intended income withholding to apply in any case where the obligor has ever fallen behind a month or more in payments.

Finally, we note that the circumstances surrounding the recent amendment of these statutory provisions lead us to conclude that the trial court properly ordered appellant's income withheld. The General Assembly amended the income withholding statute in response to the requirements of the 1984 Amendments to the Social Security Act. The legislative history of the Child Support Enforcement Amendments of 1984 suggests that the purpose of the amendments was to assure "that all children in the United States who are in need of assistance in securing financial support from their parents will receive assistance regardless of their circumstances." S. Rep. No. 387, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 2397. In view of that goal, we see no distinction between a parent who owes both arrearages and current support payments and one whose total support obligation consists of arrearages.

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

Affirmed.

Judge WYNN concurs.

Judge PHILLIPS concurs in the result.

EDNA D. WORRELLS, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. 904SC165

(Filed 21 May 1991)

Insurance § 134 (NCI3d) — insurance policy on entireties property — husband as owner of policy — husband and wife separated — wife entitled to proceeds

Plaintiff wife was an insured under defendant's fire insurance policy and thus was entitled to one-half of the actual cash value of the repairs to the subject property where the property was owned by plaintiff and her husband as tenants by the entirety; the husband entered into the insurance contract at a time when he was separated from plaintiff and when he was living on and maintaining the property; the policy listed the husband as the named insured and included his spouse "if a resident of the same household"; and the exclusionary clause was ineffective to exclude plaintiff as a named insured because both husband and wife owned the entire estate which could not be severed by the act of either individual.

Am Jur 2d, Insurance § 1743.

APPEAL by defendant from judgment entered 11 December 1989 by *Judge David E. Reid, Jr.* in DUPLIN County Superior Court. Heard in the Court of Appeals 21 February 1991.

S. Reginald Kenan for plaintiff-appellee.

Anderson, Cox, Collier & Ennis, by Donald W. Ennis and William T. Corbett, Jr., for defendant-appellant.

JOHNSON, Judge.

This case arises from a dispute involving the payment of fire insurance proceeds. The following facts are undisputed. On or about 28 December 1984, Willie Lee Worrells and defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) entered into an insurance contract which provided fire insurance for a house situated on land owned by Willie Lee and Edna Worrells, as tenants by the entirety. At that time Mr. Worrells was married to, but separated from, Edna Worrells and he lived on and maintained

the property. The policy at issue listed Mr. Worrells as the named insured on the declarations page and included the following exclusionary clause: "[t]hroughout this policy 'you' and 'your' refer to the 'named insured' shown in the Declarations and the spouse *if a resident of the same household*[.]" (Emphasis added.) On 28 November 1985, the house was destroyed by fire. On 19 December 1985, Mr. Worrells submitted a sworn proof of loss as required by the policy to recover the full amount of damage to the house and further complied with all other policy requirements in connection with his claim. On 7 January 1986, plaintiff and Mr. Worrells were granted an absolute divorce.

On 26 April 1986 and 8 January 1987, defendant Farm Bureau presented Mr. Worrells with two separate checks totaling about $28,000 as complete payment for both real property and personal property losses. This money was paid to Mr. Worrells over the objections of plaintiff and her attorney. On 25 June 1987, plaintiff brought suit against Farm Bureau to recover one-half of the proceeds as a tenant in common. She alleged breach of contract, conversion, unfair trade practices and bad faith refusal to settle. Plaintiff moved for summary judgment. By order dated 31 October 1989, the court granted, *inter alia*, plaintiff's motion for summary judgment on the issue of whether Edna Worrells was a named insured on the insurance policy and by judgment dated 11 December 1989 ordered that plaintiff recover one-half of the actual cash value of the repairs to the house. From this judgment, defendant appeals.

Initially, we note that neither side argues the effect, if any, of an equitable distribution judgment which appears to have been made prior to the payments to Mr. Worrells and in which plaintiff was granted one-half the value of the house. *See Lamb v. Lamb*, 92 N.C. App. 680, 375 S.E.2d 685 (1989). The only evidence in the record of this equitable distribution judgment appears in the transcript of the summary judgment hearing and the mere mention of it in the affidavit of Edna Worrells. This issue is not properly before us and we did not address it.

Defendant's sole contention on appeal is that the trial court erred as a matter of law in ruling that plaintiff was an insured under the homeowner's policy. Farm Bureau argues that the insurance policy at issue is a personal contract between the named insured and the insurer and that the exclusionary clause is valid as to the plaintiff-spouse. Defendant points to the exclusionary

clause as distinguishing the instant case from the leading case of *Carter v. Insurance Co.*, 242 N.C. 578, 89 S.E.2d 122 (1955). In *Carter*, our Supreme Court considered, in a case of first impression, whether a wife, living separate and apart from her husband, could collect on an insurance policy taken out by him alone on entireties property. In that case, the husband and wife owned a house as tenants by the entirety. They separated, and at all relevant times afterward the husband lived in and had possession of the insured house while the wife lived elsewhere. After the separation, the husband took out a fire insurance policy on the house. The policy was issued in his name alone and he paid the premiums. At some point, fire caused a loss in excess of the policy amount. Husband demanded payment in the full amount of the policy. Wife demanded that she be paid one-half of the insurance proceeds. After the fire, but before payment was made, the parties were granted an absolute divorce. The trial judge granted the full amount to the husband and the wife appealed. The Supreme Court stated the issue to be "whether a husband's interest in an estate by the entirety is insurable for his benefit alone, as a separate moiety apart from the entire estate owned by him and his wife." *Id.* at 579, 89 S.E.2d at 123. The Court held that it was not and that the loss benefits created by the insurance policy inured to the benefit of the entire estate as owned by both husband and wife. In its discussion, the *Carter* Court noted that the policy at issue was a "standard form policy" which contained no special provision excluding the wife from coverage. *Id.* at 580, 89 S.E.2d at 124. In its analysis the Court relied on the "fundamental principles governing this peculiar estate of the husband and wife." *Id.* at 579, 89 S.E.2d at 123. Thus the Court looked not to contract law but to the characteristics of the entireties estate for the solution. *Cf. McDivitt v. Pymatuning Mut. Fire Ins. Co.*, 303 Pa. Super. 130, 449 A.2d 612 (1982) (criticizing *Carter* for "missing the mark" by relying on the special nature of the entirety relationship; emphasized instead the personal nature of the insurance contract).

In *Lovell v. Insurance Co.*, 302 N.C. 150, 274 S.E.2d 170 (1981), also a case of first impression, our Supreme Court adopted the "innocent spouse" doctrine as developed in other jurisdictions. In *Lovell*, the wife owned property with her husband as tenants by the entireties. The property was insured by a policy issued to the husband, the named insured. The husband intentionally burned the entirety property and the insurer refused to pay any

amount to the wife, claiming that she was barred by the intentional act of her husband. The Court of Appeals agreed, applying the law relating to tenancies by the entirety as well as the provision of the policy which excluded recovery for an intentional burning. The Supreme Court, applying the "more relevant rules of insurance and contract law," reversed and held that the wife was entitled to recover from the insurance company to the extent of one-half the value of the policy. *Lovell*, 302 N.C. at 152, 274 S.E.2d at 171. The *Lovell* Court adopted the view of the New Jersey court in *Howell v. Ohio Cas. Ins. Co.*, 130 N.J. Super. 350, 327 A.2d 240 (App. Div. 1974), that the contract rights are several, not joint, and able to be possessed separately and individually by each spouse. *Lovell*, 302 N.C. 150, 274 S.E.2d 170. The *Lovell* Court declined to accept their appellee's argument that the wife has no rights under the policy when only the husband is named as insured and beneficiary. The Court noted:

> [f]irst, the case law in North Carolina clearly establishes that the wife is also an insured party, if the property is held by the entirety, even though only the husband's name appears on the policy. *Carter v. Insurance Co.*, 242 N.C. 578, 89 S.E.2d 122 (1955). Second, by enacting G.S. 58-180.1 [now G.S. 58-44-45] the legislature apparently intended to resolve the related question of whether a policy insuring entirety property was void if issued solely in the name of either husband or wife. That statute, coupled with the clear rule of law established by case precedent, was sufficient notice to defendants that by insuring the interest of the husband it also insured the interest of plaintiff wife.

Lovell, 302 N.C. at 153, 274 S.E.2d at 172. Thus the *Lovell* Court did not appear to see a conflict between the application of contract and insurance law to the innocent spouse situation and the application of entireties law to the *Carter* situation.

We find that the decision in *Lovell* is a consequence of the particular inequities which would otherwise result were entireties law applied to the innocent spouse situation. No such inequities exist in the case *sub judice* and thus the *Carter* case controls.

The insured property in the instant case was owned by the Worrells as tenants by the entireties. "These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole, and not of a moiety

or any undivided portion thereof." *Carter*, 242 N.C. at 579, 89 S.E.2d at 123, *quoting Davis v. Bass*, 188 N.C. 200, 203, 124 S.E. 566, 568 (1924). Once such an estate is established, neither spouse can sever it by his or her sole act. *Davis*, 188 N.C. 200, 124 S.E. 566. The exclusionary clause in the insurance contract was thus ineffective to exclude Mrs. Worrells as a named insured. Upon the granting of the absolute divorce, the entireties estate was converted into a tenancy in common and the cash proceeds were personal property held as tenants in common. *Carter*, 242 N.C. at 580, 89 S.E.2d at 124.

We affirm the judgment of the court below holding that plaintiff is an insured under the defendant's fire insurance policy and is entitled to one-half of the actual cash value of the repairs to the subject property.

Affirmed.

Judges PARKER and ORR concur.

RICHARD M. JONES, PLAINTIFF/APPELLANT v. LOWE'S COMPANIES, INC., DEFENDANT/APPELLEE, SELF-INSURED (FRED S. JAMES & CO., ADJUSTING AGENCY)

No. 9010IC920

(Filed 21 May 1991)

Master and Servant § 90 (NCI3d) — workers' compensation — failure to give immediate notice to employer — reasonable excuse

In an action to recover workers' compensation benefits, the finding by the Commission that plaintiff failed without reasonable excuse to give his employer written notice of the accident within 30 days of its occurrence was not supported by the evidence where it tended to show that plaintiff in fact did not give immediate notice to the employer's warehouse manager and shipping supervisor; he continued to work for his employer at his regular job, though he did have some pain which worsened over time; he notified his employer two months after the accident when his leg became numb and

would no longer support his body; and it was not until this time that he realized the nature and seriousness of his injury.

Am Jur 2d, Workmen's Compensation §§ 442 et seq.

APPEAL by plaintiff from Opinion and Award of North Carolina Industrial Commission entered 9 May 1990. Heard in the Court of Appeals 13 March 1991.

Richard B. Hager, P.A., by Richard B. Hager, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Thomas M. Clare, for defendant-appellee.

GREENE, Judge.

Richard M. Jones (Employee) appeals from an "Opinion and Award" of the Industrial Commission denying his claim for benefits under the Workers' Compensation Act (Act).

The findings made by the Commission which are supported by some competent evidence in the record reveal that on the morning of 20 October 1988, Employee was engaged in the delivery of several panels of sheetrock to a job site. While he was carrying two of the panels "the wind blew against the panels thereby twisting [Employee] . . . and the panels of sheetrock whereupon [Employee] . . . felt the immediate onset of back pain radiating to his left leg." Employee continued to work for Lowe's Companies, Inc. (Employer) and "did not relate anything" to Employer about the accident or his injury. On 23 December 1988, Employee first sought medical care for his injuries "because his left leg . . . [became] numb and . . . folded up on him . . . ." Employee on 23 December 1988 orally advised Employer that "he had hurt his back on the job in October, 1988" and gave Employer written notice of the accident on 16 January 1989.

The Commission entered the following relevant finding of fact:

> [Employee] . . . did not give [Employer] . . . written notice of his accident within 30 days of its occurrence and he did not have reasonable excuse for failing to timely give said notice.

The Commission then concluded that Employee was not entitled to any benefits under the Act because "he failed, without reasonable

excuse therefore, to give [Employer] . . . written notice of the accident within 30 days of its occurrence."

The issue is whether the evidence supports the finding of the Commission that Employee failed without reasonable excuse to give Employer written notice of the accident within 30 days of its occurrence.

N.C.G.S. § 97-22 provides that an "injured employee" must give written notice to his employer "immediately on the occurrence of an accident, or as soon thereafter as practicable . . . ; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident . . . ." N.C.G.S. § 97-22 (1985). Here, Employee's written notice was well outside the 30-day requirement. However, the employee is excused from this 30-day notice requirement if the employee has a "reasonable excuse . . . for not giving such notice *and* . . . the employer has not been prejudiced thereby." N.C.G.S. § 97-22 (emphasis added).

A "reasonable excuse" has been defined by this Court to include "a belief that one's employer is already cognizant of the accident . . ." or "[w]here the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows . . . ." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987). The burden is on the employee to show a "reasonable excuse."

Employee argues that he advised Employer's warehouse manager and shipping supervisor of his accident on the day it occurred. The Commission, however, rejected Employee's testimony on this point and found as a fact that Employee "did not relate anything" to Employer about the accident or his injury until 23 December 1988. In that there is competent evidence from Employer's warehouse manager and shipping supervisor denying any notice, we are bound by the finding. *Grant v. Crouch*, 243 N.C. 604, 607-08, 91 S.E.2d 705, 707 (1956). Accordingly, the required notice cannot be excused on the grounds that the Employer was "already cognizant of the accident."

Employee next argues that he did not reasonably know of the "nature, seriousness, or probable compensable character of his injury" on the date of the accident. On this issue Employee offered

testimony that he did not realize until 23 December 1988, the day his leg became numb and would no longer support his body, the nature and seriousness of his injury. The undisputed evidence reveals that, up until that time, Employee continued to work at his regular job for Employer, though he did have some pain which worsened over time. This evidence does not support the finding of the Commission that Employee "did not have a reasonable excuse for failing to timely give said notice." To the contrary, any reasonable view of this evidence requires a finding that Employee notified Employer of the accident as soon as he was or should have been aware of the "nature, seriousness, and probable compensable character of his injury." *See Gamble v. Borden, Inc.*, 45 N.C. App. 506, 510, 263 S.E.2d 280, 282, *disc. rev. denied*, 300 N.C. 372, 267 S.E.2d 675 (1980) (where all the evidence in the record supported a finding that employee's injuries were permanent, the finding of the Commission that the injuries were temporary was vacated and the case remanded for entry of finding that injuries were permanent). It therefore follows that the conclusion of the Commission that Employee failed without reasonable excuse to give written notice is vacated and remanded for entry of an order concluding that the Employee did have a reasonable excuse in failing to timely notify Employer of the accident. *See Baker v. Dept. of Correction*, 85 N.C. App. 345, 347, 354 S.E.2d 733, 734 (1987) (Commission's conclusion vacated and remanded for entry of new conclusion of law consistent with findings).

On remand, the Commission must now determine if Employer has been prejudiced by the delayed written notice. N.C.G.S. § 97-22. If prejudice is shown, Employee's claim is barred even though he had a reasonable excuse for not giving notice of the accident within 30 days. On this issue the burden is on Employer to show prejudice. *See In the Matter of the Compensation of Dorothy Higgins v. Medical Research Foundation of Oregon*, 615 P.2d 1192, 1194 (Or. 1980); *Manitowoc County v. Dept. of Industries, Labor and Human Relations*, 276 N.W.2d 755, 758 (Wis. 1979) ("[i]n the absence of notice, the employer has the burden of showing it has been prejudiced"). Whether prejudice exists requires an evaluation of the evidence in relationship to the purpose of the statutory notice requirement.

> The purpose is dual: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate

the earliest possible investigation of the facts surrounding the injury.

2B Larson's Workmen's Compensation Law § 78.10, 15-102; *Booker v. Medical Center*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979).

Vacated and remanded.

Judges WELLS and WYNN concur.

KIMZAY WINSTON-SALEM, INC., PLAINTIFF v. CHRISTINE L. JESTER, D/B/A MAKE MINE YOGURT AND HARRELL ANDREWS, D/B/A MAKE MINE YOGURT, DEFENDANTS

No. 9021DC425

(Filed 21 May 1991)

Rules of Civil Procedure § 55.1 (NCI3d)— default judgment—order enlarging judgment and reopening case for hearings erroneous

In an action to recover rent due for space in a shopping center, the trial court erred in entering an order undertaking to relieve plaintiff from the amount of a default judgment and reopening the case for hearings, since the court had no authority to enter the order, as the court neither set aside the default judgment nor relieved plaintiff of it pursuant to N.C.G.S. § 1A-1, Rules 55 or 60, but instead kept the judgment in effect and permitted it to be enlarged, which no rule or statute authorizes; the law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits, which plaintiff did here by executing on it, by retaining the money collected by execution, and by suing defendant in a separate action for future rents; by deciding to obtain a final judgment for a sum certain that was then owed, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount; and plaintiff's affidavits did not support the court's finding that the judgment was entered as a result of mistake, inadvertence or excusable neglect.

Am Jur 2d, Judgments §§ 1152 et seq.

APPEAL by defendant Christine L. Jester from order entered 31 January 1990 by *Judge Abner Alexander* in FORSYTH County District Court. Heard in the Court of Appeals 28 November 1990.

In this action to recover rent due under the terms of a lease covering certain space in Cloverdale Plaza Shopping Center in Winston-Salem, plaintiff voluntarily dismissed its complaint against defendant Andrews, the original lessee, and obtained a default judgment against Andrews' assignee, defendant Jester, who did not plead to the amended complaint. The lease, for five years ending in April, 1991, provided for a monthly rental of $1,133.33 plus certain maintenance expenses, and the amended complaint, filed on 28 October 1988, alleged that the rent then owed was $5,394.12 and asked to recover that amount and future rent as it accrued. The default judgment against defendant Jester for $7,039.18 was entered on 9 December 1988; it was based upon an affidavit and itemized statement of plaintiff's treasurer showing that under the terms of the lease defendant owed $7,039.18 through 30 November 1988, and plaintiff's motion asserting that the "sum certain" stated in the treasurer's affidavit was owed. The judgment not having been paid, on 25 July 1989 plaintiff had the Clerk of Superior Court issue an execution directing the Sheriff to satisfy the judgment. The execution showed that $8,081.14 was owed on the judgment including interest and court costs and the Sheriff collected that amount from defendant Jester and paid the net proceeds to the Clerk of Court on 21 September 1989. Meanwhile, plaintiff had filed two other actions against defendant Jester with regard to the lease. The first action sought possession of the premises and ended with an order ejecting defendant Jester; the second action sought rents allegedly due from 1 December 1988 through 30 April 1991, and was dismissed by the court on 30 October 1989 on the ground that it was barred by *res judicata* because the issues raised therein "were or could have been adjudicated" in this action. On 6 December 1989 plaintiff moved in this action for relief from the default judgment under the provisions of Rule 60(b)(1), N.C. Rules of Civil Procedure. The relief requested was to be permitted to present evidence showing that "the amount of the default judgment should be increased by . . . $35,857.14," and the ground asserted therefor was that "the amount of said judgment was entered by mistake and inadvertence and that Plaintiff is in fact entitled to a judgment much larger than that obtained." In support of the motion plaintiff submitted two affidavits;

the affidavit of plaintiff's treasurer stated that in setting out the amount owed when the default judgment was sought that he "was unaware" of any right that plaintiff had to obtain a judgment for future rents; the other affidavit, that of plaintiff's attorney, Peter J. Juran, stated that in obtaining the judgment "they inadvertently" sought only the past rents and the separate action for future rents was brought without "realizing that the original complaint had requested rents." In allowing the motion the court opined that the default judgment "was entered as a result of a mistake, inadvertence, and excusable neglect," granted plaintiff relief "as to the amount of the Judgment," and "reopened for hearings as to the amount of damage, if any, caused by Defendant's actions complained of in the Complaint." The appeal is from that order.

House & Blanco, P.A., by Peter J. Juran, for plaintiff appellee.

Chester C. Davis for defendant appellant Christine L. Jester.

PHILLIPS, Judge.

Though defendant's appeal is dismissible since it is from an interlocutory order that does not affect a substantial right, G.S. 1-277; G.S. 7A-27; *Veasey v. City of Durham*, 231 N.C. 354, 57 S.E.2d 375 (1950), to prevent manifest injustice to the appellant, and to expedite the end of this overly litigated matter, which was legally set at rest more than nineteen months ago when the default judgment was satisfied, we suspend the rules under the provisions of Rule 2 of our appellate rules and treat the appeal as a petition for *certiorari* made pursuant to Rule 21(a) and grant it. For the order undertaking to relieve plaintiff from the amount of the judgment and reopen the case for hearings is erroneous for several reasons, plaintiff is not entitled to recover anything further of defendant, and if the case is not terminated now she, the trial court and this Court will be further burdened and inconvenienced by it to no purpose.

The first reason the order is erroneous is because the court had no authority to enter it. The order neither set aside the default judgment nor relieved plaintiff of it as Rules 55(d) and 60(b), N.C. Rules of Civil Procedure, authorize upon good cause being shown; instead, it keeps the judgment in effect and permits it to be enlarged, which no rule or statute authorizes. Though the only basis for the default judgment was that a "sum certain" was then due plaintiff from defendant, Rule 55(b)(1), N.C. Rules of Civil Procedure,

the order left the default judgment standing while permitting its base to be destroyed by the recovery of future debts. This contradictory, incongruous directive is in the nature of permitting plaintiff to retain its cake after eating it, which is no more possible in court than elsewhere. Under similar circumstances our Supreme Court said: "Neither 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).

The second reason the order is erroneous is because our law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. *Draughon v. Draughon*, 94 N.C.App. 597, 380 S.E.2d 547 (1989). In this case, after petitioning the court to enter the very judgment involved, plaintiff relied upon its validity and force not once but thrice—by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents.

Another reason the order is erroneous is that by deciding to obtain a final judgment for the sum certain that was then owed, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C.App. 81, 398 S.E.2d 628 (1990).

Finally, the order is also erroneous because plaintiff's affidavits do not support the court's finding that the judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they show are of a kind that the law does not excuse. For all the affidavits show, when sifted down, is that in signing the court papers which enabled the default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents—a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by Rule 11 of our civil procedure rules.

Reversed.

Judges ORR and GREENE concur.

IN RE BRUCE

[103 N.C. App. 81 (1991)]

IN THE MATTER OF: WILLIAM E. BRUCE, PETITIONER

No. 9010SC742

(Filed 21 May 1991)

Professions and Occupations § 1 (NCI3d) — professional engineer — fine and suspension — fine dropped — suspension enforced — double jeopardy inapplicable

Where the Court of Appeals held that the N. C. Board of Registration for Professional Engineers and Land Surveyors could suspend petitioner's license for two years or fine him $500, but not both, the Double Jeopardy Clause was not applicable, so the Board could, on remand, refund the $500, as it constituted a remedial remedy and not a punitive sanction, and enter a two-year suspension of petitioner's license.

Am Jur 2d, Criminal Law § 251.

APPEAL by petitioner from order entered 19 April 1990 in WAKE County Superior Court by *Judge F. Gordon Battle*. Heard in the Court of Appeals 12 March 1991.

McMillan, Kimzey & Smith, by Duncan A. McMillan, for petitioner-appellant.

Bailey & Dixon, by Wright T. Dixon, Jr. and Renee C. Riggsbee, for respondent-appellee.

GREENE, Judge.

William E. Bruce appeals from an amended decision of the North Carolina Board of Registration For Professional Engineers and Land Surveyors (Board), suspending Bruce's license for two years.

The underlying facts of this case are set out in the first appeal of this case reported in *In re Bruce*, 97 N.C. App. 138, 387 S.E.2d 82 (1990). Summarized, in May, 1988, the Board concluded after a hearing that Bruce had demonstrated professional incompetence and gross negligence by approving two school building designs which were structurally deficient. The Board originally fined Bruce $500 and suspended his license to practice in this state for two years. Bruce petitioned for judicial review and the Board's decision and order were affirmed in Wake County Superior Court by a judgment filed 24 January 1989. In Bruce's first appeal to this

Court, we held that, under N.C.G.S. § 89C-21 as it existed at the time, the Board could suspend Bruce's license or fine him, but could not do both. *Id.* at 140-41, 387 S.E.2d at 83. On remand to the Board, by an amended decision and order dated 15 February 1990, the Board only suspended Bruce's license for two years.

Bruce has included in the record on appeal in this case a copy of a check issued by Bruce's attorney, payable to the Board, in the amount of $500 in payment of Bruce's fine. This check is dated 2 September 1988. The record also contains a check issued by the Board, payable to the law firm representing Bruce, in the amount of $500. This check is dated 22 February 1990. A letter written by the Board to Bruce states that the Board was refunding the fine paid by Bruce's attorney, and that the Board was retaining the two year suspension of Bruce's license.

The only issue presented is whether the Board can refund the $500 fine and suspend Bruce's license for two years.

Bruce contends that the fine and suspension by the administrative board was penal in nature, *In re Truelove*, 54 N.C. App. 218, 282 S.E.2d 544 (1981), *disc. rev. denied*, 304 N.C. 727, 288 S.E.2d 208 (1982), and therefore any modification in the order must be consistent with the Double Jeopardy Clause of the fifth amendment of the United States Constitution. He argues that the Board's action in refunding the money and suspending his license violates the Double Jeopardy Clause. We disagree.

We assume without deciding that the Double Jeopardy Clause of the fifth amendment, if applicable, would prevent the Commission from refunding the $500 fine and suspending Bruce's license. *Cf. State v. Stafford*, 274 N.C. 519, 164 S.E.2d 371 (1968) (when sentence of criminal defendant is vacated, on re-sentencing defendant must be given credit for all time served under the original sentence). However, on the facts of this case, the Double Jeopardy Clause does not apply. While the Double Jeopardy Clause can apply to penalties or sanctions rendered in civil cases, as well as criminal, *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487 (1989), it does so only when the penalty or sanction "may not fairly be characterized as remedial." *Id.* A civil penalty or sanction is punitive in nature and not remedial when the "sanction [is] overwhelmingly disproportionate to the damages . . . [the offender] has caused." *Id.*

While there is no evidence relating to the actual loss by the State and, therefore, no evidence of the precise amount which would constitute a remedial penalty, such evidence is not necessary in this case. *See Halper* at 446, 104 L.Ed.2d at 500 (Government entitled to rough remedial justice in that it may demand compensation according to imprecise formulas, as long as rough justice does not become clear injustice). Here, we find the small amount of the fine to be remedial given the Board's obligation to police the professions of engineering and land surveying, which necessarily requires investigations and the holding of hearings. *See* N.C.G.S. § 89C-22 (1989) (procedure for disciplinary action). *Cf. United States v. WRW Corp.*, 731 F.Supp. 237 (E.D. Ky. 1989) (analyzing case under *Halper* rules and finding no violation of double jeopardy where civil penalties totaling $90,350 were assessed, and stating that Government's losses include the ancillary costs of detection, investigation and prosecution under the Mine Safety and Health Act).

Therefore, the Double Jeopardy Clause is not implicated in this case. Since Bruce asserts no other impropriety regarding the Board's decision, the Commission was within its authority to refund the $500 fine already paid by Bruce and enter a suspension of the license.

Affirmed.

Judges WELLS and WYNN concur.

IN THE MATTER OF THE ESTATE OF HAZEL CLINE, JR., DECEDENT

No. 9028SC1077

(Filed 21 May 1991)

Husband and Wife § 2.1 (NCI3d) — antenuptial agreement — all claims to property relinquished — widow not entitled to year's allowance on life estate in marital home

Plaintiff widow was barred from recovering a year's allowance and from receiving a life estate in the marital home by her antenuptial agreement which relinquished all claim to any property of her husband.

Am Jur 2d, Husband and Wife § 277.

Waiver of right to widow's allowance by antenuptial agreement. 30 ALR3d 858.

Operation and effect of antenuptial agreements to waive or bar surviving spouse's right to probate homestead or surviving family's similar homestead right or exemption. 65 ALR2d 727.

APPEAL by executor from *Burroughs (Robert M.), Judge.* Judgment entered 12 June 1990 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 10 April 1991.

This is a civil proceeding wherein plaintiff, widow of Hazel Cline, Jr., deceased, sought spousal support from the guardian of her incompetent husband and a surviving spouse's year's allowance pursuant to G.S. 30-15 from the executor of her husband's estate after his death.

On 12 June 1990, Superior Court Judge Robert Burroughs made detailed findings of fact and conclusions of law and ordered that Mrs. Cline receive $4,121.00 in spousal support during her husband's previous incompetency, $5,000.00 as her year's allowance, and that she be allowed to remain in residence in the marital home rent free during her lifetime. Defendant, executor of the estate, appealed.

Devere C. Lentz & Associates, by John M. Olesiuk, for executor, appellant.

Gum & Hillier, by Ingrid Friesen, for widow, appellee.

HEDRICK, Chief Judge.

No question is raised on appeal regarding that portion of Judge Burroughs' order pertaining to spousal support during the decedent's previous period of incompetency. Thus, that portion of the order will be affirmed.

Defendant contends the trial court erred in concluding that the antenuptial agreement did not bar plaintiff from receiving a year's allowance pursuant to G.S. 30-15. Defendant also contends the trial court erred in allotting plaintiff a life estate in the marital home since the antenuptial agreement would bar such an award.

Prior to their marriage, Hazel Cline, Jr., and Mildred Irene Smith entered into an agreement whereby each reciprocally released, renounced and quitclaimed any interest acquired by virtue of the marriage in and to any real or personal property then owned or thereafter acquired, and specifically renounced and disclaimed any right to inherit or participate in the distribution of any real and personal property of the other spouse.

Our Supreme Court has held that a widow is barred from recovering a year's allowance by an antenuptial agreement relinquishing all claim to any property of her husband. *Perkins v. Brinkley*, 133 N.C. 86, 45 S.E. 465 (1903). Plaintiff in the case at bar argues that the discussion in *Perkins* of the premarital agreement's effect on the year's allowance was mere *dicta*. That argument is not persuasive.

We hold *Perkins* is controlling. The record discloses that the antenuptial agreement released the estate from any claims by plaintiff as wife or widow of Hazel Cline, and shows that she had no claim to any property of the decedent or his estate, except for the award of spousal support during Mr. Cline's incompetency.

Thus, that portion of the judgment awarding plaintiff a year's allowance of $5,000.00 and awarding her a life estate in the marital home will be vacated. That portion of the judgment awarding plaintiff spousal support during Mr. Cline's incompetency up to the date of his death will be affirmed.

Vacated in part; affirmed in part.

Judges WELLS and EAGLES concur.

DR. A. J. EDELSTEIN AND GERRY EDELSTEIN AND RICHARD LAVALLEE AND CHARLENE LAVALLEE, PLAINTIFF v. THE PINNACLE INN AND COUNTRY CLUB CONDOMINIUM OWNERS' ASSOCIATION, INC. D/B/A THE PINNACLE (A NORTH CAROLINA NON-PROFIT CORPORATION), DEFENDANT

No. 9024DC1128

(Filed 21 May 1991)

Appeal and Error § 341 (NCI4th)— failure to set out assignments of error—appeal dismissed

Defendant's appeal is dismissed where it failed to set out the assignments of error in its brief or in the record in violation of N.C.R. App. P. 9(a)(1)(k) and 28(b)(5).

Am Jur 2d, Appeal and Error §§ 417 et seq.

APPEAL by defendant from judgment filed 12 March 1990 in AVERY County District Court by *Judge C. Philip Ginn*. Heard in the Court of Appeals 14 May 1991.

No brief filed for plaintiff-appellees.

John M. Wright for defendant-appellant.

GREENE, Judge.

The defendant appeals from an order filed 12 March 1990 wherein the trial court ruled that the defendant had not complied with N.C.G.S. § 47A-20 (1984). We do not reach the merits of this appeal.

North Carolina Appellate Rule 10(a) provides that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." Because the record does not contain any assignments of error, there is nothing for this Court to review. By not including assignments of error in the record, the defendant violated N.C.R. App. P. 9(a)(1)(k) which requires assignments of error to be set out in the record. Furthermore, even assuming that the defendant had set forth its assignments of error in the record, because the defendant did not set out the assignments of error in its brief, the defendant abandoned its assignments of error. N.C.R. App. P. 28(b)(5).

Because of the defendant's substantial failure to comply with the rules of appellate procedure, we dismiss this appeal. N.C.R. App. P. 25(b) and 34(b)(1).

Dismissed.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. JAMES MOORE, JR.

No. 9028SC431

(Filed 4 June 1991)

1. **Criminal Law § 101 (NCI4th)— child sexual abuse—defendant's admission of abuse of another child—not disclosed—admissible**

The trial court did not err in a prosecution for rape, first degree sexual offense and taking indecent liberties by admitting a statement possessed by the State containing defendant's admission that he had sexually abused another child where the State had not revealed the statement in response to defendant's discovery request. The trial court noted that the State had not initially attempted to introduce the statement and that defendant opened the door by questioning the witness about DSS files which contained the statement. N.C.G.S. § 15A-903(a)(2).

Am Jur 2d, Depositions and Discovery §§ 432-434.

2. **Rape and Allied Offenses § 5 (NCI3d)— first degree rape—evidence sufficient**

The trial court did not err by refusing to dismiss a prosecution for defendant's first degree rape of his daughter for insufficient evidence where the victim testified to defendant's acts and demonstrated her testimony with anatomically correct dolls, identifying the female doll as herself and the male doll as her father; the victim identified defendant's home as the location where the acts took place; the victim denied that anyone else had touched her private parts; two other witnesses described the victim's use of anatomically correct dolls when

demonstrating what defendant had done to her; and there was medical testimony consistent with sexual abuse.

Am Jur 2d, Rape §§ 88 et seq.

3. **Criminal Law § 34.5 (NCI3d)— child sexual abuse—evidence of sexual misconduct with other victims—admissible**

The trial court did not err in a prosecution for rape, first degree sexual offense and taking indecent liberties by admitting into evidence testimony regarding defendant's prior alleged sexual misconduct with two other victims. Defense counsel elicited testimony during cross-examination of a witness which would imply that defendant's ex-wife could have been responsible for abuse of the victim and then asked the witness how she concluded that defendant had abused the victim. The State was entitled to have the witness explain her answer during redirect examination.

Am Jur 2d, Rape §§ 71, 73, 75, 102.

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

4. **Rape and Allied Offenses § 4.1 (NCI3d)— child sexual abuse—other victims—admissible on cross-examination**

The trial court did not err in a prosecution for rape, first degree sexual offense, and taking indecent liberties by allowing the State to cross-examine defendant about specific acts of sexual abuse of two other victims where testimony as to one other victim had been properly admitted and any testimony about that victim by defendant was merely cumulative, and cross-examination of defendant as to the second victim was properly admitted because defendant opened the door to that evidence.

Am Jur 2d, Rape §§ 71, 73, 75, 102.

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

5. **Attorneys at Law § 38 (NCI4th)— attorney's motion to withdraw—attorney as prospective witness—motion denied**

The trial court did not abuse its discretion in a prosecution for rape, first degree sexual offense, and taking indecent liber-

ties by denying defense counsel's motion to withdraw in order to serve as a witness for defendant. Defense counsel contended that he should be allowed to testify that the victim had told him that the incidents did not occur in her father's trailer, but the jury heard evidence relative to the child victim's inconsistent testimony as to where the alleged misconduct occurred and returned a special verdict on jurisdiction.

Attorneys at Law §§ 173, 174.

Defense attorney as witness for his client in state criminal case. 52 ALR3d 887.

APPEAL by defendant from judgments entered 16 October 1989 by *Judge Shirley L. Fulton* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 15 January 1991.

On 3 April 1989 defendant was indicted for first degree rape, first degree sexual offense and taking indecent liberties between 1 August 1988 and 31 August 1988 with his five year old biological daughter. The evidence presented at trial tended to show that the victim lived with her father and younger siblings in a trailer in Woodfin, North Carolina. The victim's parents had been divorced on 9 June 1988.

On 2 November 1988 Detective Sergeant Eugene C. Loeffler received a call reporting that some children were running around "with no clothes on" at the end of Walnut Lane. Loeffler dispatched Officer Krause to the scene who in turn requested Loeffler's assistance. By the time Loeffler arrived at the scene, the children were dressed in clothes given to Krause by a neighbor and "were running around wild." Krause tried to wake up defendant several times but was unable to get him to answer the door. Since he had reported the children running around unsupervised in the past to the Department of Social Services (DSS), Loeffler decided to take the children to DSS. Defendant eventually answered the door and Loeffler informed him that he (defendant) needed to go to DSS to talk over the situation.

While in custody of DSS, the victim received a physical examination on 16 November 1988 by Dr. Ann Gravatt. During trial, Dr. Gravatt testified that the findings from the physical examination of the victim were consistent with sexual abuse and sexual intercourse. The examination revealed that the victim's "vaginal

introital diameter" was 10 millimeters, which was larger than expected, and that the victim had no hymenal tissue to protect the entrance to the vaginal opening.

At trial the victim testified that defendant "hurt [her] in the private parts" and demonstrated how defendant hurt her private parts with anatomically correct dolls. First, the victim identified the female doll as herself and the male doll as her father (defendant). The victim then placed the penis of the male doll against the vaginal area of the female doll. The victim identified the penis as "peanut" and nodded her head in the affirmative that her vaginal area was what she referred to as "private parts." The victim identified defendant's home from a photograph as the place where defendant "put his private parts in [her] private parts." The victim testified that no one else had touched her in her private parts other than defendant. The victim indicated that these events happened approximately the month before school started. During trial there were some conflicts in the victim's testimony as to whether the alleged sexual abuse occurred in North Carolina or South Carolina since the victim had also visited Greenville, South Carolina during the summer that the alleged sexual abuse occurred.

Defendant presented evidence during trial through his testimony and the testimony of other witnesses that the victim had a history of untruthfulness. Defendant also presented evidence through the testimony of witnesses that he had not sexually abused any of his children. Defendant testified denying that he had sexually abused the victim. During cross-examination, the State questioned defendant about whether he had abused his seven-month old stepson seven years before and also sexually abused his fifteen-year old sister-in-law. Defendant denied these allegations.

At the close of the State's evidence, the trial court dismissed the first degree sexual offense charge. The jury returned a special verdict as to jurisdiction finding that North Carolina had jurisdiction to try defendant. The jury also returned guilty verdicts on the charges of first degree rape and taking indecent liberties with a minor. The trial court sentenced defendant to life imprisonment for the first degree rape and ten years imprisonment for taking indecent liberties with a minor. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mary Jill Ledford, for the State.

Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux & Belser, P.A., by David G. Belser, for defendant-appellant.

EAGLES, Judge.

I.

[1] Defendant first assigns as error the trial court's admission into evidence of a statement possessed by the State containing defendant's admission that he had sexually abused another child, when the State had not revealed the statement in response to a discovery request by defendant. Defendant argues that "the introduction into evidence of damaging statements made by defendant to Department of Social Services (D.S.S.) personnel was improper in light of the fact that such statements were not made available to defendant prior to trial as required by law." Defendant contends that he was "incapable of mounting an appropriate defense as required by due process of law." Defendant also contends that the trial court's refusal to grant his motion for discovery sanctions was also improper because G.S. 15A-903(d) requires disclosure of the documents and the trial court's legal analysis on this issue was improper. Defendant argues that the trial court's "failure to impose *any* discovery sanction amounted to an abuse of discretion." Defendant argues that the trial court's refusal to grant his discovery sanctions request amounted to reversible error. We disagree.

> Upon motion of a defendant, a trial court must order the prosecutor to permit a defendant to inspect and copy any relevant written or recorded statements in the State's control that were made by a defendant. N.C.G.S. § 15A-903(a)(1) (1983). Further, N.C.G.S. § 15A-903(a)(2) provides that upon motion, the trial court must order the prosecutor to divulge any oral statements made by the defendant that are relevant to the case. When a party fails to comply with the order, the trial court may grant a continuance or a recess, prohibit the violating party from introducing the non-disclosed evidence, or enter any other appropriate order. N.C.G.S. § 15A-910 (1983). Because the trial court is not required to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, is within the trial court's discretion, *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983), including whether to admit or exclude evidence

not disclosed in accordance with a discovery order. *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978).

State v. Weeks, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). We note that here defendant did not seek imposition of sanctions generally but limited his request to exclusion of the evidence and mistrial. The trial court refused to impose either of those sanctions and no others were requested. "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986).

We note that G.S. 15A-903(a)(2) requires the disclosure of "any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody, or control of the State[.]" Without addressing whether G.S. 15A-903(a)(2)'s requirement for disclosure would operate to permit the court to exclude the evidence, we hold that the trial court did not abuse its discretion in admitting the statement after cross-examination. Here, during a bench conference the prosecutor admitted that she was aware of the statement but believed that she could not successfully offer the statement into evidence in her case in chief since she had not provided the statement pursuant to defendant's request. In its ruling, the trial court stated that the statement was not directly relevant to the instant case since it involved another child and the mother of the child. The trial court noted that the State had not initially attempted to introduce the statement. However, the court pointed out that defendant had "opened the door" to the matter and relying on the business record exception to the hearsay rule, had questioned the witness about DSS files on the Moore family which contained defendant's statement that he had abused another child. Because defendant had "opened the door," the trial court then allowed the State on redirect examination to ask further questions about the prior allegation of abuse with another victim. On this record, we hold that the trial court did not abuse its discretion in admitting the evidence since defendant had in fact "opened the door."

II.

[2] Defendant next assigns as error the trial court's refusal to dismiss based on the insufficiency of the evidence. Defendant argues

that "the evidence presented by the State failed to prove the essential element of penetration of the victim's vagina by the defendant, and was therefore insufficient to prove the offense of First Degree Rape as defined [in] N.C.G.S. § 14-27.2." Defendant contends that "the evidence was simply too uncertain and insufficient for a jury to find the element of penetration beyond a reasonable doubt." We disagree.

> For a charge of first degree rape to withstand a motion to dismiss for insufficient evidence, there must be evidence among other things, that defendant engaged in vaginal intercourse with the victim. G.S. 14-27.2. In ruling on a motion to dismiss for insufficient evidence the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence. *State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984). There must be substantial evidence of each essential element of the offense charged, together with evidence that defendant was the perpetrator of the offense. *State v. Gardner*, 311 N.C. 489, 510-11, 319 S.E.2d 591, 605 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1232, 84 L.Ed. 2d 369 (1985).

State v. Green, 95 N.C. App. 558, 562, 383 S.E.2d 419, 421 (1989). "Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. Further, '[t]he trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss.' " *State v. Bruce*, 315 N.C. 273, 281, 337 S.E.2d 510, 516 (1985).

In *Green, supra*, the seven year old victim answered affirmatively when asked if defendant, who was her biological father, had " 'put his private parts in [her] private parts.' " 95 N.C. App. at 559, 383 S.E.2d at 420. The victim also answered affirmatively when asked if defendant had " 'put his private parts in [her] mouth,' " *id.*, and if defendant had " 'lick[ed her] private parts.' " *Id.* at 560, 383 S.E.2d at 420. In *Green*, the State presented corroborative evidence from the victim's mother, a police detective and the doctor who examined the victim and testified that the findings from the physical examination of the child were " 'compatible with penile penetration.' " *Id.* at 563, 383 S.E.2d at 422. The *Green* court held this evidence sufficient to withstand defendant's motion to dismiss.

In *State v. Estes*, 99 N.C. App. 312, 393 S.E.2d 158 (1990), defendant there argued that the victim's testimony that defendant " 'stuck his thing' in the 'back and front' of the child," *id.* at 315, 393 S.E.2d at 160, notwithstanding any physical evidence or demonstration by the victim on anatomically correct dolls of the alleged misconduct was insufficient evidence of penetration for first degree sexual offense. The *Estes* court noted that our Supreme Court in *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), found the victim's testimony that defendant " 'put his penis in the back of me,' " *id.* at 316, 393 S.E.2d at 160, insufficient to withstand a motion to dismiss. The *Estes* court, however, distinguished its case from *Hicks* because in *Estes* the victim further identified the "back of her" as " 'where I go number two.' " *Id.*

Here the victim testified that defendant "hurt [her] in the private parts." She then demonstrated how defendant hurt her using anatomically correct dolls. The victim identified the female doll as herself and the male doll as her father. The victim then placed the penis, which she identified as "peanut" against the vaginal area of the female doll, which she indicated was her "private parts." The victim also identified defendant's home as the location where defendant "put his private parts in [her] private parts." The victim also replied "no" when asked if "anybody else ever touched you in your private parts." Further, Detective Loeffler testified that the child demonstrated what defendant did to her with anatomically correct dolls by "[sticking] the penis of the male doll around the vaginal area of the female doll." Rosemary Provencher also testified that the victim "took the penis of the male doll and put it around the area, the vaginal area of the female doll" when demonstrating what defendant did to her. Finally, Dr. Gravatt testified that the victim's vaginal opening was significantly larger than that of a child four to five years of age, that there was no hymenal tissue, that there was "ragged scar tissue" in the process of healing and that the victim had a urinary tract infection which is typically seen in sexually abused children. Dr. Gravatt further testified that the victim's injuries were consistent with sexual abuse and that "there [was] no way that normal childhood play or accidents could [have] cause[d] the type of findings on this physical exam." We find the cases cited by defendant distinguishable and defendant's arguments unpersuasive. Accordingly, this assignment of error is overruled.

III.

[3] Defendant contends that the trial court erred in admitting into evidence alleged prior misconduct of defendant. Defendant contends that the trial court erred in failing to exclude testimony regarding prior alleged sexual misconduct involving two other victims, "neither of whom were victims in the case in which defendant was tried." Defendant argues that the evidence presented by the State was contrary to the rules of evidence "and unduly inflamed and prejudiced the jury against the defendant." We disagree.

First, with respect to the trial court's admission of testimony from the State's witness Rosemary Provencher involving defendant's admission that he abused another victim approximately seven years prior to the current charges of sexual abuse, we agree with the State's contention that Rule 404 of the Rules of Evidence is not dispositive on the admissibility of Ms. Provencher's testimony.

> [I]t is a general rule of evidence that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. Various exceptions to this general rule of inadmissibility, as well recognized as the rule itself, are discussed in *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954). The admissibility of the evidence challenged by this assignment of error, however, is not governed by the rule of evidence discussed in *State v. McClain, supra.* Here, evidence was elicited from [the witness] on cross-examination calculated and intended to show bias and to discredit her testimony. This calls for application of the rule that where evidence of bias is elicited on cross-examination the witness is entitled to explain, if he can, on redirect examination, the circumstances giving rise to bias so that the witness may stand in a fair and just light before the jury. "A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross-examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so." *State v. Glenn*, 95 N.C. 677 (1886). *Stansbury*

> states the rule in these words: "If circumstances evidencing bias are elicited on cross-examination, the witness is entitled to explain them away, if he can, on redirect examination, after which the cross-examining party may produce evidence nullifying the effect of the explanation." [Citations omitted.]

State v. Patterson, 284 N.C. 190, 195-96, 200 S.E.2d 16, 20 (1973).

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Leroux, 326 N.C. 368, 383, 390 S.E.2d 314, 324, *cert. denied*, 111 S.Ct. 192, 59 U.S.L.W. 3249, 112 L.Ed.2d 155 (1990), quoting, *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). "[W]here defense counsel on cross-examination of a witness brings out evidence tending to show that someone else was suspected of committing the crime charged, the State is entitled to introduce evidence in explanation or rebuttal thereof, even though such evidence would have been irrelevant had it been offered initially by the State. In such a case, the defendant has 'opened the door' to this testimony and will not be heard to complain. 'Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so.' " *State v. Stanfield*, 292 N.C. 357, 364, 233 S.E.2d 574, 579 (1977).

Here, during cross-examination of Ms. Provencher, defendant elicited testimony which would imply that defendant's ex-wife and not defendant could have been responsible for abusing the victim. Defense counsel questioned Ms. Provencher about how she concluded that defendant abused the victim in view of the information in the file concerning the victim's mother's admission to abusing one of her other children. Ms. Provencher stated that she "would have to expand on [her] answer on that, with the other information that I know about that." At that particular time defense counsel concluded cross-examination. The State asked her the objected to question for the purpose of explaining her testimony on cross-examination. The State was entitled to have its witness explain her answer during re-direct examination. Accordingly, this assignment of error is without merit.

IV.

[4] Defendant also argues that the trial court erred in allowing the State to cross-examine defendant about specific acts of sexual abuse of two other victims.

> [I]t has been accepted as an established principle in North Carolina that "the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime." . . .
>
> Rule 404(b) of the North Carolina Rules of Evidence provides as follows:
>
> > (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

State v. DeLeonardo, 315 N.C. 762, 769, 340 S.E.2d 350, 355 (1986). " 'Our Court has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule.' " *Id.* at 770, 340 S.E.2d at 356, quoting, *State v. Williams*, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981).

> Our Supreme Court has held "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." However, "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 . . . Rule 403." The period of time between the prior sexual acts and the acts charged is an important part of the balancing process. "[T]he passage of time between the commission of the . . . acts slowly erodes the commonality between them."

State v. Roberson, 93 N.C. App. 83, 85, 376 S.E.2d 486, 487, *disc. rev. denied*, 324 N.C. 435, 379 S.E.2d 247 (1989). "While a lapse of time between instances of sexual misconduct slowly erodes the

commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989).

" '[T]he facts of each case ultimately decide whether a defendant's previous commission of a sexual misdeed is peculiarly pertinent in his prosecution for another independent sexual crime.' " *Id.* at 446-47, 379 S.E.2d at 848. "[E]vidence of defendant's prior misconduct with other family members properly was admitted to show that 'defendant systematically engaged in nonconsensual sexual relations with his [daughters] as they matured physically, a pattern of conduct embracing the offense charged.' " *Id.* at 447, 379 S.E.2d at 848.

> Remoteness in time is more significant when evidence of another crime is admitted to show that it and the crime being tried both arose out of a common scheme or plan. It would be unlikely, though not inconceivable, that crimes committed several years apart were planned at the same time. Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes. It is reasonable to think that a criminal who has adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes.

State v. Riddick, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986).

Here the trial court admitted evidence that defendant sexually abused two other victims. First, the trial court admitted evidence that defendant sexually abused his seven-month-old stepson allegedly on 17 July 1981. This information was properly admitted through the testimony of Ms. Provencher on re-direct examination to explain why she thought defendant also committed the sexual abuse of the victim in the current case. The seven-month old victim suffered from "double subdural hematomas, multiple facial and body bruises, and his penis was blackened." As a result, any testimony concerning this victim elicited from defendant was merely cumulative of testimony by Ms. Provencher.

Second, the trial court admitted testimony that defendant sexually abused his fifteen year old sister-in-law on 7 July 1985. The cross-examination concerning defendant's misconduct towards this victim was properly admitted in view of defendant's response to cross-examination about his prior convictions. Defendant was asked to state his prior convictions and he responded that he had been "charged . . . with trying to have sexual advance with her, but it's not true. I did not. Her stepdad sent her up to cause me trouble." While the fifteen year old victim was sleeping on the couch in defendant's residence, defendant allegedly inserted his finger in her vagina. Here defendant opened the door to this evidence and the State was entitled to "explore, explain or rebut that evidence." *State v. Brown*, 310 N.C. 563, 571, 313 S.E.2d 585, 590 (1984).

Defendant also argues that allowing cross-examination of him regarding the sexual abuse of the two victims violated Rule 608 of the North Carolina Rules of Evidence.

Rule 608 allows inquiry on cross-examination into specific instances of conduct if probative of truthfulness or untruthfulness. However, in *State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986), our Supreme Court stated that "extrinsic evidence of sexual misconduct is not in any way probative of a witness' character for truthfulness or untruthfulness." *Id.* at 506, 342 S.E.2d at 514. Even so, any error in admitting evidence in violation of Rule 608 does not require a new trial unless there is a " 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *Id.* In this case defendant has failed to show that he has been prejudiced by the admission of the testimony. First, the testimony concerning defendant's abuse of his seven-month-old stepson was previously admitted through the State's re-direct examination of Ms. Provencher. Accordingly any cross-examination of defendant concerning this charge was merely cumulative. Secondly, defendant opened the door to the accusation of sexual misconduct towards his fifteen year old sister-in-law when responding to the State's question concerning his prior convictions. Defendant stated that the charge was not true and that he was being set up. In any event, upon receiving a negative answer, the State did not make further inquiry into the prior instances of misconduct. Accordingly this assignment of error is overruled.

V.

[5] Defendant next contends that the trial court erred in denying the defense counsel's motion to withdraw as counsel in order to serve as a witness for defendant. Defendant argues that the testimony of his attorney concerned jurisdiction which was "a matter essential to the adjudication of the case." Defendant contends that the "trial court's denial of defense counsel's motion to withdraw constituted prejudicial error which merits reversal by this court." We disagree.

Whether an attorney can withdraw as counsel is a matter in the sound discretion of the trial judge. *State v. Elam*, 56 N.C. App. 590, 593-94, 289 S.E.2d 857, 860, *disc. rev. denied*, 305 N.C. 761, 292 S.E.2d 577 (1982). On this record we hold that the trial court did not abuse its discretion in denying defense counsel's motion to withdraw. In his argument to the trial court, defense counsel mentioned the inconsistency in the victim's testimony and that he should be allowed to testify that the victim told him that the incidents did not occur in her father's trailer in Woodfin. Here the jury heard evidence relative to the child victim's inconsistent testimony as to the place where the alleged sexual misconduct occurred. The jury then returned a special verdict finding that North Carolina had jurisdiction over this matter. Accordingly, on this record we find no abuse of discretion and this assignment of error is overruled.

Accordingly, we find no error.

No error.

Judges PHILLIPS and WYNN concur.

MICHELLE K. HARRIS, THROUGH HER GUARDIAN AD LITEM, DAVID B. FREEDMAN, DAVID A. HARRIS, AND ELLEN E. HARRIS, PLAINTIFFS v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. 9021SC911

(Filed 4 June 1991)

Insurance § 69 (NCI3d)— automobile insurance—stacking—non-owner family member

The trial court correctly granted summary judgment for plaintiffs in a declaratory judgment action to determine whether plaintiffs were entitled to stack the UIM coverages of three separate vehicles covered under a single Nationwide policy. A distinction between the policy owner and a non-owner family member covered by the policy would not be valid under *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259. N.C.G.S. § 20-279.21(b)(4).

Am Jur 2d, Automobile Insurance § 329.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

Judge GREENE dissenting.

APPEAL by defendant from judgment entered 14 June 1990 in FORSYTH County Superior Court by *Judge James M. Long*, granting plaintiffs' motion for summary judgment. Heard in the Court of Appeals 13 March 1991.

Plaintiff Michelle K. Harris, the minor daughter of plaintiffs David and Ellen Harris, was injured in an automobile accident while traveling as a passenger in a vehicle owned by George Wayne Faust and operated by his daughter, Mary Elizabeth Faust, on 25 September 1989. The Faust vehicle was insured under a State Farm Insurance Company policy having liability limits of $100,000.00. Michelle incurred medical expenses alone in excess of $100,000.00. At the time of the accident, Michelle's parents owned three vehicles insured under a single policy by defendant Nationwide Mutual Insurance Company [hereinafter Nationwide]. In its policy covering the Harris' three vehicles, Nationwide provided uninsured and underinsured motorist [hereinafter UIM] coverage of one hundred thousand dollars ($100,000.00) per person and three hundred thou-

sand dollars ($300,000.00) per accident for each vehicle insured. Plaintiffs paid to Nationwide separate premiums of $10.00 per vehicle for uninsured and UIM coverage.

Plaintiffs filed this action for declaratory judgment on 2 March 1990 requesting the trial court to determine whether plaintiffs were entitled to stack the UIM coverages of three separate vehicles covered under the single Nationwide policy. On 14 May 1990 plaintiffs filed a motion for judgment on the pleadings and summary judgment. Defendant orally cross-motioned for summary judgment pursuant to N.C.R. Civ. P. 56(b). In a judgment dated 14 June 1990, the trial court granted plaintiffs' motion for summary judgment. The dispositive portions of the trial court's judgment are as follows:

> 2. That the coverage for the three vehicles listed in the insurance policy referred to in the Complaint and issued by the defendant to the plaintiffs David A. Harris and Ellen E. Harris can be stacked so as to provide underinsured motorist coverage in the amount of $300,000 for injuries and damages sustained by the plaintiffs arising out of the accident described in the Complaint, and that the underinsured motorist coverage available to Michelle Harris is identical to the coverage available to David A. Harris and Ellen E. Harris under the insurance policy issued by the defendant.
>
> 3. That the defendant's limit of liability to the plaintiffs shall be $300,000, less the primary coverage paid to the plaintiffs pursuant to N.C. Gen. Stat. §20-279.21(b)(4).

The court denied defendant's oral motion for summary judgment. Defendant appealed.

Womble Carlyle Sandridge & Rice, by Richard T. Rice, Clayton M. Custer and James P. Hutcherson, for plaintiffs-appellees.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates, for defendant-appellant.

WELLS, Judge.

Defendant assigns error to the trial court granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment. Defendant contends that Michelle K. Harris

is not entitled to stack the three vehicles on her parents' single policy because she is not the owner of the insured vehicles.

The decision of our Supreme Court in *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), allows intrapolicy and interpolicy stacking of UIM coverage. In *Sutton*, the court held that the language of the Motor Vehicle Safety and Financial Responsibility Act is intended to permit both interpolicy and intrapolicy stacking of multiple vehicles for UIM coverage by the policy owner and prevails over any inconsistent language found in a policy. Therefore, the dispositive question in this case is whether a distinction exists for UIM coverage purposes between the policy owner and a non-owner family member covered by the policy.

We perceive that such a distinction would not be valid under *Sutton*. Although the plaintiff in *Sutton* was the owner of the insured vehicles, the Court's holding in *Sutton* is that the benefits contemplated under the applicable statutory provisions in N.C. Gen. Stat. § 20-279.21(b)(4) flow to the *insured injured party*. (Emphasis supplied). At the time of the accident in this case, Michelle was a household resident and a family member as contemplated by the provisions of defendant's policy, and was therefore included *under the policy* as a person insured. Under the holding of this Court in *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986), Michelle falls within the class of persons insured under the provisions of G.S. § 20-279.21(b)(3) for her claims in this case, thus entitling her to UIM coverage under her parents' policy independent of policy provisions. *See also Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991).

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

Affirmed.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

This case presents two distinct issues. First, whether intrapolicy stacking is appropriately considered in determining if the tort-

feasor's vehicle is underinsured. Second, whether intrapolicy stacking is permitted in determining an insurer's limit of liability when the injured party is a non-named insured. For the reasons stated below, I dissent.

I

The defendant argues that the plaintiffs are not entitled to any underinsured coverage because the tortfeasor's vehicle does not qualify as an underinsured vehicle either under the policy language or under N.C.G.S. § 20-279.21(b)(4) (1989). Specifically, defendant contends that because the tortfeasor's vehicle was insured by a policy having liability limits of $100,000 and because the insured injured party was covered under a policy having primary liability limits of $100,000, the tortfeasor's vehicle was not an underinsured vehicle. The plaintiffs contend the tortfeasor's vehicle was underinsured because the UIM coverages available to the insured injured party was $300,000, thus qualifying the tortfeasor's vehicle as an underinsured vehicle under both the statute and the policy.

POLICY

The policy of insurance in question defines an underinsured motor vehicle in the "uninsured/underinsured motorists coverage" endorsement as

> a land motor vehicle . . . of any type . . . [t]o which . . . the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is:
>
> a. equal to or greater than the minimum limit specified by the financial responsibility law of North Carolina; and
>
> b. less than the *limit of liability for this coverage.*

(emphasis added). The policy in "Part D Uninsured Motorists Coverage" defines "limit of liability" as

> [t]he limit of bodily injury liability shown in the Declarations for 'each person' for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. Subject to this limit for 'each person', the limit of bodily injury liability shown in the Declarations for 'each accident' for Uninsured Motorists Coverage is our maximum limit of liability for all

damages for bodily injury resulting from any one accident. The limit of **property damage** liability shown in the Declarations for 'each accident' for Uninsured Motorists Coverage is our maximum limit of liability for all damages to all property resulting from any one accident. This is the most we will pay for bodily injury and **property damage** regardless of the number of:

1. **Covered persons;**

2. Claims made;

3. Vehicles or premiums shown in the Declarations; or

4. Vehicles involved in the accident.

In *Tyler v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 713, 401 S.E.2d 80 (1991), this Court construed a very similar "limit of liability" provision contained in a medical payment provision of an insurance policy. Specifically, the "limit of liability" provision in *Tyler* provided:

LIMIT OF LIABILITY. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for each person injured in any one accident regardless of the number of:

1. Claims made;

2. *Vehicles or premiums shown in the Declarations* . . . ; or

3. Vehicles involved in the accident.

Id. at 715, 401 S.E.2d at 82 (emphasis in original).

In *Tyler*, the insurer had issued one policy of insurance providing "medical payments coverage with a limit of $2,000.00 for the two covered vehicles." *Id.* at 714, 401 S.E.2d at 81. The insured paid a separate premium for the medical payment coverage on each of the two vehicles. The issue in *Tyler* was whether the insured was entitled to "intrapolicy stacking of medical payments coverage." *Id.* The Court held that the specific unambiguous language of the "limit of liability" provision contained in the policy precluded plaintiff from stacking "the medical payments coverage for each car for which he has paid a premium." *Id.* at 715, 401 S.E.2d at 82; *see also Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 324, 335 S.E.2d 228, 232 (1985), *disc. rev. denied*, 315 N.C. 587,

341 S.E.2d 25 (1986) (similar "limit of liability" provision precluded plaintiff from stacking separate uninsured motorist coverages on three different vehicles insured in one insurance policy). Consistent with *Tyler*, plaintiffs are not entitled under the policy to stack UIM coverages on the three vehicles to determine the "limit of liability." Therefore, the "limit of liability," as that term is used in the underinsured endorsement in this policy, is $100,000, and because the tortfeasor was also insured in the amount of $100,000, the tortfeasor's vehicle was not an underinsured vehicle as that term is used in the policy.

If the insured had purchased UIM coverages in varying amounts for the three vehicles named in the single policy, the policy would undoubtedly be ambiguous because it would be impossible to determine the applicable limits of liability. In such event, the "limit of liability" would be determined by stacking the UIM coverages for each car on which premiums were paid. *See Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 509, 246 S.E.2d 773, 779 (1978) (absent express language in the policy relating to whether the plaintiff was entitled to collect medical payments for each car on which premiums were paid, insured entitled to stack). However, in this case the UIM coverage was the same on each of the three vehicles, namely $100,000.

STATUTE

An "underinsured highway vehicle" is defined by statute as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than *the applicable limits of liability under the owner's policy.*

N.C.G.S. § 20-279.21(b)(4) (emphasis added). The statute does not define "the applicable limits of liability under the owner's policy." Does this statutory reference to "limits of liability" refer to the owner's primary liability coverage, the UIM coverage on any one vehicle, or the total UIM coverages on all vehicles? Because of this ambiguity, "resort must be had to judicial construction to ascertain the legislative will, . . . and the courts will interpret the language to give effect to the legislative intent." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978) (citation omitted). "In seeking to discover this intent, the court should consider the

language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). The statute "should be construed contextually and harmonized if possible to avoid absurd or oppressive consequences." *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 177, 171 S.E.2d 427, 430 (1970).

The nature and purpose of N.C.G.S. § 20-279.21(b)(4) is to "compensate innocent victims of financially irresponsible motorists . . . [and enhance] the injured party's potential for full recovery of all damages." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 266-67, 382 S.E.2d 759, 764 (1989). The statute should be "liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Id.* at 265, 382 S.E.2d at 763. In *Sutton*, our Supreme Court held that the statute should be construed to prevent the " 'anomalous situation that an insured is better off—for purposes of the underinsured motorist coverage—if separate policies were purchased for each vehicle.' " *Id.* at 267, 382 S.E.2d at 764 (citation omitted).

To construe "applicable limits of liability under the owner's policy" to be the amount of UIM coverage on any one vehicle shown in the policy declarations, here $100,000, would result in an anomalous situation where the insured would be better off had he purchased separate policies for each vehicle. If separate policies had been purchased, providing the same coverage on each of the three vehicles, the "limits of liability" under the UIM endorsement would have been $300,000. This anomalous situation is exactly what our Supreme Court in *Sutton* attempted to avoid when it allowed intrapolicy stacking of UIM coverages and likewise should be avoided in ascertaining the "limits of liability" for UIM coverage. Furthermore, to preclude stacking of UIM coverages as contained in one policy, in determining the applicable "limits of liability," would seriously impair a party's potential for full recovery of all damages sustained in an accident caused by an underinsured motorist.

Therefore, the applicable "limits of liability" referred to in the statute is not that amount stated in the declarations for any one vehicle, but instead the aggregate of the UIM coverages stated in the policy's declarations. This construction also "gives the insured due consideration for the separate premiums paid for each UIM coverage," whether in one policy, as here, or in separate policies. *Id.*

Because "the terms of the policy conflict with statutory provisions favorable to the insured, the provisions of the statute will prevail." *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 91, 194 S.E.2d 834, 837 (1973). Accordingly, the tortfeasor's vehicle qualifies as an underinsured vehicle if it is insured in an amount less than the aggregated underinsured motorist coverages stated in the policy's declarations.

II

The defendant next argues that even if the tortfeasor's vehicle is determined to be underinsured, both the policy and the statute prohibit Michelle K. Harris from stacking the UIM coverages to determine the insurer's limit of liability.

POLICY

The "uninsured/underinsured motorists coverage" endorsement in the insurance policy provides in pertinent part:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a **family member's** injuries shall be the sum of the limits of liability for this coverage under all such policies.

In Smith v. Nationwide Mut. Ins. Co., 328 N.C. 139, 146, 400 S.E.2d 44, 49 (1991), our Supreme Court read this policy language to allow "the stacking of . . . UIM coverages for a family member when the family member is covered by more than one policy issued to the named insured." However, the unambiguous language of this policy prevents stacking of the UIM coverages contained in it.

The above endorsement language requires two or more policies before stacking is allowed by a family member. Here, Michelle K. Harris was covered by only one policy. This interpretation becomes irrefutable in light of the policy definition of "limit of liability" which limits the defendant's liability for UIM coverage to $100,000 "regardless of the number of . . . vehicles or premiums shown in the Declarations . . . ." Therefore, the endorsement language, read in connection with the "limit of liability" provision, prohibits the stacking by a family member of multiple UIM coverages contained in a single policy.

STATUTE

Whether under the statute a non-named insured, such as Michelle K. Harris, is entitled to stack UIM coverages to determine the insurer's limit of liability is an issue which has not been addressed by our Supreme Court. In *Sutton*, the plaintiff injured party was the policyholder and named insured of all of the policies of insurance which the Court allowed to be stacked. *Sutton*, 325 N.C. at 261-62, 382 S.E.2d at 761. When presented with a case where the injured party was not the policyholder, the Court refused to apply the statutory analysis used in *Sutton* to determine the issue of stacking of UIM coverages. *Smith*, 328 N.C. at 151-52, 400 S.E.2d at 52. Instead, the *Smith* Court allowed stacking under the terms of the policy. *Id.*

The UIM statute provides in pertinent part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the *owner's underinsured motorist coverages* provided in the *owner's policies of insurance*; *it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply*, the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-40-15(9) and (10).

N.C.G.S. § 279.21(b)(4) (emphases added). The statute is unambiguous in its language that only the "owner" is allowed "the benefit of all limits of liability of underinsured motorist coverage under all such policies . . . ." In other words, only the "owner" can stack underinsured motorist "coverages and policies." *See Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (statute allows stacking of coverages and policies). The statute's reference to "owner," in context, refers to the owner of the policies or policy of insurance containing underinsured motorist coverages. *See* N.C.G.S. § 20-4.01 (1989) (unless context of statute requires a different definition, definition of words in § 20-4.01 apply to statute). Therefore, under the statute, Michelle K. Harris, who is not the owner of the policy in question, is not allowed to stack the underinsured motorist coverages available on the policy of insurance issued by the defendant to Michelle's parents.

In conclusion, while I find that the tortfeasor's vehicle qualifies as an underinsured vehicle, Michelle K. Harris is prohibited by both the statute and the policy from stacking UIM coverages. Accordingly, I would reverse the order of the trial court.

LOIS B. CARTER, PLAINTIFF v. MARK H. FOSTER, LINDA FOSTER, IMPRESSIVE PAPERS, INC., AND MHF, INC., DEFENDANTS

No. 9019SC160

(Filed 4 June 1991)

1. **Attorneys at Law § 7.4 (NCI3d)— action on a debt—attorney fees—no provision in note**

The trial court did not err by awarding attorney fees in an action on a debt where there were no provisions for payment of such fees in the evidence of indebtedness. The parties negotiated a settlement of all plaintiff's claims, including attorney fees, and the trial court could properly consider the parties' settlement agreement and its negotiated provisions for payment of attorney fees in deciding plaintiff's motion for summary judgment. Since attorney fees were negotiated as part of a settlement, the court declined to review reasonableness.

Am Jur 2d, Compromise and Settlement §§ 24, 25.

2. **Uniform Commercial Code § 46 (NCI3d)— sale of collateral—claim dismissed**

The trial court did not err in an action on an indebtedness by dismissing defendants' counterclaim arising from the sale of collateral where defendants did not except to any finding of fact, the findings supported the conclusion that defendant Mark Foster himself sold the collateral with the consent of plaintiff and plaintiff was not responsible for the manner or terms under which defendant Foster sold the collateral; and the conclusions supported the judgment that the counterclaim be dismissed.

Am Jur 2d, Counterclaim, Recoupment, and Setoff § 142.

3. Appeal and Error §§ 118, 134 (NCI4th)— denial of summary judgment—denial of attorney fees—not reviewable on appeal

The denial of plaintiff's motion for summary judgment as to all of her claims was not reviewable on appeal; moreover, the issue of attorney fees on one of the notes was not reviewable because plaintiff did not appeal from the denial of attorney fees on that note after the bench trial.

Am Jur 2d, Appeal and Error §§ 104, 545 et seq.

APPEAL by defendants from order entered 1 December 1988 by *Judge Preston Cornelius* and from judgment entered 7 September 1989 by *Judge Thomas W. Seay, Jr.*, in ROWAN County Superior Court. Heard in the Court of Appeals 18 September 1990.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff-appellee.

Thomas M. King for defendant-appellants.

PARKER, Judge.

This civil action arose out of plaintiff's agreement to capitalize defendants' business venture, which ultimately failed. Plaintiff and defendants Mark Foster and Impressive Papers, Inc., signed a memorandum of understanding in which plaintiff agreed to make loans to the venture totaling $150,000.00.

For her loan of $100,000.00, plaintiff received a promissory note ("Note 1") dated 7 January 1987, with interest at ten percent and convertible within a year at her option into shares in defendant Impressive Papers, Inc. Note 1 was executed on behalf of Impressive Papers, Inc., by Mark H. Foster, President, and by Mark H. Foster individually. The note contained no provision for payment of attorney's fees in the event of default. Note 1 was secured by a deed of trust of the same date, which referred to "indebtedness, advancements and other sums expended by Beneficiary pursuant to this Deed of Trust and costs of collection (including attorneys fees as provided in the Promissory Note) . . . ." The parties also signed a security agreement under which defendants Mark Foster and Impressive Papers, Inc., as borrowers granted to plaintiff as lender a security interest in assets described in an attachment to the security agreement, in after-acquired property, and in the proceeds of both.

For her loan of $50,000.00, plaintiff received a nonconvertible promissory note ("Note 2") dated 1 July 1987. Note 2 referred to the parties' memorandum of understanding and security agreement. Executed for defendant Impressive Papers, Inc., by Mark H. Foster, president, Note 2 lacked any provision for payment of attorney's fees in the event of default. No deed of trust securing Note 2 appears of record.

On 26 August 1987, the parties executed a document entitled "Agreement," ("Loan Agreement") under the terms of which defendants Mark Foster, Linda Foster, and Impressive Papers, Inc., agreed to repay plaintiff $5,000.00 lent that day and due 7 January 1988 with interest at ten percent. The introductory paragraph of the Loan Agreement stated: "(Registrar: This agreement affects Deeds of Trust in Book 422, Page 382 and Book 472, page 399 if you want to make marginal entries.)" Paragraph two of the Loan Agreement read as follows:

> The security given in the "security instruments" (the two Deeds of Trust mentioned above and the Security Agreement dated January 7, 1987) will stand as security for all $155,000 lent to Borrower by Lender to date, plus interest and attorneys fees and costs of collection. Default in any performance will be default of all security instruments.

After the business venture failed, plaintiff repossessed some of the collateral covered by the security agreement. In February 1988 plaintiff filed the complaint in this action, alleging that defendants had defaulted on Notes 1 and 2 and the Loan Agreement. Without answering the complaint, defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted.

On 12 May 1988, intending to settle their dispute, the parties signed a Stipulation and Settlement Agreement ("Settlement Agreement") and a consent judgment. Paragraph three of the Settlement Agreement provided, "Several defendants owe plaintiff the sums set out in paragraphs 15 [Note 1], 17 [Note 2], and 19 [Loan Agreement] of the complaint, and, in addition, in each case they owe plaintiff attorney's fees in the amount of 15% of the principal amount of each of those debts." Paragraph three of the consent judgment contained an identical statement. Although the Settlement Agreement and consent judgment were signed by defendants Mark and Linda Foster, defendant Mark Foster for the two corporate defendants Impressive Papers, Inc. and MHF, Inc., defense

counsel, and counsel for plaintiff, the consent judgment was never signed by a judge of the trial division.

In September 1988 plaintiff moved for summary judgment, attaching to the motion copies of the Settlement Agreement and consent judgment. On 1 December 1988 the trial court denied defendants' motion to dismiss and granted plaintiff's motion for summary judgment as to the claims based on Note 1 and the Loan Agreement. The order read in pertinent part:

> 2. Plaintiff shall have and recovery [sic] of defendants Mark H. Foster and Impressive Papers Inc. the sum of $109,587.83, with interest thereon at $30.01 per day from 1 February 1988 until the same be fully paid, and attorney's fees in the amount of $16,438.17.
>
> 3. Plaintiff shall have and recovery [sic] of defendants Mark H. Foster, Linda Foster, and Impressive Papers Inc. the sum of $5218.75, with interest thereon at $1.43 per day from 1 February 1988 until the same be fully paid, and attorney's fees in an amount of $728.81.
>
> . . . .
>
> 4. With regard to the second, forth [sic], fifth, and sixth claims for relief plaintiff's motion for summary judgment is denied.

On 10 November 1988 defendants answered plaintiff's complaint. Later, granted leave to amend this answer to add two counterclaims, defendants counterclaimed that (i) plaintiff's sale of collateral under the security agreement was not conducted in a commercially reasonable way and (ii) plaintiff breached the parties' memorandum of understanding by refusing to capitalize the venture as agreed. Plaintiff's reply included a motion to dismiss both counterclaims for failure to state a claim upon which relief could be granted.

The parties waived trial by jury. The court below heard evidence and at the close of all the evidence defendants voluntarily dismissed their counterclaim for breach of the memorandum of understanding. At the same time, plaintiff moved under Rule 41 to dismiss the counterclaim arising from the sale of collateral. In its judgment of 7 September 1989 the court decreed that defendants' counterclaims were dismissed and forever barred.

On appeal defendants contend the court erred in (i) awarding attorney's fees upon summary judgment for plaintiff on the claims arising from Note 1 and the Loan Agreement and (ii) dismissing their counterclaim arising from the sale of collateral under the security agreement. Plaintiff cross assigns as error the partial denial of her motion for summary judgment in the order of 1 December 1988. For reasons which follow, we affirm the actions of the judges of the trial division.

[1] Defendants first contend the court erred in awarding attorney's fees because there were no provisions for payment of such fees in the evidences of indebtedness between the parties. We disagree.

Obligations to pay attorney's fees on a note or other evidence of indebtedness are "valid and enforceable up to but not in excess of fifteen percent" of the outstanding balance as defined by statute "[i]f such note . . . or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the 'outstanding balance.' " N.C.G.S. §§ 6-21.2 and 6-21.2(1) (1986). Construing N.C.G.S. § 6-21.2, this Court said

> Although "provisions calling for a debtor to pay attorney's fees incurred by a creditor in the collection of a debt" have long been considered against public policy, *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 290, 266 S.E.2d 812, 815 (1980); *Tinsley v. Hoskins*, 111 N.C. 340, 16 S.E. 325 (1892), such provisions are enforceable when specifically authorized by statute. *Enterprises, Inc. v. Equipment Co.; Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976). G[eneral] S[tatute] 6-21.2 "represents a far-reaching exception to the well-established rule against attorney's fees obligations," *Supply, Inc. v. Allen*, 30 N.C. App. at 276, 227 S.E.2d at 124, and specifically approves of an obligation to pay reasonable attorneys' fees found in *any* note "or other evidence of indebtedness." G.S. 6-21.2.

Reavis v. Ecological Development, Inc., 53 N.C. App. 496, 499, 281 S.E.2d 78, 80 (1981) (emphasis in original), *overruled on other grounds by Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988).

In the case under review, the parties negotiated a settlement of all plaintiff's claims against defendants, only three of which arose from defendants' default on the three loans. The negotiated agreement settling all plaintiff's claims included a provision for the pay-

ment of attorney's fees, but only with respect to the loans in default. In the context of the parties' agreement settling all plaintiff's claims against defendants, these attorney's fees were not an "obligation to pay attorneys' fees upon any note . . . or other evidence of indebtedness" under N.C.G.S. § 6-21.2. Without undermining the intent or force of that statute, parties may, in settling disputes, agree to the payment of attorney's fees. We, therefore, conclude that this case is not controlled by N.C.G.S. § 6-21.2.

"Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959) (citation omitted). As stated by the North Carolina Supreme Court

> In 5 R.C.L., p. 878, it is said: "It is the duty of courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims; and the nature or extent of the rights of each should not be nicely sc[r]utinized. Courts should, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration of each agreement is not only valuable, but highly meritorious. They are encouraged because they promote peace, and when there is no fraud, the court will not overlook the compromise, but will hold the parties concluded by the settlement. . . . Equity [too] favors amicable adjustments, and will not disturb them unless its jurisdictions [sic] [be] invoked in favor of one without knowledge at the time, by satisfactory evidence of deception, fraud or mistake."

Armstrong v. Polakavetz, 191 N.C. 731, 734-35, 133 S.E. 16, 17-18 (1926). *Accord Bohannon v. Trotman*, 214 N.C. 706, 720, 200 S.E. 852, 860 (1939). In addition, "[o]nce the parties have entered into an agreement settling a disputed claim, neither party will, in the absence of any element of fraud or bad faith, be permitted to repudiate it." 15A Am. Jur. 2d *Compromise and Settlement* § 7 (1976). Further,

> where the parties agree upon the terms of a compromise, but it is contemplated that their agreement will not be binding until it is committed to writing and signed by the parties, either party has the right to reconsider and repudiate the

> terms to which he previously agreed, and there is no valid compromise if a party changes his mind and refuses to sign the written agreement.

Id. § 9 at 782. "To avoid an otherwise valid compromise on the ground that it is contrary to public policy, there must be some fact on which the asserted invalidity can rest." *Casualty Co. v. Teer Co.*, 250 N.C. at 552, 109 S.E.2d at 175.

On motion for summary judgment the court may properly consider "material which would be admissible in evidence . . . ." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). While evidence of either an offer or acceptance of consideration in compromising or attempting to compromise a disputed claim is not admissible to prove liability for or invalidity of the claim, N.C.G.S. § 8C-1, Rule 408 (1988), "evidence of a *contract* of compromise between the parties to a suit, whether or not performed, is admissible." 2 H. Brandis, *Brandis on North Carolina Evidence* § 180 (3d ed. 1988) (emphasis in original). If the compromise agreement is "not performed, and suit on the original claim ensues, no policy favors 'the protection of those who repudiate the agreements the making of which the privilege is designed to encourage.' McCormick on Evidence, 3d ed., § 274." *Brandis* § 180 at 58 n.24. The North Carolina Supreme Court has said

> [W]here, instead of an unaccepted offer of compromise, there be an express and final agreement upon the matter, there is no reason why either party should not be at liberty to insist on such admission or agreement, whenever it may serve his interest, as on any other admissions or agreements. . . . A concluded agreement of compromise must, in its nature, be as obligatory, in all respects, as any other, and either party may use it whenever its stipulations or statements of fact become material evidence for him.

Sutton v. Robeson, 31 N.C. (1 Ired.) 380, 383 (1849).

Applying these principles, the trial court could properly consider the parties' Settlement Agreement and its negotiated provision for payment of attorney's fees in deciding plaintiff's motion for summary judgment. Before this Court, defendants do not argue that they changed their minds and refused to sign the Settlement Agreement. Although defendants wish to avoid the effect of the agreement, they point to no fact which would render it invalid.

Defendants do not argue fraud or bad faith on the part of plaintiff; neither do defendants argue mistake. At the time defendants executed the Settlement Agreement, they were aware of the provision for attorney's fees. In view of long standing policy which encourages the settlement of legal disputes between the conflicting parties and the enforcement of settlement contracts, we hold that in the instant case, the trial court did not err in awarding attorney's fees upon summary judgment. In addition, since the provision for payment of attorney's fees was negotiated as part of the settlement, we decline to review its reasonableness.

[2] Defendants' second and final contention is that the trial court erred in dismissing their counterclaim arising from the sale of collateral. Again, we disagree.

> The Rules of Civil Procedure provide in pertinent part
>
> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff . . . . If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . operates as an adjudication upon the merits. . . .
>
> The provisions of this rule apply to the dismissal of any counterclaim . . . .

N.C.G.S. §§ 1A-1, Rules 41(b) and (c) (1990).

On a motion to dismiss a defendant's counterclaim under Rule 41(b), where all the evidence is in, it is "incumbent upon the judge to consider and weigh it all . . . and render judgment on the merits of the . . . counterclaim in the form directed by Rule 52(a)." *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973). The function of the judge is to evaluate a counterclaimant's evidence free of any limitations as to the inferences which a court must indulge in favor of plaintiff's evidence on a motion for a directed verdict in a jury case. *See Fearing v. Westcott*, 18 N.C. App. 422, 424, 197 S.E.2d 38, 41 (1973). An involuntary dismissal should be granted

if the counterclaimant has shown no right to relief or if he has shown a right to relief but the trial court as trier of fact determines that the party moving for dismissal is entitled to a judgment on the merits. *See Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 660, 301 S.E.2d 523, 527, *disc. rev. denied*, 309 N.C. 319, 307 S.E.2d 162 (1983).

In the context of an involuntary dismissal, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. The trial court's judgment must be granted the same deference as a jury verdict. *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 218-19 (1983).

Defendants' Assignment of Error 8 reads as follows: "The court's entry of an unvoluntary [sic] dismissal of Defendants' Counterclaim on the basis that there was competent evidence to prove defendants' claim." Nevertheless, defendants did not except to any finding of fact. Where the assignments of error are insufficient to present the findings of fact for review, the appeal presents the questions whether the findings support the court's inferences and conclusions of law and judgment and whether error appears on the face of the record. *Putnam v. Publications*, 245 N.C. 432, 434, 96 S.E.2d 445, 447 (1957).

Findings relevant to the dismissal of defendants' second counterclaim included the following:

> 4. In the summer of 1987 Impressive Papers, Inc. owned certain machinery, equipment, and inventory which was covered by the security agreement attached to the Complaint. This collateral was located in a building leased by the corporation from one Ramdin.
>
> . . . .
>
> 7. Sometime toward the end of January 1988 plaintiff took possession of the inventory, machinery and equipment by padlocking the building in which it was stored and denying defendants access to it.
>
> . . . .
>
> 9. These parties entered into a "Stipulation and Settlement Agreement" dated 12 May 1988. The document actually was signed by all of the defendants in final form on or about

25 May 1988. That document has been offered into evidence and is part of the record in the cause. It provides, in pertinent part, that plaintiff would allow defendants access to the tangible personal property collateral in order to permit defendant to sell that collateral. It provides that the collateral could not be sold without plaintiff's approval of the terms of the sale, that all sale proceeds would be held in trust by defendants' then counsel of record . . . and that the lien created by plaintiff's security would attach to all those proceeds.

10. Plaintiff did permit [defendant Mark] Foster to have access to the collateral and to sell it. He sold a portion of that collateral on or about 14 June 1988 for the sum of $15,000.00 and the balance of the collateral on or about 26 July 1988 for the sum of $40,000.00. He paid the proceeds over to his counsel and [they were] deposited in his trust account pursuant to the terms of the stipulation and settlement agreement.

The trial judge's conclusion of law was that all the evidence, taken in the light most favorable to defendants, showed defendant Mark Foster himself sold the collateral with the consent of plaintiff, and even if he sold it in a commercially unreasonable manner or for less than its fair market value, plaintiff was in no way responsible for the manner or the terms under which he sold the collateral. The court concluded further that plaintiff's motion to dismiss the counterclaim should be allowed.

Under *Fearing*, the trial court as the finder of fact was not required to take defendants' evidence in the light most favorable to them. Hence defendants received the benefit of a more favorable view of their evidence. With respect to defendants' counterclaim arising from sale of the collateral, we conclude the trial court's findings support its conclusions, and the conclusions support the court's judgment that the counterclaim be dismissed and forever barred. We, therefore, hold the trial court did not err in dismissing defendants' counterclaim.

[3] In her cross assignment, plaintiff contends the trial court erred in refusing to grant summary judgment as to all her claims. This contention is not properly before the Court and is overruled. In *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985), our Supreme Court held that a denial of summary judgment is not reviewable on appeal after trial.

Moreover, without taking an appeal, an appellee may cross assign as error any omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment from which appeal has been taken. N.C.R. App. P. 10(d). *See also Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982) ("Rule 10(d) provides protection for appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based"). Plaintiff did not appeal from the trial judge's denial of attorney's fees on Note 2 after the bench trial. Hence, the issue of attorney's fees on Note 2 is not a proper subject for review.

Affirmed.

Judges JOHNSON and EAGLES concur.

DEBRA J. BATTLE v. NASH TECHNICAL COLLEGE

No. 907SC655

(Filed 4 June 1991)

1. **Master and Servant § 10.2 (NCI3d)— wrongful discharge— summary judgment for defendant—proper**

The trial court did not err by granting summary judgment for defendant on a wrongful discharge claim where plaintiff was discharged from her employment with defendant as a Counselor Instructor for failure to repay student loans to ECU. N.C.G.S. § 143-553 provides that State Employees who owe money to the State must make full restitution as a condition of continuing employment; a prior opinion in this case held that the essential issues of fact litigated and determined in the administrative decision are conclusive between the parties; and the issues between the parties were litigated and determined by defendant's Board of Trustees or were not properly before the Court of Appeals.

Am Jur 2d, Master and Servant §§ 54, 55.

2. Appeal and Error § 382 (NCI4th)— wrongful discharge— settlement of record by court—no abuse of discretion

The trial court did not abuse its discretion in a wrongful discharge action by not allowing plaintiff's motion to include her response to defendant's summary judgment motion and attachments thereto in the record on appeal and the transcript of the hearing. Plaintiff did not attempt to present opposing affidavits until the day of the hearing; Rule 56 specifically provides that the moving parties be required to submit supporting affidavits which would set forth the moving party's basis for the motion and that opposing affidavits should be filed prior to the day of the hearing. Moreover, the court did not abuse its discretion in excluding the transcript from the record on appeal; the case on this record does not necessitate a copy of the transcript of the hearing.

Am Jur 2d, Appeal and Error §§ 427, 444.

Judge GREENE concurring.

APPEAL by plaintiff from judgment entered 25 January 1990 by *Judge Napoleon B. Barefoot* in NASH County Superior Court and appeal by defendant from order entered 18 April 1990 by *Judge Napoleon B. Barefoot* in NASH County Superior Court and order entered 30 May 1990 by *Judge Frank R. Brown* in NASH County Superior Court. Heard in the Court of Appeals 23 January 1991.

This is the second appeal in a civil action for wrongful discharge from employment. Plaintiff seeks reinstatement and damages incurred as a result of the termination of her employment. On 23 January 1986 plaintiff entered into a written contract with defendant to work as a Counselor/Instructor until 30 June 1986. The contract provided that plaintiff would receive $1,637.00 per month as compensation. From approximately 1979 until the current contract plaintiff had been periodically employed by defendant under contracts ranging in duration from six months to a year.

During the time that plaintiff was employed by defendant, plaintiff had been in default on a loan evidenced by a promissory note payable to East Carolina University (ECU). The loan was part of the National Direct Student Loan Program. While a student at ECU plaintiff also borrowed money from the Sarah E. Clement Emergency Loan Program. Eventually, ECU secured a civil money

judgment against plaintiff for the unpaid loan balances. On 2 July 1984, ECU wrote plaintiff's employer, defendant Nash Technical College (Nash), and informed them that plaintiff had failed to repay the loan and as an employee of Nash was violating G.S. Chapter 143, Article 60. At that time, plaintiff was in default in the amount of $4,233.39 on the National Direct Student Loan and $263.89 on the Sarah E. Clement Emergency Loan. Nash's president, Dr. J. Reid Parrot, Jr., then wrote plaintiff and advised her about the ECU correspondence and informed her that G.S. Chapter 143, Article 60 "provides that employees of the State who owe money to the State must make full restitution of the amount as a condition for continued State employment." Before 27 May 1986, plaintiff made one voluntary payment of $20.00 on 1 February 1983. Plaintiff's state income tax refunds were seized in 1983, 1984 and 1985 to be applied against her indebtedness.

Again, on 24 March 1986, ECU contacted Nash's Vice President, Dr. Charles A. Bucher. ECU demanded that plaintiff's employment be terminated for her failure to repay the indebtedness. Dr. Bucher wrote ECU for verification of the loan and ECU informed him that as of 1 May 1986 plaintiff was delinquent in the amount of $3,685.89. Dr. Parrot then wrote plaintiff and directed her to meet with Nash's officials to discuss the matter. On 15 May 1986, plaintiff met with the officials and indicated that there were some problems with ECU's records and that she would look into the matter. Thereafter, Dr. Parrot wrote plaintiff and informed her that her employment was terminated effective 31 May 1986. Plaintiff appealed that decision to Nash's Board of Trustees (Board).

At the conclusion of the Board's hearing, the Board determined that plaintiff had not repaid her debt within a reasonable period of time after receiving written notice of her responsibility to do so. The Board also determined that "[t]here was no genuine dispute as to whether the money was owed by Ms. Battle to ECU, or how much was owed, and there was no unresolved issue concerning insurance coverage." As a result the Board concluded that "Deborah J. Battle did not repay the amount owed ECU within a reasonable time after notice to her of her right to do so. There was no genuine dispute as to whether or not said money was owed and there was no unresolved issue concerning insurance coverage[;] [t]here was no extraordinary reason that made Deborah J. Battle incapable of repaying her debts to ECU[; and] Deborah J. Battle did not

attempt repayment of the debts to ECU in good faith." The Board determined that plaintiff's termination was appropriate.

On 8 May 1987, plaintiff initiated this action seeking compensation for lost income and other expenses incurred as a result of her discharge, punitive damages, reinstatement, costs and attorneys' fees. Defendant answered denying any liability. Subsequently, defendant filed a motion for summary judgment. Plaintiff filed no counter-affidavits or other forecast of evidence. The trial court granted defendant's motion and dismissed the action with prejudice. Plaintiff appealed. Thereafter defendant moved to dismiss plaintiff's appeal for plaintiff's failure to comply with Rule 11(b) of the N.C. Rules of Appellate Procedure by failing to serve the proposed record on appeal on defendant's counsel in a timely manner. The trial court denied this motion. Defendant appealed the denial of that motion. Subsequently, defendant moved to dismiss the appeal for plaintiff's failure to comply with Rules of Appellate Procedure 9(a)(1)(e) and 9(b)(2). The trial court denied this motion. Defendant appealed.

Leland Q. Towns for plaintiff-appellant.

Valentine, Adams, Lamar, Etheridge & Sykes, by L. Wardlaw Lamar, for defendant-appellee.

EAGLES, Judge.

I. PLAINTIFF'S APPEAL

[1] Plaintiff first assigns as error the trial court's granting of defendant's motion for summary judgment since there were still material issues to be tried. In her brief plaintiff contends that the following matters were in dispute: "1. It is disputed whether money owed to East Carolina University is money owed to the State pursuant to the statute; 2. It is disputed whether the plaintiff falls within the exception of the statute that a genuine dispute as to the money owed and whether she was pursuing her administrative remedies; 3. It is disputed whether amounts garnished from her income tax refund constitutes repayment under the statute; 4. It is disputed whether the reasonable time period as contemplated by the statute ran from May 15, 1986 until the date of her dismissal; 5. It is disputed whether Nash Technical College violated the provisions of its policies and procedures regarding due process and affording plaintiff a hearing prior to her termination." Plaintiff

contends that none of these issues were litigated by the Board and that "[t]he granting of the defendant's motion for summary judgment was simply inappropriate given the nature of issues raised in all the pleadings, the documents, the numerous hearings and the total circumstances." We disagree and affirm.

At the outset, we note that in our prior opinion, *Battle v. Nash Technical College*, (unpublished opinion), (94 N.C. App. 601, 381 S.E.2d 353, 887SC1171, 5 July 1989), *disc. rev. denied*, 325 N.C. 431, 384 S.E.2d 536 (1989), citing *Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980), the *Battle* court stated that "those essential issues of fact which were litigated and determined in the administrative decision are conclusive between the parties in this action." "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." *North Carolina National Bank v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983).

G.S. 143-553 in pertinent part provides the following:

> (a) All persons employed by an employing entity as defined by this Part who owe money to the State and whose salaries are paid in whole or in part by State funds must make full restitution of the amount owed as a condition of continuing employment.
>
> (b) Whenever a representative of any employing entity as defined by this Part has knowledge that an employee owes money to the State and is delinquent in satisfying this obligation, the representative shall notify the employing entity. Upon receipt of notification an employing entity shall terminate the employee's employment if after written notice of his right to do so he does not repay the money within a reasonable period of time; provided, however, that where there is a genuine dispute as to whether the money is owed or how much is owed, or there is an unresolved issue concerning insurance coverage, the employee shall not be dismissed as long as he is pursuing administrative or judicial remedies to have the dispute or the issue resolved.

After careful review of the Board's resolution, which was attached to Dr. Parrot's affidavit in support of defendant's motion

for summary judgment, we hold that the following issues were litigated and determined by the Board and as a result are conclusive between the parties. First, with respect to whether the money owed to ECU was money owed to the State, the Board in its resolution stated that "[t]he funds borrowed by Ms. Battle pursuant to the National Direct Student Loan Program and the Sarah E. Clement Emergency Loan Fund at ECU constituted State funds." Second, with respect to whether plaintiff fell within the exception of the statute concerning a genuine dispute as to the money owed, the Board concluded that "[t]here was no genuine dispute as to whether or not said money was owed and there was no unresolved issue concerning insurance coverage." Third, with respect to whether a reasonable time period ran from 15 May 1986, which was the date that plaintiff met with Nash's officials, until plaintiff's dismissal, the Board concluded that "Deborah J. Battle did not repay the amount owed ECU within a reasonable time after notice to her of her right to do so."

While the Board's resolution did not address the following issues mentioned by plaintiff, we hold that they are not properly before this Court. With respect to whether Nash violated the provisions of its policies and procedures regarding termination, we find no record evidence of Nash's "policies and procedures" regarding termination. We note that defendant admitted in his answer that it "had a personnel policy providing for grounds for dismissal, and notice and hearing requirements for the non-tendering of new contracts" but denied plaintiff's allegation that the procedure was not observed. While plaintiff has attached a copy of this information to her brief, it is not part of the record on appeal. There is record evidence that plaintiff was given the opportunity for repayment and that a reasonable amount of time had passed between notice of default and plaintiff's termination. Secondly, with respect to whether amounts garnished from her income tax refund constitute repayment under the statute, the Board in its resolution found that plaintiff made only one voluntary payment of $20.00 on 1 February 1983 and that the following sums were *seized* from plaintiff's State income tax refund: $368.58 (14 October 1983); $364.58 (7 December 1984); and $723.56 (3 September 1985). Without expressly deciding whether the garnishment of an income tax refund constitutes repayment under the statute, here there is no evidence that plaintiff attempted voluntary repayment of her indebtedness. ECU contacted Nash on 24 March 1986 and informed Mr. Bucher

that "Ms. Battle is making no effort on her own to make repayment." Subsequently, Ms. Battle met with officials of Nash and informed them that there was a "mix-up" or "error" in ECU's records and that Nash "would be receiving correspondence within one week straightening out the matter." Even if seizure of tax refunds would be sufficient to constitute a partial repayment under the statute, here even after receiving the 1985 tax refund, ECU determined that plaintiff was still delinquent in satisfying her obligation and as a result wrote Nash's vice-president again in March of 1986. Though she paid the ECU debt on 26 May 1986, shortly *after* she was terminated by Nash on 20 May 1986, in light of her payment history after the July 1984 discussion, it is clear that plaintiff did not attempt to repay her indebtedness within a reasonable amount of time after receiving notice of the March 1986 correspondence. Accordingly, this assignment of error is overruled.

[2] Plaintiff next assigns as error the trial court's failure "to allow plaintiff to include her response to defendant's summary judgment and attachments thereto in the record on appeal and the transcript of the hearing since plaintiff should have been allowed to file these items and they should have been considered by the trial court." Plaintiff argues that the trial court abused its discretion in excluding these matters from the record. Plaintiff argues that she was "not required to respond to the defendant until such time as the defendant had carried out [its] burden" of proving that summary judgment should be granted in its favor. Plaintiff further argues that the inclusion of the transcript in the record on appeal was "necessary for the reviewing court to make a fair and accurate assessment of the case and the proceedings below."

"It appears to be well established in this State that the action of the judge in settling the case on appeal, when the parties cannot agree, is final and will not be reviewed on appeal." *Millsaps v. Wilkes Contracting Co.*, 14 N.C. App. 321, 327, 188 S.E.2d 663, 666-67, *cert. denied*, 281 N.C. 623, 190 S.E.2d 466 (1972). G.S. 1A-1, Rule 56 provides that "[t]he adverse party prior to the day of hearing may serve opposing affidavits."

> G.S. 1A-1, Rule 56 does not contain a specific provision with respect to when affidavits in support of a motion for summary judgment must be filed and served. Nevertheless, it seems implicit in Rule 56(c) that such affidavits must be filed and

> served prior to the day of the hearing. Rule 56(c) provides: "The adverse party prior to the day of the hearing may serve opposing affidavits." It is clear that opposing affidavits are to be served prior to the day of the hearing. It follows that the clear intent of the legislature is that supporting affidavits should be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing.

Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974). "Undoubtedly, Rule 56(e) grants to the trial court wide discretion to permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. However, this provision presupposes that an affidavit or affidavits have already been served. The rule speaks only of supplementing or opposing." *Id.* at 131, 203 S.E.2d at 424.

Here plaintiff did not attempt to present opposing affidavits until the day of the hearing. In her brief plaintiff argues that she was not required to respond to defendant's motion for summary judgment until defendant had carried out his burden and the basis for his motion became clear. We find this argument meritless especially in view of the fact that Rule 56 specifically provides that the moving party is required to submit supporting affidavits which would set forth the moving party's basis for the motion and that opposing affidavits should be filed prior to the day of the hearing. On this record we hold that the trial court did not abuse its discretion in failing to allow plaintiff's response or include the response in the record on appeal. Likewise, the trial court did not abuse its discretion in excluding the transcript from the record on appeal. Our assessment of the case on this record does not necessitate a copy of the transcript of the hearing. Accordingly, this assignment of error is overruled.

II. DEFENDANT'S APPEAL

Defendant assigns as error the trial court's denial of its motion to dismiss plaintiff's appeal for failure of the plaintiff to serve the proposed record on appeal within the time allowed by Rule 11(b) and assigns as error the trial court's failure to dismiss plaintiff's appeal for plaintiff's inclusion of paperwritings in the proposed record on appeal which were not before the court at the time of the entry of summary judgment and plaintiff's failure to include the complete order of the Board in the proposed record.

While we have considered defendant's assignments of error, we find it unnecessary to address defendant's appeal since we have affirmed the trial court's grant of summary judgment in defendant's favor in plaintiff's appeal.

The decision of the trial court is affirmed.

Affirmed

Judge GREENE concurs with separate opinion.

Judge PHILLIPS concurs in the result only.

Judge GREENE concurring.

I write separately to emphasize that the pre-hearing filing requirement applicable to affidavits in support of and in opposition to a summary judgment motion does not apply to other evidence the parties may wish to present at the summary judgment hearing.

In addition to affidavits, other appropriate evidence at a summary judgment hearing includes the pleadings, depositions, stipulations, answers to interrogatories, admissions on file, and oral testimony. N.C.G.S. § 1A-1, Rule 56(c) (1990) (authorizing consideration of "the pleadings, depositions, answers to interrogatories, and admissions on file"); N.C.G.S. § 1A-1, Rule 43(e) (1990) ("[w]hen a motion is based on facts not appearing of record the court . . . may direct that the matter be heard wholly or partly on oral testimony . . ."); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2723 (2d ed. 1983) (Rule 43(e) applies to summary judgment motions). With the exception of affidavits, the other evidence appropriately considered by a trial court at a summary judgment hearing need not be presented "prior to the day of [the] hearing . . . ."

Furthermore, despite the specific language of Rule 56(c) requiring affidavits to be filed "prior to the day of [the] hearing," the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. N.C.G.S. § 1A-1, Rule 6(b) (1990). If a request for permission to file affidavits is made on the day of the summary judgment hearing, the trial court "may permit

the act to be done where the failure to act was the result of excusable neglect." *Id.*

Here, there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment. Furthermore, there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to the date of the summary judgment hearing. Therefore, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff cannot complain about its exclusion.

LYLE W. CASSADA, PLAINTIFF v. CECIL CASSADA AND WIFE, PAULINE CASSADA, AND DAVID STRATTON AND WIFE, DARLENE STRATTON, DEFENDANTS

No. 9028SC589

(Filed 4 June 1991)

Adverse Possession § 36 (NCI4th)— adverse possession by decedent—intervening life tenant—twenty-year period not met

The trial court, in an action to establish a boundary, erroneously granted summary judgment for defendants and the case was remanded for entry of summary judgment for plaintiff where the disputed boundary arose from a will which left a life tenancy to the testator's wife, with the remainder to his children; and the children executed deeds of partition after the death of the testator and before the death of the wife. The testator's intent as gathered from the four corners of the will indicates that his children would only have a present possessory interest either upon the death of the mother/life tenant or some other act by the trustee which would terminate the trust. There is no record evidence that the trust has been terminated other than by the death of the mother/life tenant on 18 August 1973 and there is no reason to infer that her assent to partitioning the property should be equated with assent to terminating the trust. The remaindermen's possession of the property was not adverse in that it was with

the acquiescence and permission of their mother, the life tenant, and the twenty-year period for adverse possession was not met.

Am Jur 2d, Adverse Possession §§ 15, 203, 253.

APPEAL by plaintiff from judgment entered 25 April 1990 by *Judge Robert D. Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 5 December 1990.

This is an action to determine the boundary line between adjoining tracts of property owned by plaintiff Lyle Cassada and defendant Pauline Cassada and ownership of approximately six acres of land currently enclosed in a fence on Pauline Cassada's tract of land. Plaintiff instituted this action on 8 February 1989 claiming title to the disputed land by virtue of a deed recorded in Deed Book 754 at page 172 in the Buncombe County Registry. In their answer, defendants claim ownership of the disputed land by adverse possession of the disputed tract for more than twenty years and request that title to the property be quieted and that they be declared lawful owners of the disputed tract.

Plaintiff Lyle Cassada, defendant Cecil Cassada and Willard Cassada were the three youngest sons of W. J. Cassada and Lucinda Cassada. Following W. J. Cassada's death in 1945 and a will caveat proceeding and subsequent appeals, a consent judgment was entered which provided that plaintiff Lyle Cassada, defendant Cecil Cassada, Willard Cassada, and their mother, Lucinda Cassada, together owned a two-thirds interest in the lands of W. J. Cassada "under and by virtue of the provisions of the Last Will and Testament of W. J. Cassada."

W. J. Cassada's will provided, in pertinent part, that:

Item 2. All of the rest and residue of my estate, real, personal and mixed, I give, devise and bequeath absolutely and in fee simple unto my son, Willard Cassada, in trust, however, for the following uses and purposes, to-wit:

(a) My wife, Lucinda Cassada, shall have the possession, use and enjoyment of my home and farm, together with all of my household and kitchen furniture, live stock, farming implements and all of my personal property, so long as she may live and remain my widow, to be the home of herself and of our three youngest sons, Willard, Cecil, and Lyle, and to

be used and enjoyed by her and them in common; this to be in lieu of dower, year's support, or any other allowance which she or they might claim and subject, also, to sale and conveyance of any part of said property as hereinafter provided.

(b) Upon the death of my said wife and the payment of all of her debts and funeral expenses, or upon her marriage, all of my said property, real, personal and mixed, shall be and become the property of my said three sons, Willard, Cecil, and Lyle, to be theirs absolutely, subject only to the following, to-wit:

. . . .

Item 3. I authorize and empower my executor and trustee hereinafter named, or the executor and trustee for the time being hereunder, to sell at public or private sale any portion of my estate which he may hold in trust whenever in his judgment such sale shall become necessary in order to carry out the purposes herein expressed or shall be deemed for the best interests of my estate, and to make good and sufficient deeds or other instruments of transfer therefor, provided that proceeds of all such sales shall be held and used for the purposes herein mentioned and subject to the trust herein created, and provided also, that the purchasers of any of said property shall not be required to see to the application of the purchase price thereof.

W. J. Cassada appointed his son, Willard Cassada, as the "Lawful Executor and Trustee to all intents and purposes, to take and hold all of my estate for the uses and purposes herein set forth, and to execute this my Last Will and Testament according to the true intent and meaning of the same and of each and every part and clause thereof."

The following pertinent facts have been stipulated to by the parties: In July of 1954, the three brothers had the property surveyed and along with their spouses executed deeds of partition among themselves with Willard receiving Tract 1; Cecil receiving Tracts 2 and 2A; and Lyle receiving Tract 3. Neither Lucinda Cassada nor Willard Cassada (as disclosed by the record evidence) in his official capacity as trustee under the will joined in the execution of the deeds. However, the parties stipulated that they partitioned the property "with the knowledge of" Lucinda Cassada. Lucinda

Cassada died on 18 August 1973. At some point in 1954 or 1955, after the exchange of deeds of partition, Cecil Cassada erected a fence to separate his property from Lyle Cassada's property. The fence did not follow the property lines set out in the survey which was used to partition the property and as a result included the disputed property.

In 1985, Cecil Cassada conveyed the property to his wife, Pauline. In 1988 Pauline Cassada employed a surveyor to survey the land and discovered the discrepancy in the property lines. In 1983 Cecil and Pauline Cassada had conveyed a portion of the disputed property to Lyle Cassada's daughter and son-in-law, Darlene and David Stratton.

After the discrepancy between the property line and Cecil's fence was discovered in 1988, plaintiff instituted this suit to establish the boundary. Each party subsequently moved for summary judgment. The trial court denied plaintiff's motion and entered summary judgment in favor of defendant. Plaintiff appeals.

Leonard, Biggers & Knight, P.A., by William T. Biggers and T. Karlton Knight, for plaintiff-appellant.

Shuford, Best, Rowe, Brondyke & Wolcott, by Patricia L. Arcuri and James Gary Rowe, for defendant-appellees.

EAGLES, Judge.

Plaintiff assigns as error the trial court's determination that Pauline Cassada was the owner of the subject property by adverse possession. Plaintiff contends that the "claim of Defendants to the disputed land must fail for the following reasons: (1) The possession of the land by the defendants has not been adverse to all persons as required by statute and as expressed in *Locklear v. Savage*, [159 N.C. 236, 74 S.E. 347 (1912)]. . . . (2) By the execution and delivery of a warranty deed to Lyle Cassada, Cecil and Pauline Cassada are estopped from claiming the disputed lands as their own. . . . (3) The possession of the disputed land by Cecil Cassada was not notorious. . . . (4) There can be no dissesin [sic] of one whose right to possession is a future right." Plaintiff contends that the facts presented in the record as a matter of law do not entitle defendants to summary judgment. We agree.

At the outset we note that the interest of each party in the land in question derived from the Last Will and Testament of W. J. Cassada.

> It is the duty of the Court to construe the provisions in a will so as to discover the intent of the testator and to give effect to it if it is not in contravention of some established rule of law or public policy. Such intention is to be determined by an examination of the will, in its entirety, and in light of all surrounding facts and circumstances known to testator.
>
> Where there is ambiguity or uncertainty the Court is to take into consideration the established rules for construction of a will. Effect must be given to each clause, phrase and word, if a reasonable construction of the will so permits. Each string should give its sound.
>
> The intent of the testator is determined from the entire instrument so as to harmonize, if possible, provisions which would otherwise be inconsistent. A phrase should not be given a significance which clearly conflicts with the evident intent of the testator as gathered from the four corners of the will and the Court will adopt that construction which will uphold the will in all its parts if such course is consistent with established rules of law and the intention of the testator. However, where provisions are irreconcilably in conflict, then the last expression of intent will ordinarily prevail. Apparent conflicts will be reconciled, if possible to do so consistent with testator's intent, and irreconcilable provisions will be resolved by giving effect to the general prevailing purpose of the testator.

Joyner v. Duncan, 299 N.C. 565, 576-77, 264 S.E.2d 76, 86 (1980). (Citations omitted.)

"When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity." G.S. 31-38. The rule that a "devise of the 'use of' property is the equivalent of a devise in fee . . . has no application, however, when the will shows an intent to pass an interest that is less than a fee." *Thompson v. Ward*, 36 N.C. App. 593, 596, 244 S.E.2d 485, 487 (1978).

In *Stephens v. Clark*, 211 N.C. 84, 189 S.E. 191 (1937), testatrix, who died in 1906 with no children, made the following provisions in her Last Will and Testament:

> "My husband, Robert P. Wyche, shall have full and entire possession of all of my property including my bank account with the First National Bank of Charlotte, North Carolina, and also my account with the Loan and Savings Bank of Charlotte, North Carolina. All my money in the First National Bank of Charlotte, North Carolina, shall be devoted to keeping up the old homeplace during the life of my stepmother. After her death, the remainder of the specified amount shall go to the support of the heirs according as they may need and deserve it. My money in the Savings Bank of Charlotte, N.C., I give and bequeath to my husband, Robert P. Wyche. The rents from my interest in tenement houses now in the possession of my husband shall go also to keeping up the old homeplace during the life of my stepmother, Theresa K. Butler. And in case my husband die before my stepmother, then all the property or money belonging to my estate at the time of his death shall go to keep up the old homestead, and then at the death of my stepmother all of the property shall go to the legal heirs."

Id. at 86, 189 S.E. at 193. The *Stephens* court, in addressing the rights of the parties to the testatrix's property, stated that

> [t]he rule that, when real estate shall be devised to any person, the same shall be construed to be a devisee in fee simple is inapplicable here as the words used in the will of the testatrix negative the idea of the investiture of title in fee, or for life, or the granting of any other beneficial interest in the real property to Robert P. Wyche, and express the intent, rather, to impose upon her husband duties as executor and trustee of an active trust, with directions as to the use of the property real and personal, and as to how the income shall be applied during his life and after his death, in case he should die before her stepmother.

Id. at 88, 189 S.E. at 194. In *Stephens*, the court stated that as long as the stepmother lived, "there was no right to the possession of the lands upon which to base an action for recovery of the land, and that such an action would have constituted an infringement on the possession of the trustee who was holding for the

purpose of carrying out the directions of the will." *Id.* at 89, 189 S.E. at 195.

Here, the testator conveyed all of his estate, real, personal and mixed in trust to his son Willard Cassada. Pursuant to the express terms of the will, the testator's wife, Lucinda Cassada, had the "possession, use and enjoyment of my home and farm, together with all of my household and kitchen furniture, live stock, farming implements and all of my personal property, so long as she may live and remain my widow, to be the home of herself and of our three youngest sons, Willard, Cecil, and Lyle, and to be used and enjoyed by her and them in common[.]" While the testator provided that the property was to be used and enjoyed by his widow and minor sons in common, the testator's intent as gathered from the four corners of the will was to convey to his wife a present possessory interest in a life estate with the remainder upon her death passing to his three minor sons. This conclusion is bolstered by the succeeding paragraph which provides that upon the death of Lucinda Cassada, "all of my said property, real, personal and mixed, shall be and become the property of my said three sons, Willard, Cecil, and Lyle, to be theirs absolutely[.]" The testator's intent as gathered from the four corners of the will indicates that his children would only have a present possessory interest either upon the death of the mother/life tenant or some other act by the trustee which would terminate the trust. While the testator's conveyance of his property in trust obviously indicates his concern that his three minor children would be provided for during their minority, it is equally obvious that the testator intended to leave his wife a life estate and not a tenancy in common with their three minor children.

> No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.

G.S. 1-40.

> "Every possession of land will not ripen into title. Each one of the following elements must be proved by a claimant in order for him to obtain title by adverse possession.
>
> There must be an *actual possession* of the real property claimed; the possession must be *hostile* to the true owner; the claimant's possession must be *exclusive*; the possession must be *open and notorious*; the possession must be *continuous and uninterrupted for the statutory period*; and the possession must be with *an intent to claim title to the land occupied.*" Webster Real Estate Law in North Carolina § 258, p. 319.

Mizzell v. Ewell, 27 N.C. App. 507, 510, 219 S.E.2d 513, 515 (1975). "[I]f the plaintiff entered into possession with the permission of the owner, such possession would not be adverse unless and until the plaintiff disclaimed such arrangement and made the owner aware of such disclaimer or disclaimed the arrangement in such manner as to put the owner on notice that the plaintiff was no longer using the land by permission but was claiming it as absolute owner." *Wilson Board of Education v. Lamm*, 276 N.C. 487, 491, 173 S.E.2d 281, 284 (1970).

"It is a well established rule that possession of real property cannot be adverse to remaindermen until the death of the life tenant, even though during the lifetime of the life tenant he gave a deed purporting to convey a fee." *Stone v. Conder*, 46 N.C. App. 190, 199, 264 S.E.2d 760, 765, *disc. rev. denied*, 301 N.C. 105 (1980). *See also* P. Hetrick, Webster's Real Estate Law in North Carolina § 302 (rev. ed. 1988).

Here in order to establish adverse possession of the disputed tract, one of several contingencies must have occurred. Either, under the express terms of the will, the life tenant must have died thereby terminating the trust and making the remaindermen's interest a present possessory interest and then the requisite elements for adverse possession must have been met after her death; or, the trust must have been terminated through some other means than the life tenant's death and the property adversely possessed as against those having an interest in the property upon the trust's termination.

First, with respect to whether the remaindermen had adversely possessed the property against the life tenant by taking possession of the property after partitioning it, we hold that the

remaindermen have not met the requisite requirements for adverse possession. Their possession of the property was not adverse in that it was with the acquiescence and permission of their mother, the life tenant. Here the parties stipulated that the property was partitioned "with the knowledge of" Lucinda Cassada. Secondly, there is no record evidence that the trust had been terminated. Where the parties have stipulated in the record that the property was divided with the permission of their mother, the life tenant, there is no reason to infer that her assent to partitioning the property should be equated with assent to terminating the trust. Even though a trust may be voluntarily terminated by act or agreement of all the beneficiaries, *see Fisher v. Ladd*, 47 N.C. App. 587, 268 S.E.2d 20 (1980), we hold on this record that the life tenant's assent to the partitioning of the property alone is not sufficient to terminate the trust. We note that pursuant to the express terms of the will, the trust would have been terminated by the death of the mother/life tenant. She died on 18 August 1973. We find no other record evidence of the trust being terminated. Accordingly, since this action was instituted on 8 February 1989, the twenty year statutory period had not been met by adverse possession following the death of the life tenant, or by adverse possession following other termination of the trust or by adverse possession during the life of the life tenant. Since the twenty year statutory period did not begin to run on these facts until the death of the life tenant, we find it unnecessary to address whether the other requisite elements for adverse possession have been met.

We hold that the trial court erroneously entered summary judgment in favor of defendants and this cause is remanded for entry of summary judgment in favor of plaintiff.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. MARVIN ANTHONY CUMMINGS

No. 9018SC732

(Filed 4 June 1991)

1. **Criminal Law § 307 (NCI4th)— burglary—motion to sever offenses denied—no error**

The trial court did not err in a prosecution for first degree burglary by denying defendant's motion to sever offenses where the trial court could find from the evidence a scheme or plan to deprive motel occupants of their property while they were asleep. N.C.G.S. § 15A-926(a).

Am Jur 2d, Trial §§ 7-10.

2. **Criminal Law § 34.8 (NCI3d)— burglary—other offenses—admissible—common scheme or plan and identity**

Even if defendant's motion to sever three burglary charges had been granted, evidence of the other two offenses would have been admissible at each trial to show both a common scheme or plan and identity. Where the evidence established a similar modus operandi in all three cases, there was a connection in each case between defendant and the acts the prosecution sought to introduce against him, and the connection was probative of defendant's identity. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 326, 333.

3. **Burglary and Unlawful Breakings §§ 80 and 78 (NCI4th)—sufficiency of evidence—identity of defendant—intent to commit larceny**

The trial court did not err in a prosecution for multiple first degree burglaries by denying defendant's motion for nonsuit where defendant was linked to one burglary by a witness and by a key found in his home, and, in another offense where the victim awoke and nothing was taken, no explanation was offered for defendant's presence in the motel room at 1:30 a.m. In the absence of other intent or explanation for breaking or entering in the nighttime, it can be inferred that the intent is to commit a larceny.

Am Jur 2d, Burglary §§ 27, 36, 42.

STATE v. CUMMINGS

[103 N.C. App. 138 (1991)]

APPEAL by defendant from judgment entered 8 February 1990 by *Judge James A. Beaty, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 23 January 1991.

Defendant was found guilty of two counts of first degree burglary and sentenced to prison for twenty-five years. He was found not guilty of a third charge of first degree burglary.

The State's evidence at trial tended to show the following: On the night of 7 July 1989 Virginia Reaves was staying with her three daughters in Room 213 at a Ramada Inn in Greensboro. She locked the chain lock on the door and went to bed at approximately 11 p.m. Around 5 a.m. her sixteen-year-old daughter awoke and saw a man standing in the doorway to the bathroom. She also saw her mother's purse near the front door of the room which was standing open. She woke up her mother and the man ran out of the room and down the hall. The door chain, as well as the screws that held the lock in place, were on the floor near the door and Mrs. Reaves' purse was missing. Her daughter described the burglar as a large black man in his twenties, approximately six feet tall, wearing dark sweatpants, no shirt, and a baseball cap turned backwards.

On 22 July 1989, Bernice Keeton and her husband were staying at the same Ramada Inn in Greensboro. She went to bed around 11 p.m. Mr. Keeton came in around 1:30 a.m. He closed the door which locked when it was shut. He did not use the chain or deadbolt locks on the door. Mrs. Keeton woke up in the middle of the night and noticed that her alarm clock was not where she had left it. She testified that she thought her husband had moved it and at the time "thought no more of it." At dawn, Mrs. Keeton woke up and discovered that her alarm clock, some clothing, shoes, her purse, jewelry, and Mr. Keeton's wallet were missing. The door to their room was ajar.

On 1 September 1989, Michael Halsema was staying at a Quality Inn in Greensboro. The door to his room locked automatically when it was closed and could be opened only by a special key card. He went to bed around 12:15 a.m. and was awakened by a noise around 1:30 a.m. Mr. Halsema saw a black man, about 5 feet ten inches tall, wearing a cap, a cutoff T-shirt and jogging pants standing in the doorway of his room. Mr. Halsema screamed and the man left the room. There was no evidence that the locks were tampered with and nothing was taken.

Mr. Halsema immediately reported the incident to the hotel security guard. Around 5:30 a.m. the security guard saw walking near the pool a person who fit the description given by Mr. Halsema. The security guard called the police who confronted the defendant as he came out of the elevator into the lobby. Defendant told officers that he was trying to find a bathroom. The security guard called Mr. Halsema to the hotel lobby. Mr. Halsema came to the desk in the lobby, saw defendant standing with the police, and told the security guard and police that defendant was the person who had come into his room.

At approximately 7 a.m. police searched the car defendant had driven to the hotel and found nothing. The police searched the car again at approximately 10:15 a.m. During the second search, they found two bank slips from a Cincinnati bank with the Keetons' name on them and a travelers check cover from the same bank.

That same morning police searched the residence defendant shared with his girl friend. There police found five large keys with numbers stamped on them on top of a tall cabinet. The manager of the Ramada Inn testified that the keys were the same type of keys used at the motel. The manager tried one of the keys marked "213" and it opened the door of the room that Mrs. Reaves and her daughters had occupied.

The three offenses were joined for trial. Defendant was found guilty in the case involving Mrs. Reaves and her daughters (89-CRS-57553) and the case involving Mr. Halsema (89-CRS-57619). He was found not guilty in the case involving Mr. and Mrs. Keeton (89-CRS-57552).

Attorney General Lacy H. Thornburg, by Assistant Attorney General Douglas A. Johnston, for the State.

Anne B. Lupton for defendant-appellant.

EAGLES, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to sever the offenses for trial and in overruling his objection to joinder. We disagree.

G.S. 15A-926(a) provides:

> Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies

or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

Joinder motions are addressed to the discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. Ruffin*, 90 N.C. App. 712, 370 S.E.2d 279 (1988). Our task on appeal is to determine "whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Fultz*, 92 N.C. App. 80, 83, 373 S.E.2d 445, 447 (1988) (quoting *State v. Corbett*, 309 N.C. 382, 389, 307 S.E.2d 139, 144 (1983)).

Here, the trial court could find from the evidence a scheme or plan to deprive motel occupants of their property while they were asleep. All of the offenses took place within two months of each other at motels in Greensboro. All of the crimes occurred in the early morning hours. In each instance someone entered an occupied motel room by stealth while the occupants were asleep. In two of the cases, personal property was taken and the third was interrupted by the victim being awakened. Additionally, in two cases, the victims identified the burglar as a young, black male wearing jogging pants and a baseball cap, who escaped on foot. We hold that this evidence is sufficient to establish a common scheme or plan. Accordingly, we hold that the trial court did not err in joining the three offenses for trial.

[2] Additionally, we note that even if the motion to sever had been allowed and each offense had been tried separately, evidence of the other two offenses would have been admissible at each trial to show both a common scheme or plan and identity. "The test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial and under the balancing test of G.S. 8C-1, Rule 403." *State v. Schultz*, 88 N.C. App. 197, 202, 362 S.E.2d 853, 857 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988). In *State v. McClain*, 240 N.C. 171, 176, 81 S.E.2d 364, 367 (1954), the Supreme Court said: "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." G.S. 8C-1, Rule 404(b) is consistent with prior North Carolina practice. *State v.*

Belton, 77 N.C. App. 559, 335 S.E.2d 522 (1985). Here, the evidence establishes a similar modus operandi in all three cases. Over a two month period, someone by stealth broke into three occupied motel rooms in Greensboro. Each incident occurred during the early morning while the victims were asleep.

Evidence of other offenses is admissible to establish identity if the other acts contain "similarities [that] support the reasonable inference that the same person committed both the earlier and the later crimes." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 109 S.Ct. 247, 102 L.Ed. 235 (1988). In each case, there was a connection between the defendant and the acts the prosecution sought to introduce against him. The connection was probative of defendant's identity and admissible. In 89-CRS-57553 (the Reaves case), defendant fit the general description given by Mrs. Reaves' daughter. Police found a key to the Reaves' motel room in defendant's home. In 89-CRS-57552 (the Keeton case), a charge on which defendant was not convicted, police found banking slips belonging to the Keetons in the car defendant was driving. Finally, in 89-CRS-57619 (the Halsema case), the victim identified the defendant as the person who had come into his room during the early morning hours of 1 September 1989.

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the burglary charge in the Reaves case for insufficient evidence. This argument is without merit. To withstand a motion to dismiss, there must be substantial evidence of all material elements of the offense. It is irrelevant whether the evidence is circumstantial or direct, or both. *State v. Minor*, 290 N.C. 68, 224 S.E.2d 180 (1976). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). On a motion for nonsuit the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference that the jury may legitimately draw from the evidence. *State v. Jackson*, 306 N.C. 642, 295 S.E.2d 383 (1982).

Here, defendant was linked to the 8 July 1989 burglary by the testimony of Mrs. Reaves' daughter. She described the suspect as a young, black man, approximately six feet tall, wearing dark sweatpants, no shirt, and a baseball cap turned backwards. On

1 September 1989 the police found a key imprinted with the number "213" in defendant's home which he shared with his girl friend. The hotel manager testified that the key in fact opened Room 213, where Mrs. Reaves and her daughters were sleeping in the early morning of 8 July 1989. Defendant's girl friend testified that she had never stayed at this motel. This evidence; though circumstantial, is sufficient to withstand defendant's motion for nonsuit. Accordingly, this assignment of error is overruled.

Defendant also argues that the trial court should have granted defendant's motion for nonsuit in the Halsema case. Defendant contends that the evidence does not give rise to the inference that the person who entered Mr. Halsema's room intended to commit larceny. Defendant relies on *State v. Hankins*, 64 N.C. App. 324, 307 S.E.2d 440 (1983), *aff'd*, 310 N.C. 622, 313 S.E.2d 579 (1984), where this Court held that the State's evidence was insufficient to submit to the jury the question of whether defendant intended to commit larceny. We think *Hankins* is distinguishable. In *Hankins* there was some evidence to rebut the presumption of felonious intent that arises when there is an unauthorized entry at night and flight upon discovery. In the absence of other intent or explanation for a breaking or entering in the nighttime, it can be inferred that the intent is to commit a larceny. *State v. Goodman*, 71 N.C. App. 343, 322 S.E.2d 408 (1984), *disc. rev. denied*, 313 N.C. 333, 327 S.E.2d 894 (1985). Here, no explanation was offered for defendant's presence in Mr. Halsema's motel room at 1:30 a.m.

For the reasons stated, we find no error.

No error.

Judges PHILLIPS and WYNN concur.

STATE OF NORTH CAROLINA EX REL. JAMES LONG, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, PETITIONER v. BEACON INSURANCE COMPANY, RESPONDENT; CLAIM NO. 29101; CLAIMANT: PRECISION CHIPPER CORPORATION

No. 9010SC126

(Filed 4 June 1991)

1. **Insurance § 3 (NCI3d)— products liability policy—coverage—claims made basis**

The trial court did not err in an action to determine insurance coverage by concluding that a products liability policy had been issued on a claims made basis and that no oral or written representation by any person converted this to occurrence basis coverage where there was a conflict in the testimony and the court's findings were supported by substantial evidence.

Am Jur 2d, Insurance § 728.

Event as occurring within period of coverage of "occurrence" and "discovery" or "claims made" liability policies. 37 ALR4th 382.

2. **Insurance § 3 (NCI3d)— products liability insurance—action to determine coverage—claimant bound by agent's knowledge—Alabama law**

The trial court did not err in an action to determine insurance coverage by concluding that the claimant was bound by its insurance agent's knowledge that the policy was written as a claims made policy. Under Alabama law, which governed the action, an independent insurance agent who places coverage with various companies is a broker and not an agent of the insurance company.

Am Jur 2d, Insurance §§ 110, 111, 113, 1583, 1600.

3. **Insurance § 3 (NCI3d)— products liability insurance—claims made policy—claim outside policy**

The trial court did not err in an action to determine insurance coverage by determining that the claimant's 1985 lawsuit was outside the policy period and not covered by a 1983 claims made policy even though the incident was reported to the insurer during the 1983 policy year. Notice of an inci-

dent is not the same as making a claim; a claim is made only when an affirmative demand for payment is made.

Am Jur 2d, Insurance §§ 728, 1323 et seq.

Products liability insurance. 45 ALR2d 994.

APPEAL by claimant Precision Chipper Corporation from order entered 15 August 1989 by *Judge Hamilton H. Hobgood* in WAKE County Superior Court. Heard in the Court of Appeals 30 August 1990.

Precision Chipper Corporation ("Precision") sought a determination of the validity and amount of its claim for coverage under a products liability insurance policy purchased in 1983 from Beacon Insurance Company ("Beacon"), an insolvent insurance company which had been placed in judicially ordered rehabilitation pursuant to the provisions of Article 17A of Chapter 58 of the North Carolina General Statutes (repealed by Session Laws 1989, c. 452, but due to simultaneous enactment and subsequent recodification similar provisions are now contained in Article 30 of Chapter 58). Precision's claim arises from a pending products liability action brought in April of 1985 against it in Texas by the widow and minor child of Rubin Anson Cox, Jr., who was killed on 21 November 1983 in an accident involving an industrial wood chipping machine manufactured by Precision. Beacon's rehabilitator denied coverage on the ground that the insurance policy in effect at the time of the accident was written on a "claims made" basis and that no claim was made until after the policy had expired. The policy was negotiated, purchased, written and issued in Alabama for an Alabama insured and the parties agree that its meaning and effect is governed by the law of Alabama. By order of the Superior Court of Wake County, stipulated and agreed to by the parties, the documents, proceedings and all other information identified as confidential by the parties were ordered sealed. The court denied Precision's claim and its motion for continued confidentiality on appeal was initially denied by this Court, but on *certiorari* to our Supreme Court, the order of confidentiality was ordered to "remain in full force and effect throughout any appellate proceedings in this matter."

The facts found by the trial court which are pertinent to the several questions presented follow: In the fall of 1981 Bob Smith, president of Precision, contacted David Bates of Bates Insurance Agency, Inc. ("Bates"), an insurance retailer, seeking "occurrence

basis" products liability insurance coverage, but was informed by Bates that only "claims made" coverage was available. Bates approached Charles Garrison, a vice president of E & S Facilities, Inc. ("E & S"), a wholesaler of surplus and excess insurance, to obtain coverage for Precision. E & S had authority to accept risks, set rates and write policies for various insurers, including Beacon, as it was Beacon's managing general agent and representative in Alabama. Precision was provided with products liability insurance coverage written by Beacon on a claims made basis for the period from 1 January 1982 to 1 January 1983. The policy specifically excluded coverage for any machine manufactured prior to 1 January 1982 and is not involved in this appeal. A renewal policy was issued covering the period from 29 December 1982 to 29 December 1983 on exactly the same basis except that the $10,000 deductible was rewritten to include attorneys' fees. On 3 January 1983 Precision obtained a proposal from Trammell-Harper & Associates, Inc., a competitor of Bates, for occurrence basis products liability coverage. In early January, 1983 Bob Smith showed the proposal to Bates' representatives and told them that unless they could provide occurrence coverage to match the proposal, Smith would accept the proposal and move all of Precision's insurance business to Trammell-Harper. Bates' representatives met with Charles Garrison to determine if E & S could provide the same coverage as the competing proposal, Garrison indicated that he would match the proposal, and Bates so informed Precision. A few days after the meeting between Bates and E & S, E & S issued a claims made policy covering all equipment ever manufactured by Precision. Bates notified Garrison of the discrepancy and Garrison said that he would fix the problem with endorsements to the policy. Bates received the endorsements on 18 January 1983, but they did not change the policy's type of coverage, and the next day Bates issued Precision a written "insurance binder" indicating that Precision had coverage on an occurrence basis with Beacon. On 28 January 1983 Bates sent Precision a letter stating: "Both policies [primary and secondary] are now written on an occurrence basis," and sent a copy of the same to Garrison at E & S. Precision never received a copy of the policy. The agency relationship between Beacon and E & S (and therefore the authority of E & S to accept risks, set rates, and write new policies) was terminated effective 1 January 1983. The accident involving Rubin Anson Cox, Jr. occurred on 21 November 1983. The next day, Precision gave Bates notification of the accident, which was forwarded to E & S and Beacon. Beacon

received no further notification or demand about the Cox matter before suit was filed in April, 1985. No coverage was provided by Beacon for Precision after 29 December 1983. Bates obtained occurrence basis products liability coverage for Precision from another insurance wholesaler for the 1984 policy year.

No brief filed for petitioner appellee.

Johnson, Gamble, Mercer, Hearn & Vinegar, by M. Blen Gee, Jr., for respondent appellee, the rehabilitator of Beacon Insurance Company.

Bradley, Arant, Rose & White, Birmingham, Alabama, by Michael R. Pennington; and Smith, Helms, Mulliss & Moore, by Richard W. Ellis and David C. Keesler, for claimant appellant Precision Chipper Corporation.

PHILLIPS, Judge.

[1] The first question for determination is whether the court erred in concluding that Beacon issued the 1983 policy to Precision on a claims made basis and that no oral or written representations by any person converted this to occurrence basis coverage. Precision argues that it was never notified that the agency relationship between E & S and Beacon was terminated and that E & S, as managing general agent for Beacon, orally created a valid and enforceable contract between Precision and Beacon for occurrence basis products liability insurance. There is, however, a conflict between the testimony of Bates' employees and Garrison of E & S as to whether Garrison orally promised to provide occurrence basis coverage or that he had the authority to even write such coverage. The trial judge, accepting the testimony of Garrison (that he did not orally promise occurrence basis coverage) over that of Bates' employees (that Garrison did), found that the policy was written on a claims made basis, *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968), and since the findings are supported by substantial evidence, they are conclusive. *Davison v. Duke University*, 282 N.C. 676, 194 S.E.2d 761 (1973). The written endorsements to the policy further support the trial court's finding that Garrison only broadened Precision's coverage but never changed it to occurrence basis.

[2] The second question presented is whether the trial court erred in concluding that Precision was bound by Bates' knowledge that

the 1983 policy as written was a claims made policy. Precision argues that the 1983 policy was never delivered to it and therefore Precision is not bound by the terms of the policy; but delivery to Bates, the agent for Precision, was sufficient to bind Precision. Under Alabama law, an independent insurance agent who places coverage with various companies is a "broker" and not an agent of the insurance company. *Northington v. Dairyland Insurance Co.*, 445 So.2d 283 (Ala. 1984). Where the broker is the agent of the insured, the insured is bound by the acts of the broker within the scope of his authority as in the case of any other agent. And where a broker, employed by an insured to procure insurance, receives, reads and accepts a policy, the broker's knowledge is imputable to the insured, 3 G. Couch, *Couch on Insurance 2d* Sec. 25:99 (1984), as is the failure of a broker to ascertain that a policy did not contain the provisions requested. 16C J. Appleman, *Insurance Law and Practice* Sec. 9145 (1981). Sec. 27-7-1(a)(2) of the Alabama Insurance Code further provides that: "Brokers cannot bind the insurer and all business produced must be countersigned by a resident agent of the insurer accepting the risk." The document which Bates forwarded to Precision was not countersigned by an agent of Beacon. Precision also argues that Garrison of E & S orally promised to procure occurrence basis coverage, but even if it did so, and the court found otherwise, neither Beacon nor any other insurer that E & S obtained policies from would be bound thereby for the reasons already stated. 4 G. Couch, *Couch on Insurance 2d* Sec. 26A:25 (1984).

[3] Precision next contends that the trial court erred in determining that the Cox lawsuit filed in April, 1985 was outside the policy period and not covered by the 1983 claims made policy. The thrust of the argument is that the incident was reported to Beacon within the 1983 policy year, Beacon hired an investigator to investigate it during the policy period, and Beacon's own internal documents show that Beacon recognized during the policy period that "[s]hould there be any liability in this case, it very well could exceed our $500,000 limit." But notice of an incident that can give rise to a claim for damages is not the same thing as making a claim. A "claim" is "made," so it has generally been held, only when an affirmative demand for recompense or payment is made, *Katz Drug Co. v. Commercial Standard Insurance Co.*, 647 S.W.2d 831 (Mo. App. 1983); *Phoenix Insurance Co. v. Sukut Construction Co., Inc.*, 136 Cal. App. 3d 673, 186 Cal. Rptr. 513 (1982), and the first

demand for relief in connection with the incident reported was in the lawsuit filed after the policy period expired. A demand for relief, if sufficient to constitute a claim, does not have to be in the form of a lawsuit. Although the Alabama courts apparently have not determined this precise issue, it seems likely that they would reach the same result, as the Alabama Supreme Court in *Langley v. Mutual Fire, Marine and Inland Insurance Co.*, 512 So.2d 752 (Ala. 1987), *overruled on other grounds, Hickox v. Stover*, 551 So.2d 259 (Ala. 1989), implied that notice of an incident from which liability could arise was not the triggering event under a claims made policy.

In view of our holding that the Cox lawsuit was not covered by Beacon's policy, Precision's remaining contention that the trial court erred in evaluating the Cox claim is immaterial to the appeal and we will not discuss it.

Affirmed.

Judges JOHNSON and PARKER concur.

CARLTON FRITTS, PLAINTIFF v. GEORGE P. SELVAIS, DEFENDANT

No. 9026SC926

(Filed 4 June 1991)

1. Appeal and Error § 147 (NCI4th)— deficiency judgment—argument that collateral retained—not raised at trial

Defendant in an action for a deficiency judgment could not raise on appeal the argument that plaintiff had retained the collateral after repossession where defendant did not raise that argument before the trial court.

Am Jur 2d, Appeal and Error §§ 545 et seq.

2. Appeal and Error § 147 (NCI4th)— deficiency judgment—sale of collateral—reasonableness of price—incompetent evidence—no objection at trial

There was evidence in an action for a deficiency judgment to support the trial court's finding that the sale price of the collateral was commercially reasonable where plaintiff testified

that the amount was the market value for a person who walked in off the street without knowing anything about the business. Defendant cannot argue the incompetency of that evidence on appeal because he failed to object or move to strike at trial.

Am Jur 2d, Appeal and Error §§ 545 et seq.

APPEAL by defendant from judgment filed 20 March 1990 in MECKLENBURG County Superior Court by *Judge Robert M. Burroughs*. Heard in the Court of Appeals 13 March 1991.

Barbara L. White for plaintiff-appellee.

Cannon & Blair, P.A., by Bentford E. Martin, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment filed 20 March 1990, awarding plaintiff a deficiency judgment in the amount of $40,585.

In 1983, plaintiff, Carlton Fritts, sold to defendant, George Selvais, the primary assets of plaintiff's diesel engine repair and reconstruction business. Defendant incorporated and operated the business under the name of Beltech Enterprises, Inc. (Beltech).

In connection with the sale of the assets, plaintiff and defendant executed a Closing Agreement, an Employment Agreement and a Lease Agreement under which defendant agreed to lease plaintiff's building for the operation of the business. Also in connection with the sale, defendant executed to plaintiff two promissory notes, one in the amount of $247,000 and one in the amount of $10,000. This debt was secured by a Security Agreement in which defendant pledged the purchased assets as collateral.

Between October, 1983 and August, 1985, defendant operated a diesel repair business but was unable to make all payment obligations to plaintiff. On 30 August 1985, plaintiff declared defendant to be in default and repossessed the collateral pursuant to his rights under the Security Agreement. At that time, plaintiff and defendant executed a Repossession Agreement. In this agreement, defendant and Beltech admitted default, tendered the collateral for repossession, and waived any right to notice of a public or private sale of the collateral and of any proposal by plaintiff to retain the collateral in satisfaction of the debt. The agreement

further provided that plaintiff would release defendant from any liability for any deficiency in excess of $75,000, and that defendant would retain all defenses he may have to any claim by plaintiff for a deficiency.

Upon repossession, plaintiff re-entered the premises and operated the business in his own name for a period of two to five weeks, after which time plaintiff incorporated the business under the name of Tarheel Diesel Service, Inc. (Tarheel). Plaintiff was the only shareholder in this corporation, and plaintiff and his wife were the only officers in the corporation. Plaintiff then transferred the repossessed collateral to Tarheel in exchange for a promissory note made to plaintiff by Tarheel in the amount of $26,415. This note was signed by plaintiff in his capacity as president of Tarheel.

In February, 1988, plaintiff filed this action seeking a deficiency judgment in the amount of $75,000.

The issues are: (I) whether plaintiff retained the collateral in satisfaction of the debt owed by defendant such that defendant is relieved of any deficiency; and (II) whether the sale of the collateral failed to meet the statutory requirement that the sale be commercially reasonable.

I

[1] Defendant first argues that plaintiff, after repossession, retained the collateral and thereby discharged any claim for a deficiency against defendant. N.C.G.S. § 25-9-505(2) (1986) (providing that the secured party may retain the collateral in satisfaction of the debtor's obligation). Specifically, defendant argues that Tarheel was plaintiff's "alter ego" and should not be considered as a separate entity. If the corporate entity is disregarded, plaintiff would be deemed to have retained the collateral himself in satisfaction of defendant's obligation and would thereby be precluded from seeking any deficiency.

However, regardless of the merits of defendant's alter ego theory, defendant cannot now make this argument. Nowhere in the pleadings, the record or the transcript did defendant ever raise this argument before the trial court. Defendant's contention that plaintiff's action for a deficiency is barred on the basis that Tarheel is plaintiff's alter ego is an affirmative defense. *See* W. Shuford,

North Carolina Civil Practice and Procedure § 8-7 (3d ed. 1988) (a defense which "introduces new matter in attempt to avoid the plaintiff's claim regardless of the truth or falsity of the allegations in the complaint[ ] must be considered an affirmative defense"). *See, e.g., Noble Exploration, Inc. v. Nixon Drilling Co.*, 794 S.W.2d 589 (Tex. Ct. App. 1990) (the use of an alter ego theory to establish an independent reason why plaintiff should not recover constitutes an affirmative defense). Because defendant did not assert this "affirmative defense in his pleadings or in the trial, he cannot present it on appeal." *Delp v. Delp*, 53 N.C. App. 72, 76, 280 S.E.2d 27, 30, *disc. rev. denied*, 304 N.C. 194, 285 S.E.2d 97 (1981).

II

[2] Defendant next argues that the price received from Tarheel for the collateral was not commercially reasonable. The applicable statute provides in part:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and *terms* must be commercially reasonable.

N.C.G.S. § 25-9-504(3) (1986) (emphasis added). The price received is one of the "terms" of the sale for purposes of this subsection. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 117, 245 S.E.2d 566, 569 (1978). Furthermore, commercial reasonableness is a question of fact, *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 722, 329 S.E.2d 728, 730 (1985), and in this non-jury case the facts were determined by the trial judge.

In the present case, the trial court found the sale commercially reasonable, and expressly found it commercially reasonable with respect to price. Therefore, if this finding is supported by any competent evidence it is conclusive on appeal. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988).

Three factors have been identified to give some guidance in determining the commercial reasonableness of the resale price of collateral: (1) the price reflected by price handbooks, (2) the fair market value of the collateral, and (3) the price received on a second resale. *Don Jenkins & Son v. Catlette*, 59 N.C. App. 482, 484, 297 S.E.2d 409, 411 (1982), *citing* J. White & R. Summers,

Handbook of the Law Under the Uniform Commercial Code § 26-11 (1972). In this case, plaintiff testified that there are no manufacturers' price handbooks available to the public from which a price for the collateral could be ascertained. Though plaintiff testified that he ultimately resold the collateral, there is no evidence of the price paid by the buyer. However, in response to the question regarding plaintiff's opinion of the fair market value of the collateral at the time he transferred it to Tarheel, plaintiff testified that the amount of $26,415 was "what I would call the market value of [the inventory, equipment, and fixtures of the business] for a person that's walked in off the street and don't [sic] know anything about the business and buy it, what was left."

Defendant argues, however, that plaintiff's evidence of value is incompetent because the concept of "fair market value" assumes a willing buyer who understands and appreciates the value of the goods to other knowledgeable buyers in the open market, and not a buyer who walks in off the street and knows nothing of the business. Assuming defendant's contention is correct, defendant did not, at trial, object to the question asked or move to strike the response given in regard to the value of the collateral upon repossession. *See* N.C.R. Evid. 103(a)(1) (1986) (no particular form required to preserve error for appeal as long as objection or motion to strike "clearly presented the alleged error to the trial court"). Unless evidence is rendered incompetent by statute, which is not the present case, the "[f]ailure to object to the introduction of evidence is a waiver of the right to do so, 'and its admission, even if incompetent, is not a proper basis for appeal.' " *Christensen v. Christensen*, 101 N.C. App. 47, 54, 398 S.E.2d 634, 638 (1990) (citations omitted); N.C.R. Evid. 103 (error may not be predicated upon a ruling admitting evidence unless ". . . a timely objection or motion to strike appears of record"); 1 H. Brandis, Brandis on North Carolina Evidence (3d ed. 1988) (judge may, but is not required to, exclude inadmissible evidence in the absence of objection, "and a failure to make an objection waives it").

By failing to object or to move to strike plaintiff's evidence regarding the value of the collateral at trial, and in the absence of any evidence in the record that the trial judge excluded the evidence without an objection or motion to strike, defendant cannot argue the incompetency of this evidence on appeal. Accordingly, for the purposes of this appeal, plaintiff's evidence is deemed com-

petent to support the trial court's finding that the price was commercially reasonable.

Affirmed.

Judges WELLS and WYNN concur.

CHARLES ABERNETHY, JR., BY HIS GUARDIAN AD LITEM, CHARLES ABERNETHY, SR., PLAINTIFF v. SPARTAN FOOD SYSTEMS, INC., D/B/A HARDEES, DEFENDANT

No. 9025SC922

(Filed 4 June 1991)

Negligence § 53.8 (NCI3d)— plaintiff stabbed in restaurant— negligence of restaurant owner—directed verdict for defendant improper

The trial court erred by granting a directed verdict for defendant in an action seeking damages for personal injuries sustained when plaintiff was attacked and stabbed with a knife in defendant's Hardees' restaurant in Hickory. Viewing the evidence in the light most favorable to the defendant, the jury could find that defendant's acting manager should have reasonably foreseen that danger to his customers was imminent, that he was therefore under a duty to warn them of the danger or to call the police, and that the breach of this duty was a proximate cause of plaintiff's injuries.

Am Jur 2d, Premises Liability §§ 45, 48.

APPEAL by plaintiff from judgment entered 18 April 1990 in CATAWBA County Superior Court by *Judge J. Marlene Hyatt*, granting defendant's motion for directed verdict and dismissing plaintiff's complaint. Heard in the Court of Appeals 13 March 1991.

Plaintiff brought this action seeking damages for personal injuries sustained when he was attacked and stabbed with a knife in defendant's Hardees' restaurant in Hickory. In his complaint, plaintiff alleged that his injuries were caused by the negligence of defendant in failing to warn him of dangerous circumstances at the restaurant and in failing to summon police protection.

At trial, defendant's motion for a directed verdict was allowed at the close of plaintiff's evidence.

From the trial court's judgment dismissing plaintiff's action, plaintiff appealed.

Rudisill & Brackett, P.A., by H. Kent Crowe, for plaintiff-appellant.

Tate, Young, Morphis, Bach & Farthing, by Edwin G. Farthing and Martha E. Fox, for defendant-appellee.

WELLS, Judge.

The sole question presented in this appeal is whether the trial court erred in granting defendant's motion for a directed 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). 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 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.*

It is well established that an individual who enters the premises of a store as a customer during business hours holds the status of a business invitee for purposes of establishing the duty owed to the individual by the owner of the premises. The general duty imposed upon the owner is not to insure the safety of his customers, but to exercise ordinary care to maintain his premises in such a condition that they may be used safely by his invitees in the manner for which they were designed and intended. Ordinarily the store owner is not liable for injuries to his invitees which

result from the intentional, criminal acts of third persons. It is usually held that such acts cannot be reasonably foreseen by the owner and therefore constitute an independent intervening cause absolving the owner of liability. Nevertheless, where circumstances exist which give the owner reason to know that there was a likelihood of conduct on the part of third persons which endanger the safety of his invitees, a duty to protect or warn the invitees could be imposed. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981). In . . . [a] store, when the dangerous condition or activity. . . arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it. *Id.* (*quoting Aaser v. Charlotte*, 265 N.C. 494, 144 S.E.2d 610 (1965)).

At trial, plaintiff's evidence tended to show the following events and circumstances. On 9 July 1987 Aretha Freeman was working at defendant's restaurant known as "Hardees" as a head cashier and customer relations person. Robert Stewart was the acting intern manager on duty that same evening. At approximately 9:00 p.m. two men entered defendant's restaurant without shoes or shirts. The men, apparently intoxicated, smelled of alcohol and used profanity at the Hardees' employees. One man's nose was broken, leaving the cartilage protruding through the skin. The men ordered the Hardees' employees to take their "damn" order and called the employees "nigger" and "faggot." Although Aretha asked Mr. Stewart on two different occasions to call the police, Mr. Stewart failed to do so. At one point, Sherry Sessoms, the cashier taking the order, threatened to call the police and the men left the restaurant.

As the men were leaving the restaurant they engaged in an argument with two other men, including Cortez Martin, entering the restaurant. During the argument all the men proceeded to the Hardees' lawn outside and in front of the Hardees' restaurant. From behind the counter, the Hardees' employees could see the men through the front glass window. Aretha Freeman testified to having seen one of the previously disruptive men being hit in the face and falling to the ground. The injured man immediately jumped to his feet and ran across the street to the Days Inn. Aretha testified that Mr. Stewart was standing behind the counter

during the fight on Hardees' front lawn and that she asked Mr. Stewart to call the police. Again, Mr. Stewart failed to call the police.

While Mr. Stewart stood at the counter, Cortez Martin then entered the restaurant and stated that the man running across the street was going to get a knife or something. At this point neither Mr. Stewart nor any Hardees' employee had called the police. As Cortez Martin left the restaurant, an older man and his granddaughter entered the restaurant. While the man and his granddaughter were waiting for their food, the plaintiff, Charles Abernethy, Jr. and two friends entered the restaurant. At no time did Mr. Stewart or any Hardees' employee give a warning to these new customers regarding the events that had transpired or the threat that the men might return with a knife.

Approximately ten minutes later, the two disruptive men reentered the restaurant, again without shirts and shoes, shouting "Where them niggers at, we're going to get them." One of the men went to the serving counter waving a knife and continued to be threatening and disruptive. Again, Ms. Freeman implored that the police be called, but Mr. Stewart did not respond. After a few minutes, one of plaintiff's friends asked the man with the knife to "calm down." At that point the man with the knife confronted the plaintiff and tried to hit him. As the plaintiff backed away, he tripped over a highchair and fell to the floor. The man then jumped on top of plaintiff, stabbed him with a knife from his left shoulder to the center of his stomach and on his neck. The man immediately ran out the door. The police were then called and they arrived within four or five minutes.

Viewing the evidence in the light most favorable to the plaintiff in the instant case, a jury could find that defendant's acting manager should have reasonably foreseen that danger to his customers was imminent; that he was therefore under a duty to either warn them of the danger or to call for police to help protect his customers from such threatening circumstances; and that the breach of this duty was a proximate cause of plaintiff's injuries. Accordingly, we hold that the trial court erred in directing a verdict for defendant and we therefore order a new trial.

New trial.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. JESSIE DANIEL ADAMS, DEFENDANT-APPELLANT

No. 9021SC817

(Filed 4 June 1991)

1. **Criminal Law § 314 (NCI4th)— defendant's motion for joinder—denied—no abuse of discretion**

The trial court did not abuse its discretion in an arson prosecution by denying defendant's motion to join or consolidate his trial with that of a codefendant. A defendant may not independently assert his preference for joinder; under our statutory structure, the choice is for the State, not a defendant. Moreover, a trial court's ruling on consolidation or severance is discretionary and there was no abuse of discretion. N.C.G.S. § 15A-926(b)(2)a.

Am Jur 2d, Trial §§ 17 et seq.

2. **Criminal Law §§ 89.7 (NCI3d); 82.2 (NCI3d)— arson—witness's medical history—excluded—no error**

The trial court in an arson prosecution properly excluded testimony and records concerning a witness's mental and emotional condition and treatment. The trial court examined the medical records *in camera* and found no good cause to violate the confidentiality of the physician-patient relationship, and the Court of Appeals examined the records and noted that they revealed no evidence bearing on the credibility of the witness.

Am Jur 2d, Witnesses §§ 230 et seq.

3. **Criminal Law § 1195 (NCI4th)— arson—sentencing—potential mitigating factors—loss by failure of court to join defendants—no error**

An arson defendant's argument that he was deprived of potential mitigating factors at sentencing by the denial of his joinder motion was rejected where the court had previously resolved the joinder question adversely to defendants.

Am Jur 2d, Criminal Law §§ 525 et seq.

APPEAL by defendant from judgment entered 5 April 1990 in FORSYTH County Superior Court by *Judge James M. Long*. Heard in the Court of Appeals 20 March 1991.

Defendant was indicted for first degree arson. At trial, the State's evidence tended to show the following events and circumstances.

In July 1989, Eugene Martin resided at 648 East Sprague Street in Winston-Salem. Prior to this time, Martin had allowed Tommy Neal to move into his residence. In April or May 1989, Martin had allowed defendant Adams to move in as well. Due to problems involving rent payment, noise, maintenance, visitation and altercations with his new residents, Martin ordered both Neal and Adams to move out of his home in late July. Someone broke into Martin's house the following evening and Martin boarded up all windows and doors except the front door. A couple of days later, on 30 July 1989, Martin discovered Neal and Adams at his residence and again ordered them to leave and not come back. Later that same evening following a night of drinking beer and playing pool, Martin and his brother returned to Martin's house and retired for the evening. During the early morning, Martin's brother discovered the house was on fire. After unsuccessful attempts to extinguish the fire, Martin and his brother were forced to leap through the flames onto the sidewalk in front of the house. Along with the help of a neighbor the two were able to extinguish the fire with the neighbor's garden hose.

An investigation by the Winston-Salem Fire Department revealed that an accelerant, probably gasoline, was poured onto a mattress, placed at the door on the front porch, and ignited. The investigation also revealed that next-door neighbor Tamara West was an eyewitness to the incident.

Tamara West testified that she saw defendant pour gasoline onto the mattress placed at the door on the front porch of 648 East Sprague Street and Tommy Neal ignite the mattress. Martin testified that while the fire was being extinguished, defendant drove by his residence. A few minutes after the fire was extinguished defendant returned to the scene and denied involvement in the fire.

Defendant testified, generally attempting to establish an alibi, to the effect that he was at a local bar on the evening of the fire. After leaving the bar, he drove by Martin's house and seeing

the fire, stopped and talked to Martin, who accused him of trying to burn his house. Defendant testified that Martin later told defendant that he did not believe defendant burned his house but that Tommy Neal did so. After being arrested, defendant spent some nights with Martin.

The jury found defendant guilty of first degree arson. After finding that an aggravating factor outweighed mitigating factors, the trial court sentenced defendant to 25 years' imprisonment, a sentence in excess of the presumptive. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for the State.

Wilson, DeGraw, Johnson & Rutledge, by Daniel S. Johnson, for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns error to the trial court denying defendant's motion to join or consolidate the trials of defendant and Tommy Neal. Upon written motion *of the prosecutor*, charges against two or more defendants *may be* joined for trial when each of the defendants is charged with accountability for the same offense (Emphasis supplied). N.C. Gen. Stat. § 15A-926(b)(2)a. Although the thrust of the defendant's argument is that he was entitled to joinder on his motion, the only authority he offers to support that argument is the general proposition that joinder of defendants charged with the same offense is generally favored in the interest of judicial economy. The cases defendant relies on, *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986), and *State v. Jenkins*, 83 N.C. App. 616, 351 S.E.2d 299 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987), speak to the entitlement *of the State* to joinder of defendants under the pertinent provisions of N.C. Gen. Stat. § 15A-926. In our opinion a defendant could not independently assert his preference for joinder with a co-defendant. Under our statutory joinder structure, the choice is for the State, not a defendant. Finally we note that it is well established that a trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion. *Belton, supra.* We discern no abuse of that discretion here. This argument is rejected.

[2] Defendant assigns error to the trial court excluding medical records and preventing cross-examination of the State's witness,

Tamara West, regarding her mental and emotional condition and treatment. On cross-examination, defendant attempted to examine Tamara West about her treatment and hospitalization for alcohol abuse and for "a mental condition or mental problems," and hospitalization for "any emotional problems." The State's objections to those questions were sustained. Defendant also subpoenaed Tamara West's medical records from Forsyth/Stokes Mental Health Center. Over the State's objection, defendant was not allowed to examine the custodian of those records as to their content. The trial court examined the medical records *in camera* and found no good cause to violate the confidentiality of the physician-patient relationship and preserved those records sealed for review by the appellate court.

Although a witness may be impeached by a showing of mental deficiency as it bears upon the witness' credibility, *State v. Witherspoon*, 210 N.C. 647, 188 S.E. 111 (1936), medical records for treatment purposes are privileged and the contents of such records may be disclosed only if, in the opinion of the trial court, disclosure is necessary to a proper administration of justice. N.C. Gen. Stat. § 8-53 (1986). After examining the medical records on appeal we note that the records reveal no evidence bearing on the credibility of the State's witness, the only possible basis for their relevance. We therefore conclude that the trial court properly excluded Tamara West's medical records and ruled correctly as to defendant's cross-examination. This assignment is overruled.

[3] After the jury verdict the trial court conducted a sentencing hearing. At that hearing the court found one aggravating factor, namely that defendant had prior convictions for criminal offenses punishable by more than 60 days' confinement. The court also found two mitigating factors. They were that defendant suffered from a mental condition (intoxication) that was insufficient to constitute a defense but significantly reduced his culpability and that the relationship between defendant and Eugene Martin, the victim, was an extenuating circumstance. The trial court then ruled that the sole aggravating factor outweighed the two mitigating factors and sentenced defendant to 25 years' imprisonment.

Defendant contends that the denial of his joinder motion "resulted in the loss of potential mitigating factors to be considered for sentencing." He suggests that had his trial been joined with that of Tommy Neal, certain factors in mitigation might have been

disclosed, such as duress, compulsion, or a passive role. As we have resolved the question of defendant's asserted entitlement to joinder adversely to him, we must reject this argument.

We conclude that defendant had a fair trial, free of prejudicial error.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

E. A. DOLLAR, JR. AND FOYE S. DOLLAR, PLAINTIFFS v. BESS B. TAPP, DEFENDANT

E. A. DOLLAR, JR., FOYE S. DOLLAR, AND ARCHIE DOLLAR, PLAINTIFFS v. BESS B. TAPP, DEFENDANT

No. 9015DC1096

(Filed 4 June 1991)

Rules of Civil Procedure § 60.2 (NCI3d)— action on debts—Rule 60 motion improperly denied

The trial court erred by denying defendant's motion for a new trial under N.C.G.S. § 1A-1, Rule 60(b)(6) in an action on a debt where defendant received a calendar request four days prior to the session of court at which trial was set, rather than a trial calendar four weeks prior as required by the General Rules of Practice, and defendant forecast a meritorious defense in her answer in that she contended that the money had been repaid as part of a separate transaction and attached a check as evidence. Whether defendant can properly establish that this transaction took place and what the parties intended it to accomplish are matters to be resolved at a trial on the merits.

Am Jur 2d, Trial §§ 25, 28.

APPEAL by defendant from order entered 14 June 1990 in ORANGE County District Court by *Judge Stanley Peele*. Heard in the Court of Appeals 13 May 1991.

Plaintiffs filed this action to recover a debt they alleged was owed them by defendant. Several days later, they filed a second complaint which substituted Archie Dollar for E.A. Dollar, Jr. in their second claim but was in all other respects identical. Defendant filed a *pro se* answer admitting that she borrowed money from plaintiffs but claimed the debt had been extinquished through a separate business transaction with plaintiffs.

On 27 February 1990, plaintiffs served a motion for consolidation and a notice of hearing for that motion, along with a calendar request for a hearing on the motion and the trial on the merits, by mail on defendant. The calendar request was for the session beginning 5 March 1990. Defendant received the documents on 1 March 1990 and called the Office of the Clerk of Court to tell them she could not be in court on 5 March. At the call of the calendar on 5 March, plaintiffs' motion for consolidation was granted, and the matter set for trial on 19 March. No one ever informed defendant of the trial date. She did not attend the trial, and judgment was entered against her.

Defendant then retained counsel and filed a Rule 60(b) motion to set aside the judgment. The trial court made findings of fact and concluded that defendant had failed to show a meritorious defense to plaintiffs' claims and had received notice of plaintiffs' request that the matter be set for trial "according to the local practice." Based on these findings and conclusions the trial court denied the motion. Defendant appeals.

Bayliss, Hudson & Merritt, by Ronald W. Merritt, for plaintiffs-appellees.

Levine, Stewart & Davis, by Donna Ambler Davis, for defendant-appellant.

WELLS, Judge.

Defendant assigns error to the trial court's conclusions that she was given proper notice of plaintiffs' request that the matter be set for trial and that she failed to show a meritorious defense to plaintiffs' action. We agree with defendant and award a new trial.

Defendant contends that the trial court erred in failing to set aside the judgment and grant her a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. This subsection serves as a "grand reservoir

of equitable power" by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it. *Oxford Plastics v. Goodson*, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

The trial court concluded that defendant received notice of plaintiffs' request "that the matter be set for trial at the March, 1990 session according to the local practice." The Rules of Practice require more than this, however. Rule 2(b) of the General Rules of Practice for the Superior and District Courts provides:

> The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

Rule 3.1 of the Rules of Practice for Civil District Court in Judicial District 15-B provides:

> Request for the setting of cases on the trial calendar shall be made in writing no later than four (4) weeks prior to the beginning of the session of court. Copies of all requests shall be sent to opposing counsel. The calendar shall be set and mailed out.

Defendant received a calendar request four days prior to the session of court at which the trial was set, rather than a trial calendar four weeks prior, as is required by the General Rules of Practice. While we recognize that no formal trial date is set in District 15-B until the day of calendar call, this does not alter the requirement that a party receive notice that a trial on the merits has been set for a particular session of court. A calendar request received four days before the start of the session is not sufficient.

We recognize that the law imposes certain affirmative duties on parties to a lawsuit to keep abreast of the proceedings in that suit. A party once served with a summons has a duty to give the matter the attention a person of ordinary prudence would give to important business. *Anderson Trucking Service, Inc. v. Key Way Transport, Inc.*, 94 N.C. App. 36, 379 S.E.2d 665 (1989). This duty does not negate the notice requirements of Rule 2, however. "Rule 2 of the Rules of Practice, by requiring notice of the calendar-

ing of a case, secures to a party the opportunity to prepare his case for trial and to be present for trial or to seek a continuance." *Laroque v. Laroque*, 46 N.C. App. 578, 265 S.E.2d 444, *disc. review denied*, 300 N.C. 558, 270 S.E.2d 109 (1980). Defendant did not receive the requisite notice that a trial on the merits would take place during the 5 March 1990 session of court. On these facts, "a reasonable application of the provisions of Rule 60(b)(6)" requires that defendant's failure to appear at the trial be excused. *Oxford Plastics, supra.*

These procedural deficiencies are not sufficient, however, to require granting relief under Rule 60. The defendant also must forecast a meritorious defense to plaintiffs' action. *Id.* A meritorious defense is a real or substantial defense, and a mere denial of indebtedness is not sufficient. *PYA/Monarch, Inc. v. Ray Lackey Enterprises, Inc.*, 96 N.C. App. 225, 385 S.E.2d 170 (1989). Defendant filed an answer in which she admits the original loans (although challenging which one of the plaintiffs actually loaned her the money) but contends that the money was repaid as part of a separate transaction between the parties. She also attached a check which she contends is evidence of that transaction. Plaintiffs' contention that the transaction defendant relies on makes little business sense is not dispositive. The trial court should not attempt to resolve the factual dispute but should determine only if the movant has sufficiently forecast a meritorious defense. *Chapparal Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985). We also disagree with plaintiffs' contention that defendant's answer merely shows a business deal through which the debt could be repaid at a later date. We think it equally reasonable to infer from the language used that the debt was considered repaid at that time.

Defendant has sufficiently forecast a meritorious defense—repayment. Whether she can properly establish that this transaction in fact took place and what the parties intended to accomplish through it are matters properly to be resolved at a trial on the merits. For the reasons stated, we hold that the trial court erred in denying defendant's motion and remand for a new trial.

The order denying defendant's Rule 60(b) motion is

Reversed.

The judgment entered for plaintiff is

Vacated.

This matter is remanded for trial on the merits.

Judges ARNOLD and PHILLIPS concur.

UNION GROVE MILLING AND MANUFACTURING COMPANY, PLAINTIFF v. JOHN A. FAW, MARY EDNA GAITHER FAW (NOW MARY EDNA GAITHER); N.C. DAIRY HERD IMPROVEMENT ASSOC., INC., DALE PIERCE, ROBERT LANEY, NCNB NATIONAL BANK OF NORTH CAROLINA, STEVE ADAMS, BENNY FOSTER AND BARTLETT MILLING COMPANY, DEFENDANTS

No. 9023SC972

(Filed 4 June 1991)

Divorce and Separation § 143 (NCI4th)— equitable distribution—division of entireties property—judgment lien against husband—property subject to lien

The trial court correctly granted summary judgment against defendant wife where defendant Mary Gaither and her ex-husband, John Faw, had purchased land as entireties property; plaintiff obtained a judgment against Faw; defendants Gaither and Faw divorced and she was awarded the entire ownership of the property in an equitable distribution award; the property was sold in foreclosure; and there were surplus proceeds claimed in part by plaintiff in satisfaction of its judgment lien. The divorce converted the entirety into tenancy in common and plaintiff's lien immediately attached to the ex-husband's undivided one-half interest. Defendant Gaither took title in fee simple absolute subject to plaintiff's judgment lien on defendant John Faw's one-half undivided interest.

Am Jur 2d, Husband and Wife § 74.

Spouse's liability, after divorce, for community debt contracted by other spouse during marriage. 20 ALR4th 211.

UNION GROVE MILLING AND MANUFACTURING CO. v. FAW

[103 N.C. App. 166 (1991)]

APPEAL by defendant Mary Edna Gaither from judgment entered 15 June 1990 in WILKES County Superior Court by *Judge Thomas W. Ross*. Heard in the Court of Appeals 7 May 1991.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff-appellee.

Hall and Brooks, by John E. Hall, for defendant-appellant.

WYNN, Judge.

This appeal involves the effect of a judgment lien against one spouse on marital property which, by virtue of a divorce decree, has been converted into property held as a tenancy in common and which, by virtue of a subsequent equitable distribution award, has been awarded to the non-debtor spouse. The specific issue here is whether the non-debtor spouse takes the property subject to the lien of judgment.

Plaintiff brought this action as a special proceeding in Wilkes County Superior Court alleging that as a judgment creditor of defendant John A. Faw, it was entitled to recover one-half of the surplus proceeds remaining after a foreclosure sale of former marital property. In addition to defendant John Faw, plaintiff named as defendants the appellant, Mary Edna Gaither Faw (defendant John Faw's former wife, now Mary Edna Gaither), and several other persons or entities that had judgments against the defendant John Faw, individually (each of these judgments was docketed after plaintiff's judgment). Because issues of fact were raised by the responsive pleadings, the proceeding was transferred to the civil issue docket pursuant to the provisions of N.C. Gen. Stat. § 45-21.32(c) (1984). The record reveals the following additional facts.

During their marriage, the Faws acquired a tract of land in Readies River Township, Wilkes County, as tenants by the entireties (hereinafter referred to as "the property"). As security for the payment of certain monies, the Faws executed and delivered a deed of trust covering the property to the Federal Land Bank.

On 4 February 1988, plaintiff obtained a $34,981.09 judgment in the Iredell County Superior Court against Mr. Faw, individually. Subsequently, on 15 February 1988, plaintiff docketed the judgment in the office of the Clerk of Superior Court for Wilkes County.

In December 1988, the Federal Land Bank, through its substitute trustee, instituted foreclosure proceedings on the property after the Faws had defaulted on the underlying obligation secured by the deed of trust. Prior to the sale of the property, the Faws became divorced by judgment filed January 3, 1989; and, in June 1989, appellant (Mrs. Faw) was awarded the entire ownership of the property as part of an equitable distribution award.

Following the Faws' divorce and the division of the marital property, the substitute trustee, pursuant to an authorization from the clerk of court, conducted a sale of the property. After the foreclosure sale and subsequent extinction of the underlying debts and fees, there remained surplus proceeds in the amount of $71,375.54. Faced with the claim of the plaintiff/judgment creditor, the substitute trustee paid one-half of the proceeds to appellant and deposited the remaining one-half with the clerk of court pending a determination as to its ownership.

Thereafter, plaintiff instituted this special proceeding asserting that its judgment lien against Mr. Faw's interest in the subject property was superior in time to any other and that it was therefore entitled to the remaining one-half of the surplus proceeds. From the trial court's grant of summary judgment in favor of the plaintiff, Mrs. Faw appeals.

I

It is well established in North Carolina that summary judgment is properly granted where there are no genuine issues of material fact to be decided and the movant is entitled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970). The appellant does not contend that there were genuine issues of material fact to be decided by the trial court; rather, she contends that plaintiff was not entitled to judgment as a matter of law. We disagree.

When property is held by married persons as tenants by the entireties, a lien of judgment effective against only one spouse does not attach to the property until the property is converted into another form of estate. *In re Foreclosure of Deed of Trust*, 303 N.C. 514, 519-20, 279 S.E.2d 566, 569 (1981). One such type of conversion occurs upon divorce where property held as a tenancy by the entirety is converted into property held as a tenancy in common, and each former spouse thereafter holds an undivided

one-half interest in the subject property. *Branch Banking and Trust Co. v. Wright*, 74 N.C. App. 550, 552, 328 S.E.2d 840, 841, *disc. review allowed*, 314 N.C. 662, 335 S.E.2d 321, *appeal withdrawn*, 318 N.C. 505, 353 S.E.2d 225 (1985). Moreover, upon divorce, each former spouse's undivided one-half interest becomes subject to the claims of his or her individual creditors. *Id.* at 553, 328 S.E.2d at 842.

In *Wright, supra*, this court stated that, "the estate of a tenancy in common of necessity intervenes between absolute divorce and award of title pursuant to equitable distribution when property was held by the entireties." *Id.* Once it is established that there has been a tenancy in common, the rule is that the grantee of a tenant in common can take only that tenant's share and step into that tenant's shoes. *Id.* at 552, 328 S.E.2d at 841.

In the instant case, the divorce between Mr. and Mrs. Faw on 3 January 1989 converted their tenancy by the entirety ownership in the subject property into tenancy in common ownership and the plaintiff's lien of judgment immediately attached to Mr. Faw's undivided one-half interest. Thus, upon being awarded the subject property in the equitable distribution judgment, appellant took title in fee simple absolute subject to the plaintiff's judgment lien on defendant John Faw's one-half undivided interest. *See id.* at 553, 328 S.E.2d at 842.

II

The appellant has failed to address her second assignment of error in her brief; accordingly, it is deemed abandoned. N.C. R. App. P. 28(b)(5).

III

For the reasons set forth above, the judgment entered below is

Affirmed.

Judges COZORT and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 MAY 1991

CANNADY v. U. N. C. No. 9010IC1007	Ind. Comm. (TA-10981)	Affirmed
CHAMBERS v. N.C. MEMORIAL HOSPITAL No. 9010SC463	Wake (88CVS522)	Affirmed
CHEMICAL INDUSTRY INSTITUTE OF TOXICOLOGY v. ALLIED VAN LINES No. 9010SC261	Wake (89CVS258)	Appeal Dismissed
CORBIN FOR THE ADOPTION OF BROWN No. 9018SC934	Guilford (88SP1139)	Affirmed
COX v. NATIONAL WARRANTY CORP. No. 908SC152	Lenoir (89CVS279)	Affirmed
EARP v. WEAVER No. 9010SC627	Wake (87CVS8622)	Defendants' appeal is dismissed. Plaintiff's cross-appeal is affirmed.
HEDGEPETH v. NORTH RIDGE ESTATES ASSOCIATES No. 9010SC450	Wake (88CVS08702)	Affirmed in part; reversed in part
HINSON v. CLARK No. 8926SC1407	Mecklenburg (87CVS2351)	No Error
IN RE PENDLETON No. 9026DC918	Mecklenburg (87J687) (88J817)	Affirmed
IN RE ROGERS No. 9019DC1014	Randolph (90J96)	Affirmed
ITHACA INDUSTRIES, INC. v. STOKES No. 9023DC1274	Wilkes (87CVD1350)	Dismissed
JOHNSON v. N. C. DEPT. OF CRIME CONTROL & PUBLIC SAFETY No. 9010SC128	Wake (88CVS9078)	Appeal Dismissed

JUDSON v. STANDARD INSULATING CO. No. 9026DC89	Mecklenburg (88CVD8347)	Affirmed
LANEY v. HOSIERY CORP. OF AMERICA No. 9010IC942	Ind. Comm. (711751)	Dismissed & Remanded
ROGERS v. DESAULLES No. 9030SC822	Haywood (88CVS246)	Reversed
STATE v. BERRY No. 9015SC898	Alamance (89CRS1726) (89CRS13752) (89CRS13753) (89CRS13754) (89CRS13755) (89CRS13756) (89CRS13757) (89CRS13758) (89CRS13759) (89CRS13760) (89CRS13761) (89CRS13762) (89CRS13763) (89CRS13764) (89CRS13765) (89CRS13766) (89CRS13767) (89CRS13768) (89CRS13769) (89CRS13770) (89CRS13771)	Affirmed
STATE v. BRITT No. 903SC1225	Carteret (90CRS1524) (90CRS1562)	Affirmed
STATE v. CARTER No. 904SC1298	Onslow (90CRS7582)	No Error
STATE v. KELLAM No. 9018SC605	Guilford (89CRS49129) (89CRS49130)	No Error
STATE v. McCLENDON No. 9020SC1341	Union (90CRS4376) (90CRS4377)	No Error
STATE v. MONTGOMERY No. 9021SC1048	Forsyth (89CRS38345) (89CRS38346)	No Error

STATE v. MORGAN No. 9029SC1237	Transylvania (89CRS2440)	Affirmed
STATE v. NEUMANN No. 9022SC747	Davie (89CRS150) (89CRS151)	No Error
STATE v. NORFLEET No. 901SC1280	Gates (90CRS399)	No Error
STATE v. PATTON No. 9026SC1267	Mecklenburg (90CRS24600) (90CRS24602)	No Error
STATE v. PURNELL No. 9010SC1308	Wake (89CRS006792) (89CRS011377)	No Error
STATE v. SEARCY No. 9017SC32	Rockingham (88CRS8547) (88CRS8548) (89CRS2104)	No Error
STATE v. WATERS No. 9026SC954	Mecklenburg (89CRS17376) (89CRS17378)	No Error

FILED 4 JUNE 1991

APPLETON v. APPLETON No. 9018DC724	Guilford (89CVD3216) (88CVD9968)	Vacated & Remanded
ATLANTIC VENEER CORP. v. OWENS VENEER SALES No. 903SC584	Carteret (88CVS830)	Affirmed
BARBEE v. ATLANTIC MARINE SALES & SERVICE No. 9126SC18	Mecklenburg (90CVS2798)	Appeal Dismissed
EDWARDS v. DECKARD No. 9126SC42	Mecklenburg (88CVS14188)	Affirmed
FARTHING v. COUNCIL No. 9014SC460	Durham (89CVS849)	Affirmed in part, reversed in part & remanded
FIELDS v. SHEA No. 903DC895	Carteret (88CVD70)	Reversed & Remanded

GALLIMORE v. BURNETTE No. 9019DC293	Randolph (87CVD469)	Affirmed
JOHNSTON COUNTY v. R. N. ROUSE & CO. No. 8911SC1402	Johnston (89CVS764)	Affirmed
KIDLA v. GRAINGER No. 893SC1359	Carteret (88CVS459)	No Error
PIERMAN v. DAVIDSON ELECTRIC MEMBERSHIP CORP. No. 9022SC656	Davidson (89CVS998)	Affirmed
POPE v. POPE No. 9015DC662	Orange (87CVD307)	Affirmed
STATE v. BLACKWELL No. 909SC637	Person (89CRS24)	No Error
STATE v. DALTON No. 9017SC1333	Rockingham (87CRS8463) (87CRS8464) (87CRS8465) (87CRS8466) (87CRS8467) (87CRS8468)	Affirmed
STATE v. DANIEL No. 9015SC1361	Alamance (90CRS05405) (90CRS08091)	No Error
STATE v. GODFREY No. 9012SC1283	Cumberland (89CRS30624)	No Error
STATE v. HILL No. 9012SC995	Cumberland (89CRS31548)	No Error
STATE v. HOWZE No. 9118SC20	Guilford (90CRS5709)	No Error
STATE v. LOWERY No. 9016SC1337	Robeson (90CRS3382) (90CRS3383)	No Error
STATE v. McCAIN No. 8918SC1377	Guilford (88CRS20543) (88CRS20544) (88CRS43120)	No Error
STATE v. NEAL No. 9017SC1314	Rockingham (90CRS2322)	Affirmed

STATE v. WALLACE No. 9027SC1345	Gaston (89CR05611) (89CR05612)	No Error
STATE v. WILLIAMS No. 9018SC1319	Guilford (89CRS56561)	No Error

STATE OF NORTH CAROLINA v. MICHAEL RAY McDANIELS, DEFENDANT/APPELLANT

No. 9010SC993

(Filed 18 June 1991)

1. Searches and Seizures § 12 (NCI3d)— narcotics—stop of car at airport—reasonable suspicion

The trial court in a cocaine prosecution correctly denied defendant's motion to suppress, which was based on the issue of reasonable suspicion to make an investigatory stop, where SBI agents received information that an air charter agent suspected drug smuggling activity; defendant and another man, using the names "Mr. Smith" and "Mr. Jones" without first names, had arranged to charter a plane to fly late at night to a location in New Jersey a short distance from New York City; the officers knew that the New York City area is the source of about ninety percent of the drugs brought into central North Carolina; the two men had made an identical trip the weekend before from RDU using a different charter service which had no planes available on this occasion; the two were dressed in "shiny," "silky," "flashy" business suits; they took off around 6:30 p.m. and landed back in North Carolina about 1:30 a.m. on Sunday; they paid in cash for their flight, which is common for drug couriers while businessmen usually pay by business check or credit card; the two men gave the charter service two telephone numbers, one of which was disconnected and the other did not show a separate listing for a Smith or Jones; the car in which they were riding, which had heavily tinted glass, circled the parking lot when it arrived, drove away, then returned five or ten minutes later; a check on the car while the men were on their flight revealed that the license plate was in the name of a Durham woman and was assigned to a different car; the vehicle identification number was registered to an owner named neither Smith nor Jones in another part of the state; and, while defendant carried a briefcase, late Saturday night seemed to the agents an unusual time to conduct business.

Am Jur 2d, Searches and Seizures §§ 41-43.

2. Searches and Seizures § 12 (NCI3d)— narcotics—stop of car at airport late at night—constitutional

A stop of a car containing suspected drug couriers late at night at an airport was supported by a reasonable suspicion and was constitutional where there was reasonable suspicion that the occupants of the car had chartered an aircraft to fly to the New York area for narcotics; the charter service owner feared retaliation if his business was suspected of being the informer and requested that the stop be made away from his hangar; the charter service parking area had no lights and adjoined a number of alleyways; there is no screening for weapons on private flights; the chief SBI agent was concerned about the safety of a confrontation at that location; the officers were also concerned about the safety of a high speed chase at the airport or on the highway; the suspects were stopped a short distance from the charter service; the duration of the investigative stop was "probably not two minutes" up to the time the officers received consent to search the car; the officers confirmed their suspicions that the suspects had purchased tickets for their charter flight under assumed names; the total time from stop to arrest was ten to fifteen minutes by one estimate and twenty-five to thirty by another; only the main agent approached the driver's side of the car; the blue lights on the vehicles used to make the stop were turned off; a second officer approached the passenger side of the car, where this defendant was sitting; the officers spoke in a calm, normal voice with a nonthreatening tone; the suspects were never surrounded; the only weapon visible was that of a state trooper; no weapon was drawn; and no force was used to get the occupants to step out of the car. Even if the officers seized defendant for Fourth Amendment purposes, a seizure is not per se an arrest.

Am Jur 2d, Searches and Seizures §§ 41-43.

3. Searches and Seizures § 11 (NCI3d)— narcotics—search of vehicle—valid

A motion to suppress in a cocaine trafficking prosecution, based in part on the alleged invalidity of the consent to a search of a car, was properly denied because defendant had no expectation of privacy in the car in which he was a passenger because he was not in apparent control of the car. Moreover,

defendant never objected to the driver's consent at the scene and never asserted ownership rights in either the car or any of its contents; even if defendant had ownership rights in the contents of the car, failure to speak and assert the personal right of immunity from unreasonable search and seizure amounts to a voluntary consent when that person knows the driver has given his verbal consent to search. The facts surrounding the consent demonstrate no coercion by the police, implied or otherwise, and the consent was effective to bestow permission to search under N.C.G.S. § 15A-222(2) and N.C.G.S. § 15A-221(a). Although the officers had reason to believe that the driver was probably not the registered owner, the driver's words of consent were sufficient to justify the agent's continuing assumption that the driver was lawfully in control of the car and nothing in the record suggests that the driver's consent was limited in scope, including any objection to the use of a dog to continue searching the car.

Am Jur 2d, Searches and Seizures §§ 49, 53, 96.

4. **Searches and Seizures § 11 (NCI3d)— narcotics—search of briefcase inside vehicle—valid**

There was no Fourth Amendment violation in the SBI's handling of a briefcase during its investigation of the inside of a car where an agent searching the car picked up a briefcase on the back floorboard and asked the driver and then defendant if it belonged to either, defendant told the agent that the case belonged to his cousin and that he did not think the police should search the briefcase without a warrant, the agent placed the briefcase on the backseat unopened, a dog later alerted to the briefcase, a warrant was obtained, and cocaine was found inside. If defendant had a privacy interest, it was limited to the contents of the briefcase, which were not examined until after the agents procured a search warrant.

Am Jur 2d, Searches and Seizures §§ 96, 97, 99.

Use of trained dog to detect narcotics as unreasonable search in violation of Fourth Amendment. 31 ALR Fed 931.

5. **Searches and Seizures § 23 (NCI3d)— narcotics—search warrant—probable cause—trained drug dog**

There was probable cause to issue a warrant to search for narcotics in a briefcase where the supporting affidavit related

the facts leading up to the stop as well as details about the suspects' possession of the briefcase, a dog alerted to the briefcase inside the car, and the dog had been certified by U.S. Customs.

Am Jur 2d, Searches and Seizures §§ 64, 68-70, 97.

Use of trained dog to detect narcotics as unreasonable search in violation of Fourth Amendment. 31 ALR Fed 931.

Judge COZORT concurring.

Judge GREENE dissenting.

APPEAL by defendant from order entered 15 June 1990 by *Judge Donald W. Stephens* in WAKE County Superior Court. Heard in the Court of Appeals 9 April 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

Cheshire, Parker, Hughes & Manning, by Joseph Blount Cheshire, V, and George Bullock Currin, for defendant-appellant.

PARKER, Judge.

Defendant pled guilty to charges of trafficking in cocaine by conspiracy, trafficking in cocaine by possession and trafficking in cocaine by transportation. Pursuant to N.C.G.S. § 15A-979(b) defendant reserved his right to appeal the lower court's denial of his motion to suppress. The evidence presented by the State on *voir dire* tended to show that defendant traveled with a companion by private charter plane from Raleigh-Durham International Airport (herein "RDU") to the New York City area late on a Saturday night. The two men returned to RDU a few hours later. Acting upon information from a concerned citizen, two agents of the State Bureau of Investigation (herein "SBI") made inquiries and suspected criminal activity. The agents arranged for additional officers to assist and waited for defendant and his companion to return from their trip. For reasons to be discussed later, the agents decided not to stop the two men until they started driving their vehicle away from RDU. The SBI enlisted the assistance of the highway patrol for this stop. An identity check during the stop revealed that the car's driver and defendant passenger had chartered their flight under fictitious names. Two SBI agents asked the driver

and defendant to step out of the car. After the men had been pat down searched, one of the agents asked for consent to search the vehicle. The driver indicated that the officers could search the car.

In the search, an agent located a handgun in the glove box, from which defendant had been observed withdrawing his hand after the car had been stopped. The agent also picked up a briefcase from the floor and asked both the driver and defendant if the case was his. Defendant stated that the case belonged to his cousin and objected to a search of the case without a warrant. The agent placed the case on the back seat and advised the driver that the SBI wished to use its drug detection dog, which had been brought to the scene. Neither defendant nor his companion objected. The dog was put through its standard routine and ultimately gave a positive reaction to the briefcase. Knowing that this dog signals, by scratching and biting, only in the presence of the odor of controlled substances it has been trained to recognize, the agents placed defendant and his companion under arrest. The agents then procured a search warrant before opening the briefcase, which contained two kilograms of cocaine. Additional facts will be detailed in discussion of the issues raised on appeal.

Defendant appeals denial of his motion to suppress on five grounds: (i) the drug agents making the investigative stop of the car lacked reasonable, articulable suspicion; (ii) defendant's detention was an intrusion even more serious than an investigative stop, requiring probable cause; (iii) there was no valid consent to the search of the car; (iv) sniffing of the briefcase by a drug detection dog was an illegal search; and (v) the warrant to search the briefcase was not based on probable cause. We find that the court's findings of fact were clearly supported by the evidence presented at an extensive suppression hearing and its conclusions of law are, therefore, conclusive for purposes of appellate review. *State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979). The trial judge properly denied the suppression motion.

I.

[1] As to defendant's first assignment of error, the existence of reasonable suspicion establishes the constitutionality of a temporary investigative, warrantless seizure. *Id.* at 706, 252 S.E.2d at 779. The warrantless seizure of a person does not violate the Fourth Amendment so long as the officer is "able to point to specific

and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 20 L.Ed.2d 889, 906 (1968); *see also State v. Sugg*, 61 N.C. App. 106, 300 S.E.2d 248, *disc. rev. denied*, 308 N.C. 390, 302 S.E.2d 257 (1983). Similarly, objective facts and circumstantial evidence, leading a trained officer to conclude that criminal activity may be occurring, are "a sufficient basis to justify an investigative stop" of a moving vehicle. *United States v. Cortez*, 449 U.S. 411, 413, 66 L.Ed.2d 621, 625 (1981).

The trial court found the entire eyewitness testimony of three SBI agents and a State trooper "credible and worthy of belief," despite defense counsel's rigorous cross-examination of those witnesses at the hearing. That testimony disclosed the following facts supporting the officers' reasonable suspicion that defendant was involved in ongoing criminal activity. The facts known to the officers at the time of the stop "must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by experience and training." *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E.2d 230, 234 (1984).

Receiving information that an air charter agent suspected drug smuggling activity, the SBI learned that defendant and another man, using the names "Mr. Smith" and "Mr. Jones" without first names, had arranged to charter a plane from Carolina Charter Service (herein "Carolina") to fly late at night to a location in New Jersey only a taxicab ride away from New York City. The officers knew that the New York City area is the source of about ninety percent of the illegal drugs brought into central North Carolina. The two men had made an identical trip the weekend before out of RDU, using a different airline charter service; the men had been referred to Carolina when they attempted to hire the service again and it had no available planes. Dressed in "shiny," "silky," "flashy" business suits, the two men took off around 6:30 p.m. and landed back in North Carolina at 1:30 a.m. Sunday. The men paid $1,270.00 in cash for their flight. Businessmen using private charter services usually pay by business check or credit card; the officers testified that paying by cash is "a very common practice by people traveling as drug couriers." Drug smugglers are known to carry large amounts of cash; defendant carried a briefcase that the chief SBI agent surmised to be transporting cash to the New York area.

Further, the men gave Carolina two telephone numbers, which the SBI attempted to verify without success. One of the numbers was disconnected and the other did not show a separate phone listing for either a Smith or a Jones. An officer testified that "[s]omeone who might be involved in narcotics trafficking does not tend to want to put down his correct phone number." Upon its arrival at RDU the car in which defendant was riding, with heavily tinted glass, first circled the parking area for Carolina and then drove away from the parking area before returning five to ten minutes later to park. The officers believed that the car's occupants might have been watching out for police. A police check on the parked car, made during the time the men were on their trip, revealed that the license plate was in the name of a Durham woman named Frye but was assigned to a different car and that the vehicle identification number was registered to an owner named neither Smith nor Jones in another part of the State. Finally, while the briefcase suggested a business transaction, late on Saturday night seemed to the SBI agents an unusual time to conduct business when combined with the other suspicious factors in the case.

At the suppression hearing the prosecutor asked the main SBI agent on the case if he considered these factors "individually, or did you consider [the factors] altogether in making this decision?" The agent responded that "it was the totality of everything." He later expanded on that point.

> Q. [T]o what extent if any was there one particular factor that you've listed that by itself made you suspicious?
>
> A. I don't know that there was one factor. There were a number of factors, and they continued right up through the time that we talked to [the two men] on the side of the road once we discovered that they were traveling under fictitious names, we discovered that with certainty.

We agree with the trial court that these particularized facts raised a reasonable suspicion permitting the officers to make a forcible stop, for purposes of dispelling or confirming the agents' suspicions of criminal activity. It has long been the law that

> [a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143, 146, 32 L.Ed.2d 612, 617 (1972); *see also Florida v. Royer*, 460 U.S. 491, 502, 75 L.Ed.2d 229, 239 (1983) (articulable suspicion to stop suspected drug courier in order to check identity, with subsequent discovery that suspect was traveling under an assumed name); *State v. Allen*, 90 N.C. App. 15, 28-29, 367 S.E.2d 684, 691-92 (1988) (facts supporting articulable suspicion for police encounter with defendant outside airport terminal); *State v. Perkerol*, 77 N.C. App. 292, 335 S.E.2d 60 (1985), *disc. rev. denied*, 315 N.C. 595, 341 S.E.2d 36 (1986) (courier trafficking in cocaine). We, therefore, overrule defendant's first assignment of error.

II.

[2] Next, defendant argues that the detention of the car and its two occupants was tantamount to an arrest, requiring probable cause, given the circumstances attending the agents' decision to wait to stop him and his companion until the two of them were driving away from the airport. The facts developed during the suppression hearing do not support defendant's arguments with regard to the location of, or other circumstances surrounding, the stop.

The officers testified that they stopped the suspects outside the parking area for several reasons. First, the charter service owner feared physical retaliation from drug smugglers against "a couple of million dollars' worth of aircraft," if the suspects were stopped near his hangar and Carolina was suspected of being an informant. Therefore, the owner specifically requested that the stop be made away from the hangar. Second, the parking area for the charter service had "no lights" and adjoined a number of "little alleyways." "It's not the big parking lot; it's a driveway-parking-lot-type situation." The chief SBI agent testified that he "had a lot of concern for confronting two individuals who I didn't know who they were in the dark, because there's no lights there whatsoever in that parking area there where the car was parked." "It's pretty dark in that area. And we wanted to be as safe as we could." Third, and perhaps paramount in the officers' minds, there is no X-ray or metal detector screening for weapons of passengers boarding private flights. The officers testified uniformly that they had considerable concern about their own safety and that of innocent bystanders. Finally, the officers also had safety concerns about a high-speed chase, "either in the area of the airport

itself where people would be on foot and in vehicles and also out on the interstate highway."

The prosecutor asked the chief agent how the circumstances of defendant's travel affected the officers' decision about the location for the investigative stop.

> Q. You said that in an ordinary interdiction situation a vehicle's not involved, a car's not involved. How was this situation different from the ordinary interdiction or a general interdiction?
>
> A. We primarily operate in the terminals itself and are concerned with people getting on or getting off the commercial aircraft. This is one where it was a charter; and we knew the gentlemen were going to come off the plane, get in their car, and drive away. And we had to get them to the safest place for everyone concerned.

As the United States Supreme Court has observed, "a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify" an arrest. *Terry*, 392 U.S. at 26-27, 20 L.Ed.2d at 909.

Defendants were stopped a short distance from the charter service, before their car even passed the commercial airline terminals. In order to be able to intercept defendant's vehicle as it proceeded to one of the two major arteries out of the airport, the SBI had asked the highway patrol to place a car near each of those two possible egress points.

> [W]e determined that the safest place to stop them was at the intersection there on a small service road between Terminal C and Terminal A and B. It's an area that's lit up to the point of almost being daylight with extremely strong, bright streetlights; and it's out of the public.

Other facts likewise fail to suggest the intrusiveness of an arrest. The duration of the investigative stop, up to the time the officers received consent to search the car, was "[p]robably not two minutes." The brevity of an investigative stop is a key factor in justifying such a seizure. *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824 (1979); *State v. Grimmett*, 54 N.C. App. 494, 284 S.E.2d 144 (1981), *disc. rev. denied and appeal dismissed*, 305 N.C. 304, 290 S.E.2d 706 (1982); *see also* ALI, Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) (recommending a maximum

of twenty minutes for a *Terry* stop). During the two minutes of the stop in this case, the officers confirmed their suspicion that the travelers, "Mr. Smith" and "Mr. Jones," purchased the tickets for their charter flight under assumed names. The names on the suspects' New Jersey driver's licenses were Michael McDaniels and Clark Waddell. After patting the suspects down for weapons, the officers obtained Waddell's consent to search. "The officer may question the driver and passengers . . . and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82, 45 L.Ed.2d 607, 617 (1975) (approving investigative stop of moving vehicle). Adding the time it then took an agent and the dog to search the car, the total elapsed time from the officers' stopping the car up to defendant's arrest was ten to fifteen minutes, according to the chief SBI agent, or possibly twenty-five to thirty minutes, according to the State trooper's estimate.

Further, only the main agent approached the driver's side of the car upon its being stopped. The blue lights on the agent's car and the trooper's car "up ahead," the only lights used to bring the suspects' car to a halt, were not left on. A second agent approached the front passenger side where defendant was sitting. "[P]rior to the individuals being arrested, the only people who came to the car was myself, Agent Black, and Captain Brown was standing at the back of the car." The officer at each side of the car spoke in a normal, calm voice and used a non-threatening tone. The officers testified that the suspects were never surrounded and, in fact, other officers kept at "a distance further than the length of this courtroom." Defendant makes much of the fact that there were a number of officers at the scene; however, our Supreme Court has refused to hold that police coercion exists as a matter of law even when ten or more officers are present with a suspect in his own home before the suspect consents to a search. *State v. Fincher*, 309 N.C. 1, 25, 305 S.E.2d 685, 700 (1983) (Exum, J., dissenting in part and concurring in part).

Moreover, no weapons were visible on any officer except for the State trooper, who was in standard uniform. No weapons were drawn, nor was any police gun out of its concealed holster. Several officers were in plainclothes; a few had on jackets with official logos, although their dress was still casual. No officer's bulletproof vest was exposed to view. Finally, no force was used to get the

occupants to step out of the car once it became apparent that both men were traveling under false names. The officers then informed the two men that this was a narcotics investigation.

Even if, by show of authority, the officers "seized" defendant for Fourth Amendment purposes and our discussion indicates that there was such a seizure in this case, a seizure is not *per se* an arrest. Indeed, the United States Supreme Court, differentiating an informal encounter between an officer and a citizen from an investigative stop implicating constitutional protections, illustrates the meaning of "seizure" as follows.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554, 64 L.Ed.2d 497, 509 (1980). Only one of these factors, the presence at the scene of several officers, existed in this case. Finally, defendant complains that the stop occurred "late at night, in a remote area of the airport property." We note that the lateness of the stop was determined solely by the time defendant himself had chosen for returning to the State from New Jersey; the allegedly remote area was very well lit and in fact a public road.

For all these reasons, this Court finds no irregularity, and certainly not a situation of arrest, in this investigative stop. The seizure in this case, supported as it was by reasonable suspicion, was constitutional. *See, e.g., State v. Sugg*, 61 N.C. App. at 108-109, 300 S.E.2d at 250 (limited investigative stop is one of "three tiers of police encounters" and distinguishable from full-scale arrest).

III.

[3] Defendant's next assignment of error concerns the alleged invalidity of the driver's consent to police to search the car. We have considered each of defendant's specific contentions in this assignment: (i) the driver's consent was coerced by implied threat; (ii) even if consent was voluntary, the driver did not have apparent control or apparent custody of the stopped car and, therefore, could not give effective consent to the search; and (iii) even if the consent was voluntary, the scope of the consent did not extend to the

sniffing of the air surrounding the briefcase. This Court agrees with the trial court's conclusion that defendant, because not the person in apparent control of the car, had no reasonable expectation of privacy "as to any area within the vehicle." Nor do we disagree with the trial court's conclusions that defendant had apparent authority over the briefcase and that he exercised his lawful right to refuse to consent to a warrantless search of the interior of the briefcase. That refusal was not overridden.

Initially, we note that defendant never objected to the driver's consent at the scene, nor did defendant ever assert ownership rights in either the car or any of its contents. Even if defendant had ownership rights in the contents of the car, and we find no evidence that he did, failure to speak and assert the personal right of immunity from unreasonable search and seizure "amount[s] to a voluntary consent to search," where the person who remains silent knows that the driver has given his verbal consent to a search. *State v. Coffey*, 255 N.C. 293, 297-98, 121 S.E.2d 736, 740 (1961); *see also State v. Foster*, 33 N.C. App. 145, 148, 234 S.E.2d 443, 446 (1977) (silence in face of consent by person in apparent control of car permits court to infer consent by person remaining silent, "[e]ven assuming" that person remaining silent "was in some way a part owner of the car").

We now turn to each of defendant's arguments concerning the search of the vehicle. First, the facts surrounding the driver's consent demonstrate no coercion by the police, implied or otherwise. When the driver's identification disclosed the name Waddell with a domicile in New Jersey, he was asked to step outside the car. The main SBI agent reported that he used a normal tone of voice and that the driver remained "fairly composed."

> He stepped out of the vehicle a short distance away from the car. I explained to him that we were involved in a narcotics investigation and would appreciate his cooperation. I asked him for his consent to conduct a search of the vehicle. He said to go ahead but the car was not his and nothing in it was his.

The officers' testimony that they used absolutely no force was not contradicted at the suppression hearing. Under these facts defendant has failed to make a showing of involuntary consent by the driver. *See, e.g., State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983) (defendant's signature on consent form was voluntarily, willingly and understandingly made, notwithstanding presence of

at least ten officers at the scene, defendant's age of 17 and defendant's evidence that (i) he had an IQ in range between 50 and 65; (ii) he suffered from a schizophreniform disorder; and (iii) he was more susceptible than average person to fear and intimidation); *State v. Casey*, 59 N.C. App. 99, 112, 296 S.E.2d 473, 482-83 (1982).

Second, under the applicable State statutes the consent was effective to bestow permission on the agent to search the car. N.C.G.S. § 15A-221(a) provides for warrantless searches and seizures "if consent to the search is given." Under N.C.G.S. § 15A-222(2) the requisite consent "must be given" either by the registered owner of the car "or by the person in apparent control of its operation and contents at the time consent is given . . . ." N.C.G.S. § 15A-222(2) (1988). "Our courts have often found that consent given by the owner or person lawfully in control of a vehicle is sufficient to justify a search that yields evidence used against a non-consenting passenger." *State v. Mandina*, 91 N.C. App. 686, 695, 373 S.E.2d 155, 161 (1988) (citations omitted). A driver is in "apparent control" of a car and its contents, whether the vehicle or its contents belong to him or to others. The officers at the scene had reason to believe that the driver was probably not the registered owner, since they had run a vehicle check earlier in the evening. Still, the driver's words of consent were sufficient to justify the agent's continuing assumption that the driver was lawfully in control of the car. If the driver had either refused to consent or told the agent that the car was stolen, this case would be different.

This Court also rejects defendant's argument that his companion's consent was limited in scope. Nothing in the record suggests that Waddell told the officers certain areas or certain items were "off limits." Nor is there any record evidence of the driver's limiting the manner of search. In particular, there is no evidence that either defendant or the driver objected to police use of a dog to continue searching the car; nor did the driver ever attempt to modify or withdraw his initial consent to the search. These facts concerning the suspects' failure to object are similar to those in *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989), *disc. rev. denied and appeal dismissed*, 326 N.C. 366, 389 S.E.2d 809 (1990), in which this Court found no restriction on the scope of a driver's consent to search a vehicle.

Further, contrary to defendant's contention, this Court also finds no Fourth Amendment violation in the SBI's handling of the

briefcase during its investigation of the inside of the car. An agent searching the car picked up a briefcase on the back floorboard and first asked the driver and then defendant if it belonged to either man. After defendant told the agent the case belonged to his cousin and that he did not think the police should search the cousin's briefcase without a search warrant, the agent replaced the briefcase in the car, unopened. If defendant had a privacy interest at all, it was limited to the contents of the briefcase, as found by the trial court. Those contents were not examined until after the agents had procured a search warrant. We note further that under *Florida v. Jimeno*, --- U.S. ---, 114 L.Ed.2d 297 (1991), a police officer may now search a closed container found in a vehicle, where the officer has the suspect's general consent to search and the officer might reasonably believe the container holds the object of the search. *See also California v. Acevedo*, --- U.S. ---, 114 L.Ed.2d 619 (1991) (closed container in stopped vehicle may be searched without warrant so long as police have probable cause to believe contraband or evidence of crime is contained therein).

For each of the foregoing reasons, we reject these arguments in defendant's third assignment of error.

IV.

[4] If the driver's consent is deemed to be valid, defendant next argues that the alleged "search" of the briefcase in the car by a police dog certified in drug detection was illegal. Defendant first contends that the drug detection dog was thrust into the car without giving either man opportunity to object. The facts developed at the suppression hearing, however, show only that the chief agent was keeping the driver advised and informed "of what we were doing, because he had already given us consent to search the vehicle." "It was more an informational thing than anything else." The driver not having objected to the dog's being put into the car, the search proceeded.

As defendant mentions in his statement of the facts, the dog immediately jumped out of the car upon being introduced to the car's interior. The possible significance of the dog's unusual reaction, left unexplained by defendant, was explored on *voir dire*.

> Q. What if any unusual odor did you observe in the automobile?

A. A very strong odor of deodorizers in the car. There were deodorizers hanging in more than one location inside the car, and there was a very strong odor in the car from those.

THE COURT: Let me ask you about that. . . .

Does cocaine have any particular smell?

A. Yes, sir, it does.

THE COURT: Detectible to the human nose?

A. Only if you're very close to where the cocaine is or if there's a large quantity of cocaine present . . . .

The dog's handler gave similar testimony:

I feel the reason he jumped out of the vehicle was because the odor of the perfumes was so strong. I can only describe it as it smelled to me like somebody had dumped a bottle of cologne in the vehicle.

Nor, as defendant argues, did the sniffing of the exterior of the briefcase by a well trained and exceptionally skilled drug detection dog amount to a "search" within the meaning of the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 707, 77 L.Ed.2d 110, 121 (1983); *see also United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975). Defendant's authority on this point is not analogous to the consensual situation in the present case. *Cf. People v. Unruh*, 713 P.2d 370 (Colo. 1986) (reasonable expectation of privacy invaded by police use of dog to sniff locked safe from defendant's basement).

In this case the trial court also questioned the SBI dog handler about the use of the K-9. The handler testified about his experience with this dog, the only one used by the SBI at that time, the dog's qualifications and excellent track record and the significance of the dog's scratching and biting the briefcase. "I knew at that point that there was, in fact, a controlled substance in that briefcase." The trial court then asked the handler whether he could possibly influence the dog to give a false positive alert. The handler replied: "I know of no instance in which I could make the dog alert to—to a particular item because he's alerting to the odor [and not anything the handler does]." Later the same witness explained to the court that "the dog cannot alert if he doesn't smell the narcotic odor."

Finding no merit in any of defendant's arguments about the use of a trained drug dog, we overrule his fourth assignment of error.

V.

[5] Finally, defendant attacks the warrant obtained for search of the briefcase for lack of probable cause. This attack is groundless. The magistrate, considering all the evidence contained in the officer's affidavit, properly determined under the totality of the circumstances "whether there exist[ed] a fair probability that evidence of a crime can be found in a particular place." *State v. Greene*, 324 N.C. 1, 8, 376 S.E.2d 430, 436 (1989), *sentence vacated*, --- U.S. ---, 108 L.Ed.2d 603 (1990) (mem.). The information given to the magistrate established probable cause under the lay, nontechnical standard applied to probable cause for search warrants. *Id.* at 8, 376 S.E.2d at 435. There is no longer an independent requirement that an informant—here, defendant argues, the dog—be proven reliable. *Id.* at 8-9, 376 S.E.2d at 436.

The affidavit supporting application for the search warrant relates facts leading up to the police stop as well as specific details about the suspects' possession of a briefcase. The affiant states that once consent to search was obtained,

> [t]he SBI narcotic detection K-9 was put around and in the vehicle. During the sea[r]ch inside the vehicle the K-9 gave a positive alert to a brown briefcase located in the back floorboard. The K-9, Tazmanian, is certified by US Customs . . . .

The dog's certification extended to cocaine, heroin, marijuana and hashish. The briefcase contained cocaine. Initial certification of the dog occurred in 1983, with recertification on 1 September 1988. The magistrate issued the search warrant on 25 September 1988. This Court accords a magistrate's determination of probable cause great deference. *Id.* at 8, 376 S.E.2d at 436. We overrule the final assignment of error.

Affirmed.

Judge COZORT concurs in separate opinion.

Judge GREENE dissents in separate opinion.

Judge COZORT concurring, with separate opinion.

I am compelled to comment on the dissent's comparison of the stop in this case with the "typical airport stop case" and the dissent's apparent conclusion that the evidence must be suppressed because the intrusion of the officers here was greater than that of the typical airport stop. That conclusion is unrealistic and ignores the need for the officers to make appropriate plans for their safety and that of innocent charter flight workers and other bystanders. The testimony in this case demonstrates admirable caution, given the situation, on the part of the officers. The defendant's darkened vehicle was parked in a dark area adjoining little alleyways. These circumstances must be considered when determining what constitutes appropriate constitutional intrusiveness. We should not demand, as the dissent apparently does, that one officer approach a darkened vehicle in a dark area, occupied by suspected drug couriers who may be armed, to "ask a few questions," in complete disregard of the safety of himself, other officers and bystanders. The stop in this case, though longer and with more officers than that approved in an open well-lighted airport, was constitutional under the circumstances.

Judge GREENE dissenting.

I agree with the majority that the defendant was seized for Fourth Amendment purposes. *See California v. Hodari D*, --- U.S. ---, 113 L.Ed.2d 690 (1991). However, I disagree that the seizure was constitutional. Instead I agree with the defendant that the "initial stop and detention . . . constituted a more serious intrusion than that allowed on mere reasonable suspicion and was tantamount to an arrest."

In order to apply the law to the evidence, it is necessary to expound some on the facts as shown in the record. Agent Turbeville testified on direct and cross-examination as follows:

> Q. Agent Turbeville, to what extent if any did you plan to stop that car for further investigation?
>
> A. Well, first of all, we had to decide where we were going to stop them at; and we determined that the safest place to stop them was at the intersection there on a small service road between Terminal C and Terminal A and B. It's an area that's lit up to the point of almost being daylight with extreme-

ly strong, bright streetlights; and it's out of the public. And once they reached that point I radioed ahead to Sergeant George to turn on his blue light, who was directly in front of them and at the stop sign, which would prevent them from running. And I was behind them so they would not get out into traffic and pose any danger for anyone.

. . . .

THE COURT: Were you in radio contact with him [Sergeant George]?

A. Yes. And once we got to this area here (indicating), which is an extremely well-lit area, that's when I asked him, when he pulled up to that stop sign, I asked Sergeant George to turn on his blue light. And there was no place for the car to go at that point. He couldn't get around us because there's an island in the road there.

. . . .

Q. Right. Okay. Now, again to describe when the car stopped, you indicated with your diagram where the cars were, where did the police individuals go at the time the suspect car was stopped?

A. I went to the driver's door. Special Agent Black went to the passenger door. Captain Brown was at the rear of the vehicle, and Sergeant George exited his car and was standing by the front door with the front door open to his car.

Q. So, there was an officer in front of the car, behind the car, and on both sides of the car?

A. That's correct.

Q. And did you say Officer Black went to the passenger door?

A. Yes.

Q. And you went to the other door?

A. Driver's door.

Q. Where were the other officers?

A. In the other vehicles?

Q. Yes, sir?

A. They all stayed with their vehicles. I'm not sure if all of them got out or not. I don't recall all of them being out of their vehicles, but they all stayed at their vehicles. Nobody came up. I had directed them earlier not to come up to the car.

. . . .

Q. Well, did Mr. McDaniels voluntarily walk up to the front of the vehicle?

A. Again, you'd [sic] to ask Agent Black about that.

Q. Did Mr. Waddell voluntarily walk up to the front of the car?

A. He walked—he got out of the car voluntarily and he came over, sort of to the side of the front of the vehicle, yes, sir.

Q. He walked with you?

A. Yes.

Q. A police officer?

A. Yes.

Q. Identified himself as a police officer?

A. Yes.

Q. In the presence of seven or eight other police officers?

A. Yes.

Q. Four other police vehicles?

A. Yes.

Summarized, the State's evidence shows the following: The vehicle in which the defendant was a passenger was stopped near the airport at approximately 2:00 a.m. One officer blocked the defendant's path and turned on his blue light. Another officer came up behind the defendant in another vehicle and turned on his blue light. When the defendant's car stopped, one officer went to the driver's door, another officer went to the passenger's door, another officer went to the rear of the vehicle, and another officer went to the front of the vehicle. A total of four police vehicles surrounded the defendant's vehicle. There were approximately nine police officers at the scene. Other than the four officers who came to the

defendant's vehicle, the other officers remained in or near their vehicles. The defendant was asked by one of the officers to step out of the vehicle. After getting out of the vehicle, the defendant was subjected to a "pat down" search. Then the driver of the vehicle was asked by one of the officers if he would consent to a search of the vehicle. The driver agreed.

In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968), our United States Supreme Court recognized a "narrowly drawn" exception to the probable cause requirement of the Fourth Amendment for seizures of the person that do not rise to the level of an arrest. Therefore, *Terry* defined a special category of Fourth Amendment seizures. If the "nature and extent of the detention are minimally intrusive," a seizure may be supported on less than probable cause. *United States v. Place*, 462 U.S. 696, 703, 77 L.Ed.2d 110, 118 (1983). The "critical threshold issue" of whether the seizure qualifies as a *Terry* stop or instead amounts to a defacto arrest is the "intrusiveness of the seizure." *Id.* at 722, 77 L.Ed.2d at 131 (Blackmun, J., concurring). The lower the magnitude of the intrusion, the more likely it qualifies as a *Terry* stop.

Here, the seizure of the defendant is indistinguishable from a traditional arrest, and "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway v. New York*, 442 U.S. 200, 213, 60 L.Ed.2d 824, 836 (1979). This case is unlike the typical airport stop case, wherein an officer approaches an individual and asks a few questions in a minimally intrusive manner. The Fourth Amendment requires more to justify the maximal intrusion in this case. Because the State concedes there was no probable cause to stop the defendant, the defendant's motion to suppress the evidence obtained as a result of this unlawful stop should have been allowed. *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441 (1963) (confession, as well as physical evidence obtained as a direct result of an arrest unsupported by probable cause, must be suppressed). I therefore would reverse the ruling of the trial court on the defendant's motion to suppress and grant the defendant a new trial.

STATE OF NORTH CAROLINA v. GEORGE EDWARD PATTERSON

No. 9018SC233

(Filed 18 June 1991)

1. Criminal Law §§ 501, 505 (NCI4th)— armed robbery—hung jury—inquiry into numerical division—further deliberations—no error

There was no error in an armed robbery prosecution where the court twice sent the jury back to deliberate after it indicated that it was deadlocked; the court inquired into the division, which was 11-1; defense counsel had specifically requested that the judge make such an inquiry; the judge twice told the jury that he did not want to know which way the jury was leaning; the judge gave repeated *Allen* instructions about the duty of jurors to follow their individual consciences; and, seen in their entirety, the judge's remarks to the jury were neutral and uncoercive.

Am Jur 2d, Trial §§ 884, 900, 905.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury. 77 ALR3d 769.

2. Criminal Law § 68 (NCI3d)— armed robbery—police sketches—authentication—not admissible

Police sketches of an armed robbery suspect were properly authenticated but were not admissible where the police artist authenticated the sketches by demonstrating that he had prepared them himself soon after the robbery, but the state failed to prove the accuracy of either sketch, so that the sketches did not make defendant's participation in the crime more or less probable.

Am Jur 2d, Evidence §§ 802, 803.

Admissibility in evidence of composite picture or sketch produced by police to identify offender. 42 ALR3d 1217.

3. Criminal Law § 73 (NCI3d)— police identity sketches—hearsay

There was no prejudicial error in an armed robbery prosecution from the erroneous admission of police sketches of the suspects where the relevance of the sketches was not established because the witnesses who had seen the robbers did not

testify at trial about the accuracy of the sketches; it cannot be said that a sketch based on oral assertions alone is not a statement and therefore not subject to hearsay rules, absent a state rule parallel to Federal Rule 801(d)(1); and there was no prejudice because the state had two unequivocally positive identifications of defendant from witnesses on the stand; defendant's attorney fully explored the identification testimony but did not dwell on the sketches; and no inference can be drawn from the jury's request to see the sketches and a photograph of defendant during deliberations because the jury may have considered the sketches like or unlike the photo or defendant.

Am Jur 2d, Evidence §§ 802, 803.

Admissibility in evidence of composite picture or sketch produced by police to identify offender. 42 ALR3d 1217.

4. **Criminal Law § 46.1 (NCI3d)— armed robbery—evidence of flight—competent and sufficient**

The state's evidence of police efforts to locate defendant was admissible and was sufficient to support an instruction on flight where defendant's accomplice testified that he sent word to defendant to leave the jurisdiction; the chief detective in the case interviewed family members on two occasions and periodically made checks in other locations in an attempt to locate defendant; and defendant was discovered in California 12 years after the crime. The inability to locate defendant even with the aid of family for such a long period permits the inference that defendant was avoiding apprehension.

Am Jur 2d, Trial § 788.

5. **Criminal Law § 83 (NCI4th)— reinstatement of indictment—failure of prosecutor to file notice—waived by defendant's failure to file notice before trial**

The failure of the prosecutor to file a notice of reinstatement of indictment did not void an armed robbery conviction where defendant failed to file a motion addressed to the pleading before trial as required by N.C.G.S. § 15A-952(b)(6) and (c).

Am Jur 2d, Indictments and Informations §§ 300, 301.

APPEAL by defendant from judgment entered 28 August 1989 by *Judge James J. Booker* of GUILFORD County Superior Court. Heard in the Court of Appeals 23 October 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Philip A. Telfer, for the State.

Appellate Defender Malcolm Ray Hunter, by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.

PARKER, Judge.

Defendant was indicted in 1977 for the 9 April 1977 armed robbery of a Shoney's Restaurant in Greensboro. Because the order for his arrest could not be served, the prosecutor entered a dismissal with leave of the charge against defendant on 4 October 1979. Defendant was eventually located in California, where he was arrested for the Greensboro offense in November 1988.

At trial, which began on 22 August 1989, the State's case consisted of testimony from a number of witnesses, most of whom were put on to identify defendant as the perpetrator, and about two dozen exhibits. Thomas Avant testified that he and defendant had robbed Shoney's together that day. Identification of Avant as one of the robbers by Shoney's manager, Schultz, soon after the commission of the crime led to Avant's arrest and guilty plea. Schultz identified defendant in the courtroom as the other robber and also as the robber who had hit him with a gun.

Q. Do you see any of those people here in the courtroom?

. . .

A. Yes, he's sitting at the defense counsel.

. . .

Q. Would you point out the person that you say you see here in the courtroom and describe him?

. . .

A. Mr. Patterson sitting beside of the defense counsel.

Q. How do you know that's him?

A. Because when I turned around and asked him what they wanted, he pulled out a gun and said, "This is a robbery," and I looked him eye to eye. I couldn't ever forget the face, especially after being hit over the head several times by the same person.

Q. Is there any doubt in your mind that this man is the man that pistol whipped you?

A. There is no doubt in my mind that this is the same man. It is the same man.

Another employee, Baldwin, who was also present during the robbery, testified that there were some similarities between defendant and the robber with the gun. Baldwin could not positively identify defendant as the robber; he had picked out Avant as one of the robbers in a photo lineup but had picked out the photo of someone other than defendant as possibly the robber with the weapon. Shoney's cook testified that he had not seen a gun and mentioned that a bruise under defendant's eye was similar to a mark on one of the robbers. At trial none of these eyewitnesses testified that the police had made drawings of the two robbers based on the witnesses' descriptions given soon after the crime.

A police officer who had worked with four eyewitnesses to create composite sketches of both robbers was on the stand later when the prosecution moved, over defense objection, to have those drawings admitted into evidence. The sketches were admitted and the police artist told the jury how such composites are put together. The detective who had handled the case from the time of the crime to defendant's arrest also testified as to the dates on which he had tried to locate defendant in different cities. He gave no testimony about his reasons for contacting people in those cities at various times over the years.

Defendant's counsel learned of the existence of these composite drawings during *voir dire* examination of Baldwin on the first day of trial and asked to examine the sketches at that time. The sketches were introduced into evidence on the second day of trial. On *voir dire* the police artist identified Schultz and Baldwin, who were in the courtroom, as two of the eyewitnesses who had helped with the sketches just after the robbery. Both those witnesses had already testified. On direct examination, Baldwin was not shown or asked to authenticate the sketches later presented at trial. Schultz did not mention, nor was he asked about, the sketches. The sketching officer was unable to remember who the other two eyewitnesses had been; those two eyewitnesses were never identified by the State.

At the close of the State's case, defendant moved to dismiss. Upon denial of the motion, defendant, through counsel, offered

several documents including: a transcript of Avant's 1977 plea, confessing to five armed robberies in exchange for a recommendation that all sentences run concurrently; a letter from Avant to defendant's counsel dated February 1989, stating that, contrary to Avant's prior statements to the police in 1977, defendant had not been at the crime scene in Greensboro; a notice that the State would pray judgment be entered against Avant on 21 August 1989 for the Shoney's robbery; the eight photos in the recent police photo array from which Schultz and the cook had been unable to pick out defendant; and a photo of another suspect picked out of the same photo lineup by Baldwin. Defendant did not testify.

The jury began deliberations in the late afternoon and adjourned for the night after a little more than an hour. The next morning the jury deliberated, on and off, for about two hours. Early that morning the jury asked to examine three exhibits, namely, the police sketches of the two robbers and the 8" X 10" photograph of defendant used by the police a few weeks before in the photo array. Schultz had admitted at trial that he had not been able to pick out that photograph of defendant from the photo lineup.

The jury returned to the courtroom for half an hour to review these pictures. At that time the judge explained that he would not answer a specific question the jury had asked because the court did not want to prejudice the jury for or against the defendant. Forty-five minutes later, at 11:15, the jury sent a note informing the judge that "[w]e are unable to reach a unanimous decision at this time."

Before the jury was called back to the courtroom, the judge invited comments from both the prosecutor and the defense attorney preliminary to reading to the jury a proposed instruction on failure to reach a verdict. The prosecutor asked that the jury be allowed to deliberate "for the day." Defense counsel requested that the judge ask for the numerical split, without asking which way the jury was leaning. The prosecutor then requested that the judge also read the North Carolina version of the *Allen* charge in N.C.G.S. § 15A-1235, specifically the four sub-parts in (b). Upon their return, the jury indicated to the judge that they were divided 11-1. The court gave a detailed *Allen* instruction, emphasizing five times that each juror was to abide by his conscientious conviction as to the weight or effect of the evidence. The jury resumed deliberations at 11:24.

At 11:55 the jury sent another note saying: "We are hopelessly deadlocked. It does not appear that any time or further deliberations would change the existing vote." Before calling the jury back into the courtroom, the judge once again heard from counsel. The prosecutor requested that the judge let the jury continue to deliberate as the trial had already lasted for four days and the jury had deliberated only four hours. Defendant's attorney moved for a mistrial; the motion was repeated several times during the subsequent proceedings. The prosecutor suggested that the judge just send an order to continue to the jury. The court denied the defense motion for mistrial and decided to re-call the jury.

In expressing its appreciation for the jury's work on the case, the court told the jury: "I think it would be to everyone's advantage, however, if you would continue your deliberations for sometime yet. And this is not to put pressure on anybody to make any change that their conscientious convictions require them to make." The judge then recessed for lunch, saying that "[p]erhaps a little bit of time away from the problem might be of some assistance."

After the lunch break, the judge spoke again with the lawyers in open court out of the jury's presence. Then he simply told the jury that they could "continue [their] deliberations for a while" and repeated both the *Allen* charge and an instruction about the ascertainment of truth. Fifty-five minutes later the jury returned a verdict of guilty. Defense counsel had the jury polled, and each juror expressed individual consent.

The judge denied defendant's motion that the verdict be set aside as well as the motion for judgment notwithstanding the verdict. Defendant was subsequently sentenced to life imprisonment.

On appeal, defendant contends the trial court erred by: (i) coercing a verdict when the jury was deadlocked, (ii) admitting the composite sketches and (iii) admitting irrelevant evidence on the issue of flight and instructing the jury on this issue. The defendant also argues that the entry of judgment is void because the prosecutor failed to reinstate the indictment that had been dismissed with leave in 1979.

I

Coercion of the Verdict

[1] Defendant contends that the trial court erred by inquiring into the jury split and denying defendant's motion for mistrial

when the jury was deadlocked. Defendant asserts violation of his right to a jury trial under both the United States and the North Carolina Constitutions. By failure to raise the federal constitutional issue at trial, defendant has, however, waived that argument on appeal. *State v. Bussey*, 321 N.C. 92, 95, 361 S.E.2d 564, 566 (1987). Under applicable State law, the "totality of the circumstances" is the test for determining whether the trial judge's actions have coerced a verdict thereby impinging on a defendant's right to jury trial. *Id.* at 96, 361 S.E.2d at 566-67; *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984). Unlike federal law, under North Carolina law judicial inquiry into the numerical split of the jury is not "inherently coercive." *Fowler*, 312 N.C. at 308, 322 S.E.2d at 392-93.

Defendant argues the trial judge's actions in this case were coercive under *State v. McEntire*, 71 N.C. App. 720, 323 S.E.2d 439 (1984). In *McEntire* the trial judge made two inquiries on his own initiative about the jury split. On appeal this Court observed that the wide divergence in the split on both offenses charged—9-3 and 8-4 at the first inquiry, and 10-2 and 5-7 at the second—raised the suspicion of coercion. *Id.* at 724, 323 S.E.2d at 442. In the present case by contrast, the split was 11-1; and defense counsel had specifically requested that the judge make such an inquiry. In addition, the judge twice indicated to the jury that he did not want to know which way the jury was leaning.

Nor did the judge in this case fail to signal the importance of individual conscience in voting on a verdict, unlike the judge in *McEntire*. The judge in the present case gave repeated *Allen* instructions about the duty of jurors to follow their individual consciences. In *McEntire*, this Court observed:

> [T]he better practice would have been to stress more clearly that each juror must decide for himself and not surrender his convictions for the mere purpose of returning a verdict. Indeed, the best practice would have been simply to repeat in toto the instructions [in the *Allen* charge].

Id. at 725, 323 S.E.2d at 442. The judge in this case followed "the best practice." Seen in their entirety, the judge's remarks to the jury were neutral and uncoercive. We find, therefore, that the trial judge did not abuse his discretion in sending the jury back to deliberate two times after the jury indicated it was having trouble reaching unanimity.

II

The Sketches

[2] We next turn to defendant's contention that the sketches were not properly authenticated and were inadmissible hearsay. Police or eyewitness sketches or composite pictures, if relevant and probative, are admissible, 1 *Brandis on North Carolina Evidence* § 34, at 164-66 (3d ed. 1988) (footnotes and citations omitted); but to be admissible, "[t]he exhibit must be identified as sufficiently accurate," *id.* at 165-66. "The touchstone for admissibility of all exhibits is proper authentication." *State v. Rogers*, 316 N.C. 203, 223, 341 S.E.2d 713, 725 (1986), *overruled on different ground, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Although our research discloses no North Carolina case setting forth the exact requirements for proper authentication of police sketches, the general guideline is established in N.C.G.S. § 8C-1, Rule 901(a):

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The official Commentary to Rule 901(a) of the North Carolina Rules of Evidence cautions, however, "that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain."

The special police investigator who had prepared the drawings testified that the sketches were copies of the two he had prepared from discussions with eyewitnesses to the 1977 robbery. He explained the use of facial components from an "Identi-kit" to change features in a composite "until the individual is satisfied that what we have is as close as we can get to the person that they are trying to identify." The investigator said that he recognized two of those eyewitnesses in court, Schultz and Baldwin, but did not see the other two. Defendant's counsel objected to admission of the sketches on a number of grounds. We hold that the police artist authenticated the sketches by demonstrating that he himself had prepared them soon after the 1977 robbery.

As noted, however, compliance with the facial requirements of Rule 901(a) does not mean (i) that an exhibit automatically qualifies as relevant under Rule 401 or (ii) if relevant, that it is admissible under Rule 802. While an object is ordinarily admissible when the proponent proves some relevant connection with the case, *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979), Rule 401 requires of relevant evidence that it have a "tendency to make the existence of any fact . . . of consequence . . . more probable or less probable . . . ." N.C.G.S. § 8C-1, Rule 401.

In this case the State failed to prove the accuracy of either sketch, so that the sketches did not make defendant's participation in the crime more or less probable. Hence the relevancy of the sketches is questionable. The jury heard no testimony from any of the eyewitnesses who had helped "draw" the sketch that either sketch in fact looked like the robbers. Further, the sketching officer had no personal knowledge of the suspects' appearances and could not, therefore, vouch for the accuracy of the sketched representations. Only the eyewitnesses could have testified that the sketches were accurate or inaccurate and there was no such testimony. "[A] sketch is irrelevant until there has been evidence that it was the subject of a prior identification made by a witness. . . . Thus, unless the witness testifies, the sketch remains irrelevant and therefore inadmissible." *United States v. Moskowitz*, 581 F.2d 14, 21-22 (2d Cir.), *cert. denied*, 439 U.S. 871, 58 L.Ed.2d 184 (1978).

[3] However, even if an eyewitness had testified that either sketch was a good likeness of defendant, the evidence would still not have been admissible as substantive evidence in this State. Under the North Carolina Rules of Evidence, the sketches cannot be categorized as "nonhearsay," as might be the case under Federal Rule of Evidence 801(d)(1) covering prior out-of-court identifications and other previous "statements." The Commentary to N.C.G.S. § 8C-1, Rule 801 explains that North Carolina Rule 801(d) does not parallel the federal rule because the categories of prior statements embraced in Federal Rule 801(d)(1) had long been called "hearsay" under State common law. The legislature, therefore, deleted the federal version of 801(d)(1) from the State rule altogether.

We, therefore, examine the application of the hearsay rule as written in North Carolina to police sketches of a suspect drawn on the basis of descriptions furnished by eyewitnesses to criminal activity. The threshold question is whether the sketches are

"statements" within the meaning of Rule 801(a): "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." The North Carolina Commentary to this definition of "statement" points out the seeming non-difficulty of interpretation of the first sub-part:

> It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of 'statement'.

The State quotes *Moskowitz*, for the proposition that "the sketch itself, as distinguished from [the victims'] statements about it, need not fit an exception to the rule against hearsay because it is not a 'statement' and therefore can no more be 'hearsay' than a photograph identified by a witness." *Moskowitz*, 581 F.2d at 21. Reasoning from the language in the State Commentary to Rule 801(a)(1), we view a sketch as but a silent depiction or replication of "an assertion made in words" about a suspect's corporeal appearance and thus a statement for purposes of the application of exclusionary Rule 802.

The State's reliance on *Moskowitz* is misplaced for the reason that the facts permitting that court to find that the sketches had been properly authenticated under Federal Rule 901 are substantially different from those before us. In *Moskowitz* two eyewitnesses to a robbery described the suspect to a police artist the next day. At trial both witnesses testified that they had previously said the sketch looked like the robber. The appellate court scrutinized the defendant's argument that a sketch, if it is a statement, is a statement of the police artist himself, who must testify and expose himself to cross-examination in order to meet the requirements of Federal Rule 801(d)(1)(C), which would place the sketch in the federal category of "nonhearsay." The Court held that the sketch was not a statement; hence its admissibility was governed solely by the authentication requirements of Rule 901 and the sketch was admissible because "[b]oth witnesses testified at trial and were subject to cross-examination" and "[t]he sketch was authenticated by extensive testimony that the sketch introduced at trial was the same sketch identified by the witnesses." *Id.*

In a concurring opinion in *Moskowitz*, Judge Friendly observed that "a more straightforward analysis [would be] to regard the sketch as an integral part of [the witness'] statements to the police artist which enabled him to draw it, making the sketch admissible

under 801(d)(1)(C)." *Id.* at 22. By implication then the concurring judge considers the sketches to be statements covered by Federal Rule 801(d)(1)(C), which but for the federal nonhearsay category would run afoul of the hearsay rule and would require the declarant of the prior identification to be present at trial for purposes of cross-examination. That interpretation is echoed in treatises commenting on the federal rule that established the nonhearsay category for prior identifications. "Rule 801(d)(1)(C) reaches . . . an identification made from a sketch, laying the groundwork for receipt of the sketch itself." 4 D. Louisell & C. Mueller, *Federal Evidence* § 421, at 206-207 (1980) (footnote omitted). "Rule 801(d)(1)(C) should . . . be interpreted as allowing evidence of prior identification by the witness of a photograph or sketch of the person he had initially perceived." 4 *Weinstein's Evidence* 801-221 (1990).

In the present case, absent any State rule parallel to the Federal Rule 801(d)(1) "escape hatch" from the hearsay rule for prior statements and prior identifications, this Court cannot say that a sketch based on oral assertions, and on oral assertions alone, is not a "statement" and, therefore, not subject to the hearsay rules, as a preliminary matter. In that sense, the composites here are not analogous to photographs because the sketches are not necessarily an "accurate" representation of what they in fact purport to show.

Under either a relevance analysis or a hearsay analysis, the sketches in this case were inadmissible. The relevance of the sketches was not established because the witnesses who had seen the robbers did not testify at trial about the accuracy of the police composites. As "statements," Rule 802 of the North Carolina Rules of Evidence requires their exclusion if offered as substantive evidence, because they do not come within a hearsay exception.

> [T]he basic North Carolina rule continues to classify prior statements of a witness [as] hearsay, thus not admitting them as substantive evidence, but freely allowing them to be received as corroboration or impeachment.

1 *Brandis on North Carolina Evidence* § 139, at 641 n.18 (3d ed. 1988); *see also id.* §§ 40, 46, 51 & 141. We hold, therefore, that admission of the sketches was error in this case.

We come, then, to the question of possible prejudice to the defendant. Under N.C.G.S. § 15A-1443(a) a defendant must demon-

strate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. James*, 321 N.C. 676, 683, 365 S.E.2d 579, 583 (1988) (no prejudice where sketch of crime scene used by witness on the stand had been prepared by another State witness); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981) (test is whether there is a reasonable possibility that the evidence in question contributed to the conviction).

Defendant argues the probable weight accorded the sketches by the jury, as against the allegedly less convincing identifications at trial. But in this case, the State had two unequivocally positive identifications of defendant from witnesses on the stand, the accomplice and Schultz, the manager who had been pistol whipped during the robbery. Schultz explained to the jury that the restaurant used artificial lighting twenty-four hours a day, so that his view of the robbers was excellent. He estimated that he was held and threatened at arm's length for an "eternity" lasting approximately ten or fifteen minutes. Among the factors to be considered by the court in determining the admissibility of an in-court identification and hence by the jury in weighing the credibility of that identification are the opportunity of the witness to view the suspect at the time of the crime, the witness' degree of attention and the level of certainty demonstrated by the witness at the courtroom confrontation. *See State v. Wilson*, 313 N.C. 516, 529, 330 S.E.2d 450, 460 (1985); *State v. McLean*, 83 N.C. App. 397, 402, 350 S.E.2d 171, 174 (1986). Although Schultz had failed to pick out defendant from a photo lineup two weeks before trial, his testimony revealed that he had excellent opportunity and reason for remembering defendant's appearance. His in-court identification was definite and emphatic. Further, Baldwin and the Shoney's cook both thought that there was some similarity between defendant and one of the robbers.

In closing argument at trial, defendant's attorney fully explored (i) the credibility or lack thereof of the identification testimony in general and the trial identification testimony in particular, (ii) the problems of cross-racial identification and (iii) the failure of eyewitness memory. Using a sketch tablet, defense counsel highlighted for the jury inconsistencies in details as to color of clothing, complexion and facial marks. Defense counsel also emphasized that Avant's testimony seemed calculated to explain away these many inconsistencies, particularly Avant's revision in court

of discrepant details between the testimony of other trial witnesses and his own 1977 talks with the police about defendant's alleged involvement in the robbery. Defense counsel did not, however, dwell on either the two sketches or the 8″ X 10″ photograph of defendant introduced at trial, except to say that "the witnesses didn't talk to us about the composite," "[w]e've just got this composite that was the product of somebody's statements to the officers," and "these photo lineups are shown to the State's witnesses and they can't identify [defendant]."

During deliberations the jury asked to review the drawings and the photo of defendant. We can draw no inference, however, from the jury's request. The jury may have considered the sketch like or unlike the photo or the live appearance of defendant at trial. Either way, from the evidence before them, particularly the two positive in-court identifications, the jury could have convicted defendant. On this record we hold admission of the sketches was not prejudicial error.

III

Other Issues

[4] Defendant's contentions concerning the admissibility of the evidence showing police efforts to locate defendant and the insufficiency of trial evidence to support a jury instruction on flight are without merit. Defendant argues that the detective's testimony was not relevant; but in light of other testimony, the testimony was relevant to show flight. Defendant's self-described accomplice testified that he had sent word to defendant to leave the jurisdiction. The chief detective in the case interviewed family members on at least two different occasions in an attempt to locate defendant. The detective also testified that he periodically made checks in other locations, attempting to determine defendant's whereabouts and culminating with the discovery of defendant in California twelve years after the crime. The inability to locate defendant even with the aid of family members for such a long period of time permits the inference that defendant was avoiding apprehension. This evidence is also sufficient under *State v. Lampkins*, 283 N.C. 520, 522, 196 S.E.2d 697, 698 (1973), to support an instruction on flight.

[5] Finally as to defendant's contention related to the indictment, the failure of the prosecutor to file a notice of reinstatement of the indictment under N.C.G.S. § 15A-932(d) does not void the judg-

ment in this case because an indictment is a pleading. N.C.G.S. § 15A-921(7). Defendant failed to file a motion addressed to the pleading before trial, as required by N.C.G.S. §§ 15A-952(b)(6) and (c). Not having objected at that time, defendant cannot now obtain relief on that basis.

No error.

Judges JOHNSON and EAGLES concur.

CHARLES RUNYON, MARY ROBBINS RUNYON, AND PATSY SIMPSON WILLIAMS, PLAINTIFFS v. WARREN D. PALEY, CLAIRE PALEY, AND MIDGETT REALTY, INC., D/B/A MIDGETT REALTY, DEFENDANTS

No. 902SC757

(Filed 18 June 1991)

Deeds § 64 (NCI4th)— restrictive covenant—personal—action to enforce—dismissed

The trial court properly granted defendants' motion to dismiss plaintiffs' action to enforce a restrictive covenant, whether the order was pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) or was intended as a partial summary judgment, where Ruth Gaskins conveyed the land in question to Doward and Jacquelyn Brugh in 1960; the deed contained restrictive covenants which were not created by a common scheme of development; Ms. Gaskins retained property across a paved road which is now owned by her daughter, plaintiff Williams; Ms. Gaskins died in August, 1961; and plaintiffs brought this action to enforce the covenants upon learning that the current owners intended to place condominium units on the land. The restrictions on the land are deemed real only if the clear intention of the parties, as gleaned from the instrument creating the restrictions, was that the restrictions remain applicable to successors in title. The deed in this case contains a recital that the restrictions run with the land being conveyed and that they are consented to by the Brughs, but neither the deed nor any other recorded document states that the restrictions benefit Ms. Gaskins' successors or that they bind the Brughs' successors.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 186, 214, 288, 304.

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiffs from Order entered 22 May 1990 by *Judge J. Herbert Small* in HYDE County Superior Court. Heard in the Court of Appeals 25 January 1991.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker and John J. Butler, for plaintiff appellants.

Young, Moore, Henderson & Alvis, P.A., by John N. Fountain, Henry S. Manning, Jr., Terryn D. Owens, and R. Christopher Dillon, for defendant appellees.

COZORT, Judge.

Plaintiffs sued to enforce a restrictive covenant in an effort to prevent development of a tract of land by defendants. The trial court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted. We affirm, finding that plaintiffs are not entitled to enforce the covenant in question.

The case below involves a tract of land on Ocracoke Island known as the "Gaskins lot." That lot is bounded to the east by Pamlico Sound and to the west by a paved road now designated as State Road 1328. By deed dated 9 January 1960, Ruth Bragg Gaskins conveyed the lot to Doward H. and Jacquelyn O. Brugh. The land conveyed was

> subject to certain restrictions as to the use thereof, running with said land by whomsoever owned, until removed as herein set out; said restrictions, which are expressly assented to by the parties of the second part, in accepting this deed, are as follows:
>
> (1) Said lot shall be used for residential purposes and not for business, manufacturing, commercial or apartment house purposes; provided however, this restriction shall not apply to churches or to the office of a professional man which is located in his residence, and
>
> (2) Not more than two residences and such outbuildings as are appurtenant thereto, shall be erected or allowed to remain on said lot. This restriction shall be in full force and effect

> until such time as adjacent or nearby properties are turned to commercial use, in which case the restrictions herein set out will no longer apply. The word "nearby" shall, for all intents and purposes, be construed to mean within 450 feet thereof.

Across the paved road from the lot conveyed, Ruth Gaskins retained property which is now owned by her daughter, plaintiff Patsy Williams. Mrs. Gaskins died in August 1961. Some time after her death, by mesne conveyances from the Brughs, defendant Warren D. Paley acquired the Gaskins lot.

Upon receiving information that Warren Paley and his wife Claire had entered into a partnership with Midgett Realty to place condominium units on the Gaskins lot, Charles and Mary Runyon, Patsy Williams, Ursula Jones, and Caroline Jones brought suit, alleging that

> Ruth Bragg Gaskins placed [the] restrictive covenants [quoted above] on the Gaskins lot for the benefit of her property and neighboring property owners, specifically including and intending to benefit the Runyons.
>
> These restrictive covenants have not been removed and are enforceable by plaintiffs.

Defendants moved to dismiss the lawsuit pursuant to Rule 12 of the North Carolina Rules of Civil Procedure; plaintiffs Ursula Jones and Caroline Jones took a voluntary dismissal pursuant to Rule 41; and the remaining plaintiffs moved for summary judgment pursuant to Rule 56. Both motions were scheduled for a hearing on 7 May 1990, and after that hearing the trial court entered an order captioned "Order of Dismissal" which decreed that

> (1) Plaintiffs' First Claim for Relief contained in their Complaint be and it is hereby dismissed.
>
> (2) Pursuant to G.S. 1A-1 Rule 54(b) the Court enters final judgment as to Plaintiffs' First Claim for Relief, being fewer than all the claims, and finds there is no just reason for delay in any appeal of this matter.

On appeal the plaintiffs contend that the trial court erred in dismissing their first claim for relief. They maintain that the Runyons, "as specifically intended beneficiaries of the restrictive covenants in question, are entitled to enforce those covenants." We disagree.

The plaintiffs concede that the covenants at issue were not created by a common scheme of development. Therefore, the intention of the original parties to the covenant governs, "and their intention must be gathered from study and consideration of *all* the covenants in the instrument or instruments creating the restrictions." J. Webster, *Real Estate Law in North Carolina* § 388 (3d ed. 1988) (emphasis in original). The parties' "intention may not be established by parol. Neither the testimony nor the declarations of a party is competent to prove intent." *Stegall v. Housing Authority*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971).

Although the Runyons are not named as beneficiaries of the restrictions in the deed of 9 January 1960 which conveyed the Gaskins lot to the Brughs (defendant Warren Paley's predecessor in title), the Runyons assert that they are entitled to enforce the covenants. They cite *Lamica v. Gerdes*, 270 N.C. 85, 90, 153 S.E.2d 814, 818 (1967), in support of the proposition "that a neighboring property owner who was an intended beneficiary of a restrictive covenant may enforce that covenant." Plaintiffs' reliance on *Lamica* is misplaced.

In *Lamica* the lot at issue was located within a subdivision. The developer first conveyed the lot in question subject to the same restrictions (including use for residential purpose) that applied to other lots in the subdivision. With those restrictions the lot was conveyed back to the developer. The developer then purported to convey the lot without restrictions, and members of the subdivision brought suit to enjoin the purchaser from constructing a dental-medical building on the lot. Unlike the restrictions in the case below, those in *Lamica* expressly empowered "any other person or person(s) owning any real property situate in said development or subdivision to prosecute any proceeding in law or equity against the person or persons attempting to violate any such covenant." *Lamica*, 270 N.C. at 90, 153 S.E.2d at 818. In holding for the plaintiffs the Court emphasized that their right to enforce the restrictions was "based upon express covenants appearing in defendant's recorded chain of title which specifically grant to the plaintiffs the right to enforce the restrictions." *Id.* at 91, 153 S.E.2d at 818; *accord Club, Inc. v. Lawrence*, 29 N.C. App. 547, 553, 225 S.E.2d 167, 170 (1976). In this case, nothing that appears of record makes the Runyons third-party beneficiaries of restrictions placed by Ruth Gaskins on the lot she conveyed to defendant Warren Paley's

predecessors in title. Accordingly, the Runyons are not entitled to enforce the restrictions placed on the Gaskins lot in January 1960.

As for Patsy Williams, the plaintiffs contend that, as current owner of part of the dominant estate, she is entitled to enforce the restrictive covenants in the deed of January 1960. Again, we must disagree.

The plaintiffs are correct, of course, that real covenants are enforceable not only between the original parties but also by subsequent owners "by mesne conveyances even though their deeds contain no reference to the restrictions." *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 227, 235, 172 S.E.2d 237, 242 (1970). The question presented, however, is whether the restrictions which plaintiff Williams seeks to enforce are real or personal.

We note initially that in North Carolina, despite the criticism of some commentators, restrictions on land are strictly construed against limitations on use. *See* J. Webster, *supra*, § 388. " 'Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, *or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply.*' " *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967) (emphasis added). A real covenant has three essential requirements: "(1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E.2d 904, 908 (1978). The recital in a recorded document that a covenant is to run with the land

> is not controlling. The express intent of the parties can prohibit a covenant from running with the land, but it cannot make a personal covenant run with the land. . . . Ordinarily, restrictions in a deed are regarded as for the personal benefit of the grantor. The party claiming the benefits of the restrictions has the burden of showing they are covenants running with the land. These principles apply with especial force to persons who . . . are not parties to the instrument containing the restrictions.

Id. at 669, 248 S.E.2d at 908.

In the case below, the deed from Mrs. Gaskins to the Brughs contains a recital that the restrictions run with the land being conveyed and that they are "expressly assented to by" the Brughs (see above). However, neither the deed nor any other recorded document states that the restrictions benefit Mrs. Gaskins' successors or that they bind the Brughs' successors.

Plaintiffs note that "in *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 227, 172 S.E.2d 237 (1970), this Court enforced a restrictive covenant between subsequent purchasers, in the absence of a subdivision, because the original parties intended the covenant to run with the land." Plaintiffs fail to note, however, that in *Quadro Stations* the restrictions at issue were expressly binding on the successors of the original parties:

> The agreement provides that "SATTERFIELD, for itself, its successors and assigns, hereby covenants and agrees with SIBARCO, its successors and assigns, that . . . said lands shall and will not be used or permitted to be used, directly or indirectly, for the sale or advertising of any petroleum product, . . ." This language clearly evidences an intention on the part of the parties to impose on the land in question a negative easement rather than to enter an agreement personal between themselves.

Id. at 235, 172 S.E.2d at 242.

The lot in question in the case below was not part of a general scheme of development. The restrictions on it are deemed real only if the clear intention of the parties, as gleaned from the instrument creating the restrictions, was that the restrictions remain applicable to successors in title. No such intention appears from the instrument. Therefore, we hold that the restrictive covenants in the deed of 9 January 1960 were personal to Ruth Gaskins. They ceased to be enforceable upon her death. To hold otherwise in the absence of recorded notice of the continuing enforceability of the restrictions would tend to undermine our system of registration on which subsequent purchasers must rely.

We note finally that the transcript of the hearing before the trial court does not clearly indicate the extent to which matters outside the pleadings were considered by the trial court. The court's order of 22 May 1990 dismissed the plaintiffs' first claim for relief

pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). Rule 12(b) provides in part as follows:

> If, on a motion asserting the defense numbered (6), 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 . . . .

The trial court's dismissal of the plaintiffs' first claim was proper pursuant to Rule 12(b)(6). Regardless of its label, if the order was intended as partial summary judgment, we note that the order would be proper pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (1990). The plaintiffs have suffered no prejudice based on the caption attached to the order.

The trial court's Order of 22 May 1990 is

Affirmed.

Judge PARKER concurs.

Judge GREENE concurs in part and dissents in part by separate opinion.

Judge GREENE concurring in part and dissenting in part.

The three elements required for a covenant to run at law are that: (1) the original covenanting parties intended the benefits and the burdens of the covenant to pass to the successors in interest of the original covenanting parties; (2) the act covenanted to be done or omitted, touches and concerns the land or estate conveyed; and (3) there is privity of estate between the owner of the burdened property and the party seeking to enforce the covenant. *See Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669-70, 248 S.E.2d 904, 908 (1978); *see also* 5 R. Powell, Powell on Real Property § 673[2], 60-46—60-82 (1991); *Orange & Rockland Utilities v. Philwold Estates, Inc.*, 418 N.E.2d 1310, 1313-14 (N.Y. 1981). Applying these principles, I agree with the majority that Charles Runyon and Mary Robbins Runyon (Runyons) are not entitled to enforce the covenant. However, contrary to the majority, I believe that Patsy Simpson Williams (Williams) is entitled to enforce the covenant.

Intent: The intent of the covenanting parties must be found in the language of the documents creating the covenant and from other "instruments of record." *Raintree* at 669, 248 S.E.2d at 908 (intent of the parties must "be determined from the instruments of record"); *see also* Powell at § 673[2], 60-58; 20 Am.Jur. 2d, Covenants, Conditions, and Restrictions § 292, 856 (intent "must be ascertained through the language of the writing, construed in connection with the circumstances existing at the time it was executed").

The covenant itself is unambiguous in declaring that the burden of the restriction runs with the land. Specifically, the covenant provides that the land conveyed is "subject to certain restrictions as to the use thereof, running with said land by whomsoever owned, until removed as herein set out; said restrictions, which are expressly assented to by the parties of the second part . . . ."

On the question of whether the benefit of the covenant passes to the covenantee's successors, the document is silent. However, where other "instruments of record" reveal that the covenantee retained land contiguous to the conveyed land, and the retained land is manifestly benefited by the covenant, it is presumed that the parties intended for the benefits to pass to the successors of the original covenantee. *See Stegall v. Housing*, 278 N.C. 95, 102, 178 S.E.2d 824, 829 (1971) (heirs of original covenantee could enforce covenants placed on other land if they "have [not] parted with all interest in any land benefited by the covenant"); *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942) ("grantor or its successor [who] still owns a part of the original tract" entitled to enforce "the restriction limiting the use of the portion sold"); *see also* 52 Wash. L. Rev., Running Covenants: An Analytical Primer, 861, 896 (1977) ("Courts routinely infer that the benefit attaches to and runs with . . . [the covenantee's] adjacent land").

> Thus, if A, the owner of a house with a vacant lot adjoining, were to sell the lot to B, securing at the same time from B a promise that he would not build within a certain distance of the line between the lot sold and that upon which the house stands, it would be a reasonable inference that the benefit of the promise was intended to run with the house lot.

American Law Institute Restatement of the Law of Property § 544, comment c (1944); *see also* 2 American Law of Property § 9.29, at 416 (1952) ("the courts have realized the social desirability of . . . [restrictive covenants] and have been extremely liberal in finding from the facts an intent to create a benefit appurtenant"); Powell at § 673[2] at 60-62 ("the retention of adjacent land by a grantor-covenantee" and the "benefiting of retained land as a result of the agreement" are factors "strongly favoring the running of the benefit").

Here, the instruments of record indicate that the covenantee retained adjacent property which was located directly across the street from the conveyed property. Furthermore, "the retained land is manifestly benefited by the covenant" in that the covenantee has some control over the nature and character of the neighborhood in which the covenantee's own land is situated. Thus, the parties to the original agreement are presumed to have intended for the covenant to run with the land, and there is no evidence in this record to rebut that presumption.

Touches the Land: This Court has previously noted that it is impossible to establish an absolute rule for determining whether a covenant touches and concerns the land, and that "[t]he question is one for the court to determine in the exercise of its best judgment upon the facts of each case.[ ]" *Raintree* at 670, 248 S.E.2d at 908. In the absence of an absolute rule, the following practical approach is helpful:

> Though some decisions seem to show a different tendency there would seem to be no reason for applying the rule of touching and concerning in an overtechnical manner, which is unreal from the standpoint of the parties themselves. Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor . . . [as landowner], the requirement should be held fulfilled.

C. Clark, *Covenants and Interests Running With Land*, p. 99 (1947).

The present case presents a restriction which provides that the land in question may not be used "for business, manufacturing, commercial or apartment house purposes," and that "[n]ot more than two residences and such outbuildings as are appurtenant thereto, shall be erected or allowed to remain on said lot." By

limiting the use of this land, the covenantee, or promisee, is aided as a landowner. As previously stated, the covenant gives the covenantee some control over the nature and character of the neighborhood in which the covenantee's own land is situated. The covenantor, or promisor, is simultaneously hampered as a landowner in that his permitted use of the property is limited to residential, and to no more than two residential structures. Thus, the covenant touches and concerns the land.

Privity: There are at least

> three kinds of privity of estate that have been mentioned by the courts—mutual privity, requiring that the original parties have had a mutual and continuing interest in the same land; horizontal privity, requiring that the covenant be made in connection with the conveyance of an estate in fee from one of the parties to the other; and vertical privity, requiring only that "the person presently claiming the benefit, or being subjected to the burden, is a successor to the estate of the original person so benefited or burdened."

Gallagher v. Bell, 516 A.2d 1028, 1037 (Md. App. 1986), *cert. denied*, 519 A.2d 1283 (1987); *see generally* Powell at § 673[2][c], 60-65—60-76. However, vertical privity, which minimizes the privity requirement, appears consistent with North Carolina law, *see Herring v. Wallace Lumber Co.*, 163 N.C. 481, 79 S.E. 876 (1913) (covenantee entitled to enforce against successor of original covenantor, covenant in timber deed), and with sound public policy. Powell at § 673[2], 60-76 ("the running of covenants generally [can serve] socially useful ends by aiding rather than hindering the alienability of land"). This also appears to be consistent with the modern view. *Id.* Indeed, "[f]ocusing on the precise relationship of the original contracting parties can create artificial results, causing covenants to be regarded as personal . . . when the covenant touches and concerns the land and the parties clearly intended for it to run with the land. The 'vertical' privity concept avoids that problem and focuses instead on the devolutional relationships . . . ." *Gallagher* at 1037; *see* 41 A.L.R. 3d Covenant in Deed Restricting Material to be Used in Building Construction, 1290, 1295 (where retained property benefited by the covenant "any person into whose hands such property passes may ordinarily enforce the restriction").

Here, Williams, the person claiming the benefit, and the defendants, the persons being subjected to the burden, are successors

to the original covenanting parties and therefore meet the privity of estate requirements.

In any event, privity of estate is not required for covenants to run in equity. Powell at § 673[1], 60-44. Covenants that run in equity are generally referred to as "equitable restrictions." *Id.* at 60-42. "For covenants to run in equity, courts require that: (1) the covenant 'touch and concern' the land; (2) the original covenanting parties intend the covenant to run; and (3) the successor to the burden have 'notice' of the covenant." *Id.* at 60-44. North Carolina appears to allow enforcement of covenants in equity. *See Northfleet v. Cromwell*, 70 N.C. 633, 641 (1874) ("the covenant will be enforced in equity against an assignee of the covenantor, with notice . . . "). Here, there is no question that Warren D. and Claire Paley, as successors to the burden, had record notice of the restrictions.

Therefore, at law and at equity, the dismissal of Williams' claim was error.

RUNYONS

The Runyons obtained their property from Mrs. Gaskins in 1954 and there were no restrictive covenants placed in that deed. Furthermore, the Runyons were not named as beneficiaries in the instrument creating the covenants which were placed on the properties conveyed by Mrs. Gaskins to the Brughs nor was the Runyon property and the Brugh property part of a general plan of development. Therefore, there exists no intent, express or inferred, that the Runyons were to benefit from the covenants on the Brugh property. Therefore, the Runyons were not entitled to seek enforcement of the covenant and dismissal of their claim was not error.

SARA C. BONESTELL AND HUSBAND, SHERMAN BONESTELL, PLAINTIFFS v. NORTH TOPSAIL SHORES CONDOMINIUMS, INC.; NATIONWIDE HOMES, INC.; BOBBY DIXON, INDIVIDUALLY; TOPSAIL REEF HOMEOWNER'S ASSOCIATION, INC., DEFENDANTS

No. 904SC870

(Filed 18 June 1991)

1. Limitation of Actions § 4.2 (NCI3d)— beach condominium— negligent construction—statute of limitations—pleading

Summary judgment was properly granted for defendant Nationwide on the moisture claim of a negligent construction action where plaintiffs' affidavits indicated their contract to purchase the condominium was dated 8 November 1980; they notified the developer of the moisture problems within the first year; their action was instituted in 1986; and Nationwide gave plaintiffs adequate notice of its limitations defense, even though it failed to plead N.C.G.S. § 1-52(16) by precise number and subsection. Nationwide's express pleading of N.C.G.S. § 1-50 as an affirmative defense, along with its reference to a three-year statute of limitations, was sufficient to put the court and parties on notice that the timing of the lawsuit was an issue.

Am Jur 2d, Limitation of Actions §§ 85, 454, 457.

2. Limitation of Actions § 12.4 (NCI3d)— beach condominium— negligent construction—statute of repose—relation back

The trial court properly granted summary judgment for defendant Nationwide on a firestop claim in an action for negligent construction of condominiums where plaintiffs filed their original action in 1986 based exclusively on moisture and weather damage; they learned for the first time on 2 May 1988 in a letter from the homeowner's association that firestops had not been installed between the units in their building and the adjacent building, creating a significant fire hazard; plaintiffs moved on 25 July 1988 to amend their complaint to allege Nationwide's failure to install firestops; the court allowed the amendment; plaintiffs did not otherwise amend or alter the complaint, including the prayer for damages; Nationwide filed a motion for summary judgment on 23 May 1990, attaching an affidavit that plaintiffs' building was completed on 20 October 1980; that fact is not controverted; and

plaintiffs filed affidavits on 14 June 1990 asserting lost rentals due to leaks and adverse publicity concerning the missing firestops. N.C.G.S. § 1-50(5) is a statute of repose and provides an outside limit of six years after the performance of construction services. Plaintiffs' 1988 amendment does not relate back to the 1986 complaint, which fell just within the six-year period, because plaintiffs did not provide Nationwide with sufficient notice in the original complaint to support relation back of their claim for lost profits.

Am Jur 2d, Limitation of Actions §§ 16, 85, 217.

3. **Damages § 173 (NCI4th)— negligent construction—lost rentals—statute of repose—no relation back**

Plaintiffs were not entitled to lost rentals from a beach condominium on their negligent construction claim where it was not controverted that the building was completed in 1980; plaintiffs filed a complaint in 1986 alleging that negligent construction of common areas resulted in moisture problems; plaintiffs learned in 1988 that firestops had not been installed, resulting in a significant fire safety hazard; plaintiffs amended their complaint in 1988 to allege the failure to install firestops, but did not amend their prayer for damages; and plaintiffs filed affidavits in 1990 in response to defendant's summary judgment motion alleging lost rentals due to adverse publicity concerning the firestops. Even if the firestop claim related back, lost profits are special damages which must be specifically averred; plaintiffs do not fall within any of the exceptions of N.C.G.S. § 1-50(5), which provides a six-year statute of repose.

Am Jur 2d, Damages §§ 626, 637, 827, 832, 834, 874.

APPEAL by plaintiffs from judgment entered 25 June 1990 by *Judge James H. Pou Bailey* in ONSLOW County Superior Court. Heard in the Court of Appeals 19 February 1991.

Hargett & Hargett, by Robert T. Hargett, for plaintiff-appellants.

Hunton & Williams, by Julius A. Rousseau, III, for defendant-appellee Nationwide Homes, Inc.

PARKER, Judge.

Plaintiffs, owners of an allegedly defective beach condominium unit used for business rental purposes, instituted this civil action in 1986 against a number of defendants: North Topsail Shores Condominiums, Inc., the developer-general contractor for their condominium complex, known as Topsail Reef; Nationwide Homes ("Nationwide"), the builder of the Reef's modular units and construction loan provider; Dixon, president and project manager for the corporate developer and also a member of the board of directors of the homeowner's association; and Topsail Reef Homeowner's Association, Inc. ("homeowner's association"), which acquired management rights and supervisory duties for Topsail Reef from the developer. Nationwide, the only party defendant involved in this appeal, was granted summary judgment on both of plaintiffs' negligent construction claims.

The allegations against Nationwide are found (i) in plaintiff's original complaint, filed 25 September 1986, alleging improper ventilation resulting in moisture retention and causing "extensive staining, cracking and mildewing on the interior walls [and] weather damage to the carpet" owing to Nationwide's allegedly negligent construction and assembly of plaintiffs' modular unit, and (ii) in a paragraph added by an amendment to the complaint, alleging Nationwide's failure to install firestops as required by the State Building Code, causing a fire safety hazard.

Nationwide's answer specifically denied negligent construction of plaintiffs' unit. As its primary defense Nationwide asserted both the six-year statute of repose, N.C.G.S. § 1-50(5), for actions involving improvements to real estate, and the three-year limitations period for defective conditions that are or should have been apparent within three years of construction, though Nationwide did not expressly refer to N.C.G.S. § 1-52(16), the applicable limitations statute. As a further defense Nationwide alleged that a different subcontractor was "responsible for the construction of the roof [and] any other structure which would permit water to enter or accumulate as alleged in the Complaint."

Initially, we take judicial notice that Judge Bailey was assigned by special designation of the Chief Justice to preside over this action and two other civil actions arising out of alleged construction defects at Topsail Reef. In one of these actions, brought by the homeowner's association against the corporate developer and its

alleged agents/alter egos, Judge Bailey found as fact that remedying the lack of firestopping at Topsail Reef would cost between $81,000.00 and $94,000.00 and that Dixon was aware, no later than December 1980, "of the substantial deficiencies in the firestopping" at Topsail Reef, communicated with Nationwide about those deficiencies, but failed to inform the association of the lack of firestopping, failed to remedy those defects himself and likewise failed to have the defects remedied. The judgment entered 27 February 1990 awarded the homeowner's association $160,000.00 in compensatory damages, with interest, and $200,000.00 in punitive damages, all against Dixon, whose own company served as co-developer and general contractor for Topsail Reef. After Dixon filed for bankruptcy in August 1990, the court stayed the damage award. In the homeowner's association action, Judge Bailey also granted Nationwide summary judgment on the basis that the action was barred by the statutes of limitations and repose.

The other civil action by the individual owners of a different unit is the subject of a separate appeal decided simultaneously with this appeal. *McTague v. North Topsail Shores Condominiums*, 103 N.C. App. 229, 404 S.E.2d 893 (1991).

On appeal plaintiffs argue that their claims are not barred by either the statute of limitations, N.C.G.S. § 1-52, or the statute of repose, N.C.G.S. § 1-50. Although summary judgment is not ordinarily appropriate in negligence cases, *Vassey v. Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980), the existence as a matter of law of a complete defense to a plaintiff's negligence claim permits the entry of summary judgment in defendant's favor. *Id.* at 72, 269 S.E.2d at 140; *see also Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981) (defendant entitled to summary judgment if plaintiff cannot surmount an affirmative defense barring the claim). We find that Nationwide has an unsurmountable defense to each of plaintiffs' claims.

I.

[1] Plaintiffs' moisture claim requires us to resolve two issues of law: (i) whether this claim is barred by the applicable statute of limitations and (ii) whether Nationwide effectively pleaded the limitations defense.

By their own admissions, plaintiffs' cause of action for the alleged moisture problems accrued no later than 1981. Plaintiffs'

affidavits indicate their contract to purchase the condominium was dated 8 November 1980. Plaintiffs' complaint states that they notified the developer of these moisture "problems within the very first year of ownership orally and in writing, as well as many other times within the past five years [before their 1986 action]." Plaintiffs have thus admitted their awareness of the alleged moisture problems at a time no later than 1981.

> A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings.

Davis v. Rigsby, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964).

The applicable statute of limitations is, therefore, N.C.G.S. § 1-52(16), requiring suit within three years of claimants' knowledge of physical damage to claimants' property. Under this statute, a cause of action accrues as soon as "physical damage to [the] property becomes apparent or ought reasonably to have become apparent . . ., whichever event first occurs." N.C.G.S. § 1-52(16) (1983). Plaintiffs' actual awareness of property damage started the running of the statute of limitations in this case.

For this reason, plaintiffs' 1986 lawsuit against Nationwide for moisture problems is procedurally barred unless we find that Nationwide did not properly assert its defense. *See, e.g., Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493-94, 329 S.E.2d 350, 354-55 (1985), *aff'g*, 69 N.C. App. 505, 317 S.E.2d 41 (1984) (imposing time bar where plaintiff first complained of water problems eight years before filing suit and repeatedly complained of many leaks four years before suit); *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 356-58, 301 S.E.2d 459, 465-67, *disc. rev. denied*, 309 N.C. 319, 306 S.E.2d 791 (1983) (upholding summary judgment for defendant where plaintiffs knew of defects in glass panels more than three years before instituting suit).

We hold that Nationwide gave plaintiffs adequate notice of its limitations defense. Because Nationwide did not "surprise" plaintiffs with the limitations defense at the summary judgment hearing, Nationwide's failure to plead N.C.G.S. § 1-52(16) by precise number and subsection is not fatal under N.C.G.S. § 1A-1, Rule 8(c). Rule 8(c) requires that a statute of limitations defense be set forth affirm-

atively. Rule 8(c) also adopts the "notice" approach to pleadings, used throughout the Rules of Civil Procedure. "[An answer] shall contain a short and plain statement of any matter constituting an . . . affirmative defense sufficiently particular to give the court and the parties notice of the transactions . . . intended to be proved." N.C.G.S. § 1A-1, Rule 8(c) (1983). Nationwide's express pleading of N.C.G.S. § 1-50 as an affirmative defense, along with Nationwide's reference to a three-year statute of limitations, was sufficient to put the court and parties on notice that the timing of the lawsuit was an issue.

We hold, therefore, that the trial court properly granted summary judgment on the moisture claim.

II.

[2] We turn next to the firestop claim. After plaintiffs filed their action based exclusively on moisture and weather damage, they learned for the first time, by letter dated 2 May 1988 from the homeowner's association, that firestops had not been installed between the units in their building and in the adjacent building, creating "a significant fire safety hazard to the occupants of these buildings." On 25 July 1988 plaintiffs moved to amend their complaint to allege Nationwide's failure to install firestops. The court allowed the amendment on 17 August 1988. Plaintiffs did not otherwise amend or alter the original complaint relating to moisture damage and containing prayers only for general compensatory damages in the amount of $20,000.00 and punitive damages in the amount of $25,000.00.

Nationwide filed for summary judgment on 23 May 1990 and attached two sworn affidavits to its motion. The affidavit of Nationwide's current senior vice-president states that the building in which plaintiffs' unit is located "was substantially and finally completed prior to October 20, 1980." This fact is not controverted. On 14 June 1990, some three weeks after Nationwide filed its motion for summary judgment, plaintiffs submitted affidavits asserting that "as a direct result of the leaks and adverse publicity regarding the buildings [sic] safety due to the lack of firestops, we suffered a loss of rentals" in the amount of $10,700.00.

We consider: (i) whether plaintiffs' claim for lost rental profits allegedly stemming from publicity about the lack of firestopping would be barred by the six-year statute of repose in N.C.G.S.

§ 1-50(5), absent preservation of the claim under some special rule, and (ii) whether the firestop claim for lost profits can be revived under the doctrine of relation back, despite the filing of the amended complaint more than seven and one-half years after plaintiffs purchased their condominium.

The six-year statute provides:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C.G.S. § 1-50(5)a (1983), *construed in Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983). A special provision for latent defects in N.C.G.S. § 1-50(5) states explicitly that its limited discovery rule falls within the outside restriction of the six-year period.

> This subdivision prescribes an outside limitation of six years from the later of the specific last act or omission or substantial completion, within which the limitations prescribed by G.S. 1-52 and 1-53 continue to run. For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

N.C.G.S. § 1-50(5)f (1983). "G.S. 1-50(5) provides an outside limit of six years" after the performance of construction services. *Smith v. Sanitary Corp.*, 38 N.C. App. 457, 464, 248 S.E.2d 462, 467 (1978), *cert. denied*, 296 N.C. 586, 254 S.E.2d 33 (1979), *overruled on different ground, Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982). "The statute thus [bars] a right of action even before injury has occurred if the injury occurs subsequent to the prescribed time period." *Id.* at 461, 248 S.E.2d at 465.

A statute of repose precludes initiation of an action beyond the fixed time period, even if the act or omission or defect was

not discovered until after the period fixed in the statute of repose has expired. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988) (statute of repose sets a fixed time limit beyond which plaintiff's claim will not be recognized); *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 440, 302 S.E.2d 868, 880 (1983) ("unless the injury occurs within the six-year period, there is no cognizable claim"); *accord* Annotation, *Time Limitation—Action against Architect*, 93 A.L.R.3d 1242, 1246-47 (1979) ("The effect of such statutes is to cut off entirely an injured person's right of action before it accrues, if it does not arise until after the statutory period has elapsed."). Plaintiffs argue that their firestop claim is saved by application of the doctrine of relation back. For the reasons that follow, we reject that argument. Notwithstanding the general principles concerning the effect of a statute of repose, our Supreme Court has held that an amended pleading filed after the expiration of a statutory time restriction may relate back to an earlier filing, under N.C.G.S. § 1A-1, Rule 15(c), if "the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences which formed the basis of the amended pleading." *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 440-41, 364 S.E.2d 380, 383 (1988).

This Court must, therefore, consider whether the 1988 amendment relates back to the 1986 date of the original complaint, which date fell just under one month short of six years following completion of construction on plaintiffs' condominium unit. For relation back to occur, plaintiffs' original complaint must have given Nationwide notice of the "transactions and occurrences" to be proved pursuant to the amendment. "The test is whether defendant ought to have known from the original complaint the facts which plaintiff attempts to add by its amendment." *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 528, 268 S.E.2d 12, 19, *disc. rev. denied*, 301 N.C. 527, 273 S.E.2d 454 (1980); *see also Pyco*, 321 N.C. at 442, 364 S.E.2d at 384.

The original claim against Nationwide was based entirely on moisture problems and water damage allegedly caused by negligent construction of the units' common areas. For these problems plaintiffs sought only general damages against Nationwide and the other defendants. Nationwide answered that a different subcontractor had installed the roof on plaintiffs' building. Contrary to the mandate in N.C.G.S. § 1A-1, Rule 9(g) that "items of special damage" be expressly pleaded, plaintiffs did not even raise the damage

issue of lost profits associated with lack of firestopping until they filed their affidavits in opposition to Nationwide's motion for summary judgment on 14 June 1990.

Under these asserted facts, Nationwide had no reason to foresee in September 1986, the date of the original complaint, that the scope of its liability could possibly extend to loss of rental value of the unit after the absence of firestopping became public knowledge for the first time in 1988. The proper analysis determines

> whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question.

6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497, at 93 (2d ed. 1990).

Even under the notice theory of pleading, plaintiffs did not provide Nationwide with sufficient notice in the original complaint to support relation back of their claim for lost profits. "[I]n applying the relation back doctrine, [the court] must look to determine if adequate notice was supplied by the original complaint, rather than by papers which were subsequently filed in the action." *Holdridge v. Heyer-Schulte Corp. of Santa Barbara*, 440 F. Supp. 1088, 1094 (N.D.N.Y. 1977) (allegations in amended complaint regarding defective mammary prostheses implanted in plaintiff in 1972 and thereafter did not relate back to original complaint against manufacturer for injuries arising from an allegedly defective prosthesis implanted in plaintiff's right breast in 1971, even though complaint did mention the 1972 implant and even though defendant did receive notice of allegations of additional injuries from plaintiffs' answers to interrogatories and from plaintiffs' memorandum of law in opposition to summary judgment motion). *Cf. Condominium Assoc.*, 47 N.C. App. at 528, 268 S.E.2d at 18-19 (amendment adding failure "to design adequate piping systems as to both plans and specifications" related back to original complaint alleging failure to comply with plans and specifications for water pipe system); *Pyco*, 321 N.C. at 443, 364 S.E.2d at 385 (amended complaint "averred basically the same allegations as the original complaint except that it did not [any longer] restrict itself to [one] specified contract number"

among four contracts by defendant to pay sums due for material supplied for a town water line improvement project).

[3] Even if we were to hold that the firestop claim did relate back, plaintiffs would not be entitled to lost profits, as such damages "are included under the rubric of special damages" and must be specifically averred. *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E.2d 617, 624, *disc. rev. denied*, 301 N.C. 95, 272 S.E.2d 300 (1980) (citing North Carolina Rule of Civil Procedure 9(g)). Case law defines what items of damage constitute "special damages." N.C.G.S. § 1A-1, Rule 9 Comment (1983). We note that the rule requiring specific pleading of special damages is, like the doctrine of relation back, based on the adequacy of notice to defendant. "[T]he facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand." *Rodd v. Drug Co.*, 30 N.C. App. 564, 568, 228 S.E.2d 35, 38 (1976).

Absent recourse to relation back of their special damages claim, plaintiffs can overcome the effect of N.C.G.S. § 1-50(5) only if they come within one of the statutory exemptions to the six-year rule. Because plaintiffs are not exempted, they cannot avoid the substantive effect of this legislation. Since the statute of repose "defines" plaintiffs' claim, *see Olympic Products Co. v. Roof Systems, Inc.*, 79 N.C. App. 436, 438, 339 S.E.2d 432, 434, *disc. rev. denied and appeal dismissed*, 316 N.C. 553, 344 S.E.2d 8 (1986), plaintiffs had no claim against Nationwide in 1988 for failure to install firestopping in 1980.

We hold, therefore, that the trial court properly granted summary judgment on the firestop claim.

Affirmed.

Judges JOHNSON and ORR concur.

MICHAEL J. MCTAGUE AND WIFE, ROSE G. MCTAGUE, PLAINTIFFS v. NORTH TOPSAIL SHORES CONDOMINIUMS, INC.; NATIONWIDE HOMES, INC.; BOBBY DIXON, INDIVIDUALLY; TOPSAIL REEF HOMEOWNER'S ASSOCIATION, INC.; ROGER PAGE; AND M. F. BOSTIC, DEFENDANTS

No. 904SC871

(Filed 18 June 1991)

APPEAL by plaintiffs from judgment entered 25 June 1990 by Judge *James H. Pou Bailey* in ONSLOW County Superior Court. Heard in the Court of Appeals 12 March 1991.

Hargett & Hargett, by Robert T. Hargett, for plaintiff-appellants.

Hunton & Williams, by Julius A. Rousseau, III, for defendant-appellee Nationwide Homes, Inc.

PARKER, Judge.

Plaintiffs appeal from summary judgment entered in favor of defendant Nationwide Homes, Inc. The issues raised are resolved in *Bonestell v. North Topsail Shores Condominiums*, 103 N.C. App. 219, 405 S.E.2d 222 (1991), an action also arising out of the construction and sale of condominiums by North Topsail Shores Condominiums, Inc., at Topsail Reef. For the reasons stated in *Bonestell*, summary judgment in favor of Nationwide is

Affirmed.

Judges JOHNSON and ORR concur.

COASTAL LEASING CORPORATION, PLAINTIFF v. EPHRAIM N. O'NEAL, D/B/A CAPE HATTERAS SEAFOOD, AND COASTAL REFRIGERATION CO., INC., DEFENDANTS

No. 903SC63

(Filed 18 June 1991)

1. **Uniform Commercial Code § 3 (NCI3d)— lease of ice-making equipment—U.C.C. warranties—applicable**

The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) a crossclaim by a lessee against an equipment supplier in an action against the lessee to recover the balance due on an equipment lease. Although the seller, Coastal Refrigeration, contended that the warranty provisions of Article 2 of the U.C.C. do not apply, there was a sale of equipment by Coastal Refrigeration to Coastal Leasing, the lessor; Coastal Refrigeration was made a party to the suit; and the lease clearly distinguishes the three parties to the transaction and directed O'Neal, the sole intended user, to seek relief exclusively from the seller. N.C.G.S. §§ 25-2-101 *et seq.*; N.C.G.S. § 25-2-316(2); N.C.G.S. § 25-1-201(37).

Am Jur 2d, Sales §§ 28, 37, 707, 908 et seq.

2. **Uniform Commercial Code § 10 (NCI3d)— leased equipment—warranties—privity between lessee and supplier**

A crossclaim by a lessee of ice-making equipment against the supplier of the equipment was not barred by lack of privity where the lessee, O'Neal, alleged that he directly negotiated a purchase with the seller, Coastal Refrigeration. The seller was anything but remote from the user.

Am Jur 2d, Sales §§ 708, 720.

3. **Uniform Commercial Code § 15 (NCI3d)— leased equipment—crossclaim against supplier—disclaimers in lease—not applicable**

Warranty disclaimers in a lease were immaterial to a crossclaim by the lessee against the supplier of the equipment where the disclaimer language applied to the lessee alone and referred the lessee to the seller-supplier for any claims involving defects or breach of warranties.

Am Jur 2d, Sales §§ 822 et seq.

4. Uniform Commercial Code § 10 (NCI3d)— leased equipment— breach of warranties—allegation of defects—sufficient

Allegations in a crossclaim for defects in leased ice-making equipment were sufficient to raise the inference that any defects in the equipment existed at the time of sale.

Am Jur 2d, Sales §§ 1280, 1282, 1285.

APPEAL by defendant O'Neal, from order entered 3 November 1989 by *Judge William C. Griffin, Jr.*, in PITT County Superior Court. Heard in the Court of Appeals 28 August 1990.

Everett, Everett, Warren & Harper by C. W. Everett, Jr., and Scott W. Warren, for defendant-appellant Ephraim N. O'Neal, d/b/a Cape Hatteras Seafood.

James M. Roberts for defendant-appellee Coastal Refrigeration Co., Inc.

PARKER, Judge.

Plaintiff lessor, Coastal Leasing Corporation (herein "leasing company" or "lessor"), instituted this action against its lessee, Ephraim N. O'Neal (herein "O'Neal" or "lessee"), to recover the balance due on an equipment lease covering an Arctic Temp 1000 AR-6 Ice Maker and a 10 HP Copeland Condensing Unit sold to leasing company by Coastal Refrigeration Co., Inc. (herein "Coastal Refrigeration" or "seller"). O'Neal moved under Rule 19(b) of the North Carolina Rules of Civil Procedure to add Coastal Refrigeration as a defendant in the action and to be permitted to file a crossclaim against Coastal Refrigeration. The trial court granted O'Neal's motion. Coastal Refrigeration answered the crossclaim and moved for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6). O'Neal appeals from the dismissal of his crossclaim. Final judgment for plaintiff has also been entered in the primary action, but is not before the Court on this appeal.

In order to survive a Rule 12(b)(6) motion, O'Neal needed only to have alleged facts that stated a claim under some cognizable legal theory. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979).

In general, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled

> to no relief under any state of facts which could be proved in support of the claim." [297 N.C.] at 185, 254 S.E.2d at 615, *quoting* 2A Moore's Federal Practice, § 12.08, pp. 2271-74 (2d ed. 1975).

Harris v. NCNB, 85 N.C. App. 669, 670-71, 335 S.E.2d 838, 840 (1987) (emphasis omitted). For the reasons stated herein, O'Neal's crossclaim was sufficient to raise the issue of his entitlement to relief. We, therefore, reverse.

O'Neal and Coastal Refrigeration dispute the applicability of the warranty provisions of Article 2 of the Uniform Commercial Code, N.C.G.S. §§ 25-2-101 *et seq.*, to this arrangement, which provided for the leasing company to obtain title from Coastal Refrigeration only after O'Neal had personally selected the equipment from the seller and then authorized its purchase by the leasing company. O'Neal seeks recovery of expenses incurred as a result of the alleged malfunctioning of the icemaking equipment, including the deficiency balance owed to the leasing company after public sale of the equipment and expenses incurred for (i) substitute equipment, (ii) large quantities of ice on the open market to protect seafood from spoilage and (iii) legal fees.

In the primary suit, judgment was entered awarding plaintiff the unpaid balance due under the lease plus interest and attorney's fees. Under the terms of that lease, failure of the equipment to operate properly was not a defense to O'Neal's liability to pay the lessor for the entire lease term. Therefore, O'Neal does not appeal the judgment in favor of the leasing company. Other terms of the lease, however, are material to our disposition of the dispute between O'Neal and Coastal Refrigeration.

The lease was attached to the lessor's complaint and was cross-referenced in O'Neal's crossclaim; the record shows that the original complaint was served on Coastal Refrigeration at the same time the crossclaim was served. The lease explicitly names Coastal Refrigeration as the supplier-seller to the lessor of the ice maker and a condensing unit, which are the subject matter of the equipment lease. Paragraph 2 describes particular transactional facts as well as the rights and liabilities of the parties to the lease.

> PURCHASE AND ACCEPTANCE: NO WARRANTIES BY LESSOR: Lessee requests Lessor to purchase the Equipment from a seller (the "Seller") and arrange for delivery to Lessee at Lessee's ex-

> pense . . . . THE LESSEE REPRESENTS THAT LESSEE HAS SELECTED THE EQUIPMENT LEASED HEREUNDER PRIOR TO HAVING REQUESTED THE LESSOR TO PURCHASE THE SAME FOR LEASING TO THE LESSEE, AND LESSEE AGREES THAT THE LESSOR HAS MADE AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, DIRECTLY OR INDIRECTLY, EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER, INCLUDING THE SUITABILITY OF SUCH EQUIPMENT, ITS DURABILITY, ITS FITNESS FOR ANY PARTICULAR PURPOSE, ITS MERCHANTABILITY, ITS CONDITION, AND/OR ITS QUALITY . . . . NO REPRESENTATION OR WARRANTY AS TO THE EQUIPMENT OR ANY OTHER MATTER BY THE SELLER SHALL BE BINDING ON THE LESSOR . . . . If the Equipment is not properly installed, does not operate as represented or warranted by the Seller or is unsatisfactory for any reason, Lessee shall make any claim on account thereof solely against the Seller . . . . Lessor agrees to assign to Lessee, solely for the purpose of making and prosecuting any such claim, any rights it may have against the Seller for breach of warranty or representation respecting the Equipment.

For purposes of review of the trial court's disposition of a motion to dismiss for failure to state a claim, this Court treats O'Neal's well pleaded factual allegations as admitted. *Warren v. Halifax County*, 90 N.C. App. 271, 368 S.E.2d 47 (1988). The principal factual allegations in the crossclaim are as follows. According to the crossclaim O'Neal "negotiated the purchase" of an ice maker and a condensing unit from Coastal Refrigeration for a purchase price of $12,500.00; the supplier suggested and was instrumental in arranging for a lease transaction in lieu of a sale. O'Neal argues in his brief that he relied on "the supplier's expertise in selecting an ice machine sufficient and satisfactory for his business needs."

The crossclaim states that the equipment did not operate properly and O'Neal contacted Coastal Refrigeration repeatedly to have the company try to fix the problem. O'Neal further alleged that the supplier either ignored his requests for service or failed in its attempts to get the icemaking equipment to work properly, despite the fact that Coastal Refrigeration "had agreed to service said equipment." As a consequence, O'Neal alleged, the ice maker and compressor did not "perform as expressly and impliedly warranted" and O'Neal "could not use [the equipment] in the capacity for which it was purchased."

O'Neal ceased making the required installment payments under the lease after about seven months because of allegedly unsatisfactory servicing and repair by Coastal Refrigeration. O'Neal then requested that the ice maker be removed from his business premises. Coastal Refrigeration later re-purchased the equipment at a public sale held by the leasing company. The crossclaim alleged that as acquiring bidder Coastal Refrigeration knew that the equipment had been "unsuited for the purposes for which [O'Neal had explained he] intended to use said equipment" and that Coastal Refrigeration's low bid resulted in the large deficiency owed to the lessor. The crossclaim prayed recovery "for monies expended and paid" by O'Neal "by virtue of the defective condition of said equipment and the breach of the express warranty and the implied warranty of merchantability issued by . . . Coastal Refrigeration" to the lessor "for which this defendant [O'Neal] is a third party beneficiary."

[1] Defendant Coastal Refrigeration argues that (i) this Court held in *Tolaram Fibers, Inc. v. Tandy Corp.*, 92 N.C. App. 713, 375 S.E.2d 673, *disc. rev. denied*, 324 N.C. 436, 379 S.E.2d 249 (1989), that the warranty provisions of N.C.G.S. §§ 25-2-101 *et seq.* (herein "Article 2" or "UCC") do not apply to a lease of this type; (ii) even if the warranty provisions of Article 2 apply to this transaction, O'Neal is barred by an alleged lack of privity with Coastal Refrigeration from asserting any breach of warranty claims against it; (iii) even if O'Neal is not barred by the absence of privity, the lease disclaims all warranties; and (iv) O'Neal's crossclaim is deficient for its failure to allege that the equipment was defective at the time of sale. We disagree with all of these contentions.

We address each contention in turn. Coastal Refrigeration erroneously analogizes this case to *Tolaram Fibers*. In *Tolaram Fibers* this Court rejected a lessee's argument that its lease "was the functional equivalent of a sale" of certain computer equipment. 92 N.C. App. at 717, 375 S.E.2d at 675. Although O'Neal raises the same argument in this appeal, we do not reach the issue for several reasons. In *Tolaram Fibers* there was no consummated sale, as there is in this case, bringing the equipment within the purview of Article 2 of the UCC. Further, unlike in *Tolaram Fibers*, where both the lease and the Court characterized the parties as "lessee" and "lessors," in the present case the seller-supplier has been made a party to the suit. Finally, unlike the lease in *Tolaram Fibers*, the lease in the present case clearly distinguishes and identifies three parties to this commercial financing transaction: lessor

(Coastal Leasing Corporation), lessee (O'Neal) and supplier-seller (Coastal Refrigeration). Rather than denying O'Neal the right to proceed against Coastal Refrigeration for supplying defective equipment or for improperly representing the capabilities of the equipment during alleged negotiations with O'Neal, the lease terms clearly directed O'Neal, the sole intended user of the equipment, to seek relief exclusively from the seller of the equipment.

Relevant sections of the UCC clearly make the Code apply to the phase of the transaction involving the leasing company and Coastal Refrigeration. N.C.G.S. §§ 25-2-101 *et seq.* (1986). Plaintiff in the primary suit was clearly a "buyer" under N.C.G.S. § 25-2-103(1)(a). The leasing company "purchased" the equipment as that verb is defined by N.C.G.S. §§ 25-1-201(32) and (33). Not only was Coastal Refrigeration a "seller" under N.C.G.S. § 25-2-103(1)(d) but it may also qualify as a "merchant" under the definition of that term in N.C.G.S. § 25-2-104(1), imposing on it the obligation that its goods conform to the implied warranty of merchantability, absent an exclusion of such a warranty meeting the requirements of N.C.G.S. § 25-2-316(2).

Moreover, this particular tripartite financing arrangement is not the type expressly excluded from the provisions of Article 2 of the UCC for the reason that the leasing company is not a financing agency as defined by N.C.G.S. § 25-2-104(2) holding a security interest as defined by N.C.G.S. § 25-1-201(37). Given O'Neal's allegations of active negotiations with Coastal Refrigeration, which allegations are supported by the language of the lease, O'Neal was also not a "stranger" to the contract for sale of goods between Coastal Refrigeration and the leasing company.

> In view of the fact that a sale is the transfer of title for a price, the transfer of title phase of the transaction may take place and may be between different parties than the parties to the offer and acceptance phase of the transaction.

2 *Anderson on the Uniform Commercial Code, Sales* § 2-206:4, at 248 (3d ed. 1982) (footnote omitted).

[2] Similarly, we are unpersuaded by Coastal Refrigeration's second argument that lack of privity bars O'Neal from bringing his crossclaim against it. O'Neal alleged that he directly negotiated a purchase with the seller. In this three-party transaction, the seller was anything but "remote" from the user. Remoteness be-

tween parties, and its consequent potential for surprise by a party unrelated to the immediate transaction, are thus not pertinent issues under the facts in this case.

"North Carolina's Uniform Commercial Code does not define 'privity' and there are no governing Code provisions dispositive of this issue." *Sharrard, McGee & Co. v. Suz's Software, Inc.*, 100 N.C. App. 428, 432, 396 S.E.2d 815, 817 (1990).

> Whether there exists such a [privity] requirement is not governed by the UCC, but by developing case law. As stated by the Court in *Kinlaw*, "Our jurisdiction's allegiance to the principle of privity has, at best, wavered." 298 N.C. at 497, 259 S.E.2d at 555 [1979]. The Court in *Kinlaw* went on to hold that where a plaintiff alleges an express warranty running directly to him, breach of that warranty, and damages caused by the breach, the absence of an allegation of privity between plaintiff and warrantor in the sale of the warranted item is not fatal to the claim.

Bernick v. Jurden, 306 N.C. 435, 448-49, 293 S.E.2d 405, 414 (1982).

In the present case, O'Neal alleged express and implied warranties flowing to him as third-party beneficiary of the equipment sales contract, breach of those warranties and damages. "If the third party is an intended beneficiary, the law implies privity of contract." *Johnson v. Wall*, 38 N.C. App. 406, 410, 248 S.E.2d 571, 574 (1978); *see also Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 79 N.C. App. 81, 85-87, 339 S.E.2d 62, 65-66 (1986), *aff'd in part and rev'd in part*, 322 N.C. 200, 367 S.E.2d 609 (1988) (but declining to rule on Court of Appeals' holdings on third-party beneficiary claims). Further, O'Neal has the right to try to prove that the seller's direct representations to him, in addition to any express or implied warranties to the lessor, formed part of the "basis of the bargain" for purposes of triggering remedies for breach of express warranty. *Sharrard*, 100 N.C. App. at 433, 396 S.E.2d at 818.

Our conclusion that O'Neal has a cognizable claim against Coastal Refrigeration is consistent with the clear and unambiguous language in the lease putting O'Neal on notice that "[a]ll complaints and redress for breach of warranty or misrepresentations were to be directed to and against the vendor" rather than against the warranty-disclaiming lessor. *Petroziello v. United States Leasing Corp.*, 176

Ga. App. 858, 861, 338 S.E.2d 63, 66 (1985) (declining to permit lessee to sue lessor in a similar lease arrangement). Our conclusion is also consistent with that of other courts and commentators discussing express warranties in the context of inducement. *See, e.g., United States Leasing Corp. v. Franklin Plaza Apts.*, 65 Misc. 2d 1082, 1086, 319 N.Y.S.2d 531, 535 (1971) ("[a]lthough title does not ultimately vest in the defendant under this [lease] contract, in a realistic, practical sense, payment is being demanded for equipment that the defendant claims it cannot use" for the purposes for which it was induced to obtain the equipment); 3 *Williston on Sales* § 17-5, at 12 (4th ed. 1974) ("single most important decision" for purposes of court's finding creation of express warranty "is whether the seller's statements were so regarded by the buyer as part of his reason for purchasing the goods").

[3] Coastal Refrigeration's third argument asserting the lessor's disclaimer of all warranties in the lease is immaterial. The disclaimer language applies to the lessor alone and refers the lessee to the seller-supplier for any claims involving defects or breach of warranties. Unquestionably, under the explicit terms of the lease quoted above the leasing company's disclaimer of warranties as against its lessee were effective. O'Neal's crossclaim, however, is not against his lessor but rather against the seller-supplier who is named and otherwise specifically referred to in various sentences of the lease. Coastal Refrigeration does not even argue that it attempted to disclaim, limit or modify warranties as to either O'Neal or the leasing company.

[4] Coastal Refrigeration's final argument that O'Neal failed to allege the existence of defects at the time of sale is likewise unsuccessful. The allegations in the crossclaim were sufficient to raise the inference that any defects in the equipment existed at the time of sale. 3 *Anderson on the Uniform Commercial Code, Sales* § 2-314:196, at 280 & n.18 (3d ed. 1983 & Cum. Supp. 1990) ("operative facts in a warranty action may be established by circumstantial evidence"); 67A Am. Jur. 2d *Sales* § 789 & nn.48-49 (1985).

In conclusion we note that financing transactions functionally identical to the one now before this Court have been similarly viewed by courts in other jurisdictions. In *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), *rev. denied*, 91 Wash. 2d 1023 (1979), for example, a leasing company sued its lessee, the operator of a supermarket, for unpaid rental

amounts on an automatic ice vending machine. Defendant lessee crossclaimed against the distributor who had sold the machine to the lessor, alleging breach of express and implied warranties. The appellate court quoted the oral opinion of the trial judge in describing the special relationship of the three parties. The facts giving rise to that relationship in *World Wide Lease* present a business pattern replicated in the case now before this Court.

> [In] the relationships of the parties this was not anything other than a device, a financing tool whereby [lessee] acquired the use of this machine. When [lessors] purchased the machine they, for all practical purposes, did so on behalf of and as agent for [lessee]. They didn't make the selection of the machine. They didn't negotiate price; they had nothing to do with the prior negotiations . . . . Any warranties, any obligations that [seller] had ran right through [lessors] and did in fact inure to the benefit of [lessee].

Id. at 541, 586 P.2d at 892.

In agreeing with that part of the trial court's analysis, the appellate court in *World Wide Lease* also observed that the sales price offered to lessee originally was the same as the price at which the leasing company then purchased the equipment, reinforcing the analysis of the lessor's role as a middleman used for purposes of financing. *Id.* at 542-43, 586 P.2d at 893. O'Neal's crossclaim alleged that Coastal Refrigeration had quoted him a purchase price of $12,500.00 for the equipment he later leased for a total of about $17,000.00, amortized over a three-year term. *See also United States Leasing Corp. v. Franklin Plaza Apts.*, 65 Misc. 2d 1082, 319 N.Y.S.2d 531 (1971) (lessee had valid claim against supplier-seller under following facts: seller with whom ultimate user negotiated offered user choice between outright purchase and long-term lease; user opted for lease; party named in user's lease agreement, however, was not seller but rather an interposed leasing corporation, with whom user had had no previous contact; seller was not a party to lease agreement but was referred to as "supplier" of the equipment therein).

For the foregoing reasons, O'Neal stated a cognizable claim against Coastal Refrigeration and had the right to go forward with evidence supporting the allegations in his crossclaim.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. PAUL JACKSON

No. 9026SC831

(Filed 18 June 1991)

1. **Constitutional Law § 251 (NCI4th)— narcotics—confidential informant—disclosure of identity—not required**

The trial court did not err in a prosecution for trafficking in cocaine by denying defendant's motion for disclosure of a confidential informant's identity where only the informant's presence at the scene and role in arranging the purchase weighed in favor of disclosure; the factors weighing against disclosure were that defendant offered no defense on the merits, so that there was no contradiction between his evidence and the State's evidence for the informant to clarify; no testimony by the informant was offered at trial; and the State asserted that disclosure would jeopardize pending investigations. The factors favoring nondisclosure outweigh the factors favoring disclosure.

Am Jur 2d, Criminal Law §§ 1002-1005.

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

2. **Narcotics § 4.3 (NCI3d); Conspiracy § 36 (NCI4th)— trafficking in cocaine—constructive possession—conspiracy—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss charges of trafficking in cocaine and conspiring to traffick in cocaine for insufficient evidence where Rickey Allison drove himself to the parking lot in a white car on two separate occasions to conduct negotiations for a drug transaction; Allison established that an officer had money for cocaine but was unwilling to follow him to a residence; Allison drove away and returned as a passenger in a red car driven by defendant; the cocaine in Allison's pocket produced a bulge noticeable

at some distance; defendant did not enter the convenience store when Allison walked to the informant's car, as had the two males who had accompanied Allison earlier; defendant remained in the car looking around the parking lot; Allison placed a light colored rag inside the informant's car window; a search following the arrests revealed two firearms in the trunk of the car driven by defendant; and a white napkin removed from the informant's car held four clear plastic bags containing 111.73 grams of cocaine. An agreement between Allison and defendant to commit the felony of trafficking in cocaine could be inferred from the same evidence.

Am Jur 2d, Conspiracy § 40; Drugs, Narcotics, and Poisons § 47.

Judge WYNN dissenting.

APPEAL by defendant from judgments entered 2 February 1990 by *Judge Kenneth A. Griffin* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 20 March 1991.

On 6 July 1989 Officer C. D. Kearney set up a possible drug deal with the assistance of a confidential informant. Arrangements were made to purchase four ounces of cocaine from a black male by the name of Rickey. Upon arrival at the agreed upon convenience store parking lot, Officer Kearney contacted the informant and requested that the informant give him more information about Rickey and that he come to the location.

Rickey Allison arrived driving a white car with two other black males in the car. Neither of these two males were described as the defendant. Allison held a conversation with the informant which Officer Kearney could not hear, and then left in his car. The informant told Officer Kearney what had transpired. Allison returned five to ten minutes later alone and held another conversation with the informant out of Officer Kearney's hearing. Officer Kearney then intervened to ask whether there was a problem. Allison asked Officer Kearney if he had the money, then left again after being told Officer Kearney had the money.

A few minutes later Allison returned in a red car driven by defendant. Defendant parked less than a parking space away from Officer Kearney's car. Allison exited defendant's car, walked over to the informant's car, and placed a light-colored rag inside the

informant's car window. Officer Kearney contacted the surveillance team which arrested Allison and defendant. A white napkin removed from the informant's car held four clear plastic bags of a hard, white rock substance. This material was determined to be 111.73 grams of cocaine. A .38 caliber revolver and a .22 caliber rifle were found locked in the trunk of the car driven by defendant.

The jury returned verdicts of guilty of trafficking in cocaine by possessing 28 grams or more but less than 200 grams, trafficking in cocaine by transporting 28 grams or more but less than 200 grams, and feloniously conspiring to commit the felony of trafficking in cocaine by possessing and transporting 28 grams or more but less than 200 grams. The trial court entered judgments imposing a total of twenty-one years imprisonment and $75,000.00 in fines for the three offenses. From these judgments defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin Perkins Pendergraft, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Robert L. Ward, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant contends the trial court committed reversible error in denying his motion to compel the state to disclose the confidential informant's identity. Generally the state has the privilege of withholding a confidential informant's identity from a defendant, but there are exceptions. *State v. Newkirk*, 73 N.C. App. 83, 325 S.E.2d 518, *disc. review denied*, 313 N.C. 608, 332 S.E.2d 81 (1985).

Roviaro v. United States, 353 U.S. 53, 1 L.Ed.2d 639 (1957), sets forth the test to be applied when the disclosure of an informant's identity is requested. *Id.* The trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case. *Id.* "However, before the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981) (citations omitted).

In making this determination, the trial court needs to take into account a number of factors.

> Two factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant, . . . and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify. . . . Several factors vitiating against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt.

Newkirk, at 86, 325 S.E.2d at 520-21 (citations omitted). Here only the informant's presence and role in arranging the purchase weigh in favor of disclosure.

There are several factors favoring nondisclosure. Defendant offered no defense on the merits, so there was no contradiction between his evidence and the state's evidence for the informant's testimony to clarify. No testimony by the informant was admitted at trial, rather the testimony of three law enforcement officers established defendant's guilt. In addition, the state asserted disclosure of the informant's identity would jeopardize pending investigations. *See State v. Johnson*, 81 N.C. App. 454, 344 S.E.2d 318, *disc. review denied*, 317 N.C. 339, 346 S.E.2d 151 (1986).

The factors favoring nondisclosure outweigh the factors favoring disclosure. Accordingly the trial court did not err in denying defendant's motion to compel disclosure of the confidential informant's identity.

[2] Defendant next contends the trial court erred in denying his motion to dismiss all of the charges for insufficient evidence.

> [U]pon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury . . . . The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citations omitted).

Here the evidence suggests that on two separate occasions Allison drove himself to the parking lot in a white car to conduct negotiations for the drug transaction. Allison then established that Officer Kearney had the money for the cocaine and that Officer Kearney was unwilling to follow him to a residence located off of Old Steele Creek Road. Next Allison got into the white car, drove out of the parking lot, and headed down Old Steele Creek Road. A few minutes later, Allison returned to the parking lot *as a passenger* in a red car driven by defendant.

Allison sat in the front seat with defendant. The cocaine in Allison's left front pants pocket produced a bulge noticeable at some distance. When Allison exited and walked over to the informant's car, defendant did not enter the convenience store as the two males had done who had accompanied Allison earlier. Defendant remained seated in the car looking around the parking lot. A search following the arrests discovered two firearms in the trunk of the car driven by defendant. A white napkin removed from the informant's car held four clear plastic bags containing 111.73 grams of cocaine.

It is well established in North Carolina that possession of a controlled substance may be either actual or constructive. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972). A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it. *State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983).

> As the terms "intent" and "capability" suggest, constructive possession depends on the totality of the circumstances in each case. *No single factor controls, but ordinarily the questions will be for the jury.* . . . The fact that a person is present in a [vehicle] where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs. . . . [T]here must be evidence of other incriminating circumstances to support constructive possession. (Emphasis added.)

State v. James, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citations omitted). *See also State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976).

In light of the incriminating circumstances surrounding Allison's mode of transportation during the negotiations and the actual drug transaction, it is reasonable for the jury to infer that the defendant was present merely to ensure the safety of the cocaine. This evidence, while circumstantial in nature, coupled with the fact that two firearms were found in the red car's trunk, allowed the state to withstand the defendant's motion to dismiss. "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury. . . . " *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *cert. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986) (citations omitted). The trial court did not err in denying defendant's motion to dismiss the two charges of trafficking in cocaine by possession and by transportation.

From this same evidence an agreement between defendant and Allison to commit the felony of trafficking in cocaine could be inferred. "A criminal conspiracy is an 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." *State v. Lipford*, 81 N.C. App. 464, 465, 344 S.E.2d 307, 308 (1986). The trial court did not err in denying defendant's motion to dismiss the charge of conspiring to commit the felony of trafficking in cocaine. Therefore, in the trial below we find

No error.

Judge JOHNSON concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

In my opinion, the trial court erred in finding that the evidence in this case was sufficient to the extent that reasonable minds might infer guilt.

"Mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." *State v. Balsom*, 17 N.C. App. 655, 659, 195 S.E.2d 125 (1973). In *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976), this court found that mere presence for a brief period was not enough.

Moreover, while one may be convicted of constructive or actual possession of a controlled substance, *State v. DiNunno*, 67 N.C. App. 316, 313 S.E.2d 3, *rev. denied*, 311 N.C. 307, 317 S.E.2d 683 (1984), the power and the intent to control the contraband are two essential elements in proving constructive possession. *State v. Davis*, 20 N.C. App. 191, 201 S.E.2d 61 (1973), *cert. denied*, 284 N.C. 618, 202 S.E.2d 274 (1974). Hence, the defendant's awareness of the contraband must be established. *State v. Weems*, 31 N.C. App. at 571, 230 S.E.2d at 194 (1976).

It is clear that no evidence was produced to directly link Jackson to the contraband. The contraband was concealed in the pocket of Allison and there was no evidence to show that Jackson was aware that Allison had cocaine on his person. At best, the evidence in this case established only that the defendant was present at the scene of a crime and in close proximity to the contraband. It was error to deny the defendant's motion to dismiss the trafficking in cocaine by possession charge.

Nor do I believe that the "incriminating circumstances surrounding Allison's mode of transportation during the negotiations and the actual drug transaction" presented sufficient evidence to permit the inference that the defendant was present merely to ensure the safety of the cocaine. Even viewing the evidence in a light most favorable to the state, the evidence merely establishes that Allison met with the undercover agent on two occasions without the defendant and on his third visit with the agent, the defendant gave Allison a ride in his car. And while the majority makes much of the presence of firearms, these firearms (one of which was unloaded) were locked in the trunk of defendant's car at the time of the transaction. This evidence was not sufficient to withstand defendant's motion to dismiss the charge of trafficking in cocaine by transportation.

Finally, regarding the conspiracy charge, in *State v. Lipford*, 81 N.C. App. 464, 344 S.E.2d 307 (1986), this court defined criminal conspiracy as that which exists when two or more persons agree to commit an unlawful act, or a lawful act in an unlawful manner.

In the case at hand, the state presented no evidence that there was such an agreement between Allison and Jackson to traffick in cocaine. In his conversations with the undercover agent, Allison made no mention of Jackson's name. Allison conducted the entire drug transaction without any evidence of assistance or agree-

ment on the part of the defendant. The trial court erred in denying defendant's motion to dismiss the conspiracy to traffick in cocaine charge.

In sum, the evidence showed only that Jackson was in bad company; it was not, in my opinion, sufficient to convict him of trafficking in cocaine by possession, trafficking in cocaine by transporting, or conspiracy to traffick in cocaine.

For the aforementioned reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. TIMOTHY ALLEN MORRIS, DEFENDANT

No. 903SC695

(Filed 18 June 1991)

1. **Jury § 1 (NCI3d); Narcotics § 6 (NCI3d)— remission of vehicle forfeiture—no right to jury trial**

There is no right to a jury trial of a claim under N.C.G.S. § 90-112.1 for remission of forfeiture of a vehicle used in violation of the controlled substances laws.

Am Jur 2d, Forfeitures and Penalties § 44.

2. **Narcotics § 6 (NCI3d)— remission of vehicle forfeiture—interest in vehicle—knowledge of illegal use—value of interest**

The evidence did not support the trial court's determination that a claimant for remission of a seized vehicle under N.C.G.S. § 90-112.1 did not have an interest in the vehicle acquired in good faith prior to the seizure where all the evidence showed that title had been transferred to the claimant under N.C.G.S. § 20-72(b) at the time the vehicle was seized, and claimant's evidence showed that he paid for the vehicle and transferred title to defendant only upon condition that defendant reimburse him for part of the purchase price, and that defendant's failure to make any payments to claimant was the sole reason claimant again acquired the title. On remand, the trial court must make findings with respect to claimant's knowledge or reasonable belief as to the use of the vehicle in violation of the controlled substances laws and the value of claimant's interest in the vehicle.

Am Jur 2d, Forfeitures and Penalties § 49.

Supreme Court's views as to due process requirements of forfeitures. 76 LEd 2d 852.

APPEAL by claimant from order entered 9 February 1990 by *Judge William C. Griffin, Jr.*, in PITT County Superior Court. Heard in the Court of Appeals 18 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Lawrence Reeves, Jr., for the State.

James Hite Avery Clark & Robinson, by Leslie S. Robinson, for claimant-appellant.

PARKER, Judge.

Claimant's son, defendant Timothy Allen Morris, was convicted of three felonies, possession with intent to sell or deliver in excess of one and one-half ounces of marijuana, conspiracy to sell in excess of one and one-half ounces of marijuana, and conspiracy to deliver one and one-half ounces of marijuana. These and other charges against defendant arose from incidents which occurred 2 May 1989. When defendant was arrested on that day, law enforcement officers also seized the black 1985 Ford Mustang automobile he was driving.

[1] Claimant moved for the return of the car, citing N.C.G.S. § 90-112.1; but his motion was denied and he appealed to this Court. Claimant first contends the trial court erred in denying his motion for a jury trial. Claimant argues he was entitled to a jury trial by article I, section 25, of the North Carolina Constitution; *State v. Meyers*, 45 N.C. App. 672, 263 S.E.2d 835 (1980); and *State v. Richardson*, 23 N.C. App. 33, 208 S.E.2d 274, *cert. denied*, 286 N.C. 213, 209 S.E.2d 317 (1974).

The right to trial by jury as provided for by article I, section 25, of the North Carolina Constitution applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted. The right does not apply to cases in which a right and remedy were thereafter created by statute. *See McInnish v. Board of Education*, 187 N.C. 494, 496, 122 S.E. 182, 183 (1924); *Groves v. Ware*, 182 N.C. 553, 558, 109 S.E. 568, 571 (1921). "[T]he relevant date for determining the scope of the constitutional right to jury trial in civil cases

is the date of adoption of the 1868 Constitution." *N.C. State Bar v. DuMont*, 304 N.C. 627, 641, 286 S.E.2d 89, 97 (1982). Recently the North Carolina Supreme Court held that since no right to bring an action for equitable distribution of marital property existed prior to the adoption of N.C.G.S. §§ 50-20 and -21, there is no right to trial by jury for such an action under the Constitution of North Carolina; and the language of these statutes creates no new right to trial by jury. *Kiser v. Kiser*, 325 N.C. 502, 511, 385 S.E.2d 487, 492 (1989).

In *State v. Richardson*, this Court observed that under N.C.G.S. § 90-112(f), the rules and procedures for forfeiture in alcohol-related cases govern procedures for forfeiture in drug-related cases as well. Because N.C.G.S. § 18A-21(b) afforded claimants in alcohol-related forfeiture cases the right to a jury trial, claimants in drug-related forfeiture cases had the same right. *Richardson*, 23 N.C. App. at 35-36, 208 S.E.2d at 275-76. *Meyers* reiterated that the right to trial by jury in drug-related forfeiture cases was based on N.C.G.S. § 18A-21(b). *Meyers*, 45 N.C. App. at 674, 263 S.E.2d at 837.

Legislation providing for the forfeiture of conveyances used to facilitate violation of alcohol control laws was first enacted in 1915. 1915 N.C. Sess. Laws c. 197, s. 1. A sheriff was authorized to seize and take into custody any conveyance used to transport spirituous, vinous or malt liquors. C.S. 3403 (1919). If the owner or party in possession was not captured or arrested, the sheriff was to advertise for the owner to come forward, institute proceedings to secure possession of the property, and if the owner failed to come forward within thirty days, advertise the property for sale. C.S. 3404 (1919). After paying reasonable expenses of the sale, proceeds were to be paid by the sheriff to the county treasurer to be applied to the credit of the county public school fund. C.S. 3405 (1919).

The 1923 General Assembly amended the Prohibition forfeiture law to bring it into conformity with national law. 1923 N.C. Sess. Laws c. 1, s. 6. Consolidated Statute 3411(f) granted to an innocent party the right to have a jury pass on his claim of ownership and lack of knowledge and consent that his property was used in transporting liquor. C.S. 3411(f) (1924). This right to jury trial was procured by statute and did not exist at common law or under any statute in 1868. The statutory right was preserved through

succeeding revisions of C.S. 3411(f). *See* N.C.G.S. § 18A-21(b) (1971 Cum. Supp.). However, after *Meyers* was decided the legislature repealed Chapter 18A, including N.C.G.S. § 18A-21, and enacted Chapter 18B, effective 1 January 1982. 1981 N.C. Sess. Laws c. 412, s. 2.

Alcohol-related forfeitures are now controlled by N.C.G.S. § 18B-504, which contains no provision explicitly granting a jury trial. Instead, the plain language of section 18B-504 indicates the legislature intended judges alone should pass on whether a claimant to an interest in seized property is entitled to relief:

> (h) Innocent Parties.—At any time before forfeiture is ordered, an owner of seized property or a holder of a security interest in seized property, other than the defendant, may apply to protect his interest in the property. The application may be made to any judge who has jurisdiction to try the offense with which the property is associated. If the judge finds that the property owner or holder of a security interest did not consent to the unlawful use of the property, and that the property may be possessed lawfully by the owner or holder, the judge may order [as follows].

N.C.G.S. § 18B-504 (1989). We conclude that because the statutory right to trial by jury in alcohol-related forfeiture cases has been repealed, *Richardson* and *Meyers* are no longer authority for a right to trial by jury in a proceeding for remission of forfeiture under N.C.G.S. § 90-112.1.

Moreover we also note that a comparison of N.C.G.S. § 90-112.1, enacted in 1975, and N.C.G.S. § 18B-504 discloses that application of the provisions of N.C.G.S. § 18B-504 to drug-related forfeitures is limited in scope, inasmuch as certain provisions in the two statutes cover the same substantive questions. While reference to N.C.G.S. § 18B-504, pursuant to N.C.G.S. § 90-112(f), is still necessary in drug-related forfeiture proceedings to determine (i) when forfeiture occurs as to certain drug-related property subject to forfeiture and (ii) when an innocent person must apply for remission of forfeiture, the elements of proof under N.C.G.S. § 90-112.1(b) are different from those specified in N.C.G.S. § 18B-504(h) for alcohol-related forfeiture.

In any proceeding in court for a forfeiture under N.C.G.S. § 90-112 of any conveyance seized for a violation of Article 5 of

the Controlled Substances Act, the court shall have exclusive jurisdiction to remit the forfeiture. N.C.G.S. § 90-112.1(a) (1990). In any such proceeding the court shall not allow the claim of any claimant for remission unless and until he proves that (i) he has an interest in such conveyance, as owner or otherwise, which he acquired in good faith; (ii) he had no knowledge or reason to believe the conveyance was being or would be used in the violation of laws relating to controlled substances; and (iii) his interest in the conveyance is in an amount in excess of or equal to the fair market value of such conveyance. N.C.G.S. § 90-112.1(b) (1990). If the court in its discretion allows the remission, the conveyance shall be returned to the claimant. N.C.G.S. § 90-112.1(c) (1990). If the court should determine that the conveyance should be held for purposes of evidence, it may order the vehicle to be held until the case is heard. N.C.G.S. § 90-112.1(d) (1990).

We are unable to discern from this language or the language of section 90-112 any legislative intent to grant the right of trial by jury to a claimant for remission of forfeiture. On the contrary, the plain words of section 90-112.1 suggest that an application for remission of forfeiture in drug-related cases is to be heard by the court only.

In sum, the right to trial by jury on applications for remission of forfeiture in alcohol-related cases did not exist at common law or pursuant to statute in 1868. General Statute 18B-504 does not preserve the right to trial by jury, and neither N.C.G.S. § 90-112 nor § 90-112.1 creates a right to trial by jury. We, therefore, hold that no such right exists and the trial court did not err in denying claimant's motion for trial by jury.

[2] Claimant's second and final contention is that the trial court erred in ordering the forfeiture of the conveyance because there was no competent evidence to support the facts as found and thus the findings do not support the court's conclusions of law. We agree.

At the hearing on an application for remission of forfeiture the trial court considers only three issues, namely the claimant's interest in the conveyance acquired in good faith, his knowledge or reasonable belief as to the unlawful use of the conveyance, and the value of his interest. N.C.G.S. § 90-112.1(b) (1990).

To assign or transfer title or interest in a motor vehicle, the owner must execute, in the presence of a person authorized to

administer oaths, an assignment and warranty of title on the reverse of the certificate of title in form approved by the North Carolina Division of Motor Vehicles. The assignment must include the name and address of the transferee, and no title shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. N.C.G.S. § 20-72(b) (1989). Every purchaser of a vehicle previously registered shall make application for transfer of title within twenty days after acquiring the vehicle, and responsibility for such transfer shall rest on the purchaser. N.C.G.S. § 20-74 (1989). "Title" as used in section 20-72(b) is synonymous with "ownership"; and as to the transfer of ownership of a motor vehicle, section 20-72(b) prevails over the Uniform Commercial Code. *Insurance Co. v. Hayes*, 276 N.C. 620, 630, 640, 174 S.E.2d 511, 517, 524 (1970). There is no longer a requirement under the Motor Vehicle Act "that a purchaser apply for a new certificate of title before title may pass or vest." *N.C. National Bank v. Robinson*, 78 N.C. App. 1, 5, 336 S.E.2d 666, 669 (1985).

Claimant's evidence showed title to the 1985 Mustang automobile was originally in the name of claimant. State's evidence showed that from 6 February 1989 until 24 April 1989, title was in the name of defendant. State's Exhibit 1, a North Carolina certificate of title, showed further that on 24 April 1989 defendant transferred title to the vehicle to claimant and on that same date claimant made application to the North Carolina Department of Motor Vehicles for transfer of title and registration by paying the required fees. Claimant's evidence showed the actual issue date of the title under which he claimed ownership was 9 May 1989.

The relevant findings of the trial court included the following:

> 11. Record title to said Mustang automobile at the time of the seizure of said Mustang automobile was still in the name of [defendant].
>
> 12. There is a record indication that the transfer or that the re-transfer of title was made by [defendant] to [claimant] on April 24, 1989, prior to the date of seizure.
>
> 13. There was insufficient evidence presented to satisfy the Undersigned that the transfer of record title to [claimant] took place prior to the seizure of said Mustang automobile.

14. In any event, [defendant] was the beneficial owner of said Mustang automobile notwithstanding any question of record title.

These findings are not supported by the evidence. Instead, all the evidence showed that at the time the conveyance was seized, title had as a matter of law been transferred to claimant under N.C.G.S. § 20-72(b). In addition, claimant's evidence showed he paid for the vehicle and transferred title to defendant only upon condition that defendant reimburse him for part of the purchase price. Further, defendant's failure to make any payments to claimant was the sole reason claimant again took possession of title. We, therefore, conclude the evidence does not support the court's conclusion that at the time of seizure claimant did not have an interest in the conveyance acquired in good faith.

Having determined claimant had no interest in the conveyance, the trial court made no findings with respect to claimant's knowledge or reasonable belief as to the use of the conveyance in violation of the controlled substances laws or the value of claimant's interest in the conveyance, factors which a claimant must also prove under N.C.G.S. § 90-112.1(b). These statutory requirements raise questions of credibility for resolution by the finder of fact.

For the reasons stated herein, the decision below is vacated and the matter remanded for a new hearing.

Vacated and remanded.

Judges COZORT and GREENE concur.

R. GENE EDMUNDSON, EXECUTOR OF THE ESTATE OF C. JULIAN WILSON (DECEASED), PLAINTIFF v. MARGUERITE W. MORTON, JOE B. MORTON, EDWIN B. WILSON, W. W. MASON, L. L. MASON, LOUISE W. TOLLEY, CAROLYN W. JONES, W. H. STOVALL, JAMES A. HOWARD, ROBERT W. HOWARD, GEORGIA HOWARD POMETTO, JOHN HOWARD, GLADYS SYKES WALLACE, ELIZABETH D. SYKES, AND NANCY B. McKEE, DEFENDANTS

No. 909SC813

(Filed 18 June 1991)

Wills § 58.1 (NCI3d)— stocks and bonds—specific bequest—accession of stocks—ademption of bonds

The trial court erred in a declaratory judgment action to determine the rights of the beneficiaries in stocks and bonds by concluding that the bequest was general and that the named beneficiaries were entitled to all of the stocks and bonds, including accessions. While the court viewed the testator's language as indicating a specific bequest, the label of the bequest is not dispositive. It is clear from the language of the will as a whole and the surrounding circumstances that the testator intended the beneficiaries in Item 5 of the will to take only those stocks and bonds bequeathed to him by his wife. There is no mention of the testator's intent regarding any accessions to the stock by split, dividend, or otherwise, and those shares acquired by the testator between the time of execution and his death pass through the residuary clause. The bonds present a different problem because the attorney-in-fact, who is also a residual beneficiary, exchanged several bonds for Series HH bonds. The principle of ademption is not a rule of law which operates blindly, and was not applied here because the court was reluctant to allow a trustee to effectively rewrite a will, particularly where, as here, the trustee stands to profit from the transfers if they are viewed as adeeming the bonds.

Am Jur 2d, Wills §§ 1140 et seq., 1246, 1327, 1716.

APPEAL by defendants Morton, Morton, Wilson, Mason, Mason, Tolley, and Jones from judgment entered 13 February 1990 in GRANVILLE County Superior Court by *Judge E. Lynn Johnson.* Heard in the Court of Appeals 6 May 1991.

Plaintiff, executor of the estate of C. Julian Wilson, brought this action for declaratory judgment regarding the rights of the named beneficiaries in certain stocks and bonds which the testator owned at the time of his death. Item Five, the bequest in question, reads as follows:

> I give and bequeath to my nephews-in-law and my nieces-in-law who may be living at the time of my death, and Elizabeth Sykes, widow of my nephew-in-law, Arthur Sykes, share and share alike, all of the stocks and bonds which I may own as inherited by me from my wife, Rachel H. Wilson, and for identification purposes such stocks and bonds which I inherited from my wife are as follows:
>
> 228 Shares American Telephone and Telegraph Company, common
>
> 120 Shares American Tobacco Company, common
>
> 5 shares Carolina Power & Light Company, preferred
>
> 494.590 Shares Investors, Mutual, Inc., common
>
> 131.189 Shares Investors Variable Payment Fund, Inc., common
>
> U.S. SAVINGS BONDS, SERIES E

NUMBER	DATE	MATURITY VALUE
L4004877933E	Dec. 1943	$50.00
Q4008735615E	May 1943	25.00
C4003195302E	Sept. 1943	100.00
C4003195303E	Jan. 1943	100.00
C4003195304E	Jan. 1943	100.00
C4003195305E	Jan. 1943	100.00
C4003195306E	Jan. 1943	100.00
C4003195307E	Jan. 1942	100.00
C4003026589E	Feb. 1942	100.00
C4003195308E	March 1942	100.00
C114698955E	Dec. 1945	100.00
C114698956E	Dec. 1945	100.00
C114698957E	Dec. 1945	100.00
C114698958E	Dec. 1945	100.00
C146275941E	April 1949	100.00
C146275942E	April 1949	100.00
C146275943E	April 1949	100.00

C146275944E	April 1949	100.00
C146275945E	April 1949	100.00
C146275964E	April 1949	100.00
C146275966E	April 1949	100.00
C146275967E	April 1949	100.00
C9340623E	Juen[sic] 1944	500.00

At the time the will was executed, testator owned 228 shares of American Telephone and Telegraph Company, 120 shares of American Tobacco Company, 5 shares of Carolina Power & Light Company, 850.59 shares of Investors Mutual, Inc. and 202.231 shares of Investors Variable Payment Fund, Inc. After the will was executed, and before testator's death, dividend reinvestments increased his holdings to 20.877 shares of Carolina Power & Light Company, and 277.791 shares of Investors Variable Payment Fund, Inc. A stock split increased the number of his shares of American Tobacco to 240. A portion of the bonds listed were exchanged, along with certain other bonds, by testator's appointed attorney-in-fact, for Series HH bonds.

The case was tried based on the above stipulated facts. The trial court found that the paragraph in question amounted to a general bequest, and that the beneficiaries listed in that paragraph should receive "the entirety of the bequest, including any accessions resulting from stock splits and stock dividends, as well as the Series E Bonds." Defendants Morton, Morton, Wilson, Mason, Mason, Tolley and Jones appeal.

No brief for plaintiff.

Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn, and Charles M. White III, for defendants-appellants Marguerite W. Morton and Joe B. Morton, Executors of the Estate of Marguerite W. Morton, Joe B. Morton, Edwin B. Wilson, W. W. Mason, L. L. Mason, Louise W. Tolley and Carolyn W. Jones.

Cheshire, Parker & Butler, by D. Michael Parker, for defendants-appellees James A. Howard, Robert W. Howard, Georgia Howard Pometto, John Howard, Gladys Sykes Wallace, Elizabeth D. Sykes and Nancy B. McKee.

WELLS, Judge.

This appeal presents the sole question of whether the trial court properly interpreted the effect of Item Five of the will on

the distribution of the assets of the estate. The appealing defendants in this case are beneficiaries under the residual disposition clause in Julian Wilson's will, who would stand to benefit from a different interpretation of the provisions of Item Five. The appellee defendants are those who stand to benefit from the trial court's interpretation. We remand this action for modification of the declaratory judgment entered.

The trial court concluded that Item Five was a general bequest, and that the named beneficiaries were entitled to all of the stocks and bonds in that bequest, including all accessions. Appellees contend that the trial court's characterization of the bequest is correct because the testator mentioned "all of the stocks and bonds." Appellants contend that the bequest is a specific bequest, covering only the number of shares mentioned or described in the bequest. Usually, a bequest of all of a testator's property is a general bequest. N. Wiggins, *Wills and Administration of Estates in N.C.*, § 140 (2d ed. 1983). In this case, however, testator left all that he may have owned of a particular block of stocks and bonds which he inherited from his wife, not all of his stocks and bonds. A helpful statement of the rule on how best to characterize a bequest of stocks and bonds is set out in W. Bowe and D. Parker, *Page on Wills*, § 48.6 (1962):

> The general rule is that if it appears from the entire will that the testator intends to pass particular stocks, bonds, or other securities which he has described with sufficient certainty, the gift is specific. . . .

In *Heyer v. Bullock*, 210 N.C. 321, 186 S.E. 356 (1936), Chief Justice Stacy described a specific bequest as follows:

> A specific legacy is a bequest of a specific article, distinguished from all others of the same kind, pointed out and labeled by the testator. . . .

Accord Wachovia Bank & Trust Co. v. Dodson, 260 N.C. 22, 131 S.E.2d 875 (1963).

While we view the testator's language to indicate a specific bequest, we do not think the question of how best to label the bequest is dispositive of the issue in this case. The general rule is that the beneficiary of a general bequest of stock does not receive the benefit of accession to the stock occurring between the time of execution and the testator's death. Annotation, *Change In Stock*

Or Corporate Structure, Or Split Or Substitution Of Stock Of Corporation As Affecting Bequest Of Stock, 46 A.L.R.3d 7.

Our task in interpreting the will is to determine, insofar as it is possible, the intention of the testator. *Barnes v. Evans*, 102 N.C. App. 428, 402 S.E.2d 164 (1991). It is clear from the language of the will as a whole and the surrounding circumstances of record that the testator intended the beneficiaries in Item Five to take only those stocks and bonds bequeathed to him by his wife. He "pointed out and labelled" those stocks and bonds which were included in that bequest. The parties stipulated that a stock split increased the number of shares testator held in American Tobacco to 240. The parties also stipulated that testator acquired 15.877 shares of Carolina Power & Light Company and 75.56 shares of Investors Variable Payment Fund, Inc., through "dividend reinvestments." The trial court referred in its order to "stock dividends." While this creates an ambiguity as to whether the testator had reinvested cash dividends, or had simply received stock dividends from these companies, this ambiguity does not affect our holding. There is no mention in the bequest of the testator's intent with regard to the disposition of any accessions to the stock, by way of stock split, stock dividend, dividend reinvestment, or otherwise. We hold that those shares of stock acquired by testator between the time of execution and his death pass through the residuary clause, rather than to the named beneficiaries in Item Five.

The disposition of the bonds presents a different problem. Testator's attorney-in-fact exchanged several of the bonds bequeathed to testator from his wife, along with other Series E bonds, for four Series HH bonds dated September 1981. Testator's attorney-in-fact is also a beneficiary under the residuary clause of the will. The trial court held that the beneficiaries named in Item Five take the "entirety of the bequest" which was to include "all of the Series E Bonds." This creates an ambiguity as to whether the beneficiaries should take only those Series E bonds which remain or can be repurchased, or should take the proceeds from any transfer of the object of the bequest. Insofar as the trial court's declaratory judgment is contrary to our holding, it must be modified on remand.

An ademption generally occurs when the subject matter of a specific devise or bequest has been transferred during the testator's

lifetime, and cannot be found in the testator's estate when he dies. *Tighe v. Michal*, 41 N.C. App. 15, 254 S.E.2d 538 (1979). The principle of ademption is a rule of law which operates without regard to the testator's intent. *Id.* It is not a rule of law which operates blindly, however, as evidenced by the fact that we did not apply it in that case. It also should not be applied on the facts of this case.

In *Tighe*, the testatrix had become incompetent, and her trustees had bought and sold certain stocks. There is no evidence in this case that testator was ever incompetent, nor any indication of why an attorney-in-fact was appointed for him. We are generally reluctant to allow a trustee to, in effect, rewrite a will. *See Wachovia Bank and Trust Co. v. Ketchum*, 76 N.C. App. 539, 333 S.E.2d 542 (1985). Particularly where, as here, the trustee stands to profit from the transfers if they are viewed as adeeming the Series E bonds, we decline to hold that such an ademption took place. We hold, therefore, that the named beneficiaries in Item Five are entitled to the entirety of the original bequest of Series E bonds. Insofar as the bonds have been transferred or sold by the attorney-in-fact, the named beneficiaries are entitled to the proceeds, unless it is necessary to abate the testamentary gifts of the testator. *In re Estate of Warren*, 81 N.C. App. 634, 344 S.E.2d 795 (1986).

In summary, we hold that the beneficiaries in Item Five shall take only those stocks which testator listed in the bequest and owned at death. All accessions to these particular stocks occurring by way of stock split or stock dividends *since* testator's death pass along with the bequest. *Wachovia Bank & Trust Co. v. Dodson, supra.* Those stocks acquired between the time of execution of the will and testator's death do not pass along with the bequest. The transfer of Series E bonds by testator's attorney-in-fact shall not be construed as working an ademption.

This case is remanded to the trial court for entry of a judgment consistent with our opinion.

Modified and remanded.

Judges ARNOLD and PHILLIPS concur.

CLAUDINE GARRETT, PLAINTIFF-APPELLANT v. CYNTHIA OVERMAN, AND GEORGE OVERMAN, D/B/A SUNDANCE STABLES, DEFENDANT-APPELLEES

No. 907SC1161

(Filed 18 June 1991)

Animals, Livestock, or Poultry § 15 (NCI4th)— horse—at large—electric fence—liability of keeper

The trial court erred by granting a directed verdict for defendant stable owners in an action brought by plaintiff for injuries sustained when her car struck a horse which had escaped from defendants through an electric fence. Plaintiff's evidence showed that defendant Cynthia Overman anticipated that horses would run through the electrified wires, defendants knew that other horses had run through the wires in the past, the wires were spliced together when broken, and a path led from the stables to a frequently traveled highway. The state of repair of the fence does not preclude a finding of breach of the duty of care if the fence is insufficient to restrain horses, the fact that this horse had not previously escaped does not preclude a finding of breach, and the fact that the horses which previously escaped had never damaged a motor vehicle does not preclude a finding of breach or proximate cause.

Am Jur 2d, Animals §§ 50, 52, 54.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway. 29 ALR4th 431.

APPEAL by plaintiff from order entered 31 July 1990 in WILSON County Superior Court by *Judge Napoleon B. Barefoot.* Heard in the Court of Appeals 15 May 1991.

Perry, Brown & Levin, by Cedric R. Perry, for plaintiff-appellant.

Gibbons, Cozart, Jones, James, Hughes, Sallenger & Taylor, by Thomas R. Sallenger, for defendant-appellees.

GREENE, Judge.

The plaintiff appeals the trial court's order entered 31 July 1990 wherein the trial court granted the defendants' directed verdict motion made at the close of the plaintiff's evidence.

The evidence viewed in the light most favorable to the plaintiff tends to show the following: On 31 January 1989, between 6:00 a.m. and 6:30 a.m., the plaintiff was driving to work on Bethlehem Road in Rocky Mount, North Carolina. While driving down that road, a horse collided with the plaintiff's car. After the horse had rolled over the car, the plaintiff brought the car to a stop in a nearby yard. The plaintiff exited her car from the passenger's side because the door on the driver's side of the car would not open. The plaintiff went to a nearby house and had the resident call the police and an ambulance. She went to Nash General Hospital where, though not admitted, she received emergency room treatment.

In addition to minor cuts and bruises, the plaintiff incurred back and neck injuries as a result of the collision. She experienced decreased mobility and intense pain in her back. Because of her decreasing mobility and pain, she went to Heritage Hospital in Tarboro. Later, she was treated by Dr. S. L. Scarborough, a licensed chiropractor in North Carolina. According to Dr. Scarborough, the collision caused the plaintiff to suffer from sciatic neuritis, which is painful radiation usually down a leg, and lumbalgia, which is a painful lumbar spine.

The horse that collided with the plaintiff's car was, at the time of the collision, under the custody of the defendants. The defendants owned and operated Sundance Stables where the defendants boarded and bred horses. At the time of the collision, the defendants had operated Sundance Stables for over twelve years. On 31 January 1989, the defendants had twenty-one horses boarded at the stables.

Sundance Stables was located off of Old Mill Road, a frequently traveled highway, near Bethlehem Road, also a frequently traveled road, and was enclosed by a fence, a portion of which is made of wood and the remainder of electrified stainless steel wire. The fence which bordered Old Mill Road stood approximately four to five feet high and was made of three wood planks supported in a horizontal position by posts. Each plank had space between it and the next plank. This portion of the fence was erected in 1988,

and no horse had jumped through this wooden fence at any time before the collision.

The remainder of the fencing was comprised of electrified wire of either one or two strands supported by wood posts spaced several feet apart. The fence comprised of two strands of wire had a bottom wire standing about two feet off the ground, and the top wire standing about four feet off the ground. The stainless steel wires were electrified by a device known as a "hot box." Two to three times a day on days when the horses were in the pasture, someone at the stables checked either the "hot box" or the wires to make sure that the wires were not broken.

Cynthia Overman (Overman), one of the defendants, testified that she anticipated horses running through the electrified wires. According to Overman, the horses "test" the wires when they arrive at the stables, and when they get shocked by the wires, they "learn their lesson . . . ." Although Overman testified that the horse in question had been in the pasture every night for two weeks and "was used to the wire," she did not testify that this horse had "tested" the wires in that two-week period. Prior to 1989, other horses had run through the electrified wires. Each time this happened, someone would splice the wires back together so as to make the wire electrified again. George Overman, another defendant, had spliced the wires on various occasions.

The horse which collided with the plaintiff's car ran through the portion of the electric fence comprised of two electrified wires. After getting out of the pasture, the horse followed a path in the back part of the stable area, which path led to Bethlehem Road where the horse collided with the plaintiff's car.

The issue is whether the plaintiff presented substantial evidence of the defendants' negligence to survive a directed verdict motion.

> 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). "More than a scintilla of evidence" means the same as "substantial evidence." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "Accordingly, if the non-movant presents such relevant evidence as a reasonable mind might accept as adequate to support the elements of the non-movant's claim or defense, the trial court must deny a motion for a directed verdict." *Hines v. Arnold*, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

"The liability of the owner [or person having charge] of animals for permitting them to escape upon public highways, in case they do damage to travelers or others lawfully thereon, rests upon the question whether the keeper is guilty of negligence in permitting them to escape. In such case the same rule in regard to what is and what is not negligence obtains as ordinarily in other situations." *Gardner v. Black*, 217 N.C. 573, 576, 9 S.E.2d 10, 11 (1940). Negligence "requires proof that: the defendant had a duty of care; the defendant breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury." *Stoltz v. Burton*, 69 N.C. App. 231, 233-34, 316 S.E.2d 646, 647 (1984).

The defendants do not dispute that they owed a duty to the plaintiff. Not only did Overman testify that she "had a responsibility to keep the horse restrained and off the streets" to the best of her ability, but "[i]t is the legal duty of a person having charge of animals to exercise ordinary care and the foresight of a prudent person in keeping them in restraint." *Gardner*, 217 N.C. at 576, 9 S.E.2d at 11. Furthermore, the defendants do not dispute that the plaintiff suffered damage as a result of the collision with the horse. However, the defendants argue that they did not breach their duty of care.

The defendants argue that because the electrical fencing was in good repair, the horse in question had not previously escaped,

and there was no evidence that any of the horses that had previously escaped had ever collided with a motor vehicle upon a highway, the defendants could not have breached their duty of care. We disagree. The state of repair of the fence does not preclude a finding of a breach if the fence itself, even in good repair, is insufficient to restrain horses. The fact that the horse in question had not previously escaped from the pasture does not preclude a finding of breach. *See Wells v. Johnson*, 269 N.C. 622, 153 S.E.2d 2 (1967) (cattle); *Eatman v. Bunn*, 72 N.C. App. 504, 505-06, 325 S.E.2d 50, 51 (1985) (cow); Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R.4th 431 (1984). Furthermore, the fact that the horses which had previously escaped never damaged a motor vehicle does not preclude a finding of breach or proximate cause. *See Wells*, 269 N.C. at 622, 153 S.E.2d at 3 (no evidence that cattle damaged motor vehicles when out of pasture on previous occasions); *Shaw v. Joyce*, 249 N.C. 415, 106 S.E.2d 459, 460 (1959) (no evidence that mule damaged motor vehicles when out of pasture on previous occasions).

The plaintiff's evidence shows that Overman anticipated that horses would run through the electrified wires, the defendants knew that other horses had run through the wires in the past, the wires were spliced back together when broken, and a path led from the stables to a frequently traveled highway. This evidence is such relevant evidence as a reasonable mind might accept as adequate to support the conclusions that the defendants were negligent in preventing the horse from escaping from the pasture, and that they should have reasonably foreseen that a horse would escape from the pasture and likely cause harm to a traveler on the highway. Accordingly, the trial court erred in granting the defendants' directed verdict motion.

Reversed and remanded.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. JULE W. THOMAS, JR., PAMELA SCHUFFERT, SHEILA HIGGINS, MARY E. MAYHEW, TERRY W. TURNER, COLIN HUDSON, HELEN L. GORDON, CHARLES ERIK ANDREWS, ALAN D. BRAGWELL

No. 9028SC744

(Filed 18 June 1991)

Criminal Law § 34 (NCI4th)— trespass at abortion clinic—defense of necessity—requirements not met

The trial court did not err in a prosecution arising from a sit-in at a clinic offering abortions by refusing to instruct the jury on the defense of necessity. While the defense of necessity remains viable, it is unavailable where the legislature has acted to preclude the defense by making a clear and deliberate choice regarding the values at issue. The General Assembly has made a clear and deliberate choice by making abortions performed in accordance with statutory provisions lawful; since there was no evidence that the clinic was performing or was about to perform illegal abortions, the evil which the defendants sought to avoid was nonexistent and the possibility of the defense foreclosed.

Am Jur 2d, Trespass § 42.

APPEAL by defendants from judgments entered 14 December 1989 in BUNCOMBE County Superior Court by *Judge Shirley L. Fulton.* Heard in the Court of Appeals 23 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Charles R. Brewer for defendants-appellants.

WYNN, Judge.

On the morning of 22 July 1990, the defendants, along with others, staged a "sit-in" on the premises of the Western Carolina Medical Clinic in Buncombe County, North Carolina. The clinic offers complete gynecological services to women, including abortion services. In spite of conspicuous signs posted on the premises indicating "No Trespassing, Clinic Patients Only," the defendants proceeded onto the premises and blocked the entrances to the clinic by sitting in front of them. Shortly thereafter, the clinic's

director, Ms. Joni Ellis, told the defendants and others taking part in the "sit-in" that she was authorized by the clinic to demand that they leave the premises. Ellis repeated the demand that they leave eight times. When the defendants failed to leave the premises, they were arrested.

Prior to trial, each of the defendants stipulated that they were on the premises of the clinic on the day in question and that they remained there after being instructed to leave. However, they denied having possessed criminal intent. In a consolidated trial, each defendant was convicted of violating North Carolina General Statutes section 14-159.13 (second degree trespass). The defendants thereafter filed a joint notice of appeal pursuant to North Carolina Rule of Appellate Procedure 5.

I

In this case, we are called upon to determine whether the defense of "necessity" is available to individuals who commit the crime of trespass in an effort to "save the lives" of fetuses from abortion. The defendants contend that the trial court committed reversible error by refusing to instruct the jury on the "necessity" defense and by excluding certain testimony and other evidence which tended to support the defense. Admittedly, this issue is one of first impression in this State. For the reasons which follow, we are constrained to hold that the defense of "necessity" is inapplicable to the facts of this case.

Under the "necessity" defense, " '[a] person is excused from criminal liability if he acts under a duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice.' " *State v. Gainey*, 84 N.C. App. 107, 110, 351 S.E.2d 819, 820 (1987) (quoting Black's Law Dictionary 929 (rev. 5th ed. 1979)). The rationale behind the defense is based upon the public policy that "the law ought to promote the achievement of higher values at the expense of lesser values, and [that] sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." W. LaFave & A. Scott, Handbook on Criminal Law § 50, at 382 (1972). "[I]f the harm which will result from compliance with the law is greater than that which will result from violation of it, [a person] is justified in violating it." *Id.* at 381.

In *Gainey, supra,* we noted in dicta that "the defense of necessity has not been considered in North Carolina cases thus far." 84 N.C. App. at 110, 351 S.E.2d at 820. Upon reexamination of this issue in greater depth, we acknowledge that in fact several early decisions of the North Carolina Supreme Court appear to have recognized "necessity" as a defense to criminal prosecutions. In *State v. Wray,* 72 N.C. 253 (1873), a druggist unlawfully sold spirituous liquors for medicinal purposes at the direction of a physician. The Court held that the druggist was not indictable because the liquor was sold "in good faith, and after the exercise of due caution as to its necessity as a medicine." 72 N.C. at 255. In *State v. Brown,* 109 N.C. 802, 13 S.E. 940 (1891), the Court pointed out that it was well settled law that where a highway became impassable, a traveler might go *extra viam* upon the adjacent land without subjecting himself to an action for trespass. "This extraordinary rule," Justice Avery wrote, "was subsequently recognized by the courts of this country, and the right to do with impunity what would ordinarily subject a person to liability in an action for damages, was generally held to rest upon the doctrine of necessity." 109 N.C. at 803, 13 S.E. at 941 (citations omitted). However, the Court declined to apply the doctrine of necessity in that case where it was shown that the defendant had trespassed for his personal convenience and noted that in previous cases, the Court had limited the application of the "necessity" defense to instances where "a human being was thereby saved from death or peril, or relieved from severe suffering." *Id.* at 806, 13 S.E. at 942 (citing *State v. Brayer,* 98 N.C. 619, 2 S.E. 755 (1886); *see also Randall v. Richmond and Danville R.R.,* 107 N.C. 748, 12 S.E. 605 (1890); *State v. Wray, supra.*). In *State v. Southern Railway Co.,* 119 N.C. 814, 25 S.E. 862 (1896), the Court reviewed the defendant's conviction for violating a statute which prohibited the running of a train after 9:00 a.m. on Sundays, and stated: "If the defense relied upon was that it was necessary to run after the hour fixed as the limit by statute in order to preserve the health or to save the lives of the crew . . . , or relieve them from suffering, it was incumbent on the defendant to show to the satisfaction of the jury that the act was done under the stress of such necessity in order to excuse it as not in violation of the spirit though in conflict with the letter of the law." 119 N.C. at 821, 25 S.E. at 862.

Inasmuch as the defense of "necessity" has not been expressly abolished in this State, we find that it indeed remains viable; however,

we conclude that the requirements for its invocation have not been met under the facts of this case.

It is often said that the necessity defense was not intended to excuse criminal activity by those who disagree with the decisions and policies of the lawmaking branches of government. 22 C.J.S. *Criminal Law* § 51 (1989). As such, the defense is unavailable where the legislature has acted to preclude the defense by making a clear and deliberate choice regarding the values at issue. *Id.* at § 50.

Recent cases in other jurisdictions follow this line of reasoning. In *Gaetano v. United States*, 406 A.2d 1291 (D.C. App. 1979), the court was confronted with the same argument presented here—that because abortion terminates life, one is entitled to go onto the property of the abortion clinic and prevent abortions. The *Gaetano* court concluded that the "necessity" defense did not apply, and held that the right to be free from criminal interference prevailed over the trespassers' illegal actions. In *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), the Fourth Circuit affirmed the grant of an injunction which prohibited the defendants in that case from trespassing on the premises of an abortion clinic and reasoned that the activities of the trespassers "in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law." 914 F.2d at 585.

In the instant case, the defendants contend that it was "necessary" for them to commit the crime of trespass in order to avoid the greater "evil" of death by abortion. They argue that by violating the literal terms of N.C. Gen. Stat. § 14-159.13, they were able to promote a higher value than the value promoted by the trespassing statute.

In our opinion, the North Carolina General Assembly has made a "clear and deliberate choice" regarding the competing values at issue by choosing to make those abortions performed in accordance with the provisions of N.C. Gen. Stat. § 14-45.1 lawful. Since there was no evidence at the defendants' trial that the clinic was performing or about to perform illegal abortions, it is implicit that the "evil" which the defendants sought to avoid by blocking the clinic's entrances was nonexistent. The nonexistence of an "evil" to avoid foreclosed the possibility of a defense based upon necessity. Accordingly, we hold that there was no error in the trial court's refusing to instruct the jury on the defense of necessity.

II

We have examined the defendants' remaining assignments of error and find them also to be without merit. For the reasons set forth above, we find no error in the defendants' trial for second degree trespass.

No error.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA v. EDDIE LEE SHAW

No. 9016SC202

(Filed 18 June 1991)

Criminal Law § 69 (NCI3d)— narcotics—recording of telephone conversation by family member—not admissible

The trial court erred in a prosecution for felonious possession of a controlled substance by denying defendant's motion to suppress evidence seized pursuant to a search warrant based on a telephone conversation between defendant and another man which was tape recorded by the other man's mother. The mother's activity is prohibited by 18 U.S.C. 2510 *et seq.*, which states that any exceptions to its prohibitions are specifically provided. The statute makes no express exception for electronic surveillance between family members.

Am Jur 2d, Searches and Seizures §§ 13, 24.

Admissibility, in criminal case, of evidence obtained by search by private individual. 36 ALR3d 553.

APPEAL from order entered 13 November 1989 by *Judge I. Beverly Lake, Jr.*, in ROBESON County Superior Court. Heard in the Court of Appeals 27 September 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mary Jill Ledford, for the State.

Musselwhite, Musselwhite & McIntyre, by David F. Branch, Jr., for defendant-appellant.

PARKER, Judge.

Defendant pled guilty to the charge of felonious possession of a controlled substance in violation of N.C.G.S. § 90-95(a)(3), reserving his right to appeal, pursuant to N.C.G.S. § 15A-979(b), the trial court's denial of his motion to suppress. Defendant based his motion to suppress one bag of psilocybin, a Schedule 1 substance, on the allegation that the search warrant leading to discovery of the evidence was based on information obtained in violation of federal wiretapping statutes. The trial judge denied the motion, holding that *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 266 S.E.2d 347, *aff'g as modified* 28 N.C. App. 644, 222 S.E.2d 463 (1976), the leading case in this State upholding the suppression of evidence under the federal wiretapping statutes, was distinguishable. We find that *Rickenbaker* is controlling and that defendant's motion was improperly denied. We, therefore, reverse.

The search warrant in this case was issued to Detective John Moore. Detective Moore's application for the warrant and his accompanying affidavit relied on the contents of a tape-recorded telephone conversation between defendant and another young man to establish probable cause to believe that defendant was in possession of a controlled substance. The other man's mother had obtained the tape recording on her own initiative, apparently by attaching a microcassette tape recorder to a telephone extension line in her house. She called the police after listening to the recorded conversation, part of which involved the speakers' plans to get together about "shrooms," the street name for mushrooms (psilocybin). The mother played the tape for Detective Moore and identified the speakers as her son and defendant. Evidence at the suppression hearing suggested that the woman's son and defendant did not know about, and had not consented to, the taping of their phone conversation. Neither the mother nor defendant testified on *voir dire*.

The sole question on appeal is the legality under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* (Title III), of the surreptitious tape recording of defendant's telephone conversation by the parent of his telephone partner and the admissibility of evidence obtained pursuant to a warrant issued on information contained in the audiotape. In *Rickenbaker*, the estranged husband had an extension line from the telephone in the marital home installed in a closet in his downtown office. Husband installed a recording device on this extension and, unknown

to his wife, recorded her telephone conversations. The Supreme Court reasoned that such interception did not fall within any of the exceptions to the wiretapping prohibitions enumerated in the statute, specifically the exception for telephone lines used "in the ordinary course of . . . business." 18 U.S.C. § 2510(5)(a)(i).

In *Rickenbaker* the Court based its holding on the express provisions of Title III, and stated unambiguously that Title III is to be interpreted from its plain language. "Where the statutory language is clear, there is no need to refer to legislative history." 290 N.C. at 382, 226 S.E.2d at 352.

Rickenbaker quoted 18 U.S.C. § 2515 in support of its decision that the husband's unconsented recordings had to be suppressed, unless his wiretapping fell within a stated statutory exception.

> No part of the contents of such communication and *no evidence derived therefrom may be received in evidence at any trial*, hearing, or other proceeding in or before any court . . . if disclosure of that information would be in violation of this chapter.

290 N.C. at 382, 226 S.E.2d at 352 (emphasis in original).

Rickenbaker also quoted the following language from Title III as relevant to its determination.

> [A]ny person who—(a) willfully intercepts . . . any wire or oral communication; . . . (b) willfully uses any . . . mechanical or other device to intercept any oral communication when—(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication . . . shall be fined not more than $10,000 . . . .

18 U.S.C. § 2511(1) (1968). By implication, the Supreme Court held that "any person" means exactly what it says. And in fact the statutory definition of "person" includes "any individual." 18 U.S.C. § 2510(6).

Significantly, *Rickenbaker* did not follow the line of cases that the State now urges this Court to adopt as the better position in two opposing lines of federal authority. The cases preferred by the State involve tape recording in the home of telephone conversations of other family members. Analogizing recording from a home extension line to eavesdropping on an extension line, which is not prohibited by Title III, these courts have found such taping

not to violate Title III. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897, 42 L.Ed.2d 141 (1974); *Perfit v. Perfit*, 693 F. Supp. 851 (C.D. Cal. 1988); *London v. London*, 420 F. Supp. 944 (S.D.N.Y. 1976); *see also* Note, *All's Fair: No Remedy under Title III for Interspousal Surveillance*, 57 Fordham L. Rev. 1035 (1989) (authored by Cori D. Stephens). However, these cases give no satisfactory explanation for not including "any family member" within Congress' inclusive language of "any individual."

Consistent with this line of cases, the State argues that 18 U.S.C. § 2510(5)(a)(i) creates an exception for taping conversations within the privacy of one's own home. The exception in section 2510(5)(a)(i) is worded, however, as follows:

> (5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication *other than*—
>
> > (a) *any telephone* . . . (i) furnished to the subscriber or user by a provider of wire or electronic communication in the ordinary course of its business *and being used . . . in the ordinary course of [subscriber's or user's] business*; or furnished by such subscriber or user for connection to [such] facilities. . . .

18 U.S.C. § 2510(5)(a)(i) (1988) (emphasis added). There was no evidence before the trial court that the mother used a microcassette recorder "in the ordinary course of business." Even if section 2510(5)(a)(i) were applicable to tape recorders when the exception refers only to "any telephone," there was also no evidence in this case that the electronic device was supplied to the mother "by a provider of [telephone] communication" in the ordinary course of its business.

The State concedes in its brief that Title III makes no express exception for electronic surveillance between family members. Because *Rickenbaker* directs us to interpret Title III by its express language, rather than by examination of legislative history or interpretation of congressional intent, the case law authority presented by the State is inapplicable in North Carolina to the facts in this case. The United States Supreme Court has similarly observed that "[t]he purpose of the [wiretapping] legislation . . . was effectively to prohibit . . . all interceptions of oral and wire comminications,

except those specifically provided for in the Act . . . ." *United States v. Giordano*, 416 U.S. 505, 514, 40 L.Ed.2d 341, 353 (1974).

We conclude, therefore, that the activity by the mother is prohibited by Title III, which states that any exceptions to its prohibitions are "specifically provided in this chapter." 18 U.S.C. § 2511(1). *See also Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974); *Heggy v. Heggy*, 699 F. Supp. 1514 (W.D. Okla. 1988); *Nations v. Nations*, 670 F. Supp. 1432 (W.D. Ark. 1987); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979).

Reversed.

Judges JOHNSON and EAGLES concur.

CLINTON DEVANE BASS, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. 907SC130

(Filed 18 June 1991)

Insurance § 69 (NCI3d) — underinsured motorist coverage — stacking — permitted

Summary judgment for defendant was reversed where plaintiff filed an action praying that defendant insurance company be held liable for underinsured motorist coverage; defendant answered that it had issued a policy insuring two vehicles owned by plaintiff but plaintiff's injuries occurred while he was operating a third vehicle not insured by defendant; the trial court granted summary judgment for defendant and was affirmed by the Court of Appeals at 100 N.C. App. 728; and the Supreme Court remanded for reconsideration in light of *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139. The vehicle in this case is not listed in the policy issued by defendant, but plaintiff is a named insured in both policies. The Supreme Court reasoned in *Smith* that liability insurance is primarily vehicle oriented, but UM/UIM insurance is essentially person

oriented. Under the language of this policy, the UIM provision may be stacked.

Am Jur 2d, Automobile Insurance §§ 322, 329.

APPEAL by plaintiff from Judgment entered 15 December 1989 by *Judge G. K. Butterfield, Jr.*, in WILSON County Superior Court. Heard in the Court of Appeals 9 May 1991.

Thomas and Farris, P.A., by Allen G. Thomas and Julie A. Turner; and Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson, for plaintiff appellant.

Poyner and Spruill, by George L. Simpson, III, for defendant appellee.

COZORT, Judge.

This case is before this Court on remand from the North Carolina Supreme Court, to be reconsidered in light of that Court's recent decision in *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991). Following *Smith*, we find the underinsured motorist coverages provided in plaintiff's automobile insurance policies are stackable. We hold the trial court incorrectly entered summary judgment for the defendant, and we reverse.

We set out the facts in detail in *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 100 N.C. App. 728, 398 S.E.2d 47 (1990), and will not repeat all the facts here. Briefly, plaintiff filed this action on 24 October 1989, praying that the trial court find the defendant insurance company liable to plaintiff for underinsured motorist coverage. Defendant answered that it had issued a policy insuring two vehicles owned by plaintiff (Policy 1), but that plaintiff's injuries occurred while he was operating a third vehicle he owned which was not insured by defendant, but by a different insurance company (Policy 2). The trial court granted summary judgment for defendant, and we affirmed *Bass*, 100 N.C. App. 728, 398 S.E.2d 47 (1990), following *Smith v. Nationwide Mut. Ins. Co.*, as it had been decided by a panel of the Court of Appeals. *See Smith v. Nationwide Mut. Ins. Co.*, 97 N.C. App. 363, 388 S.E.2d 624 (1990). The Supreme Court reversed *Smith* and granted discretionary review in the instant case for the limited purpose of remanding this case to the Court of Appeals to be reconsidered in light of the Supreme Court's opinion in *Smith*.

In *Smith*, plaintiff's decedent, Crystal Smith, was fatally injured while driving a Toyota owned by her and her father. *Id.* at 141, 400 S.E.2d at 46. The Toyota was insured under Nationwide Policy No. 61J097608 (Policy A); Miss Smith and plaintiff were listed as insureds under this policy. Plaintiff also had insurance with Nationwide under Policy No. 61E449873 (Policy B) which insured two other vehicles. *Id.* Each of the Nationwide policies provided UIM coverage at limits of $100,000.00/$300,000.00. The other vehicle involved in the accident was insured by Farm Bureau Mutual Insurance Company, who paid its single limit liability coverage to Miss Smith's estate. *Id.* Plaintiff brought suit against Nationwide seeking a declaration that underinsured motorist coverage provided for in Policy A and Policy B may be stacked in calculating the total underinsured motorist coverage provided to satisfy any judgment for the wrongful death of Miss Smith. *Id.*

The Supreme Court held that the underinsured motorist (UIM) coverages provided in two separate automobile insurance policies issued to the plaintiff may be stacked to compensate for the death of plaintiff's daughter who was killed while driving a vehicle owned by plaintiff and his daughter, even though the daughter and the vehicle she was driving were listed on only one of the policies. *Id.* at 153, 400 S.E.2d at 53. The Court stated that in determining whether insurance coverage is provided by a particular policy, careful attention must be given to (1) the type of coverage, (2) the relevant statutory provisions, and (3) the terms of the policy. *Id.* at 142, 400 S.E.2d at 47.

The Court reasoned that uninsured/underinsured motorists (UM/UIM) coverage is different from liability insurance coverage in that UM/UIM "protects covered persons from the consequences of the negligence of others." *Id.* at 146, 400 S.E.2d at 49. While liability insurance may be primarily vehicle oriented, UM/UIM insurance is "essentially person oriented." *Id.* at 148, 400 S.E.2d at 50.

In the present case, as in *Smith*, the relevant statute is N.C. Gen. Stat. § 20-279.21 (1989). Under § 20-279.21(b)(4), UIM coverage is "to be used only with policies that are written at limits that exceed those prescribed by [the statute] and that afford uninsured motorist coverage . . . in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy." In *Smith*, the Court stated that "while the statutory scheme

requires the insurance company to offer UM/UIM coverages only if liability coverages exceed the minimum statutory requirement and in an *amount* equal to the limits of bodily injury liability insurance, nothing in the statute requires that the *scope* of the coverage be the same." (emphasis in original) *Id.* at 148, 400 S.E.2d at 50. Thus, in the present case, we need only look at the UIM section of the policy to determine whether plaintiff may recover from the UIM provision of the policy issued by defendant as well as under the UIM provision of Policy 2.

In *Smith*, the Court found that plaintiff was a "covered person" under both policies where decedent was a named insured under one policy and the pertinent provision of the other policy which covered the uninvolved automobiles and which did not name plaintiff's decedent as an insured contained no "family member" exclusion. *Id.* at 150, 400 S.E.2d at 51. *See Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). In the instant case, plaintiff is a named insured in both policies, but the vehicle involved in the accident is not listed in the policy issued by defendant. However, we rely on the Supreme Court's suggestion in *Smith* that "the definition of 'persons insured' for UM/UIM coverage strongly suggests that the UM/UIM coverage for family members follows the person rather than the vehicle," and hold that plaintiff may recover under the UIM provision of the policy issued by defendant as well as Policy 2. *Id.* at 149, 400 S.E.2d at 50.

In order to determine whether plaintiff may stack the UIM coverages under both policies, we must examine the policy language found in the "Other Insurance" provision of the policy issued by defendant. The UM/UIM endorsement modifies the "Other Insurance" provision of the UM coverage agreement with respect to damages the plaintiff is entitled to recover from an uninsured or underinsured motorist. The provision is as follows:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a **family member's** injuries shall be the sum of the limits of liability for this coverage under all such policies.

Thus, under the language of the policy, the UIM provision of the policy issued by defendant may be stacked with the UIM coverage of Policy 2. Therefore, the decision of the trial court granting summary judgment for defendant is reversed.

Reversed.

Judges ORR and WYNN concur.

STATE OF NORTH CAROLINA v. MARY ANNA BARLOW

No. 904SC255

(Filed 18 June 1991)

Criminal Law § 76.5 (NCI3d)— confessions without Miranda warning—subsequent confessions after warning—trial court findings—insufficient

A plea of no contest was stricken and the cause was remanded, despite *State v. Edgerton*, 328 N.C. 319, where there was evidence from which it could be inferred that at least one of the statements to officers made prior to the videotaped confession was involuntary. The trial court was obliged to make a determination as to whether any of the three statements complained of was the result of a constitutional violation. The order also does not contain sufficient findings for the court to determine whether the trial judge even considered one of the statements to be a confession.

Am Jur 2d, Evidence §§ 529, 534, 537, 542.

Judge ORR dissenting.

ON remand to this Court for reconsideration by order of the Supreme Court dated 2 May 1991. Heard in the Court of Appeals 5 June 1991.

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

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

WELLS, Judge.

This case has been remanded to this Court for our reconsideration in light of our Supreme Court's opinion in *State v. Edgerton*, 328 N.C. 319, 401 S.E.2d 351 (1991). Our initial opinion is reported at 102 N.C. App. 71, 401 S.E.2d 368 (1991).

In *Edgerton*, defendant had been arrested and charged with murder. The State's evidence tended to show that Deputy Sheriff Perry arrived at the scene of the shooting and asked defendant to get into the police car, which defendant did. Perry then asked defendant whether he had fired his gun into the home of one of the victims and he responded that he had. Perry then told defendant not to say anything else and took defendant to Chief Deputy Bowden. Bowden started to read defendant the *Miranda* warnings, but before he could finish, defendant made an inculpatory statement. We awarded a new trial based on the fact that the trial court had not determined whether the statement to Perry was involuntary, and if so, whether it tainted the statement given to Bowden. *State v. Edgerton*, 86 N.C. App. 329, 357 S.E.2d 399 (1987). In reversing this Court, the Supreme Court held that the statement to Bowden was not the result of an interrogation, and that there was no evidence that the statement to Perry was coerced.

We do not perceive that our Supreme Court's opinion in *Edgerton* requires a different result than the one we previously reached in this case. The Court pointed out, as we did in our original disposition of this appeal, that the fact that there had been a prior un-Mirandaized statement to law enforcement officials does not, nothing else appearing, taint a confession properly preceded by the *Miranda* warnings. The fruit of the poisonous tree analysis presupposes the existence of a constitutional violation. *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed.2d 222 (1985). The giving of the prophylactic *Miranda* warnings is not a constitutional right, but is meant to ensure that the constitutional right against compulsory self-incrimination is protected. *Id.* The Supreme Court found no evidence of a violation involving the statement to Perry, so no fruit of the poisonous tree analysis was necessary.

There is evidence in this case, however, from which it could be inferred that at least one of the three complained-of statements to law enforcement officers made prior to the videotaped confession was involuntary. Defendant testified at the suppression hearing that Officer Newkirk arrived shortly after she had confessed to the health care worker, and they spoke out of her hearing. Officer Newkirk then handcuffed her, although he told her that she was not under arrest. She was then taken to the police station where she was constantly supervised for forty-five minutes, including being escorted to the restroom by a police officer, while waiting for Detective Gelling. Given these circumstances, we hold that

the trial court was obliged to make a determination as to whether any of the three statements complained of were the result of a constitutional violation. While portions of the trial court's order would tend to indicate that the trial court believed the oral and written statements made to Detective Gelling were in fact voluntary, we continue to adhere to our original holding that this case must be remanded for further proceedings in light of the proper legal framework. The trial court's order under review here also does not contain sufficient findings for us to determine whether the trial court considered the oral statement made to Deputy Chief Collins (the third statement complained of) to even be a confession. We therefore reaffirm our previous holding and mandate that the defendant's plea of no contest be stricken, the judgment entered be vacated, and the cause be remanded to the superior court for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Chief Judge HEDRICK concurs.

Judge ORR dissents.

Judge ORR dissenting.

I respectfully dissent. In my view, our Supreme Court's opinion in *State v. Edgerton*, 328 N.C. 319, 401 S.E.2d 351 (1991), mandates a different result.

Under *Edgerton*, a noncoerced interrogation while a defendant is in custody but before *Miranda* warnings are given does not bar admission of a subsequent confession. Upon review of the evidence, I disagree with the majority's view that there is evidence from which it can be inferred that at least one of the statements made prior to the videotaped confession was involuntary. These statements at issue were not coerced and thus, under *Edgerton*, did not taint the subsequent videotaped confession.

STEVEN RICHARD FURR, PLAINTIFF v. JAN BRUCE NOLAND AND JAMES S. NOLAND, DEFENDANTS

No. 9026SC1167

(Filed 18 June 1991)

Rules of Civil Procedure § 13 (NCI3d) — compulsory counterclaim — voluntarily dismissed — barred

The trial court properly dismissed a claim arising from a truck accident where the Nolands initially filed suit against Furr for personal injuries; Furr filed a counterclaim for his injuries; Furr took a voluntary dismissal of his counterclaim on 3 April 1989; a jury found that the Nolands were not injured as a result of the negligence of Furr; Furr filed a claim against the Nolands and two insurance companies for his injuries on 27 March 1990; and the trial court granted summary judgment for defendants. There is no dispute that the claim now asserted arose out of the same occurrence which was the subject of the original lawsuit and plaintiff acknowledges that his current suit is based on what was a compulsory counterclaim in the prior lawsuit. Although N.C.G.S. § 1A-1, Rule 41 makes no distinction between permissive and compulsory counterclaims, the court recognizes that one exists.

Am Jur 2d, Judgments §§ 430, 434, 436, 492.

APPEAL by plaintiff from order of *Judge Raymond A. Warren* entered 24 August 1990 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 16 May 1991.

Karro, Sellers, Langson and Gorelick, by Seth H. Langson, for plaintiff appellant.

Golding, Meekins, Holden, Cosper and Stiles, by Terry D. Horne, for Jan Bruce Noland and James S. Noland, defendants appellees; McClure and Contrivo, P.A., by Frank J. Contrivo, for Allstate Insurance Company; and Parker, Poe, Adams and Bernstein, by David N. Allen, for Michigan Mutual Insurance Company.

COZORT, Judge.

The sole issue presented on appeal is whether plaintiff may maintain this action on a claim which was a compulsory counterclaim in a prior lawsuit and on which plaintiff took a voluntary dismissal.

We hold that N.C. Gen. Stat. § 1A-1, Rule 13(a) (1990) controls, and we affirm the trial court's dismissal of the present action.

On 25 June 1986, Steven Furr was operating a truck which collided into a truck operated by Jan Noland. The truck operated by Jan Noland was owned by James Noland; the truck operated by Furr was owned by Frederickson Motor Express Corporation. On 16 May 1987 in Mecklenburg Superior Court, the Nolands filed suit against Furr and Frederickson for personal injuries which allegedly resulted from the collision. Furr (plaintiff in the present action) filed a counterclaim for his injuries. On 3 April 1989, Furr took a voluntary dismissal of his counterclaim. On 13 June 1989, a Mecklenburg County jury found that the Nolands were not injured as a result of the negligence of Furr and awarded no damages to the Nolands.

On 27 March 1990, Furr filed a claim in Mecklenburg County Superior Court against the Nolands for injuries arising out of the collision of 25 June 1986. Furr also asserted claims against Allstate Insurance Company and Michigan Mutual Insurance Company. All three defendants filed N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990) motions to dismiss plaintiff's lawsuit. At the hearing on the defendants' motions, the trial court considered matters outside of the pleadings and granted summary judgment in favor of the defendants. Plaintiff appeals.

Defendants maintain that the trial court properly dismissed plaintiff's claim because the claim was a compulsory counterclaim which should have been asserted and litigated in the prior lawsuit between the parties. We agree. N.C. Gen. Stat. § 1A-1, Rule 13(a) provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

In the present case, there is no dispute that the claim which plaintiff is now asserting arose out of same occurrence which was the subject of the 16 May 1987 lawsuit. Plaintiff acknowledges that his current suit is based on what was a compulsory counterclaim in the prior lawsuit. Plaintiff contends, however, that under N.C. Gen.

Stat. § 1A-1, Rule 41 (1990), he is allowed to maintain a new action on his compulsory counterclaim. We disagree.

Rule 41(a) provides that "[i]f an action commenced within the time prescribed therefor . . . is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . ." Rule 41(c) makes the provisions of subsection (a) applicable to the "dismissal of any counterclaim." Rule 41 makes no distinction between permissive and compulsory counterclaims; however, we recognize that one exists. Rule 13 requires a party to assert as a counterclaim any claim arising out of the same transaction or occurrence as the pending action, "at peril of being barred" from asserting the claim in a later action. Comment, N.C. Gen. Stat. § 1A-1, Rule 13 (1990). The doctrine of res judicata operates to bar subsequent action on the same claim which the plaintiff had the opportunity to litigate as a counterclaim in the prior action. *Painter v. Board of Educ.*, 288 N.C. 165, 217 S.E.2d 650 (1975). Rule 13 and the doctrine of res judicata would be completely undermined if parties were allowed to voluntarily dismiss and then later refile compulsory counterclaims. The judicial economy promoted by Rule 13 would be lost. *See Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978).

Our result is supported by the statutory construction doctrine that where two statutory provisions conflict, one of which is specific or "particular" and the other "general," the more specific statute controls in resolving any apparent conflict. *North Carolina ex rel. Utilities Commission v. Union Elec. Membership Corp.*, 3 N.C. App. 309, 314, 164 S.E.2d 889, 892 (1968).

We hold plaintiff may not now maintain a separate action on a compulsory counterclaim in the prior action.

Affirmed.

Judges ORR and WYNN concur.

DOUGLAS WRIGHT, EMPLOYEE, PLAINTIFF v. WAKE COUNTY PUBLIC SCHOOLS, EMPLOYER, SELF-INSURED (N.C. BOARD OF EDUCATION), DEFENDANT

No. 9110IC181

(Filed 18 June 1991)

Master and Servant § 62 (NCI3d) — auto accident — leaving required meeting — not in the course of employment

The Industrial Commission correctly denied plaintiff's workers' compensation claim where plaintiff was injured in an automobile accident after he left a required meeting to which he had been directed to drive his private car by his employer. Being required to drive one's car to a meeting is no different from being required to drive one's car to work.

Am Jur 2d, Workmen's Compensation §§ 255 et seq.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 11 October 1990. Heard in the Court of Appeals 17 June 1991.

The opinion and award of the Industrial Commission contains the following findings of fact:

(1) At the time of the injury giving rise to this claim, plaintiff, a 22-year-old man, was employed part time by defendant-employer as a school bus driver. Plaintiff's duties included driving the school bus and attending and participating in school transportation meetings.

(2) On 30 November 1988, plaintiff's average weekly wage was $132.86, yielding a compensation rate of $88.58.

(3) Defendant is a duly qualified self-insured.

(4) On 30 November 1988, plaintiff drove his school bus on his designated early morning route.

(5) Later that morning, plaintiff drove his personal car to a school transportation meeting, for which the school bus drivers were paid a pre-determined amount for each meeting. At the first meeting of that school year, Bob Sanford, plaintiff's supervisor, requested that the drivers either carpool or drive their personal car to the meetings, if possible, in order to limit

the number of school buses in the parking lot at the school where the meetings took place.

(6) After completion of the meeting, plaintiff left the school grounds between 10:00 and 10:15 A.M. in his personal car and was involved in an automobile accident on a public street immediately thereafter. Plaintiff did not have to report back to his bus for his afternoon route until 2:00 or 2:15 P.M. and was on his own personal business after leaving the morning meeting.

(7) As a result of the automobile accident, plaintiff was taken to the emergency room for evaluation and was later seen and treated for back pain by Dr. Kenneth Rich and Dr. John Smith, a chiropractor.

(8) Plaintiff drove his route for a few days after the incident, experiencing discomfort while doing so, until he was directed to stay out of work by one of his physicians through January 1989.

The Commission entered the following conclusions of law based on the foregoing findings of fact:

(1) Inasmuch as plaintiff was going about his own personal business at the time of the automobile accident, plaintiff did not sustain an injury by accident arising out of and in the course of his employment. N.C.G.S. § 97-2(6).

(2) Plaintiff's claim, therefore, is not compensable under the North Carolina Workers' Compensation Act. N.C.G.S. § 97-2(6).

Charles R. Hassell, Jr., for plaintiff, appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kim L. Cramer, for defendant, appellee.

HEDRICK, Chief Judge.

The sole issue contested on appeal is whether plaintiff was performing a duty arising out of and in the course of his employment at the time the accident occurred. We find he was not.

It is a matter of law in this jurisdiction that accidents occurring while an employee is commuting to or from work do not arise out of or occur in the course of the employee's duties of employment. *See Barham v. Food World*, 300 N.C. 329, 266 S.E.2d 676,

reh'g denied, 300 N.C. 562, 270 S.E.2d 105 (1980). Plaintiff contends that because his presence was required at a meeting after which his accident occurred, his travel from that meeting should be included within the scope of his employment duties. In support of this argument, plaintiff points to the fact that he was directed by his employer to drive his own car to the meeting.

We cannot, however, find any support for plaintiff's contentions. Being required to drive one's car to a meeting is no different from being required to drive one's car to work. When plaintiff left the meeting he was not traveling to a destination required by his employer nor was he engaged in the furtherance of his employer's business. He was simply leaving a work-related function and going about his own business on his own time. Under these circumstances, we cannot find error in the decision of the Industrial Commission denying workers' compensation.

For these reasons, we affirm the order of the Commission.

Affirmed.

Judges COZORT and LEWIS concur.

ANGELA HUFFSTETLER, PETITIONER/APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT/APPELLEE

No. 8927SC1329

(Filed 18 June 1991)

1. **Social Security and Public Welfare § 1 (NCI3d)— AFDC—six-month review—prior determination—law of the case**

The Division of Social Services erred in an AFDC determination by deciding that a husband's impairments no longer substantially reduce his ability to support his children where the evidence upon which the agency made that determination is not materially different from the evidence before the agency when it determined that his ability to support his children was substantially impaired. The first decision, not having been appealed, is the law of the case and may not be reversed upon essentially the same evidence.

Am Jur 2d, Welfare Laws § 15.

2. Social Security and Public Welfare § 1 (NCI3d)— AFDC—husband's alcohol abuse—no change in condition

The Division of Social Services erred in an AFDC determination by deciding that a husband's medical condition failed to render him incapacitated for purposes of supporting his children where the agency had determined six months earlier that his impairments substantially reduced his ability to support and care for the children. The findings and conclusions after the six-month review showed that the impairments that existed six months earlier still existed and did not indicate that his condition had improved to the point that he was capable of obtaining and retaining a full-time job. The decision, contrary to law, would deprive the children of AFDC benefits not because their father can contribute to their support, but because of his intemperate practices.

Am Jur 2d, Welfare Laws § 15.

APPEAL by petitioner from judgment entered 19 July 1989 by *Judge Robert E. Gaines* in CLEVELAND County Superior Court. Heard in the Court of Appeals 17 September 1990.

Catawba Valley Legal Services, Inc., by John Vail, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane T. Friedensen, for respondent appellee.

PHILLIPS, Judge.

Petitioner and her husband, Dennis Huffstetler, live in Kings Mountain with their two sons, Rusty, 14, and Dennis, 13. By a final agency decision entered 26 April 1988, the Division of Social Services of the North Carolina Department of Human Resources determined that petitioner was entitled to Aid to Families with Dependent Children because of her husband's inability to contribute to the support of the children. The conclusion that Mr. Huffstetler's impairments substantially reduced his ability to support and care for the children was based in pertinent part upon findings that—

(a) he had a continuing history of alcohol abuse and suffered recurring intermittent rectal bleeding for six or seven years;

(b) he had been experiencing chest pain of undetermined etiology for three or four years that occurred two or three times a week;

(c) he slept poorly due to alcohol abuse; and

(d) he was diagnosed as having inadequately controlled high blood pressure.

When the agency reviewed Mr. Huffstetler's status six months later, as the regulations permit, it concluded that his impairments do not substantially reduce his ability to support and care for the children. That decision, affirmed by the Superior Court, is challenged by petitioner's appeal.

[1] Petitioner's only argument—that the final agency determination that Mr. Huffstetler's impairments no longer substantially reduce his ability to support his children is not supported by substantial evidence—has merit. The evidence upon which the agency determined that Mr. Huffstetler's impairments do not substantially reduce his ability to support his children is not materially different from the evidence before the agency when it determined that Huffstetler's ability to support his children was substantially reduced by his health impairments. The first decision, not having been appealed, is the law of the case and may not be reversed upon essentially the same evidence. *Cameron v. McDonald*, 216 N.C. 712, 6 S.E.2d 497 (1940).

[2] The decision appealed from is also erroneous because the Department's findings of fact and other conclusions do not support its ultimate conclusion that Huffstetler's medical condition "fails to render him incapacitated." The Department's pertinent findings and conclusions follow:

Findings

a. He is diagnosed as having alcoholic gastritis. . . . The descending part of duodenum appeared to be slightly stretched and the possibility of some extrinsic pressure from the head of the pancreas is suggested, however, pancreatitis was ruled out. The possibility of hepatomegaly is suggested. . . . The record shows that he has cut back rather considerably on his alcohol consumption.

b. His hypertension is not well controlled but improved control is indicated on therapy. He complained of recurring chest pain that results in left side numbness.

c. The appellant's husband also complained of recurrent swelling of the feet and hands, and bouts of vomiting.

Conclusions

1. The evidence indicates that the appellant's husband does have a problem with hypertension. However, this problem is attributable to his failure to take his medication properly.

2. While he continues to have problems with chest pains, swelling and vomiting the record shows that he has failed to abstain from the use of alcohol. It is noted that his alcohol intake has lessened but he has failed to abstain.

3. He has regular heart rate and rhythm and his chest is clear of rales.

These findings and conclusions do not indicate that Mr. Huffstetler's condition had improved to the point that he was capable of obtaining and retaining a full-time job. Instead, they show that the impairments that existed six months earlier still exist. Eligibility for Aid to Families with Dependent Children under Section 2330 of the AFDC Manual depends only upon the parent's inability to contribute to the support of the child. In this case, contrary to law, the agency's final decision, affirmed by the court, would deprive the Huffstetler children of AFDC benefits not because their father can contribute to their support but because of his intemperate practices. *King v. Smith*, 392 U.S. 309, 20 L.Ed.2d 1118 (1968). The cases the Department cites for allowing benefits to be terminated for failing to participate in alcohol treatment programs do not apply to this case. All those cases involved Social Security benefits for uncooperative alcoholics; this case concerns benefits for needy children.

Reversed.

Chief Judge HEDRICK and Judge ARNOLD concur.

THE ROWAN COUNTY BOARD OF EDUCATION, A PUBLIC BODY POLITIC, PLAINTIFF v. UNITED STATES GYPSUM COMPANY, DEFENDANT

No. 9019SC663

(Filed 2 July 1991)

1. Fraud § 12.1 (NCI3d)— asbestos—acoustical ceiling plaster—action for fraud—directed verdict denied

The trial court correctly denied defendant's motions for a directed verdict and judgment n.o.v. as to plaintiff school system's claims for fraud, misrepresentation and punitive damages where plaintiff offered evidence that defendant had acquired a product, added asbestos to the original formula, and sold it under the name Sabinite from shortly after 1930 until 1964; defendant developed and marketed in 1952-53 another acoustical plaster called Audicote which also contained asbestos; defendant and ten other companies agreed in 1936 to underwrite certain experiments at the Saranac Laboratory; the agreement provided that the results would be the property of those advancing the required funds, who would determine whether the results would be made public; the report of the laboratory director, Gardner, discussed the question of cancer in 1943; a draft of the report was prepared in 1948 and submitted to the sponsoring companies; the references to cancer, tumors, and occupational standards were removed prior to publication; the published version of the report was characterized as a complete survey of the entire experimental investigation; both Sabinite and Audicote exhibited bonding and dusting problems which were not disclosed; brochures on the products were routinely included in a catalog to which architects refer in specifying products for a building; the brochures did not mention the potential hazards of asbestos or the dusting problems; and the architect who designed the high school testified that he relied on that catalog and on manufacturer's representatives in specifying products. A manufacturer's concealment of information concerning significant health risks is not purged by the manufacturer dealing only with middlemen or agents and not with the ultimate purchasers or users. A jury could reasonably find that defendant defrauded plaintiff with respect to the high school, and the jury's finding of fraud as to any of the schools was sufficient to support punitive damages.

Am Jur 2d, Fraud and Deceit §§ 159, 306, 307, 316, 319, 347.

2. Fraud § 11 (NCI3d)— asbestos—concealment of hazard—post-sale evidence—admissible

The trial court did not err by admitting post-sale evidence in an action for fraud alleging that the manufacturer of acoustical ceiling plaster had concealed information concerning asbestos. Much of the post-sale evidence went not to knowledge but to the nature of soft acoustical plaster containing asbestos; subsequent acts and conduct are competent in fraud claims on the issue of original intent and purpose; and post-sale removal of asbestos from defendant's own plants was relevant to the issue of property contamination from asbestos.

Am Jur 2d, Fraud and Deceit § 241.

3. Evidence § 30 (NCI3d)— asbestos—fraudulent misrepresentation—documents—admissible

The trial court properly admitted documents relating to experiments between 1930 and 1943 in an action for fraudulent concealment of the hazards of asbestos where it appears that defendant stipulated to the authenticity of at least some of the exhibits and, even in the absence of stipulation, no suspicion concerning authenticity was raised by the documents' condition or internal consistency, the archival locations were logical for authentic documents, and the documents had been in existence for more than 20 years. Once the documents were authenticated, evidence in the documents was admissible pursuant to the hearsay exception for ancient documents. N.C.G.S. § 8C-1, Rules 901 and 803(16).

Am Jur 2d, Evidence §§ 823, 825.

4. Appeal and Error § 341 (NCI4th)— expert testimony—inadequate assignment of error

An assignment of error was inadequate to preserve alleged error for review where defendant's assignment of error to certain expert testimony referred to 29 pages inclusively, encompassing testimony on at least 12 documents or letters. Defendant failed to specify which of the documents was at issue or how testimony about any particular document violated the hearsay rule. North Carolina Rules of Appellate Procedure, Rule 10.

Am Jur 2d, Appeal and Error §§ 658, 670.

5. **Appeal and Error § 147 (NCI4th)— expert witnesses—cross-examination—learned treatises—assignment of error—not proper**

Defendant's assignments of error to the cross-examination of its expert witnesses with learned treatises were not properly presented where defendant's objections at trial were not on the grounds assigned as error on appeal. N.C.G.S. § 8C-1, Rule 803(18); N.C. Rules of Appellate Procedure, Rule 10(b)(1).

Am Jur 2d, Appeal and Error § 670.

6. **Appeal and Error § 147 (NCI4th)— asbestos—evidence of comparative risk excluded—no offer of proof—discretionary authority to exclude**

There was no error in an action for fraudulently concealing the risks of asbestos in ceiling plaster from the exclusion of defendant's evidence concerning comparative risk where there was no offer of proof concerning part of the evidence, and the trial judge was well within his discretionary authority in excluding the remaining portion on the grounds that its probative value was substantially outweighed by the danger of confusion of the issues, misleading the jury, or by undue delay or waste of time. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Appeal and Error § 604.

7. **Fraud § 13 (NCI3d)— asbestos—concealment of risk—requested instructions—no error**

The trial court did not err in its instructions to the jury in an action for fraudulently concealing the risks of asbestos when the instructions are reviewed in light of the general principles that the instructions are reviewed contextually and that the refusal to give requested instructions is not error when the instructions given fully and fairly present the issues.

Am Jur 2d, Fraud and Deceit §§ 483, 484; Trial § 592.

Judge GREENE concurs in part and dissents in part.

APPEAL by defendant from Judgment entered 26 January 1990 and Order entered 14 February 1990 by *Judge Edward K. Washington* in ROWAN County Superior Court. Heard in the Court of Appeals 14 December 1990.

Ness, Motley, Loadholt, Richardson & Poole, by Edward J. Westbrook; and Woodson, Linn, Sayers, Lawther, Short & Wagoner, by Donald D. Sayers, for plaintiff appellee.

Morgan, Lewis & Bockius, by Peter J. Lynch and Rebecca J. Slaughter; and Kennedy, Covington, Lobdell & Hickman, by William C. Livingston and Raymond E. Owens, Jr., for defendant appellant.

COZORT, Judge.

On 30 July 1985, plaintiff Rowan County Board of Education (Rowan) brought suit against defendant United States Gypsum Company (Gypsum). Rowan sought compensatory and punitive damages related to the removal from various schools of acoustical ceiling plaster containing asbestos. After a three-week trial the jury awarded Rowan $812,984.21 in compensatory damages and $1,000,000.00 in punitive damages, and the court entered judgment in those amounts. From that judgment and the trial court's denial of its motion for judgment notwithstanding the verdict, Gypsum appealed. We find no prejudicial error.

In 1980 communications and publications from the Environmental Protection Agency (EPA) and the North Carolina Department of Public Instruction alerted Rowan officials to the dangers posed by certain construction materials containing asbestos. Rowan officials received a number of documents dealing with asbestos, including an EPA publication which contained the following warnings:

> EPA and the scientific community believe that any exposure to asbestos involves some health risks. No safe level of exposure or threshold exposure level has been established. . . .
>
> * * * *
>
> . . . The school population is very active. Certain asbestos-containing materials can be damaged during school activities and as a result of the capricious school behavior of students. When the material is damaged, asbestos fibers are released and exposure can occur.

After consulting with engineers, an industrial hygienist, members of a gubernatorially appointed "asbestos task force," and an architect, Rowan officials decided to remove from county schools the ceiling materials containing asbestos. The removal process began

in 1983. In 1983 and 1984 Gypsum took core samples from the ceilings of Rowan schools. Before the removal process began, Rowan offered Gypsum the opportunity to perform air sample tests in the schools involved; Gypsum declined.

When Rowan brought suit in July 1985, its complaint included eight claims. Rowan eventually withdrew five of those. Three claims were tried before a jury: fraud and misrepresentation, negligence, and breach of implied warranty. On 18 June 1986, Gypsum moved for summary judgment on the grounds that all of Rowan's claims were barred by statutes of limitation. That motion was granted, but, reversing the trial court, this Court held that the action was not barred. *Rowan County Bd. of Educ. v. U.S. Gypsum*, 87 N.C. App. 106, 115, 359 S.E.2d 814, 820, *disc. review denied*, 321 N.C. 298, 362 S.E.2d 782 (1987).

Pursuant to special commission the case was tried before Judge Edward K. Washington from 3 January to 26 January 1990. At trial Gypsum contended, *inter alia*, that Rowan could not carry its burden of proving that Gypsum had manufactured the ceiling plaster in the schools at issue. At the close of Rowan's case in chief, the trial court granted Gypsum's motion for a directed verdict on all claims as to Cleveland Elementary School and Corriher-Lipe Junior High School. As to all schools, the court granted Gypsum a directed verdict on the claim for breach of implied warranty of merchantability. At the close of all evidence the court granted Gypsum a directed verdict "as to the breach of implied warranty of fitness for a particular purpose" and "as to gross negligence." On the remaining claims the court denied Gypsum's motion for a directed verdict.

On the issues submitted to it, the jury returned a verdict finding (1) that two of Gypsum's acoustical plasters containing asbestos were installed in Rowan's schools (Sabinite in Granite Quarry Elementary School and Audicote in East Rowan and South Rowan High Schools), (2) that Rowan was damaged by Gypsum's negligence, (3) that Gypsum defrauded Rowan with respect to the above schools, and (4) that Rowan was entitled to recover $812,984.21 in compensatory damages and $1,000,000.00 in punitive damages. The trial court entered judgment in accordance with that verdict, and Gypsum moved for judgment notwithstanding the verdict or a new trial. The trial court denied that motion.

On appeal Gypsum lists in the record one hundred and seven assignments of error. We note initially that twenty-nine of those are not discussed nor even cited in Gypsum's brief; they are deemed abandoned. N.C.R. App. P. 28(a). We note further that for the most part Gypsum has brought forward objections overruled by the trial court that are now captioned "assignments of error." Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure provides that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law." Thus, we address Gypsum's remaining seventy-eight assigned errors according to the issues of law which are raised collectively. Those issues of law may be subsumed under the following categories: (1) the trial court's denial of Gypsum's motions for directed verdict and judgment notwithstanding the verdict, (2) the trial court's rulings on evidentiary questions, and (3) the trial court's instructions to the jury.

[1] Gypsum contends that the trial court erred in refusing to grant its motions for directed verdict and judgment notwithstanding the verdict as to Rowan's claim for fraud and misrepresentation and as to punitive damages. Gypsum contends further that, based on statutes of limitation, it is entitled to judgment notwithstanding the verdict as to all claims. We disagree with both assertions.

A motion for judgment notwithstanding the verdict "is essentially a renewal of an earlier motion for directed verdict." *Bryant v. Nationwide Mutual Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). At trial and on appellate review the same standard applies to both motions. *Smith v. Pass*, 95 N.C. App. 243, 255, 382 S.E.2d 781, 789 (1989). The trial court

> must view all the evidence that supports the non-movant's [here the plaintiff's] claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant, 313 N.C. at 369, 329 S.E.2d at 337-38. As appellate reports have frequently noted, a motion for judgment notwithstanding the verdict is granted cautiously and sparingly. *Id.* at 369, 329 S.E.2d at 338; *Smith v. Pass*, 95 N.C. App. at 255-56, 382 S.E.2d at 789.

Thus, the trial court erred on this question only if, viewing the evidence in the light most favorable to Rowan's claim and giving Rowan the benefit of every reasonable inference to be drawn from the evidence, no jury could reasonably find that Gypsum defrauded Rowan. The elements of fraud are: "[f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981). Where "there is a duty to speak the concealment of a material fact is equivalent to fraudulent misrepresentation." *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 198, 225 S.E.2d 557, 565 (1976).

> Fraud may be committed by suppression of the truth as much as by a false representation. . . .
>
> * * * *
>
> Where a material defect is known to the seller, and he knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's diligent attention or observation, the seller has a duty to disclose the existence of the defect to the buyer.

Carver v. Roberts, 78 N.C. App. 511, 512-13, 337 S.E.2d 126, 128 (1985) (citations omitted). Even under circumstances where a vendor may have no duty to speak, "if he does assume to speak he must make a full and fair disclosure as to the matters he discusses." *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 501 (1974). Recovery in fraud also requires justifiable reliance by the plaintiff in acting or refraining from action because of the defendant's fraudulent misrepresentation. *See* W. Prosser, *Handbook of the Law of Torts* §§ 105, 108 (5th ed. 1984); Restatement (Second) of Torts § 537 (1977). We note, finally that in fraud actions "it is generally for the jury to decide whether plaintiff reasonably relied upon representations made by defendant." *Stanford v. Owens*, 46 N.C. App. 388, 395, 265 S.E.2d 617, 622, *disc. review denied*, 301 N.C. 95 (1980).

On the issues of Gypsum's duty to disclose material information and its fraudulent misrepresentation by concealment of material facts, Rowan offered evidence tending to show the following: Gypsum acquired a product invented and patented by Dr. Paul Sabin, added asbestos to the original formula, and, from shortly after 1930 until

1964, "marketed and sold this product under the name Sabinite." In 1952-53 Gypsum developed and marketed another acoustical plaster which contained asbestos: Audicote. In 1936 Gypsum and ten other companies "agree[d] to underwrite certain experiments with asbestos dust to be conducted by Dr. Leroy U. Gardner, Director of the Saranac Laboratory, Saranac Lake, New York." Among others, the experiments addressed these questions:

(1) What concentration of dust is necessary to produce the fibrosis of the lungs which is designated as asbestosis.

(2) Whether exposure to asbestos dust will produce asbestosis without the existence of previous infection and whether the X-ray changes found in advanced human asbestosis can be reproduced in animals without infection.

(3) Whether the fibrosis produced by asbestos is of the progressive type, that is, will the fibrosis increase (once it has started) after exposure to the dust has ceased.

The agreement between Gardner and the sponsoring companies provided that

> the results obtained will be considered the property of those who are advancing the required funds, who will determine whether, to what extent and in what manner they shall be made public. In the event it is deemed desirable that the results be made public, the manuscript of your study will be submitted to us for approval prior to publication.

Rowan's evidence tended to show that in February 1943 Gardner reported on the results of his experiments. His cover letter stated: "The question of cancer now seems more significant than I had previously imagined." His report included the following observations:

Disability

> Clinical experience suggests that truly disabling asbestosis is manifested by less striking X-ray changes than a corresponding degree of silicosis. Such disability in asbestosis is due to disease within the lungs and not to secondary heart disease. As in silicosis, associated pulmonary infection increases the amount of severity of the dust fibrosis with resultant accentuation of disability. There is urgent

need for a careful physiological study of pulmonary function in asbestosis of varying severity.

* * * *

III *Peculiar Characteristics of Asbestosis*

(a) Localization of fibrous minerals in lungs differs from that of granular dust particles.

Fibres like chrysotile having a certain degree of flexibility and elasticity accumulate within the finest air tubes. Granule dust is carried further on and is widely scattered through the terminal air spaces.

(b) Rate of tissues reaction to asbestos is much more rapid than to an active dust like quartz. Evidences of formation appear as soon as sufficient concentration of fibres has localized in specific areas; . . .

* * * *

XIII *Recommendation for a New Standard of Safe Atmospheric Concentrate of Asbestos Dust.*

(a) While there is no official standard, the tentative one of 4 or 5 million particles per cubic foot of air is frequently quoted.

(b) This is probably unreliable because it is based upon sampling with a standard impinger which we have shown does not collect most of the fibres that are the source of hazard.

Regarding the Saranac Experiments, Rowan's evidence tended to show further that Gardner's report was not published prior to his death in 1946 and that in September 1948 a draft final report prepared by Dr. Arthur Vorwald, Gardner's permanent successor, was submitted to Vandiver Brown, the representative of the sponsoring companies. This draft included a brief section on the relationship between inhalation of asbestos and neoplasia (the development of tumors, especially malignant tumors). Brown sent copies of this draft to Gypsum and other sponsors and suggested

Saranac will undoubtedly wish to publish the report either independently or in conjunction with the proposed report on human asbestosis and it would likewise appear desirable from

> the point of view of the industry that the report be published provided some of the speculative comments are omitted. As a preliminary to a discussion with representatives of Saranac, a meeting of representatives of the companies which financed the experiments is indicated. . . .
>
> . . . If you are unable to have a representative attend, it would be desirable for you to designate some representative of another company to act for you in connection with decisions that will have to be made.

Replying by telegram, Gypsum requested Brown "to act for us in connection with decisions." The representatives of the underwriting companies who attended the meeting recommended "that all reference to cancer or tumors should be omitted." The published version of Vorwald's draft, characterized as "a complete survey of [Gardner's] entire experimental investigation," made no mention of neoplastic disease or of Gardner's statements on occupational asbestos standards.

Regarding Gypsum's knowledge of the potential dangers of Sabinite and Audicote and of product defects which increased those dangers, Rowan's evidence tended to show, finally, that Sabinite and Audicote exhibited bonding and dusting problems which were not disclosed. In response to a complaint, an internal report requested in November 1951 by D. W. Gaston, assistant sales manager, concluded that

> Sabinite "M" at best can not be considered a hard material, and the surface of properly applied Sabinite "M" can be indented by punching with the fingers.

A memorandum addressed to "all architect service representatives" in January 1956 evaluated Audicote as follows: "Structurally this material has the least guts [compared to Sabinite and Hi-lite] and it is possible to have fine sifting from slight surface abrasion or vibration." An internal document, prepared by Gypsum in 1966, noted that the company's "present spray applied product [Audicote] has too 'soft' a finish."

As to fraudulent misrepresentation on which Rowan justifiably relied when South Rowan High was constructed during the period 1958 to 1961, Gypsum conceded at trial that its brochures on products were routinely included in Sweet's Catalog which contains information architects "refer to in specifying products for installa-

tion within a building." Gypsum's brochures advertised Audicote as "having exceptional adhesive qualities" and being "ideal for use in schools, churches, hospitals." Rowan adduced evidence tending to show that none of Gypsum's brochures mentioned the potential hazards of asbestos or of Audicote's reported problems with dusting.

Howard Bangle, the architect who designed South Rowan High School and ordered the acoustical plaster installed in it, testified that in specifying products he relied on Sweet's Catalog and on manufacturer's representatives. He testified further as follows:

> Q. Did you expect that the acoustical ceiling plaster product that you were specifying would dust or delaminate or otherwise deteriorate and come apart?
>
> A. No.
>
> * * * *
>
> Q. Mr. Bangle, did anybody from U.S. Gypsum Company ever tell you that their product Audicote was subject to fine sifting from slight surface abrasion or vibration?
>
> MR. LIVINGSTON: Objection.
>
> A. No.
>
> * * * *
>
> Q. Mr. Bangle, if you had been made aware of these complaints about Audicote that we have just been talking about and if you had been made aware of the qualities of Audicote that we have just been discussing, would you have ever included it in your specifications for South Rowan?
>
> MR. LIVINGSTON: Objection.
>
> A. No.

Although Gypsum contends in its brief that "Rowan offered no evidence that U.S. Gypsum sold any acoustical plaster product directly to Rowan," in oral argument at trial Gypsum conceded that Howard Bangle was Rowan's agent. "[W]here fraud is worked upon an agent by a third person, either by misrepresentation or by silence, the fraud is considered as worked upon the principal, and the latter has a right of action against the third person for redress." 3 Am. Jur. 2d *Agency* § 298 (1986); *see also* Restatement (Second) of Agency § 315 (1958).

While we acknowledge the lack of any prior decision in North Carolina directly on point on this specific issue of fraud, the existence of a claim of fraud under these circumstances is a logical extension of our law providing civil sanctions for fraudulent conduct. Fraud embraces "all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." Black's Law Dictionary 594 (5th ed. 1979). A manufacturer's concealment of information concerning significant health risks is not purged by the manufacturer's dealing only with middlemen or agents and not with the ultimate purchasers or users. To hold to the contrary is to condone behavior the law otherwise finds abhorrent.

In light of the evidence summarized above and the inferences permissible from it, we hold that a jury could reasonably find that Gypsum defrauded Rowan with respect to South Rowan High School. Thus, the trial court did not err in denying Gypsum's motions for directed verdict and judgment notwithstanding the verdict as to fraud. Because the jury's finding of fraud as to any of the schools at issue was sufficient to support punitive damages, *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112-14, 229 S.E.2d 297, 301-02 (1976), the trial court did not err in denying Gypsum's motions as to punitive damages. Regarding Gypsum's contention that it is entitled to judgment notwithstanding the verdict as to all claims on the ground that they are barred by statutes of limitation, it is sufficient to note that this Court has already held to the contrary, and we are bound by that holding. *Rowan County*, 87 N.C. App. at 115, 359 S.E.2d at 820, *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987); *In re Harris*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

[2] We turn next to Gypsum's contention that a new trial should be granted because of error committed in the admission of evidence. Gypsum contends first that the admission of post-sale evidence was improper. "Evidence of U.S. Gypsum's knowledge or conduct during the many years after the installation of the products in Rowan's buildings," Gypsum argues in its brief, "was irrelevant to plaintiff's claims of negligence, fraud and misrepresentation, and punitive damages." Gypsum contends further that the admission of this body of evidence unfairly prejudiced it to such an extent

that a new trial is required. We do not agree that this evidence was irrelevant or that a new trial is warranted.

Gypsum argues, in essence, that post-sale evidence can go only to the issue of knowledge. Gypsum's argument overlooks the fact that much of the post-sale evidence in the case below goes not to knowledge but to the nature of soft acoustical plaster containing asbestos. Gypsum contended at trial that, but for Environmental Protection Agency regulations, the kind of product it marketed as Audicote would be appropriate for use in schools today. Rowan was thus entitled to offer, as the United States District Court for South Carolina recently noted, evidence going "to the issue of the unfit nature of asbestos for friable products in school buildings." *Spartanburg School District Seven v. United States Gypsum Co.*, No. 83-1744-3, slip. op. at 12 (D.S.C. July 29, 1987). On this basis evidence from plaintiff's exhibits U-320, U-321, U-322, U-323, U-325, U-327, U-339, U-341, and U-375, to which defendant objected at trial, was properly admitted. All of these documents dealt with Audicote's tendency to "excessive fissuring" or other characteristics related to its softness or friability.

Citing *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956), Gypsum contends in its brief that, "where intentional misconduct is at issue, as in fraud and punitive damages, it is clearly improper to consider U.S. Gypsum's alleged knowledge of any potential hazards subsequent to the sale of such products." Gypsum's reliance on that case is misplaced; *Hinson* reviews the history of punitive damages in this jurisdiction and discusses the causes of action for which they are allowable, but it has nothing to say about the admissibility of post-sale evidence to show intent in fraud claims. *Id.* Contrary to Gypsum's assertion that its "conduct must be judged as of 1960, the last date of sale and installation of the acoustical plaster products at issue," our Supreme Court has held that, in fraud claims, " '[s]ubsequent acts and conduct are competent on the issue of original intent and purpose.' " *Rush (Cross) v. Beckwith*, 293 N.C. 224, 232, 238 S.E.2d 130, 136 (1977) (quoting *Early v. Eley*, 243 N.C. 695, 701, 91 S.E.2d 919, 923 (1956)). On that rationale we cannot say that the trial court abused its discretion in admitting an excerpt from Gypsum's corporate counsel's "Report to the Board of Directors on Asbestos Litigation" dated 10 November 1982. *See Dykes v. Raymark Industries, Inc.*, 801 F.2d 810, 817-18 (6th Cir. 1986), where the court found post-sale evidence relevant to and

admissible on the issue of whether defendant "suppressed information about asbestos dangers."

Gypsum also assigns error to the admission of post-sale evidence concerning its removal of "insulation materials and other products" containing asbestos from its own plants. The documents at issue (plaintiff's exhibits U-609.04, -609.083, -620, -625) mandated the removal, among other products, of friable asbestos, defined as "any material containing more than one percent of asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry." Evidence of removal of asbestos "is relevant to the issue of property contamination from asbestos." *City of Greenville v. W.R. Grace & Co.*, 640 F.Supp. 559, 572 (D.S.C. 1986). Thus, we find no abuse of discretion by the trial court in admitting this evidence.

[3] As for the evidentiary issues regarding the admission of documents relating to the Saranac Laboratory experiments (the Saranac documents), Gypsum first contends that, contrary to N.C. Gen. Stat. § 8C-1, Rule 901 (1988), the following exhibits were admitted into evidence without authentication: U-007, -009, -29(2), -53, -58, -63, -65, -66, -73, -084, -089, -092, -98, -104, -110, -111, -114, -138, -141, and -152. We disagree. Rule 901 provides in pertinent part as follows:

> (a) *General provision.*—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) *Illustrations.*—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> * * * *
>
> (8) Ancient Documents or Data Compilations.—Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Regarding the authenticity of the Saranac documents, the following exchange occurred at trial:

COURT: Well, let me ask, Peter, which—assuming that you know what documents he intends to offer: A, which of these documents do you object to; B, of the projection or the forecast of the testimony of Dr. Schepers, what aspect of that do you intend to object to? First as to reports or exhibits or whatever.

MR. LYNCH [Counsel for Gypsum]: Yes, sir. Well, generally speaking I object to—if we're going to talk about the mass of Saranac documents, the majority of them, because the majority of them were never received by or sent to or came from the files of U.S. Gypsum. . . .

* * * *

. . . Now, there's not going to be any dispute about signatures on these documents. We're not going to have, I don't believe, unless I'm not thinking right, I don't think we're going to contest Vorwald's signature or Gardner's signature so that—

MR. WESTBROOK [Counsel for Rowan]: The documents are authentic.

MR. LYNCH: That's been stipulated to for the majority of them if not all of them. My point is basically this: Dr. Schepers was not involved in any of this Gardner study. He came to Saranac four years, I believe, after the final report was completed . . . and I don't think that this is the proper witness to put these documents in through. That's the general statement.

* * * *

MR. WESTBROOK: Your Honor, these were documents generated by Saranac. Some of the copies were found either in the files of the recipients of the letters from Saranac, recipients of the reports from Saranac; but Dr. Schepers can identify them through the signatures of Dr. Gardner, for instance, as documents that were prepared by Saranac.

MR. LYNCH: That's not going to be an issue. The issue is whether they were ever seen by my client and whether they're relevant to prove anything against my client.

Stipulation that a document is genuine authenticates it for purposes of Rule 901(a). *Olympic Products v. Roof Systems, Inc.*, 88 N.C. App. 315, 323, 363 S.E.2d 367, 372, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988). While the record is ambiguous on this point, it appears that Gypsum stipulated at trial to the authenticity of at least seven of Rowan's exhibits: U-6, U-29, U-110, U-111, U-118, U-129, and U-76. Even in the absence of stipulation, we find, on the basis of Rule 901(b)(8), no error by the trial court in admitting U-110, U-111, U-129 and the remaining Saranac documents, which include the agreement among eleven companies "to underwrite certain experiments" at Saranac Laboratory, reports on the experiments at Saranac, correspondence between Saranac and the experiments' sponsors, and correspondence between Gypsum and the other sponsors or their agent. No suspicion concerning the authenticity of those documents is raised by their condition or internal consistency; their archival locations were logical for authentic documents; and they had been in existence for more than twenty years.

Gypsum contends further that evidence from the Saranac documents was inadmissible both on the grounds of hearsay and relevance. We disagree.

Once the documents were authenticated, evidence in the Saranac documents listed above was admissible pursuant to the following exception to the hearsay rule: "Statements in Ancient Documents.—Statements in a document in existence 20 years or more the authenticity of which is established." N.C. Gen. Stat. § 8C-1, Rule 803(16) (1988). Our Rule 803(16) is identical to the federal rule and may be applied to any kind of document. 1 H. Brandis, *Brandis on North Carolina Evidence* § 152 (3d ed. 1988). Evidence offered under this rule is subject to the general requirements applicable to hearsay exceptions, for example, firsthand knowledge by declarant (which "may appear from the statement or be inferable from circumstances") and probative value balanced against the danger of unfair prejudice. McCormick, *McCormick on Evidence* § 324 (E. Cleary 3d ed. 1984); *see also* 11 J. Moore, *Moore's Federal Practice* § 803(16)[4] (2d ed. 1989). Having reviewed the statements in the documents at issue here, we find no reversible error in the trial court's rulings which admitted them into evidence. As for Gypsum's argument that the statements in the documents were not relevant to Rowan's claims, we find it completely untenable and decline to discuss it.

[4] Gypsum contends further that the trial court erred in allowing "one of plaintiff's witnesses, Dr. Gerritt Schepers, an alleged fact witness testifying for this purpose, to discuss certain animal dusting experiments which were conducted at the Saranac Laboratory . . . between approximately 1937 and 1946, notwithstanding the fact that Dr. Schepers admitted that he had no connection with the Saranac Laboratory at the time." Gypsum contends that testimony of Dr. Schepers concerning the Saranac experiments undertaken by Dr. Gardner and associated correspondence was inadmissible hearsay. Gypsum assigns as error the admission of testimony appearing at transcript page 489, line 7 through page 514, line 25; and page 636, line 6 through page 638, line 17.

We note initially that the qualification of Dr. Schepers as an expert in asbestosis and pneumoconiosis (diseases caused by inhalation of irritant mineral or metallic particles) consumes at least six pages of the trial transcript. While much of the testimony of which Gypsum complains is clearly expert opinion testimony regarding the significance of Dr. Gardner's experiments and other technical matters, much of the testimony does concern the creation of documents, the chronology of revisions to those documents, and correspondence which antedated Dr. Schepers' appointment as Director of the Saranac Laboratory in 1954.

However, assuming without deciding that portions of this testimony are inadmissible hearsay, Gypsum's assignment of error to this lengthy testimony is inadequate to preserve the alleged error for review. Rule 10 of the North Carolina Rules of Appellate Procedure provides in pertinent part as follows:

> (c) *Assignments of Error.*
>
> (1) *Form; Record References.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without arguments, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. *An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.* (Emphasis added.)

Gypsum's reference to twenty-nine pages inclusively encompasses testimony on at least twelve documents or letters. Three of these were not included in the exhibits submitted as a part of the record and cannot be the basis of an assignment of error. N.C.R. App. P. 9(a). Others originated at Saranac and remained in the records of Saranac's regularly conducted activities; still other documents were obtained from the files of recipients of correspondence from Saranac. Gypsum fails to specify which of these documents is at issue or how Schepers' testimony about any particular document violates the hearsay rule. Accordingly, its assignment of error fails to conform to the Rules of Appellate Procedure.

Gypsum's remaining assignment of error to testimony by Schepers, that "it was without foundation, incompetent, and not relevant," has been reviewed and found to be without merit.

[5] Gypsum contends further in its brief that the trial court erred in allowing "Rowan to cross-examine U.S. Gypsum's expert witnesses with hearsay statements from publications which were not qualified as reliable and authoritative." Gypsum assigns error to nine instances of cross-examination testimony admitted, it now argues, in violation of N.C. Gen. Stat. § 8C-1, Rule 803(18) (1988).

On cross-examination wide " 'latitude is given counsel in testing for consistency and probability matters related by a witness on direct examination.' " *State v. Burgin*, 313 N.C. 404, 406, 329 S.E.2d 653, 656 (1985) (quoting *Maddox v. Brown*, 233 N.C. 519, 524, 64 S.E.2d 864, 867 (1951)). As for cross-examination pursuant to Rule 803(18), the rule provides:

> (18) Learned Treatises.—*To the extent called to the attention of an expert witness upon cross-examination* or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. (Emphasis added.)

While the Advisory Committee's Note on Rule 803(18) states in part that the "rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility

that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness," other authority suggests that the reliable authority of learned treatises used in cross-examination of expert witnesses must be established by a method permitted in the rule. *See* McCormick, *McCormick on Evidence* § 321 (E. Cleary 3d ed. 1984) and 1 H. Brandis, *Brandis on North Carolina Evidence* § 136 (3d ed. 1988). In two of the instances at issue, Gypsum's expert witness conceded, albeit reluctantly, the authoritativeness of the treatise being used in cross-examination. In a third instance the concession of authority was ambiguous and arguable.

However, in none of the instances assigned as error was Gypsum's objection at trial based on the grounds now assigned on appeal. In at least six instances Gypsum objected on the basis that the witness had never "seen the document before nor did he make any use of it during his direct examination. No proper foundation has been laid." The rule does not require that the treatise at issue must have been relied on by the expert during his direct examination. N.C. Gen. Stat. § 8C-1, Rule 803(18) (1988); McCormick, *McCormick on Evidence* § 321 (E. Cleary 3d ed. 1984); and 1 H. Brandis, *Brandis on North Carolina Evidence* § 136 (3d ed. 1988). A party "who fails to challenge the reliability of authority prima facie admissible under Rule 803(18) must overcome a presumption of admissibility on appeal." *State v. Oliver*, 85 N.C. App. 1, 14, 354 S.E.2d 527, 535 (1987). Moreover, in these six instances and as well as the remaining three, the error assigned on appeal was not the specific basis of Gypsum's objection at trial and hence was not brought to the attention of the trial court. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1). Accordingly, Gypsum's assignments of error to the cross-examination of their expert witness with allegedly hearsay material is not properly presented.

[6] Gypsum's final assignments of error to evidentiary rulings during trial are made to the court's exclusion of evidence concerning comparative risk. On 9 August 1989, the trial court entered an order which granted "Plaintiff's Motion to Preclude Non-Asbestos Testimony . . . with leave to Defendant to renew its position at trial and to make an offer of proof at the appropriate time." On

appeal Gypsum assigns error specifically to the exclusion of (1) testimony from Dr. Peter Elmes concerning an editorial in the British Medical Journal *Lancet* and (2) testimony from Dr. Kenneth Crump concerning risk assessment. Gypsum argues that "the trial court abused its discretion in excluding comparative risk evidence."

After sustaining objection to Elmes' testimony concerning a portion of the *Lancet* material, the trial court stated: "During the noon recess you [counsel for Gypsum] can get that into the record." However, while an offer of proof concerning comparative risk was made during that recess no offer of proof regarding the testimony on the *Lancet* material was made. "Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial." *State v. Kirby*, 276 N.C. 123, 133, 171 S.E.2d 416, 423 (1970).

Gypsum's offer of proof concerning Crump's evidence on comparative risk showed that he would have testified substantially as follows:

> Q. Tell us a little bit about your experience in comparative risk assessment.
>
> A. . . . For example, in school asbestos cases, I've compared the risk from asbestos in schools to the risk from smoking cigarettes, the risk from having a chest x-ray, the risk from living in Aspen and being in a higher level and having more exposure to cosmic radiation and a number of different things, playing high school football, for example.

Assuming, for the sake of argument, that this evidence was admissible as having some relevance (which we find dubious), we hold that the trial judge was well within his discretionary authority to exclude it on the grounds that its probative value was substantially outweighed by the danger of "confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time." N.C. Gen. Stat. § 8C-1, Rule 403 (1988); *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

We now turn to Gypsum's assignments of error to the jury instructions on three issues: post-sale evidence, "state of the art," and punitive damages. Gypsum contends that the trial court erred (1) in declining to instruct the jury not to consider post-sale evidence in considering the claims that were submitted to them, (2) in refus-

ing Gypsum's proffered instruction on "state of the art," and (3) in misstating the law of North Carolina on punitive damages.

[7] As for the first issue, it is sufficient to note that Gypsum's request did not comply with N.C. Gen. Stat. § 1-181 (1983) and N.C. Gen. Stat. § 1A-1, Rule 51(b) (1990), both of which require that requests for special instructions be submitted in writing and before the judge's charge to the jury is begun.

Gypsum requested jury instructions included several variants on the issue of "state of the art." In substance the following instruction is typical of those presented:

> To be a proximate factor in bringing about plaintiff's injury, the risk of harm must have been foreseeable by a reasonable manufacturer at the time the product was sold. . . . The defendant, United States Gypsum, cannot be held liable if it did not know or could not have reasonably been expected to discover that the asbestos of the type and concentration used in United States Gypsum's products was dangerous during the 1950's and 1960's when the materials were manufactured.

"The court's refusal to submit requested instructions is not error when the instructions fully and fairly present the issues in controversy." *Tan v. Tan*, 49 N.C. App. 516, 521, 272 S.E.2d 11, 15 (1980). North Carolina's appellate reports have repeatedly stated that "the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984). With those principles in mind we have reviewed the trial court's instructions in light of Gypsum's requested instructions and have found no prejudicial error.

Lastly, we find Gypsum's assignment of error to the trial court's instructions on punitive damages to be entirely devoid of merit.

We find Gypsum has failed to demonstrate that a new trial should be granted.

For the reasons stated above we find no prejudicial error in the trial of the case below.

No error.

Judge PARKER concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I concur with the majority that there was no error in either the compensatory damages award or the trial court's denial of Gypsum's motions for directed verdict and judgment notwithstanding the verdict with regard to Rowan's fraud claim as to South Rowan High School [South Rowan]. However, I disagree with the majority's holdings that "the trial court did not err in denying Gypsum's motions for directed verdict and judgment notwithstanding the verdict as to fraud" regarding Granite Quarry Elementary School [Granite Quarry] and East Rowan High School [East Rowan], and that "[b]ecause the jury's finding of fraud as to any of the schools at issue was sufficient to support punitive damages, . . . the trial court did not err in denying Gypsum's motions as to punitive damages."

The majority implicitly recognizes that the "reasonable reliance" element of a fraud claim need not be proven by direct evidence; circumstantial evidence is sufficient. *W. R. Grace & Co. v. Strickland*, 188 N.C. 369, 373-74, 124 S.E. 856, 858 (1924); 37 Am. Jur. 2d *Fraud and Deceit* §§ 448, 479 (1968). "A basic requirement of circumstantial evidence is reasonable inference from established facts." *Lane v. Bryan*, 246 N.C. 108, 112, 97 S.E.2d 411, 413 (1957); 37 Am. Jur. 2d *Fraud and Deceit* § 472. While older case law held that an inference could not be based upon another inference, "[t]here is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made." *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987).

"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." *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). "[I]f the non-movant presents such relevant evidence as a reasonable mind might accept as adequate to support the elements of the non-movant's claim or defense [i.e., substantial evidence], the trial court must deny a motion for a directed verdict." *Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181-82 (1991). Rowan's circumstantial

evidence, viewed in the light most favorable to it, is substantial evidence that Rowan reasonably relied on Gypsum's alleged fraudulent misrepresentations or concealment with regard to South Rowan. Rowan's evidence shows that (1) Gypsum's "promotional literature was the major way in which it communicated with architects," (2) this literature contained the alleged fraudulent misrepresentations or concealment, (3) this literature was routinely included in Sweet's Catalog [Sweet's], (4) Howard Bangle [Bangle], the architect for South Rowan, ordered Gypsum's products for South Rowan, (5) Bangle testified that at the time he was the architect for South Rowan, he relied on Sweet's when specifying products for a job, (6) Bangle was Rowan's agent, and (7) Bangle testified that he would not have allowed Gypsum's products to be used had he known of their alleged defects.

Rowan, however, did not produce substantial evidence of reasonable reliance with regard to Granite Quarry or East Rowan. Bangle was not Rowan's agent for these schools, and the architects for them did not testify at trial. Rowan's evidence shows that (1) Gypsum's "promotional literature was the major way in which it communicated with architects," (2) this literature contained the alleged fraudulent misrepresentations or concealment, (3) the architects of Granite Quarry and East Rowan allowed Gypsum's products on these jobs, (4) Bangle "testified that all architects he knew used Sweet's," and (5) Bangle testified that he would not have allowed these products to be used had he known of their alleged defects. From this circumstantial evidence, Rowan argues that it has shown reasonable reliance by its architects on the alleged fraudulent misrepresentations or concealment with regard to Granite Quarry and East Rowan. I disagree.

With regard to South Rowan, the permissible inference of reasonable reliance by Rowan on Gypsum's alleged fraudulent misrepresentations or concealment in Sweet's is based upon the direct evidence that Bangle, as Rowan's agent, relied on Sweet's in specifying products for jobs, Sweet's routinely contained Gypsum's literature, Bangle ordered Gypsum's products, and Bangle would not have ordered them had he known of their alleged defects. However, the inference of reasonable reliance on Gypsum's literature in Sweet's by the architects on the Granite Quarry and East Rowan jobs is based upon an inference not supported by Rowan's evidence, i.e., that those architects, like Bangle, used Sweet's in specifying products for jobs. Rowan's evidence does not show that its Granite

Quarry and East Rowan architects relied on Sweet's as Bangle did. To the contrary, Rowan's evidence shows only that all of the architects that Bangle knew used Sweet's. The evidence does not show that Bangle knew the architects on the Granite Quarry and East Rowan jobs. Accordingly, an inference of reasonable reliance cannot be drawn from Rowan's evidence with regard to Granite Quarry and East Rowan because such an inference would be impermissibly based upon another inference not supported by circumstantial evidence but only upon pure speculation. Because Rowan did not produce substantial circumstantial evidence of reasonable reliance with regard to Granite Quarry and East Rowan, Gypsum's motions for directed verdict and judgment notwithstanding the verdict as to fraud should have been allowed with regard to those schools.

Furthermore, even though Rowan produced substantial evidence of fraud with regard to South Rowan, the jury award of punitive damages was not based solely upon that claim, but was instead based on a finding of fraud with regard to all three schools. The verdict form submitted to the jury and the jury's answers read in pertinent part:

> 5. Did the defendant defraud the plaintiff with respect to:
>
> A. Granite Quarry Elementary School YES.
>
> B. South Rowan High School YES.
>
> C. East Rowan High School YES.
>
> . . . .
>
> 7. If the fifth issue or any part thereof is answered "yes," what amount of damages, if any, is plaintiff entitled to recover of the defendant?
>
> ANSWER: $1,000,000.00.

While punitive damages would have been proper on a jury determination that Gypsum had defrauded Rowan with respect to South Rowan, the award for $1,000,000 in punitive damages was based on three separate acts of fraud, two of which should not have been submitted to the jury. Because there is a "substantial likelihood" that some portion of the punitive damages award went to punish Gypsum for the alleged Granite Quarry and East Rowan frauds, which claims should have been dismissed, Gypsum is entitled to a new trial on the issue of punitive damages as they

relate to Gypsum's fraud claim with regard to South Rowan. *Cf. Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 616-17, 306 S.E.2d 519, 526-27 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E.2d 294 (1984) (substantial likelihood that compensatory and punitive damages issues so intertwined in minds of jurors thus requiring new trial on damages).

HAYWOOD HARRIS, IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF ETTA HARRIS v. GEORGE J. MILLER, M.D.

No. 902SC336

(Filed 2 July 1991)

1. **Physicians, Surgeons, and Allied Professions § 11 (NCI3d) — negligence of nurse anesthetist — respondeat superior — surgeon not liable**

A directed verdict was properly granted for a surgeon on the issue of vicarious liability in a malpractice action where it was undisputed that the nurse anesthetist negligently caused the injury and that the nurse anesthetist was employed by the hospital. The captain of the ship doctrine under which all personnel in the operating room are unquestionably deemed to be the surgeon's employees is rejected; the test is whether the surgeon has the right to control the operating room personnel, and there is a distinction between the power to supervise and the power to control.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 287-289.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR3d 1017.

2. **Physicians, Surgeons, and Allied Professions § 11 (NCI3d) — negligence of nurse anesthetist — liability of surgeon — insufficient evidence**

The trial court properly granted a directed verdict for defendant surgeon in an action arising from the undisputed negligence of a nurse anesthetist where the hospital policy manual, which gave the surgeon the power to supervise the nurse anesthetist during the operation, was insufficient to show

that the surgeon had the right to control the anesthetist's work; plaintiff offered no evidence that the surgeon personally selected the nurse anesthetist; there was no evidence that the surgeon had any responsibility for the assignment or training of nurse anesthetists; the consent form, by which the patient consented to surgery by "Dr. Miller and/or the assistants as may be selected by him" does not constitute evidence that the surgeon had the right to control the work and the manner of performing the work of the anesthetist; the testimony of six witnesses, including defendant, that the surgeon has the ultimate responsibility for the quality of care given a patient is not evidence that the surgeon has the right to control the manner in which all those involved in rendering care to the patient do their jobs; and it was established through plaintiff's own experts that nurse anesthetists are highly trained and skilled. While it is reasonable that the surgeon would have a supervisory obligation, there is no evidence that the surgeon would have the right to control the manner in which the anesthetist administered the anesthesia or performed the related functions of his job.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 287-289.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR3d 1017.

3. Physicians, Surgeons, and Allied Professions § 11 (NCI3d)—negligence of nurse anesthetist—liability of surgeon—apparent agency

A directed verdict was properly granted for a surgeon on the issue of apparent agency in a malpractice action in which it was undisputed that the nurse anesthetist was negligent. The consent form relied on by plaintiff was the hospital's consent form, not the surgeon's, it was witnessed by a hospital nurse and does not show that the surgeon personally made any representations to the patient, and the second sentence authorizing anesthetics is a separate authorization allowing another physician, not the surgeon or even an assistant selected by him, to administer the anesthesia. The consent form contains no evidence that the surgeon represented to the patient that he would employ or control the person administering the anesthesia.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 182.

4. **Physicians, Surgeons, and Allied Professions § 15.2 (NCI3d)—negligence of nurse anesthetist—liability of surgeon—expert testimony—nurse anesthetist—excluded**

The trial court did not err in a medical malpractice action by excluding the expert testimony of a nurse anesthetist concerning the instructions and supervision a surgeon should give an anesthetist during a medical crisis where it was not disputed that the nurse anesthetist in this case was negligent, plaintiffs had settled with the nurse anesthetist and the hospital, and the action proceeded against the surgeon. The record does not reflect that plaintiff elicited from the witness that she was familiar with the standards of practice for orthopedic surgeons "with same or similar training and experience situated in the same or similar communities . . . ." N.C.G.S. § 90-21.12.

Am Jur 2d, Expert and Opinion Evidence § 396; Physicians, Surgeons, and Other Healers §§ 354, 356.

Medical malpractice: necessity and sufficiency of showing of medical witness' familiarity with particular medical or surgical technique involved in suit. 46 ALR3d 275.

Malpractice testimony: competency of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality. 37 ALR3d 420.

5. **Physicians, Surgeons, and Allied Professions § 15 (NCI3d)—medical malpractice deposition of expert—excluded—cumulative**

The trial court did not abuse its discretion in a medical malpractice action by excluding the deposition of an expert in orthopedic surgery where the evidence was cumulative.

Am Jur 2d, Evidence § 256.

Judge PHILLIPS dissenting.

APPEAL by writ of certiorari by plaintiff from judgment entered 5 January 1989 in MARTIN County Superior Court by *Judge William C. Griffin, Jr.* Heard in the Court of Appeals 28 November 1990.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by Adam Stein and James E. Ferguson, II, for plaintiff-appellant.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale, Sherry C. McConnell, and Kurt E. Lindquist, II, for defendant-appellee.

GREENE, Judge.

Etta Harris and her husband, Haywood Harris, filed this medical malpractice action on 1 April 1983 against George J. Miller, M.D. (an orthopedic surgeon), William Hawkes (a certified registered nurse anesthetist), and Beaufort County Hospital. On 21 October 1986, Mr. and Mrs. Harris settled with nurse Hawkes and Beaufort County Hospital and released them from liability.

On 8 November 1987, Mrs. Harris died from injuries sustained during her operation. Mr. Harris, as administrator of the estate of Etta Harris, was substituted as plaintiff and the complaint was amended to allege Mrs. Harris' wrongful death. Dr. Miller was the only defendant named in the amended complaint. The complaint alleges that Dr. Miller was negligent in treating Mrs. Harris, negligent in the supervision of nurse Hawkes, and vicariously liable for the negligence of nurse Hawkes in that Hawkes was Dr. Miller's agent.

Trial began on 28 November 1988. At the close of plaintiff's evidence, the trial court granted defendant's motion for a directed verdict on the issue of vicarious liability on the ground there was insufficient evidence of an agency relationship between Dr. Miller and nurse Hawkes and on the ground that the release of Hawkes relieved Dr. Miller of any vicarious liability. The jury returned a verdict in favor of defendant on the issue of defendant's own negligence. Plaintiff appeals.

Plaintiff's evidence tends to show that in 1981, Mrs. Harris experienced severe back pain and was referred by her physician to Dr. Miller. Dr. Miller diagnosed a ruptured disc requiring a laminectomy. On 26 May 1981, Mrs. Harris was admitted to Beaufort County Hospital and on 31 May 1981 she signed a consent form authorizing "Dr. Miller and/or such assistants as may be selected by him" to perform the operation.

Mrs. Harris underwent surgery on 1 June 1981. Dr. Miller performed the surgery and nurse anesthetist Hawkes administered

the anesthesia. At the time, Beaufort County Hospital did not employ a staff anesthesiologist. The hospital's Anesthesia Manual provided that "[a]nesthesia care shall be provided by nurse anesthetists working under the responsibility and supervision of the Surgeon doing the case." Nurse Hawkes was employed by the hospital as a certified registered nurse anesthetist. Dr. Miller, on the other hand, was in private practice and was not on the hospital staff. Nor was he in any way under contract with the hospital. He had applied for and obtained privileges to use the hospital facilities in the treatment of his patients.

Plaintiff introduced the testimony of an expert in anesthesiology who had reviewed Mrs. Harris' medical records and the depositions of Dr. Miller and nurse Hawkes. Based upon the anesthesia record maintained by nurse Hawkes throughout Mrs. Harris' operation, upon Hawkes' deposition, and upon his own expertise, the expert testified that after Mrs. Harris was put to sleep there was a small drop in her blood pressure. This drop is a normal reaction to the anesthetic agents used on patients. Generally, however, the blood pressure goes back up once the operation begins as a result of surgical stimulation. Mrs. Harris' blood pressure never went up.

At 8:05 a.m., approximately the time the surgery began, the blood pressure dropped lower and the heart rate rose to an abnormally high rate. Nurse Hawkes thought at the time these abnormalities resulted because Mrs. Harris was not deeply asleep. He increased the anesthetic. At 9:15 a.m., the blood pressure dropped lower. The anesthesia record indicates that by 9:30 a.m. the blood pressure had dropped so low it was no longer audible and the heart rate had risen higher. The expert testified that, based on the anesthesia record, Hawkes was continuing to give Mrs. Harris 33% oxygen, 66% nitrous oxide, and ½% ethrane. He further testified that in such a situation it was common knowledge that the proper measure is to cut off everything going to the patient except oxygen which is turned up to 100%, and that in his opinion Mrs. Harris suffered from brain damage due to hypoxia, or insufficient oxygenation, during the operation.

Plaintiff introduced the testimony of another expert in anesthesiology who had also reviewed the medical records and depositions. He testified that when nurse Hawkes became concerned that Mrs. Harris was not getting enough anesthesia he gave her a dose of innovar, a combination of a narcotic and tran-

quilizer which tends to decrease blood pressure. He testified that the low blood pressure and high heart rate which prompted Hawkes to give more anesthesia was not a result of insufficient anesthesia as Hawkes thought, but was a result of Hawkes' improper placement of the endotracheal tube. A post-operative x-ray revealed that the tube was ventilating only one lung. The expert stated his opinion that Mrs. Harris suffered brain damage between 9:15 and 10:30 a.m. due to prolonged low blood pressure and an improperly placed endotracheal tube.

Plaintiff read into evidence Dr. Miller's deposition which established that preparation for Mrs. Harris' surgery began at 7:30 a.m. on 1 June 1981. Dr. Miller began the operation at 8:05 a.m. At approximately 8:40 a.m., Dr. Miller noticed an unusual amount of bleeding which he began to control by direct pressure. Between 8:50 and 9:00 a.m., Dr. Miller noted the bleeding had not stopped as he would normally expect. At 9:00 a.m., when Mrs. Harris had lost three to four hundred cc's of blood, approximately twice the normal amount, Dr. Miller told nurse Hawkes to begin giving blood to Mrs. Harris. Dr. Miller stated he did not recall any response from Hawkes, though other evidence indicates that Hawkes responded that blood volume was "okay." After requesting blood, Dr. Miller returned to his attempts to control the bleeding and was unaware that blood was not started immediately. As a precautionary measure, two units of blood had been cross-matched to Mrs. Harris' blood before the operation began, and were in refrigeration in the hospital's blood bank on the floor above the operating room. Dr. Miller's post-operative review of the blood bank's records indicated the blood was not signed out of the blood bank until 9:30 a.m. Dr. Miller estimated that at the very earliest Mrs. Harris began receiving blood at 9:40 a.m., though nurse Hawkes did not designate in the records he kept during the operation the specific time blood was first given to Mrs. Harris. The blood bank records indicate the second unit was signed out at 9:43 a.m., and two additional units were cross-matched and signed out at 10:43 a.m. These two additional units of blood were cross-matched pursuant to a request made by Dr. Miller shortly after 10:00 a.m. By that time Dr. Miller had called in another surgeon, Dr. Waters, to assist him in controlling the bleeding problem. It was then that "we realized that we had a major bleeding problem."

Dr. Miller stated that he had no recollection of nurse Hawkes informing him at any time prior to 11:00 a.m. that Mrs. Harris'

blood pressure was dropping or that her heart rate was going up. Then, at approximately 11:10 a.m. both Dr. Miller and Dr. Waters were still operating on Mrs. Harris' back when nurse Hawkes informed them that Mrs. Harris' blood pressure and pulse had rapidly dropped to extremely low levels. The two surgeons then abandoned the efforts to control the bleeding and closed the incision in Mrs. Harris' back. Mrs. Harris was then transferred to another bed and placed on her back so the surgeons could begin resuscitation efforts.

Dr. Miller attributed the low pulse and blood pressure to massive unexplained and unaccounted bleeding. Thinking blood may have been entering the abdomen, Dr. Miller consulted with Dr. Coleman, a general surgeon with a sub-specialty in vascular surgery. Dr. Coleman used a needle to inspect the abdomen for blood and found none. Dr. Coleman then made an incision in the abdomen to examine for blood, again finding none.

Dr. Coleman examined the aorta and indicated that it was flaccid, that the heart was not pumping at a high volume. Dr. Coleman clamped the aorta so blood would not go to the legs, causing the blood pressure to increase. Dr. Coleman closed the incision after the blood pressure returned.

At approximately 1:30 p.m., Mrs. Harris was taken from the operating room to the intensive care unit. Mrs. Harris' condition was still unstable at that time, with a pulse of 110 and a systolic blood pressure of 40. Dr. Miller explained this move was made because the intensive care unit is better equipped for the long-term treatment and monitoring of a patient.

Plaintiff introduced the testimony of an expert in nurse anesthesia care. The trial court, however, would not allow this expert to testify that under the circumstances nurse Hawkes needed supervision in determining that a problem existed and in stabilizing Mrs. Harris' condition. Based on a *voir dire* examination, the expert would have also testified that it was Dr. Miller's responsibility to provide necessary supervision. During cross-examination of plaintiff's experts in anesthesiology, defendant elicited testimony regarding the training and competency of certified registered nurse anesthetists.

> Q. Would you explain to the jury, please, what a certified registered nurse anesthetist is?

A. A certified registered nurse anesthetist is—has to first be an R.N. You have to be a registered nurse. Then have to have had certain experience. Just an ordinary nurse who works in a nursing home or on a surgical floor, for instance, does not qualify to go to anesthesia school.

In 1981—sorry—I keep going back to that. [The] nurse has to have certain experiences . . . primarily in the arena of critical care. They have to have had some experience in taking care of critically ill people before they are admitted to nursing anesthesia school.

The amount of nurse anesthesia school is two years continuous education and at the conclusion of which these student nurse anesthetist[s] are then given [an] examination and if they pass [it], then that certifies them to be a certified registered nurse anesthetist.

. . . .

Q. [W]ould it be fair to say that in North Carolina, probably most people who are put to sleep are directly put to sleep by a certified registered nurse anesthetist rather than by an anesthesiologist?

A. That's correct.

. . . .

Q. The quality of care rendered by a certified registered nurse anesthetist is high, is it not?

A. Generally.

Q. In fact, didn't you say in the jury's absence that you think that the standards of care for [an] anesthesiologist and a nurse anesthetist are exactly the same.

A. I do.

Q. And that's because their competency in terms of performing the actual tasks of anesthesia are comparable, are they not?

A. As a general rule, yes.

Q. There is no question in your mind, is there, doctor, that nurse anesthetists are experts in the delivery of anesthesia?

A. No doubt.

Regarding the issue of Dr. Miller's own negligence, the testimony relevant to this appeal pertained to Dr. Miller's attempts to control Mrs. Harris' bleeding during the operation. At one point in the operation Dr. Miller used a substance known as Surgicel to stop the bleeding. It was at this point that Dr. Miller called Dr. Waters into the operating room for assistance. After approximately twenty minutes, Dr. Miller removed the Surgicel thinking the bleeding should have stopped by that time. He found the bleeding had not stopped. Dr. Miller and Dr. Waters then consulted the product literature for Surgicel, provided by the manufacturer, and determined it should not be left in the patient upon completion of a laminectomy because it tends to swell upon contact with body fluids and could potentially put pressure on nerves and cause paralysis. Rather than replace the Surgicel, the surgeons attempted to temporarily control the bleeding by direct pressure while they looked for the sources of the blood.

Plaintiff offered during his case in chief the deposition of an expert in orthopedic surgery from Columbia, Missouri. This expert stated that there exists a generally recognized national standard of care for orthopedic surgeons. He further stated that Dr. Miller deviated from the applicable standard of care in his attempts to control Mrs. Harris' bleeding during the operation. Specifically, he contended the Surgicel substance should have been left in place to stop the bleeding, or at least once it was removed and Dr. Miller could see the bleeding had not stopped he should have replaced the Surgicel. The failure to replace the Surgicel made "a very bad situation into an irretrievable one," and caused hypovolemic shock which resulted in brain damage.

Defendant offered the testimony of an expert in orthopedic surgery who testified that he was familiar with the standard of care as it existed in June of 1981 for communities similar to Beaufort County. He further testified that Dr. Miller did not depart from the applicable standard of care, that Dr. Miller did everything orthopedic surgeons are taught to do to control bleeding, and that it was appropriate for Dr. Miller to remove the Surgicel when he did.

Plaintiff sought to introduce in rebuttal the deposition of another orthopedic surgeon who stated that he practices medicine in Wilson, North Carolina. He and Dr. Miller both belong to the Eastern North Carolina Orthopedic Association which consists of approximately thirty-four orthopedic surgeons from a number of towns in eastern North Carolina. After initially stating that he does not generally use Surgicel in back operations because of potential complications, he stated in pertinent part:

> Q All right, and it was the duty of the surgeon to contain the bleeding?
>
> A That is correct.
>
> Q All right, it would be a departure from the standard of care for the surgeon not to bring this bleeding under control and end the procedure, isn't that correct?
>
> A That is correct.
>
> Q Even if it required the use of Surgicel to do that, it should be done, isn't that correct, Doctor?
>
> A I think that Surgicel was probably the only thing that was stopping the bleeding. And if—at this point probably Surgicel would be used.
>
> Q Even though there may be certain risks that Surgicel may have on nerve roots, when you balance that against what can happen with the blood loss, it would be better to leave the Surgicel in, isn't that correct, Doctor?
>
> A I—I think so.

The trial court excluded this testimony upon concluding it was similar to other evidence offered during plaintiff's case in chief on the issue of whether Dr. Miller breached the applicable standard of care and was not, therefore, rebuttal evidence.

The dispositive issues are: (I) whether the trial court erred in granting a directed verdict for defendant at the close of plaintiff's evidence in that plaintiff presented sufficient evidence of an agency relationship between Dr. Miller and nurse Hawkes to submit to the jury the issue of Dr. Miller's vicarious liability based on the doctrine of *respondeat superior*; (II) whether in the absence of an agency relationship, there was sufficient evidence of apparent

agency to submit the issue of vicarious liability to the jury; (III) whether the trial court erred in excluding portions of the testimony of plaintiff's expert in nurse anesthetist care; and (IV) whether the trial court erred in excluding the deposition testimony of an orthopedic surgeon offered by plaintiff as rebuttal evidence.

I

[1] Plaintiff first argues the trial court erred in directing a verdict in defendant's favor, at the close of plaintiff's evidence, on the issue of Dr. Miller's vicarious liability.

A defendant's motion for a directed verdict is a test of whether the evidence is legally sufficient to submit the case to the jury and to support a verdict for plaintiff. *Shreve v. Duke Power Co.*, 97 N.C. App. 648, 649, 389 S.E.2d 444, 445, *disc. rev. denied*, 326 N.C. 598, 393 S.E.2d 883 (1990). In deciding a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party. *Watkins v. Hellings*, 321 N.C. 78, 361 S.E.2d 568 (1987). A directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant. *Id.* In the present case we determine whether the evidence, considered in a light most favorable to plaintiff, was sufficient to submit to the jury the issue of vicarious liability.

The doctrine of *respondeat superior* provides that the employer is liable for the negligence of his employee occurring while the employee is acting within the scope of his employment. *Thomas v. Poole*, 45 N.C. App. 260, 264, 262 S.E.2d 854, 856 (1980). Liability based on the doctrine of *respondeat superior* is established by proving the following facts: "(1) an injury by the negligence of the wrongdoer, (2) the relationship of employer-employee between the party to be charged and the wrongdoer, (3) a wrong perpetrated in the course of employment or within the employee's scope of authority, and (4) an employee going about the business of his superior at the time of the injury." *White v. Hardy*, 678 F.2d 485, 487 (4th cir. 1982).

It is undisputed in this case that nurse Hawkes was employed by Beaufort County Hospital, and that he negligently caused injury to Mrs. Harris while acting in the course and scope of his employment. Plaintiff argues further, however, that nurse Hawkes was a "lent servant" acting under the immediate control, power and

supervision of Dr. Miller and that there was, therefore, a relationship of employer-employee between Dr. Miller and nurse Hawkes.

We reject any argument that an operating surgeon is the so-called "captain of the ship" such that all personnel in the operating room are unquestionably deemed to be the surgeon's employees. Note, *Texas Labels Captain of the Ship Doctrine: "False Rule of Agency,"* 14 Wake L. Rev. 319 (1978) (explaining and criticizing captain of the ship doctrine). The "vital test" of whether the surgeon is an employer of those in the operating room is whether the surgeon has the right to control the operating room personnel. *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 139-40 (1944) (setting forth eight factors which are, among others, useful in determining whether a right of control exists). Regarding the employer-employee relationship in the context of lent servants, our Supreme Court has quoted with approval the language used by the Supreme Court of Pennsylvania.

> "1. One who is in the general employ of another may, with respect to certain work, be transferred to the service of a third person in such a way that he becomes, for the time being and in the particular service which he is engaged to perform, an employe of that person. (citations)
>
> "2. The crucial test in determining whether a servant furnished by one person to another becomes the employe of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it.* (citations)
>
> "3. A servant is the employe of the person who has the *right* of controlling the manner of his performance of the work, irrespective of whether he actually *exercises* that control or not. (citations)
>
> . . . ."

Weaver v. Bennet, 259 N.C. 16, 28, 129 S.E.2d 610, 618 (1963) (quoting *Mature v. Angelo*, 373 Pa. 593, 97 A.2d 59 (1953)). The question before us thus becomes whether plaintiff presented sufficient evidence that Dr. Miller possessed the right to control the work done by nurse Hawkes and also the manner in which nurse Hawkes performed his work.

[2] Plaintiff first contends such evidence was offered in the form of the hospital's policy manual which provides that "a nurse anesthetist [works] under the responsibility and supervision of the surgeon doing the case." Plaintiff argues that the case of *Jackson v. Joyner*, 236 N.C. 259, 72 S.E.2d 589 (1952), stands for the proposition that a nurse anesthetist employed by a hospital becomes the lent servant of the surgeon for the duration of the operation if the surgeon has the immediate power to supervise and control the nurse. In *Jackson*, an eight-year-old girl died after a tonsillectomy due to anesthesia complications. The girl's mother had requested that her family physician be engaged to administer the anesthesia for the operation. The surgeon rejected the request, stating he had someone to administer the anesthetic, a nurse Hanson, and that he would use that person. *Jackson* at 261, 72 S.E.2d at 591. *See Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E.2d 57 (1951) (an earlier appeal of the same case). The surgeon then arranged for the assistance of nurse Hanson who was employed by the hospital. In line with the principles stated above, the Supreme Court held that the trial court erred in removing from the jury an issue of *respondeat superior* because, under these circumstances, the surgeon had full power of control over nurse Hanson and that nurse Hanson was therefore a lent servant. *Jackson* at 261, 72 S.E.2d at 591.

The evidence relied upon by plaintiff in the present case, i.e., the hospital policy manual, gives the surgeon the power to *supervise* the nurse anesthetist during the operation. However, there is a distinction between the power to supervise and the power to control.

> [A] servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out to the servant the work to be done, *or supervises the performance thereof*, or designates the place and time for such performance, or gives the servant signals calling him into activity, or gives him directions as to the details of the work and the manner of doing it . . . .

Weaver at 25, 129 S.E.2d at 616 (emphasis added) (citations omitted). *See also* 57 C.J.S. *Master and Servant* § 566 (1948). Therefore, it is not sufficient that the surgeon has the power to *supervise*, or even that he has the power to give directions as to the details and manner of doing the work. There must be evidence that the surgeon has the right to *control* the work and the manner of doing

it. *Weaver*. The hospital policy manual standing alone does not constitute evidence of such control.

We also find *Jackson* factually distinguishable. Plaintiff in the present case offered no evidence that Dr. Miller personally selected nurse Hawkes as the anesthetist. In *Jackson*, the surgeon personally selected the anesthetist, rejecting the request of the patient's mother that her family physician administer the anesthesia. It is generally stated that inherent to the right to control is the right to select, and accordingly discharge, the alleged employee. 57 C.J.S. *Master and Servant* § 563(b) (1948) ("it is indispensable that the right to select the person claimed to be a servant should exist").

This case is more analogous to the later case of *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E.2d 733 (1976). In *Starnes*, plaintiff argued that a surgeon was vicariously liable for the negligence of a nurse anesthetist who caused burns to an infant during an operation. This Court rejected the argument where the record disclosed that the anesthetist was assigned by the hospital's anesthesiology department and the surgeon had no responsibility for the training or assignment of nurse anesthetists. Similarly, in this case there was no evidence that Dr. Miller had any responsibility for the assignment or training of nurse anesthetists.

Plaintiff next argues that Mrs. Harris consented to surgery by "Dr. Miller and/or the assistants as may be selected by him," and that this consent confirms that Dr. Miller had control over nurse Hawkes during the operation. We reject this argument. The consent form does not constitute evidence that Dr. Miller had the right to control the work and the manner of performing the work of nurse Hawkes.

Finally, plaintiff argues that six witnesses, including Dr. Miller himself, testified that the surgeon has the ultimate responsibility for the quality of care given a patient. It is unclear whether this "ultimate responsibility" results from a medical code of ethics, a hospital disciplinary code, or some other policy within the medical profession. In any event, we are unpersuaded that this conclusory testimony should be accepted as a competent legal conclusion on the part of the medical profession that a surgeon is vicariously liable for any and all negligence which occurs in the course of care given a patient. The fact that under some statement of policy a surgeon bears the "ultimate responsibility" of care is not evidence

that the surgeon has the right to control the manner in which all those involved in rendering care to the patient do their jobs.

Furthermore, it was established through plaintiff's own experts in this case that nurse anesthetists are highly trained and highly skilled. There was testimony that the standard of care for a nurse anesthetist is the same as that for an anesthesiologist, and that nurse anesthetists are experts in the delivery of anesthesia. This evidence is indicative that the surgeon and anesthetist work as a team, each with his own area of expertise, to achieve as a common end the successful completion of the surgery. It is reasonable that the surgeon would have a supervisory obligation to effect that end, but, at least in this case, there is no evidence that the surgeon had the right to control the manner in which the anesthetist administered the anesthesia or performed the related functions of his job as set out by hospital policy.

Therefore, nurse Hawkes was not, on this evidence, Dr. Miller's employee under the doctrine of *respondeat superior*.

II

[3] Plaintiff next argues that in the absence of an employer-employee relationship, Dr. Miller is vicariously liable under the principle of apparent agency in that he held out to Mrs. Harris, via the consent form, that he had the right to control nurse Hawkes during the course of the surgery. Plaintiff correctly states that a principal who represents to a third party that another is his agent is liable for harm caused the third party by the apparent agent if the third party justifiably relied upon the principal's representation. *See* Restatement (second) of Agency § 267 (1958). However, we reject plaintiff's argument for two reasons.

First, the consent form referred to by plaintiff purports to be Beaufort County Hospital's consent form, not Dr. Miller's consent form. The form is signed by Mrs. Harris and witnessed by a hospital nurse. The form itself does not show that Dr. Miller personally made any representations to Mrs. Harris.

Second, the consent form is entitled "SPECIAL CONSENT TO OPERATION, ANESTHESIA OR OTHER PROCEDURE." The form first authorizes Dr. Miller to perform the operation. In pertinent part, the form goes on to provide:

> I further authorize and request that the above-named physician and/or his assistants perform such procedures as are, in his professional judgment, necessary and desirable. I consent to the administration of such anesthetics as may be considered necessary or advisable by the physician responsible for this service.

By the language of the consent form, Mrs. Harris authorized the "above-named physician," i.e., Dr. Miller, to perform such other procedures as he deemed necessary. The second sentence above represents a second, independent consent to the administration of anesthetics "by the physician responsible for this service." This consent is a separate authorization allowing another physician, not Dr. Miller nor even an assistant selected by him, to administer the anesthesia. Thus, the consent form contains no evidence that Dr. Miller represented to Mrs. Harris that he would employ or control the one administering the anesthesia.

Accordingly, nurse Hawkes was not, on this evidence, Dr. Miller's apparent agent, and directed verdict on this issue was not error.

III

[4] Plaintiff next argues the trial court erred by excluding the expert testimony of a nurse anesthetist. Had the nurse been allowed to testify she would have testified to the instructions and supervision a surgeon should give an anesthetist during a medical crisis.

We agree with plaintiff that a witness may be deemed an expert for purposes of giving opinion testimony in fields other than his or her own area of a profession. *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988) (obstetrician-gynecologist competent to testify as to referral practices of pediatrician); *Lowery v. Newton*, 52 N.C. App. 234, 278 S.E.2d 566, *disc. rev. denied*, 303 N.C. 711 (1981) (general/plastic surgeon competent to testify to standard of care of neurosurgeon); *Haney v. Alexander*, 71 N.C. App. 731, 323 S.E.2d 430 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985) (physicians competent to testify to standard of care for nurses). Accordingly, situations may exist where a nurse is competent to testify to the standard of care for a physician. However, the applicable statute provides:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C.G.S. § 90-21.12 (1990).

In the present case, the witness testified that she was "familiar with the standards of care relating to anesthesia practice for certified registered nurse anesthetists in North Carolina." She was accepted by the trial court as an expert in nurse anesthetist care. However, the record does not reflect that plaintiff elicited from this witness that she was familiar with the standards of practice for orthopedic surgeons "with same or similar training and experience situated in the same or similar communities . . . ." *Id.* Therefore, the exclusion of the anesthetist expert's testimony regarding any action or directions or supervision a surgeon should give during a medical crisis is not error. *See York v. Northern Hospital District*, 88 N.C. App. 183, 362 S.E.2d 859 (1987), *disc. rev. denied*, 322 N.C. 116, 367 S.E.2d 922 (1988) (no error in excluding nurse's testimony as to the standard of care required of a surgeon or anesthesiologist where there was no foundation that nurse was familiar with those standards).

IV

[5] Plaintiff's final argument is that the trial court erred in excluding as rebuttal evidence the deposition of an expert in orthopedic surgery stating that he practiced in eastern North Carolina and that Dr. Miller deviated from the standard practices of orthopedic surgeons in eastern North Carolina and communities similar to Beaufort County. The trial court excluded the evidence upon concluding it was similar to other evidence offered during plaintiff's case in chief on the issue of whether Dr. Miller breached the applicable standard of care and was not, therefore, rebuttal evidence.

The general rule is that it is in the discretion of the trial judge whether to allow additional evidence by a party after that party has rested or whether to allow additional evidence after the close of the evidence. *Castle v. B. H. Yates Co.*, 18 N.C. App. 632, 634, 197 S.E.2d 611, 613 (1973). Rebuttal is not generally intended as an opportunity for plaintiff to present his case again. "[T]he usual rule will exclude *all evidence which has not been made necessary by the opponent's case in reply.*" Wigmore, *Wigmore on Evidence* § 1873 (1976). Thus, plaintiff's case in rebuttal does not consist of witnesses who merely support his complaint, "but is confined to testimony which is directed to refuting the evidence of the defendant, unless the court in its discretion permits him to depart from the regular order of proof." McCormick, *McCormick on Evidence* § 4 (3d ed. 1984).

N.C.G.S. § 90-21.12 establishes a method for ascertaining the standard of care which is to be determined in accordance with "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities. . . ." The standard of care may vary from community to community depending upon the practices of health care providers in that community. Conflicts in the evidence as to the standard of care for a particular community are resolved by the jury.

On the question of the applicable standard of care, plaintiff in his case in chief presented the deposition testimony of Dr. Gaines, an orthopedic surgeon who was not directly familiar with the standard of practice in Beaufort County. However, he was no less competent to testify as to the applicable standard of practice because of his foundation testimony that in his opinion there is a national standard of practice for orthopedic surgeons and that he was familiar with the national standard. *See Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984) (where standard is same across the country, expert familiar with standard may testify despite no familiarity with defendant's community). Plaintiff's witness was, in effect, familiar with the standard of practice in Beaufort County and similar counties because he was familiar with the national standard of practice. Dr. Gaines' deposition proceeds to assert that Dr. Miller deviated from the standard of practice in several ways, the most specific of which was Dr. Miller's decision to remove the Surgicel used to control bleeding during the operation.

Defendant presented the testimony of Dr. Hamilton, an orthopedic surgeon who established as a foundation for his testimony that he was familiar with the standard of practice in Beaufort County and similar communities. He stated that Dr. Miller did not deviate from standard of practice, and particularly, that Dr. Miller acted appropriately by removing the Surgicel.

Plaintiff's proposed rebuttal was a deposition of another orthopedic surgeon who practices in a community near Beaufort County and who laid a foundation for his testimony by establishing, at least inferentially, that he was familiar with the standard practices of orthopedic surgeons in communities similar to Beaufort County. The deposition states that Dr. Miller deviated from standard practice by removing the Surgicel.

The only significant difference between the deposition offered during plaintiff's case in chief and the deposition plaintiff sought to introduce as rebuttal is the foundation evidence which enables each surgeon to testify under N.C.G.S. § 90-21.12, i.e., that he is familiar with the standard practices for orthopedic surgeons in the same or similar communities. The substantive evidence, i.e., what the standard practice is in such communities, is the same in both depositions. We therefore find no abuse of discretion in the trial court's exclusion of this evidence on the basis that it is cumulative to the evidence offered by plaintiff in his case in chief and is not rebuttal.

No error.

Judge ORR concurs.

Judge PHILLIPS dissents with separate opinion.

Judge PHILLIPS dissenting.

In my opinion the trial court erred in directing a verdict for the defendant on the agency issue, as the evidence presented was sufficient to indicate that Dr. Miller had the right to control the work of Nurse Hawkes during the operation and the manner in which he did it. In brushing aside the testimony of several doctors, including Dr. Miller himself, that defendant had the ultimate responsibility for the proper treatment of the patient during surgery, the majority incorrectly indicates that the testimony was without

legal or probative effect and that the source of that responsibility is unclear and may result from some ineffective medical or hospital code. As the evidence plainly indicates, it seems to me, the surgeon's ultimate responsibility for those who assist in the surgery results from the physician-patient relationship, the nature of the services undertaken, and the realities of the operating room, where the only alternative to a coordinated team effort under the control of the surgeon is for the assistants to do as they see fit, which is a folly that no sensible patient not *in extremis* would ever knowingly submit to and that no conscientious surgeon would ever permit.

And in my view it was prejudicial error to exclude the expert testimony of Nurse Anesthetist Privatte as to the things that a nurse anesthetist can and cannot properly do during a medical crisis without instructions from the surgeon and as to the instructions that surgeons give in such situations. Though not a surgeon, she had assisted surgeons in thousands of operations and was eminently qualified to give the testimony, which could have made a difference in the case, and what members of a trade or profession ordinarily do in certain situations is evidence of what should be done in those situations, though not phrased in the jargon of approved standards.

STATE OF NORTH CAROLINA v. HENRY TURNER

No. 9017SC474

(Filed 2 July 1991)

1. Criminal Law § 1099 (NCI4th)— attempted sexual offense and indecent liberties—penetration as aggravating factor

It is not a violation of a defendant's due process rights to consider as an aggravating factor an element of a greater charge dropped in exchange for a plea bargain for a lesser included offense. Therefore, defendant's due process rights were not violated by the trial court's finding as an aggravating factor for attempted first degree sexual offense and attempted indecent liberties with a child to which defendant pled guilty that there was vaginal penetration by defendant.

Am Jur 2d, Assault and Battery § 55; Criminal Law §§ 598, 599.

2. Criminal Law § 1099 (NCI4th)— aggravating factor—penetration—sufficiency of evidence

The trial court's finding as an aggravating factor for attempted sexual offense and attempted indecent liberties that there was vaginal penetration by defendant was supported by a preponderance of the evidence where defendant stipulated to the admission of an exhibit offered to show that there was some penetration; there was evidence that the victim told the police that there was vaginal penetration; and a codefendant testified that defendant "put his penis in her private spot."

Am Jur 2d, Assault and Battery § 55; Criminal Law §§ 598, 599.

3. Criminal Law § 1166 (NCI4th)— aggravating factor—low I.Q. and development range

The evidence supported the trial court's finding as an aggravating factor for attempted sexual offense and attempted indecent liberties that the twelve-year-old victim was especially vulnerable in that she had an I.Q. in the mildly handicapped range and her development age was six years and two months where it tended to show that defendant went to a party given by a person who was baby-sitting the victim; defendant had seen the victim on previous occasions at her mother's store and knew who she was; defendant had the opportunity to observe the victim all evening during the party; defendant observed the victim's behavior while two codefendants were sexually assaulting her and joined in the offense only at their encouragement; and the State introduced a psychoeducational evaluation of the victim conducted nine months after the assault which established that the victim had a developmental age of six years and two months, that her I.Q. fell in the moderately handicapped range and that her comprehension and expressive skills were quite low.

Am Jur 2d, Assault and Battery § 55; Criminal Law §§ 598, 599.

4. Criminal Law § 1187 (NCI4th)— aggravating factor—prior conviction—failure to raise lack of counsel issue

The burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defend-

ant, and where defendant failed to object or move to suppress the evidence of a prior conviction, he is precluded from raising on appeal the issue of his indigency and lack of counsel.

Am Jur 2d, Criminal Law §§ 598, 599; Habitual Criminals and Subsequent Offenders § 9.

5. **Criminal Law § 1218 (NCI4th)— mitigating factor—passive participant—finding not required**

The trial court did not err in failing to find as a mitigating factor for an attempted sexual offense that defendant was a passive participant where defendant did not object to sexual assaults on the victim by the two codefendants and attempted to have sex with the victim at the encouragement of one codefendant.

Am Jur 2d, Criminal Law §§ 598, 599.

6. **Criminal Law § 1267 (NCI4th)— mitigating factor—good character—finding not required**

The trial court did not err in failing to find as a mitigating factor that defendant is of good character where the record established, at best, only an absence of bad character.

Am Jur 2d, Criminal Law §§ 598, 599.

7. **Criminal Law § 1086 (NCI4th)— two offenses—consolidated judgment—aggravating and mitigating factors—absence of findings for each offense**

Where offenses of attempted first degree sexual offense and attempted indecent liberties with a child were consolidated for judgment, and the sentence imposed did not exceed the maximum sentence allowable for the more serious felony, defendant was not prejudiced by the trial court's failure to make separate findings of aggravating and mitigating factors for each offense.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from judgment entered 13 December 1989 in CASWELL County Superior Court by *Judge Melzer A. Morgan, Jr.* Heard in the Court of Appeals 15 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Angelina M. Maletto, for the State.

Wayne E. Crumwell for defendant-appellant.

WYNN, Judge.

From a judgment imposing an eighteen-year sentence following his plea of guilty and conviction of attempted first degree sexual offense and attempted indecent liberties with a child, defendant appeals. For the reasons that follow, we find no error.

I

At the sentencing hearing, the State presented evidence which tended to show that on 18 February 1989, the defendant along with Chuckie Stump ("Stump") and David Hicks ("Hicks") went to a house party given by Chuckie's sister, Rhonda Stump. During the course of the evening, two minor children, the twelve-year-old prosecutrix and her seven-year-old sister, were left at the residence by their mother to be cared for by Rhonda Stump while their mother was working. Later that night after the party had ended, the three men were allowed to sleep in the living room along with the victim while Rhonda Stump slept with her boyfriend and the younger child in the only bedroom in the house. On being left alone with the victim, two of the men engaged in sexual activities including intercourse with her starting with Stump and followed by Hicks. After encouragement by his two companions, the defendant tried to have sex with the prosecutrix but stopped when she started crying. Testimony from Hicks established that the defendant penetrated the victim prior to stopping.

Defendant admitted that he attempted to have sex with the victim but denied that he penetrated her.

Evidence was also presented that the victim had an I.Q. in the mildly handicapped range and a developmental age of six years and two months. The prosecuting witness did not testify.

The pleas were consolidated for judgment and defendant was sentenced to eighteen years imprisonment.

II

The defendant assigns error primarily to the trial judge's findings of factors in aggravation and mitigation at his sentencing

hearing. With respect to such factors, the state has the burden of proving that aggravating factors exist, and the defendant has the burden of proving that mitigating factors exist; proof of aggravating and mitigating factors must be by a preponderance of the evidence, and it must be shown that such factors are reasonably related to the purposes of sentencing. N.C. Gen. Stat. § 15A-1340.4(a) (1988); *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). Having established what must be proven, we turn to the assignments of error with respect to factors in aggravation in this case.

[1] By his first assignment of error, defendant contends that the trial judge erred by finding as an aggravating factor that there was vaginal penetration by defendant. He makes two contentions: 1) that the trial court's finding of a factor in aggravation based on evidence of the crime of first degree rape was improper in that it was not the charge to which defendant pled guilty and allowing it as an aggravating factor violated his due process rights, and 2) the evidence of vaginal penetration is suspect in that the State did not prove it by a preponderance of the evidence.

With respect to defendant's first contention, the issue is controlled by *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983), wherein our Supreme Court held that it is not a violation of defendant's constitutional due process rights to consider as an aggravating factor an element of a greater charge dropped in exchange for a plea bargain for a lesser included offense where the dismissed charge is not used in aggravation. *Accord State v. Parker*, 92 N.C. App. 102, 373 S.E.2d 558 (1988), *disc. review denied*, 324 N.C. 250, 377 S.E.2d 760 (1989). Thus, defendant's first contention is without merit.

[2] As to defendant's second contention, at trial, defendant stipulated to the introduction of State's Exhibit 2 which was offered to show that there was evidence to justify the original charge of first degree rape and that there was some penetration. Having made that stipulation, defendant cannot be heard to complain on appeal. Further, the victim told the police that there was vaginal penetration and David Hicks testified that the defendant had "put his penis in her private spot." Based upon those facts, we find that there was proof by a preponderance of the evidence that vaginal penetration occurred and therefore, this assignment of error is without merit.

[3] Defendant's next assignment of error is to the trial judge's finding as an aggravating factor that the victim was especially vulnerable in that she had an I.Q. in the mildly handicapped range (45-60) and that her development age was 6 years and 2 months. He contends that several witnesses described Patricia Baker as appearing like any normal 12 year old and that in the report which discusses her I.Q. and developmental age, it is stated that her "attitude and behavior in the classroom are excellent." These contentions are unavailing.

First, the defendant fails to cite any authority in support of his argument as required by N.C. R. App. P. 28(b)(5) (1990). Failure to comply with that rule subjects the assignments of error to abandonment. *S.J. Groves & Sons & Co. v. State*, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *disc. review. denied*, 302 N.C. 396, 279 S.E.2d 353 (1981). However, we will suspend the operation of Rule 28(b)(5) and consider this assignment of error pursuant to our authority under N.C. R. App. P. 2 (1990).

Second, our Supreme Court has held that a trial judge can use an aggravating factor not set forth in N.C. Gen. Stat. § 15A-1340.4(a)(1), as long as the judge finds that factor by a preponderance of the evidence and as long as the factor reasonably relates to the purposes of sentencing. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984), *rev'd on other grounds*, 321 N.C. 570, 364 S.E.2d 73 (1984). Moreover, a finding in aggravation that the victim was particularly vulnerable is proper where the defendant takes advantage of the victim's vulnerability during the actual commission of the crime. *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986).

In the case at bar, the defendant testified that he knew that Rhonda Stump was baby-sitting for the victim and that he had seen the victim on previous occasions at her mother's store and knew who she was. The facts also show that the defendant had the opportunity to observe the victim at Rhonda Stump's apartment all that evening. The statements of co-defendant Hicks, corroborated by defendant's statements, establish that the defendant was not the first of the three men to assault the victim; he had the opportunity to observe her behavior while either Hicks or Stump was sexually assaulting her and joined in the offense only at their encouragement. Further, the State produced a psychoeducational evaluation of the victim conducted nine months after the assault

which established that the victim had a developmental age of six years and two months, that her I.Q. fell in the moderately handicapped range and that her comprehension and expressive skills were clearly quite low. This evidence was sufficient for the trial judge to find by a preponderance that the victim was particularly vulnerable.

[4] The final aggravating factor to which defendant assigns error is to the finding of a prior conviction for purposes of aggravating his sentence. He contends that the state must make an adequate showing as to whether the defendant was indigent or had counsel at the time of the offense which is being offered to support the aggravating factor of a past conviction.

Defendant's statement of the law is correct as set forth in *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983), but the burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. *Id.* Here, the defendant failed to object or move to suppress the evidence of the prior conviction because of his indigency and lack of counsel. "Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal." *Id.* at 426, 307 S.E.2d at 160; *see also* N.C. Gen. Stat. § 15A-980 (1988). Since the defendant neither objected nor moved to suppress the evidence of the prior conviction, he is precluded from raising the issue of his indigency and lack of counsel on appeal. This assignment of error is overruled.

III

We turn now to defendant's assignments of error with respect to factors in mitigation. The trial judge found as mitigating factors that defendant aided in the apprehension of another felon; that he voluntarily acknowledged wrongdoing at an early stage; and that he agreed to testify against his co-defendants (a non-statutory mitigating factor).

[5] Defendant assigns error to the trial judge's failure to find that he was a passive participant. He contends that because his role in the offense was minor, the trial judge should have found that he was a passive participant to diminish his culpability.

In support of his contention that he was a passive participant, defendant cites *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). While *Jones* is instructive on this issue, it does not support defendant's argument. In *Jones*, the defendant tried to persuade a co-defendant not to shoot a convenience store clerk after they had robbed the store. In the case at bar, defendant did not object to the actions of Hicks and Chuckie Stump; he did not attempt to persuade them to stop and, in fact, he attempted to have sex with the victim at Hicks's encouragement. We find no error in the trial judge's refusal to find that the defendant was a passive participant. This assignment of error is overruled.

[6] Defendant next assigns as error the trial judge's refusal to find as a mitigating factor that defendant is of good character. He contends that the record taken in its entirety provides, by a preponderance of the evidence, that he is a person of good character. When a defendant argues that the trial judge erred in failing to find a mitigating factor, proved by uncontradicted evidence, he is "asking the court to conclude that 'the evidence so clearly establishes that fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *Id.* at 219-20, 306 S.E.2d at 455 (citations omitted). Here, the defendant has not cited any evidence that is manifestly credible. He has thereby failed to carry his burden of proof on appeal. Further, the record establishes, at best, that there is an absence of bad character. The absence of bad character does not establish good character. *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983). We find no merit to defendant's assignment of error and therefore it is overruled.

IV

[7] Finally, defendant assigns error to the trial judge's failure to make separate findings of aggravating and mitigating factors for each offense. He also assigns error to the trial judge's finding that the aggravating factors outweighed the mitigating factors in sentencing defendant to a term beyond the presumptive term for the offenses to which he pled guilty.

With respect to defendant's contention that the trial judge should have found factors in aggravation and mitigation for each separate offense, we find that *State v. Miller*, 316 N.C. 273, 341 S.E.2d 531 (1986), is controlling. In *Miller*, the Supreme Court held:

> When cases are consolidated for judgment and the judge finds aggravating and mitigating factors as to the most serious offense, but fails to make such findings as to the lesser offenses consolidated, the defendant is not prejudiced so long as the sentence given does not exceed the maximum sentence permissible for the most serious offense.

316 N.C. at 284, 341 S.E.2d at 537.

In the case at bar, the maximum sentence allowable for the more serious felony, attempted first degree sexual offense is twenty years, a period in excess of the 18 years received by the defendant. The defendant benefited from his plea bargain by having his convictions consolidated for judgment and receiving a sentence less than the 20 years allowed for the more serious offense; he is not entitled to an additional benefit of separate findings as to the lesser of the consolidated offenses.

With respect to defendant's assignment of error to the trial judge's finding that the factors in aggravation outweighed the factors in mitigation, this court has held that the weight given to each factor and the decision to increase or decrease the presumptive sentence is within the sound discretion of the trial judge. *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E.2d 658, 661 (1982), *disc. review denied*, 306 N.C. 745, 295 S.E.2d 482. "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E.2d 689, 697 (1983) (citations omitted).

In the case at bar, defendant cites no authority to substantiate any claim of error. Nor has he shown that the trial judge abused his discretion. Accordingly, we find that the trial judge committed no error in sentencing defendant beyond the presumptive term.

V

For the foregoing reasons, in the decision of the trial judge at the sentencing hearing we find,

No error.

Judge EAGLES concurs.

Judge PHILLIPS concurs in the result.

BARBARA JEAN FOSTER BOGER, PLAINTIFF v. BOBBY EUGENE BOGER, DEFENDANT

No. 9021DC213

(Filed 2 July 1991)

Divorce and Separation § 129 (NCI4th)— equitable distribution— increase in pension benefits for early retirement—separate property

An increase in the husband's pension benefits after the date of separation because of his election to participate in an early retirement incentive plan offered by his employer was separate rather than marital property where the early retirement option was offered only after the parties separated, and the husband was not eligible for early retirement without additional service after the date of separation, since the increase was not vested as of the date of separation and was compensation for lost future earnings.

Am Jur 2d, Divorce and Separation §§ 880, 905, 906.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses. 94 ALR3d 176.

APPEAL by defendant from order entered 5 September 1989 by *Judge R. Kason Keiger* in FORSYTH County District Court. Heard in the Court of Appeals 23 October 1990.

Forsyth Legal Associates, by William L. Durham, for plaintiff-appellee.

Law Firm of Victor M. Lefkowitz, by Geoffrey C. Mangum, and Victor M. Lefkowitz, for defendant-appellant.

PARKER, Judge.

At issue in this appeal are the classification, for purposes of equitable distribution, of post-separation pension benefits and the

proper application of N.C.G.S. § 50-20(b)(3) governing the distribution of pension benefits. The parties separated on 1 December 1986, and plaintiff filed her suit for absolute divorce and equitable distribution of marital property on 26 January 1988. A judgment of absolute divorce was entered on 2 March 1988, and thereafter the equitable distribution proceedings were heard on 27 and 28 July 1989.

The husband appeals the distribution of that portion of his pension benefits increased after the date of separation by his election to participate in an early retirement incentive plan offered by his employer several years after the date of marital separation. The husband would have us characterize such an increase as compensation for lost *future* earnings, distinguishing the increase from the pension rights vested as of the date of separation, which are properly characterized as deferred compensation and hence "marital" property. Characterizing the amount of the increase received in exchange for early retirement as lost future earnings would put the amount within the category of "separate" property under the Equitable Distribution Act, N.C.G.S. §§ 50-20 *et seq.* ("the Act").

The husband has worked for R.J. Reynolds ("RJR") since 1959. RJR was acquired in a leveraged buy-out after the date of the parties' separation. About two years after that separation the new management, as part of a program to reduce the wage force, offered senior employees significantly higher pension benefits if those employees would agree to retire on 1 July 1990. Employees needed a combined age and years of service of 81.5 in order to qualify for this incentive retirement option. Defendant reached the 81.5 eligibility figure about five months after his separation from plaintiff.

The value of defendant's vested RJR retirement benefits as of the date of marital separation was around $929.00 per month for retirement at age sixty-five, or $349.00 for retirement taken after age fifty-five. Absent any retirement incentive plan, the husband would have been eligible, according to the testimony of RJR's Retirement Plans Administrative Assistant at the distribution proceeding, for a monthly annuity of $1,056.27. But in April 1989 the husband had elected early retirement under the new employee incentive plan, giving up his job and salary of $50,000.00 a year for a monthly benefit of $1,639.02 from age fifty-six to age sixty-two were he to choose the highest monthly benefit, a single life annuity

option. After age sixty-two his RJR pension was to be offset by the estimated amount of his Social Security benefits.

At the distribution hearing the parties contested the monthly pension amount to which a stipulated "coverture fraction" was to be applied. The judge specifically asked the Retirement Plans Administrative Assistant if a "sweetener package [w]as . . . something that was added to the retirement plan by the Company after [the employee] separated from his wife" and not "something that was built into the plan." The RJR witness confirmed that the early retirement option at a much higher monthly annuity had been added to RJR's retirement plan well after the date of the marital separation. The husband contends that the stipulated percentage applies only to his pension rights vested as of the date of separation, and not to the amount of the increase afforded by his election to retire early under an RJR plan offered to the husband more than two years after the date of separation and about one year after the divorce. The wife argues that she has a distributive interest in the early retirement incentive benefits as well, and that the trial court had the power to make such an award.

In its 5 September 1989 order distributing the marital property, the district court judge found that the parties had stipulated to a 40% distribution to the wife of the husband's retirement benefits and that the husband was to begin receiving his RJR pension on 1 July 1990. The court noted that the parties disagreed as to the amount to which the percentage factor was to be applied. In describing the early retirement incentive offered to the husband by RJR, the court found that:

> Provision for the larger monthly annuity came into effect subsequent to the time of the parties' separation and was non-contributory other than continued employment, and, although the actual increase in retirement annuity came into effect after the date of separation, the Court does find that the substantial portion of the retirement came about during the 25.32 years of marriage.

In that same order the court's third Conclusion of Law stated that:

> [T]he plaintiff's entitlement to the defendant's pension as [set] forth is appropriate, taking into consideration what this Court believes to be the intent of the legislature in establishing the

> equitable distribution law, and that to deprive the plaintiff of the additional portion of the defendant's retirement which came about following the defendant's date of separation [from plaintiff] would defeat the thrust of the legislature in enacting this equitable distribution law.

The judge's Qualified Domestic Relations Order, pertaining only to retirement/pension benefits, calculated the total number of marital years applicable to the wife's interest in defendant's pension rights and arrived at a 35.71% formula for her entitlement to the base benefit plus the early retirement increase that defendant would begin receiving by reason of his early retirement. The court recited that it had "considered all of the factors in G.S. 50-20 in arriving at this percentage."

On appeal the wife argues that she is entitled to the judge's award of 35.71% of any retirement/pension benefits received by her ex-husband. She argues that the benefits vested once her husband had worked the ten years required for vesting of pension rights at RJR and that the judge correctly treated the post-separation increase in the husband's pension as a mere "distributional factor" under N.C.G.S. §§ 50-20(c)(11a) and (12). We disagree with plaintiff that case law compels, or even suggests, this result. *Truesdale v. Truesdale*, 89 N.C. App. 445, 450, 366 S.E.2d 512, 514 (1988), the case relied on by plaintiff, announced that passive post-separation appreciation of a marital home after the date of separation was neither marital nor separate property but rather a distributional factor.

The present case does not involve mere passive appreciation of an asset incapable of classification. Rather, it calls upon this Court to decide for the first time whether the increased component of a retirement annuity, offered to a spouse only after separation and for which the spouse was not eligible without additional service after the date of separation, should be classified as "separate" property for purposes of equitable distribution. We hold that the increase, which vested only after the date of separation, is separate property. *See Hall v. Hall*, 88 N.C. App. 297, 307, 363 S.E.2d 189, 195-96 (1987) (nonvested stock options considered separate property because contingent on continued employment after date of separation). Judicial classification of property prior to distribution is governed by the Act and the case law interpreting the Act. The early retirement option did not exist at the time the parties separated;

nor had the husband worked long enough for RJR, as of the date of separation, to have been qualified for the incentive increase offered to him much later. Hence his interest in the annuity increase could not have "vested" as of the date of separation.

Vesting is crucial in distinguishing between marital and separate property under N.C.G.S. §§ 50-20(b)(1) and (2). Since its amendment in 1983, the Act has defined "all vested pension, retirement, and other deferred compensation rights" as marital property. N.C.G.S. § 50-20(b)(1) (1987). Similarly, the Act dictates that "[t]he expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property." N.C.G.S. § 50-20(b)(2). Furthermore, the section on distribution after classification specifically directs that "[t]he [distributive] award *shall* be based on the vested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and *shall not* include contributions, years of service or compensation which may accrue after the date of separation." N.C.G.S. § 50-20(b)(3) (emphasis added). Although the Act endows the trial judge with wide discretion in considering a host of "distributional factors," including separate property, in making the final distribution award under N.C.G.S. § 50-20(c), that discretion does not reach an attempt under N.C.G.S. §§ 50-20(c)(11a) and (12) to rewrite N.C.G.S. § 50-20(b)(3).

This Court interpreted the term "vesting" in *Milam v. Milam*, 92 N.C. App. 105, 373 S.E.2d 459 (1988), *disc. rev. denied*, 324 N.C. 247, 377 S.E.2d 755 (1989), by expressly adopting the interpretation used in a sister state: " ' "[v]esting" occurs when an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future. . . .' " *Id.* at 106-107, 373 S.E.2d at 460 (quoting *In re Marriage of Grubb*, 745 P.2d 661, 664 (Colo. 1987) (*en banc*)). *Milam* decided its vesting problem in the context of the Act by asking when the employee's pension rights were "guaranteed."

Unlike the employee in *Milam*, however, the husband in this case was not "guaranteed" the increased annuity at the time of separation. Under the incentive plan he was eligible for the retirement incentive only after the combination of his age and years of service totalled 81.5 years, which did not occur until some five months after the date of separation. But that "eligibility" did not exist at all until the company created and offered the incentive plan to senior employees some two years after the date of separation.

This Court's decision that the husband's increased annuity could not have been vested as of the date of separation is in accord with the most closely analogous decisions in this State. *Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987) (stock options acquired after the date of separation not deemed to be vested upon separation and hence not marital property); *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988) (proceeds from husband's life insurance policy on couple's son did not vest until accidental death of son three months after the couple separated and, therefore, were not "acquired" before the date of separation or "owned" at the date of separation, as required by N.C.G.S. § 50-20(b)(1), even though the insurance policy had been purchased with marital funds), *disc. rev. improvidently allowed*, 324 N.C. 245, 376 S.E.2d 739 (1989).

In addition to interpreting the language of the Act, we have been directed to apply the "analytic" approach adopted in *Johnson v. Johnson*, 317 N.C. 437, 450-51, 346 S.E.2d 430, 438 (1986) ("After weighing the relative strengths and weaknesses of both the mechanistic and the analytic approaches, we are of the opinion that the latter is the better reasoned."). The analytic approach looks to the individual components of property to be classified (in the *Johnson* case, a personal injury award) rather than to application of a literal, mechanistic reading of the statutory definitions of marital and separate property. *Id.* at 446, 346 S.E.2d at 435. Using the analytic approach we can describe the incentive increase in pension benefits in this case as compensation for the loss of *future* earnings. The Act expressly prohibits distribution of that part of a spouse's income earned after the date of separation. N.C.G.S. § 50-20(b)(3).

Analysis of benefits accrued by reason of election of early retirement as compensation for loss of future earnings fully supports "the policy behind G.S. 50-20 [as] basically one of repayment of contribution." *Hinton v. Hinton*, 70 N.C. App. 665, 669, 321 S.E.2d 161 (1984). We hold, therefore, that the trial court erred in distributing the portion of the pension representing compensation for future earnings lost through early retirement, in direct violation of N.C.G.S. § 50-20(b)(3). Because the trial court included the increase in the monthly benefit in the Qualified Domestic Relations Order to be sent to RJR-Nabisco under paragraph four of the order dated 5 September 1989, we remand the case with directions that the court issue a new order as to the distribution of husband's

pension benefits, awarding the wife a 35.71% share of only the pension rights that were vested as of the date of separation.

Reversed and remanded.

Judges JOHNSON and EAGLES concur.

BARRY EUGENE BLEVINS, PLAINTIFF v. FREDERICK MITCHELL TAYLOR, THOMAS SEUBERLING, SOUTHEASTERN HISTORICAL RE-ENACTMENT SOCIETY, INC., BROWN LOFLIN, AND HANDY DANDY RAILROAD, INC., DEFENDANTS

No. 9022SC585

(Filed 2 July 1991)

Negligence § 53.6 (NCI3d)— historical re-enactment—loaded weapon—liability of sponsor

Summary judgment was correctly entered for the sponsor of a civil war re-enactment in a negligence action brought by a participant who received shotgun injuries during the battle. Defendant Loflin had only the ordinary duties owed by owners and occupiers of land to business invitees. The undisputed facts in the record will not permit the inference that defendant Loflin had knowledge of a substantial danger or sufficient information to foresee injury to an invitee from live ammunition; rather, the testimony supports the view that plaintiff's injury was the result of an unforeseeable and isolated act by a fellow member of the Society. No duty arose in these circumstances to take special precautions for plaintiff's safety.

Am Jur 2d, Negligence §§ 135, 136, 488.

APPEAL by plaintiff from order entered 20 March 1990 by *Judge Thomas W. Seay, Jr.*, in DAVIDSON County Superior Court. Heard in the Court of Appeals 5 December 1990.

Wilson, Biesecker, Tripp & Sink, by Roger S. Tripp, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers and Charlot F. Wood, for defendant-appellee.

PARKER, Judge.

Plaintiff appeals from a summary judgment for defendant Brown Loflin entered pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Plaintiff, a self-described "hardcore" member of the Southeastern Historical Re-Enactment Society (Society), brought a negligence suit against a number of defendants for shotgun injuries sustained in connection with a mock Civil War battle during the Southeast Old Thresher's Reunion, a festival held in Davidson County over the Fourth of July Holiday. The defendants included the Society, the owner of the shotgun, the user of the shotgun and Loflin. Loflin, who sponsored the public event featuring the military re-enactment involved in this case, leased the land on which the staged battle took place. We affirm the trial court's judgment in that (i) no material facts are in dispute; (ii) defendant breached no legal duty owed to plaintiff; and (iii) defendant was, therefore, entitled to summary judgment as a matter of law.

We begin with the salient facts before the trial court on the motion for summary judgment. The following paragraphs in the Society's own "Safety Regulations," in effect at the time of plaintiff's accidental injury, are relevant to the activities in which the Society was engaged on Loflin's land.

1) All Safety Regulations will be *strictly* enforced by the Staff. Any violation of standard firearm safety or common sense in regard to firearm safety shall be cause for an individual to be expelled from the field and the remainder of activities.

2) The Commander and his Sergeants shall be responsible for the inspection of the unit prior to events and immediately following events to ensure conformance with Safety Regulations.

. . . .

5) Only approved weapons may be used and only blank, black-powder cartridges shall be carried. No projectiles, bullets, musket balls, or loading blocks shall be carried at any time.

. . . .

26) ALL firearms must meet ALL these safety requirements or they may not be used at any event.

Over the four-year period just prior to the accident, plaintiff had participated in about four dozen Civil and Revolutionary War re-enactments. The Society had no history of accidental injuries. Plaintiff testified that he knew of no injuries at any previous Society re-enactment. Plaintiff was aware of the Society's regulations concerning weapons and blank ammunition and testified in his deposition that he relied on the Society's safety measures.

The shotgun that allegedly wounded plaintiff in this case had been brought to the battle by a Society member, another defendant in the case. That defendant testified by deposition that he had no reason to believe that the gun was loaded in contravention of the Society's rules prohibiting the use of live ammunition or projectiles. When questioned about prior accidents, the owner of the shotgun answered that he had participated in about 150 events over the course of twenty years and that there had never been any injuries before plaintiff's. The alleged weapon was actually fired by yet another Society member, also named as a defendant. His deposition testimony disclosed that he had inspected the shotgun before firing it, discovered that it was loaded and assumed it had been loaded with blank, black-powder cartridges.

Plaintiff testified in detail at his deposition about the Society's established procedures for implementing its safety regulations. The Society's regular method for weapons inspection put the responsibility for safety clearance on officers and non-commissioned officers (NCOs) of the Society. In their presence, members would drop a ramrod into the barrel of the gun and listen for a "ping" indicating that the weapon had an empty barrel and/or they would "pop the cap" (fire the musket or shotgun at the ground to check that it was clear). If the weapon would not clear, it was not to be used. The officers and NCOs also inspected the cartridge box of each rifleman. According to plaintiff's deposition testimony, he thought the Society's safety rules and regulations were "good enough" and "there was no reason for [him] to believe that live amunition [sic] would be flying through the air." By his own testimony, plaintiff conceded that there was, therefore, no reason for Loflin to have expected the use of any live ammunition either. Plaintiff also testified that the Society did not follow its safety procedures on the day of his accident, apparently because there was not sufficient time to do so, although some Society members, including plaintiff, had checked their weapons on their own.

Loflin's affidavit in support of his motion for summary judgment stated that "it was [his] understanding that the Society had safety rules or precautions it followed before and during each re-enactment which included inspection of firearms." Loflin further indicated that he had agreed to sponsor previous re-enactments with the Society and "[t]here were no problems whatsoever in [those two] previous re-enactments, and I had heard of no problems whatsoever in any previous re-enactments anywhere." Loflin's affidavit attested to Loflin's complete lack of knowledge about any load of live ammunition in the shotgun that allegedly injured plaintiff.

None of these facts is in dispute on appeal. Rather, plaintiff's argument is that, on such facts, Loflin had a non-delegable legal duty, based on the alleged intrinsically dangerous activity of the Society's handling of firearms, (i) to institute his own safety regulations for the protection of the public and Society members, (ii) to insure that the Society complied with its safety rules and regulations and (iii) to inspect the weapons himself. No such duties existed in this case. As we discuss herein, Loflin had only the ordinary duties owed by owners and occupiers of land to business invitees; and he did not breach any of those duties. Therefore, we affirm the summary judgment order in favor of Loflin.

Under the facts in this case, plaintiff was Loflin's invitee rather than a mere licensee. *See, e.g., Hood v. Coach Co.*, 249 N.C. 534, 540-41, 107 S.E.2d 154, 158 (1959). The general rule is that an owner or possessor of land owes an invitee the duty to exercise ordinary care to maintain the premises in a safe condition and to warn of hidden dangers that have been, or could have been, discovered by reasonable inspection. *Mazzacco v. Purcell*, 303 N.C. 493, 498, 279 S.E.2d 583, 587 (1981); *Cantey v. Barnes*, 51 N.C. App. 356, 359, 276 S.E.2d 490, 492 (1981). Where the danger on land is not hidden but arises out of the negligent or intentional act of a third person, the owner or occupier will not be held liable for negligence if he did not know of the danger and it had not existed long enough for him to have discovered it, corrected it or warned against it. *Aaser v. Charlotte*, 265 N.C. 494, 499-500, 144 S.E.2d 610, 615, 14 A.L.R.3d 1008, 1015 (1965); *see also* Restatement (Second) of Torts § 344 comment f (1965) (possessor "under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. . . . If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless

or criminal conduct on the part of third persons, . . . he may be under a duty to take precautions against it.").

Plaintiff argues, however, that this case does not come within these general rules but is more like cases finding a non-delegable duty of the owner of a place of amusement to provide for the reasonable protection of patrons against injuries from "the defective or dangerous condition of the premises or from defective amusement apparatus or devices," *Dockery v. Shows*, 264 N.C. 406, 411, 142 S.E.2d 29, 33 (1965), or cases finding a non-delegable duty of employers to undertake necessary precautions to protect others from injury caused by acts of independent contractors engaged in peculiarly risky activities, where harm is likely to occur absent such precautions, *Deitz v. Jackson*, 57 N.C. App. 275, 279, 291 S.E.2d 282, 285 (1982). We do not agree that Loflin had such a non-delegable duty in this case.

Deitz does not recognize the existence of a duty to undertake safety precautions unless and until the activity is "sufficiently dangerous." *Id.* at 281, 291 S.E.2d at 286. Differently stated, the duty exists only if "harm will likely result if precautions are not taken" by the person with general oversight over the activities. *Id.* at 280, 291 S.E.2d at 286. Despite injury to an invitee, the landowner does not have a duty to inspect or protect against harm where the injury is caused by "a danger collaterally created" by the negligence of another. *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 259, 17 S.E.2d 125, 128 (1941); *see also Woodson v. Rowland*, 92 N.C. App. 38, 45, 373 S.E.2d 674, 678 (1988), *disc. rev. allowed on additional issues*, 324 N.C. 117, 377 S.E.2d 247 (1989).

A parallel limitation exists in the amusement park cases. "There is responsibility only for perils discoverable by ordinary and reasonable inspection and oversight." *Dockery*, 264 N.C. at 412, 142 S.E.2d at 34. Thus, it must be "reasonably foreseeable that harmful consequences will arise from the activity . . . unless precautionary methods are adopted" before the duty to implement precautions arises. *Deitz*, 57 N.C. App. at 279, 291 S.E.2d at 285 (quoting *Dockery*, 264 N.C. at 410, 142 S.E.2d at 32). Not surprisingly, *Dockery* acknowledges that the owner of an amusement park or its general manager "need not provide against unlikely or unforeseeable conduct of a patron" or "for casual or isolated acts of negligence of sub-concessionaire or his employee." 264 N.C. at 413, 142 S.E.2d at 34. *Accord* Restatement (Second) of Torts § 415 comment c

(1965) ("the rule . . . does not impose liability upon the possessor . . . for harm which results from a merely casual act of negligence which is not sufficiently persistent to give the possessor the opportunity to prevent it by the exercise of reasonable care").

This Court "may pass upon the intrinsic dangerousness of an activity as a matter of law." *Deitz*, 57 N.C. App. at 280, 291 S.E.2d at 286. *Deitz* tests whether there is " 'a recognizable and substantial danger inherent' " in an activity, *id.* at 279, 291 S.E.2d at 286, by an analysis of certain factors: "known conditions" under which the activity is carried out, together with "time, place, and circumstances" of the activity, *id.* at 281, 291 S.E.2d at 286. Intrinsic dangerousness is not "the ordinary dangerousness which accompanies countless activities when they are negligently performed." *Id.*

Nothing in the facts before the trial judge suggests that the Society was engaged, on the day of plaintiff's accident, in an intrinsically dangerous activity from which defendant Loflin's duty to take precautionary measures could possibly arise. Rather, the testimony supports the view that plaintiff's injury was the result of an unforeseeable and isolated act by a fellow member of the Society. The Society had safety regulations in place and it had a long, unbroken record of absolute safety. Indeed, plaintiff's own testimony reveals that, by Society custom and under written safety rules, the Society banned live ammunition and projectiles from its re-enactments. As defendant Loflin argues: "The fact that replicas of firearms loaded only with blanks were to be used at the re-enactment effectively negates plaintiff's contention that the re-enactment involved an inherently dangerous activity."

Equally significant, plaintiff conceded in his deposition that neither he nor Loflin could possibly have foreseen the use of live ammunition.

> Q You were comfortable enough to go ahead through with the re-enactment without this safety inspection?
>
> A I wouldn't say I was comfortable. I was a little nervous but there was no reason for me to believe that live amunition [sic] would be flying through the air.
>
> Q There would have been no reason for Brown Loflin to have thought that that would be happening either, was there?
>
> A Not that I can recollect.

The deposition testimony of the defendant who fired the shotgun further reinforces the unforeseen circumstances of plaintiff's accident:

> Q What did you think as far as whether it [the shotgun] had any bullet or projectile in it?
>
> A That was the last thing on my mind.
>
> Q So, you assumed that it did not, is that correct?
>
> A Yes, sir.

The undisputed facts in this record will not permit the inference that Loflin had knowledge of a substantial danger or sufficient information to foresee injury to an invitee from live ammunition. In these circumstances, no duty to take special precautions for plaintiff's safety arose. Summary judgment in Loflin's favor was, therefore, appropriate.

Affirmed.

Judges ARNOLD and EAGLES concur.

DR. HARRY RICKENBACKER, PLAINTIFF v. DR. R. DONALD COFFEY, JR., DEFENDANT

No. 9013SC879

(Filed 2 July 1991)

Libel and Slander § 11 (NCI3d)— statements during pre-deposition conference—absolute immunity

Allegedly slanderous statements made by defendant dentist about plaintiff dentist to an attorney representing a patient during a pre-deposition conference in a dental malpractice case were absolutely privileged and thus not actionable where defendant treated the patient to remedy the allegedly negligent treatment by other dentists; plaintiff had been retained as an expert witness in the patient's pending malpractice action; and the statements were relevant and pertinent to the pending malpractice litigation.

Am Jur 2d, Libel and Slander §§ 232, 236, 237, 248.

APPEAL by plaintiff from Order and Judgment entered 25 May 1990 by *Judge Giles R. Clark* in BRUNSWICK County Superior Court. Heard in the Court of Appeals 20 February 1991.

Brenton D. Adams for plaintiff appellant.

Yates, McLamb & Weyher, by Dan J. McLamb and Derek M. Crump, for defendant appellee.

COZORT, Judge.

Plaintiff is a dentist who was a potential expert witness in a malpractice action. Defendant was a dentist who treated the patient after the alleged malpractice occurred. Plaintiff sued defendant for defamation, alleging that defendant made slanderous statements about plaintiff to an attorney representing the alleged malpractice patient during a pre-deposition conference. The trial court granted summary judgment for defendant. Finding defendant's statements to be absolutely privileged, we affirm.

The case below arose in the course of an action in which Bernard and Barbara Williams sued Fulp Dental Center and American Dental Center (Fulp Dental Center) and two dentists individually for alleged negligent treatment of Bernard Williams in 1985 and for loss of consortium. After the alleged malpractice occurred, Bernard Williams was treated by Dr. R. Donald Coffey, Jr. In their litigation against Fulp Dental Center, the Williamses were represented by Attorney Lynn Fontana. The complaint in that action was filed 14 June 1988.

To further the litigation against Fulp Dental Center Fontana's law firm retained Dr. Harry Rickenbacker "as an expert for the purpose of evaluating the claim [of Bernard Williams] and, to give testimony, if requested, as to his findings and opinions arising out of his investigation."

On 16 January 1989, Fontana held a pre-deposition conference with Dr. Coffey. During their conference Fontana asked Dr. Coffey whether he knew Dr. Rickenbacker. This case originated in Dr. Coffey's response. On 22 November 1989, Dr. Rickenbacker filed a complaint alleging that Dr. Coffey had replied to Fontana as follows:

> "Rickenbacker's girlfriend was arrested for prescribing drugs for him." Dr. Coffey also said that he: "heard that Bill Ragsdale had asked Rickenbacker on the stand if he had ever been

convicted of a felony—Rickenbacker wouldn't answer, the court recessed and Rickenbacker disappeared."

Dr. Rickenbacker alleged that Dr. Coffey's statements were false and slanderous.

Dr. Coffey answered and asserted, among other defenses, that his statements were made in connection with pending litigation, that the statements were pertinent and relevant to the litigation, and, thus, the "statements were absolutely privileged." Dr. Coffey moved for summary judgment supporting his motion for summary judgment with an affidavit which gave the following account of his conference with Fontana:

6. During this private conference with Ms. Fontana, I openly discussed all aspects of my treatment of Bernard T. Williams with her and answered her questions regarding Bernard T. Williams' injuries which were the subject of the pending Williams litigation.

7. Also during this private conference, Ms. Fontana informed me that she had retained Dr. Harry Rickenbacker as an expert to testify on behalf of Bernard T. Williams in the pending Williams litigation.

8. Ms. Fontana asked me whether I knew Dr. Rickenbacker and I replied that I thought there was a question relating to his credibility as an expert witness in giving testimony in connection with a lawsuit.

9. When Ms. Fontana asked what I meant by the above statement, I told her that I was present in the courtroom during a trial several years ago in which Dr. Rickenbacker was testifying as the plaintiff's expert and I observed Dr. Rickenbacker refuse to answer questions regarding whether he had ever been convicted of a felony which were being posed to him by attorney George Ragsdale. Additionally, I told Ms. Fontana that someone had told me that Dr. Rickenbacker had been associated with a female physician in the Wilmington area who had gotten into some trouble with her license because of problems with prescribing certain medications.

10. I have never discussed Dr. Rickenbacker with Ms. Fontana at any time other than this one litigation conference.

In response to Dr. Coffey's motion, Dr. Rickenbacker submitted an affidavit from Fontana averring that Dr. Coffey's statements to her were summarized in a file memorandum she prepared 17 January 1989. The memorandum reads in part as follows:

> I met with Dr. Coffey yesterday at about 2:45 p.m. in his office. Dr. Coffey is the oral surgeon who performed the debridement and sequestrectomy (removal of part of jaw bone).
>
> * * * *
>
> I asked Dr. Coffey if he had ever talked to Dr. Garrabrant about Mr. Williams. He said no, Majors is the only one from that group that he had talked to. I asked him if he had talked to anyone else about Mr. Williams. He said that he had spoken with one Wayne Beavers, a dentist in Cary. I asked him how he happened to talk to him and he said that he thought Dr. Fulp had had him look at the case.
>
> I asked Dr. Coffey if he knew of a dentist named Rickenbacker. He said that the last he heard, Rickenbacker's girlfriend was arrested for prescribing drugs for him. He also heard that Bill Ragsdale had asked Rickenbacker on the stand if he had ever been convicted of a felony. Rickenbacker wouldn't answer, the court recessed, and Rickenbacker disappeared, according to Dr. Coffey.
>
> I asked Dr. Coffey what the first IV was that Mr. Williams had when he was hospitalized the first time. He indicated that it was Penicillin and Genomycin [*sic*]. I asked him what affect that had on the bacteria in Mr. Williams' ostyomyelitis [*sic*]. He said it probably wouldn't have gotten the anorobic [*sic*] bacteroids [*sic*]. I asked Dr. Coffey whether he knew that Mr. Williams had told the dentist that he had had chills and a fever, and that the dentist had not taken his temperature to determine whether there was a systemic infection. Dr. Coffey said that his office doesn't take the temperature of people with toothaches. He said if somebody came in here now with ostyomyelitis [*sic*] we wouldn't take the temperature. He said an ostyomyelitis [*sic*] patient typically has a temperature that will spike up and down. One day it may be 99 and the next day over 100. He said with Mr. Williams being a two-pack-a-day smoker, a temperature of 99 would probably be normal for him.

In response to defendant Coffey's request for admissions, Dr. Rickenbacker admitted that Fontana met with Dr. Coffey while the Williamses' litigation against Fulp Dental Center was pending; that Dr. Coffey had treated Bernard Williams after his allegedly negligent treatment by Fulp Dental Center; that Fontana met with "Dr. Coffey in part to discuss [his] subsequent treatment of Bernard T. Williams"; and that Dr. Rickenbacker had been retained as an expert by the Williamses for the purposes of their litigation against Fulp Dental Center.

On 25 May 1990, the trial court granted summary judgment in favor of defendant Coffey.

On appeal Dr. Rickenbacker contends that no privilege attaches to the occasion upon which Dr. Coffey made his allegedly slanderous remarks. We disagree.

We note initially that an absolute privilege protecting a defendant from liability for defamation "attaches by reason of the setting in which the defamatory statement is spoken or published. The privilege belongs to the occasion." *R. H. Bouligny, Inc. v. United Steelworkers of America*, 270 N.C. 160, 171, 154 S.E.2d 344, 354 (1967). In *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954), the court summarized the privilege attaching to judicial proceedings as follows:

> The general rule is that a defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice.
>
> As to what constitutes a judicial proceeding within the rule of absolute privilege, it is generally held that privilege is not restricted to trials in civil actions or criminal prosecutions, "but includes every proceeding of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or *quasi*-judicial powers."
>
> Ordinarily, statements made in an affidavit which are pertinent to matters involved in a judicial proceeding, or which the affiant has reasonable grounds to believe are pertinent, are privileged, and, although defamatory, are not actionable. [Citations omitted.]

If pertinent or relevant, statements in pleadings and other papers filed with the court are absolutely privileged, and the question of relevancy is a question of law for the court. *Scott v. Veneer Co., Inc.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954).

In *Burton v. NCNB*, 85 N.C. App. 702, 706, 355 S.E.2d 800, 802 (1987), this Court "addressed the question of whether out-of-court communications between parties or their attorneys during the course of a judicial proceeding are . . . absolutely privileged." The Court held as follows:

> To fail to extend the absolute privilege to out-of-court statements which are between parties to an action or their attorneys and which are relevant to the proceeding would hinder the disclosure of facts necessary to the disposition of the suit and, thus, discourage settlement. Therefore, if an out-of-court statement is (1) between parties to a judicial proceeding or their attorneys and (2) relevant to the proceeding, it is absolutely privileged and not actionable on grounds of defamation.

Id. at 706, 355 S.E.2d at 802-03. As for statements made by the attorney for one party to the attorney for another party, in anticipation of litigation, this Court has held "that an absolute privilege exists not only with respect to statements made in the course of a pending judicial proceeding but also with respect to communications relevant to proposed judicial proceedings." *Harris v. NCNB*, 85 N.C. App. 669, 674, 355 S.E.2d 838, 842 (1987). The Court noted that its "holding is in harmony with those of numerous other jurisdictions which have extended the protection of absolute privilege to relevant communications made preliminary to proposed litigation . . . ." *Id.* at 674, 355 S.E.2d at 843.

The issue of privilege for statements by a witness or potential witness to an attorney for one of the parties to a pending lawsuit has not been addressed in North Carolina. However, the subject is addressed by the Restatement (Second) of the Law of Torts (1977). The Restatement provides in pertinent part as follows:

> **Witnesses in Judicial Proceedings**
>
> **A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial pro-**

ceeding in which he is testifying, if it has some relation to the proceeding.

* * * *

e. As to communications preliminary to a proposed judicial proceeding, the rule stated in this Section applies only when the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding.

Restatement (Second) Torts § 588 and comment e (1977). We find the rule expressed in the Restatement to be a logical and consistent extension of our existing law.

In the case below Dr. Coffey was the dentist from whom Bernard Williams sought treatment to remedy allegedly negligent treatment. Dr. Coffey would have been a logical, almost an indispensable, witness in the trial of the Williamses' action against Fulp Dental Center. Dr. Coffey was deposed by the Williamses' counsel, and the allegedly slanderous statements were made during a pre-deposition conference held at the request of the Williamses' counsel. In view of Dr. Rickenbacker's status as an expert retained for purposes of the lawsuit against Fulp Dental Center, Dr. Coffey's allegedly slanderous statements were relevant and pertinent to the litigation. Accordingly, we hold that Dr. Coffey's statements about Dr. Rickenbacker, when made to the Williamses' counsel, were absolutely privileged.

The trial court's Judgment of 25 May 1990 is

Affirmed.

Chief Judge HEDRICK and Judge LEWIS concur.

EFFIE COCKRELL, WIDOW OF DORSEY COCKRELL, DECEASED EMPLOYEE, PLAINTIFF v. EVANS LUMBER COMPANY, SELF-INSURED EMPLOYER, (ALEXSIS, INC., SERVICING AGENT), DEFENDANT

No. 9010IC178

(Filed 2 July 1991)

Master and Servant § 94.3 (NCI3d)— workers' compensation— disabled widow of employee—400 weeks compensation—mistake

A final award in a workers' compensation case was remanded where the plaintiff's husband was killed while working in defendant's sawmill; plaintiff was 62 years old, functionally illiterate, and physically disabled; she was told that workers' compensation was automatic and that she would not need an attorney; plaintiff received a letter from defendant or its servicing agent informing her that she would receive benefits for 400 weeks and enclosing a form which plaintiff signed and returned; defendant intended to pay plaintiff the benefits to which she was entitled but did not know that she was disabled; plaintiff eventually discovered that a disabled widow who does not remarry is entitled to lifetime benefits; plaintiff requested that the award be modified or set aside; and the Industrial Commission refused because there had been a mistake of law by plaintiff and a mistake of fact by defendant, but no mutual mistake of law or fact. The documents, stipulations and findings indisputably show that the parties and the Commission did not act upon the unilateral mistakes of law or fact, but upon defendant's mistaken representation that the agreement was a proper one. Since the mistake benefited its initiator to the detriment of the misinformed, fundamental equitable principles require that the mistake not be perpetuated.

Am Jur 2d, Workmen's Compensation §§ 465, 597.

APPEAL by plaintiff from Opinion and Award filed 24 July 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 1990.

Valentine, Adams, Lamar, Etheridge & Sykes, by Raymond M. Sykes, Jr., for plaintiff appellant.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Jack S. Holmes, for defendant appellee.

PHILLIPS, Judge.

The appeal in this workers' compensation case is from a decision refusing to modify or set aside a final award entered by the Commission on 13 February 1980. The award approved a settlement between the parties requiring defendant to pay plaintiff $67.33 a week for 400 weeks because of her husband's death by accident while working for defendant; and under the provisions of G.S. 97-17 it may be set aside only upon grounds specified therein, one of which is the mutual mistake of the parties, *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E.2d 355 (1976), the ground that plaintiff asserts in this case. In pertinent part G.S. 97-38 provides and provided when the award was made that compensation payments due on account of the death of a worker shall be paid over a 400 week period in all cases, and that in any case involving a surviving spouse who is unable at the time of the worker's death to support her or his self because of physical or mental disability, the payments shall continue after the 400 week period during his or her lifetime or until remarriage. The parties' mistake in reaching the settlement upon which the award is based, so plaintiff contends, was in assuming that she was entitled to compensation for the usual 400 week period, when as decedent's totally disabled widow she was entitled to compensation for as long as she lives or until she remarries. That when the settlement was made plaintiff was entitled to compensation beyond the 400 week period is now clear, as the Commission's findings, no longer contested by defendant, establish that when her husband was killed plaintiff was physically disabled and incapable of supporting herself and has not remarried. The only dispute now is whether the parties' settlement and the award based upon it was affected by a mutual mistake within the contemplation of G.S. 97-17. The established facts from which the Commission determined that a mutual mistake was not made are as follows:

On 5 October 1979, when her husband was killed while working in defendant's sawmill, plaintiff was 62 years old, uneducated, functionally illiterate, and physically disabled. A few days thereafter she went with friends to the office of the North Carolina Industrial Commission in Raleigh and spoke with an employee, who told her that benefits for an employee's death under the Workers' Compensation Act were automatic and that she would not need the services of an attorney in getting them. Plaintiff's first contact with defendant or its servicing agent about her claim was when she received

a letter dated 7 December 1979 from the servicing agent's vice president stating in pertinent part:

> As you know, we have been investigating the death of your husband as a possible Workmen's Compensation claim during his employment with Evans Lumber Company.
>
> We have now completed this investigation and determined that this claim is compensable. Under these circumstances, we enclose the proper forms for your signature. You will note that this will pay you $67.33 for a total of 400 weeks as the dependent of Mr. Cockrell at the time of his death. If you will sign this form and return same to me, we will bring your payments up to date and will continue the payments on a weekly basis.

The forms enclosed were a Form 30 Agreement For Compensation For Death that defendant had filled in and executed. In pertinent part it stated that defendant and the deceased were bound by the Workers' Compensation Act and that his death resulted from an injury by accident in the course of his employment; that plaintiff was decedent's widow and only surviving dependent and 62 years old; that his average weekly wage was $100.99; and that "based on the foregoing facts" defendant agreed to pay and plaintiff agreed to accept compensation at the rate of $67.33 per week for 400 weeks. Neither the agreement nor the letter stated whether plaintiff was or was not disabled or able to support herself. After a relative read the letter and the Form 30 agreement to plaintiff she signed the agreement and returned it to defendant, who forwarded it to the Industrial Commission, which approved it on 13 February 1980. Defendant had not investigated plaintiff's physical or mental condition and did not know that she was totally disabled; in sending the agreement for 400 weeks compensation to plaintiff, defendant did not attempt to mislead or deceive her. Defendant knew that a totally disabled spouse of a deceased worker could be entitled under G.S. 97-38 to receive workers' compensation payments beyond the usual 400 week period. Plaintiff, on the other hand, knew that she was totally disabled, but did not know that that made any difference to her rights under the Workers' Compensation Act. Sometime shortly before 21 May 1987, when the last of the 400 payments was due, an Industrial Commission bulletin explaining death benefits under the Workers' Compensation Act came into plaintiff's possession and was read to her by a relative.

At that time plaintiff learned for the first time that as a disabled widow of an accidentally killed worker she had been entitled to receive compensation payments during her lifetime or until remarriage. A few days after that a letter requesting that the award be modified or set aside was signed by plaintiff and sent to the Commission.

After hearing plaintiff's motion the Deputy Commissioner made findings essentially as stated above, and concluded that "[t]here was error due to mutual mistake with respect to and the execution of Form 30 (Agreement for Compensation)," and directed that the payments be continued "for her lifetime or until her remarriage." Upon defendant's appeal the Full Commission found and concluded that the award was not based upon a mutual mistake and reinstated it. In some conclusory remarks that preceded its revised findings of fact, the Commission stated:

> Plaintiff contends that the mistake was one of fact—that at the time of the agreement both parties thought the case involved a routine death claim. The actual mistake, though, was one of law. Plaintiff did not know that a legal distinction was made between a disabled widow and one who was able to work. Furthermore, there was no mutual mistake at all, as presumably defendant was aware of the law, and plaintiff was aware of the fact that she was disabled. Neither, however, was aware of both the law and the facts.

And the Commission in effect reiterated these remarks in Finding of Fact 8:

> 8. Plaintiff was mistaken about the applicable law at the time of her husband's death. Defendant was mistaken about plaintiff's disability at the time of death. Therefore, there was no mutual mistake of fact or law.

But the Commission did not mention, or determine the legal effect of, the mistaken impression that both parties obviously had as to the agreement properly providing for all the payments that plaintiff was entitled to receive under the Workers' Compensation Act. By focusing only upon segments of fact and law that were misunderstood by one of the parties and by disregarding the failure of the overall agreement to comply with the intention of both parties, the Commission in effect failed to see the forest for the trees. That both parties did not have the same understanding or

misunderstanding of either the law or underlying facts, as the Commission found, is not decisive; for it is indisputable that both mistakenly thought that the agreement provided for plaintiff to receive everything that she was entitled to under the Act. The death claim was clearly compensable and nothing in the record or the Commission's findings suggest that in signing the agreement either party intended to negotiate about or compromise anything. Nor is it indicated that the misunderstood segments of fact and law that the Commission deemed determinative were ever mentioned, considered, or agreed to by either party. And since the Commission found and it was agreed that defendant did not intend to mislead or deceive plaintiff, it necessarily follows that in preparing the agreement to provide for plaintiff to receive only 400 payments that defendant mistakenly thought that plaintiff was entitled only to that number; and that plaintiff mistakenly accepted defendant's representation as being true is manifest.

The mutuality of the mistake is self-evident. Without knowing or having any basis for believing that plaintiff was entitled to compensation payments for just 400 weeks, defendant mistakenly prepared the agreement to so provide, and by its letter represented to plaintiff and the Industrial Commission that it was the "proper" period required by the Workers' Compensation Act; and plaintiff, not knowing what payments she was entitled to and understanding that the benefits under the Act were automatic, accepted defendant's statement that the agreement was the "proper" one under the Act and signed it. Thus, both parties mistakenly thought that the agreement provided for plaintiff to receive all the payments that she was entitled to, and their mutual mistake is correctable by equity.

> The mistakes relieved against in equity relate most frequently to written instruments, and may be either mistakes in expression, affecting the sense of the instrument itself, or mistakes inducing the parties to execute the instrument. In the former case the mistake does not affect the equities of the agreement itself, but by reason thereof the agreement actually made has not been correctly embodied in the instrument, while in the latter case the instrument correctly embodies the agreement made, or is appropriate to its execution, but the parties would not have entered into such an agreement but for the mistake. Equity will grant relief against misprisions and mistakes in court proceedings not of a judicial character,

and even against judicial mistakes, where the court has been misled as to a fact, and has pronounced a judgment which otherwise would not have been given.

30 C.J.S. *Equity* Sec. 47, pp. 867, 868 (1965).

Since the documents, stipulations and findings indisputably show that the parties and Commission did not act upon the unilateral mistakes of either law or fact referred to in the Opinion and Award, but upon defendant's mistaken representation that the agreement was a "proper one," and since the mistake benefited its initiator to the detriment of the misinformed, acquiescent plaintiff, fundamental equitable principles require that the mistake not be perpetuated.

The Opinion and Award appealed from is reversed and the matter remanded to the Industrial Commission for the entry of an Opinion and Award modifying the earlier Opinion and Award to provide for the continuation of plaintiff's payments until she remarries or dies.

Reversed and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

RICHARD W. WALTON AND WIFE, MARYANN WALTON, PLAINTIFFS-APPELLEES v. NEIL S. CARIGNAN AND WIFE, SHARON B. CARIGNAN, DEFENDANTS-APPELLANTS

No. 901SC992

(Filed 2 July 1991)

Deeds §§ 85, 86 (NCI4th)— restrictive covenant—residential subdivision—day care home—no waiver

The trial court correctly granted summary judgment for plaintiffs in an action to enforce a restrictive covenant where plaintiffs and defendants purchased their lots subject to restrictive covenants prohibiting commercial or business use of any lot within the subdivision and Mrs. Carignan admitted operating a small licensed day care home in her residence. The covenants are plain and clear, and defendant's activities, although well motivated and much needed, are business activities. Other

business or professional activities in the subdivision to which plaintiffs have acquiesced do not amount to a waiver of the right to enforce the restrictions because changed conditions within the covenanted area are not so radical as practically to destroy the essential objects and purpose of the scheme of development.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 192, 197, 273.

Children's day-care use as violation of restrictive covenant. 29 ALR4th 730.

APPEAL by defendants from order dated 6 July 1990 in DARE County Superior Court by *Judge Paul M. Wright* granting plaintiffs' motion for summary judgment. Heard in the Court of Appeals 10 April 1991.

In January of 1987 defendants Neil and Sharon Carignan purchased a home and lot in "Burnside Forest, Section Two, Roanoke Island" subdivision in Dare County. Subsequently, Sharon Carignan decided to operate a small-scale day-care operation out of the couple's residence. Mrs. Carignan took the necessary steps to become licensed as a child day-care home.

On 21 May 1987 Mrs. Carignan received notification that she was licensed by the Division of Facility Services of the North Carolina Department of Human Resources as a registered day-care home. Since that time, Mrs. Carignan has operated a day-care home in the defendants' residence, caring for a maximum of nine children. In March, 1990, she was caring for six children. Mrs. Carignan has no employees and operates her day-care home on her own. Defendants' residence has not been enlarged or renovated in any way to accommodate the day-care operation.

Plaintiffs Richard W. and Maryann Walton are also owners of a home and lot in the "Burnside Forest, Section Two, Roanoke Island" subdivision. Plaintiffs and defendants purchased their respective lots subject to restrictive covenants prohibiting commercial or business use of any lot within the subdivision. The restrictive covenants applicable to the parties' property state in part:

THE COVENANTS, RESTRICTIONS, AND DECLARATIONS ARE AS FOLLOWS:

1. All lots and lands shall be used exclusively for residential purposes. No lots or lands included in this Declaration shall be used or occupied for the manufacture or sale of any articles or for any commercial purposes of any kind or character whatsoever, or for the conducting of any business. Hotels, motels, rooming houses or boarding houses are specifically forbidden.

. . .

17. There shall be no signs, billboards or advertising structures of any nature whatsoever placed on any lots or lands; nor shall there be any business, trade or profession conducted or practiced on the lots or lands.

Plaintiffs filed this action seeking injunctive relief, alleging that use of defendants' home as a family day-care home violated the restrictive covenants applicable to the residential property of both parties. In her answer and affidavit, defendant Sharon Carignan acknowledges the existence of the restrictive covenants and admits to operating a child day-care home in her residence. Both parties filed motions for summary judgment and on 6 July 1990 the trial court granted plaintiffs' motion and denied defendants' motion for summary judgment and enjoined defendants from operating the child day-care home. Defendants appeal.

No brief for plaintiffs-appellees.

Shearin & Archbell, by Roy A. Archbell, Jr., for defendants-appellants.

WELLS, Judge.

Because principles of summary judgment law are often stated and well understood, we need not repeat them here. The essential and dispositive question is whether the materials before the trial court presented a factual dispute appropriate for resolution by trial, or whether under the undisputed facts of this case, plaintiffs were entitled to judgment as a matter of law.

Covenants which restrict an owner's use of real property have often presented our courts with questions difficult to resolve, but few cases we have found in the law of this State have presented a question more troubling than the one at issue here.

Affordable and adequate day care for small children is a problem of immense proportions in North Carolina. Studies presented

to the trial court in this case and included in the record on appeal indicate that North Carolina has the highest proportion of working mothers of any state in the United States. Women in general, and working mothers in particular, make up a vital segment of talent needed for our various business, commercial, agribusiness enterprises, and professional and institutional services. Yet day-care facilities are in relatively short supply, especially in rural areas and smaller cities and towns. Cost and convenience, as well as dependability and safety of day care for small children, are matters of immediate and serious concern for working mothers and single fathers.

Thus, were we at liberty to do so, we might place our trial and appellate courts in a position to balance these great social needs against the interest of property owners in exercising their property rights. Other courts have done so. In their very appealing argument, defendants have directed our attention, *e.g.*, to a decision of the Michigan Court of Appeals in which that court engaged in a public policy-balancing analysis and determined that similar restrictive covenants would allow small-scale, unobtrusive day-care activities in a house in a residential neighborhood. *See Beverly Island Assoc. v. Zinger*, 113 Mich. App. 322, 317 N.W. 2d 611 (1982). Defendants have also directed our attention to a helpful annotation entitled, "Children's Day-Care Use As Violation of Restrictive Covenant," 29 A.L.R. 4th 730. This annotation reveals that this vexing question is one of national concern, and that different results have been reached in similar cases around the United States.

The courts which have generally followed the Michigan Court of Appeals' approach have tended to focus on the scope of activity as being material, if not dispositive. This approach allows the courts to determine whether the involved activity affects the use of the property so as to change its use from its essential residential characteristics. Under the case-law precedents of this State, we do not perceive that we are at liberty to use this approach to resolve this case.

Our courts have often stated that while restrictive covenants are not favored by law and therefore must be strictly construed; nevertheless, clearly and narrowly drawn restrictive covenants may be employed in such a way that the legitimate objective of a development scheme may be achieved. *See Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981). The principles have been stated

in a different way to say that the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction. *See Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967); *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 362 S.E.2d 619 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988); *Barber v. Dixon*, 62 N.C. App. 455, 302 S.E.2d 915, *cert. denied*, 309 N.C. 191, 305 S.E.2d 732 (1983). *See also* Webster, *Real Estate Law in North Carolina* § 388 (Hetrick res. 1988).

The dispositive facts in this case are not in dispute. The covenants are plain and clear—no commercial activity, no business operation. Defendant Sharon Carignan operates a business. Her profits are small and her activities are caring for small children. Although well motivated and much needed, these are business activities. As difficult as the resolution of this case may be, we have no choice but to rule that the trial court's entry of summary judgment for plaintiffs was correct.

One question remains. Defendants have briefly asserted a question of waiver, pointing out that the materials before the trial court show that numerous other business or professional activities take place, or have taken place, in the Burnside subdivision, including other day-care operations. Defendants contend that plaintiffs have acquiesced to these apparent violations. Our courts have held that acquiescence in violations of restrictive covenants does not amount to a waiver of the right to enforce the restrictions unless changed conditions within the covenanted areas are so radical as practically to destroy the essential objects and purpose of the scheme of development. *See Barber v. Dixon, supra*, and cases cited and relied upon therein. We find no such conditions of waiver in this record.

For the reasons stated, the judgment of the trial court must be and is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. RONALD LEE GWYN

No. 9017SC966

(Filed 2 July 1991)

Automobiles and Other Vehicles § 833 (NCI4th); Searches and Seizures § 9 (NCI3d)— driving while impaired—illegal arrest in Virginia—motion to suppress evidence seized from person—denied

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress evidence seized from his person after an arrest in Virginia by a North Carolina Highway Patrolman. Defendant was driving in North Carolina when the officer signaled him to stop; since the officer did not know that defendant crossed the state line before stopping his truck, the officer's deviation in completing the arrest was neither extensive nor willful. An illegal arrest is not necessarily an unconstitutional arrest; defendant's expectation of privacy did not outweigh the officer's authority to stop his vehicle upon reliable grounds. N.C.G.S. § 15A-974(2).

Am Jur 2d, Searches and Seizures §§ 39, 96.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit. 34 ALR4th 328.

APPEAL by defendant from judgment entered 6 August 1990 by *Judge W. Douglas Albright* in SURRY County Superior Court. Heard in the Court of Appeals 9 April 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Hal F. Askins, for the State.

Theodore M. Molitoris for defendant appellant.

PHILLIPS, Judge.

Reserving his right to appeal the denial of his motion to suppress evidence seized from his person after an arrest by a North Carolina Highway Patrolman inside the Commonwealth of Virginia, defendant pled guilty to driving while impaired in violation of G.S. 20-138.1. The evidence that defendant moved to suppress was the patrolman's detection of alcohol on his breath and the results of

a breathalyzer test given him by a Surry County Deputy Sheriff. In denying the motion the court found facts to the following effect:

On 15 April 1990 at about 4:30 p.m. North Carolina Highway Patrolman Tony Dudley received a call from the Surry County Sheriff's Department warning of a driver on Ward's Gap Road near the Virginia border who a deputy sheriff thought was impaired. The communication identified the driver as Ronald Lee Gwyn, a white male with sandy blond hair, described his vehicle as a red Ford pickup truck, and stated that the deputy had talked with Gwyn at a residence off Ward's Gap Road while investigating a domestic altercation and had warned him not to drive his vehicle off the premises because he appeared to be impaired. In an effort to intercept defendant another Surry County deputy sheriff was at the state line on Ward's Gap Road and Patrolman Dudley went to Parker Road, which is perpendicular to Ward's Gap Road and roughly parallel to the North Carolina-Virginia border, and stopped about 400 or 500 feet from the deputy sheriff at the entrance to Carrollwood Trailer Park. At about 4:45 p.m., as the red pickup truck driven by defendant on Parker Road approached him, Patrolman Dudley pulled his car in front of the truck and turned on his blue lights, and defendant turned his vehicle into the trailer park entrance and stopped approximately 250 feet from the roadway, just inside the State of Virginia. Patrolman Dudley smelled alcohol on defendant, arrested him for driving while impaired, and took him to the Surry County jail where the incriminating breathalyzer test was administered. Neither Patrolman Dudley nor the deputy who joined him in the trailer park knew that they were in Virginia and defendant, who had lived in the trailer park sometime earlier, did not tell them. A sign on Ward's Gap Road marked the Virginia border, but nothing on or near Parker Road in that vicinity indicated where the state line was.

From these findings, none of which are challenged by defendant, the court concluded that though defendant's arrest was illegal, in that the North Carolina Highway Patrolman had no authority to stop the defendant in the Commonwealth of Virginia, it did not violate either the state or federal constitution since the stop and arrest was based upon probable cause. Defendant argues that because the arrest was illegal the search incident to it violated the Fourth Amendment to the United States Constitution and Article 1, Section 20, of the North Carolina Constitution, and under the Fourth Amendment's exclusionary rule the evidence must be

suppressed. We do not agree. North Carolina's law of search and seizure and the requirements of the Fourth Amendment to the Constitution of the United States are the same. *State v. Hendricks*, 43 N.C.App. 245, 251, 258 S.E.2d 872, 877 (1979), *disc. review denied*, 299 N.C. 123, 262 S.E.2d 6 (1980). Under *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081 (1961), the test for suppressing evidence following an arrest is not the legality of the arrest, but whether the stop and search was unreasonable. Our Supreme Court has stated that an illegal arrest is not necessarily an unconstitutional arrest, *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706 (1973), and in *State v. Mangum*, 30 N.C.App. 311, 226 S.E.2d 852 (1976), we held that the defendant's illegal arrest beyond the policeman's territorial jurisdiction did not render the seizure and search unreasonable since the patrolman had probable cause. No United States Supreme Court case addressing this specific issue has been found and defendant cites none.

The weight of authority in other jurisdictions seems to be that arrests beyond an officer's territorial jurisdiction are not unconstitutional. "There is nothing in the Constitution or laws of the United States exempting an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though he was brought from another state by unlawful violence or abuse of legal process." 22 C.J.S. *Criminal Law* Sec. 170 (1989). "[A] court will not inquire into the manner in which accused is brought before it, the fact that accused has been illegally arrested . . . or without legal authority does not oust the jurisdiction of this court." *Id.* G.S. 15A-974(2) requires that evidence obtained be excluded where a substantial violation of our Criminal Procedure Act occurs, and in ruling on suppression motions thereunder the court must consider *inter alia*: "The importance of the particular interest violated; . . . [t]he extent of the deviation from lawful conduct; . . . [t]he extent to which the violation was willful; . . . [t]he extent to which exclusion will tend to deter future violations." G.S. 15A-974(2). In this instance, the court's evaluation of the factors stated met the statutory requirements. The interest violated, according to defendant, was his "reasonable expectation of privacy in himself and the automobile he owns." This interest did not outweigh the officer's authority to stop his vehicle upon reliable grounds, and defendant was driving in North Carolina and potentially was a menace to public safety when Patrolman Dudley signaled him to stop. And since the officer did not know that defend-

ant crossed the state line before stopping his truck, the officer's deviation in completing the arrest was neither extensive nor willful.

No error.

Judges PARKER and GREENE concur.

ROBERT GLENN CREWS, EMPLOYEE-PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EMPLOYER, SELF-INSURED, DEFENDANT

No. 9010IC1182

1. **Master and Servant § 96.5 (NCI3d) — workers' compensation — disfigurement award — findings sufficient**

A deputy commissioner's findings, adopted by the Commission, were sufficient to support an award of workers' compensation for disfigurement. The Commission was not required to make evidentiary findings, only such ultimate findings as were needed to resolve the issue.

Am Jur 2d, Workmen's Compensation § 322.

2. **Master and Servant § 96.5 (NCI3d) — disfigurement — no distinction for bodily and facial disfigurement — no error — required prospectively**

There was no error in a workers' compensation award for disfigurement which did not separately specify the compensation for bodily and for facial disfigurement. However, N.C.G.S. § 97-31(21) has now been amended to allow different maximum awards for facial and bodily disfigurement and separate awards should be entered in the future.

Am Jur 2d, Workmen's Compensation § 322.

3. **Administrative Law and Procedure § 60 (NCI4th); Appeal and Error § 315 (NCI4th) — workers' compensation — disfigurement — sufficiency of evidence — insufficient record**

The defendant's argument that a workers' compensation award for disfigurement was not supported by the evidence failed where defendant did not provide the Court of Appeals

with the record of evidence in the case. N.C. Rules of Appellate Procedure, Rules 9 and 18(c).

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

4. **Master and Servant § 69 (NCI3d)— workers' compensation— monetary limit raised—law in effect at time of injury**

The Industrial Commission erred by increasing a workers' compensation award for a brain injury from $10,000 to $20,000 where the statutory limit was raised after the injury. The longstanding rule is that a worker's right to compensation is governed by the law in effect at the time of the injury. N.C.G.S. § 97-31(24).

Am Jur 2d, Workmen's Compensation § 34.

5. **Master and Servant § 69 (NCI3d)— workers' compensation— reduction of award—remand**

A workers' compensation award was remanded for further consideration in the exercise of the Commission's judgment where the Commission reduced the award for plaintiff's loss of his spleen but erroneously increased the award for plaintiff's brain injury. There is at least a possibility that there was some interplay between the spleen award and the brain injury award.

Am Jur 2d, Workmen's Compensation § 641.

APPEAL by plaintiff and defendant from an opinion and award of the Industrial Commission filed 14 August 1990. Heard in the Court of Appeals 3 June 1991.

In this Workers' Compensation case, plaintiff was injured in a compensable accident on 22 September 1986. Pursuant to a Form 21 agreement between plaintiff and defendant, plaintiff was awarded compensation for temporary total disability beginning 18 October 1986 and continuing for an undetermined number of weeks. Plaintiff returned to full-time employment by 1 June 1987. After having returned to work, plaintiff requested a hearing and following that hearing, Deputy Commissioner Morgan S. Chapman entered an opinion awarding plaintiff $1,800.00 for disfigurement, $5,000.00 for the loss of his spleen, and $10,000.00 for damage to his brain. Both plaintiff and defendant appealed to the Full Commission.

On review, the Commission modified the original award to reduce plaintiff's spleen loss award to $2,500.00 and to increase plaintiff's brain damage award to $20,000.00. The Commission did not disturb the disfigurement award.

Both plaintiff and defendant gave notice of appeal from the Commission's award.

Pennington & Wicks, by Ralph S. Pennington, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for defendant-appellant.

WELLS, Judge.

Defendant's Appeal

[1] In its first argument, defendant contends that the Commission failed to make findings of fact sufficient to support plaintiff's disfigurement award. The Commission adopted Deputy Commissioner Chapman's findings contained in paragraph 6 of her order. We quote:

> 6. As a result of this injury by accident, plaintiff has sustained serious and permanent facial and bodily disfigurement which mars his appearance to such an extent that it may reasonably be presumed to lessen his future opportunities for remunerative employment and so reduce his future earning capacity. The fair and equitable amount of compensation for this loss under the Workers' Compensation Act is $1,800.00.

First, defendant contends these findings are not "specific," and are therefore not sufficient. The Commission was not required to make evidentiary findings, only such ultimate findings as needed to resolve this issue. *See Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E.2d 596 (1955); *accord, Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 398 S.E.2d 677 (1990). The Commission having made such ultimate findings, this argument must fail.

[2] Next, defendant contends that these findings are "defective" because they do not specify how much compensation is "due" for facial and for bodily disfigurement. Defendant cites no authority for this proposition except that compensation for facial and bodily

disfigurement is allowed in separate subsections of G.S. § 97-31. In cases such as this one, where there is both facial and bodily disfigurement, our courts have previously approved awards where the Commission did not specify in its opinion separate amounts for each category of disfigurement, but made one award to compensate the injured worker for both types of disfigurement. *See, e.g., Baxter v. Arthur Co.*, 216 N.C. 276, 4 S.E.2d 621 (1939). Effective 5 August 1987, G.S. § 97-31(21) was amended to allow a maximum award of $20,000.00 for head or facial disfigurement, while the maximum for bodily disfigurement under § 97-31(22) was left unchanged at $10,000.00. While this change in the law does not affect the outcome of this case, it appears clear to us that in future cases, separate awards should be entered in cases involving both types of disfigurement. In this case, we do not disturb the Commission's disfigurement award.

[3] In its next argument, defendant contends that the evidence in this case does not support the Commission's disfigurement finding. Defendant not having provided this Court with the record of evidence in this case, its argument must fail. *See* Rule 9 of the Appellate Rules of Procedure.

[4] In its next argument, defendant contends that the Commission erred in increasing plaintiff's award from $10,000.00 to $20,000.00 for permanent injury to his brain. At the time of plaintiff's injury on 22 September 1986, the monetary limit on awards under G.S. § 97-31(24) for permanent injury to an important internal organ of the body was $10,000.00. Effective 5 August 1987, the statute was amended to increase the limit of such awards to $20,000.00.

The longstanding rule in this State is that a worker's right to compensation for accidental injury is governed by the law in effect at the time of the injury. *See Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979), and cases and authorities cited and relied upon therein. We note that a case of this type is distinguishable from those cases in which injured workers who have been receiving compensation for partial disability have been allowed the benefit of the law in effect when they later became totally disabled. *See, e.g., Peace v. J. P. Stevens Co.*, 95 N.C. App. 129, 381 S.E.2d 798 (1989). The injury having occurred prior to the 1987 amendment to the statute, we must therefore hold that plaintiff's compensation for injury to his brain could not exceed $10,000.00.

Plaintiff's Appeal

[5] Plaintiff has not filed an appellant brief, but in his appellee brief he argues that the Commission erred in reducing the award for loss of his spleen from $5,000.00 to $2,500.00. Defendant has not properly preserved this question for our review, *see* Rule 10 of the Appellate Rules of Procedure, but because of the unusual aspects of this case, we address this question *ex mero motu.*

The Commission erroneously increased plaintiff's brain injury award to $20,000.00. There is at least a possibility that in the exercise of the Commission's judgment, there was some interplay between the spleen award and the brain award. Upon remand, the Commission shall limit the brain award to $10,000.00, but may, in the exercise of its judgment, if it deems it appropriate to do so, amend the spleen award.

The Commission may also reconsider and amend its award of attorney's fees, if it deems it appropriate to do so.

Affirmed in part, reversed in part, and remanded.

Judges ARNOLD and PHILLIPS concur.

REBECCA SMITH HARRINGTON v. SHERRILL R. PERRY

No. 9015DC985

(Filed 2 July 1991)

1. Divorce and Separation § 15 (NCI4th)— separation agreement—division of medical malpractice claim—construction of provision

The trial court properly granted summary judgment for plaintiff in an action to enforce a provision in a separation agreement requiring defendant to pay to plaintiff one-fourth of any "net recovery after attorney fees" from a medical malpractice claim. While other out-of-pocket expenses would generally be deducted from the gross proceeds as part of the determination of the net recovery, the parties have expressly set out

the deductible item and there is no further room for interpretation.

Am Jur 2d, Divorce and Separation §§ 838, 856, 913.

2. Divorce and Separation § 37 (NCI4th)— separation agreement—division of medical malpractice claim—summary judgment

The trial court did not err by granting summary judgment for plaintiff in an action to enforce a provision in a separation agreement granting plaintiff a share in defendant's medical malpractice claim. Plaintiff's complaint alleged and defendant's answer admitted the execution of a separation agreement which contained a provision that defendant would pay plaintiff one-fourth of the net recovery of his malpractice case after attorney's fees, defendant provided plaintiff with a copy of the release which states that the case was settled for $50,000, copies of checks show that defendant paid $20,000 in attorney's fees, and plaintiff's complaint alleged a claim for damages of $7,500, one-fourth of the $30,000 received by defendant. Plaintiff's evidence was clearly sufficient to show a breach of contract, and the court did not err by not making findings of fact.

Am Jur 2d, Divorce and Separation §§ 838, 856, 913.

APPEAL by defendant from judgment entered 4 June 1990 in ALAMANCE County District Court by *Judge Ernest J. Harviel.* Heard in the Court of Appeals 7 May 1991.

Abernathy, Roberson & Huffman, by G. Wayne Abernathy, for plaintiff-appellee.

Edmundson & Burnette, by R. Gene Edmundson and J. Thomas Burnette, for defendant-appellant.

WYNN, Judge.

In 1978, the plaintiff and defendant executed a separation agreement which contained the following language:

> Husband shall pay to wife one-fourth (¼) of any net recovery to him after attorney's fees from any monies received by him as a result of potential malpractice claims arising from the treatment of his leg.

Defendant's medical malpractice claim was settled in April, 1988 for $50,000.00. From this settlement, defendant received $30,000.00 after payment of $20,000.00 in attorney's fees. Following the defendant's refusal to pay her under the above provision, plaintiff instituted this action. The defendant answered admitting the execution of the separation agreement, but, averring that his net recovery from the settlement of the malpractice action had resulted in a negative balance, thereby entitling the plaintiff to no recovery.

Thereafter, plaintiff moved for summary judgment which was granted by the trial court. From that order, defendant appealed.

I

The standard of review for a motion for summary judgment requires that all pleadings, affidavits, answers to interrogatories and other materials offered be viewed in the light most favorable to the party against whom summary judgment is sought. *Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E.2d 316, 318 (1979). Summary judgment is properly granted where there is no genuine issue of material fact to be decided and the movant is entitled to a judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

The defendant contends that summary judgment was erroneously granted in this case for two reasons: (1) There existed a genuine issue of material fact concerning the intent of the parties as to the meaning of the phrase "net recovery after attorney's fees" and (2) Plaintiff did not forecast sufficient evidence to have been entitled to judgment as a matter of law.

[1] The defendant argues that the phrase "net recovery after attorney's fees" is ambiguous. As such, he maintains that the trial court should have found that there existed a genuine issue of fact as to what the parties intended by the use of that phrase. "Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intentions of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citations omitted). However, "[w]here a contract is unambiguous, its construction is a matter of law for the

court to determine." *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 333 S.E.2d 299 (1985).

The separation agreement here specifically sets forth that the plaintiff would recover one-fourth of the "net recovery after attorney's fee." We find that phrase to be quite clear, despite the contention of the defendant that the phrase by import meant that other expenses must be deducted to reach the net recovery. Generally, such other out-of-pocket expenses would be deducted from the gross proceeds as part of the determination of the net recovery. But where, as here, the parties have expressly set out the deductible item from the gross proceeds, there is no further room for interpretation of the intent of the parties. Since this provision is unambiguous, its construction is a matter of law. It follows that the trial court properly found that there were no genuine issues of fact in this case.

[2] Defendant also contends that even if the facts are undisputed, the trial court erred by concluding that plaintiff was entitled to summary judgment as a matter of law. *See Godwin Sprayers, Inc. v. Utica Mut. Ins. Co.*, 59 N.C. App. 497, 296 S.E.2d 843 (1982), *disc. review denied*, 307 N.C. 576, 299 S.E.2d 646 (1983). He argues that plaintiff's evidence which consisted of the pleadings and the separation agreement was insufficient, especially since defendant testified as to the meaning of the separation agreement clause in question.

In an action for breach of contract, plaintiff must prove that a contract existed, the specific provisions breached, the facts constituting the breach and the amount of damages resulting to plaintiff from such breach. *Cantrell v. Woodhill Enters., Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968) (citations omitted). In the case at bar, plaintiff's complaint alleges and defendant's answer admits the execution of the separation agreement which contained the provision that the defendant would pay the plaintiff one-fourth of the net recovery after attorney's fees. Defendant provided plaintiff with a copy of the release of a malpractice case which states that the case was settled for $50,000.00; copies of the checks show that defendant paid $20,000.00 in attorney's fees. Further, plaintiff's complaint alleges a claim for damages in the amount of $7,500.00 which represented one-fourth of the $30,000.00 received by the defendant. Clearly, plaintiff's evidence was sufficient to show a breach of contract. This assignment of error is without merit.

Defendant's next argument that the trial court should have made findings of fact to support the summary judgment is without merit. In fact, it is well established that such findings are inadvisable, and if the trial court did make such findings, they would be disregarded on appeal. *Hyde Ins. Agency v. Dixie Leasing Corp.*, 26 N.C. App. 138, 215 S.E.2d 162 (1975).

Having concluded that summary judgment was properly granted, we need not address the merits of defendant's other assignment of error.

For the foregoing reasons, the decision of the trial judge is

Affirmed.

Judges COZORT and ORR concur.

DWIGHT CALDWELL, EXECUTOR OF THE ESTATE OF CARMEL F. CALDWELL v. JORETTA C. CALDWELL, AND ALLEY, HYLER, KILLIAN, KERSTEN, DAVIS & SMATHERS

No. 9030SC623

(Filed 2 July 1991)

Abatement, Survival, and Revival of Actions § 11 (NCI4th)— return of alimony and attorney fees—motion in cause—action in superior court—abatement because of prior action pending

Where the appellate court held that defendant wife was not entitled to alimony without divorce and attorney fees because she was not a dependent spouse, the husband, now deceased, filed a motion in the cause in the district court seeking a refund of alimony and attorney fees already paid, and plaintiff executor was substituted as party defendant in the alimony action, the doctrine of prior action pending abated an action filed by plaintiff executor in the superior court to recover the alimony and attorney fees paid prior to the appellate court decision even though defendant wife's attorneys were not parties to the alimony action but were named as defendants in the superior court action.

Am Jur 2d, Divorce and Separation §§ 176-178, 611.

APPEAL by defendants from Judgment entered 1 February 1990 by *Judge Claude S. Sitton* in HAYWOOD County Superior Court. Heard in the Court of Appeals 11 March 1991.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff appellee.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for defendant appellants.

COZORT, Judge.

Plaintiff filed a complaint in Superior Court alleging that defendants had been unjustly enriched by alimony and attorney's fees previously paid by plaintiff. The court granted summary judgment for the plaintiff. We find the Superior Court lacked jurisdiction, and we reverse.

Carmel Caldwell and Joretta Caldwell, defendant herein, were married 7 July 1974 and separated on 11 May 1984. Joretta filed an action in the District Court of Haywood County seeking alimony without divorce and attorney's fees. On 5 November 1984, the court entered an order granting Joretta temporary alimony. On 10 July 1986, the District Court awarded permanent alimony and attorney's fees in favor of Joretta. Carmel Caldwell appealed the District Court's Judgment of 10 July 1986. Finding that Joretta Caldwell was not a "dependent spouse" as defined by N.C. Gen. Stat. § 50-16.1(3) (1987), this Court reversed the trial court. *Caldwell v. Caldwell*, 86 N.C. App. 225, 227, 356 S.E.2d 821, 823 (1987). On 12 January 1988, Carmel Caldwell filed a motion seeking a refund of temporary and permanent alimony as well as the attorney's fees awarded by the Order of 10 July 1986. In March 1988, Carmel was killed in an automobile accident, and on 3 June 1988, the executor of his estate, Dwight Caldwell, plaintiff herein, filed a motion requesting that he be substituted for the decedent. On 29 June 1988, he filed a motion to amend the motion filed 12 January 1988. On 25 August 1988, the court entered an order substituting Dwight Caldwell as a party defendant to the original suit filed in August 1984 and granting his motion to amend the January 1988 motion.

On 29 June 1988, plaintiff Dwight Caldwell filed this action in Haywood County Superior Court. This action, like the motion filed in District Court on 12 January 1988, sought recovery of

the alimony and attorney's fees awarded pursuant to the District Court's Orders of November 1984 and July 1986. Defendant Joretta Caldwell's attorneys were included as parties defendants in the Superior Court action. Before answering, defendants filed a motion pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, requesting dismissal of plaintiff's suit on the basis that it is the subject of a prior pending action. The defendants raised that issue again in their answer. After further pleadings and motions, the Superior Court granted summary judgment in favor of the plaintiff on 1 February 1990. Defendants appeal.

On appeal defendants contend the trial court erred in entering summary judgment for plaintiff. We agree.

North Carolina follows the rule "that the pendency of a prior action between the same parties for the same cause in a state court of competent jurisdiction abates a subsequent action in another court of the state having like jurisdiction." *Weaver v. Early*, 325 N.C. 535, 538, 385 S.E.2d 334, 336 (1989). As our Supreme Court has noted:

> [T]he ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of a prior action is whether the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded. This rule has been applied not only when there is a prior civil action pending which is identical to the subsequent action *but also when there is a prior action in which a party could by motion in the cause achieve what he is attempting to achieve in the subsequent action.*

Id. (emphasis added).

In the case below the District Court had subject matter jurisdiction over Joretta Caldwell's action for alimony without divorce. The court acquired and retained personal jurisdiction over the parties to the suit. In January 1988, plaintiff's decedent filed a motion in District Court seeking exactly the relief plaintiff subsequently sought in Superior Court, namely,

> 1. That the court enter judgment in [Carmel Caldwell's] favor awarding him a refund of both temporary and permanent alimony as was previously ordered by this court.
>
> * * * *

> 3. That [Carmel Caldwell] have and receive a refund of the attorney's fees paid to the plaintiff's counsel and that he have interest from and after the date of payments until the entering of this Judgment.

On 3 June 1989, plaintiff, as executor of Carmel Caldwell's estate and the real party in interest, moved in the District Court to be substituted as a party in the pending alimony action. Thus, in the two suits presented there is substantial identity as to parties, subject matter, issues involved, and relief demanded. The rights plaintiff asserted in his action in Superior Court, filed 29 June 1988, may be litigated in the prior, pending action, which thus abates his action in Superior Court.

Despite the identity of relief sought in the two suits, plaintiff contends that the doctrine of prior action pending does not control because Joretta's attorneys were not parties to the first action in District Court but were named in the second action in Superior Court. Their argument is unavailing. As the Supreme Court noted in *Weaver*, the doctrine applies when, in the prior action, "a party could by motion in the cause achieve what he is attempting to achieve in the subsequent action." 325 N.C. at 538, 385 S.E.2d at 336. Both the motion in District Court and the subsequent action in Superior Court requested a refund of attorney's fees. The plaintiff may by motion in the cause enforce his right to a refund of alimony and attorney's fees erroneously awarded.

As for plaintiff's argument that the doctrine does not apply to the case below because the District Court did not approve his motion to be substituted as party plaintiff until after he had filed suit in Superior Court, it is sufficient to observe that his motion to be substituted correctly noted that "the action herein survives the death of [Carmel Caldwell]." *See* N.C. Gen. Stat. § 28A-18-1 (1984). The action of plaintiff's decedent survived, and plaintiff himself invoked the jurisdiction of the District Court by motions before as well as on the date he filed suit in Superior Court. He will not now be heard to assert that the District Court did not have jurisdiction to adjudicate the cause.

Summary judgment for plaintiff is reversed. The cause is remanded to Superior Court for dismissal of the action.

Reversed and remanded.

Chief Judge HEDRICK and Judge LEWIS concur.

CARL DEWEY JOHNSON, SR. v. RONALD JAMES HUTCHENS AND NANCY VERNON HUTCHENS

No. 9018SC1148

(Filed 2 July 1991)

Rules of Civil Procedure § 41 (NCI3d)— time of voluntary dismissal—reinstitution of action within one year

Voluntary dismissal without prejudice of plaintiff's original action occurred when written notice was received and filed by the clerk on 11 May 1987, not when plaintiff's attorney called the office of defendant's attorney on 8 May 1987 and left a message that plaintiff was taking a voluntary dismissal or when plaintiff's attorney mailed defendant's attorney a copy of the dismissal dated 8 May 1987. Therefore, a new action filed by plaintiff on 11 May 1988 was filed within one year after the voluntary dismissal as permitted by N.C.G.S. § 1A-1, Rule 41(a)(1)(i).

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 33, 35, 36; Limitation of Actions § 311.

APPEAL by plaintiff from judgment entered 23 July 1990 by *Judge Preston Cornelius* in GUILFORD County Superior Court. Heard in the Court of Appeals 15 May 1991.

Plaintiff filed a complaint on 9 May 1986 against defendant Ronald Hutchens for injuries resulting from an automobile collision of 17 November 1983. Plaintiff took a voluntary dismissal of the 1986 action without prejudice. A new complaint filed by plaintiff on 11 May 1988 named Ronald Hutchens and Nancy Hutchens as defendants. The trial court dismissed the actions against both defendants on 23 July 1990. From the judgment dismissing defendant Ronald Hutchens, plaintiff appeals.

Max D. Ballinger for plaintiff-appellant.

Henson Henson Bayliss & Sue, by Perry C. Henson and Lyn K. Broom, for defendant-appellee.

ARNOLD, Judge.

Plaintiff contends the trial court erred in granting defendant's motion to dismiss based on plaintiff's failure to commence a new action within one year of a voluntary dismissal. We agree.

The issue presented is on what date did the one year period begin in which plaintiff could reinstitute suit following the dismissal. N.C.R. Civ. P. 41(a)(1)(i). Defendant argues that the one year period began on 8 May 1987. On this date plaintiff's attorney called the office of defendant's attorney and left a message that plaintiff was taking a dismissal in the action. He also mailed defendant's attorney a copy of the dismissal dated 8 May 1987. Plaintiff contends the time period began running after the clerk of court received and stamped the written notice of dismissal as filed on 11 May 1987.

Rule 41(a)(1)(i) allows a plaintiff to dismiss an action or any claim "at any time *before the plaintiff rests his case*[.]" N.C.R. Civ. P. 41(a)(1)(i) (emphasis added). The former practice of allowing voluntary dismissals at any time before the verdict under N.C. Gen. Stat. § 1-25 (repealed by Session Laws 1967) influenced North Carolina's adoption of Rule 41. W.A. Shuford, *North Carolina Civil Practice and Procedure*, § 41-4 (2d ed. 1981).

This influence prompted our Supreme Court to note "the very strong tradition in this State equating oral notice in open court with written notice filed with the clerk." *Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d 161, 163 (1980). Based upon this past practice the Supreme Court found oral notice of voluntary dismissal in open court "is clearly adequate, and fully satisfies the 'filing' requirements of Rule 41(a)[(1)](i)." *Id.*

Despite language in *Gillikin v. Pierce*, 98 N.C. App. 484, 391 S.E.2d 198, *review denied*, 327 N.C. 427, 395 S.E.2d 677 (1990), which could be read as suggesting otherwise, no means other than oral notice in open court have been allowed to substitute for the filing requirements of Rule 41(a)(1)(i). Contact with defendant's attorney by telephone or mail concerning voluntary dismissal does not satisfy the filing requirement of Rule 41(a)(1)(i). Voluntary

dismissal without prejudice of the action below occurred when written notice was received and filed by the clerk of court on 11 May 1987.

Rule 41(a)(1) allows a new action based on the same claim to "be commenced within one year after such dismissal" unless a shorter time is specified. Plaintiff commenced a new action based on the same claim on 11 May 1988. "In computing any period of time prescribed or allowed by these rules, . . . the day of the act . . . after which the designated period of time begins to run is not to be included." N.C.R. Civ. P. 6(a). The trial court erred in dismissing plaintiff's action based upon its erroneous holding that plaintiff had failed to commence a new action within one year after the dismissal of the prior action.

Reversed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. GUSTARIVUS WHITAKER

No. 9018SC727

(Filed 2 July 1991)

1. **Rape and Allied Offenses § 4.1 (NCI3d) — second degree sexual offense — similar offense — admissible**

The trial court did not err in a prosecution for second degree sexual offense and burglary by admitting evidence that defendant had committed a similar break-in and sexual offense about one month earlier. The evidence was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show intent, identity, common scheme, plan, or design; the probative value substantially outweighed the danger of unfair prejudice, and the court's charge to the jury correctly stated the limited purpose of the evidence. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Rape § 71.

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

2. Criminal Law § 750 (NCI4th)— sexual offense and burglary— instruction on reasonable doubt—no error

The trial court did not err in a prosecution for second degree sexual offense and burglary in its instruction on reasonable doubt where the court did not instruct the jury that evidence beyond a reasonable doubt is proof that satisfies one to a moral certainty of the charge. Defendant concedes that the court correctly defined reasonable doubt; more was not required.

Am Jur 2d, Trial §§ 827, 829-831, 841.

APPEAL by defendant from judgments entered 5 March 1990 by *Judge Melzer A. Morgan, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 23 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lorinzo L. Joyner, for the State.

Assistant Public Defender Frederick G. Lind for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of second degree sexual offense in violation of G.S. 14-27.5(a)(1) and first degree burglary in violation of G.S. 14-51 upon evidence which tends to show that he broke into Susan Farmer's home located on Elmer Street in Greensboro during the early morning hours of 23 August 1989 and sexually assaulted her. He contends that the court erred to his prejudice in receiving evidence of another crime allegedly committed by him and in charging the jury. The contentions are without merit and we find no error.

[1] Over defendant's objection and for the limited purpose of showing his identity, intent and common plan or scheme, the trial court permitted the State to introduce evidence that defendant committed a similar break-in and sexual offense on 21 July 1989. The other residence broken into was about two blocks from Ms. Farmer's house; both incidents occurred in the early morning hours after the perpetrator entered the residence involved through a window; during the course of each assault the perpetrator repeatedly admonished his victim not to look at him; in one instance the perpetrator had vaginal intercourse with the victim and performed cunnilingus

on her, in the other he stated his intention to rape the victim but had time only to perform cunnilingus before barking dogs frightened him away; both victims correctly described defendant's physical characteristics and made unequivocal in-court and out-of-court identifications of him. The evidence was admissible under Rule 404(b), N.C. Rules of Evidence, to show intent, identity, common scheme, plan or design, *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), and Rule 403 in that the probative value of the evidence substantially outweighed the danger of unfair prejudice to defendant's case, *State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988), and the court's charge to the jury correctly stated the limited purpose of the evidence.

[2] Conceding that in instructing the jury the trial court correctly defined reasonable doubt, defendant nevertheless argues that the court erred in failing to include a portion of the definition of reasonable doubt found in *State v. Hammonds*, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954), to the effect that evidence beyond a reasonable doubt is proof that satisfies one to a moral certainty of the truth of the charge. Having adequately charged the jury on reasonable doubt, the court was not required to do more. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

No error.

Judges EAGLES and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 JUNE 1991

BROADWAY v. PPG INDUSTRIES, INC. No. 9010IC928	Ind. Comm. (033648)	Affirmed
CHEEK v. GOFORTH No. 9015SC731	Orange (89CVS644)	Affirmed
DUFFELL v. POE No. 9011SC1056	Lee (88CVS321)	Affirmed
FAIRCLOTH v. SALIBA No. 9012SC743	Cumberland (88CVS4024)	Affirmed
HEATH v. MOM 'N POPS COUNTRY BISCUITS No. 9022SC180	Iredell (89CVS00818)	Reversed
HENSON v. HENSON No. 9029DC375	Rutherford (88CVD644)	Affirmed in part; reversed and remanded in part
HILL v. JOHNSON No. 9118SC259	Guilford (90CVS1982)	Affirmed
HILL v. WALKER No. 9026SC99	Mecklenburg (87CVS5289)	Affirmed
HUTCHENS v. HUTCHENS No. 9023DC1240	Yadkin (79CVD95)	Dismissed
IN RE WALLACE No. 9022DC1100	Alexander (87J33)	Affirmed
IN RE WALLACE No. 9118DC117	Guilford (90J149)	Vacated & Remanded
IN RE WORKMAN No. 9018DC377	Guilford (88J548)	Affirmed
JENNINGS v. CABARRUS PLASTICS, INC. No. 9019SC990	Cabarrus (90CVS1324)	Reversed & Remanded
JONES v. EARP No. 9011SC1039	Johnston (89CVS0177)	No Error
JONES v. PEOPLES No. 9118SC2	Guilford (89CVS1170) (89CVS1172) (89CVS1171)	Appeal dismissed. Motion for sanctions denied.

KOONTZ v. KOONTZ No. 9022DC1107	Davie (90CVD188)	Affirmed
MOORE v. PROCTOR-SILEX No. 9010IC323	Ind. Comm. (747332)	Affirmed
N. G. PURVIS FARMS, INC. v. WILLIAMS No. 9020SC593	Moore (88CVS822)	Affirmed
RHYNE v. HOMESTEAD PRESERVATION ASSN. No. 9024DC473	Yancey (87CVD124) (87CVD125) (87CVS126) (87CVS127) (87CVD128) (87CVS130)	Affirmed
STATE v. BEST No. 917SC95	Wilson (89CRS7783) (89CRS7784)	No Error
STATE v. BLACKWELL No. 9117SC32	Rockingham (90CRS184) (90CRS2315) (90CRS2316)	No Error
STATE v. BOST No. 9118SC192	Guilford (89CRS52597)	No Error
STATE v. CARDIN No. 9125SC43	Catawba (89CRS14084) (89CRS14085) (89CRS14086)	No Error
STATE v. CARTER No. 9116SC208	Robeson (88CRS0018508)	No Error
STATE v. DAVIDSON No. 9125SC74	Burke (89CRS8788) (90CRS5279)	Affirmed
STATE v. ELLIS No. 9119SC180	Rowan (90CRS3842)	No Error
STATE v. FRIERSON No. 9116SC101	Hoke (88CRS4813)	No Error
STATE v. FULBRIGHT No. 9122SC222	Alexander (89CRS3102) (89CRS3103)	No Error
STATE v. GAINEY No. 9119SC309	Rowan (90CRS12974)	Affirmed

STATE v. GATTISON No. 915SC104	New Hanover (90CRS12515) (90CRS12516) (90CRS12517)	No Error
STATE v. HARRIS No. 9126SC82	Mecklenburg (89CRS74502)	No Error
STATE v. JACKSON No. 9118SC56	Guilford (90CRS28070) (90CRS20420) (90CRS56019)	Affirmed
STATE v. McGILL No. 9116SC35	Hoke (89CRS1621) (89CRS1622) (89CRS1624) (89CRS1625) (89CRS1719) (89CRS1720)	No Error
STATE v. McNEAL No. 912SC160	Beaufort (89CRS1970) (89CRS1971)	Vacated & Remanded
STATE v. NICHOLES No. 9127SC125	Cleveland (90CRS2699) (90CRS2700)	No Error
STATE v. OSBORNE No. 9018SC595	Guilford (89CRS28705)	No Error
STATE v. PAYNE No. 902SC1344	Hyde (89CRS904) (89CRS905) (89CRS906)	Affirmed
STATE v. ROBINSON No. 9115SC211	Alamance (90CRS19062)	No Error
STATE v. ROSS No. 9126SC30	Mecklenburg (90CRS15022)	No Error
STATE v. RUDISILL No. 9127SC57	Cleveland (90CRS115)	No Error
STATE v. SPRUILL No. 918DC113	Wayne (89CR10665)	Affirmed
STATE v. TILLEY No. 9025SC1324	Caldwell (89CRS6759)	No Error
STATE v. VAUGHAN No. 9115SC23	Orange (90CRS1049)	No Error

STATE v. VERNON No. 9117SC161	Rockingham (90CRS390)	Affirmed
STATE v. WHITAKER No. 9018SC620	Guilford (89CRS58826) (89CRS58827) (89CRS59406) (89CRS59407)	No Error
STEPHENS v. HUGGINS No. 9116SC33	Robeson (87CVS1401)	Affirmed
SUTTON v. J. C. PENNEY CO. No. 908SC947	Lenoir (88CVS1037)	Affirmed
TAYLOR v. MOREHEAD CITY TOWING CO. No. 903SC489	Carteret (87CVS857)	Reversed
TILLER v. CERTIFIED CONCRETE CORP. No. 9019SC968	Randolph (87CVS1148)	No Error
TROXLER-CERQUA v. HILTZ No. 9014DC987	Durham (89CVD2085) (90CVD286)	Affirmed
WALKER v. LOWERY No. 9021DC634	Forsyth (89CVD6286)	Affirmed
WHITE v. FLUOR-DANIEL No. 9010IC765	Ind. Comm. (901170)	Affirmed

FILED 2 JULY 1991

ABLE OUTDOOR ADVERTISING v. HARRELSON No. 9010SC1032	Wake (90CVS02344)	Affirmed
BRIGGS v. BRIGGS No. 9026DC514	Mecklenburg (83CVD11019MB)	Affirmed
DEESE v. ROBINSON No. 9027SC923	Gaston (89CVS3636)	Affirmed as to defendants Terrell Robinson and David Robinson; reversed and remanded as to defendant Carol Robinson
DURHAM v. RUSSELL No. 9023SC1108	Wilkes (89CVS1583)	Affirmed

HILL v. PROFESSIONAL NURSES REGISTRY OF WINSTON-SALEM No. 9021SC1216	Forsyth (89CVS4452)	Affirmed in part, reversed in part
IN RE APPEAL OF BLANTON v. N.C. LOCAL GOVERNMENT COMM. No. 9027SC888	Gaston (89CVS285) (90CVS118)	Affirmed
IN RE MATTHEW N. No. 9128DC130	Buncombe (90J48)	Affirmed
IN RE MOTOR FUELS AUDIT ASSESSMENT v. U-FILL'ER-UP No. 9018SC960	Guilford (88CVS6305)	Affirmed
McCARTHER v. DeCATO BROTHERS, INC. No. 9110IC55	Ind. Comm. (755099)	Affirmed
McCLELLAN v. ENGLISH No. 9024SC780	Madison (85SP8)	Affirmed
McDONALD v. ESTATE OF WARLICK No. 9027SC823	Gaston (89CVS782)	Dismissed
MEACHAM v. THOMAS No. 9015SC1071	Chatham (88CVS434)	No Error
MOSS v. BRADFORD & CO. No. 8926SC1357	Mecklenburg (88CVS1656)	Affirmed
NEELY v. N.C. STATE UNIVERSITY No. 9010IC1040	Ind. Comm. (530333)	Affirmed
PALMER v. FIREMAN'S FUND INS. CO. No. 9015SC833	Alamance (89CVS1169)	Affirmed
RAY HOLLAND & SONS LANDSCAPING v. JAMES McQUEEN & ASSOCIATES No. 905DC1169	New Hanover (87CVD2292)	Affirmed
REESE v. SIPE No. 9022SC1131	Alexander (89CVS220)	Affirmed
SHAVER v. SHAVER No. 9128DC131	Buncombe (87CVD1122)	Affirmed

SOUTHERN STATES COOPERATIVE v. GILREATH No. 9122DC138	Alexander (90M136)	Affirmed
STATE v. ALLEN No. 9022SC581	Alexander (89CRS1390)	Affirmed
STATE v. BROWN No. 9116SC162	Robeson (90CRS000408)	No Error
STATE v. BUCKNER No. 9128SC34	Buncombe (90CRS9490) (90CRS7283)	No Error
STATE v. HARRIS No. 9016SC699	Robeson (89CRS5722)	No Error
STATE v. MILLER No. 9115SC64	Alamance (90CRS11481)	No Error
STATE v. PAIGE No. 903SC477	Pitt (89CRS19992)	No Error
STATE v. ROBINSON No. 9117SC141	Rockingham (89CRS02108) (89CRS02112)	No Error
STATE v. RODGERS No. 9122SC126	Davidson (88CRS2398) (88CRS2399)	Reversed & Remanded
STATE v. WILLIAMS No. 903SC830	Pitt (88CRS23225)	No Error
STATE v. WILLIS No. 9110SC197	Wake (89CRS49003) (89CRS49004)	The judgment in 90CRS49003-A, possession with intent to sell or deliver cocaine, is affirmed. The judgment in 90CRS49003-B, conspiracy to sell or deliver cocaine, is vacated and the case remanded for resentencing. The judgment in 90CRS49004, possession of cocaine, is arrested.

TOWN OF KNIGHTDALE v. JOHNSON No. 9010SC935	Wake (89CVS8844)	Affirmed
YARBOROUGH v. BRITT No. 9015SC832	Alamance (88CVS2036)	Affirmed

SHERRY BOYD, ADMINISTRATRIX D.B.N. OF THE ESTATE OF PATRICK C. BOYD, JR., DECEASED v. L. G. DEWITT TRUCKING COMPANY, INC. AND CHARLIE HARTFORD LOCKLEAR

No. 9020SC722

(Filed 16 July 1991)

1. **Damages § 84 (NCI4th)— wrongful death—intoxicated truck driver—punitive damages**

The trial court properly denied defendants' motions for directed verdict and for judgment notwithstanding the verdict on plaintiff's claim for punitive damages arising from defendant Locklear's negligence in driving his truck into the rear of the decedent's vehicle where the evidence was sufficient to meet the plaintiff's burden of proof on the issue of Locklear's intoxication, and plaintiff's evidence tended to show that Locklear was traveling in excess of the posted speed limit with a fully loaded rig and with an unauthorized female passenger, no attempt was made to avoid the accident prior to its occurrence, and Locklear's own testimony reveals that he did not see the decedent's vehicle until an instant before the collision even though the road he was traveling was straight, if somewhat hilly.

Am Jur 2d, Death § 259.

Intoxication of automobile driver as basis for awarding punitive damages. 65 ALR3d 656.

2. **Damages § 80 (NCI4th)— wrongful death—intoxicated truck driver—willful or wanton entrustment by trucking company—punitive damages**

The trial court properly denied defendants' motions for a directed verdict and for judgment notwithstanding the verdict on plaintiff's claim for punitive damages arising out of defendant truck company's negligent entrustment of the truck to defendant driver where the evidence tended to show that the driver, Locklear, had worked for twenty years for defendant trucking company, or another company with which this defendant had merged; the driver had been hired and rehired eleven times during that period; he was required to fill out an employment application each time; the company did not have any records concerning the driver's hirings prior to 1981;

the company's personnel and safety director testified that he had consulted with employees of the merged company concerning defendant; the driver had two convictions for driving while under the influence, three convictions for reckless driving, and six speeding convictions in the preceding twenty years; and, while defendants contend that federal regulations only require that an applicant's record be investigated for the last three years and that a record check for those years shows only three violations, it does not necessarily follow that such compliance conclusively demonstrates the exercise of due care. Plaintiff presented sufficient evidence from which a jury could find that Locklear was an unsafe driver and that the company knew or should have known of the danger to the driving public.

Am Jur 2d, Death § 259.

Intoxication of automobile driver as basis for awarding punitive damages. 65 ALR3d 656.

3. Automobiles and Other Vehicles § 563 (NCI4th)— wrongful death—intoxicated decedent—willful and wanton contributory negligence—exclusion of evidence harmless

Any error in excluding evidence of the decedent's intoxication in a wrongful death action was harmless error where defendants failed to show that evidence of decedent's intoxication, standing alone, would have been sufficient even to show actionable negligence, much less willful or wanton negligence.

Am Jur 2d, Death §§ 198, 203.

4. Damages § 178 (NCI4th)— wrongful death—intoxicated truck driver—punitive damages—not excessive

The trial court did not err by denying defendants' motion for a new trial on punitive damages based on an excessive award where the evidence was sufficient to warrant the amount awarded.

Am Jur 2d, Damages §§ 1021, 1023; Death § 539.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases. 35 ALR4th 441.

APPEAL by defendants from judgment entered 5 April 1990 in RICHMOND County Superior Court by *Judge Julius A. Rousseau, Jr.* Heard in the Court of Appeals 15 January 1991.

Leath, Bynum, Kitchin & Neal, P.A., by Henry L. Kitchin and Stephan R. Futrell, and Etheridge, Moser, Garner & Bruner, P.A., by Terry R. Garner, for plaintiff-appellee.

McLean, Stacy, Henry & McLean, by Horace E. Stacy, Jr., for defendants-appellants.

WYNN, Judge.

I

This appeal arises out of a wrongful death action in which plaintiff sought both compensatory and punitive damages on behalf of her deceased husband, Patrick Boyd ("decedent"), who was killed in a rear-end collision with a tractor-trailer driven by defendant Charles H. Locklear ("Locklear"), an employee for defendant L.G. DeWitt Trucking Company, Inc. ("DeWitt"). Plaintiff's complaint alleged that Locklear had been wilfully or wantonly negligent in causing the collision and that such negligence could be imputed to DeWitt as Locklear's employer. The complaint also alleged that DeWitt had been independently negligent in entrusting the tractor-trailer to Locklear, and that DeWitt's independent negligence was also wilful or wanton.

In their answer, the defendants denied that they had been negligent to any degree in causing the collision, and further denied that DeWitt had been negligent to any degree in entrusting the tractor-trailer to Locklear. In the alternative, the defendants alleged that the decedent had been contributorily negligent in causing the collision, and that such negligence had been wilful or wanton. Plaintiff's reply alleged that Locklear had had the last clear chance to avoid the accident. Other issues which were raised by the pleadings have been decided and are not involved in this appeal. The evidence in the record tends to show the following facts.

On the evening of 16 July 1985, the decedent and five other passengers (two adults and three small children) were traveling in decedent's 1967 pickup truck in a westerly direction on U.S. Highway 74 when the truck's engine stalled near the Richmond County/Scotland County line. Since the point at which the pickup truck had stalled was on a slight decline, the decedent, who was driving, allowed the pickup truck to coast and made several unsuccessful attempts to restart it.

Witness Paul Sweeny, a passenger in decedent's vehicle, testified that while the decedent was trying to restart the engine, both he and another passenger, Clyde Bass, turned to look out of the truck's rear window and noticed an eighteen-wheel tractor-trailer approximately four-tenths of a mile behind them. Upon noticing the tractor-trailer, Sweeny told the decedent of the approaching tractor-trailer. Nonetheless, the decedent continued his attempts at restarting the pickup. A "very short period of time later," Sweeny again looked out of the truck's rear window. This time, the tractor-trailer was approximately 658 feet from the pickup truck. As the pickup continued to coast "real slow," Sweeny jumped out of the pickup truck and fell onto the shoulder of the highway. Bass followed Sweeny out of the truck, carrying his daughter. Moments later, the tractor-trailer smashed into the back of decedent's truck, killing the decedent and one of the child passengers. Another child passenger was severely injured in the collision.

Sweeny further testified that the tractor-trailer did not swerve prior to the collision and that he did not see the tractor-trailer's brake lights illuminate prior to impact.

Timothy Galligan, a service station attendant in Laurinburg, North Carolina, testified that on the night of the accident, but prior to the accident, he had seen Locklear drinking a beer and that Locklear had slapped him during an ensuing argument. He further testified that in his opinion, Locklear should not have been driving that night, due to his intoxication.

Following the argument with Galligan, Locklear got into his tractor-trailer and headed toward U.S. Highway 74. Locklear testified that he was carrying a shipment of over forty-two thousand pounds of wine coolers to Akron, Ohio. The evidence also showed that an unauthorized female companion was riding with Locklear at the time of the accident.

Witness Lawrence Lee, who was driving a tractor-trailer unit for another company, testified that he was traveling behind Locklear prior to the accident. He estimated that Locklear's speed at the time of the collision was approximately 60 or 61 m.p.h.

During trial, the parties entered into a "high-low" settlement agreement with respect to compensatory damages. The parties stipulated that regardless of the jury's answers to the issues pertaining to the defendants' liability for ordinary negligence, the plain-

tiff would recover no less than $100,000, nor more than $250,000 in compensatory damages from the defendants. The agreement did not, however, limit plaintiff's recovery, if any, for punitive damages.

Nine issues were submitted for the jury's consideration. Those issues and the jury's answers to them were as follows:

1. Did Patrick Boyd die as a result of the negligence of the Defendants?

Answer: Yes

2. If so, did Patrick Boyd, by his own negligence, contribute to his death?

Answer: Yes

3. Did the Defendant Charles Locklear, have the last clear chance to avoid the collision and death of Patrick Boyd?

Answer: Yes

4. Was Pat Boyd killed by the willful or wanton conduct of Charles Locklear?

Answer: Yes

5. What amount of compensatory damages is the Plaintiff entitled to receive as a result of the death of Patrick Boyd?

Answer: $869,200.00

6. What amount of punitive damages, if any, is the Plaintiff entitled to recover for the wilful or wanton negligence of the Defendants?

Answer: $500,000.00

7. Did DeWitt Trucking Company negligently entrust its tractor and trailer to Charles Locklear?

Answer: Yes

8. If so, was the negligence of DeWitt Trucking Company willful or wanton?

Answer: Yes

9. What amount of punitive damages, if any, is the Plaintiff entitled to recover for the willful or wanton negligence of DeWitt Trucking Company?

Answer: $3,500,000.00

The parties agree that the "high-low" agreement has foreclosed the liability issues with respect to compensatory damages. Therefore, the issues raised in this appeal relate solely to punitive damages.

II

Defendants first assign as error the trial court's denial of their motions for a directed verdict on the plaintiff's claims for punitive damages arising out of the alleged negligence of defendant Locklear and the alleged negligent entrustment of defendant DeWitt Trucking Company. Defendants also assign error to the trial court's denial of their motion for judgment notwithstanding the verdict. The defendants specifically contend that the evidence at trial was insufficient as a matter of law to support the jury's finding that both Locklear's and DeWitt's negligence was wilful or wanton.

The purpose of a motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the plaintiff. *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982). In passing upon a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party; it must then grant the motion if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant. *Kelly v. International Harvester Co.*, 278 N.C. 153, 158, 179 S.E.2d 396, 398 (1971). The same factors are considered in determining whether a judgment notwithstanding the verdict should be granted. *Colony Assoc. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637, 300 S.E.2d 37, 39 (1983) (citing *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979)).

A

Locklear's Negligence

[1] Our General Statutes authorize the recovery of punitive damages in a wrongful death action. N.C. Gen. Stat. § 28A-18-2(b)(5) (1984 & Cum. Supp. 1990). In the case of accidental injuries, punitive damages can be awarded only where the defendant's misconduct reaches a higher level than mere negligence. *Holley v. Hercules*,

Inc., 86 N.C. App. 624, 627, 359 S.E.2d 47, 49 (1987). Such misconduct must amount to wantonness, wilfulness, or a reckless indifference to consequences. *Id.* "An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others." *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 861 (1978). "An act is wilful when there exists 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another,' a duty assumed by contract or imposed by law." *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 383-84, 291 S.E.2d 897, 903 (quoting *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971), *aff'd* 307 N.C. 267, 297 S.E.2d 397 (1982)). Thus, in a wrongful death action arising out of negligence, a directed verdict may properly be granted against a plaintiff seeking punitive damages only where the evidence is insufficient as a matter of law to support a jury finding that the defendant wrongfully caused the death of the decedent in a malicious, wilful, wanton or grossly negligent manner.

The plaintiff's evidence tended to show that Locklear was intoxicated at the time of the accident, that he was traveling in excess of the posted speed limit, with a fully-loaded rig and with an unauthorized female passenger, and that no attempt was made to avoid the accident prior to its occurrence. In addition, even though Locklear was traveling on a straight, if somewhat hilly road, his own testimony reveals that he did not see the decedent's vehicle until an instant before the collision.

This evidence was sufficient to support a jury finding that Locklear's conduct "manifested a reckless indifference to the rights of others." The defendants argue, however, that the plaintiff failed to meet her "extremely strict burden of proof" on the issue of Locklear's intoxication. *Ivey v. Rose*, 94 N.C. App. 773, 776, 381 S.E.2d 476, 478 (1989) (quoting *Huff v. Chrismon*, 68 N.C. App. 525, 315 S.E.2d 711, *disc. review denied*, 311 N.C. 756, 321 S.E.2d 134 (1984)). We disagree.

Three separate witnesses testified that they detected an odor of alcohol on the defendant's person: (1) Paul Sweeny, an eyewitness, testified that while standing beside Locklear following the accident, he smelled alcohol on Locklear's person; (2) an emergency medical technician testified that he smelled an odor of alcohol on Locklear while assisting him into an ambulance; and (3) a nurse who happened upon the scene of the accident also smelled alcohol on

Locklear's person. She also testified that Locklear looked like "he might be going to fall down any minute." We believe that this evidence, when coupled with Timothy Galligan's testimony that when he saw Locklear *less than one hour* before the accident, Locklear was drinking a beer and was intoxicated to the point where he should not have been driving, was sufficient to meet the plaintiff's burden on the issue of defendant Locklear's intoxication.

Viewing the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff presented sufficient evidence from which a jury could find that the defendant Locklear's negligence was wilful or wanton. Accordingly, the trial court properly denied the defendants' motions for directed verdict and for judgment notwithstanding the verdict on the plaintiff's claim for punitive damages arising out of Locklear's negligence.

B

DeWitt's Negligence

[2] The plaintiff's complaint alleged and the jury concluded that DeWitt Trucking Company negligently entrusted its tractor-trailer to Locklear and that such negligence was wilful or wanton. The defendants contend, however, that the evidence was insufficient to support either of the jury's findings and that, therefore, no basis existed for the jury's award of punitive damages for wilful or wanton negligent entrustment.

Under the doctrine of negligent entrustment,

> the owner of [a] motor vehicle who entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, thereby becomes *liable* for such person's negligence in the operation thereof; and in such case the *liability* of the owner is predicated upon his own negligence in entrusting the operation of the motor vehicle to such a person.

Heath v. Kirkman, 240 N.C. 303, 307, 82 S.E.2d 104, 107 (1954).

The evidence tended to show that Locklear had worked for DeWitt "off and on" for twenty years, from 1965-1985. During that time he was hired and rehired eleven times. Each time that Locklear was rehired, he was required to fill out an employment application. Art McKenzie, DeWitt's personnel and safety director, testified that DeWitt did not have any records concerning Locklear's hirings

for the years preceding 1981. He explained that this may have been due to the fact that DeWitt had merged with another company for which Locklear had worked prior to 1981: Textile Motor Freight. McKenzie further testified that he had nonetheless consulted with Textile Motor Freight employees about hiring Locklear.

During the twenty years that Locklear worked for Textile Motor Freight and DeWitt, DMV record checks reveal that Locklear had two convictions for driving under the influence of alcohol, three convictions for reckless driving, and six speeding convictions. The defendants contend, however, that the Federal Motor Carrier Safety Regulations require only that the hiring company investigate an applicant's driving record for the preceding three years. Since Locklear was rehired in 1985, DeWitt argues, it should only be held accountable for the information concerning Locklear's driving record between the years 1982-1985. A record check for those years, according to DeWitt, shows only three violations: (1) failure to stop for a siren and reckless driving; (2) speeding; and (3) driving while intoxicated and failure to stop for a siren.

Assuming, without deciding, that DeWitt did in fact comply with the regulations, it does not necessarily follow that such compliance conclusively demonstrates the exercise of due care. *See, e.g., Thomas v. Dixon*, 88 N.C. App. 337, 343, 363 S.E.2d 209, 213 (1988) (whether or not a building meets building code standards is not determinative of negligence); *Paysour v. Pierce*, 76 N.C. App. 364, 367, 333 S.E.2d 314, 317 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 28 (1986) (issuance of a building permit is not necessarily evidence of the safety of a building); *See also* Restatement (Second) of Torts § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions"); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 36, at 233 (5th ed. 1984).

After reviewing the evidence, we find that the plaintiff presented sufficient evidence from which a jury could find that Locklear was an unsafe driver and that DeWitt either knew or should have known of Locklear's danger to the rest of the driving public. We further find that given the number and severity of the offenses for which Locklear was convicted, the evidence was equally sufficient to support the jury's finding that DeWitt's negligent entrustment was wilful or wanton. Thus, the trial court properly denied

the defendants' motions for a directed verdict and for judgment notwithstanding the verdict on plaintiff's claim for punitive damages arising out of defendant DeWitt Trucking Company's negligent entrustment.

III

[3] The defendants next contend that the trial judge erred in excluding certain testimony of Trooper Pat Glass and the results of a blood alcohol test, both of which tended to show that the decedent had been drinking at the time of the accident. Trooper Glass, who was at the scene of the accident, testified on *voir dire* that he smelled the odor of alcohol on the decedent's person. In addition, the results of a blood alcohol test performed by the State Medical Examiner two hours after the accident revealed that the decedent had a blood alcohol content of .02.

The defendants argue that such evidence would have provided a basis for the jury to find that the decedent had been wilfully or wantonly contributorily negligent, and that such a finding would have been a defense to the defendant's wilful and wanton negligence, thereby precluding the recovery of punitive damages. They also argue that the admission of such evidence would have supported a jury instruction, which the trial judge refused to make, on the defense of wilful or wanton contributory negligence.

Assuming it was error to exclude this evidence, such error was harmless. A party asserting error must show not only that error has been committed, but also that a different result would have ensued had the error not occurred. *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985). The defendants have failed to show that the evidence of decedent's intoxication, standing alone, would have been sufficient even to show actionable negligence, *Rhyne v. O'Brien*, 54 N.C. App. 621, 625, 284 S.E.2d 122, 124 (1981), much less wilful or wanton negligence. As stated by this court in *Rhyne*:

> A mere finding by the jury that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision.

54 N.C. App. at 625, 284 S.E.2d at 125.

In the absence of additional evidence, we must conclude that even if the evidence of decedent's intoxication had been admitted, it would have been insufficient as a matter of law to submit the issue of wilful or wanton contributory negligence to the jury. Defendants' assignment of error is therefore overruled.

Since we have determined that the evidence would have been insufficient to support a finding of wilful or wanton contributory negligence had the evidence of decedent's intoxication been admitted, there was no need for the trial judge to instruct the jury on the issue of wilful or wanton contributory negligence; therefore, defendants' assignment of error on this point is also overruled.

IV

[4] In their final assignment of error, defendants contend that the trial court erred in denying their motion for a new trial on the issue of punitive damages. They assert that the jury's punitive damages awards were excessive.

"[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." *Worthington v. Bynum*, 305 N.C 478, 484, 290 S.E.2d 599, 603 (1982). A discretionary ruling by the trial judge should not be disturbed on appeal unless the appellate court is convinced by the cold record that the ruling probably amounted to a substantial miscarriage of justice. *Id.* at 487, 290 S.E.2d at 605.

After carefully reviewing the record, we are of the opinion that the evidence in the case *sub judice* was sufficient to warrant the amount of punitive damages awarded. Thus, the trial judge's denial of the defendants' motion did not amount to a substantial miscarriage of justice. We therefore find no error in the trial judge's ruling.

No error.

Judges PHILLIPS and EAGLES concur.

KATHARINE N. DIORIO, PLAINTIFF v. WILLIAM E. PENNY AND BETTY S. PENNY, DEFENDANTS

No. 9029SC1158

(Filed 16 July 1991)

Landlord and Tenant § 8.4 (NCI3d)— dangerous condition of stairs— knowledge by tenant—contributory negligence

Plaintiff tenant's action to recover for injuries received in a fall on a stairway based on defendant landlords' alleged negligent construction and maintenance of the stairs was barred by plaintiff's contributory negligence as a matter of law where plaintiff knew of the dangerous condition of the stairs but failed for six months to take any action to correct it or to notify the landlords of the condition.

Am Jur 2d, Landlord and Tenant §§ 761, 771; Premises Liability §§ 68, 583, 815.

Judge GREENE dissenting.

APPEAL by plaintiff from judgment entered 30 August 1990 in HENDERSON County Superior Court by *Judge Marvin K. Gray.* Heard in the Court of Appeals 15 May 1991.

Morris, Bell & Morris, by William C. Morris, Jr., for plaintiff-appellant.

Roberts, Stevens & Cogburn, P.A., by Frank P. Graham, for defendants-appellees.

LEWIS, Judge.

On 13 July 1985 Katharine N. Diorio and her husband leased a two-story house, owned by the defendants, in Henderson County. The house contained a staircase which did not have a handrail and consisted of twelve to fifteen steps varying from four to nine inches in height. At the time plaintiff signed the lease the staircase was covered by carpeting which extended unsupported approximately two inches beyond each step before continuing down the riser to the next step. Before leasing the house plaintiff and her husband viewed the interior of the house and walked up and down the staircase. Upon moving into the house plaintiff and her husband used one of the upstairs rooms as their bedroom. Prior to 20 January

1986, the plaintiff had slipped on the stairs on more than one occasion. She was never injured because she would always catch herself on the wall. Furthermore, prior to 20 January 1986, the plaintiff's daughter had slipped and fallen down the stairs but was not injured. Neither the plaintiff nor any member of her family complained to the defendants about the condition of the stairs at any time.

On 20 January 1986 in the evening the plaintiff walked down the stairs, slipped on the overhanging carpet on one of the steps, tumbled down the remaining stairs and broke her right arm. On 30 April 1987 she filed suit against the defendants. Having voluntarily dismissed that claim on 30 April 1990, she subsequently filed another complaint alleging that the defendants had negligently constructed and maintained the stairs. The defendants filed an answer to the complaint on 29 May 1990 denying negligence and alleging contributory negligence as a defense. Defendants' motion for summary judgment was granted on 31 August 1990. Plaintiff appeals.

"On motion for summary judgment, the question before the Court is whether the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law." *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E.2d 584, 586 (1980). While issues of negligence and contributory negligence are rarely appropriate for summary judgment, *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978), the trial court will grant summary judgment in such matters where the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury. *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 321-22, 219 S.E.2d 308, 311 (1975), *cert. denied*, 289 N.C. 296, 222 S.E.2d 695 (1976).

The uncontroverted evidence in this case indicates that the plaintiff, who had used the stairs at least twice a day for nearly six months, by her own admission was aware that the stairs posed a danger to the extent that she more than once had to "catch herself" on the wall while descending. The plaintiff also admits that she had not notified the landlord of the danger and had not taken any other step to correct the condition of the stairs. This

Court has previously stated that, "[t]he law imposes upon a person the duty to exercise ordinary care to protect himself from injury and to avoid a known danger; and that where there is such knowledge and there is an opportunity to avoid such a known danger, failure to take such opportunity is contributory negligence." *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 122, 284 S.E.2d 702, 706-07 (1981), *disc. rev. denied*, 305 N.C. 300, 290 S.E.2d 702 (1982). Where the plaintiff knew the danger of the stairs and in the course of six months failed to undertake any action whatsoever to correct it or to notify the landlord of the condition, the plaintiff, in our judgment, has violated the standard of ordinary care and is contributorially negligent as a matter of law. We distinguish this case from the holding in *Lenz v. Ridgewood Associates*, *id.*, where this Court vacated a directed verdict for the defendant. There we held that it was for the jury to decide whether a reasonable person would have stayed at home instead of exposing himself to a known danger, i.e., an icy walkway outside his home. Though Mrs. Diorio had no alternative route to the first floor of the house and while one could not reasonably expect her to remain on entirely the second floor, by her own admission she, unlike the plaintiff in *Lenz*, was not confronted with the danger for the first time on the date of her injury. She had experienced six months of close exposure to a known condition and failed to notify the landlord or take reasonable corrective measures. A plaintiff who knowingly exposes herself to a risk of which she has had long-term prior notice, has a reasonable choice or option to seek to avoid that danger and fails to exercise that option, is contributorially negligent as a matter of law. *See Brooks v. Francis*, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

Since we have determined that plaintiff is contributorially negligent as a matter of law, we decline to address the issue of whether the plaintiff has made a prima facie case of negligence sufficient to take the case to the jury.

The judgment of the trial court is therefore

Affirmed.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The majority concludes that the plaintiff was contributorially negligent as a matter of law because she "failed to undertake any action whatsoever to correct . . . [the staircase] or to notify the landlord" of its allegedly defective condition. I disagree.

I

A

For purposes of tort law and the doctrine of contributory negligence, a tenant may be required to correct defective conditions in the leased premises to avoid injury to herself. This duty, however, depends on various factors, including, but not limited to, the extent of the defect and the cost to the tenant to repair it. Although a tenant may be contributorially negligent if she fails to repair a minor defect which subsequently causes her injury, *see* N.C.G.S. § 42-43(a)(1) (1984) (tenant obligated to keep premises as "safe as the conditions of the premises permit"), the tenant is not expected to make major repairs, such as rebuilding a staircase with risers of varying heights or replacing carpeting on such a staircase. Such repairs are for the landlord. *See* N.C.G.S. § 42-42(a)(1), (2) (1984) (landlord obligated to comply with building codes and "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition"). Because the circumstances dictate whether the tenant should make repairs required for safety purposes, the issue of whether a tenant injured by the defective condition is contributorially negligent for failing to make those repairs is a question properly reserved for the jury.

B

I further disagree that the plaintiff's failure to notify the defendants of the condition of the staircase renders her contributorially negligent as a matter of law.

A prerequisite for a landlord's tort liability for the failure to repair a defective condition under N.C.G.S. § 42-42(a)(2) is (1) notice, either written or oral, to the landlord of the condition or (2) evidence that the landlord was aware or should have been aware of it. *See Surratt v. Newton*, 99 N.C. App. 396, 405-06, 393 S.E.2d 554, 559 (1990); *Bradley v. Wachovia Bank & Trust Co.*, 90 N.C. App. 581, 584, 369 S.E.2d 86, 88 (1988). Here, the defendants' evidence shows that the plaintiff never notified the defendants of the condi-

tion. The plaintiff's evidence, however, shows that the defendants were aware of the condition of the staircase in that Jennifer Ciechan, the tenant in the house before the plaintiff, had fallen on the carpeted staircase. Ciechan testified at her deposition that although she could not specifically recall the actual conversation with the defendants concerning her fall on the stairs, she felt like the fall had been mentioned to them. Furthermore, the defendants themselves lived in this house in the early 1980's after the staircase had been carpeted and therefore were aware or, at the very least, should have been aware of the condition of the staircase. Accordingly, because the plaintiff has demonstrated that a genuine issue of material fact exists on the question of whether the defendants were aware or should have been aware of the condition of the staircase, summary judgment for the defendants on that ground was improper.

C

Furthermore, the plaintiff was not otherwise contributorially negligent as a matter of law.

"[T]he law imposes upon a person the duty to exercise *ordinary care* to protect himself from injury and to avoid a known danger; and that where there is such knowledge and there is an opportunity to avoid such a known danger, failure to take such opportunity is contributory negligence." *Lenz v. Ridgewood Assocs.*, 55 N.C. App. 115, 122, 284 S.E.2d 702, 706-07 (1981), *disc. rev. denied*, 305 N.C. 300, 290 S.E.2d 702 (1982) (emphasis in text). Stated differently, "contributory negligence per se may arise where a plaintiff knowingly exposes himself to a known danger when he had a *reasonable* choice or option to avoid that danger, . . . or when a plaintiff heedlessly or carelessly exposes himself to a danger or risk of which he knew or should have known." *Id.* at 122-23, 284 S.E.2d at 707 (citation omitted) (emphasis in text). Therefore, a plaintiff is not contributorially negligent as a matter of law when she "undertakes a reasonably necessary journey or mission or engages in a reasonably necessary activity where there are no reasonable alternatives open to . . . [her] even in the face of risk of harm to . . . [herself]." *Id.* at 123, 284 S.E.2d at 707; *see Collingwood v. General Elec. Real Estate Equities*, 324 N.C. 63, 71-72, 376 S.E.2d 425, 430 (1989) (plaintiff not contributorially negligent as a matter of law where plaintiff jumped from her third-floor apartment win-

dow to escape from a raging fire outside her door, even though no smoke or fire entered her apartment).

In *Lenz*, at about 10:30 a.m. on 20 January 1978, the plaintiff slipped and fell on an icy walkway leading from his apartment to the parking lot where his car was located. He was on his way to Greensboro College. The ice had formed on the walkway from a previous ice storm a month earlier and from an ice storm during the day and night of 19 January 1978. The plaintiff testified that he walked across the ice carefully because he knew it was slick. On cross-examination, the plaintiff testified that he could have taken another route to his car, but even "had he taken such route, he nevertheless would have been faced with negotiating some areas of ice-covered sidewalks." *Lenz*, 55 N.C. App. at 121, 284 S.E.2d at 706. The plaintiff alleged that the owners of the apartment complex were negligent in failing to maintain the common areas in a safe condition. Specifically, the plaintiff alleged that the defendants failed to exercise ordinary care to remove the ice from the walkway. The defendants argued that the plaintiff was contributorially negligent as a matter of law in walking "where he knew he would encounter an unsafe or dangerous condition . . . ." *Id.* at 122, 284 S.E.2d at 706. This Court disagreed with the defendants and held that the issue of the plaintiff's alleged contributory negligence presented jury questions. The jury had to decide whether the plaintiff, as an ordinarily prudent person, should have stayed in his apartment, whether the plaintiff's journey to school was a reasonably necessary journey, and whether the plaintiff had a reasonable, alternate route to his car. *Id.* at 123, 284 S.E.2d at 707.

Likewise, the facts of this case present jury questions about the plaintiff's alleged contributory negligence. The evidence, viewed in the light most favorable to the plaintiff, shows that she proceeded carefully down the only staircase in the house but nevertheless slipped and fell. The jury, not this Court, must decide whether she undertook a reasonably necessary journey or engaged in a reasonably necessary activity, whether there were no reasonable alternatives open to her even in the face of the alleged risk of harm to herself posed by the staircase, and whether she carelessly exposed herself to the alleged risk of which she knew or should have known.

The defendants argue that the plaintiff's past experience with the staircase combined with her knowledge that the stairs were

narrow, steep, carpeted, and difficult to negotiate compels a conclusion that the plaintiff was contributorially negligent as a matter of law. I disagree. As our Courts have repeatedly stated,

> the existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior — 'the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.'

Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citation omitted) (emphases in text); *Collingwood*, 324 N.C. at 71, 376 S.E.2d at 430; *O'Neal v. Kellett*, 55 N.C. App. 225, 229, 284 S.E.2d 707, 710 (1981) (plaintiff considered steps unsafe); *Lenz*, 55 N.C. App. at 122, 284 S.E.2d at 707.

Finally, the defendants' reliance on *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E.2d 889 (1982), is misplaced. In *Brooks*, the plaintiff-tenant was injured on her way to her backyard when the steps in the rear of her house collapsed under her feet. The plaintiff knew that the rear steps were unstable, considered them to be dangerous, and had notified her landlord many times about the condition of the steps. The house had a set of cement steps in the front, and the plaintiff could have reached her backyard had she used her front steps. These cement steps provided the plaintiff with a completely safe, alternate route to her backyard. Therefore, by choosing a known dangerous route when she had a reasonable option, the plaintiff was contributorially negligent as a matter of law. *Id.* at 560, 291 S.E.2d at 891-92. On the facts in the record in this case, the plaintiff did not have the reasonable option that the plaintiff in *Brooks* had. Therefore, because the plaintiff was not contributorially negligent as a matter of law in using the staircase in her house, unlike the plaintiff in *Brooks*, the trial court erred in granting summary judgment for the defendants on that ground.

II

The defendants argue in the alternative, an issue not addressed by the majority, that they are entitled to summary judgment because the evidence reveals that they were not negligent. I disagree.

Because the defendants moved for summary judgment, they had the burden of conclusively showing that they were not negligent

or that the plaintiff was contributorially negligent, a matter previously discussed. Based upon the plaintiff's deposition transcript, her husband's deposition transcript, the plaintiff's response to the defendants' request for admissions, and the plaintiff's answer to the defendants' interrogatories, the defendants argue that they are entitled to summary judgment because the *plaintiff* did not show in these materials that the defendants had breached a duty of care or that the plaintiff's injuries were proximately caused by any alleged defect in the staircase. The defendants misunderstand their burden on their summary judgment motion. The plaintiff was not required at the hearing to establish any element of her claim until the defendants had shown that an essential element of her claim did not exist or that the plaintiff could not produce evidence to support an essential element of her claim. To require the plaintiff-non-movant to show a breach of duty or the existence of proximate cause would be to allow the defendants to shift their burden onto the plaintiff and thereby require the plaintiff to prove her claim at the summary judgment hearing. North Carolina courts do not follow this federal approach to burden allocations on summary judgment motions. *See Metts v. Piver*, 102 N.C. App. 98, 101-03, 401 S.E.2d 407, 409-10 (1991) (Greene, J., concurring in the result).

Here, the defendants did not produce any evidence conclusively showing that plaintiff's injuries were not proximately caused by the alleged defects in the staircase. Furthermore, the only evidence the defendants produced to show that they did not breach a duty of care owed to the plaintiff was the fact that the plaintiff never notified the defendants of the defective condition of the staircase. Accordingly, the plaintiff was only required to produce evidence on this element of her claim. As stated above, the plaintiff's evidence shows that the defendants were or should have been aware of the condition of the staircase. This evidence demonstrates that a genuine issue of material fact exists on this issue and precludes summary judgment for the defendants.

I would reverse the trial court's order of summary judgment.

STATE OF NORTH CAROLINA v. BRUCE YOUNG

No. 906SC646

(Filed 16 July 1991)

1. **Rape and Allied Offenses § 5 (NCI3d)— rape and sexual offense—two separate dates—variance not fatal**

There was no fatal variance between indictments which alleged that a rape occurred on 27 September 1988 and that a sexual offense occurred on 29 September 1988 and testimony by the child victim that intercourse occurred on 29 September and oral sex took place on 27 September since the variance as to which offense occurred on which date did not prevent defendant from presenting evidence of alibis for both dates.

Am Jur 2d, Rape § 52.

2. **Rape and Allied Offenses § 6 (NCI3d)— instructions—offenses "on or about" dates in indictment**

The trial court did not err in instructing the jury that it could find defendant guilty of first degree rape and first degree sexual offense against a child victim if it found that defendant committed the offenses "on or about" the dates listed in the indictments where the indictments charged that the offenses occurred "on or about" those two specific dates. The defendant cannot claim error when the court's instruction uses the same time frame as that given in the indictment.

Am Jur 2d, Rape § 108.

3. **Rape and Allied Offenses § 4.1 (NCI3d)— another sexual offense—admissibility to show plan**

In a prosecution for rape and sexual offense against a child victim, testimony by a friend of the victim that, when she visited the victim six to seven years prior to the crimes in question, defendant removed the witness from the victim's bedroom, told her to drop her pants, and then touched her "private" was admissible to show defendant's plan of sexual activity with young girls. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Rape §§ 67, 73.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR3d 841.

4. Rape and Allied Offenses § 4.1 (NCI3d)— sexual magazines possessed by defendant—admissibility to show intent or plan

Where a child rape and sexual offense victim testified that defendant would show her magazine pictures depicting sexual acts before performing sexual acts upon her, sexual magazines possessed by defendant were admissible to show defendant's intentions or plans to commit sexual acts on the victim.

Am Jur 2d, Evidence § 884; Rape § 55.

5. Rape and Allied Offenses § 4.1 (NCI3d)— exclusion of letters written by victim

The exclusion of letters written by a thirteen-year-old alleged rape and sexual offense victim to her boyfriends did not deny defendant the right to present his defense that physical evidence of sexual activity by the victim could be explained by her sexual encounters with others where the letters related only to who "likes" whom and who is "going with" whom and did not refer to sexual activity.

Am Jur 2d, Evidence §§ 878, 881; Rape § 55.

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

The mandatory life sentence for first degree sexual offense did not constitute cruel and unusual punishment.

Am Jur 2d, Criminal Law § 626; Rape §§ 114, 115.

Federal constitutional guaranty against cruel and unusual punishment—supreme court cases. 33 LEd 2d 932.

Comment Note—Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 355.

APPEAL by defendant from Judgments entered 6 January 1990 by *Judge Ernest B. Fullwood* in HERTFORD County Superior Court. Heard in the Court of Appeals 18 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kathryn Jones Cooper, for the State.

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

COZORT, Judge.

Defendant Bruce Young was convicted of one count of first-degree sexual offense, one count of first-degree rape, and two counts of taking indecent liberties with a child. Defendant was sentenced to life for first-degree rape, sentenced to life for first-degree sexual offense (to run concurrently with the sentence for first-degree rape), and sentenced to two consecutive terms of three years in prison for the two counts of taking indecent liberties with a child. On appeal, defendant contends, among other things: (1) that there is a fatal variance between the indictment and the evidence, and (2) that the trial court erred in admitting evidence of defendant's possession of certain magazines depicting sexual acts. We find no prejudicial error.

The State's evidence tended to show that defendant lived with Carla Sawyer and her mother. Carla, who was thirteen years old at the time of the trial, testified that defendant started messing with her when she was six years old by putting his hands where they were not supposed to be and by making her have oral sex with him. This behavior continued until she was ten, when defendant started having sexual intercourse with her at least once or twice a week. Carla further testified that on 27 September 1988 the defendant made her have oral sex with him, and that on 29 September 1988 the defendant made her have sexual intercourse with him. Defendant showed her "centerfold-type" pictures from a magazine. Defendant was twenty-five to twenty-seven years old at the time of the crime. The State offered medical evidence tending to show that Ms. Sawyer had been sexually active for at least six months prior to her being examined on 5 October and 10 October 1988. Carla's mother testified that Carla rarely slept away from home.

The State's evidence also showed that the defendant had sexually assaulted another girl. Carla testified that one night when a girlfriend slept over, the defendant came into the bedroom and struck her on the head with a flashlight. The girlfriend, Spring Fowler, testified that defendant hit Carla over the head with a flashlight and then removed Spring from the bedroom, told her

to drop her pants, and then touched her "private." Carla wrote a friend about the incidents, and that friend gave the letter to the school guidance counselor. The Hertford County Department of Social Services on 5 October 1988 received an anonymous sexual abuse report concerning Carla Sawyer; and Susan Farmer, the Hertford County Social Services Supervisor, met with Carla at the school that morning. Susan Farmer then contacted the police and removed Carla from her home, placing her in a shelter home.

At the close of the State's evidence, defendant moved to dismiss each of the four charges for insufficiency of evidence, pursuant to N.C. Gen. Stat. § 15A-1227. The trial court denied the motion. The defendant then moved to strike the testimony of Spring Fowler, alleging it was: (1) too remote in time; (2) irrelevant and immaterial; (3) prejudicial to the defendant; and (4) not part of the discovery requested and received by the defendant. The trial court denied this motion. Defendant then renewed his motion for a mistrial, and the motion was denied. Defendant's final motion requested the State to elect either the rape or sexual offense charge. The trial court denied this motion.

Defendant presented evidence of an alibi for both 27 September 1988 and 29 September 1988. Defendant testified that on 27 September 1988 he was cutting wood in the morning, and in the afternoon he babysat for Cindy Gore's children until 11:30 p.m. Defendant testified that on 29 September 1988 he was with Harold Gore. Both alibis were corroborated by Cindy and Harold Gore. Defendant testified that he never had sex with Carla, that he never showed Carla any "nudi" magazines, that he never touched Spring Fowler, and that he never had the opportunity to be alone with Carla. Joanne Sawyer Young, Carla's mother, testified that defendant was never left alone with the children and that the times she (Joanne) was not around, defendant and the children were with Harold Gore and his children.

Defendant introduced evidence that Carla was sexually active with Laura Woodard's boyfriend, Gerald Barnes. The defendant, Carla's mother, and Cindy Gore (Carla's aunt) testified that Carla told them that she had sex with Gerald Barnes around 1 October 1988. Furthermore, Carla's mother testified that Carla called her from the shelter and said she (Carla) lied about defendant and that it was Gerald Barnes who had sex with her, not the defendant. Defendant also introduced an undated letter written by Carla to

a boyfriend, identified in the record only as Phillip, stating the following: "I told you that you were the first boy I ever slept with . . . . I'm sorry I cryed [*sic*] that day we were in the barn but it did hurt some."

At the close of the defendant's evidence, the defendant renewed all motions except for the motion for a mistrial. The trial court allowed the withdrawal of the motion for mistrial and denied the other motions. The jury found the defendant guilty of one count of first-degree sexual offense, one count of first-degree rape, and two counts of taking indecent liberties with a child. Defendant appeals.

On appeal, defendant argues five assignments of error. First, defendant contends the trial court erred in denying his motion to dismiss the charges on the ground that the variance between the indictment and the evidence denied him his right to present a defense. Second, defendant contends the trial court erred in instructing the jury that the jury could find the defendant guilty if they believed beyond a reasonable doubt that the defendant committed the crimes "on or about" the dates listed in the indictments. Third, defendant contends that the admission of testimony by Spring Fowler and the admission of the "centerfold-type" magazines were unfairly prejudicial to the defendant. Fourth, defendant contends that the exclusion of letters from Carla to boyfriends was prejudicial to the defendant. Lastly, the defendant contends the trial court erred in entering judgment of life for first-degree sexual offense.

[1] Defendant's first assignment of error contends that the trial court erred in denying defendant's motion to dismiss on the ground of fatal variance between the indictment and the evidence. Citing *State v. Wilson*, 264 N.C. 373, 378, 141 S.E.2d 801, 804 (1965), defendant contends that when a defendant presents an alibi defense, the State must show that the acts alleged in the indictment occurred on the dates set forth in the indictment. Defendant also contends the charges should have been dismissed because the indictment charging rape alleges that the rape occurred 27 September 1988, and the indictment charging first-degree sexual offense alleges that offense occurred 29 September 1988, while Carla Sawyer testified at trial that the intercourse occurred on 29 September and the oral sex on 27 September. We find no error.

In *State v. Everett*, our Supreme Court reviewed the rules regarding proof of temporal specificity in cases of sexual assaults on children:

> Generally, an indictment must include a designated date or period within which the offense occurred. N.C.G.S. § 15A-924(a)(4) (1990). However, the statute expressly provides that "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *Id.* Also, "[n]o judgment upon any indictment . . . shall be stayed or reversed for . . . omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly." N.C.G.S. § 15-155 (1990).
>
> In cases of sexual assaults on children, temporal specificity requisites diminish.
>
> > We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.
>
> *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted). Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs. *See State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987); *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984). "[I]t is sufficient for conviction that the jury is satisfied *upon the whole evidence* that each element of the crime has been proved beyond a reasonable doubt." *State v. May*, 292 N.C. 644, 655, 235 S.E.2d 178, 185 (emphasis added), *cert. denied*, 434 U.S. 928, 98 S. Ct. 414, 54 L.Ed.2d 288 (1977).

328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (emphasis in original).

Carla Sawyer testified that defendant perpetrated rape and other sexual offenses against her on several occasions over a period of six years. She specifically recalled offenses occurring on 27 September and 29 September 1988. The defendant presented an alibi for both dates. The difference between the testimony of the victim as to which offense occurred on which date did not prevent the defendant from presenting his alibi. The inconsistencies were for the jury to resolve. There was thus no error in letting the case go to the jury.

[2] Defendant's second assignment of error contends that the trial court erred by instructing the jury they could find the defendant guilty if they found the defendant committed the offenses "on or about" the dates in the indictment. Defendant contends the instruction was error because the prosecuting witness clearly remembered when the alleged acts occurred. As a result, the defendant relied on an alibi defense for specific dates rather than a general denial. Defendant contends he was not put on notice that he would have to present an alibi for dates other than those set out in the indictments. Defendant argues his alibi defense was compromised by the "on or about" instruction because the "jury could believe defendant's evidence and still convict if it believed he had sex with Carla at some other time."

As we noted in our discussion of the defendant's first assignment of error, our courts have not required that the evidence of the date of alleged offense conform precisely to the date alleged in the indictment, especially in cases of sexual assaults on children. *See State v. Everett, id.* The indictments below charged that the offenses occurred "on or about" two specific dates. The State's evidence was that the specific offenses charged were committed on those dates. The defendant presented an alibi for those dates. If the defendant has been put on notice of the times charged in the indictment, the defendant cannot claim error when the jury instruction uses the same time frame as that given in the indictment. The indictments used the words "on or about" 27 and 29 September 1988. Thus, the defendant was put on notice of the time frame through the indictments, and the conforming jury instruction was not error.

In his third assignment of error, defendant contends the trial court erred by admitting testimony by Spring Fowler that defend-

ant touched her "private" and by admitting into evidence "centerfold-type" magazines. We disagree.

[3] Spring Fowler testified that between six and seven years ago she visited Carla Sawyer at her home. Spring further testified that defendant hit Carla over the head with a flashlight and then removed Spring from the bedroom, told her to drop her pants, and then touched her "private." Carla testified that the defendant would show her magazines which had "centerfold-type" pictures of a guy laying down and a girl sitting on top of his private, and that the magazine was kept in the bathroom under the sheets. Deputy Ernie Sharpe testified that he found the magazines exactly where Carla said they would be, in the bathroom under the linen on a shelf.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1988) allows evidence of prior bad acts by the defendant to prove, among other things, motive, opportunity, plan, and intent. The incident involving Spring Fowler occurred, according to Carla's testimony, during the same time defendant was assaulting her. Spring Fowler's testimony was thus admissible to show defendant's plan of sexual activity with young girls. Likewise, the magazine was admissible to show defendant's intentions and plans to perform specific sexual acts with his victim. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988), establishes two requirements for admissibility: first, that the misconduct be similar in kind to that charged, and second, that the misconduct not be too distant in time to the charged conduct.

Evidence of prior misconduct which shows a relevant state of mind such as intent, motive, plan or opportunity "is deemed admissible and not violative of the general rule prohibiting character evidence." *Id.* at 577, 364 S.E.2d at 119. Defendant, upon presentation of Spring Fowler's testimony, claimed error in the trial judge's denial of his motion for a continuance. Motions for a continuance are at the discretion of the trial judge, and the trial court's decision is reviewable for abuse of discretion only. *State v. Swann*, 322 N.C. 666, 676-77, 370 S.E.2d 533, 539 (1988). We find no abuse of discretion. Because Spring Fowler's testimony was offered for a limited purpose, and the defendant had ample opportunity to cross-examine Spring Fowler, any prejudice to the defendant was minimal and insufficient to constitute reversible error.

[4] Like Spring Fowler's testimony, evidence of the magazines was relevant and admissible under N.C. Gen. Stat. § 8C-1, Rule

404(b) (1988) to show defendant's intentions or plans to commit sexual offenses on the victim. Carla testified that the defendant would show her the pictures, and then perform sexual acts upon her. As evidence of such intent or plan, the magazine was admissible under Rule 404(b).

[5] Defendant's fourth assignment of error contends that the trial court erred in excluding letters Carla wrote to her boyfriends. The letters indicated that Carla had many different boyfriends and indicated some degree of affection. Defendant argues in his brief that the letters suggest that Carla had a series of sexual encounters with several boyfriends, thus explaining the physical evidence of Carla's sexual activity. Defendant contends that in being limited to presenting two isolated incidents of sexual activity between Carla and other males, defendant could not explain the physical findings of repeated sex in the face of the State's ability to argue that defendant was the only one who had constant access to Carla. Thus, the defendant argues, the exclusion of the letters denied the defendant the right to present his defense.

Our review of the letters in question shows that none of the letters excluded refer to sexual activity. Rather, the letters, to and from Carla and her friends, relate to who "likes" whom, and who is "going with" whom. The letters are thus irrelevant to the issue presented, whether defendant committed sexual offenses against Carla. There was no error in excluding the letters.

[6] Defendant's final assignment of error contends that the mandatory life sentence for a first-degree sexual offense constitutes cruel and unusual punishment. In *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985), the North Carolina Supreme Court held that a mandatory life sentence for first-degree sexual offense was constitutional. "[I]t is within the province of the General Assembly to determine the extent of punishment which may be imposed upon those convicted of crimes." *Id.* at 763, 324 S.E.2d at 837. Defendant's sentence does not constitute cruel and unusual punishment.

Defendant's trial was free of prejudicial error.

No error.

Judges PARKER and GREENE concur.

COLSON & COLSON CONSTRUCTION CO., AN OREGON GENERAL PARTNERSHIP, PLAINTIFF v. JAMES A. MAULTSBY AND WIFE, LAUREL R. MAULTSBY, SALLY T. GILMORE, AS SUBSTITUTE TRUSTEE, AND FIRST UNION NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, DEFENDANTS

No. 9018SC119

(Filed 16 July 1991)

Mortgages and Deeds of Trust § 32.1 (NCI3d)— foreclosure— purchase money note—attorney fees

The trial court erred in awarding attorney fees to defendants in a declaratory judgment action to determine defendants' right to attorney fees where defendants sold property to plaintiff; plaintiff executed a purchase money promissory note; the note was secured by a deed of trust which incorporated the purchase money note; the maker of the note agreed to pay the holder reasonable attorney fees not exceeding fifteen percent of the outstanding balance, plus other reasonable expenses incurred in exercising rights and remedies upon default; plaintiff failed to make a balloon payment under the note; checks from plaintiff to defendant for accrued interest and for outstanding principal, accrued interest and taxes were returned for insufficient funds; plaintiff offered to wire funds to the trust account of defendant's counsel; defendant's counsel demanded payment of attorney fees of $24,058.50, representing fifteen percent of $160,389.99, the amount of all outstanding principal, accrued interest, and reimbursement for taxes with interest; plaintiff responded that it did not believe it was obligated to pay that amount of attorney fees; $163,564.47 was subsequently wired to the trust account of defendants, representing the previously agreed amount plus attorney fees of $2500; counsel for defendants returned the payment; foreclosure was instituted; a partial payment was later accepted; and the trial court ordered that defendant recover from plaintiffs in the foreclosure action attorney fees of $24,424.43, trustee's fees, and other amounts. Except for ad valorem taxes, property assessments, and property insurance premiums paid by the purchase money creditor on behalf of the purchase money debtor, a purchase money debtor cannot be forced to elect between paying an amount in excess of the balance purchase price secured by a purchase money deed of trust or forfeiting the property at foreclosure. The balance

purchase money debtor's exercise of his right to redemption cannot be conditioned on the payment of additional moneys not secured by the purchase money deed of trust; to hold otherwise would be to make the purchase money debtor personally liable, a consequence the anti-deficiency statute prohibits. N.C.G.S. § 45-21.38 (1984).

Am Jur 2d, Mortgages §§ 625-628.

Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses, and costs of collection, of specified percentage of note. 17 ALR2d 288.

APPEAL by plaintiff from judgment entered 7 December 1989 in GUILFORD County Superior Court by *Judge James J. Booker.* Heard in the Court of Appeals 30 August 1990.

Brooks, Pierce, McLendon, Humphrey & Leonard, by S. Leigh Rodenbough IV, James H. Jeffries IV, and Daniel M. Sroka, for plaintiff-appellant.

Shope and McNeil, P.A., by Richard I. Shope and Michael L. Burton, for defendant-appellees James A. and Laurel R. Maultsby.

Carruthers & Roth, P.A., by Sally T. Gilmore, for defendant-appellee Sally T. Gilmore, Substitute Trustee.

PARKER, Judge.

Plaintiff instituted this action for declaratory relief under N.C.G.S. §§ 1-253 and 1-254 to determine defendants' entitlement to attorneys' fees under a purchase money note and deed of trust and for injunctive relief under N.C.G.S. § 45-21.34 prior to foreclosure.

Defendants James A. Maultsby and wife, Laurel R. Maultsby, sold property in Greensboro, North Carolina, to plaintiff, Colson & Colson Construction Co., an Oregon general partnership. Plaintiff executed a purchase money promissory note, dated 8 December 1987, in the amount of $162,500.00, payable to defendants Maultsby. Principal and interest at the rate of ten percent were to be paid as follows: Payments of accrued interest only were due on 4 June 1988, 4 December 1988, and 4 June 1989; and a final payment of principal and accumulated interest was due on 17 September 1989. The note was secured by a deed of trust wherein plaintiff as grantor conveyed the property to Richard I. Shope, trustee,

with defendants Maultsby as beneficiaries. The deed of trust incorporated the purchase money note by reference.

The note included an acceleration clause: In case of default in payment of any installment not cured within ten days from the due date, the holder could declare the remaining principal and interest due and payable. The unpaid principal, accrued interest, and all other sums due under the note and deed of trust bore interest at the rate of ten percent after default until paid.

Upon default, an attorney could be employed to enforce the holder's rights and remedies; and the maker agreed to pay the holder reasonable attorneys' fees not exceeding fifteen percent of the outstanding balance owing on the note, plus all other reasonable expenses incurred by the holder in exercising any rights and remedies upon default. Rights and remedies as provided both in the note and deed of trust were cumulative and could, in the discretion of the holder, be pursued singly, successively, or together against the property described in the deed of trust or any other funds, property or security held by the holder for payment or security. Failure to exercise any right or remedy did not constitute waiver or release.

Under the deed of trust, if foreclosure was commenced but not completed, the grantor agreed to pay all expenses incurred by the trustee and a partial commission computed on five percent of the outstanding indebtedness according to the following schedule: one quarter thereof before the trustee issued a notice of hearing; half thereof after issuance of the notice; three quarters after the hearing; and the greater of the full commission or minimum after the initial sale.

The note and deed of trust were assigned to defendant First Union National Bank ("FUNB") as collateral security for the payment of monies owed FUNB by Maultsby Orthopaedic Clinic; FUNB later reassigned the note and deed of trust to defendants Maultsby. Defendant Gilmore was appointed as substitute trustee under the deed of trust. Based on FUNB's reassignment of the note and deed of trust, on 27 November 1989, plaintiff filed notice of voluntary dismissal of its claims against FUNB.

Plaintiff made the three payments of accrued interest in timely fashion. Plaintiff was, however, unable to make the balloon payment of principal and interest due on 17 September 1989. Prior to 17

September plaintiff mailed to defendant a check in the amount of $8,125.00, representing accrued interest. The check was returned for insufficient funds. On 21 September 1989 plaintiff made the $8,125.00 payment by wire transfer. By letter dated 20 September 1989, defendants Maultsby declared plaintiff in default under the note and demanded all amounts due. The letter advised that if the entire principal and accrued interest were not paid within five days, foreclosure would commence, and if foreclosure was commenced, the trustee would seek fees in the amount of fifteen percent of the total amount due, plus reasonable attorneys' fees. In addition the letter stated that under N.C.G.S. § 6-21.2, the note holder could collect attorneys' fees in the amount of fifteen percent of the outstanding principal and interest if not paid within five days from the date of written notice and that if the entire principal and interest was not paid within five days from 20 September 1989, the note holder would exercise its right to charge and collect attorneys' fees in the amount of fifteen percent of the entire principal and interest due.

On 26 September 1989 J. Wallace Gutzler, general counsel for plaintiff, and counsel for defendants Maultsby agreed that the time for payment without incurring attorneys' fees would be extended by two days. It was agreed that defendants Maultsby would accept $160,389.99, which represented all outstanding principal and accrued interest, as well as reimbursement for taxes, with interest thereon, paid by these defendants. On 27 September 1989 defendants Maultsby received a check from plaintiff in the agreed amount, but the check was subsequently returned for insufficient funds.

Upon realizing the check had been dishonored and verifying that plaintiff had sufficient funds to make payment, on 11 October 1989 plaintiff's general counsel offered to wire the agreed sum to the trust account of counsel for defendants Maultsby. Defendants' counsel demanded payment of attorneys' fees in the amount of $24,058.50, representing fifteen percent of $160,389.99. Plaintiff's general counsel responded that plaintiff did not believe it was obligated to pay attorneys' fees in this amount.

On 12 October 1989 plaintiff wired $163,564.47 to the trust account of counsel for defendants Maultsby. In his letter dated 11 October 1989, plaintiff's general counsel explained that this amount represented the previously agreed amount, plus attorneys' fees in the amount of $2,500.00. The letter stated that the transfer

of funds was conditioned upon defendants' prompt reconveyance of the deed of trust and note marked "paid" and proposed that the issue of reasonableness of attorneys' fees be submitted to the state bar or a judge of superior court.

Counsel for defendants Maultsby returned plaintiff's payment by letter dated 12 October 1989, and demanded payment of $189,464.89, which represented principal and interest of $161,216.42, attorneys' fees of $24,182.46, trustee's fees of $4,030.41, and costs of $35.60. The same day defendants Maultsby caused defendant Gilmore as trustee to institute foreclosure proceedings on the property securing plaintiff's indebtedness.

On 21 November plaintiff made a partial payment to defendants Maultsby in the amount of $161,064.47. This sum represented the principal balance, interest from 4 June to 12 October, property taxes paid by defendants Maultsby, and interest thereon, minus a deduction for the $8,125.00 paid by plaintiff on 21 September. Defendants Maultsby accepted this amount as partial payment of plaintiff's obligation to them. Principal and interest actually accrued on 21 November was $162,829.56, which represented principal and interest as of 12 October in the amount of $161,064.47, and interest to 21 November in the amount of $1,765.09.

In its judgment dated 7 December 1989, the trial court after making the requisite findings and conclusions, ordered that defendants Maultsby recover from plaintiff in the foreclosure action (i) attorneys' fees of $24,424.43, representing fifteen percent of the outstanding principal and interest balance as of 21 November 1989; (ii) trustee's fees of $4,070.74, representing two and one-half percent of the outstanding principal and interest balance as of the same date; (iii) the outstanding principal balance of $1,765.09; and (iv) interest at ten percent per annum on the attorneys' fees, trustee's fees, and principal balance from 21 November 1989 until paid. In addition, defendants Maultsby were to recover (i) additional trustee's fees after hearing and/or sale, as provided in the deed of trust, and (ii) filing fees; recording fees; service costs; and facsimile, postage, and copying charges incurred by the trustee upon completion of the foreclosure or until all sums due were paid and the property redeemed. The trial court also granted plaintiff's motion for a stay of the foreclosure proceedings begun by defendants.

The first question raised in this appeal is whether the purchase money creditors are entitled to add their attorneys' fees to the

amount necessary to satisfy the obligation secured by a purchase money deed of trust when the purchase money debtor in default exercises his right of redemption to prevent foreclosure on the property conveyed in the purchase money deed of trust. Plaintiff argues that under *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988), a purchase money deed of trust creditor/seller is precluded by the anti-deficiency statute, N.C.G.S. § 45-21.38, from recovering attorneys' fees from the debtor/purchaser. Defendants contend that since, unlike in *Merritt*, no deficiency is being sought, N.C.G.S. § 45-21.38 is inapplicable, and the only question is the amount of the indebtedness owed, not the source from which it is to be paid.

The anti-deficiency statute provides:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same . . . .

N.C.G.S. § 45-21.38 (1984).

Without question the present action does not involve a deficiency after foreclosure. Certain language in *Merritt*, and particularly the Court's reiteration of the legislative intent underlying the anti-deficiency statute, strongly suggest, however, that this distinction is not determinative in a purchase money note and deed of trust transaction. The Court noted that a "mechanically literal and restrictive" interpretation of the anti-deficiency statute was not acceptable and re-emphasized its statement in *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979), that the intent of the legislation was the protection of vendee/mortgagors from oppression by vendor/mortgagees. *Merritt*, 323 N.C. at 334, 372 S.E.2d at 562. The Court further explained that

> "the manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate

> and the securing instruments state that they are for the purpose of securing the balance of the purchase price."

Id. at 335, 372 S.E.2d at 562 (quoting *Realty Co. v. Trust Co.*, 296 N.C. at 370, 250 S.E.2d at 273).

The Court in *Merritt* acknowledged that attorneys' fees and expenses associated with foreclosure of a purchase money deed of trust are not part of the purchase price. 323 N.C. at 335, 372 S.E.2d at 562. The Court noted further, "Payment of the costs and expenses required by N.C.G.S. § 45-21.31(a) is not the obligation of the purchase money debtor whose deed of trust is being foreclosed." *Id.* at 336, 372 S.E.2d at 563. Relying on its reasoning in *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985), that a purchase money debtor cannot waive the protection of the anti-deficiency statute, the Court held that the agreement in the note to pay attorneys' fees could not be a waiver of the limitation on the purchase money creditor's right to recover only from the property conveyed. *Merritt*, 323 N.C. at 336, 372 S.E.2d at 563. Finally, the Court in *Merritt* also rejected the argument that N.C.G.S. § 6-21.2 permitted recovery of attorneys' fees, holding that the anti-deficiency statute, which deals specifically with default on a purchase money note and deed of trust, controls over the statute for collection of indebtedness in general, N.C.G.S. § 6-21.2. 323 N.C. at 337, 372 S.E.2d at 563-64.

Guided by the principles enunciated in *Merritt* and also by the equitable principle protecting a purchase money debtor's right of redemption, *see Riddick v. Davis*, 220 N.C. 120, 16 S.E.2d 662 (1941), we are of the opinion that, except for ad valorem taxes, property assessments and property insurance premiums paid by the purchase money creditor on behalf of the purchase money debtor, a purchase money debtor cannot be forced to elect between paying an amount in excess of the balance purchase price secured by a purchase money deed of trust or forfeiting the property at foreclosure. The purchase money deed of trust creditor cannot bring an action on the note to recover the purchase price either before or after foreclosure, *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985); *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979), and is strictly limited to the property which was conveyed for purposes of securing the balance of the purchase price. *Merritt*, 323 N.C. at 335, 372 S.E.2d at 562. The promissory note in the present case states on its face that it is "given as purchase money,

and is secured by a Purchase Money Deed of Trust." The note is incorporated by reference into the deed of trust. Under *Merritt* attorneys' fees are not part of the purchase price. Hence, even if the trustee were to foreclose on the purchase money deed of trust, the purchase money creditor's attorneys' fees would not be a secured obligation. The purchase money debtor's exercise of his right of redemption, therefore, cannot be conditioned on the payment of additional moneys not secured by the purchase money deed of trust. To hold otherwise would be to make the purchase money debtor personally liable, a consequence the anti-deficiency statute, as interpreted by our case law, prohibits. *Barnaby v. Boardman*, 313 N.C. at 570, 330 S.E.2d at 602-603.

The possibility that the purchase money creditor may be the purchaser at foreclosure and that the property may have a value in excess of the balance of the purchase price does not alter this result. The purpose of the anti-deficiency statute is to prevent oppression of a purchase money debtor by a purchase money creditor. The purchase money debtor has both an equitable and statutory right to redeem. *Riddick v. Davis*, 220 N.C. 120, 16 S.E.2d 662 (1941); N.C.G.S. § 45-21.20 (1984). The law favors the party the policy was designed to protect.

For the foregoing reasons we hold that the trial court erred in awarding attorneys' fees to defendants. As we have held that defendants are not entitled to attorneys' fees, we do not address plaintiff's remaining contentions. The judgment is vacated and the action remanded for further proceedings, as necessary, not inconsistent with this opinion.

Vacated and remanded.

Judges JOHNSON and PHILLIPS concur.

ELLA LINDSEY, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANTS

No. 9014DC1033

(Filed 16 July 1991)

1. **Rules of Civil Procedure § 56.3 (NCI3d)— summary judgment motions—waiver of objection to affidavits**

Plaintiff waived objection to the admissibility of affidavits submitted by defendants in a hearing on a motion for summary judgment by failing to object to the affidavits or to move to strike them.

Am Jur 2d, Summary Judgment § 18.

2. **Insurance § 68.7 (NCI3d)— insurance settlement—uninsured motorist—inclusion of medical payments—issue of material fact**

A genuine issue of material fact was presented as to whether an insurance settlement was only for plaintiff's uninsured motorist claim or included plaintiff's claim under the medical payments provision where defendant presented an affidavit of its claims adjuster that she informed plaintiff's attorney that the $4,000 paid to plaintiff was in settlement of claims under the uninsured motorist and medical payments provisions, but plaintiff submitted an affidavit by her attorney that the settlement was for plaintiff's uninsured motorist claim and that the adjuster never informed him otherwise.

Am Jur 2d, Automobile Insurance § 291.

3. **Insurance § 68.7 (NCI3d)— automobile insurance—medical payments—family member—summary judgment improper**

Defendant insurer failed to show that it was entitled to summary judgment in plaintiff's action to recover under the medical payments provision of an automobile policy issued to her mother where it submitted an affidavit by its claims manager that plaintiff is not a family member of the insured as that term is defined by the policy, but the policy was not included in the record on appeal, and the appellate court cannot determine the significance of the allegation that plaintiff is not a family member of the insured.

Am Jur 2d, Automobile Insurance § 287.

Judge EAGLES concurring in the result.

Judge LEWIS concurs only in the concurring opinion.

APPEAL by plaintiff from judgment entered 5 July 1990 in DURHAM County District Court by *Judge William Y. Manson.* Heard in the Court of Appeals 8 May 1991.

Robert T. Perry for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Loann S. Meekins, for defendant-appellee North Carolina Farm Bureau Mutual Insurance Company.

Reynolds, Bryant & Patterson, P.A., by Lee A. Patterson, II, for defendant-appellee Nationwide Mutual Insurance Company.

GREENE, Judge.

Plaintiff filed this action on 2 October 1989 against defendants, Nationwide Mutual Insurance Company (Nationwide) and North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau), seeking recovery of medical expenses under policies issued by Nationwide and Farm Bureau. On 5 July 1990, the trial court granted summary judgment in favor of defendants Nationwide and Farm Bureau. Plaintiff appeals.

In her complaint, plaintiff alleges that on 2 October 1988, plaintiff was a passenger in a car which was involved in a collision with a hit and run driver. The car in which plaintiff was a passenger was owned and operated by Pearline Ragland, and insured by Nationwide under a policy providing medical payment coverage of $2,000.00 and uninsured motorist coverage of $50,000.00. At the time, plaintiff's mother was insured by Farm Bureau under a policy which provided medical payment coverage of $1,000.00 per person. As the result of injuries sustained in the collision, plaintiff had medical bills totaling $1,064.20.

On 30 June 1989, plaintiff executed an agreement entitled "Release and Trust Agreement—UMC" which provided, in part, that for the consideration of the sum of $4,000.00, plaintiff "does forever release and discharge Nationwide of and from all claims of whatsoever kind and nature prior to and including the date hereof growing out of the Uninsured Motorist Coverage of an Automobile Insurance Policy . . . issued by Nationwide to Pearline

Ragland, and resulting or to result from an accident which occurred October 1, 1988 at or near Durham, NC." Nationwide issued a check in the amount of $4,000.00 payable to plaintiff and her attorney. At the bottom of the check, dated 28 June 1989, are the handwritten words "Full Accord and Satisfaction of All Claims."

Plaintiff subsequently demanded payment of her medical expenses under the medical payment coverage provisions of the policies issued by Nationwide and Farm Bureau. Both companies refused to make payment, and plaintiff instituted this action.

In support of its motion for summary judgment, Nationwide submitted the affidavit of Sheila Geibig, a claims adjuster for Nationwide. The affidavit states in part:

> 5. That on June 23, 1989, and again on June 28, 1989, I spoke with [plaintiff's] attorney, Robert T. Perry, by telephone and negotiated [plaintiff's] claim with him.
>
> 6. That on June 28, 1989 I made an offer to settle [plaintiff's] claim for $4,000.00 to Mr. Perry, her attorney. The $4,000.00 was offered in full and final settlement of all her claims arising from the accident of October 2, 1988. I specifically informed Mr. Perry that this offer was for settlement of the lost wages, medical bills, and pain and suffering asserted by his client. I further specifically informed Mr. Perry that this offer included the asserted claims of his client under the Uninsured Motorist coverage portion of Ms. Ragland's policy and the Medical Payment Coverage portion of Ms. Ragland's policy.
>
> 7. That on June 28, 1989, Mr. Perry indicated that on behalf of his client, he accepted the above-referenced offer of $4,000.00 to settle her claim.

In opposition to Nationwide's motion for summary judgment, plaintiff submitted the affidavit of her attorney, Robert Perry. Perry's affidavit states in part:

> 4. That on June 28, 1989 a settlement was obtained to settle the uninsured motorist claim with Nationwide Insurance Company for the sum of $4,000.00. Demand was also made for payment of medical payment claim under Ms. Perline Ragland policy [sic]. Ms. Shelia [sic] Geibig stated that she would be making a payment for medical bills incurred by Ms. Lindsey

in the said accident. However, no such payment was made. At no time did Ms. Geibig inform me that the offer of $4,000 included settlement for portion [sic] of Ms. Ragland's Medical payment Coverage.

In support of its motion for summary judgment, Farm Bureau submitted the affidavit of James Beckley, a district claims manager for Farm Bureau. This affidavit refers to an "attached policy of insurance" which was issued to plaintiff's mother, Mary V. Betts. We note, however, that this policy is not included in the record on appeal. The affidavit further states, in part:

3. I have reviewed the deposition testimony of Ella Lindsey and based on the information she provided at her deposition, Ella Lindsey was not a *family member* of Mary V. Betts on October 2, 1988, as said term is defined in the DEFINITIONS section of the insurance policy issued to Mary V. Betts and applicable on October 2, 1988.

4. On or about August 24, 1989, a claim representative of North Carolina Farm Bureau Mutual Insurance Company was informed by Nationwide Insurance Company that Ella Lindsey received payment in the amount of $1,064.20 for her medical payment claim arising from the accident of October 2, 1988, said payment made pursuant to the $2,000.00 medical payment coverage provided by Ms. Pearline Ragland's insurance policy issued by Nationwide.

The issues are: (I) whether plaintiff may for the first time on appeal argue that the admission of the affidavits of Sheila Geibig and James Beckley was error in that the affidavits contain evidence of negotiation, compromise and settlement, made inadmissible by N.C.R. Evid. 408; and (II) whether the trial court erred in granting summary judgment in favor of (A) Nationwide, and (B) Farm Bureau.

We first note that affidavits supporting or opposing a motion for summary judgment "shall set forth such facts as would be admissible in evidence . . . ." N.C.R. Civ. P. 56 (1990). A release agreement, such as the one executed by plaintiff in this case, is subject to the parol evidence rule. G. Couch, *Couch on Insurance* § 60:20 (2d ed. 1983). Thus, where the language in the release is unambiguous, construction of the release is a matter of law for the court, and parol evidence as to the facts surrounding execu-

tion of the release may not be introduced to contradict or vary the written terms. Therefore, if the release in this case is without ambiguity, and if the facts set forth in the affidavits contradict or vary the written terms of the release, then the facts contained in the affidavits would not be admissible in evidence and are, therefore, incompetent to support a motion for summary judgment.

However, we do not address these questions on this appeal because the issue is not properly presented. The parol evidence rule is a rule of substantive law and not a rule of evidence. H. Brandis, *Brandis on North Carolina Evidence* § 251 (1988). There is a split of authority regarding the legal effect of failing to object at trial to the admission of parol evidence. Some courts have held that such evidence, in the absence of an objection, is to be considered by the trial court, while other courts have held that such evidence must be disregarded by the trial court even in the absence of an objection to its admission. *See* Annotation, *Modern Status of Rules Governing Legal Effect of Failure to Object to Admission of Extrinsic Evidence Violative of Parol Evidence Rule*, 81 A.L.R.3d 249 (1977). However, North Carolina follows the former rule holding that, in the absence of an objection to its admission, the trial court is to consider parol evidence. *Bishop v. DuBose*, 252 N.C. 158, 164, 113 S.E.2d 309, 314 (1960) (parol evidence admitted without objection must be considered on question of nonsuit); *Scott v. Green*, 89 N.C. 278, 280 (1883) (where no objection is made to parol evidence party cannot complain that jury was permitted to hear the evidence). The record in this case does not show that plaintiff objected to the affidavits submitted by either of the defendants. Therefore, the facts set out in these affidavits were competent evidence to be considered by the trial court in ruling upon the motions for summary judgment.

I

[1] Plaintiff first argues that the affidavits of both Sheila Geibig and James Beckley contained evidence of settlement negotiations made inadmissible by N.C.R. Evid. 408 (1988), and were, therefore, incompetent to support defendants' motions for summary judgment. N.C.R. Civ. P. 56 (1990); *Borden, Inc. v. Brower*, 17 N.C. App. 249, 253, 193 S.E.2d 751, 753, *rev'd on other grounds*, 284 N.C. 54, 199 S.E.2d 414 (1973) ("[a]ffidavits filed in support of or in opposition to a motion for summary judgment 'shall set forth such

facts as would be admissible in evidence[ ]' "). Rule 408 provides in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . . . This rule . . . does not require exclusion when the evidence is offered for another purpose . . . .

N.C.R. Evid. 408.

However, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record." N.C.R. Evid. 103 (1988); *see Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729-30 (1988) (failure to move to strike defective affidavit waives objection for purposes of summary judgment determination). We do not find an objection or motion to strike the affidavits in the record on appeal. Therefore, assuming *arguendo* that the affidavits were inadmissible under Rule 408, plaintiff cannot assert her admission as error on appeal.

II

Plaintiff next argues the trial court erred in granting summary judgment for Nationwide and Farm Bureau in that there are genuine issues of material fact regarding the claims against both defendants precluding summary judgment.

> Summary judgment is appropriate if the movant shows no genuine issue of material fact and that he is entitled to judgment as a matter of law. . . . An issue is material when the facts on which it is based would constitute a legal defense which would prevent a non-movant from prevailing. . . . To entitle one to summary judgment, the movant must conclusively establish "a complete defense or legal bar to the non-movant's claim." . . . "The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence." . . . When movant is the defendant, this rule placing the burden on the movant reverses the usual trial burdens. . . . If movant fails in this showing, summary judgment is improper, regardless of whether nonmovant makes

> any showing. . . . "In the absence of such proof, plaintiff [nonmovant is] not required to show anything at the hearing; for in a hearing on a motion for summary judgment[,] the nonmovant, unlike a plaintiff at trial, does not have to automatically make out a *prima facie* case, but only has to refute any showing made 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) (citations omitted).

A

[2] Nationwide's evidence, in the form of Sheila Geibig's affidavit, in support of its motion for summary judgment, tends to show that Ms. Geibig informed plaintiff's attorney that the $4,000.00 was in settlement of plaintiff's claims asserted under the uninsured motorist provision and the medical payment coverage provision of Ms. Ragland's policy. Plaintiff's evidence, in the form of her attorney's affidavit, in opposition to Nationwide's motion for summary judgment, tends to show that the settlement was for plaintiff's uninsured motorist claim, and that Ms. Geibig never informed plaintiff's attorney otherwise.

From the evidence presented upon the motion for summary judgment, there exists a genuine issue of material fact as to whether the settlement included plaintiff's claim for medical expenses under the medical expenses coverage provision of Ms. Ragland's policy. *See Moore v. Beacon Ins. Co.*, 54 N.C. App. 669, 671, 284 S.E.2d 136, 138 (1981), *disc. rev. denied*, 305 N.C. 301, 291 S.E.2d 150 (1982) (whether medical expenses included in release "is for the jury to determine"). Therefore, entry of summary judgment in favor of Nationwide was in error.

B

[3] Farm Bureau's evidence, in the form of James Beckley's affidavit, in support of its motion for summary judgment, alleges only that the policy in question was issued to Mary V. Betts on 2 October 1988, and that plaintiff is not a family member of Ms. Betts as that term is defined by the policy. Though the affidavit states that this policy is attached, it is not included in the record on appeal.

In that the insurance policy in question is not included in the record on appeal, we cannot on appeal determine the significance

of Farm Bureau's allegation that plaintiff is not one of Ms. Betts' family members. Thus, Farm Bureau failed to "conclusively establish 'a complete defense or legal bar to the nonmovant's claim[,]' " *Cheek* at 162, 390 S.E.2d at 458, and is not, therefore, entitled to summary judgment.

We also reject the argument that Beckley's statement, in his affidavit, that Nationwide had already paid plaintiff's medical expenses, entitles Farm Bureau to summary judgment. As we found above, plaintiff submitted evidence in opposition to the motions for summary judgment tending to show the settlement from Nationwide did not include her medical expenses. Thus, there is a genuine issue of material fact on this issue regarding both defendants. Accordingly, the entry of summary judgment in favor of Farm Bureau was in error.

Reversed and remanded.

Judge EAGLES concurs in the result only in a separate opinion.

Judge LEWIS concurs only in Judge EAGLES concurring opinion; concurring only in the result.

Judge EAGLES concurring in the result.

I concur in the result only. I think that here we are bound by this Court's opinion in *Whitehurst v. Corey*, 88 N.C. App. 746, 364 S.E.2d 728 (1988). In *Whitehurst* the Court held that on a motion for summary judgment plaintiff waived any objection to the admissibility of a parol agreement by failing to make a motion to strike.

JO ANN ROUMILLAT, PLAINTIFF v. SIMPLISTIC ENTERPRISES, INC. D/B/A BOJANGLES FAMOUS CHICKEN N' BISCUITS, DEFENDANT

No. 9021SC1119

(Filed 16 July 1991)

Negligence § 57.8 (NCI3d)— parking lot—grease spot—slip and fall—summary judgment for defendant—error

Summary judgment was improperly entered for defendant in a negligence action arising from a fall in a parking lot where plaintiff's evidence was that the parking lot sloped, that it wasn't very clean, and that she slipped in a circular grease spot two and a half or three feet in size which she described as automobile grease. The lack of evidence that defendant knew or should have known of the presence of the grease in the parking lot does not entitle defendant to summary judgment; defendant would be entitled to summary judgment on that basis on its own motion only if it met its burden of showing that it did not know and should not have known of the presence of the grease in its parking lot. Under the conditions and circumstances of the case, the question of whether the grease constituted an obvious condition of which plaintiff and defendant are charged with having equal knowledge must be left to the jury, as well as the question of whether the obviousness, if any, was sufficient to absolve the defendant of all liability.

Am Jur 2d, Premises Liability § 659.

Liability of owner or operator of parking lot for personal injuries allegedly resulting from condition of premises. 38 ALR3d 10.

Judge PARKER dissenting.

APPEAL by plaintiff from judgment filed 23 July 1990 in FORSYTH County Superior Court by *Judge Melzer A. Morgan, Jr.* Heard in the Court of Appeals 17 April 1991.

Frye and Kasper, by W. Everette Murphrey, for plaintiff-appellant.

Hutchins, Tyndall, Doughton & Moore, by Laurie L. Hutchins, for defendant-appellee.

GREENE, Judge.

Plaintiff, Jo Ann Roumillat, filed this negligence action against defendant, Simplistic Enterprises, Inc., d/b/a Bojangles Famous Chicken N' Biscuits, on 18 August 1989. Plaintiff appeals from an order for summary judgment in favor of defendant, filed on 23 July 1990.

Included in the evidence before the trial court at the summary judgment hearing was plaintiff's complaint which alleges in pertinent part:

> That on or about the 21st day of December, 1987, at or about 8:15 o'clock p.m., the Plaintiff, her husband and son were leaving the Defendant's restaurant on the South side; Plaintiff then preceded [sic] to cross with her family the drive thru lane and stepping [sic] up on the small traffic island; then Plaintiff stepped off the small traffic island into an open parking space taking two or three steps when her left foot slipped and she fell on her right knee severely injuring it; the parking lot upon which Plaintiff was walking was made of asphalt and has a sloping grade such that customers and patrons after stepping down off the small traffic island (adjacent to the drive thru lane) walk on a downward slope to their automobiles; that Plaintiff's left foot slipped on a *slick, greasy substance* and other debris which remained on the open parking space which she was crossing when she fell; there were no warning signs or barriers preventing pedestrians or patrons from entering onto the parking area; and that the Defendants, acting by and through their agents or employees knew, or should have known of the dangerous condition existing on their said parking lot hereinabove referred. [Emphasis added.]

Also before the trial court at the summary judgment hearing was plaintiff's deposition. Regarding the parking lot, plaintiff stated in her deposition that "[i]t slopes." She further stated that it "wasn't a very clean area." Regarding the grease in the parking lot, plaintiff described it as "[a]utomobile grease." She described the shape of the grease spot as being circular, and its size as being two and a half or three feet. When asked to describe its texture, plaintiff stated, "Thick, mucky like. It wasn't an oil like you put in a car of that substance." When asked whether she had seen any grease

in the parking lot on that night before it happened, plaintiff stated, "No. It's black. The parking lot is black."

The sole issue on appeal is whether the trial court erred in granting summary judgment for defendant.

Defendant argues, as the sole basis for supporting the summary judgment, that there is no evidence in the record to establish that defendant knew or should have known of the presence of the "slick, greasy substance" in the parking lot. Although we agree with the defendant that there is no such evidence in the record, contrary to defendant's argument this lack of evidence does not entitle defendant to summary judgment. At trial the burden will be on plaintiff to show defendant knew or should have known of the "slick, greasy substance" in defendant's parking lot. *See Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 166, 336 S.E.2d 699, 702 (1985) (plaintiff who slipped and fell on human excrement on floor of defendant's business must, in order to show negligence, prove at trial that defendant knew or should have known of its existence). Upon defendant's motion for summary judgment, however, defendant is entitled to judgment on this basis only if it meets its burden of showing that it did not know, and should not have known, of the presence of the "slick, greasy substance" in its parking lot. *See 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) (burden on movant to show entitlement to summary judgment). The nonmovant, here plaintiff, has no burden to present evidence in opposition to the movant's, here defendant's, motion for summary judgment until the movant produces evidence sufficient to establish its right to judgment as a matter of law. *Id.* Defendant failed in its burden because the record reveals no evidence that defendant did not know, and should not have known, of the "slick, greasy substance" in its parking lot. Therefore, summary judgment for defendant on this basis was error.

Furthermore, given the width, thickness, and texture of the grease, the "other debris" trapped within the grease, the slope of the parking lot, the color of the grease and parking lot, and the fact that plaintiff stepped in the grease while negotiating the parking lot to get to her car, defendant was not entitled to summary judgment on the basis that defendant had no legal duty to warn plaintiff of the grease or to remove the grease from the parking

lot. Although one may expect the presence of some automobile oil in a parking lot, and although an owner or occupier of land generally has no duty to warn of an obvious condition of which the invitee has equal knowledge, "this is certainly not a fixed rule, and *all of the circumstances must be taken into account.*" *Southern Railway v. ADM Milling Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755, *disc. rev. denied*, 307 N.C. 270, 299 S.E.2d 215 (1982) (quoting W. Prosser, *Handbook of the Law of Torts*, § 61, pp. 394-95 (4th ed. 1971)).

> In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee *notwithstanding his knowledge, warning or the obvious nature of the condition, something more in the way of precautions may be required.* . . . It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, *it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough.*

Id.

Under the conditions and circumstances in this case, the question of whether the grease, in the first instance, constituted an obvious condition of which plaintiff and defendant are charged with having equal knowledge must be left to the jury, as well as the second question of whether the obviousness, if any there be, was sufficient to absolve the defendant of all liability.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge PARKER dissents with dissenting opinion.

Judge PARKER dissenting.

I respectfully dissent. The oft stated rule is that the person in possession of property owes an invitee the duty to exercise ordinary care to maintain the premises in a reasonably safe condition and to warn of hidden dangers that have been or could have been discovered by reasonable inspection. *Mazzacco v. Purcell*, 303

N.C. 493, 498, 279 S.E.2d 583, 587 (1981). The possessor of land is not the insurer of the safety of those on the premises. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E.2d 483 (1967). The person in possession has no duty to warn an invitee of an obvious danger or of a condition of which the invitee has equal or superior knowledge. *Harris v. Department Stores Co.*, 247 N.C. 195, 100 S.E.2d 323 (1957). The law assumes that the reasonable person in the exercise of ordinary care for his or her safety, absent a diversion or distraction, will be vigilant to avoid injury in the face of a known and obvious danger. *See Walker v. Randolph County*, 251 N.C. 805, 810, 112 S.E.2d 551, 554 (1960).

The majority cites *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985), but in my opinion the present case is distinguishable from those cases where a person has slipped and fallen on a foreign substance on the floor in a grocery or retail store. In those situations the invitee does not expect such substances to be on the floor and the proprietor has reason to foresee that if such substances are left on the floor a person is likely to fall and suffer injury. Hence, where the substance was placed on the floor by a third party or was of an undetermined origin, the inquiry is whether the injured party can show that the substance or object had been on the floor long enough for the proprietor or his agents in the exercise of reasonable care to have learned of its presence and taken precautions to prevent injury. *Long v. Food Stores*, 262 N.C. 57, 136 S.E.2d 275 (1964).

The presence of automotive oil and grease in parking lots, however, is a matter of common knowledge. One would be hard pressed to find a parking lot, other than one recently paved, that did not have an accumulation of oil and grease deposits in the parking spaces. For this reason, automotive oil and grease in a parking lot are more nearly analogous to ice during inclement, icy weather. *See Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E.2d 483 (1967). The condition being obvious, the invitee is charged with equal knowledge. *Id.* at 448, 154 S.E.2d at 484. *Accord Southerland v. Kapp*, 59 N.C. App. 94, 295 S.E.2d 602 (1982). The proprietor, therefore, has no duty to warn of the presence of automotive oil and grease, and the failure to remove it does not constitute a breach of the proprietor's duty to keep the premises in a reasonably safe condition. From plaintiff's description of it in her deposition, the grease spot on which she fell was not unusual or different from any other grease spot in a parking lot. Plaintiff

testified that the parking lot was well lighted, and from the record there is no evidence that her attention was distracted by any act on the part of defendant.

In my view *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 294 S.E.2d 750, *disc. rev. denied*, 307 N.C. 270, 299 S.E.2d 215 (1982), is distinguishable on its facts. In that case the injured party, an employee of the railroad who regularly worked on the crew that serviced defendant's industry, slipped while performing a switching operation. The evidence showed that grain in the area caused the employee's shoes to be slippery and that "Defendant never swept the area clean in response to complaints about the condition of the tracks." *Id.* at 674, 294 S.E.2d at 755. The Court distinguished *Wrenn*, noting that *Wrenn* involved a one time situation, whereas the employee in *Southern Railway* repeatedly encountered the dangerous condition in the performance of his job. The Court then stated, "Under these circumstances, reasonable care may have required more than a warning of the danger." *Id.* at 674, 294 S.E.2d at 756. The Court further stated: "Defendant was not required to take extraordinary precautions for the safety of its invitees, or to take precautions that would render the operation of its business impractical." *Id.* at 675, 294 S.E.2d at 756 (citations omitted).

Based on the foregoing, defendant has, in my view, met its burden of showing that as to plaintiff's claim for negligence arising out of the presence of automotive grease in the parking lot, an essential element is non-existent, namely, breach of a legal duty owed to plaintiff under the circumstances. *See Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989).

Furthermore, I do not agree with the majority's application of the standard for summary judgment under Rule 56 of the Rules of Civil Procedure. The majority says the lack of evidence that defendant knew or should have known of the slick, greasy substance does not entitle defendant to summary judgment. In *Collingwood* the Court stated that a movant may meet its burden of showing the lack of any triable issue "by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. In the present case plaintiff's answers to interrogatories, filed in November 1989 some eight months prior to hearing on the summary judgment motion, listed the names of

five witnesses, none of whom was to testify as to defendant's prior knowledge of the condition of the premises. Under Rule 26(e) of the Rules of Civil Procedure a party has a duty to supplement its answers to interrogatories. "By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* On the record in the present case, defendant has shown that plaintiff cannot produce evidence to support an essential element of her claim. Plaintiff failed to forecast any competent evidence, or the ability to produce any competent evidence, which would show that defendant knew or should have known of the existence of the automotive grease.

Finally, on the record in this case, under the holding in *Stoltz v. Burton*, 69 N.C. App. 231, 316 S.E.2d 646 (1984), and the cases cited therein, summary judgment was also proper on the claim, if any, based on the slope of the parking lot.

For the foregoing reasons I vote to affirm.

NORTH CAROLINA BAPTIST HOSPITALS, INC. v. MELANIE BETH FRANKLIN, BY HER GUARDIAN AD LITEM, C. THOMAS EDWARDS

No. 8925SC837

(Filed 16 July 1991)

Infants § 2.1 (NCI3d)— hospital services—necessaries doctrine—contract with parents—child not liable

Defendant child is not liable under the necessaries doctrine for hospital services furnished to her by plaintiff following an automobile accident where the services were furnished at the request of the child's parents who expressly contracted with plaintiff to pay for them, and plaintiff elected to obtain a judgment establishing the liability of the parents under an express contract. The inability of the parents to pay their debt to plaintiff hospital did not make the child liable for the debt under the necessaries doctrine so as to permit the hospital to enforce a lien against funds held by the clerk of court for the child.

Am Jur 2d, Infants §§ 58, 72.

Former Judge DUNCAN concurred in the result reached in this case prior to 30 November 1990.

APPEAL by defendant from judgment entered 22 March 1989 by *Judge C. Walter Allen* in BURKE County Superior Court. Heard in the Court of Appeals 14 February 1990.

By this action plaintiff seeks to recover of the minor defendant $16,652.12 for necessary health care services provided her and to enforce a lien against funds of hers held by the Clerk of Superior Court. In defense she asserts, *inter alia*, that her parents contracted for the services and before bringing its suit plaintiff obtained judgment against her parents for the debt that it now asserts that she owes. Following a trial by Judge C. Walter Allen, sitting without a jury, judgment was entered for plaintiff in the amount sued for. The pertinent facts follow:

On 19 March 1986 when she was nine years old defendant Melanie Beth Franklin, who lives in Burke County with her parents, was injured in an automobile accident there, as was her father with whom she was riding. After being treated for a day in a local hospital she was transferred to plaintiff's hospital in Winston-Salem where she remained until 10 April 1986. Upon being admitted to plaintiff hospital her mother, Cathie Franklin, signed papers accepting responsibility for the charges incurred; and when discharged from that admission Mrs. Franklin signed other papers to the same effect. On 11 January 1987 defendant child was readmitted to plaintiff hospital for follow-up care and at that time both parents signed an affidavit assuming responsibility for all the hospital's charges and agreeing to pay $20 per month thereon until they were paid. A financial statement that plaintiff had Mr. Franklin execute at that time shows that he was disabled and receiving monthly Social Security payments of $386, and that Mrs. Franklin was a textile mill employee earning $660 a month. Meanwhile defendant's father, Wayne Franklin, and defendant, by him as guardian *ad litem*, sued Darby Woody, the automobile driver who allegedly caused the accident. In their action defendant child sought damages for her injuries, including pain, suffering and future disability, and her father sought damages for his injuries and property damage and for her medical expenses and lost services. Since Woody had insurance limits of only $25,000 and was judgment-proof, the action was settled for that amount on 30 March 1987 by a consent judgment entered by Judge Gaines, who approved the settlement of the child's claim, ordered that she and Wayne Franklin recover $25,000 of defendant Woody, and directed that $5,000 of that amount, less attorney's fees, be distributed *pro rata* to the health care

providers that had filed lien notices in the case, and that the remaining $20,000, less an attorney's fee of $5,000, be delivered to the Clerk of Superior Court as trustee for the minor defendant. The distributions directed were made; plaintiff received $1,827.27, thereby leaving a balance owing of $16,652.12 for treating the minor child, and the Clerk of Court received $15,000, which it holds as trustee for the child. On the same day the consent judgment was entered Wayne Franklin voluntarily dismissed his action against Woody with prejudice. On 20 July 1987 plaintiff sued defendant's parents for the $16,652.12 balance owed on her bills, and in that action on 21 September 1987 a default judgment was entered by the Clerk which stated that the suit was "on an open account, on which the sum of $16,652.12 is due." On 17 March 1988 this action was filed against defendant child for the same debt.

In entering judgment in this case the trial court found and concluded, *inter alia*, that plaintiff's services were necessary for defendant's health; that defendant's parents had refused and were unable to pay plaintiff's charges; that the expenses of her treatment at plaintiff hospital were a substantial factor in settling her action against the tort feasor and obtaining her estate of $15,000; and that as a matter of law defendant child is liable to plaintiff for the balance owed.

Turner, Enochs, Sparrow, Boone & Falk, P.A., by B. J. Pearce, for plaintiff appellee.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert B. Byrd, Lawrence D. McMahon, Jr. and Sam J. Ervin, IV, for defendant appellant.

PHILLIPS, Judge.

The dispositive issue in this case is whether under the circumstances established defendant child is liable under the necessaries doctrine for the hospital services furnished her by plaintiff. The following legal principles apply: The necessaries doctrine, under which infants, lunatics and others generally incapable of entering into enforceable contracts may be held liable for necessaries, one of which is medical and hospital care when ill or injured, has been a part of Anglo-American jurisprudence since before the time of Lord Coke. E. Coke, *First Part of the Institutes of the Laws of England* 172a (1836). Under the doctrine an infant who contracts for or obtains necessaries that are not being supplied by his parents

or guardian may not disavow the agreement and can be held liable for their fair value, 1 W. Blackstone, *Commentaries on the Laws of England* *466, *Smith v. Young*, 19 N.C. 26 (1836); and when an infant or lunatic receives necessaries at the request of others, but not upon their credit, the law will imply a promise by the recipient to pay their reasonable value under *quantum meruit*. *Richardson v. Strong*, 35 N.C. 106 (1851). But a child living with its parents cannot be held liable even for necessaries "unless it be proved that the parent was unable or unwilling to furnish the child with such clothes, &c., as the parent considers necessary." *Freeman v. Bridger*, 49 N.C. 1, 4 (1856). "[T]he mere fact that an infant has a father, mother, or guardian does not prevent his being bound to pay what was actually necessary for him when furnished, if neither his parents nor guardian did anything toward his care or support." *Cole v. Wagner*, 197 N.C. 692, 696, 150 S.E. 339, 340 (1929). The best view according to one authority is that the necessaries doctrine is *quasi* contractual in nature, since an infant's contract for necessaries, whether express or implied, is enforceable only to the extent that the amount charged is reasonable. 4 R. Lee, *North Carolina Family Law* Sec. 272 (4th ed. 1981). The general law appears to be that "to render the infant liable, the necessaries must have been furnished to him on his own credit and not on the credit of others." 43 C.J.S. *Infants* Sec. 180 (1978). *See also* 42 Am. Jur. 2d *Infants* Sec. 67 (1969). "It is a well established principle that an express contract precludes an implied contract with reference to the same matter." *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (citations omitted). "When there is a contract between two persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods." *Id.* at 714, 124 S.E.2d at 908 (citations omitted).

Since the record clearly shows that plaintiff's admittedly necessary services for the child were not furnished upon her credit or at her request, but were furnished at the request of the parents, who agreed to pay for them, the judgment holding the defendant child liable has no basis under the foregoing authorities and must be vacated. While the court found, *inter alia*, that plaintiff did not rely upon the credit of the parents in accepting the child as a patient or in rendering the services, the findings are unsupported by competent evidence and are refuted by uncontradicted evidence

that plaintiff is estopped to attack, including the three express contracts it entered into with the parents, the judgment obtained against them, and the testimony of its liability counsellor that the hospital did not rely upon the child for anything, but relied on "the parents to go and apply for Medicaid to cover the expenses." That the parents did not do as the hospital expected (whether because they were ineligible for Medicaid or were misinformed by a Medicaid employee is not clear) did not alter the basis upon which the charges were incurred; and that plaintiff understood this is established by its failure to assert a claim against the child until after it had sued and obtained a judgment against the parents.

The express contracts plaintiff had with the parents and the judgment plaintiff obtained upon them were dispositive of the child's liability under the necessaries doctrine, the only theory sued upon, and defendants' request to so find and conclude should have been granted. Since the charges were incurred upon the parents' credit, the child was not liable for the debt under the necessaries doctrine, 43 C.J.S. *Infants*, *supra*; plaintiff having expressly contracted with the parents for payment, a contract between the hospital and the child for payment cannot be implied, *Vetco Concrete Co. v. Troy Lumber Co.*, *supra*; and plaintiff having *elected* to obtain a judgment establishing the parents' liability for the debt under an express contract, it cannot recover the same debt from the child upon *quasi* contract grounds. *Irvin v. Harris*, 182 N.C. 647, 109 S.E. 867 (1921).

Plaintiff relies, as did the court, upon the statement in *Cole v. Wagner*, 197 N.C. 692, 150 S.E. 339 (1929), as to a child being liable for necessaries when the parents do nothing to obtain them, but the parents here, unlike those in *Cole*, did do something. They did everything that any parent could possibly do for its child in regard to the necessaries except pay for them after the debt was incurred. They were living with, caring for and supporting the child; they arranged for the child to obtain the necessary hospital care both in Morganton and Winston-Salem; they assumed responsibility for the charges and contracted to make small monthly payments on them; and they submitted to the entry of a default judgment against them. Sifted down, the question really is did the inability of the parents to pay their debt to the hospital make the child liable for it under the necessaries doctrine? No authority of which we are aware holds that it did; and we hold that it did not. To hold otherwise, as the court in effect did, would make

children the guarantors of their parents' debts for clothes, lodging, schooling, medical care and other necessaries. Heretofore the necessaries doctrine has not had that scope, and guaranties have not been established in that manner.

Since the child's liability under the necessaries doctrine has not been established, the trial court's findings and conclusions that the expenses of her treatment at plaintiff hospital were a substantial factor in obtaining the $15,000 that the Clerk of Court holds for her have no bearing on the necessaries issue, but they are erroneous in any event. In effect, the court found and concluded that when the recovery was obtained defendant's father was no longer in the case, the judgment was entered only for the minor defendant, and that a major factor in her recovery was the expense of her care at plaintiff hospital. But the record shows without contradiction that: The father was still in the case, and his dismissal was not filed until after the consent judgment was filed; the child did not sue to recover medical expenses and the judgment does not indicate that any medical expenses were awarded to her; Wayne Franklin sued to recover the child's hospital and medical expenses; the judgment was that Melanie Franklin and her father, Wayne Franklin, "recover $25,000 of defendant," and that $5,000 of that amount, less attorneys' fees, be allocated to him for her medical expenses, and $20,000, less attorneys' fees, be allocated to her. And while her doctor did not expect defendant to have any permanent disability, her injuries were not inconsequential and certainly were worth the $20,000 received; *inter alia* she had a fractured spine which required two extensive surgeries, one to insert an internal fixation device in the spine, and the other to remove it. In entering the judgment the judge, of course, knew that the child was not entitled to recover medical expenses, and since the judgment is presumed to be lawful and the record shows that it was, it can only be construed as a recovery by the child of $20,000 in settlement for her injuries and a recovery by Wayne Franklin of $5,000 in settlement of his suit for her medical and hospital expenses.

Reversed.

Chief Judge HEDRICK and Judge DUNCAN concur.

Former Judge DUNCAN concurred in the result reached in this case prior to 30 November 1990.

IN THE MATTER OF: CRYSTAL DAWN GRUBB, RESPONDENT-APPELLANT

No. 9023SC1065

(Filed 16 July 1991)

Schools § 15 (NCI3d)— disrupting teaching of students—juvenile adjudication—insufficient evidence

Respondent juvenile's conduct did not substantially disrupt, disturb or interfere with the teaching of students at a public educational institution within the meaning of N.C.G.S. § 14-288.4(a)(6) so as to support an adjudication of delinquency where the state's evidence tended to show that the respondent was talking to another student in a loud and disruptive voice during a high school class; the teacher reprimanded respondent but she continued to talk; other students were distracted by the episode and started looking up from their work; and respondent stopped talking when the teacher asked her to do so a second time and told her to stay after class.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 23, 54; Schools §§ 263, 267.

Judge ARNOLD dissenting.

APPEAL by respondent from order entered 13 July 1990 in ASHE County District Court by *Judge Michael E. Helms*. Heard in the Court of Appeals 16 April 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane R. Thompson, for the State.

Kilby & Hodges, by Sherrie R. Hodges and Benjamin G. Hurley, Jr., for defendant-appellant.

WYNN, Judge.

From an order imposing juvenile probation following her adjudication as a juvenile delinquent, respondent appeals. For the reasons that follow, the order is reversed.

Evidence for the State tended to show that on 26 March 1990, Crystal Grubb was a student at Beaver Creek High School in Ashe County, North Carolina. State's witness, Donna Hodges, testified that during class Crystal was talking to another student in a loud

and disruptive voice. Ms. Hodges reprimanded Crystal but she continued to talk. Other students were distracted by the episode and started looking up from their work. At that point, Ms. Hodges asked Crystal a second time to stop talking. Crystal looked at her, made a "smurky" face and shrugged her shoulders. Ms. Hodges then asked Crystal to stay after class, at which time Crystal stopped talking.

After class Ms. Hodges assigned a written report to Crystal to make up for the time missed from class. She did not turn in the assignment. Crystal was then referred to the assistant principal, Pamela Scott, for further disciplinary action. Ms. Scott subsequently filed a juvenile petition and Crystal was adjudicated as a juvenile delinquent. From that order, she appeals.

I

Respondent first contends that the trial judge abused his discretion by not granting her motion to dismiss at the close of the State's evidence. She contends that her conduct did not materially interfere with the class being taught.

A motion to dismiss a juvenile petition is recognized by North Carolina statutory and case law. N.C. Gen. Stat. § 7A-631 (1989) provides that "all rights afforded adult offenders" are conferred upon respondents in juvenile adjudication hearings, subject to certain exceptions which are not applicable to the case at bar. In *In re Dulaney*, 74 N.C. App. 587, 328 S.E.2d 904 (1985), this court held that a juvenile respondent "is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *Id.* at 588, 328 S.E.2d at 906.

As in adult proceedings, "[i]n order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged." *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985); *see also State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577 (1982). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence. *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

In this case, respondent was charged with a violation of N.C. Gen. Stat. § 14-288.4(a)(6) (1990), which provides:

(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

. . . .

(6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

The controlling case setting forth the definition of disruptive conduct is *State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967), *cert. denied*, 390 U.S. 1028, 88 S.Ct. 1418, 20 L.Ed. 2d 285 (1968). *Wiggins* was decided under N.C. Gen. Stat. § 14-273, which has been repealed. However, it is instructive as to the meaning of "disruptive conduct." Our Supreme Court said,

> When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a substantial interference with, disruption or and confusion of the operation of the school in its program of instruction and training of students there enrolled.

Wiggins, 272 N.C. at 154, 158 S.E.2d at 42. The fact that the word "interrupt" does not appear in the present statute does not change the plain meaning of the language contained therein. The conduct in question must substantially interfere with the operation of school.

An example of such conduct is contained in *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970). In *Midgett*, students locked the secretary to the principal out of her office, barred entry to the doors and windows with filing cabinets and tables and activated the bell system, resulting in the necessary early dismissal of the students from their classes. This court, applying the language in *Wiggins*, *supra*, held that the students had substantially interfered with the operation of school within the contemplation of N.C. Gen. Stat. § 14-273.

The conduct in the case at bar does not approach the conduct in *Midgett*. While the State contends that the incidents of 26 March 1990 were the last of several incidents of misbehavior by the respondent, the juvenile petition states that "*on or about 26 March 1990*, the juvenile did unlawfully, willfully and intentionally engage in disorderly conduct in a public building, to wit: . . . continued

talking which disturbed, disrupted and interfered with the teaching of students." (emphasis added) Further, at the adjudication phase of the hearing, as to Crystal Dawn Grubb, the trial judge stated in open court, "I'm going to adjudicate her delinquent for the events alleged in the Petition occurring March 26, 1990, talking in class after being told to stop talking."

It should be noted that while the trial judge received evidence of repeated misconduct, such evidence was presented only during the disposition phase when Mrs. Scott testified, "There have been 22 referrals, formal teacher referrals." No evidence of repeated infractions was presented during the adjudication phase. We therefore conclude that the trial judge's finding in the juvenile order that, "The juvenile has been reported to the office numerous times this school year for infractions . . . ," is unsupported by evidence presented at the adjudication phase of the hearing. On the date in question, respondent stopped talking after being asked a second time and the class was only momentarily disrupted. This evidence even in the light most favorable to the State was insufficient to establish a violation of Section 14-288.4(a)(6) and respondent's motion to dismiss should have been granted.

For the foregoing reasons the adjudication of respondent as a juvenile delinquent is

Reversed.

Judge JOHNSON concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

The trial court found respondent to be in violation of N.C. Gen. Stat. § 14-288.4(a)(6) (1986). Intentional conduct which "[d]isrupts, disturbs or interferes with the teaching of students at any public or private educational institution" is addressed. G.S. § 14-288.4(a)(6). Based on the record before this Court respondent's actions "on or about 26 March 1990" come within the statute's ambit.

The majority fails to see that this proceeding is the culmination of extensive disciplinary efforts by the school administration. During its examination of a teacher the trial court inquired about

the general discipline options available to the school, specifically asking about in-school suspension, out-of-school suspension, detention hall and spanking.

The trial court found respondent's conduct was "an actual, material interference with part of the program of instruction" and her "purpose or intent on that occasion was that her conduct would have that effect." After this finding the trial court made the "unsupported" finding of fact mentioned by the majority which has its basis in the disposition phase. This finding of fact goes not to respondent's guilt or innocence, but to one of the special conditions of probation. Respondent is not to associate with four students whose names "on many of those occasions" were sent to the office as people involved with respondent in those numerous incidents. The trial court's findings of fact support the order issued and I would affirm.

SHEILA A. ROGERS, WIDOW, LEWIS ROGERS, FATHER, AND KATHERINE ROGERS, MOTHER OF EARL ROGERS, DECEASED EMPLOYEE, PLAINTIFFS v. UNIVERSITY MOTOR INN, EMPLOYER, AND GREAT AMERICAN INSURANCE CO., CARRIER, DEFENDANTS

No. 9010IC956

(Filed 16 July 1991)

Master and Servant § 79.2 (NCI3d)— workers' compensation— death benefits—separated spouse—adultery

The Industrial Commission erred by finding that the appellant did not qualify for death benefits as a widow who was separated from her husband for justifiable cause where the deceased had had a drinking problem and was abusive; appellant and deceased lived apart for the last 12 years of their marriage; appellant had instituted a support action but had abandoned it; and appellant had lived with another man, but that relationship terminated the year decedent died. N.C.G.S. § 97-2(14) states that the husband and wife must be living apart for justifiable cause, but there is no specific formula for the definition of justifiable cause. It would defy justice to require that the appellant endlessly subject herself to her husband's violent behavior and alcoholism in order to

qualify as a widow under the Workers' Compensation Act, and appellant's return to her husband in 1973 and cohabitation with him until their final separation did not condone his behavior. Furthermore, there is no evidence that the legislature intended an exception under the statute where adultery occurs in a legal marriage.

Am Jur 2d, Workmen's Compensation § 201.

APPEAL by plaintiff, Sheila A. Rogers, from the North Carolina Industrial Commission's Order of 3 May 1990 in which the Full Commission affirmed the decision of Deputy Commissioner Charles Markham in favor of Lewis and Katherine Rogers. Heard in the Court of Appeals 7 May 1991.

James T. Bryan, III for plaintiff-appellant, Sheila A. Rogers.

Charles T. L. Anderson for plaintiff-appellees, Lewis Rogers and Katherine Rogers.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III and Kathryn G. Tate, for defendant-appellees.

LEWIS, Judge.

This appeal presents the Court with the primary issues of whether the Full Commission committed reversible error: 1) with regard to certain findings of facts, 2) in concluding that the appellant was not a "widow" of Earl Rogers, living apart from him for "justifiable cause," and 3) in ruling that the appellant's adulterous affair barred her from qualifying as a widow under N.C.G.S. §§ 97-2(14) and 97-39.

The appellant Sheila Rogers was married to the deceased Earl Rogers in 1965. They remained married until Earl Rogers' death in February of 1987. The appellant and deceased lived apart for the last twelve years of their marriage. The appellant now seeks to overturn the Full Commission's opinion and award which adopted the deputy commissioner's order. The deputy commissioner's order denied the appellant's claim that she was a widow of Earl Rogers under N.C.G.S. §§ 97-2(14) and 97-39, and declared Lewis and Katherine Rogers, the parents of Earl Rogers, as next of kin to the deceased. The order then declared that the deceased's parents were entitled to any death benefits allowed under the Workers' Compensation Act.

The deputy commissioner made the following findings of facts in his order which was later adopted by the Full Commission:

> Early in the marriage, Sheila became aware that Earl had a drinking problem, which continued until his death more than 20 years later. Earl was admitted to the Alcohol Rehabilitation Center at Butner for periods of 30 days in January, 1976; 30 days in January, 1978; and 28 days in November, 1984. Records of Orange County show that one Earl A. Rogers was convicted of public drunkenness January 4, 1973 and May 20, 1974. Records of North Carolina Memorial Hospital covering the period 1966 to 1986 indicate that Earl Rogers had been a chronic alcoholic. . . .
>
> Earl Rogers became quarrelsome, aggressive and sometimes violent when he was drinking. He also was subject to hallucinations and paranoia. . . .
>
> Earl was violent toward Sheila. He knocked her down and her ear was split open. He knocked her off the porch while drunk and broke her ankle. She received hospital treatment for these injuries in 1967, eight years before Sheila and Earl separated. On later occasions, about 1973, Earl, while drinking, threatened her with a knife, tried to cut her throat with a razor, and threatened to kill her with a hunting rifle. Also while drinking, Earl tore up the house, throwing food out of the house, and breaking windows. The window breaking episode occurred just before the couple separated in 1975.
>
> At an indeterminate time, but after physical threats Earl made to her in 1973, Sheila left Earl, and she and her son [by a different man] . . . [moved in with a woman]. . . . This arrangement terminated in about three weeks because Earl came to the woman's house and annoyed them all so much that Sheila decided to move back in with Earl.
>
> There was constant arguing, fussing and quarreling between Earl and Sheila during their marriage. Sheila had decided she did not want her son to grow up in this atmosphere, and that she couldn't take it any more. In the summer of 1975, during a quarrel, Earl told Sheila to get out. She left immediately. . . .
>
> The incidents of violence by Earl against Sheila occurred in 1973 or before. The only violent episode specifically iden-

> tified with her final departure . . . was the breaking of windows in the trailer the day she left.

The appellant then moved to Roanoke with her son. After she moved, she had one telephone conversation with the deceased. He sounded drunk during that conversation. The appellant returned to Chapel Hill for a nonsupport suit which she later abandoned. That was the last time she saw the deceased. The commissioner also found that the appellant lived with another man for at least a year in Roanoke but the relationship terminated the year Earl Rogers died.

Our standard of review in this case is: (1) whether there was any competent evidence before the agency to support its findings of fact and (2) whether the findings of fact support the agency's conclusions of law. *McClean v. Roadway Express, Inc.*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982) (citation omitted). The appellant argues that there is insufficient evidence to support twelve of the commissioner's findings of fact. We have reviewed the transcript of the evidence and hold that there is competent evidence to support the commissioner's findings of fact.

Being bound by the commissioner's findings of fact, we must address whether those findings support the commissioner's conclusions of law that the appellant was not a widow of Earl Rogers. N.C.G.S. § 97-2(14) defines the term widow to include:

> only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

N.C.G.S. § 97-2(14). By statute, a widow is "conclusively presumed to be wholly dependent for support upon the deceased employee," and shall receive benefits under the Workers' Compensation Act. N.C.G.S. § 97-39. Therefore, the appellant's actual dependence is not an issue in this case.

The commissioner made the following conclusions of law:

> Sheila A. Rogers was not living with or dependent for support upon the deceased at the time of his death. As to his desertion, the "constructive abandonment" doctrine has long been recognized in this state, *Somerset v. Somerset* 3 N.C. App. 473, 475, 165 S.E.2d 33[, 34] (1969) and it may consist of either affirmative acts of cruelty or of a willful failure to

provide adequate support. *Powell v. Powell*, 25 N.C. App. 695, 699, 214 S.E.2d 808[, 811] (1975). Here the failure by Earl to provide support to Sheila Rogers after their separation was not willful, as she never asked him for support except in a law suit she abandoned. All the physical cruelties shown by the record to have been inflicted on Sheila by Earl predated their separation by about two years, and were condoned by her when she returned home after a brief separation about 1973. The same is true of the marital misconduct to which "justifiable cause" is usually equated.

. . .

In this case, Earl told Sheila to leave and she left, although she had earlier formed the intention to leave out of concern for her son's upbringing. She made a conscious choice not to remain in the family home, and adhered to that choice the remainder of her husband's life; Earl never disputed that choice.

In *Bass v. Mooresville Mills*, [11 N.C. App. 631, 182 S.E.2d 246 (1971)], the North Carolina Court of Appeals found "sound" authority from other jurisdictions to the effect that "justifiable cause," as employed in statutory provisions similar to G.S. 97-2(14), may not be interpreted as applicable to separations by mutual consent. The Court observed: "(T)here is no reason why a separated wife who has surrendered all right to look to the husband for support while he is living, should upon his death, receive benefits that are intended to replace in part the support which the husband was providing, or should have been providing." The Court of Appeals re-affirmed *Bass* in *Sloop v. Williams Exxon Service*, 24 N.C. App. 129, 210 S.E.2d 111 (1974) and quoted with approval the above passage. Here, Sheila Rogers surrendered her right to look to her husband for support in several ways, among them not pressing her suit for non-support about 1979; following a course of conduct indicating their mutual agreement not to live as husband and wife; and, finally, engaging in an adulterous relationship which preceded Earl's death and continued thereafter.

We hold that the findings of facts do not support these conclusions of law. In the two cases on which the commissioner relied, *Bass* and *Sloop*, the spouses were formally bound by separation agreements. The separation agreements legally defined and limited the parties' rights with respect to each other. Here, however, ac-

cording to the evidence the parties' separation was due to the marital misconduct of the husband. There is no evidence of a separation agreement.

N.C.G.S. § 97-2(14) states that to be a widow the husband and wife must be "living apart for justifiable cause . . . at such time." In *Jones v. Service Roofing & Sheeting Metal Co.*, 63 N.C. App. 772, 306 S.E.2d 460 (1983), this Court held that the relevant time for justifiable separation is for the "months immediately preceding his death." We agree that the period before his death may shed light on the cause of separation at his death. Here, although the plaintiff last endured Earl Rogers' violence and drinking years before his death, we must look to the totality of the circumstances to determine the cause of separation.

There is no specific formula for the definition of "justifiable cause" under the statute. One must consider the complexity and history of the particular relationship in order to determine whether the appellant was separated for justifiable cause in the months before Earl Rogers' death. Here, we are bound by the commissioner's findings that Earl Rogers' heavy drinking never stopped, and that his alcoholism affected his behavior, causing him to be abusive, violent and paranoid. By the time of his death, the deceased had not stopped drinking. It would defy justice to require that the appellant endlessly subject herself to her husband's violent behavior and alcoholism in order to qualify as a widow under the Workers' Compensation Act.

With respect to the commissioner's conclusion that the appellant's return to her husband in 1973 condoned her husband's behavior, this Court in *Earp v. Earp*, 52 N.C. App. 145, 148, 277 S.E.2d 877, 879 (1981), held that a wife is not held to condone physical abuse and indignities by continuing to cohabit with her husband. There was no evidence in this case that the appellant forgave the deceased's behavior before she returned to him on the condition that the alcoholism and abuse cease. The evidence was that he continued to drink to excess after she returned. Therefore, as in *Earp*, the appellant did not condone the continued alcoholism of her husband by returning to him and cohabitating with him before their final separation. After considering the findings of fact by the Commission of the history of violence and alcoholism of the deceased, and its effect on his wife, we hold

that the appellant was separated from her husband for justifiable cause at the time of his death.

We must also consider the effect of the appellant's adulterous relationship on her right to collect under the Workers' Compensation Act. In his order, the commissioner cited *Fields v. Hollowell*, 238 N.C. 614, 78 S.E.2d 740 (1953), as authority that the appellant's adulterous affair barred her from qualifying as a widow under the Workers' Compensation Act. In *Fields*, the Supreme Court of North Carolina held that a woman who was living with an employee as his "common law wife" at the time of his death is not entitled to any compensation under N.C.G.S. § 97-39. The court held that she was not married to the employee and thus could not qualify as a "widow." Here, the appellant was legally married to the deceased. Any dicta in *Fields* that criticizes sexual relationships outside of marriage does not create an exception under the statute that where adultery occurs in a legal marriage, one cannot qualify as a widow under the Workers' Compensation Act. We do not condone adultery. However, it is not within our authority to create such an exception to N.C.G.S. §§ 97-2(14) and 97-39. To find that the legislature intended such an exception, it must be apparent in the statute. We see no evidence of such intention. If they so intend, the legislature will doubtless make it clear.

We hold that the Full Commission erred in finding that the appellant did not qualify as a widow who was separated from her husband for "justifiable cause," under the statute.

Reversed and remanded.

Judges EAGLES and GREENE concur.

BRENDA WATSON GREER, ADMINISTRATRIX OF THE ESTATE OF KANDY RENAE GREER, DECEASED v. BYNUM HARRISON PARSONS AND PHYLLIS McLEOD PARSONS

No. 8925SC814

(Filed 16 July 1991)

1. **Appeal and Error §§ 342, 89 (NCI4th)— wrongful death— motions to dismiss denied—defendants not cross-appellants— appeal interlocutory**

Defendants' contentions in a wrongful death action that the trial court erred by denying their motions to dismiss for failure to state a claim upon which relief could be granted and for failing to join the decedent's parents as necessary parties were not considered because defendants were not cross-appellants, their purported exceptions were excluded from the record by order of the trial judge, and the orders complained of were interlocutory.

Am Jur 2d, Appeal and Error §§ 47, 856, 858, 859.

2. **Death § 31 (NCI4th)— death of fetus—wrongful death action— punitive damages**

The trial court erred by dismissing the claim for punitive damages in a wrongful death action arising from the death of a fetus in an automobile collision. The release executed by the parents did not bar this action by the personal representative of the deceased child because the release by its terms bound only the parents and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death. Moreover, only the child's personal representative, not the parents, had the authority to assert or settle a claim for the child's wrongful death. Furthermore, the claim for punitive damages is not barred by *DiDonato v. Wortman*, 320 N.C. 423, because it is not joined with the settled claim of the parents. N.C.G.S. § 28A-18-2.

Am Jur 2d, Death §§ 16, 191-194, 256.

Right to maintain action or to recover damages for death of unborn child. 84 ALR3d 411.

3. Death § 31 (NCI4th)— wrongful death—stillborn child—loss of child's companionship, services, society—dismissal proper

The trial court did not err in a wrongful death action arising from the death of a fetus in an automobile collision by dismissing claims for loss of the child's companionship, services, and society. While plaintiff's contentions regarding *DiDonato v. Wortman*, 320 N.C. 423, are not without merit, that decision's holdings cannot be revised by the Court of Appeals.

Am Jur 2d, Death §§ 250, 253.

Former Judge DUNCAN concurred in the result reached in this case prior to 30 November 1990.

APPEAL by plaintiff from order entered 17 April 1989 by *Judge C. Walter Allen* in CALDWELL County Superior Court. Heard in the Court of Appeals 12 February 1990.

On 19 October 1986 Brenda Watson Greer, then eight and a half months pregnant, and Danny Robert Greer, her husband, were injured in a collision between their automobile and one operated by one defendant and owned by the other, and their unborn child, Kandy Renae Greer, was killed. On 8 April 1987, without bringing suit, Danny Robert and Brenda Watson Greer settled their claims against the defendants for $53,000 and signed a release discharging the Parsons "for ourselves, heirs, personal representatives and assigns" from "any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action" for any injuries, present or future, stemming from the 19 October 1986 automobile accident. On 28 July 1988 Brenda Watson Greer qualified as Administratrix of the Estate of Kandy Renae Greer, and on 4 August 1988 filed this wrongful death action in which both compensatory and punitive damages are sought. Defendants' motions to dismiss the complaint for failure to state an enforceable claim and for failing to join the parents of the deceased child as necessary parties were denied. In answering the complaint, defendants alleged as an affirmative defense that the release executed by the parents bars the Administratrix's action and moved for summary judgment as to the claims for punitive damages, loss of services and companionship, and pain and suffering. Following a hearing the trial court dismissed the claims for punitive damages and damages for loss of services, companionship, society and the like "[p]ursuant

to *DiDonato vs. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987), and in light of the release signed by Danny Robert Greer and Brenda Watson Greer," but refused to dismiss the claim for pain and suffering.

Wilson, Palmer & Lackey, P.A., by Hugh M. Wilson and Wesley E. Starnes, for plaintiff appellant.

Mitchell, Blackwell, Mitchell & Smith, P.A., by Hugh A. Blackwell and Juleigh Sitton-Wall, for defendant appellees.

PHILLIPS, Judge.

[1] First, we must determine what issues are properly before us. Plaintiff appellant contests the dismissal of the claim for punitive damages and the claim for loss of the child's services, companionship, society and the like. Though both orders are interlocutory, they are immediately appealable and properly before us because of plaintiff's right to have all claims concerning the child's death tried by the same jury. G.S. 1-277; G.S. 7A-27; *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976). Defendants, dubbing themselves as "Appellees/Cross-Appellants," argue in their brief that the trial court erred in denying their motions pursuant to Rule 12(b)(6) and (7), N.C. Rules of Civil Procedure, to dismiss plaintiff's complaint for failing to state a claim for which relief can be granted and for failing to join the parents as necessary parties; and in denying their motion for summary judgment under Rule 56 as to the claim for pain and suffering. Defendants are not cross-appellants and their arguments cannot be considered for two reasons: First, the arguments are not within our authorized scope of review as established by Rule 10(a), N.C. Rules of Appellate Procedure, because the purported exceptions upon which defendants' cross-assignments are based were excluded from the record on appeal by an order of the trial judge that defendants did not except to, and they have no assignments of error "set out in the record . . . in accordance with . . . Rule 10." Second, the orders complained of are not immediately appealable in any event, because all of them are interlocutory and none of them affect a substantial right of the defendants, since the claims that they moved to dismiss, if meritless, will come to nothing in due course anyway. *See* G.S. 1-277; G.S. 7A-27; *Hill v. Smith*, 38 N.C. App. 625, 248 S.E.2d 455 (1978).

[2] Turning now to plaintiff appellant's first contention, we agree that the trial court erred in dismissing the claim for punitive damages and that the dismissal was not warranted by either the decision in *DiDonato v. Wortman, supra*, or the release that Mr. and Mrs. Greer signed for their claims before Mrs. Greer qualified as personal representative of the child's estate and this action was brought. In pertinent part our Wrongful Death Act, G.S. 28A-18-2, provides:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages . . .
>
> (b) Damages recoverable for death by wrongful act include:
>
> . . .
>
> (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
>
> a. Net income of the decedent,
>
> b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
>
> c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
>
> . . .
>
> (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence.
>
> (c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages

recovered, is admissible in an action for damages for death by wrongful act.

Pertinent to this case, in *DiDonato* our Supreme Court overruled earlier decisions of this Court to the effect that a viable, stillborn child is not a "person" within the purview of G.S. 28A-18-2(a) and held that: A viable fetus is a "person" under the Act and the estate of such a person may bring an action for damages. And though, as the opinion states, that was the only question presented, the Court went on to state, in substance, that in such actions:

> Recovery may not be had for loss of the child's services, society, companionship and the like because, in the Court's view, nothing can be known about such a child's abilities, intelligence, industry, or personality and "[a] jury attempting to calculate an award for such damages would be reduced to 'sheer speculation,' " *Id.* at 432, 358 S.E.2d at 494; punitive damages are recoverable when appropriate, but to guard against a defendant being punished twice for a single act of negligence when the parents are the beneficiaries of such a child's estate and have a claim of their own based upon the same negligent acts, the two claims must be joined.

This action by the personal representative of the decedent child is not barred by the release executed by Danny Robert Greer and Brenda Watson Greer for two reasons: First, the release by its terms bound only themselves and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death. Second, under our law the parents, though the child's next of kin, had no authority to either assert or settle a claim for the child's wrongful death; only the child's personal representative has that authority. G.S. 28A-18-1; *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E.2d 253 (1963).

We also hold that the Administratrix's claim for punitive damages is not barred under *DiDonato* or otherwise because it is not joined with the settled claim of the parents. The only purpose of the court's joinder requirement is to facilitate the fair litigation of two claims for punitive damages that are based upon the same act or event; when only one claim is being or can be litigated there is nothing to join. *DiDonato* does not forbid the settlement of claims, joinable or otherwise, or require the doing of vain and foolish things, and joining the parents' defunct claim with the Ad-

ministratrix's pending claim would be a pointless absurdity. Defendants' right not to be assessed with punitive damages that have already been paid can be protected in another, simpler way. If they allege that part of the moneys the parents received in settlement of their claims was for punitive damages defendants would have a right, it seems to us, to support that contention with evidence and have the jury consider it in evaluating the Administratrix's claim for punitive damages, if that claim goes to the jury.

[3] Notwithstanding the Court's statement in *DiDonato* that damages for loss of a stillborn child's companionship, services, society and the like are too speculative to be recoverable under our Wrongful Death Act, plaintiff nevertheless maintains that the dismissal of her claims for such losses was error and that the *DiDonato* decision should be clarified to harmonize with the intention of the General Assembly in enacting G.S. 18A-18-2. The gist of her contentions is that the Wrongful Death Act expressly authorizes the recovery of damages for the loss of a child's society, companionship and the like when proven and that it is not impossible to prove the nature and extent of some of the damages suffered, and the decision as to these losses should be reconsidered.

The contentions are not without basis. The *DiDonato* decision on the claim for the loss of a stillborn child's society and companionship cannot be reconciled with the "basic principle of law and equity that no man shall be permitted to take advantage of his own wrong," *Garner v. Phillips*, 229 N.C. 160, 161, 47 S.E.2d 845, 846 (1948); for the decision permits tort-feasors to escape accountability for the parents' loss of a child's companionship and society when the child is killed before its characteristics are known. Another anomaly is that the decision prevents parents from trying to prove damages that the Act expressly authorizes in all cases under it. The implication in the opinion that damages for a child's lost companionship and society depends entirely upon its personality, character and other traits is far too broad. Everyone who has been a parent—or been around parents with young children—knows that normal parents have a unique and treasured companionship with their young children; not because of the particular characteristics or merits of the children, but because of the needs of the parents to perpetuate themselves and the children's dependency upon them. While the companionship and associations that an adult child has with its parents does depend to some extent upon its character, personality and other traits, kinship is enduring and a parent's

bond with its offspring does not vanish when the child's personality becomes displeasing or its character disappointing. Thus, for a jury to conclude that any normal parent would have enjoyed cuddling, looking after, playing with and training his or her child regardless of its characteristics would not be "sheer speculation"; instead, it would be a rational determination based upon their knowledge of human experience and the law of probabilities. Nor does the opinion take into account that the life-long experiences and insights of jurors accompany them into the box, and that they would know without proof that children bring sorrow and anxiety as well as joy to their parents and would likely appraise the loss of any child's society and companionship accordingly. But none of the decision's holdings or implications can be revised by this Court, and the dismissal of this claim is therefore affirmed.

Affirmed in part; reversed in part.

Chief Judge HEDRICK and Judge DUNCAN concur.

Former Judge DUNCAN concurred in the result reached in this case prior to 30 November 1990.

KENNETH LOONEY, JAMES A. TRIPP, AND KEW C. LOFTIS, TRUSTEES FOR THE CHURCH OF GOD, AND THE CHURCH OF GOD v. THE COMMUNITY BIBLE HOLINESS CHURCH

No. 907SC1001

(Filed 16 July 1991)

Religious Societies and Corporations § 2.1 (NCI3d)— ownership and right to control church property—jury question

In an action by plaintiff denominational church to determine the ownership and right to control local church property, the evidence presented a jury question as to whether the local church intended to establish a connectional relationship with the denominational church with respect to church property so as to give the denominational church the right to control such property where there was evidence tending to show that the local church's predecessor congregation affiliated with plaintiff denominational church in 1955 and remained so affiliated

until 1988, and the discipline of the denominational church manifests an implied assent of local churches to denominational control of local church property, but there was also evidence tending to show that, when the local church affiliated with the denominational church, the local property was deeded to trustees for the local church rather than to the denominational church or trustees for the denominational church, and that this pattern was followed in all property transactions during the entire period of affiliation.

Am Jur 2d, Religious Societies § 42.

APPEAL by plaintiffs from judgment entered 30 June 1990 in WILSON County Superior Court by *Judge I. Beverly Lake, Jr.* Heard in the Court of Appeals 10 April 1991.

Plaintiffs brought this action to determine the ownership and right to control certain church property situated in Wilson County. The individual plaintiffs, as trustees for the Church of God denomination, and plaintiff Church of God prayed that plaintiff Church of God be declared the owner of the property and that the defendant be enjoined from occupying and using the property.

The defendant Community Bible Holiness Church is the successor to the Community Church of God, which in turn was the successor to the Batts Chapel Free Will Baptist Holiness Church. At the time this action was brought defendant Community Bible Holiness Church was occupying and in control of the disputed property.

At trial, evidence was presented relating to the record title transactions affecting the church property and the relationship between defendant local church and the Church of God denomination.

The following issues were submitted to and answered by the jury:

ISSUE NO. 1:

Is the plaintiff Church of God a connectional church organization?

ANSWER: Yes.

ISSUE NO. 2:

Was the defendant local church prior to August 1988 in a connectional relationship with the plaintiff parent church with respect to property matters?

ANSWER: No.

Upon the jury's verdict, the trial court entered judgment for defendant, declaring it to be the sole owner of the disputed church property.

Plaintiffs appeal from that judgment.

Leon A. Lucas for plaintiffs-appellants.

Bobby G. Abrams for defendant-appellee.

WELLS, Judge.

The fundamental question presented in this case is whether the defendant local church gave up its right to own and control the local church property by affiliating with the Church of God denomination. In their first assignment of error, plaintiffs assert that the answer to that question is "yes" and therefore the trial court erred in not granting their motion at trial for a directed verdict or for judgment notwithstanding the verdict.

As our Supreme Court has noted, it is rarely appropriate to grant a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 of the Rules of Civil Procedure for a party bearing the burden of proof. *See Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979), and cases and authorities cited and discussed therein. In *Burnette*, the Court's resolution of this question focused on the proposition that the credibility of evidence will usually be left to the jury to determine. But the Court recognized that even when credibility of the evidence may not be questioned, conflicting inferences arising on the evidence must be resolved by the jury. We perceive that the case now before us presents more of a conflicting inference than a credibility question.

Plaintiff does not suggest, nor do we perceive, that there is any real dispute as to the credibility of the witnesses in this case nor as to the authenticity of the documentary evidence. As our discussion will reflect, the essential nature of the question to be decided is whether, as plaintiffs contend, the defendant local church

by "impliedly" assenting to the "minutes" or discipline of the plaintiff Church of God denomination, gave control of the local church property to the plaintiff Church of God as a matter of law. The evidence pertinent to this question presented at trial is as follows.

Following a six-week tent revival in 1949 near Highway 42 in Wilson County, members of the revival's congregation continued to meet in the home of Leona Ellis and her husband. Combining their income and labor, the group began building their own church in 1949 and completed it in 1950. The congregation organized and named itself Batts Chapel Free Will Baptist Holiness Church. On 15 April 1950 Cooper D. Batts conveyed to the Batts Chapel Free Will Baptist Holiness Church trustees, Herman Sutton, Leona Ellis and Sissie Harris, in fee simple, the property on which the church is located.

In 1955, the Batts Chapel congregation began to affiliate themselves with the Church of God denomination for the purposes of fellowship. On 18 August 1955, the Batts Chapel Free Will Baptist Holiness Church trustees conveyed the church property to Wiley Jackson, Leona E. Ellis and Winifred Harris as trustees for the Community Church of God.

On 13 November 1972 Wallace L. Whitley and his wife, Onnie W. Whitley, conveyed a lot adjoining the church property to the Community Chapel Church of God trustees, Wiley Jackson, Marvin Howell and Jimmy Thompson. During 1972 and 1973 the congregation built a new church sanctuary. This sanctuary construction was partly financed with a $22,500.00 loan from Citizen Savings and Loan Association secured by the church property. The congregation financed further improvements to the church with loans from various local banks, all secured by the church property.

In 1988 the Church of God denomination altered its policy statement regarding how its members should live their daily personal lives. As a result of this alteration in the denomination's policy statement, the Community Church of God disassociated themselves from the Church of God and re-chartered their church as The Community Bible Holiness Church. In response, the State Overseer for the Church of God denomination, B. L. Kelly, dismissed the Community Church of God local board of trustees and appointed a successor state board of trustees, plaintiffs Kenneth Looney, James A. Tripp and W. C. Loftis.

On 30 August 1988 and 28 October 1988 the State Church of God trustees executed deeds conveying to themselves title to the real property occupied by the Community Church of God. On 31 August 1988, the State Overseer revoked the ordination of W. E. Wilson, minister of the Community Church of God. Despite these changes, W. E. Wilson continued to preach and members loyal to the Community Church of God continued to occupy the church. Members of the congregation loyal to the Church of God denomination began worshipping elsewhere.

The Church of God General Assembly Minutes provide that a local board of trustees shall hold title to local church property and that "all such property shall be used, managed, and controlled for the sole and exclusive use and benefit of the Church of God." On this evidence, we proceed to our analysis of applicable law.

While the civil courts have no jurisdiction over and no concern with purely ecclesiastical questions and controversies due to constitutional guarantees of freedom of religious profession and worship, the courts do have jurisdiction to determine property rights which are involved in, or arise from, a church controversy. *See Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973).

Our Supreme Court distinguished connectional or hierarchical churches from congregational churches in *Simmons v. Allison*, 118 N.C. 763, 24 S.E. 716 (1896). Connectional churches are governed by large bodies and individual congregations bear the same relation to the governing body as counties bear to the State. *Id.* Congregational churches are independent republics, governed by the majority of its members and subject to control or supervision by no higher authority. *Id.* Although congregational churches often associate together for mission purposes, these associations are strictly voluntary and have no governmental authority over the individual congregations. *Id.*

As a general rule the parent body of a connectional church has the right to control the property of local affiliated churches, and, as a corollary, this right will be enforced in civil courts. *A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 308 S.E.2d 73 (1983), *cert. denied*, 310 N.C. 308, 312 S.E.2d 649 (1984). However, a local church may have retained sufficient independence from the general church so that it reserved its right to withdraw at any time, and, presumably take along with it whatever

property it independently owned prior to and retained during its limited affiliation with the general church. *Id.*

Viewing the evidence in the light most favorable to defendant non-movant, three central points appear to form the decisive framework. (1) Defendant's predecessor congregation or church affiliated with the plaintiff denominational church in 1955 and remained so affiliated until 1988. (2) The discipline of the denominational church manifest an implied assent of local churches to denominational control of local church property. This evidence, if not contradicted, would make the plaintiffs' case. (3) The third point is the nature of the property transactions themselves. When the defendant local church affiliated with the plaintiff denominational church, the property was deeded to trustees of, or for, the local church, not to the denominational church or to trustees of, or for, the denominational church. This pattern was followed in all property transactions during the entire period of affiliation. Thus this evidence created a jury question as to whether *as to church property* the local church intended to establish a connectional relationship with the denominational church. *A.M.E. Zion Church, supra; Cf. Wyche v. Alexander*, 15 N.C. App. 130, 189 S.E.2d 608, *cert. denied*, 281 N.C. 764, 191 S.E.2d 361 (1972) (local connectional church property deeded to trustees for denominational church).

For the reasons stated, we therefore hold that the trial court properly denied plaintiffs' motion for a directed verdict and for judgment notwithstanding the verdict.

We have carefully reviewed plaintiffs' other assignments of error and find them to be without merit.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

ROY LYNN THOMASSON v. GRAIN DEALERS MUTUAL INSURANCE COMPANY v. JOHNNIE M. TILLEY, D/B/A JOHNNIE M. TILLEY PEST CONTROL SERVICE, COCKERHAM PEST CONTROL COMPANY

No. 9017SC1003

(Filed 16 July 1991)

Insurance § 143 (NCI3d)— homeowners insurance—collapse provision—termite damage

The term "collapse" in a homeowners insurance policy was ambiguous as applied to "hidden insect and vermin damage" and did not require a falling or reduction to a flattened form or rubble. Therefore, plaintiff's forecast of evidence that some of the floors of his house have sagged from one to two inches because of termite damage was sufficient to present a material issue of fact for the jury in an action to recover under the collapse provision of the policy.

Am Jur 2d, Insurance § 515.

APPEAL by plaintiff from order entered 17 July 1990 by *Judge W. Douglas Albright* in SURRY County Superior Court. Heard in the Court of Appeals 10 April 1991.

This case concerns interpretation of a homeowners insurance policy. Plaintiff purchased a homeowners insurance policy from Grain Dealers Mutual Insurance Company to cover a residence he owns and occupies in Elkin. Plaintiff contends that termites have substantially damaged the house's superstructure. Evidence indicates that some of the floors in the house have sagged from one to two inches because of the termite damage. Plaintiff filed a claim with Grain Dealers Mutual which contends that it is not obligated to pay under the policy. At issue is the following provision:

> 8. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
>
> a. Perils Insured Against in Coverage C—Personal Property. These perils apply to covered building and personal property for loss insured by this additional coverage;
>
> b. hidden decay;
>
> c. hidden insect or vermin damage;

d. weight of contents, equipment, animals or people;

e. weight of rain which collects on a roof; or

f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

. . . .

Collapse does not include settling, cracking, shrinking, bulging or expansion.

The trial court granted summary judgment for the defendant. Plaintiff appeals.

Franklin Smith for plaintiff-appellant.

Everett & Everett, by James A. Everett, for defendant-appellee Grain Dealers Mutual Insurance Company.

EAGLES, Judge.

The issue in this case is whether the term "collapse" used in paragraph 8 on page 5 of the insurance policy is ambiguous and accordingly whether the trial court erred in granting summary judgment for the defendant. Plaintiff contends that the term is ambiguous while the defendant argues that "collapse" is unambiguous and means "a falling or reduction to a flattened form or rubble." On this record, we hold that the word "collapse" is ambiguous. Accordingly, we reverse the trial court's order granting summary judgment for defendant.

Plaintiff contends that the policy is ambiguous because it first purports to provide coverage for hidden decay and hidden insect and vermin damage and then attempts to require that the house fall in completely before coverage is available. As it applies to hidden insect or vermin damage, we agree that the term "collapse" is ambiguous. We note that when construing an insurance policy "[t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). To require that the house fall in completely would make the provision of coverage for "hidden" decay and damage illusory.

Defendant contends that *Baker v. Whitley*, 87 N.C. App. 619, 361 S.E.2d 766 (1987), is factually analogous to this case and that there this Court "adopted the definition of the word 'collapse' from the 1977 edition of *Webster's New Collegiate Dictionary*." We find defendant's reliance on *Baker v. Whitley* unpersuasive. In *Baker* an insured sued his insurance company under the collapse provisions of his insurance policy for damages that resulted when a kitchen cabinet became unhinged from the wall and the contents of the cabinet fell to the floor and broke. In the *Baker* opinion this Court noted that the defendant cited definitions of the term "collapse" from other jurisdictions and several dictionary definitions of "collapse" including the definition from *Webster's New Collegiate Dictionary* (1977). The *Baker* court did not adopt a definition of "collapse." It held only that the evidence presented did not satisfy any definition of "collapse" and that defendant was entitled to judgment as a matter of law.

Here, defendant cites two cases from other jurisdictions that have held that the term "collapse" in an insurance policy was unambiguous and that the term meant "a falling or reduction to a flattened form or rubble." *Williams v. State Farm Fire and Casualty Co.*, 514 S.W.2d 856 (Mo. App. 1974); *Central Mutual Insurance Co. v. Royal*, 269 Ala. 372, 113 So.2d 680 (1959). However, our research disclosed that

> courts have taken divergent views as to the meaning of "collapse."
>
> Thus some courts have adopted the view that as used in a provision of this type, the term "collapse" is unambiguous in denoting a falling in, loss of shape, or reduction to flattened form or rubble. . . . On the other hand, even where so qualified by exclusion, some courts have taken the more liberal view that the term "collapse" encompasses more than a reduction to rubble and includes conditions which materially impair the basic structure or substantial integrity of the insured building or a part thereof.

Annotation, Insurance Coverage—"Collapse" of Building, 71 ALR3d 1072, 1077 (1976). Additionally, this Court in *Baker v. Whitley*, 87 N.C. App. 619, 361 S.E.2d 766 (1987), noted that two views had developed in other jurisdictions and that no previous North Carolina case has defined the term "collapse."

In *Fidelity and Casualty Co. v. Mitchell*, 503 So.2d 870 (Ala. Civ. App. 1987), the Alabama Court of Civil Appeals decided a case that is factually virtually identical to the instant case. There the insureds tried to collect for termite damage under a provision in their insurance policy that is identical to the language at issue here. The court held that evidence that a stairway had fallen eight inches from the surrounding walls and that the floor had fallen eight inches toward the middle of the house constituted a collapse within the meaning of the insurance policy. Additionally, the *Mitchell* court distinguished *Central Mutual Insurance Co. v. Royal*, 269 Ala. 372, 113 So.2d 680 (1959), on which defendant relies. The *Mitchell* court noted that in *Royal* "there were cracks in the walls and cracks in the concrete footings, but there was no collapse of the building or any part thereof." The *Mitchell* court went on to say that "[w]hile this insect damage did not reduce the house to flattened form or rubble, it nevertheless constituted a sufficient and actual collapse of some parts of the house, thereby destroying the structural integrity of the building."

The Supreme Court has said, "Any ambiguity in the policy language must be resolved against the insurance company and in favor of the insured. A difference of judicial opinion regarding proper construction of policy language is some evidence calling for application of this rule." *Brown v. Lumbermens Mutual Casualty Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (citations omitted). We think that the fact that courts in various jurisdictions have not agreed on what constitutes a collapse is some evidence that the term is ambiguous.

For the reasons stated, the order of the trial court is reversed and the case is remanded for trial.

Reversed and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS-APPELLEES v. ALL STAR MILLS, INC., LOWDER FARMS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., CONSOLIDATED INDUSTRIES, INC. AND HORACE LOWDER, DEFENDANTS, AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNELL H. RATTEREE, DAVID P. LOWDER, JUDITH R. LOWDER, R. LOWDER HARRELL, EMILY P. LOWDER, CORNELIUS AND MYRON P. LOWDER, INTERVENING DEFENDANTS

No. 9020SC1109

(Filed 16 July 1991)

1. Receivers § 11 (NCI3d) — corporate receivership — claims against assets — accounting

The trial court properly entered an order dismissing claims against a corporation in receivership if an accounting was not provided within thirty days where plaintiffs filed this action in 1979; the corporate defendants were placed in receivership and an accounting was ordered from defendant Horace Lowder; Horace Lowder submitted a schedule of assets which the court found did not comply with its order; Horace Lowder was found in the derivative action in 1983 to have illegally issued stock to himself; Judge McKinnon expressly provided for an accounting by Horace Lowder in his judgment on January 26, 1984; the remaining issues were heard in a bench trial before Judge McKinnon for which judgment was entered on 30 April 1984; Judge Seay denied Horace and Jeanne Lowder's claim upon the receiver for personal property in 1985 because of the failure to provide a comprehensive accounting; Horace and Jeanne Lowder filed claims in 1986 in response to Judge Seay's requirement that all creditors of the receivership file their claims; and Judge Seay found in 1990, among other things, that the two could not prove their claims in the absence of an accounting. Although Horace Lowder contended that Judge McKinnon's 1984 judgments were a final adjudication of the issue of an accounting, Judge Seay's 1979 order for an accounting is still operative, has never been superseded and has yet to be satisfied.

Am Jur 2d, Receivers §§ 218, 345.

2. Receivers § 11 (NCI3d)— corporation—receivership—joint claims

The trial court was justified in denying all claims Jeanne Lowder made with her husband against a receivership until an accounting is made in compliance with a court order. A claimant in the liquidation of a corporation has the burden of proving her claims pursuant to N.C.G.S. § 1-507.6, and a defense against the claims of a party count as a defense to the joint claims of a spouse.

Am Jur 2d, Receivers § 337.

3. Receivers § 11 (NCI3d)— corporation—derivative action—receivership—claimant not a necessary party

Jeanne Lowder's claims against a corporation in receivership arose from and depended on the role of her husband as an officer of the corporation and she is subject to the court's authority over the receivership even if she is not a necessary party to the derivative action. North Carolina law places on Horace Lowder the burden of proving that he was not unjustly enriched by his dealing with the corporation, and he should not be allowed to evade that burden by shifting the claim on the corporation to his wife. N.C.G.S. § 55-30(b)(3).

Am Jur 2d, Receivers §§ 254, 255.

APPEAL by claimant from a judgment entered by *Judge Thomas W. Seay, Jr.*, in STANLY County Superior Court on 9 July 1990. Heard in the Court of Appeals 14 May 1991.

Moore & Van Allen, by Jeffrey J. Davis and James P. McLoughlin, Jr., for plaintiffs-appellees.

Everett, Gaskins, Hancock & Stevens, by E.D. Gaskins, Jr., Jeffrey B. Parsons and Katherine A. O'Connor, for claimant-appellant.

LEWIS, Judge.

[1] Plaintiffs filed this action against Horace Lowder and the corporate defendants on 11 January 1979. On 9 February 1979, Judge Seay, presiding in Superior Court for Stanly County, granted plaintiffs' motion for a preliminary injunction and appointed receivers over the corporate defendants. The Court ordered Horace Lowder

to "account to the receivers for all assets of the corporate defendants . . . and for all of his personal assets so that a determination could be made of whether a constructive trust should be imposed." Horace Lowder subsequently submitted a schedule of assets which the Superior Court found did not comply with the order because it listed no values and virtually no personal property.

In the derivative action, which was tried before a jury in December of 1983, Horace Lowder was found to have illegally issued stock to himself. In his judgment on 26 January 1984, Judge McKinnon expressly provided for an accounting by Horace Lowder, stating that ". . . this judgment or any execution thereon, shall be delayed until the completion of the accounting required by Horace Lowder." The remaining issues were heard in a bench trial before Judge McKinnon for which judgment was entered 30 April 1984.

On 23 August 1985 Judge Seay denied Horace and Jeanne Lowder's claim upon the receiver for personal property because of Horace Lowder's failure to provide a comprehensive accounting. On 6 June 1986 Judge Seay required all creditors of the receivership to file their claims by 31 July 1986. Horace and Jeanne Lowder filed claims totalling $1,943,753.76 plus accrued interest. All but two of the claims filed by Jeanne Lowder are: 1) joint claims filed with her husband, or 2) claims that ask for one half of a sum owed her husband individually.

In the 9 July 1990 order from which this appeal is made, Judge Seay found that the transaction which gave rise to the claims of Horace and Jeanne Lowder was unfair to the corporation and hence without merit. He ruled that the claims of Jeanne Lowder could not be severed from those of her husband, that under North Carolina law both claimants bear the burden of proving the fairness of their dealings with the corporations, and that in the absence of an accounting the two cannot prove their claims, warranting dismissal of the claims pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure.

Appellant argues that Judge McKinnon's 1984 judgments are a final adjudication on the issue of an accounting and thus preclude Judge Seay from ordering or conditioning any claims on an accounting. We find appellant's argument to be without merit. On review of the record as a whole, we find that the accounting ordered by Judge Seay in his preliminary injunction was incorporated by reference into orders issued by Judge McKinnon at the conclusion

of both the 1984 trials. We note that in his order of 26 January 1984, Judge McKinnon conditioned execution of the judgment on the completion of "the accounting required of Horace Lowder." Judge McKinnon's language indicates that the order for an accounting was still operative at the conclusion of those trials. This judgment was affirmed on appeal. *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649 (1985). Where Horace Lowder engaged in transactions which were not approved by the corporate defendants or shareholders, the burden is on him to prove that the transactions were just and reasonable. N.C.G.S. § 55-30(b)(3) (1955).

Subsequently, in response to claims of Jeanne and Horace Lowder made on the receivership in 1985, Judge Seay ordered the receivers to retain personal property claimed by the Lowders "until there has been a comprehensive accounting by W. Horace Lowder to the defendant corporations." This order is consistent with N.C.G.S. § 1-507.6, requiring claimants to a receivership to prove their claims. Judge Seay's 1979 order for an accounting is still operative, has never been superseded and has yet to be satisfied.

[2] Jeanne Lowder also argues that the trial court erred in conditioning her claims on Horace Lowder's accounting. A claimant in the liquidation of a corporation has the burden of proving her claims pursuant to N.C.G.S. § 1-507.6. With respect to those claims based on joint ownership, a defense against the claims of a party count as a defense to the joint claims of a spouse. *Underwood v. Otwell*, 269 N.C. 571, 573-74, 153 S.E.2d 40, 42-43 (1967). The trial court was therefore justified in denying all the claims Jeanne Lowder made jointly with Horace Lowder until an accounting is made to comply with the court order.

[3] With regard to the remainder of the claims, Jeanne Lowder's claims arise from and depend on the role of her husband as officer of the corporation. To regard her claims otherwise would be to enable officers of a corporation to defraud their companies and avoid any accounting or detection by acting through their spouses and then allowing a spouse to assert claims. *See* Fletcher's Cyclopedia of Law of Corporations, § 946 (Perm.Ed.) (1990). *See Barber v. Kolowich*, 283 Mich. 97, 277 N.W. 189 (1938). North Carolina law places on Horace Lowder the burden of proving that he was not unjustly enriched by his dealing with the corporation. N.C.G.S. § 55-30(b)(3). He should not be allowed to evade this burden by

shifting the claim on the corporation to his wife. To hold otherwise would be, in the words of Judge Seay, "to eviscerate the North Carolina laws protecting stockholders from the fraud of their corporation officers or directors," in that every officer would be allowed to profit from his or her fraud by making the check payable to a spouse instead of himself. As a claimant on the receivership, Jeanne Lowder bears the burden of proving her claim and as such is subject to all valid defenses. N.C.G.S. § 1-507.6. Accordingly, she is subject to the court's authority over the receivership even if she is not a necessary party to the derivative action.

The trial court found that Horace Lowder's failure to account has made it impossible for the receivers to defend against the claims of Horace and Jeanne Lowder. The trial court is therefore authorized, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, to dismiss the claims of Horace and Jeanne Lowder on their receivership in the event that Horace Lowder fails to provide an accounting within thirty days of the effective date of the order of the trial court. *See Ramil v. Keller*, 68 Haw. 608, 726 P.2d 254 (1986) (in which the Supreme Court of Hawaii affirmed a trial court's invoking of Rule 41(b) in entering judgment against a defendant who failed to account). The trial court's order is, therefore,

Affirmed.

Judges EAGLES and GREENE concur.

TRIAD BANK, PLAINTIFF v. EDUCATIONAL CONSULTANTS, INC. AND CATHERINE A. HARKEY, DEFENDANTS

No. 9018SC1038

(Filed 16 July 1991)

Bills and Notes § 20 (NCI3d)— action on a note—amount of debt—summary judgment for plaintiff—improper

Plaintiff was not entitled to summary judgment in an action on a note for $40,094.97 where defendants' evidence was that the loan was only in the amount of $25,000, that plaintiff later requested that defendant Harkey execute a prom-

issory note in the amount of $15,000, that she never received the $15,000, and that this litigation includes both notes. Defendants' evidence establishes a genuine issue of material fact as to the amount of the debt.

Am Jur 2d, Bills and Notes §§ 244, 1150, 1151.

APPEAL by defendants from judgment entered 20 July 1990 in GUILFORD County Superior Court by *Judge W. Steven Allen.* Heard in the Court of Appeals 11 April 1991.

Turner, Enochs, Sparrow, Boone & Falk, P.A., by Peter Chastain, for plaintiff-appellee.

McCall & James, by Randolph M. James and M. Lee Decker, for defendant-appellants.

GREENE, Judge.

Plaintiff, Triad Bank, filed this action on 30 November 1989 alleging default on a promissory note executed by defendant Educational Consultants, Inc., and guaranteed by defendant Catherine A. Harkey (Harkey). On 2 April 1990, plaintiff moved for summary judgment. Plaintiff's motion was allowed on 20 July 1990 and judgment was entered against defendants in the amount of $40,094.97. Defendants appeal.

In support of its motion for summary judgment, plaintiff filed the affidavit of W. Hugh Black, vice president of plaintiff bank. Black's affidavit states in part:

> 3. That the Plaintiff Bank's loan file relating to Educational Consultants, Inc. contains the original loan documents which include *inter alia*: (a) An Unconditional Guaranty Agreement dated July 11, 1986, having been executed by Catherine Harkey, a true copy of which is attached hereto as Exhibit "A" (and to the Complaint also as Exhibit "A"); and (b) A Negotiable Promissory Note dated September 5, 1989 in the principal amount of $37,598.54, having been executed by Catherine A. Harkey in her capacity as President of Educational Consultants, Inc., a true copy of which is attached hereto as Exhibit "B" (and to the Complaint also as Exhibit "B").
>
> 4. That no payments of principal and/or interest have been made pursuant to the terms of the underlying Note and on

account of this default he instructed the law firm of Turner, Enochs, Sparrow, Boone & Falk, P.A. of Greensboro, North Carolina to send demand letters to the Defendants. A true copy of the demand letter sent to Educational Consultants, Inc. is attached hereto as Exhibit "C." A true copy of the demand letter sent to Catherine A. Harkey, as guarantor, is attached hereto as Exhibit "D." A true copy of a follow-up demand letter is attached as Exhibit "E."

5. That he has personal knowledge of the outstanding balance owed to the Plaintiff by Defendants as a result of their default and that sum is as follows:

Principal	$37,598.54
Interest to March 28, 1990	2,496.43
TOTAL	$40,094.97*

*Per diem interest accrues from and after March 28, 1990 at the rate of $12.36 per day (Triad Bank's prime lending rate plus 2% to float with said prime)[.]

Exhibits A through E, as referred to in the affidavit, were filed with the affidavit.

In opposition to plaintiff's motion for summary judgment, defendant Harkey submitted an affidavit which states in pertinent part:

4. On June 25, 1986, Catherine A. Harkey and Associates took out a $25,000 loan from Triad Bank, $10,000 of which was for operating capital and $15,000 towards the purchase of a 1986 BMW, Serial No. WBADK8300G9660371 (which had a total purchase price of $26,000). The negotiable promissory note signed by me as president of Catherine A. Harkey and Associates is attached hereto and incorporated herein by reference as defendant's Exhibit A. Attached hereto incorporated herein by reference as defendant's Exhibit B is the June 30, 1986 bank statement from Triad Bank of Catherine A. Harkey and Associates. Exhibit B reflects that the proceeds from the $25,000 loan evidenced by Exhibit A were deposited to my business account of June 25, 1986.

5. On June 30, 1986, I wrote two separate checks to Crown Pontiac on the aforesaid business account totalling $15,000. (See Exhibit C attached hereto and incorporated herein by reference.) The $15,000, plus a second party check endorsed

by me to Crown Pontiac on July 8 for $11,000 constituted full payment for the 1986 BMW referenced in paragraph 4 above. (Crown automobile receipts are attached hereto as Exhibit D.)

6. Nevertheless, on July 14, 1986, I was called to Triad Bank where I was informed by Mr. Hugh Black that I needed [to sign a] note and security agreement attached hereto as Exhibit E [in order] to "clear up the paperwork" regarding the car loan referenced in paragraph 4 above. The instant litigation includes *both* the $25,000 note taken by me on June 25 *and* the July 14, 1986 note for $15,000, although I never requested or received the $15,000 reflected on Exhibit E. Thus plaintiff is suing me twice for the single car loan of $15,000.

Exhibits A through E, as referred to in defendant Harkey's affidavit, were filed with the affidavit.

Plaintiff then filed Black's supplemental affidavit in support of plaintiff's motion for summary judgment. This affidavit states that the notes for $15,000.00 and for $25,000.00 are not related to the present case. He further states that the note for $25,000.00 was paid in February, 1987, and that the note for $15,000.00 was paid in August, 1988.

The only issue on appeal is whether defendants' evidence in opposition to plaintiff's motion for summary judgment establishes a genuine issue of material fact such that plaintiff was not entitled to judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c); *Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 353, 396 S.E.2d 327, 330 (1990). The party moving for summary judgment has the burden of showing there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *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). When plaintiff is the movant,

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 Development Corp. v. James, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980).

Here, the movant's (plaintiff's) evidence includes the unconditional guaranty agreement executed by defendant Harkey, as well as a promissory note in the amount of $37,598.54, dated 5 September 1989 and executed by Harkey as president of Educational Consultants, Inc. The note states that it is "payable in full 45 days after date on October 20, 1989 . . . ." In his affidavit, executed 28 March 1990, plaintiff's vice president states that the note is in default in that no payments have been paid on the note, and that principal plus interest total an outstanding balance of $40,094.97.

In opposition, defendants' evidence, in the form of Harkey's affidavit, states that the source of the debt at issue is a loan made by plaintiff to defendant Educational Consultants, Inc. in June of 1986. Harkey states that the loan was only in the amount of $25,000.00, and that plaintiff later requested that Harkey, as president of Educational Consultants, Inc., execute a promissory note in the amount of $15,000.00. Harkey further states that the "instant litigation includes *both* [the] $25,000.00 note . . . *and* the . . . note for $15,000.00," though she never "received the $15,000.00 . . . ."

The supplemental affidavit of plaintiff's vice president states only that the instant litigation has nothing to do with the $25,000.00 and $15,000.00 notes, and that these notes, as shown by the documentary evidence, have already been paid in full.

Plaintiff contends defendants' assertion that they never received the $15,000.00 is an affirmative defense of failure of consideration and, as such, Harkey could not assert this defense in opposition to plaintiff's motion for summary judgment because she did not raise the defense in her answer. We reject this argument. Our case law holds "that unpleaded affirmative defenses raised by evidence adduced at the hearing . . . [can] be considered *in opposition to* a motion for summary judgment." *Dickens v. Puryear*, 302 N.C. 437, 442, 276 S.E.2d 325, 329 (1981), *citing Bank v. Gillespie*,

291 N.C. 303, 230 S.E.2d 375 (1976); *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E.2d 323 (1977).

Defendants' evidence in opposition to plaintiff's motion for summary judgment establishes a genuine issue of material fact as to the amount of the debt. Accordingly, plaintiff was not entitled to summary judgment.

Reversed and remanded.

Judges PHILLIPS and PARKER concur.

SUZANNE McDONALD SMITH, PLAINTIFF v. JOHN WILLIAM SMITH, II, DEFENDANT

No. 9026DC818

(Filed 16 July 1991)

Divorce and Separation § 394 (NCI4th); Appeal and Error § 359 (NCI4th)— child support—findings insufficient—affidavit attached to brief—not part of record

A child support order contained insufficient findings of fact as to the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents, and the affidavit regarding plaintiff's employment and earnings which she attached to her brief was not part of the record on appeal. Upon remand, the revised Child Support Guidelines must be used by the trial court. N.C.G.S. § 50-13.4(c); N.C. Rules of Appellate Procedure, Rules 9(a) and 11(b).

Am Jur 2d, Divorce and Separation §§ 1035, 1039-1041.

APPEAL by defendant from order entered 7 May 1990 by *Judge Marilyn R. Bissell* in MECKLENBURG County District Court. Heard in the Court of Appeals 18 March 1991.

Plaintiff and defendant were married on 19 December 1970. One child was born of the marriage on 25 August 1976. The parties subsequently separated and entered into a separation agreement on 10 April 1980. This agreement was not incorporated into a court order. In the agreement, plaintiff was given custody of the

child and defendant agreed to pay $350.00 per month in child support. On 23 March 1981, the parties were divorced in Mecklenburg County. On 23 May 1983, the parties agreed to amend the separation agreement by increasing defendant's child support payment from $350.00 to $400.00 per month.

On 3 October 1989, plaintiff filed a motion seeking inter alia an award of child support. Prior to the hearing of 30 October 1989, both parties filed financial affidavits. Defendant's affidavit reflected a gross monthly income of $5,276.00. Plaintiff's affidavit contained no information regarding her earnings or employment status. Accordingly, the order of 7 May 1990 made no findings of fact regarding plaintiff's earnings or employment status. Defendant was ordered to pay $914.13 per month in child support, to maintain medical and dental insurance at his place of employment covering the child, and to defray one-half of the child's uninsured medical expenses. Defendant appeals.

Walker & Walker, by John G. Walker, for plaintiff-appellee.

Marshall H. Karro for defendant-appellant.

EAGLES, Judge.

Appellant contends that the trial court erred in failing to make sufficient findings of fact as to the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. We agree.

G.S. 50-13.4(c) provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

To support its order, the trial court made the following findings of fact:

> 5. The level of support needed to meet the reasonable needs of the child for its [sic] health, education, and maintenance is no less than $914.13 per month.

6. The defendant's income is approximately $5,276 per month gross.

7. The defendant is capable of paying $914.13 per month for the partial support of the minor child born of the marriage.

8. The defendant has set up a Clifford Trust to provide $40,000 funds [sic] for the college education of the minor child born of the marriage.

Defendant contends that the trial court's findings of fact regarding the estates, earnings, conditions and accustomed standard of living of the plaintiff and the child were inadequate. We agree.

Initially, we note that the order contained no findings of fact regarding plaintiff's earnings or employment status. From the record, it is clear that the trial court failed to make adequate findings regarding the estates, earnings, conditions, and accustomed standard of living of the child and the parties as required by G.S. 50-13.4(c).

The statute requires that specific findings of fact be made with respect to the factors listed in the statute. *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991); *Boyd v. Boyd*, 81 N.C. App. 71, 78, 343 S.E.2d 581, 585-86 (1986). These findings of fact give the appellate court a basis from which to determine whether the trial court gave "due regard" to these factors. *Id.* The importance of specificity in a trial court's determination of findings of fact was emphasized in *Coble v. Coble*, 300 N.C. 708, 712-14, 268 S.E.2d 185, 189-90 (1980):

> 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. It is a question of fairness and justice to all concerned. . . .
>
> . . . .
>
> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must

> support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto. (Emphasis in original.)

Here the trial court's findings of fact are insufficient to support the order. "[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967).

In an effort to compensate for the absence of any findings by the trial court regarding plaintiff's employment and earnings, plaintiff attached to her appellate brief what she contends is the final page of her affidavit on which are listed her earnings and employment status. This page is not part of the record on appeal. While conceding the absence of the affidavit from the record, plaintiff contends that had this page not been before the trial court at the hearing, plaintiff's "financial affidavit would not have been accepted by the court as an affidavit, it being the page bearing the signature and oath of the plaintiff."

Rule 9(a) of the Rules of Appellate Procedure provides that "[i]n appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9." Additionally, Rule 11(b) of the Rules of Appellate Procedure states that "[i]f all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal." Here the parties stipulated as to the record on appeal. The record to which plaintiff stipulated did not contain this page of the affidavit.

We note that the Child Support Guidelines have been revised, and those revisions govern orders entered after 1 July 1990. G.S. 50-13.4(c1) (1990 Cum. Supp.); A.O.C., Child Support Guidelines, AOC-A-162 (Rev. 7/90). *See Greer v. Greer*, 101 N.C. App. at 351, 352,

399 S.E.2d 399, 400 (1991). Upon remand, these guidelines must be used by the trial court. G.S. 50-13.4(c) (1990 Cum. Supp.).

The new guidelines specifically provide that they are to

> apply as a rebuttable presumption to all child support orders in North Carolina, except as discussed below. The Guidelines must be used for temporary and permanent child support orders. The Guidelines must be used by the Court as the basis for reviewing the adequacy of child support levels in non-contested cases as well as contested hearings. The Court may deviate from the Guidelines in cases where application would be inequitable to one of the parties or to the child. In cases where the award deviates from the Guidelines, however, the Court must provide written findings of fact to substantiate the deviation.

Child Support Guidelines, *supra*, at 2. The party seeking to deviate from the amount of child support provided by the guidelines shall have the burden of proof.

We hold that the order before us is not supported by sufficient findings of fact. These deficiencies require that the order be vacated and the matter remanded. Accordingly, the order is vacated and this case is remanded for additional proceedings not inconsistent with this opinion.

Vacated and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

JOAN BELL LEMONS, PLAINTIFF v. JACKSON B. LEMONS, JR., DEFENDANT

No. 9010DC1193

(Filed 16 July 1991)

Divorce and Separation § 28 (NCI4th)— court-ordered consent judgment—alimony and property settlement—separability—hearing required

A court-ordered consent judgment contained property settlement as well as support provisions where it required the

parties to convert the formal ownership of the marital home "to tenant in common with right of survivorship." Accordingly, where the agreement contained no integration language, an evidentiary hearing was required to determine whether the support and property settlement provisions were separable or integrated before the court could rule on the wife's motion to modify the amount of alimony paid by the husband under the agreement.

Am Jur 2d, Divorce and Separation §§ 695, 843.

APPEAL by defendant from order entered 12 February 1990 in WAKE County District Court by *Judge Russell G. Sherrill.* Heard in the Court of Appeals 4 June 1991.

Hunter, Wharton & Lynch, by V. Lane Wharton, Jr., for plaintiff-appellee.

Luke D. Hyde for defendant-appellant.

GREENE, Judge.

Jackson B. Lemons, Jr. (Husband) appeals from an order filed on 12 February 1990, in which the trial court allowed the motion of Joan Bell Lemons (Wife) for a modification of the amount of alimony paid by Husband to Wife, and increased the monthly alimony payments from $400.00 to $872.00.

Husband and Wife married on 18 December 1959 and separated on 5 December 1977. Wife filed a complaint for divorce, alimony, child custody, and child support on 9 October 1978. On 7 December 1978, the trial court filed an order which was consented to by Husband and Wife. The order states in part:

> 6. The parties have agreed that the [Wife] is entitled to permanent alimony, and beginning December 1, 1978, the [Husband] shall pay to or for the [Wife] the sum of $400 per month . . . .
>
> 7. The [Wife] shall be entitled to occupy and use the family residence . . . without payment of rent to the [Husband], for so long as she shall remain unmarried. This residence shall continue to be owned by the parties until their divorce as tenants by the entirety, and following divorce, the parties shall

take all steps necessary to convert the formal ownership to tenants in common with right of survivorship.

On 2 May 1979, the trial court filed a judgment of divorce which incorporated the order of 7 December 1978.

On 7 December 1989, Wife filed a motion seeking to modify and increase the alimony paid by Husband to Wife due to changed circumstances. A hearing was held on 3 January 1990, and an order was executed 12 February 1990. This order contains the following language:

> Prior to the opening of the hearing on the Motion, the [Husband's] counsel informed the Court that it was the position of the [Husband] that the previous Order and Consent Judgment entered herein on December 7, 1978 was non-modifiable. After hearing argument of counsel in the chambers and reviewing the file, the Court announced that the Order was not ambiguous and was clearly modifiable, and that no evidence would be heard on the [Husband's] contention that the Order was non-modifiable.

The trial court concluded that the order of 7 December 1978 was a modifiable order for alimony and ordered an increase in monthly alimony paid by Husband to Wife.

The dispositive issue is whether the "alimony" payments ordered in the consent order of 7 December 1978 represent true alimony.

At the time the consent decree in question was entered, in 1978, there existed a distinction between a "court approved contract" and a "court ordered" consent judgment. *See Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (abolishing distinction between a "court approved contract" and a "court ordered" consent judgment). Prior to *Walters*, only "court ordered" consent judgments were "modifiable within carefully delineated limitations." *Id.* at 385, 298 S.E.2d at 341. "Court approved contracts" could not be altered without the consent of the parties. *Id.* We agree with the parties that the court decree in question is a "court ordered" consent judgment. The record reveals that the trial court adopted as its own a proposed consent judgment submitted to the court.

However, not all support provisions in a court-ordered consent judgment are modifiable. "If support provisions are found to be

consideration for, and inseparable from, property settlement provisions, the support provisions, even if contained in a court-ordered consent judgment, *are not alimony* but instead are merely a part of an integrated property settlement which is *not* modifiable by the courts." *Marks v. Marks*, 316 N.C. 447, 455, 342 S.E.2d 859, 864 (1986) (emphases in original). This court has stated:

> Whether the support payments are in fact alimony does not depend on whether the order refers to it as "alimony" but instead on whether the support payments constitute "reciprocal consideration" for the property settlement provisions of the order. . . . If the support and property provisions exist reciprocally, the order is considered to reflect an integrated agreement, and the support payments are not alimony in the true sense of the word. . . . Court-ordered support payments which are part of an integrated agreement are not subject to modification by the trial court . . . .

Hayes v. Hayes, 100 N.C. App. 138, 146, 394 S.E.2d 675, 679 (1990) (citations omitted).

To resolve the question of whether an agreement is integrated or non-integrated, we look to the intention of the parties. *Id.* at 147, 394 S.E.2d at 680. If the agreement contains an unequivocal clause regarding integration or if it contains unequivocal integration language, then this clause or language controls. *Morrison v. Morrison*, 102 N.C. App. 514, 520-21, 402 S.E.2d 855, 859 (1991). In the absence of an integration clause and of integration language, the trial court must hold an evidentiary hearing to determine the parties' intent. *Hayes* at 147-48, 394 S.E.2d at 680. At the hearing, there is a presumption that the provisions of the agreement are separable. *Id.* at 147, 394 S.E.2d at 680. "The effect of this presumption is to place the burden of proof on the issue of . . . [integration] on the party claiming that the agreement is integrated . . . ." *Id.* In order to prevail, the party claiming the agreement is integrated must rebut the presumption by proving by a preponderance of the evidence that the parties intended an integrated agreement. *Id.*

In the present case, the consent order entered into between Husband and Wife contains support provisions and property settlement provisions. We reject Wife's argument that paragraph 7 of the order relates to support and not to property settlement. Paragraph 7 provides that the parties shall "convert the formal ownership [of the real property] to tenants in common with rights

of survivorship." Thus, this provision is a property settlement because it altered the title to real property, with the ultimate title holder of the marital home to be decided by survivorship. *See Vettori v. Fay*, 262 N.C. 481, 483, 137 S.E.2d 810, 811 (1964) (noting that N.C.G.S. § 41-2 abolished survivorship as a legal incident of joint tenancy, but does not preclude entering into contracts to provide for survivorship).

Accordingly, an evidentiary hearing was required to determine the intent of the parties regarding whether the provisions of the agreement were separable or integrated and it was error for the trial court to refuse to allow Husband to present evidence on this issue.

Reversed and remanded.

Judges EAGLES and LEWIS concur.

FRANKLIN COUNTY, A N.C. BODY POLITIC, PLAINTIFF v. GEORGE E. BURDICK AND MARY K. BURDICK, DEFENDANTS; JOHN TATUM, FINANCE AMERICA MORTGAGE SERVICES, NOVIE BALL DUPREE, AGENT FOR BALL HEIRS, CHARLES M. DAVIS, LIENHOLDERS

No. 909DC1189

(Filed 16 July 1991)

Equity § 2.2 (NCI3d); Taxation § 25 (NCI3d)— ad valorem taxes— constitutional amendment—constitutionality of 1970 ballot— defense barred by laches

The doctrine of laches prohibited defendants from asserting as a defense to a county's action to recover 1985-88 ad valorem taxes that the constitutional amendment passed in 1970 which empowered the county to increase property taxes violated due process on the ground that the 1970 ballot failed adequately to inform voters of the substance and effect of the amendment where more than eighteen years elapsed between the 1970 ballot and defendants' claim of unconstitutionality; the amendment was a public record and defendants could have ascertained the import of the amendment or the constitutionality of its passage at any time after the 1970 ballot; and

plaintiff county has been materially prejudiced by defendants' delay because the passage of time prevented plaintiff from presenting evidence to show that the 1970 ballot was understandable to voters.

Am Jur 2d, Constitutional Law §§ 42, 45; Initiative and Referendum §§ 46-48, 52.

APPEAL by defendants from judgment entered 13 June 1990 by *Judge H. Weldon Lloyd, Jr.* in FRANKLIN County District Court. Heard in the Court of Appeals 5 June 1991.

Davis, Sturges & Tomlinson, by Aubrey S. Tomlinson, Jr., for plaintiff.

Charles L. McLawhorn, Jr., P.A., by Charles L. McLawhorn, Jr. and Sharron R. Edwards, for defendants.

LEWIS, Judge.

On 31 August 1988 Franklin County filed suit against defendants George E. Burdick and Mary K. Burdick for collection of taxes on real estate owned by the Burdicks in Franklin County for the years between 1985 and 1988. On 8 January 1989 the defendants filed an answer denying liability on the grounds that the constitutional amendment passed in 1970 which empowered the county to increase property taxes was unconstitutional. Defendants argued that the 1970 ballot failed to adequately inform voters of the substance and effect of the amendment and that the amendment was vague and misleading. The ballot read as follows:

> FOR constitutional amendment revising those portions of the present or proposed State Constitution concerning State and local finance; or
>
> AGAINST constitutional amendment revising those portions of the present or proposed State Constitution concerning local finance.

The matter was heard by Judge Weldon Lloyd, Jr., on 14 May 1990 without a jury. The court determined that the 3 November 1970 ballot concerning the amendment was "not unconstitutional (sic) vague and was not misleading or inconsistent with other provisions of the Constitution or Laws of the State." The court further determined that the defendants owed the County the sum of five

thousand, nine hundred thirty-two and 76/100 dollars plus interest. Defendants appealed.

At trial Mr. Burdick testified that he did not understand the proposed amendment as described in the ballot because it was vague and unclear. He also testified that he did not realize the implications of the amendment until his property taxes began to rise dramatically in 1985. On appeal defendants argue that the ballot violated the Fourteenth Amendment of the United States Constitution because it was so fundamentally unfair that its passage violated the due process clause.

On appeal plaintiff asserts the bar of laches to the defendants' defense of unconstitutionality. Plaintiff has not waived the bar by failing to plead it because plaintiff was not required to plead matters in avoidance of affirmative defenses, and is not required to seek leave to plead such matters. *Brown v. Lanier*, 60 N.C. App. 575, 577, 299 S.E.2d 279, 281 (1983). Furthermore, plaintiff did inquire of Mr. Burdick at trial as to why he waited so many years to assert the unconstitutionality of the amendment.

A party is guilty of laches if he has failed to assert an equitable right for such time as materially prejudices the adverse party. *Harris & Gurganus, Inc. v. Williams*, 37 N.C. App. 585, 590, 246 S.E.2d 791, 794 (1978). This case involves an equitable right insofar as defendant asserts the defense of the unconstitutionality as a bar to the court's imposition of a tax lien on his property.

The doctrine of laches, however, "is not based upon mere passage of time; it will not bar a claim unless the delay is (1) unreasonable and (2) injurious or prejudicial to the party asserting the defense." *Taylor v. City of Raleigh*, 290 N.C. 608, 622-23, 227 S.E.2d 576, 584-85 (1976). While the mere passage of years does not in itself entitle the plaintiff to the bar of laches, *Cieszko v. Clark*, 92 N.C. App. 290, 297, 374 S.E.2d 456, 460 (1988), an unreasonable length of time resulting in prejudice to the opposing party does so entitle the plaintiff. *McRorie v. Query*, 32 N.C. App. 311, 323, 232 S.E.2d 312, 320 (1977). More than eighteen years elapsed between the 1970 ballot and the defendants' claim of unconstitutionality. While Mr. Burdick states that he did not recognize the effects of the amendment until his taxes rose in 1985, he does not claim that he was precluded from ascertaining the import of the amendment or the constitutionality of its passage before 1985, or until 8 January 1989, when he filed his answer. The amendment was public record.

The plaintiff argues that it has been materially prejudiced by the defendants' delay because the passage of time prevented plaintiff from presenting evidence supporting the fact that the ballot was understandable to voters. We are inclined to agree. It is unreasonable to expect the plaintiff to defend against this charge more than eighteen years after the vote, when voters are not likely to remember voting on the amendment and whether they were confused by it. In *Taylor v. City of Raleigh*, the plaintiffs, who were attacking a zoning ordinance, were barred by laches because they filed the action more than two years after the ordinance was passed and many of the plaintiffs had participated in a public hearing concerning the ordinance. 290 N.C. at 626, 227 S.E.2d at 586. The defendants waited more than eighteen years before inquiring into the effects of the 1970 ballot even though Mr. Burdick participated in the ballot and remembers that he did not vote on the amendment because he did not understand it.

We therefore conclude that the defendants' delay in claiming the unconstitutionality of the 1970 ballot is both unreasonable and materially prejudicial to the plaintiff. Defendants' defense is therefore barred by laches. The judgment of the trial court is consequently

Affirmed.

Judges EAGLES and GREENE concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE INC., AND W. HORACE LOWDER, DEFENDANTS AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNELL H. RATTEREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER, CORNELIUS AND MYRON P. LOWDER, INTERVENING DEFENDANTS

No. 9020SC897

(Filed 16 July 1991)

1. **Rules of Civil Procedure § 11 (NCI3d)— motions to dismiss and for summary judgment—sanctions—proper**

The trial court had more than ample basis for imposing sanctions under N.C.G.S. § 1A-1, Rule 11, where the motion to dismiss and motion for summary judgment are based on the same grounds that have proven baseless in past motions and appeals and are patently frivolous.

Am Jur 2d, Appeal and Error § 1024; Motions, Rules, and Orders § 5.

2. **Appeal and Error § 510 (NCI4th)— appeal—motion in appellate court for sanctions—show cause order**

Upon review of the more than twenty appeals brought to the Court of Appeals in this case, and considering appellant's 75 page brief which sets forth precisely the same argument as in his motion to dismiss and in previous appeals, the Court of Appeals issued notice that the appellant was to have 10 days from the mandate to show cause why sanctions pursuant to Appellate Rule 34 should not be imposed, with a date for an oral hearing set by separate order.

Am Jur 2d, Appeal and Error § 1024.

Award of damages for dilatory tactics in prosecuting appeal in state court. 91 ALR3d 661.

APPEAL by defendant W. Horace Lowder from an order entered 29 March 1990 by *Judge Thomas Seay* in Superior Court, STANLY County. Heard in the Court of Appeals 7 May 1991.

Moore & Van Allen, by Jeffrey J. Davis, James P. McLoughlin, Jr., and Frank C. Patton, III, for plaintiffs-appellees.

W. Horace Lowder, pro se.

LEWIS, Judge.

[1] Plaintiffs instituted this shareholder's action on 11 January 1979 against W. Horace Lowder and certain interlocking family corporations alleging that W. Horace Lowder as chief executive officer and director of the corporations violated the fiduciary duties owed to the corporations and the other shareholders. After a jury finding of misappropriation of corporate opportunity by W. Horace Lowder, permanent receivers were appointed for the corporations' assets to satisfy liabilities. The liquidation is now complete and the only remaining matter is the payment of claims made against the dissolved corporations.

W. Horace Lowder, individually and on behalf of the liquidated and dissolved Corporate Defendants, here appeals the Memorandum and Order filed on 29 March 1990, awarding plaintiffs sanctions against W. Horace Lowder for filing motions to dismiss and for summary judgment in violation of North Carolina Rule of Civil Procedure 11. The Superior Court awarded plaintiffs the sum of $2,918.82 to reimburse them for the attorneys' fees and expenses. In addition, the Court ordered W. Horace Lowder to pay $1,000 to the Clerk of Superior Court as an additional sanction for filing "frivolous and vexatious motions to dismiss and for summary judgment."

In reviewing a trial court's award of sanctions under Rule 11, the appellate court shall conduct a de novo review in which it will determine:

> (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by sufficiency of the evidence.

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). In review of the appropriateness of the particular sanctions imposed, an appellate court applies the "abuse of discretion" standard. *Id.*

Judge Seay based his sanctions on findings that the defendant's motions to dismiss were barred by res judicata in several Court of Appeals opinions, and that W. Horace Lowder had raised the same objections to the derivative suit several times. Judge Seay also based his sanctions on findings that W. Horace Lowder had the advice of numerous attorneys and the notice of numerous Court of Appeals opinions that he had a lack of basis for his objections. Judge Seay held that W. Horace Lowder had once again made a motion to dismiss based on these objections and that the motion was, in the court's judgment, frivolous and filed for the purpose of delaying the action and harassing the plaintiffs.

We find that Judge Seay had more than ample basis for the imposition of sanctions. This Court has ruled time and time again that W. Horace Lowder has no standing to make motions or appeal on behalf of the corporate defendants which are now in receivership. *Lowder v. All Star Mills, Inc.*, 91 N.C. App. 621, 372 S.E.2d 739 (1988) (Costs taxed to W. Horace Lowder pursuant to Rule 34). In his motion to dismiss as in many of his previous motions to dismiss and appeals, W. Horace Lowder argues that the trial court lacks jurisdiction and exceeds its authority by entering any order whatsoever. *Id.* Once again we note that this argument has been rejected repeatedly. *Lowder v. All Star Mills, Inc.*, 100 N.C. App. 322, 396 S.E.2d 95 (1990) (Remanded to trial court for hearing pursuant to Rule 34). The motion to dismiss and motion for summary judgment are based on the same grounds that have proven baseless in past motions and appeals, and are patently frivolous. *Lowder v. All Star Mills*, 91 N.C. App. 621, 372 S.E.2d 739 (1988). Furthermore, we find that Judge Seay did not abuse his discretion in computing the amount of the sanctions; indeed, he exercised notable judicial restraint.

[2] Plaintiff appellees have moved that we impose sanctions on W. Horace Lowder for his appeal of Judge Seay's order and sanctions. Appellant has submitted a 75 page brief, in clear violation of the 35 page limit of Rule 28(j) of the North Carolina Rules of Appellate Procedure, which puts forth precisely the same argument he did in his motion to dismiss and in previous appeals. Under Rule 34 of the North Carolina Rules of Appellate Procedure we are authorized to impose a sanction against a party when:

> (1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

Upon review of the more than twenty appeals brought to this Court in this case, we have concluded that a hearing pursuant to Rule 34 is in order. We hereby give notice to W. Horace Lowder pursuant to Rule 34 of the Rules of Appellate Procedure that, following receipt of briefs and an oral hearing, we will consider the imposition of one or more of the sanctions enumerated under Rule 34(b):

(1) dismissal of the appeal

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including, reasonable attorneys fees incurred, because of the frivolous appeal or proceeding, and

(3) any other sanction deemed just and proper.

We give the appellant 10 days from the date the mandate in this matter is issued to show cause in writing why sanctions pursuant to Rule 34 should not be imposed. Appellees may at the same time submit a brief on the issue if they so choose. By separate order, the Court of Appeals will set a date for an oral hearing pursuant to Rule 34 for the same purpose. N.C. Rule of Appellate Procedure 34(d). For the reasons stated, the judgment of the trial court is therefore:

Affirmed.

Judges EAGLES and GREENE concur.

APPALACHIAN OUTDOOR ADVERTISING COMPANY, INC. v. TOWN OF BOONE

No. 9024SC1139

(Filed 16 July 1991)

Municipal Corporations § 30.13 (NCI3d)— sign—zoning violation—removed after administrative hearing upheld—action for compensation or rescission of order—summary judgment for defendant

The trial court correctly granted summary judgment for defendant in an action for compensation for the removal of a sign or that the Board of Adjustment's order to remove the sign be rescinded and declared void. There is no dispute that plaintiff received written notice of the decision against him on 7 June 1989 and never filed notice of appeal pursuant to N.C.G.S. § 160A-388(e). Plaintiff's attempts in this case to raise collateral issues of just compensation or to have the Board's decision rescinded are precluded by the failure to appeal within the appropriate time pursuant to N.C.G.S. § 160A-388(e).

Am Jur 2d, Zoning and Planning §§ 13, 125, 252.

APPEAL by plaintiff from judgment entered 2 August 1990 by *Judge Charles C. Lamm* in WATAUGA County Superior Court. Heard in the Court of Appeals 14 May 1991.

On 3 January 1989, plaintiff erected a sign blocking a business sign on adjacent property. This was a violation of defendant's zoning ordinance, and plaintiff was advised to remove its sign. Plaintiff requested an administrative hearing and defendant's planning director upheld the original decision that plaintiff must remove its sign. Plaintiff then appealed to the Boone Board of Adjustment (the Board).

On 7 June 1989, plaintiff received notification of the Board's decision to uphold the planning director. Plaintiff removed its sign on 12 June 1989.

Plaintiff filed its complaint in this action on 6 December 1989 seeking just compensation for the removal of its sign, or in the alternative, that the Board's order to remove the sign be rescinded and declared void.

On 31 January 1990, defendant answered the complaint and filed a motion for summary judgment. The trial court heard arguments on the motion for summary judgment during the 30 July 1990 session of Superior Court and granted defendant's motion by order of 2 August 1990.

Plaintiff appeals from this order.

Flaherty, Robbins, Swanson & Hartshorn, P.A., by Ed Hartshorn, III, for plaintiff-appellant.

Paletta & Hedrick, by David R. Paletta, for defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment in defendant's favor. For the following reasons, we hold that the trial court did not err and affirm its judgment of 2 August 1990.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990), a motion for summary judgment may be granted "if the pleadings, depositions, . . ., 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." A defending party is entitled to summary judgment if he can show that a plaintiff cannot overcome an affirmative defense or that no claim for relief exists. *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 216, 341 S.E.2d 61, 63 (1986) (citation omitted). The party moving for summary judgment has the burden of establishing the lack of any triable issue of material fact, and all inferences are resolved in favor of the non-movant. *Joel T. Cheatham, Inc. v. Hall*, 64 N.C. App. 678, 308 S.E.2d 457 (1983).

With these general principles in mind, we now turn to whether summary judgment was appropriate in the present case. In support of its motion, defendant argues that N.C. Gen. Stat. § 160A-388(e) governs appeals from the Board of Adjustment decisions, and requires that such decisions be appealed within 30 days after the aggrieved party receives written notice of the decision. There is no dispute that plaintiff received written notice of the decision against him on 7 June 1989 and never filed notice of appeal pursuant to § 160A-388(e). Defendant further argues that plaintiff may not circumvent the requirements of that statute by filing a complaint

under § 136-131.1 for just compensation when the just compensation argument was made before the Board and rejected. We agree.

In *Durham County v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964), defendant's application for a variance permit to build a house was denied by the Durham County Board of Adjustment and defendant failed to appeal pursuant to G.S. 153-266.17 (now § 153A-345(e), which is virtually identical to § 160A-388(e); the only difference is that the former applies to appeals from county boards and the latter applies to appeals from town or city boards). The defendant then proceeded to build the house and Durham County filed an action to enjoin defendant from building.

In ruling for the plaintiff, our Supreme Court stated:

> Moreover, 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*." G.S. 153-266.17; Session Laws of 1949, Chapter 1043, Section 8. The decision of the Board of Adjustment is not subject to collateral attack. As stated . . . [cite]: "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."

Id. at 283-84, 136 S.E.2d at 603. *See also New Hanover County v. Pleasant*, 59 N.C. App. 644, 297 S.E.2d 760 (1982) (to allow a collateral attack on an unappealed board of adjustment's decision would make the decision meaningless).

Thus, plaintiff's attempts in the case before us to raise collateral issues for just compensation, or in the alternative, to have the Board's decision rescinded, is precluded by plaintiff's failure to appeal within the appropriate time pursuant to § 160A-388(e).

Plaintiff argues that *Durham County* and *New Hanover County* do not apply here because plaintiff requested just compensation which had not been raised before the Board and did not request that the prior judgment be declared invalid. We have reviewed the record before us and find that plaintiff did, in fact, raise the issue of just compensation before the Board and requested in its

complaint that the Board's decision be rescinded. We find no merit to plaintiff's contentions.

For the above reasons, we hold that the trial court did not err in granting summary judgment in defendant's favor and therefore affirm its judgment of 2 August 1990.

Affirmed.

Judges COZORT and WYNN concur.

C. M. EASTERWOOD AND WIFE, MARTHA M. EASTERWOOD; JAMES C. HICKS AND WIFE, HILDA L. HICKS; TERRY A. WARD AND WIFE, DOROTHY S. WARD; JOHN R. HOOVER AND WIFE, REBECCA M. HOOVER; ALBERT LOYE, JR., AND WIFE, CAROLYN LOYE; G. G. LOTHIAN AND WIFE, LINDA M. LOTHIAN; CHESLEY OVERBY AND WIFE, BETTY OVERBY, BARBARA B. JONES AND HUSBAND, RONNIE JONES; DAVID M. VAUGHN AND WIFE, XANDRA W. VAUGHN; DALE A. FARRAR; IRA TROLLINGER AND WIFE, NANCY F. TROLLINGER; TOMMY SCHOOLFIELD AND WIFE, HAZEL SCHOOLFIELD, PLAINTIFFS v. GARY D. BURGE AND WIFE, BETTY J. BURGE, DEFENDANTS

No. 9017SC1159

(Filed 16 July 1991)

1. **Deeds § 85 (NCI4th)— restrictive covenant—residential purposes—use for access**

A restrictive covenant confining use of a subdivision lot to "residential purposes only" for the construction of "one detached single family dwelling" was violated by the owners' use of the lot for an access road to a tract of land outside the subdivision.

Am Jur 2d, Covenants, Conditions, and Restrictions § 191.

Covenant in conveyance requiring erection of dwelling as prohibiting use of property for business or other nonresidential purpose. 32 ALR2d 1207.

2. **Deeds § 82 (NCI4th)— restrictive covenant—waiver and estoppel**

A plaintiff who participated in the exchange of a subdivision lot with knowledge of defendants' intended use of the

lot will be estopped from asserting that a restrictive covenant prohibited such use. Likewise, a plaintiff who knew of the planned use and consented or acquiesced in the plan has waived his right to assert the restrictive covenant.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 273, 313.

APPEAL by plaintiffs from summary judgment entered 14 June 1990 by *Judge W. Douglas Albright* in ROCKINGHAM County Superior Court. Heard in the Court of Appeals 15 May 1991.

Gwyn, Gwyn & Farver, by Julius J. Gwyn, for plaintiff-appellants.

No brief was submitted for defendant-appellees.

LEWIS, Judge.

[1] Defendants acquired a 1.313 acre lot in the Easterwood Subdivision (hereafter, the Easterwood lot) subject to a restrictive covenant which confined use of the lot to "residential purposes only" for the construction of "one detached single family dwelling." After having acquired this property, the defendants purchased approximately 13.902 acres bordering the nearby Reidsville City Lake (hereafter, the outside tract) which is not subject to restrictive covenants. The defendants have constructed a gravel way over and across the Easterwood lot as a means of access to and from the outside tract and U.S. Highway 158 by way of the private road of the Easterwood subdivision. The defendants do not contemplate construction of a single family residence on the Easterwood lot and intend to use it strictly as an access. The plaintiffs filed a complaint praying that the defendants be permanently enjoined from using the lot for the purpose of access. Defendants answered denying breach of restrictive covenants and asserting estoppel, laches, and waiver in defense. Both parties moved for summary judgment. The plaintiffs' motion was denied and defendants' motion was granted. The trial court retained jurisdiction.

Summary judgment is appropriate where there is no genuine issue of material fact, and where the moving party is entitled to judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 621, 279 S.E.2d 102, 104 (1981). The effect of a restrictive covenant must be gathered from the language of the covenants in the in-

struments creating the restrictions, and are to be strictly construed against limitations in use. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967).

Appellants rely on *Long v. Branham* for the proposition that: "nothing else appearing, restrictions imposed upon a particular subdivision are for the benefit of that particular development and no other. Therefore if its lots are restricted to residential use only, that is tantamount to saying that they are restricted solely to residential use in that subdivision." *Id.* at 274, 156 S.E.2d at 243. The facts of *Long v. Branham* are strikingly similar to those at hand. In that case, the defendants sought to use their lot for an access road connecting the major drive in a first subdivision to their house in an adjoining subdivision. The court construed a restrictive covenant in the first subdivision to exclude any use other than the actual construction of a residential house within the bounds of the subdivision citing that:

> [i]t is quite obvious that its developers and those who purchased lots therein did not contemplate that [the main road] should ever become a thoroughfare which would carry traffic from another subdivision. Their objective was a quiet, residential area in which the noise and hazards of vehicular traffic would be kept at a minimum and in which children could play with relative safety.

Id. at 274-75, 156 S.E.2d at 243.

We hold that this case falls within the holding of *Long v. Branham* and consequently that the defendants' use violates the restrictive covenant.

The defendants claimed the defenses of estoppel and waiver, and stated in their motion for summary judgment that the Easterwoods, Farrars, and Smiths all had knowledge of the purpose for which the defendants were purchasing the land; that the Easterwoods were told on two occasions of their intentions and did not object, that several of the plaintiffs knew defendants had purchased the unrestricted outside tract with knowledge that the Easterwood lot would be used for access, and that the Farrars traded the Easterwood lot with knowledge of the use defendants intended. Defendants argue that the failure of the Easterwoods, who are the developers, as well as the other plaintiffs to object to the plan of the roadway, constitutes waiver or, alternatively, a repre-

sentation on which the defendants reasonably relied in incurring the expenses of building the driveway. *See Shuford v. Oil Co.*, 243 N.C. 636, 646-47, 91 S.E.2d 903, 911 (1956). Plaintiffs deny that they consented in any way to the plans of the defendants.

[2] Where a plaintiff participated in the exchange of land to the defendants knowing the defendants' intended use, that plaintiff should be estopped from asserting the restrictive covenant. *Rodgerson v. Davis*, 27 N.C. App. 173, 179, 218 S.E.2d 471, 475 (1975). Where a plaintiff knew of the plan of the defendants and consented or acquiesced in the plan, that plaintiff has waived his right to assert the restrictive covenant. *Id.* While the defendants' use of the property does constitute a violation of the restrictive covenant, we remand the case to the trial court for determination of whether each of the plaintiffs is estopped from asserting or has waived the right to assert the covenant.

Reversed and remanded.

Judges EAGLES and GREENE concur.

SPEROS CONSTRUCTION COMPANY, INC., PLAINTIFF v. JAMES MUSSELWHITE, DEFENDANT

No. 9016DC1163

(Filed 16 July 1991)

Judgments § 55 (NCI3d)— interest on a judgment—rate—law in effect at time of judgment

An award of interest on a judgment at eight percent was partially correct and partially incorrect where defendant entered a plea of guilty to obtaining money from plaintiff by false pretenses in 1978; the court ordered defendant to pay plaintiff restitution in the amount of $13,999.15 as a special condition of probation; plaintiff obtained a judgment against defendant on 20 August 1980 for $13,999.15 plus interest at the legal rate of six percent per annum; plaintiff brought the present action on that judgment on 29 May 1990 for $18,070, representing the principal amount plus interest at the legal rate of eight percent from 20 August 1980 minus all set-offs,

plus interest at the rate of eight percent from 25 May 1990 until paid in full; and plaintiff was granted summary judgment on that complaint. An implied contract, for which the rate would have been six percent, did not result from defendant fraudulently obtaining money from plaintiff or from the court's order that defendant pay restitution. Although the law in effect at the time the judgment was entered against defendant on 20 August 1980 set the legal rate at eight percent, the statute sets the legal rate at eight percent ". . . and no more," so that it must necessarily be inferred that interest may be imposed at a rate less than eight percent if requested by the party entitled to the interest and plaintiff's attorney prepared the judgment asking for six percent. Finally, the present action was an independent action on the judgment, so that plaintiff could request and the court award interest at the rate of eight percent from the date the action was instituted. N.C.G.S. § 24-1.

Am Jur 2d, Interest and Usury §§ 59, 60.

APPEAL by defendant from a judgment entered 4 September 1990 by *Judge Gary L. Locklear* in District Court, ROBESON County. Heard in the Court of Appeals 15 May 1991.

Page & Page, P.A., by Richmond H. Page, for plaintiff appellee.

D. Jeffrey Rogers for defendant appellant.

LEWIS, Judge.

On 8 December 1978, the defendant entered a plea of guilty to the crime of obtaining money from the plaintiff by false pretenses. The defendant was ordered to pay restitution in the amount of $13,999.15 to the plaintiff as a special condition of his probation.

On 20 August 1980, the plaintiff obtained a judgment against the defendant for "the sum of $13,999.15 plus interest at the legal rate of six (6) per cent per annum . . ." as damages resulting from the defendant's acts. The plaintiff brought the present action on that judgment on 29 May 1990 for $18,070.09, which represented the principal amount of $13,999.15 plus interest at the legal rate of 8% from 20 August 1980 minus all set-offs, plus interest at the rate of 8% from 25 May 1990 until paid in full. The defendant answered, denying that the legal rate of interest of 8% applied

to this case. On 13 September 1990, the plaintiff was granted summary judgment on his complaint. The defendant appeals.

N.C.G.S. § 24-1, which provides for the maximum legal rate of interest in this state, was amended to change the rate from 6% per annum to 8% per annum, effective 1 July 1980. If the liability results from a damage award, the 6% rate applies to judgments entered before 1 July 1980 and the 8% rate applies to judgments entered after that date, even to interest accruing before the effective date. *E.E.O.C. v. Liggett & Myers, Inc.*, 690 F.2d 1072, 1075 (4th Cir. 1982). If the principal amount of liability arises out of a contractual obligation entered into by the agreement of the parties, the legal rate in effect at the time of the agreement governs the transaction. *Merritt v. Knox*, 94 N.C. App. 340, 343, 380 S.E.2d 160, 162-63 (1989). After the debt has matured, the 8% rate applies to interest accruing after 1 July 1980. *Id.*

The defendant contends that interest at the rate of 6% applies to the judgment against him because the money he fraudulently obtained from the plaintiff was in the nature of a loan arising from an implied contract, on which the interest began to accrue before 1 July 1980. We disagree.

An implied contract did not result from either the defendant's act of fraudulently obtaining the money from the plaintiff or from the court's order that the defendant pay restitution to the plaintiff, because there was no meeting of the minds between the parties. *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985). The law in effect at the time of an agreement determines the rate of interest on an obligation only where an agreement has actually been reached. Otherwise, the law in effect at the time of judgment determines the rate of interest. In the present case, judgment was entered against the defendant on 20 August 1980, when the legal rate of interest was 8%.

The court here erred, however, in awarding the plaintiff interest at the rate of 8% from the date of the 1980 judgment until the date of the 1990 judgment. The court granted the plaintiff summary judgment in the amount of $18,297.39, which apparently represented the principal amount of $13,999.15 plus interest at the rate of 8% from 20 August 1980 to 4 September 1990, the date the judgment was entered. The 1980 judgment, prepared by the plaintiff's attorney to be signed by the Clerk of Superior Court, called for interest at 6%. The trial court in signing the 1980 judg-

ment had the authority to award interest at the rate requested by the plaintiff as long as it did not exceed the legal rate of 8% per annum. N.C.G.S. § 24-2 states that "[t]he legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, *and no more*." N.C.G.S. § 24-1 (emphasis added). For the last three words of § 24-1 to be of any significance, it must necessarily be inferred that interest may be imposed on judgments at a rate less than 8% if requested by the party entitled to the interest. Here the plaintiff's attorney prepared the 1980 judgment asking for 6%. We presume that is what he intended.

The trial court did not err in awarding interest on the judgment at the rate of 8% from 29 May 1990, the date the present action was instituted, until paid in full. The plaintiff brought the present action apparently to prevent the 10-year statute of limitations from barring his recovery on the prior judgment. *See* N.C.G.S. § 1-47. This action was in the nature of an independent action on the judgment, the only procedure in this state by which a judgment can be renewed. *Reid v. Bristol*, 241 N.C. 699, 702, 86 S.E.2d 417, 419 (1955). As it was a separate and distinct action, the plaintiff could request, in his complaint, interest at the legal rate of 8%, and the trial court could award interest at that rate from the date the present action was instituted until the judgment is satisfied. *See* N.C.G.S. § 24-5(b).

The judgment of the trial court is affirmed in part, reversed in part, and remanded for entry of judgment for the plaintiff in the proper amount. The amount of the judgment shall be the sum of $13,999.15 plus interest at the rate of 6% per annum from 20 August 1980 until 29 May 1990 as stated in the original judgment. The judgment may provide for interest on that amount at the rate of 8% per annum from 29 May 1990 until paid in full.

Affirmed in part and reversed in part.

Judges EAGLES and GREENE concur.

COMMUNITY PSYCHIATRIC CENTERS v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION

No. 8910OAH1256

(Filed 16 July 1991)

Administrative Law § 56 (NCI4th); Hospitals § 2.1 (NCI3d)— certificate of need case—no contested case hearing—dismissal of appeal

Petitioner's appeal in a certificate of need case is dismissed for lack of subject matter jurisdiction under N.C.G.S. § 131E-188(b) where no "contested case hearing" was held because the Administrative Law Judge granted DHR's motion to dismiss upon finding that a letter from petitioner was not a valid petition for a contested case hearing because it was not verified or supported by affidavit and that a verified petition thereafter received from petitioner was not timely. The result of petitioner's ineffective attempts to file a petition for a contested case hearing was only a contested case, and judicial review was available to petitioner only in the Wake County Superior Court or the superior court of the county of petitioner's residence pursuant to N.C.G.S. § 150B-45.

Am Jur 2d, Administrative Law § 731.

APPEAL by petitioner from order entered 23 May 1989 by Administrative Law Judge Beecher R. Gray in the Office of Administrative Hearings. Heard in the Court of Appeals 6 May 1991.

Petitioner's appeal arises from a decision of the North Carolina Department of Human Resources which denied petitioner's application for a certificate of need. Petitioner sought to challenge this decision in a contested case hearing in the Office of Administrative Hearings. From an order dismissing the action for lack of subject matter jurisdiction, petitioner appeals.

Hunton & Williams, by John R. McArthur, and McGlinchey, Stafford, Mintz, Cellini & Lang, by Donna G. Klein and Eve Barrie Masinter, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James A. Wellons, for respondent-appellee.

ARNOLD, Judge.

Petitioner is not a "party in a contested case hearing" within the meaning of N.C. Gen. Stat. § 131E-188(b) (1988). This appeal must therefore be dismissed for lack of subject matter jurisdiction.

The Administrative Law Judge (A.L.J.) found the following facts. The Department of Human Resources (DHR) mailed petitioner notice that DHR had denied petitioner's application for a certificate of need on 26 December 1988. DHR first received a letter from petitioner captioned "Petition for Contested Case Hearing" on 20 January 1989. This letter was not verified or supported by affidavit. DHR received a second document from petitioner on 30 January 1989 requesting a contested case hearing. This document was verified.

From these findings the A.L.J. concluded the letter received on 20 January 1989 was not a valid petition and the second document received on 30 January 1989 was not timely filed. As a result the Office of Administrative Hearings did not have subject matter jurisdiction. The A.L.J. then entered an order granting DHR's motion to dismiss.

In *Charlotte-Mecklenburg Hospital Authority v. North Carolina Department of Human Resources*, 83 N.C. App. 122, 349 S.E.2d 291 (1986), we held that a "contested case hearing" is a jurisdictional prerequisite under G.S. § 131E-188(b) for a direct appeal to this Court from a final agency decision. A contested case hearing is distinguishable from a contested case. The phrase "contested case" extends beyond an adjudicatory hearing to include "any agency proceeding, by whatever name called, wherein the legal rights, duties and privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing." *Charlotte-Mecklenburg*, at 124, 349 S.E.2d at 292; see N.C. Gen. Stat. § 150B-2(2) (1987).

The result of petitioner's ineffective attempts to file a petition for a contested case hearing was only a contested case. A contested case hearing was not held because the A.L.J. granted DHR's motion to dismiss. *See Rowan Health Properties, Inc. v. North Carolina Dept. of Human Resources*, 89 N.C. App. 285, 365 S.E.2d 635 (1988). Without this jurisdictional prerequisite petitioner cannot utilize G.S. § 131E-188(b) to appeal to this Court.

"Any person who is aggrieved by the final decision in a *contested case* . . . is entitled to judicial review of the decision under this Article. . . ." N.C. Gen. Stat. § 150B-43 (1987) (emphasis added). "To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides." N.C. Gen. Stat. § 150B-45 (1987). Petitioner's relief was to be found under these statutory provisions rather than G.S. § 131E-188(b).

Appeal dismissed.

Judges WELLS and PHILLIPS concur.

JANE DOE AND SALLY DOE, BY AND THROUGH THEIR GUARDIAN AD LITEM, ANNE CONNOLLY v. FRANK HOLT

No. 9021SC1013

(Filed 16 July 1991)

Parent and Child § 2.1 (NCI3d)— sexual assaults—parental immunity doctrine inapplicable

The parental immunity doctrine did not bar actions by two minor girls against their father for willfully assaulting, abusing, molesting and raping them.

Am Jur 2d, Parent and Child § 10.

Liability of parent or person in loco parentis for personal tort against minor child. 19 ALR2d 423.

APPEAL by plaintiffs from order entered 27 August 1990, *nunc pro tunc* 9 August 1990, by *Judge Russell G. Walker, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 11 April 1991.

Theodore M. Molitoris for plaintiff appellants.

No brief filed for defendant appellee.

PHILLIPS, Judge.

Defendant is the father of the minor plaintiffs, whose action against him for willfully assaulting, abusing, molesting and raping them was dismissed under the provisions of Rule 12(b)(6), N.C. Rules of Civil Procedure, on the ground that the action is barred by the parental immunity doctrine. According to the complaint: The alleged abuses, molestations and rapings occurred beginning in 1980, when the appellants were five and six years old, and continued until 1989, when they were fourteen and fifteen; defendant's acts constituted incest in violation of G.S. 14-178, second degree rape in violation of G.S. 14-27.3, and second degree sexual offense in violation of G.S. 14-27.5, and caused plaintiffs to suffer permanent physical, emotional and mental injuries. Accepting the facts alleged as admitted for the purpose of ruling on the motion, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), we hold that the action is not barred by the parental immunity doctrine.

Our Supreme Court adopted the parental immunity doctrine in *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923), where a child sued her father for negligently causing a motor vehicle accident in which she was injured. The doctrine was adopted, so the majority opinion states, because the home is the foundation of our society and suits by children against their parents would impede the management of the home and disrupt the family relationship. Though some jurisdictions have applied the immunity to criminal as well as negligent acts, neither of our Courts has as yet done so and the indications have been that they would not. In another action based upon a parent's negligent operation of a motor vehicle the Court upheld the doctrine, but noted that some courts have held that the immunity does not apply to "[o]utrageous conduct on the part of the parent which invades the child's rights and brings discord into the family," and that "[w]illful and intentional injury of the child has been held to terminate the parent-child relation and thus avoid application of the parental immunity rule." *Skinner v. Whitley*, 281 N.C. 476, 481, 189 S.E.2d 230, 233 (1972) (citations omitted). In *Lee v. Mowett Sales Co., Inc.*, 316 N.C. 489, 492, 342 S.E.2d 882, 884 (1986), another case based on negligence, the Court in *dicta*, citing 3 R. Lee, *N.C. Family Law* Sec. 248 (4th ed. 1981), stated that the parental immunity doctrine "does not apply to . . . actions by an unemancipated minor involving willful and malicious acts."

The proper limits of the doctrine are stated, we believe, in *Wilson v. Wilson*, 742 F.2d 1004, 1005 (6th Cir. 1984), and they do not extend to the acts of this defendant. The case involved sexual assaults on the child similar to those alleged here, about which the Court said: The "common law parental immunity rule holds only insofar as it subserves the domestic peace and tranquility of the family, and where the reason fails the rule should not apply"; that the father's sexual assaults were so destructive of the family relationship as "to eliminate the . . . public policy behind the parental immunity rule." *Id.* The law abhors absurdities; defendant having destroyed the family relationship by maliciously defiling his helpless children, it would be absurd and unjust to call to his aid a doctrine devised to preserve family unity and harmony.

Reversed.

Judges PARKER and GREENE concur.

NUCOR CORPORATION, PLAINTIFF v. GENERAL BEARING CORPORATION, DEFENDANT

No. 9026SC729

(Filed 16 July 1991)

1. **Arbitration and Award § 34 (NCI4th); Costs § 33 (NCI4th)— superior court—review of arbitration award—authority to award attorney fees**

The superior court had authority to award attorney fees under N.C.G.S. § 6-21.2 in the first instance upon review of an arbitration award. A provision of N.C.G.S. § 1-567.11 only precludes an award of attorney fees by an arbitration panel but does not ban an award by the superior court.

Am Jur 2d, Arbitration and Award § 139.

2. **Costs § 33 (NCI4th)— attorney fees—evidence of indebtedness—stock purchase agreement**

A stock purchase agreement was an "evidence of indebtedness" within the meaning of N.C.G.S. § 6-21.2 where

it evidenced on its face a legally enforceable obligation to pay money.

Am Jur 2d, Costs § 92.

3. Costs § 33 (NCI4th)— statutory attorney fees—action on debt —evidence of work value not required

The trial court did not err in awarding attorney fees under N.C.G.S. § 6-21.2 of 15% of the outstanding balance owed on the obligation in question without receiving evidence as to the nature and extent of the work done and its reasonable value.

Am Jur 2d, Costs § 72.

Liability of parties to arbitration for costs, fees, and expenses. 57 ALR3d 633.

APPEAL by defendant from order entered 27 April 1990 and judgment entered 2 May 1990 by *Judge Kenneth A. Griffin* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 24 January 1991.

DeLaney and Sellers, P.A., by Ernest S. DeLaney III and Ernest S. DeLaney, for plaintiff appellee.

Kennedy Covington Lobdell & Hickman, by Raymond E. Owens, Jr., for defendant appellant.

PHILLIPS, Judge.

The judgment appealed from confirmed an arbitration award to plaintiff in the amount of $1,537,690 and awarded plaintiff attorney's fees in the amount of $230,653.50 pursuant to the provisions of G.S. 6-21.2. All of defendant's contentions concern the legal fees awarded. None has merit, and we affirm.

Inter alia, the stock purchase agreement that was arbitrated obligated defendant to convey to plaintiff all the outstanding stock of a subsidiary corporation it owned; to pay plaintiff the value of the subsidiary's obsolete inventory; to pay any deficiency in the warranted net worth of the subsidiary; and, without specifying a percentage, to pay plaintiff's reasonable attorney's fees in the event of default. The agreement also required defendant to secure its various obligations by an irrevocable letter of credit in the

amount of $1,500,000 and to put $1,000,000 of the purchase money received in escrow pending its full performance. Despite the provision authorizing the award of attorney's fees, the arbitration panel declined to award them because of its belief that it had no legal authority to do so. Upon review the Superior Court affirmed the panel's award and awarded plaintiff an attorney's fee of 15% of the balance that defendant owed under the agreement.

[1] Defendant's main contention is that in reviewing the arbitration panel's award the Superior Court had no authority to award attorney's fees in the first instance, because an award of attorney's fees for work performed in arbitration proceedings is precluded by the following provision of G.S. 1-567.11:

> Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

This provision only precludes an award of attorney's fees by an arbitration panel, it does not ban an award by the Superior Court. *G. L. Wilson Building Co. v. Thorneburg Hosiery Co., Inc.*, 85 N.C. App. 684, 355 S.E.2d 815, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987).

[2] Though G.S. 6-21.2 expressly authorizes the award of attorney's fees in suits to collect any "evidence of indebtedness," defendant argues that the fees were not authorized because the stock purchase agreement involved was not an "evidence of indebtedness" within the contemplation of that statute. But the term "evidence of indebtedness" as used in G.S. 6-21.2, so the Court held in *Stillwell Enterprises, Inc. v. Interstate Equipment Company*, 300 N.C. 286, 294, 266 S.E.2d 812, 817 (1980), refers "to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money," and the agreement involved is obviously such an instrument.

[3] Nor, as defendant argues, did the trial court err in awarding a fee of 15% of the balance that defendant owed plaintiff without receiving evidence as to the nature and extent of the work done and its reasonable value. For G.S. 6-21.2(2) expressly provides that when a contract authorizing attorney's fees does not specify the fee percentage that it shall be construed to mean 15% of the

"outstanding balance" owed on the obligation involved, and in setting the fee the court merely followed the statutory mandate.

Affirmed.

Judges EAGLES and WYNN concur.

ELLA RUTH BAKER, PLAINTIFF/APPELLANT v. INDEPENDENT FIRE INSURANCE COMPANY, DEFENDANT/APPELLEE

No. 903SC689

(Filed 16 July 1991)

Insurance § 122 (NCI3d)— fire insurance—refusal of examination under oath—summary judgment for defendant

The trial court correctly granted summary judgment for defendant on a fire insurance claim where plaintiff refused to be examined under oath until after suit was filed. Plaintiff's policy required her to submit to an examination under oath when reasonably requested.

Am Jur 2d, Insurance § 1364.

APPEAL by plaintiff from order entered 8 February 1990 by *Judge Thomas Watts* in PITT County Superior Court. Heard in the Court of Appeals 6 May 1991.

Fitch, Wynn & Associates, by Reginald Scott, for plaintiff appellant.

Yates, McLamb & Weyher, by R. Scott Brown and Andrew A. Vanore, III, for defendant appellee.

PHILLIPS, Judge.

Plaintiff appeals the dismissal by summary judgment of her action under an insurance policy for fire damage done to her house and personal property on 12 April 1989. Her action was dismissed because before filing suit plaintiff refused to submit to an examination under oath concerning the circumstances of the fire as defendant requested and the policy terms required. Since the record does

not contain any assignments of error, we are only required to examine the face of the record for error; but waiving that deficiency it is obvious that the court did not err in dismissing the action, and we affirm.

Defendant's policy (and by virtue of the enactment of G.S. 58-44-15 every other fire insurance policy issued in this state) contains the following provisions: "No action can be brought unless the policy provisions have been complied with . . ." and your duties after loss are "f. as often as we reasonably require . . . (3) submit to examination under oath." Compliance with these and companion provisions has been held to be a condition precedent to suing on a fire policy. *Huggins v. Hartford Insurance Co.*, 650 F.Supp. 38 (E.D.N.C. 1986); *Chavis v. State Farm Fire and Casualty Co.*, 317 N.C. 683, 346 S.E.2d 496 (1986).

The materials of record, including defendant's requests for admission that plaintiff did not object or respond to within the time allowed by Rule 36, N.C. Rules of Civil Procedure, establish the following uncontradicted facts: On 21 July 1989 defendant in writing requested plaintiff to submit to an examination under oath on Tuesday, 8 August 1989, at the office of her lawyer; on 1 August 1989 plaintiff, through her counsel, refused this request and filed the action on 23 October 1989. These facts establish as a matter of law that plaintiff did not comply with a condition precedent to bringing suit on the policy and that the dismissal of her action was proper.

In arguing otherwise, plaintiff points only to the following: Her affidavit, which states in effect that she thought being examined under oath before suit was filed would not accomplish anything and that she was willing to be examined after suit was filed; and counsel's letter to the insurance company dated 1 August 1989 stating that plaintiff would not submit to an examination before suit, but would be willing to be examined under oath later after suit was filed. These materials support, rather than discredit, the dismissal order. The policy required plaintiff to submit to an examination under oath when reasonably requested before suit was filed and she refused to be so examined. Her willingness to be examined after suit was filed did not meet the requirement.

Affirmed.

Judges ARNOLD and WELLS concur.

JOANNE ELLIOT, PLAINTIFF v. A. O. SMITH CORPORATION AND EMPLOYERS INSURANCE OF WAUSAU, DEFENDANTS

No. 9010IC1062

(Filed 16 July 1991)

Master and Servant § 96 (NCI3d)— injury by accident—timeliness of notice—Commission's findings binding

The Industrial Commission's finding in a workers' compensation action that plaintiff did not suffer an accident and had no reasonable excuse for not timely reporting it were binding because the determination of those issues depended upon plaintiff's credibility and the Commission, as finder of fact, found that plaintiff's testimony was not credible.

Am Jur 2d, Workmen's Compensation §§ 445, 630.

APPEAL by plaintiff from Opinion and Award filed 11 July 1990 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 April 1991.

Charles N. Stedman for plaintiff appellant.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Jack S. Holmes, for defendant appellees.

PHILLIPS, Judge.

Plaintiff appeals from an Opinion and Award denying her claim for compensation under the Workers' Compensation Act. The claim was denied on two grounds—first, that she was not injured by accident as she maintains, and second, that without reasonable excuse she failed to notify the employer of the alleged accident within thirty days of its occurrence as G.S. 97-22 requires. Her claim is that on 9 July 1987, while lifting a motor during the course of her employment, she suffered an injury by accident that ultimately resulted in disabilities to her back and knee. After hearing the evidence of the parties the Commission found and concluded in pertinent part that she did not suffer an injury by accident within the purview of the Act and had no reasonable excuse for not timely reporting it in any event. Plaintiff's argument that the Commission's findings are erroneous is unavailing. For under the circumstances involved whether plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely

notice were factual issues that depended entirely upon her credibility; the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, and that determination is binding upon us. *Torain v. Fordham Drug Co., Inc.*, 79 N.C. App. 572, 340 S.E.2d 111 (1986).

Affirmed.

Judges PARKER and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 JULY 1991

ANDREWS v. ANDREWS No. 9025DC1221	Burke (87CVD867)	Affirmed
BENNETT v. RICHARDSON-WAYLAND ELECTRICAL CORP. No. 9010IC865	Ind. Comm. (510210)	Affirmed
BROYHILL FURNITURE INDUSTRIES v. JESSUP FURNITURE OUTLET No. 9025SC1095	Caldwell (89CVS1498)	Affirmed
EDWARDS v. EDWARDS No. 9018DC1188	Guilford (89CVD2319)	Reversed
FORSYTH MEMORIAL HOSPITAL v. HAIRSTON No. 9021SC1140	Forsyth (90CVS1121)	Affirmed
GAMMON DESIGN/BUILD v. DURFEY-HOOVER-BOWDEN INS. AGENCY No. 9010SC1118	Wake (88CVS2181)	New Trial
GOINS v. OAKLEY No. 9011SC997	Lee (89CVS800)	Affirmed
IN RE WALTERS No. 9016DC976	Scotland (88J110) (88J111) (88J112) (88J113) (88J114)	Affirmed
KENNEDY v. KENNEDY No. 903DC1175	Pitt (86CVD1372)	Affirmed
LOWDER v. ALL STAR MILLS No. 9020SC1132	Stanly (79CVS015)	Affirmed
MECHANICAL SUPPLY CO. v. T & G REALTY CO. No. 9026DC1021	Mecklenburg (88CVD12648)	Affirmed
MURRAY v. McCALL No. 9014SC754	Durham (88CVS457)	No Error
NASHVILLE BLDG. SUPPLY CO. v. MORGAN No. 907SC1092	Nash (90CVS81)	Affirmed

PENDERGRASS v. CARD CARE, INC. No. 907SC994	Nash (89CVS54)	Affirmed
PRITCHARD v. CRAIGHILL, RENDLEMAN No. 9026SC1082	Mecklenburg (89CVS2929)	Affirmed
RABON v. FIELDCREST-CANNON, INC. No. 9010IC1211	Ind. Comm. (822991)	Affirmed
STATE v. CAGLE No. 906SC914 STATE v. TRITT	Northampton (89CRS2710) (89CRS2711) (89CRS2712) (89CRS2023) (89CRS2024(a)) (89CRS2713) (89CRS2714) (89CRS2715) (89CRS2028(a))	No Error
STATE v. WEATHERS No. 9026SC1015	Mecklenburg (89CRS56394)	No Error
VAN DER WIELE v. VAN DER WIELE No. 9029DC1036	Henderson (89CVD120) (89CVD406)	Affirmed in part and reversed in part
WHITE v. BAILEY & ASSOCIATES No. 907SC1034	Wilson (89CVS730)	Affirmed

POLLY A. RECTOR, MICHAEL E. CRANFORD, PETITIONERS-APPELLEES v. NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT-APPELLANT

No. 9021SC1134

(Filed 6 August 1991)

1. **Sheriffs and Constables § 2 (NCI3d)— handicapped trainees— certification denied—arbitrary and capricious**

The decision of the North Carolina Sheriffs' Education and Training Standards Commission not to certify petitioners was not supported by substantial evidence and was arbitrary and capricious where one petitioner was paralyzed in both legs and used two crutches for walking and the other was paralyzed in one leg and used one crutch for walking; both petitioners attended Basic Law Enforcement Training at Forsyth Technical Institute; the post-delivery report by the Assistant Administrator of the course listed petitioners as successfully completing the course; the school director, Mr. Jones, signed the report and sent it to the Criminal Justice Standards Division; the Area Coordinator of the North Carolina Department of Community Colleges telephoned Mr. Jones and questioned him concerning the inclusion of petitioners in the report; Mr. Jones then telephoned the Criminal Justice Standards Division and requested the return of the report; and Mr. Jones upon receiving the report struck through petitioners' names and returned it to the Criminal Justice Standards Commission. Although the instructors' evaluations were his only source of information concerning the petitioners' actual performance in the course, Mr. Jones based his decision on the advice of the Area Coordinator, Mr. Rector, and on his observations of petitioners' physical characteristics and his personal opinions.

Am Jur 2d, Sheriffs, Police, and Constables § 10.

2. **Sheriffs and Constables § 2 (NCI3d)— handicapped trainees— certification denied—sufficiency of evidence**

The North Carolina Sheriffs' Education and Training Standards Commission erred by finding that the assistant course administrator of a Basic Law Enforcement Training course, Mr. Phipps, had concluded that the handicapped petitioners were not proficient in certain areas where Mr. Phipps testified that he did not make any special effort to see how the course

was being conducted or how petitioners were performing and that he had left that to the certified instructors, Mr. Phipps was not certified in any of the test areas, and all the information Mr. Phipps received from the course instructors indicated the petitioners had passed the three physical sections. The evidence did not support the finding.

Am Jur 2d, Sheriffs, Police, and Constables § 10.

3. **Sheriffs and Constables § 2 (NCI3d)— handicapped trainees— certification denied—sufficiency of evidence**

The evidence does not support the argument of the North Carolina Sheriffs' Education and Training Standards Commission that petitioners, who are handicapped, did not perform in the same manner as other trainees in a Basic Law Enforcement Training course where the assistant course administrator told an SBI agent that no leniency was given to petitioners; each instructor for the three physical sections testified that petitioners were required to meet the same standards as the other trainees; the defensive tactics training instructor testified that both petitioners had passed the section and that all trainees were required to perform the same maneuvers, although he allowed some modification of the techniques to allow petitioners to begin from a sitting position and to use a crutch instead of a baton; that instructor further testified that the end result was the same and that it was not unusual to modify techniques; the driver training instructor testified that petitioners had passed the same course everyone else took with the modification of hand controls to operate the vehicle; although the instructor had reservations about the petitioners' ability to handle high speed chases, he never witnessed petitioners or any other trainee in such a situation; the only competent evidence on which to base an opinion of Ms. Rector's firearms qualification was testimony that she did qualify; and, even though she was not allowed to fire a shotgun because of her physical condition, the course standards did not require students to qualify with a shotgun.

Am Jur 2d, Sheriffs, Police, and Constables § 10.

APPEAL by defendant from Order of *Judge James J. Booker* entered 23 July 1990 in FORSYTH County Superior Court. Heard in the Court of Appeals 14 May 1991.

Governor's Advocacy Council For Persons With Disabilities, by Judy J. Burke; and Wright, Parrish, Newton & Rabil, by Carl F. Parrish and Nils E. Gerber, for petitioner appellees.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Ralph B. Strickland, Jr., for respondent appellant.

COZORT, Judge.

Petitioners are handicapped deputy sheriffs in Forsyth County who were denied basic law enforcement training certification by the respondent North Carolina Sheriffs' Education and Training Standards Commission. The Superior Court of Forsyth County reversed the Commission's decision as arbitrary and capricious, finding petitioners had satisfied the minimum training requirements specified by law. We affirm.

The Commission establishes the minimum hiring, training, and retention standards for deputy sheriffs and sheriffs' jailers in North Carolina. After evaluating applications for compliance with minimum standards, the Commission denies or grants certification. In order to be certified, employment applicants must complete Basic Law Enforcement Training (BLET) within one year of employment. The North Carolina Criminal Justice Education and Training Standards Commission (Criminal Justice Standards Commission) administers BLET courses on a statewide basis.

In 1984, R. Shelton Jones, School Director of Forsyth Technical Institute (Forsyth Tech), Gary Rector, Area Coordinator of the North Carolina Department of Community Colleges, Ron Barker of the Forsyth County Sheriff's Department, and R. W. Phipps of the Winston-Salem Police Department met to establish a BLET course at Forsyth Tech in Winston-Salem, North Carolina. At this meeting, the parties present discussed whether petitioners Polly Rector and Michael Cranford should be excluded from the course because of their physical conditions. Ms. Rector is paralyzed in both legs and uses two crutches for walking. Mr. Cranford is paralyzed in one leg and uses one crutch for walking. Because of the school's "open door" policy it was decided that petitioners would be admitted to the course.

Both petitioners attended the BLET course during the period September 24, 1984 through December 22, 1984. The BLET course included eighteen training sections in which each trainee was re-

quired to obtain a minimum score of seventy percent. Mr. Cranford attended the entire course. Ms. Rector attended only the firearms and driver training sections of the course because she had previously attended an earlier BLET course in the spring of that year.

At the end of the course, R. W. Phipps, assistant administrator of the BLET course, filled out the post-delivery report listing each of the trainee's scores in the eighteen areas of testing and noting successful completion of the course. Mr. Phipps listed Ms. Rector and Mr. Cranford as having successfully completed the course. Mr. Jones, the school director, signed the report indicating that those who had successfully completed the course possessed the "minimum degree of general attributes, knowledge and skill to function as an inexperienced law enforcement officer." Mr. Jones then sent the report to the Criminal Justice Standards Division.

The following day Mr. Gary Rector, the Area Coordinator of the North Carolina Department of Community Colleges, telephoned Mr. Jones and questioned him concerning the inclusion of the petitioners on the post-delivery report. Following his conversation with Mr. Rector, Mr. Jones called Mr. David Cashwell, the Associate Program Administrator of the Criminal Justice Standards Division, and requested the return of the post-delivery report for correction. Upon the return of the report, Mr. Jones struck through the names of Ms. Rector and Mr. Cranford with the intent of removing the petitioners from the list of those who had successfully completed the course. He then returned the report to Mr. Cashwell.

Upon completion of the BLET course, both Ms. Rector and Mr. Cranford received diplomas indicating successful completion of the course.

Nearly two and one-half years later, in mid-April 1987, Ms. Georgia Lea, then Director of the Commission, notified Ms. Rector and Mr. Cranford of the denial of their certification. Both petitioners appealed the decision and requested an administrative hearing pursuant to Chapter 150B of the North Carolina General Statutes.

After a hearing, the Chief Administrative Law Judge Robert A. Melott (ALJ) recommended on 18 October 1988 that petitioners be certified. In his proposal Judge Melott concluded that both petitioners met all requirements for certification.

The Commission rejected the recommendation and denied both petitioners' applications for certification. The Commission conclud-

ed, in orders filed 3 May 1989 that both petitioners had not satisfied the minimum training requirements set forth in the North Carolina Administrative Code and that Mr. Cranford had not satisfactorily completed a commission-accredited basic training course within one year of his probationary appointment as deputy sheriff. Both petitioners appealed the final agency decision to the Superior Court of Forsyth County.

On appeal, Superior Court Judge James J. Booker reversed the Commission, concluding (1) that the petitioners had passed the minimum training requirements and satisfactorily completed a commission-accredited basic training course within one year of their probationary appointments as deputy sheriffs; (2) that any influence by Mr. Rector resulting in the changing of the post-delivery report which was initially based on the evaluation by the instructors was an improper procedure; and (3) that the Commission's decision not to certify the petitioners because of their handicap, despite their instructors' positive evaluation, was arbitrary and capricious. In an order on 21 July 1990, Judge Booker ordered the Commission to issue certifications to the Commission, effective 15 January 1985. Pursuant to N.C. Gen. Stat. § 150B-52 (1987), the Commission appealed the superior court's decision to this Court.

On appeal, the Commission brings forward four major arguments. The Commission first contends that the trial court exceeded its authority by making findings of fact which were not contained in either the ALJ's proposal for decision or the final agency decision. In its next three arguments, the Commission contends the trial court erred by concluding (1) that petitioners met minimum requirements, (2) that petitioners were not certified because they were handicapped, and (3) that the Commission's decision was arbitrary and capricious. Before addressing the Commission's arguments, we first summarize the rules applicable to judicial review of final agency decisions.

N.C. Gen. Stat. § 150B-51 (1987) governs the scope of judicial review of final agency decisions in the superior court. Pertinent to this proceeding, subsection (b) provides:

> [The court] 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 G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

In reviewing the agency's decision, the superior court applies the "whole record" test, which requires the examination of all competent evidence to determine if the administrative agency's decision is supported by substantial evidence. *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "is more than a scintilla or a permissible inference." *Lackey v. Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). In its role as an appellate court, the superior court reviews the agency's decision but is not allowed to replace the agency's judgment with its own when there are two reasonably conflicting views, even though the court could have reached a different result upon de novo review. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). However, "the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. [T]he court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* Upon determining that the agency's decision is not supported by substantial evidence, the superior court may make additional findings of fact in order to show the insubstantiality of the evidence relied upon by the agency. *See Star Automobile Co. v. Saab-Scania of America, Inc.*, 84 N.C. App. 531, 535, 353 S.E.2d 260, 263 (1987).

The whole record test is also applied when determining whether a decision is arbitrary and capricious. *Brooks, Comm'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). "Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate "any course of reasoning and the exercise of judgment." ' " *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citing *Comm'r of Ins.*

v. Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)) (citation omitted).

[1] We now turn to the issues presented in this case. In 1984, N.C. Admin. Code tit. 12, r.09B.401(a) (August 1984) (now codified at N.C. Admin. Code tit. 12, r.10B.0503(a) (December 1990)) required law enforcement trainees to complete a commission-accredited basic training course within one year of original probationary appointment. N.C. Admin. tit. 12, r.09B.0407 (August 1984) specified the minimum training requirements for certification as a law enforcement officer, as adopted by the Commission. Section r.09B.0407 (now codified as N.C. Admin. tit. 12, r.10B.0509 (December 1990)) stated as follows:

> To satisfy the minimum training requirements for certification as a law enforcement officer, a trainee shall:
>
> (1) achieve a score of 70 percent correct answers on the commission administered comprehensive written examination, provided in Rule .0406 of this Subchapter;
>
> (2) demonstrate successful completion of an accredited offering of the "Basic Recruit Training — Law Enforcement: [sic] course as shown by the certification of the school director;
>
> (3) demonstrate proficiency in the motor-skill and performance subject areas of firearms training, police driver training, vehicle stops, and defensive tactics as shown by the school director's finding of trainee competence;
>
> (4) exhibit a final firearms firing average of at least 70 percent out of a possible 100 percent on a firing range approved by the Director of the Standards Division; and
>
> (5) obtain the recommendation of the trainee's school director that the trainee possesses at least the minimum degree of general attributes, knowledge, and skill to function as an inexperienced law enforcement officer.

In its final agency decision, the Commission concluded that both petitioners failed to satisfy the minimum training requirements set forth in subsections (2), (3), and (5) above. The Commission further concluded that Ms. Rector also failed to satisfy subsection (4). Finally, the Commission concluded that Mr. Cranford did not comply with N.C. Admin. tit. 12, r.09B.0401(a), which requires the

satisfactory completion of a commission accredited basic training course within one year of his original appointment as deputy sheriff. The Commission's findings and conclusions were based primarily on the testimony of Mr. Shelton Jones, Forsyth Tech Director; Mr. R. W. Phipps of the Winston-Salem Police Department; testimony from three course instructors; and Ms. Rector's firearms scoring memorandum.

After reviewing the whole record, we agree with the superior court that the petitioners met all the pertinent and necessary requirements in all areas for certification. The Commission's decision not to certify the petitioners was not supported by substantial evidence and was arbitrary and capricious.

We first scrutinize the testimony of Forsyth Tech Director Jones and the basis for his refusal to recommend certification of the petitioners. The Commission found that Mr. Jones did not "sit in on every class . . . and actually conduct or observe all the training on [the relevant] areas of these students," but relied upon information received from Mr. Phipps and his own observation of Ms. Rector and Mr. Cranford at registration. The Commission further found that based upon the information available to him, Mr. Jones concluded that Ms. Rector and Mr. Cranford did not have the minimum degree of general attributes, knowledge, and skill to function as inexperienced law enforcement officers.

The evidence shows that Mr. Jones received information concerning the course from Mr. Phipps, the assistant administrator of the course, but that he did not ask specifically about Ms. Rector and Mr. Cranford. Mr. Phipps did not convey to Mr. Jones his opinion that the petitioners had not demonstrated proficiency in the motor-skill and performance subject areas and lacked the minimum degree of general attributes, knowledge, and skill to function as an inexperienced law enforcement officer until after Mr. Jones initially sent in the post-delivery report. Even then, Mr. Jones testified that he did not rely on Mr. Phipps' opinion in making his determination on whether the petitioners had satisfied the five minimum training requirements.

At the time Mr. Jones initially sent in the post-delivery report, the instructors' evaluations were his only source of information concerning the petitioners' *actual* performance in the course. The post-delivery report indicated that both petitioners had received scores of seventy percent or better in each area of testing.

Even when Gary Rector, the Area Coordinator of the North Carolina Department of Community Colleges, telephoned Mr. Jones concerning the petitioners' inclusion on the post-delivery report, Mr. Jones did not question the competence of the instructors or whether the petitioners had actually passed the course. Specifically, he testified: "[A]nd I indicated to Mr. Rector that *they had passed all of the requirements* and we discussed what I should do and what my options were." (Emphasis added.) Mr. Jones further testified that, after reviewing the scores, he had "mixed feelings" about recommending the petitioners for certification and "had to think about it."

During this conversation, Mr. Rector expressed "concerns about the certification of Forsyth Technical College to continue to offer courses at Forsyth Tech," and that Forsyth Tech's accreditation eventually might be revoked if Mr. Jones did not strike the petitioners from the list. According to Mr. Jones, he and Mr. Rector also "talked about bad recommendations or recommendations that could backfire on us later on in court suits and things like that."

After the conversation with Mr. Rector, Mr. Jones telephoned David Cashwell, the Associate Program Administrator of the Criminal Justice Standards Division, and requested the return of the report. Mr. Cashwell testified that in this telephone conversation, Mr. Jones indicated to him that the petitioners had completed the course and that they did possess at least the minimum degree of general attributes, knowledge, and skill to function as an inexperienced law enforcement officer. When asked whether Mr. Rector told him "either in written form or verbal form that it was in fact a Mr. Gary Rector who had instructed him to strike the names from this roster," Mr. Cashwell responded, "I believe we did discuss that." Mr. Cashwell also told Mr. Jones and Mr. Rector that inclusion of the petitioners on the report recommending certification could lead to the loss of Forsyth Tech's accreditation and the loss of certification of any instructor that had not performed correctly.

Despite his "mixed feelings" and recognition that the petitioners had passed the required course indicating the ability to competently function as an inexperienced law enforcement officer, upon the return of the report Mr. Jones crossed out the names of the petitioners. In a cover letter returning the report to Mr. Cashwell, Mr. Jones stated, "Per advice of Gary Rector, two names have been struck from the 'Trainee Roster and Progress Report.' "

Although insisting that Mr. Rector only advised him to "think about" striking the petitioners from the list rather than directing him to do so, Mr. Jones testified that he "just acted on his [Rector's] advice." Mr. Jones further testified that but for the telephone call from Mr. Rector, he probably would not have asked for the return of the post-delivery report.

There is no evidence, however, that Mr. Rector ever observed the petitioners during class. Even if Mr. Rector had observed the petitioners in class, the record is void as to his qualifications to make a judgment concerning the petitioners' competence.

In addition to acting on Mr. Rector's advice, Mr. Jones testified that he made his recommendation that the petitioners had not successfully completed the five minimum training requirements based on "my observations of them at the registration, actually, of the course." His conclusion "after seeing them was that there was no way I could understand how they could fulfill the duties, the full duties, of a police officer." Upon further questioning, Mr. Jones stated: "Well, as I perceive a law enforcement officer they are people who can carry out the defense of the community through their physical attributes and I could not see how they could perform all the activities of a police officer." Mr. Jones stated that he did not personally see the petitioners do anything in the course "that would require them not to be certified," because he did not observe them in class. When asked whether Mr. Cranford and Ms. Rector could "have done anything during the course of the school to change your mind about your first impression about them not being competent or able to pass," Mr. Jones responded, "Well, if, if they could say how or demonstrated [*sic*] to me that they could chase a criminal or something to that extent."

From this testimony, it is apparent that Mr. Jones withheld his recommendation, at least in part, based on his observations of the petitioners' physical characteristics and his personal opinions, rather than the standards established by the Criminal Justice Standards Commission. The post-delivery report indicating successful completion was the only evidence of the petitioners' *actual* performance in the course available to Mr. Jones when he struck the petitioners' names from the list.

Mr. Jones did not rely upon the test scores and made a decision directly contrary to the competent evidence before him. Since Mr. Jones did not rely upon personal observation during the course,

the instructors' evaluations, or Mr. Phipps' opinion, Mr. Rector's advice and his personal observations of the petitioners at registration were the only other bases for Mr. Jones' determination that the petitioners were not proficient in the motor-skill and performance areas and did not possess the minimum degree of general attributes, knowledge, and skill to function as inexperienced law enforcement officers.

Based upon the whole record, we agree with the superior court that Mr. Jones made an arbitrary and capricious decision based on (1) his conversation with Mr. Rector and (2) his personal observations of the petitioners at registration. We therefore find the Commission's reliance upon Mr. Jones' decision to delete the petitioners' names was arbitrary and capricious.

[2] With respect to Mr. Phipps, the assistant course administrator, the Commission found (1) that, based upon the information available to him, Mr. Phipps concluded that the petitioners were not sufficiently proficient in firearms training, drivers training and defensive tactics, and lacked the minimum degree of general attributes, knowledge, and skill necessary to function as inexperienced law enforcement officers; and (2) that Mr. Phipps conveyed his opinion to Mr. Jones after the post-delivery report was initially sent in.

The evidence does not support this finding. Although admitting that he "hardly recalled the course," Mr. Phipps testified that he was on the range once when Ms. Rector was shooting. He stated that "I do not know what she shot because I'm not a range officer. I know very little about it except I have to qualify but I let the instructor take care of that. I didn't bother because I'm not an instructor and I don't know how to evaluate 'em." Although Mr. Phipps had special notification that the petitioners were in the course, he testified that he did not make any special effort to see how the course was being conducted or how the petitioners were performing. Mr. Phipps testified that "I was out there but I didn't make a special effort to see is Rector doing this or doing that . . . . I left that entirely to the instructor 'cause they're state certified instructors."

In fact, in 1984, Mr. Phipps was not certified in any of the eighteen test areas and had never even seen the guidelines from the Commission. All the information Mr. Phipps received from the course instructors indicated the petitioners had passed the three physical sections. There was no evidence which would support a

conclusion by Mr. Phipps that petitioners were not as proficient as the standard law enforcement officer.

Since Mr. Phipps' opinion was not substantiated by the evidence, the Commission could not have relied in good faith on his opinion in reaching its decision.

[3] In an effort to support its decision, the Commission argues in its brief that since the petitioners did not perform in the exact same manner as the other trainees, Ms. Rector and Mr. Cranford were not evaluated on the same standards and therefore did not successfully complete the motor-skills and performance sections of the course despite the passing scores on the post-delivery report. The evidence does not support this argument.

At some point between 1984 and the Commission's final agency decision, the State Bureau of Investigation was brought in to interview people familiar with the proceedings. Mr. Phipps told SBI Agent Susan Forest that to his knowledge no leniency was given to the petitioners. Each instructor for the three physical sections testified that the petitioners were required to meet the same standards as the other trainees. We will address each performance section separately.

Specifically, with respect to the defensive tactics section, the Commission found that (1) Ms. Rector and Mr. Cranford did not adhere to the same techniques as the other students in the defensive tactics class and were not required to use a nightstick to execute certain maneuvers; and (2) Ken Bradstock, the defensive tactics instructor, did not have an opinion as to whether the petitioners could function as law enforcement officers.

Mr. Bradstock testified that both petitioners had passed the section and that all the trainees were required to perform the same maneuvers. He allowed some modification of the techniques to allow Ms. Rector and Mr. Cranford to start a maneuver from a sitting position rather than a standing position and to use a crutch instead of a baton. He testified that "the end result was the same." In an interview with SBI Agent Forest, Mr. Bradstock indicated that it was not unusual to modify techniques, because not every trainee can perform every defensive technique in the same manner.

The Commission was arbitrary and capricious in relying on the modification to certain defensive maneuvers as a basis for deny-

ing certification. Ignoring Mr. Bradstock's testimony that the petitioners had passed the course, the Commission focused instead on the use of crutches rather than a nightstick or baton in the performance of certain defensive techniques. The standard of performance set forth in the basic training course notebook adopted by reference by the Commission stated that each trainee must perform the tactic to the satisfaction of the course instructor. The use of a crutch rather than a baton is irrelevant as long as the petitioners were able to perform the maneuvers and the course section to the satisfaction of the instructor.

With respect to police driver training, the Commission found that (1) during the section, Ms. Rector and Mr. Cranford were allowed to use hand controls to operate the vehicles and were not required to operate the vehicles without such assistance; (2) the hand controls took twenty minutes to install; and (3) Tom Dahlen, the driver training instructor, testified that neither petitioner was able to perform the functions of an inexperienced law enforcement officer because neither could handle a high speed chase.

Mr. Dahlen testified that the petitioners were allowed to use hand controls to operate the vehicle. With this modification, the petitioners passed the same course that was required by the standards and "the same course everybody else took in exactly the same time with the same sheriff's department cars and if it wasn't time it was exactly the same speed." Mr. Dahlen testified that in his opinion the petitioners did have the driving skill and knowledge to perform the "every day" functions of an inexperienced law enforcement officer. He did express reservations about the petitioners' ability to handle high speed chases, but there is no evidence that he ever witnessed the petitioners or any other trainee in such a situation. In addition, Mr. Dahlen never witnessed the petitioners driving vehicles without hand controls and testified that "[t]hey may be able to operate [a car without hand controls], I don't know."

The Commission was arbitrary and capricious in relying on the use and installation of hand controls as a basis for denying certification. Nothing in the course rules prohibited the use of hand controls. In fact, petitioners offered the testimony of a deputy sheriff, a double amputee certified in 1987, who used hand controls during the police driver training section of a BLET course. The use and installation of hand controls is irrelevant in determining whether the petitioners passed the police driver training section.

In addition to focusing on the use of hand controls, the Commission relied upon the unsubstantiated opinion of Mr. Dahlen that the petitioners could not handle a high speed chase. Mr. Dahlen never saw the petitioners attempt a high speed chase.

With respect solely to Ms. Rector, the Commission found that (1) the petitioner made several attempts to pass the firearms section of the course; (2) during her last attempt on the last day of class, only Ms. Rector, the instructor, and then Deputy Sheriff Preston Oldham were on the range when she allegedly fired the qualifying score; and (3) Ms. Rector's scores were inconsistent with the instructor's conclusion that she had qualified.

Mr. R. U. Lloyd, the firearms instructor, testified that Ms. Rector shot the minimum score of seventy percent on the last day of class. According to Mr. Lloyd, Ms. Rector did have some assistance in moving from station to station but did not receive any assistance in obtaining the shooting positions at each station at the time she qualified. The course rules did not prohibit the use of crutches in moving from station to station. Mr. Lloyd further testified that only he, Sheriff Oldham, and Ms. Rector were present at the range when Ms. Rector fired her qualifying score. Both Sheriff Oldham and Ms. Rector corroborated Mr. Lloyd's testimony that Ms. Rector shot a passing score.

Four days after the last day of class, Mr. Lloyd prepared a memorandum setting forth Ms. Rector's score. In this memorandum, Mr. Lloyd stated that Ms. Rector had qualified and that the number of practice times was consistent with other low scoring students attempting to qualify.

Based upon the scoring memorandum, the Commission concluded that the "facts and figures" were "inconsistent with a final score of 70% by Polly Rector on her final qualification attempt." The first column indicating the number of target hits totaled 42, while the second column used to score the hits indicated 45 hits. Ignoring the first column, the Commission based its conclusion that Ms. Rector had not qualified on the information in the scoring column. The report contains an obvious error and is inconclusive. The target used to score Ms. Rector was not introduced into evidence. The only competent evidence on which to base an opinion of Ms. Rector's qualification is thus the testimony of Mr. Lloyd, Sheriff Oldham, and Ms. Rector that she did qualify. Given this testimony and the inconclusive nature of the memorandum, the Commission

could not have reasonably concluded that Ms. Rector did not pass the firearms section of the course.

In its brief, the Commission points out that although the other trainees were required to shoot a shotgun, Ms. Rector was not allowed to do so because of her physical condition. The course standards, however, did not require students to qualify with a shotgun. Ms. Rector's failure to shoot a shotgun cannot be a reasonable basis for finding that she did not successfully complete the firearms section and the BLET course.

When the whole record is viewed, the evidence shows that the Commission denied certification to the petitioners because they were handicapped; the petitioners met the minimum requirements for certification. The trial court's conclusions that the Commission's decisions were arbitrary and capricious and unsupported by the substantial evidence must be affirmed. Having reached that result, we find no error in the trial court's making additional findings of fact which were supported by the evidence, in view of the whole record.

Affirmed.

Judges ORR and WYNN concur.

LEWIS E. LAMB, JR., APPELLANT v. THEDA ANDREWS LAMB, APPELLEE

No. 9021DC1174

(Filed 6 August 1991)

1. **Divorce and Separation § 218 (NCI4th)— alimony—substantial assets—maintaining standard of living**

The trial court did not err in determining that an award of alimony was necessary to maintain defendant wife's standard of living where the court found that defendant had assets of over $490,000, debts of $37,876, monthly expenses of $2,500, and a gross monthly income of $1,477. Defendant was not required to deplete plaintiff's monthly payments to her on the principal of a note given in equitable distribution before being entitled to alimony.

Am Jur 2d, Divorce and Separation §§ 665, 666.

2. Divorce and Separation § 219 (NCI4th)— alimony—consideration of equitable distribution

The trial court did not fail to consider the effect of equitable distribution on plaintiff husband's ability to pay alimony. Furthermore, the trial court did not err in awarding defendant wife the same amount of permanent alimony as she had been receiving as temporary alimony prior to equitable distribution.

Am Jur 2d, Divorce and Separation §§ 560, 657.

3. Divorce and Separation § 201 (NCI4th)— wife as dependent spouse—supporting evidence

The trial court did not err in concluding that defendant wife is a dependent spouse and plaintiff husband is the supporting spouse where the court found that defendant has assets of over $490,000, debts of $37,876, monthly expenses to maintain her accustomed standard of living of $2,500, and a gross monthly income of only $1,477, and that plaintiff husband has assets of over $901,000, debts of $338,095, gross monthly income of $8,696, net monthly income of $5,681, and monthly living expenses of $2,861.

Am Jur 2d, Divorce and Separation §§ 642, 659, 660.

4. Divorce and Separation § 539 (NCI4th)— alimony action—attorney fees erroneously awarded

The trial court erred in awarding attorney fees of $12,235 to defendant wife in an alimony action where both parties had substantial estates and an award of attorney fees was not necessary in order for defendant, as litigant, to meet plaintiff, as litigant, on substantially even terms.

Am Jur 2d, Divorce and Separation § 604.

Judge COZORT concurring in part and dissenting in part.

APPEAL by plaintiff from judgment entered 11 June 1990 by *Judge Abner Alexander* in FORSYTH County District Court. Heard in the Court of Appeals 16 May 1991.

Plaintiff and defendant separated on 5 July 1983, and on 12 January 1984 plaintiff was ordered to pay as temporary alimony $1600 per month and $84 per month for medical insurance. A judgment of absolute divorce was entered 2 October 1985, and an equitable distribution judgment was entered 6 October 1989. On 11 June

1990, a judgment was entered ordering plaintiff to pay defendant $1684 per month as permanent alimony and $12,235.15 to defendant's attorneys for services and costs rendered in the action for permanent alimony.

From this judgment, plaintiff appeals.

Womble Carlyle Sandridge & Rice, by Jimmy H. Barnhill and James H. Joyce, III, for plaintiff-appellant.

Davis & Harwell, P.A., by Joslin Davis and Robin J. Stinson, for defendant-appellee.

ORR, Judge.

At the time of the judgment of permanent alimony, the trial court found that the defendant, who was 68 years old and had health problems, owned the following assets:

1. residence at 2641 Woodberry Drive	146,700.00
2. lot, Bermuda Run, Advance, N.C.	16,000.00
3. 1982 Mercedes automobile	27,000.00
4. household furnishings and belongings	75,000.00
5. Dean Witter Sears Liquid Asset Fund	44,595.00
6. Dean Witter Government Securities Plus Fund	93,655.50
7. Balance on note from Dr. Lamb	87,326.39
	$490,276.89

Defendant had individual debts of $37,876.

The trial court found that defendant had the following monthly income:

1. part-time employment	53.00
2. Social Security	268.00
3. interest on note (equitable distribution) from Dr. Lamb	300.00
4. dividend income	601.00
5. dividend income	255.00
	$ 1,477.00

Including the temporary alimony of $1684, the trial court found that defendant's total gross monthly income was $3161. With taxes, the trial court found that defendant's average net income per month

was $2554.08. The trial court found that defendant's total monthly expenses were $2500.

Regarding plaintiff, who was 56 years old, in good health, and a dentist, the trial court found that he owned the following assets:

1. office building	129,500.00
2. residence at 2640 Reynolda Road	89,000.00
3. 1985 Audi, 1968 Oldsmobile, 1968 Jaguar	
4. vested interest in Money Purchase Pension Plan, net value	178,080.24
5. profit sharing plan, net value	148,793.28
6. 100% interest in dental practice	259,910.00
7. SR6 Limited Partnership	21,620.00
8. Winthrop Towers Limited Partnership	5,000.00
9. Oppenheimer Money Market	20,798.79
10. Valueline IRAs (2)	1,552.96
	987.70
11. Andrew Peck	24,043.59
12. 1980 I Apache Limited Partnership	11,266.84
13. Smith, Barney, Harris, Upham account	10,784.89
	$901,338.29

The trial court found that plaintiff owed the following debts:

1. D. Blake Yokley	3,787.50
2. First Union Bank secured by Reynolda Road property (monthly payments of 3075.50)	213,633.76
3. First Union Bank monthly payments of $316	14,015.81
4. Note to Theda Lamb (equitable distribution) balance: (monthly payments of $2441.29)	87,326.39
5. Wachovia Bank (monthly payments of $308.53)	14,032.00
6. CPA	3,000.00
7. Childress Home Improvements	2,300.00
	$338,095.46

The plaintiff filed a Financial Affidavit showing his total monthly living expenses as $10,461.43, but the trial court adjusted it to $2861.11. The trial court found that plaintiff had a gross monthly income of $8696.32 and net monthly income of $5681.18.

I.

Plaintiff argues that the trial court erred in failing to consider the effects of equitable distribution, the estates, earnings and accustomed standard of living of the parties in setting the permanent alimony. We disagree.

N.C. Gen. Stat. § 50-16.5(a) (1987) provides that "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." Plaintiff argues that the trial court failed to meet at least two of the statutory requirements.

"The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors established by G.S. 50-16.5(a) for a determination of an alimony award." *Shamarak v. Shamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986). "The requirement for detailed findings is thus not a mere formality or an empty ritual; it must be done." *Id.* at 128, 343 S.E.2d at 562. "Although the trial judge must follow the requirements of this section in determining the amount of permanent alimony to be awarded, the trial judge's determination of the proper amount is within his sound discretion and his determination will not be disturbed on appeal absent a clear abuse of that discretion." *Payne v. Payne*, 49 N.C. App. 132, 135, 270 S.E.2d 546, 548 (1980).

[1] Plaintiff contends that a comparison of the estates of the two parties reveals that no amount of alimony is "necessary" to maintain defendant's standard of living. We disagree. The trial court found that defendant had assets of over $490,000, debts of $37,876, monthly expenses of $2500, and a gross monthly income of $1477. Plaintiff argues that defendant's monthly receipts are $3618 with the addition of the monthly payment from plaintiff of $2141.29 (less the $300 interest) on the equitable distribution distributive award note. We disagree with plaintiff's assessment of defendant's monthly receipts. The $2141 is the principal on the equitable distribution note, and the trial court properly included this amount in the assets owned by defendant.

The trial court found that plaintiff had a gross monthly income of $8696.32, net monthly income of $5681.18, and monthly living expenses of $2861.11. He had assets of $901,338.29 and debts of

$338,095.46. Plaintiff argues that his total monthly expenses are $9002.43 which results in a shortfall of $3321.25.

The trial court's findings are supported by competent evidence and are binding on this Court on appeal. *Williams v. Williams*, 299 N.C. 174, 187, 261 S.E.2d at 849, 858 (1980). We find that the trial court properly considered the factors in N.C. Gen. Stat. § 50-16.5(a) in setting permanent alimony and making sufficiently detailed findings. Further, defendant need not deplete her monthly principal payment as plaintiff argues. As our Supreme Court stated in *Williams*, "[i]f the spouse seeking alimony is denied alimony because he or she has an estate which can be spent away to maintain his or her standard of living, that spouse may soon have no earnings or earning capacity and therefore no way to maintain *any* standard of living." 299 N.C. at 184, 261 S.E.2d at 856.

[2] Plaintiff also argues that the trial court ignored the relationship between equitable distribution and alimony and excluded the effect of equitable distribution from its consideration of plaintiff's ability to pay alimony. Further, he argues the results are unjust in that the trial court ordered the same amount of permanent alimony as temporary alimony so that defendant is receiving the same amount of alimony as she did prior to equitable distribution.

We disagree. Clearly there is a relationship between one's property and one's "need for support and the ability to furnish it." *Capps v. Capps*, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984). However, in its determination of the factors required to be considered by N.C. Gen. Stat. § 50-16.5(a), the trial court did consider the effects of equitable distribution. Further, at the time of the award of permanent alimony, over six years had passed since the award of temporary alimony. Here the trial court properly considered the required factors and did not abuse its discretion in setting the amount of permanent alimony.

Plaintiff also contends that the "trial court committed reversible error by repeatedly sustaining objections to testimony regarding the parties' accustomed standard of living prior to separation, contrary to N.C. Gen. Stat. § 50-16.5(a) and the decisions of this court." Plaintiff assigns as error the sustaining of an objection by defendant's attorney regarding plaintiff's preparation of a summary sheet of what he considered "reasonable monthly expenses for the maintenance of one person at the Woodberry Drive address." The summary sheet has not been included in the record.

"[T]he parties' standard of living during the marriage is a critical factor, which the trial court must consider to insure that the dependent spouse's alimony award will sustain her prior lifestyle." *Perkins v. Perkins*, 85 N.C. App. 660, 666, 355 S.E.2d 848, 852, *disc. review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987). Consistent with this requirement, the trial court's findings indicate he considered defendant's "station in life to which she became accustomed to during the parties' marriage."

II.

[3] Plaintiff also contends that the trial court erred in concluding as a matter of law that defendant is a dependent spouse and that plaintiff is a supporting spouse. We disagree.

The trial court stated in its conclusions of law:

> 2. The Defendant is a dependent spouse, the Plaintiff is the supporting spouse and is financially capable of supporting the Defendant; and that grounds exist for award of permanent alimony.
>
> 3. The Plaintiff is the person upon whom the Defendant is actually substantially dependent to maintain the station in life to which Defendant has become accustomed during the parties' marriage and Defendant is in need of support and maintenance from the Plaintiff; that Plaintiff has financial ability to provide, or take necessary means to provide, the Defendant with permanent alimony in the amount of $1,684.00 per month.

N.C. Gen. Stat. § 50-16.1(3) (1987) defines "dependent spouse" as a "spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1(4) defines "supporting spouse" as "a spouse . . . upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support."

In order to be "actually substantially dependent" on the other spouse, "the spouse seeking alimony must have actual dependence on the other *in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation.*" *Williams*, 299 N.C. at 180, 261

S.E.2d at 854. "[T]he trial court must evaluate the parties' incomes and expenses measured by the standard of living of the family as a unit" in order to determine if a spouse is "actually substantially dependent." *Talent v. Talent*, 76 N.C. App. 545, 548, 334 S.E.2d 256, 258 (1985).

In addition, even where a spouse is not "actually substantially dependent," the spouse may be a dependent spouse under the second part of N.C. Gen. Stat. § 50-16.1(3) if he or she is "substantially in need of maintenance and support," the meaning of which is determined by construing this statute *in pari materia* with the terms of N.C. Gen. Stat. § 50-16.5. *Williams*, 299 N.C. at 182, 261 S.E.2d at 855. Thus, a spouse is a dependent spouse if "considering the parties' earnings, earning capacity, estates, and other factors, the spouse seeking alimony demonstrates the need for financial contribution from the other spouse to maintain his or her accustomed standard of living." *Phillips v. Phillips*, 83 N.C. App. 228, 229, 349 S.E.2d 397, 399 (1986). If a trial court decides a spouse is dependent and is entitled to an order for alimony, the award will not be disturbed on appeal except for an abuse of discretion. *Id.* at 230, 349 S.E.2d at 399.

In *Williams* the trial court found that the wife's monthly expenses exceeded $3500 based on the standard of living to which the parties had become accustomed, and that the wife had a monthly gross income of $1833, resulting in a monthly shortfall of $1667, and an estate with a net worth of $761,935. The trial court found the husband had a gross income of $116,600, a net income of $61,702, and an estate with a net worth of $870,165. There the Supreme Court in upholding the trial court's award of permanent alimony held that the wife was "substantially in need of maintenance and support" from the supporting spouse and was therefore a dependent spouse. *Williams*, 299 N.C. at 187, 261 S.E.2d at 858.

Here the trial court properly considered the required factors in determining whether defendant is a dependent spouse and plaintiff a supporting spouse, and its findings are supported by the evidence. Because defendant is "substantially in need of maintenance and support" from plaintiff, we hold that the trial court did not err in concluding that defendant is a dependent spouse and plaintiff is the supporting spouse.

III.

[4] Plaintiff contends that the trial court erred in concluding that defendant was without necessary funds to pay her attorneys' fees, that plaintiff has the ability to pay $12,235.15 of these fees, and ordering plaintiff to pay $12,235.15 of such fees. We agree.

N.C. Gen. Stat. § 50-16.4 (1987) provides:

> At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

In *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980), our Supreme Court stated:

> In order to receive an award of counsel fees in an alimony case, it must be determined that the spouse is entitled to the relief demanded; that the spouse is a dependent spouse; and that the dependent spouse is without sufficient means whereon to subsist during the prosecution of the suit, and defray the necessary expenses thereof. Whether these requirements have been met is a question of law that is reviewable on appeal, and if counsel fees are properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for an abuse of discretion. The guiding principle behind the allowance of counsel fees is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate and suitable legal representation. [Citations omitted.]

In *Clark*, where the husband had a net worth in 1975 of $650,000 with a savings account in 1978 of $75,000, and the wife had an entire separate estate of only $87,000, the Court said that "[i]t would be contrary to what we perceive to be the intent of the legislature to require a dependent spouse to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse. . . ." *Id.* at 137, 271 S.E.2d at 68; *see also Cobb v. Cobb*, 79 N.C. App. 592, 339 S.E.2d 825 (1986) (attorney fees awarded where the wife would be forced to sell her only

remaining asset, the marital home). In *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985), this Court, in looking at the dependent spouse's income alone, affirmed the trial court's awarding of attorney fees.

In *Williams*, the Court denied attorney fees where the dependent spouse had a substantial separate estate. There the Court stated: "It is clear from the record before us that an award of counsel fees was not necessary to enable plaintiff, as litigant, to meet defendant, as litigant, on substantially even terms by making it possible for her to employ counsel." *Williams*, 299 N.C. at 190, 261 S.E.2d at 860.

Here the trial court found that "Defendant does not have sufficient income and assets with which to pay said sum and Plaintiff has the ability to take reasonable measures to secure assets to pay Defendant's attorneys for a portion of the services rendered to the Defendant in the sum of $12,235.15." This finding that the defendant "does not have sufficient income and assets with which to pay" her attorneys' fees is not supported by the evidence.

The evidence shows that defendant had assets of over $490,000, debts of $37,876, a total gross monthly income of $1477 (plus $1684 in alimony) with monthly expenses of $2500. The evidence also shows that plaintiff had assets of $901,338.29, debts of $338,095.46, a gross monthly income of $8696.32, and monthly living expenses of $2861.11.

Defendant argues that 57% of the value of her estate consists of non-income producing assets used by the parties when they were living together and the remaining assets were invested to generate income to meet her expenses. However, in looking at the evidence, we conclude that an award of attorneys' fees was not necessary in order for defendant, as litigant, to meet plaintiff, as litigant, on substantially even terms. The amount of attorney fees that defendant is responsible for is substantial but not so substantial as to deplete or jeopardize the defendant's assets and income. Accordingly, we conclude that the trial court erred in awarding attorneys' fees to defendant.

Affirmed in part and reversed in part.

Judge WYNN concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I agree with that portion of the majority which affirmed the trial court's order awarding permanent alimony to defendant. I disagree with the majority's conclusion that the trial court erred in awarding attorneys' fees to defendant.

Defendant is 68 years old, in bad health, and did not work outside the home during the marriage. At separation, she had no income and no significant separate estate. After equitable distribution, she has a sizable "paper" estate; however, the bulk of that estate is the marital home and investment accounts received in the equitable distribution which provide some income for the defendant. If defendant must pay her own attorneys' fees, she must use all the alimony received from plaintiff for a substantial period of time, sell the marital home, or liquidate the investment assets received in the equitable distribution. Neither option is, in my view, appropriate. The law should not require the dependent spouse to deplete that which she receives in equitable distribution or as alimony payments in order to pay her attorneys for services rendered to her. I vote to affirm the trial court's decision to award attorneys' fees to defendant.

ROLAND LAPIERRE AND WIFE, LEAH LAPIERRE v. SAMCO DEVELOPMENT CORPORATION, D/B/A AMERICRAFT BUILDERS

No. 9014SC946

(Filed 6 August 1991)

1. Sales § 6.4 (NCI3d)— residence—builder-vendor—implied warranty of habitability

The trial court did not err by denying defendant's motions for a directed verdict, judgment n.o.v., and a new trial on a claim for breach of the implied warranty of habitability in the construction of a garage and driveway where plaintiffs put on evidence that the garage was not constructed in a manner that conformed to standards of workmanlike quality, and the testimony of plaintiffs' expert witnesses also supports the conclusion that the driveway was not constructed in a

workmanlike manner and did not meet the standard of workmanlike quality then prevailing at the time and place of construction.

Am Jur 2d, Building and Construction Contracts § 27; Vendor and Purchaser §§ 330, 335.

2. Unfair Competition § 1 (NCI3d)— sale of house—construction of deck—unfair practice

The trial court did not err in finding that defendant had engaged in unfair and deceptive practices in the construction of a deck where defendant's brochure provided a picture showing the location of the deck and gave its exact dimensions; defendant's salesman told plaintiffs that the deck would be built according to the description in the brochure; defendant's vice-president testified that it was impossible to locate the deck in that location because of the ash clean-out door on the chimney; plaintiffs' expert witness testified that building the deck as represented would have created a fire hazard; and blueprints for the house indicated that the deck would be built to certain dimensions and in a certain location. Defendant represented that it would build the deck in a certain location and to certain dimensions knowing that it was impossible to build the deck in that location, then relocated the site for the deck and built the deck smaller than represented. These representations have the capacity to mislead consumers. N.C.G.S. § 75-1.1.

Am Jur 2d, Building and Construction Contracts § 126; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

3. Damages § 38 (NCI4th)— construction of residence—unfair practice and breach of implied warranty of habitability—damages

The trial court did not err in an action for unfair and deceptive practices and breach of the implied warranty of habitability arising from the construction and sale of a house by instructing the jury only on repair value. Awarding plaintiffs the cost of building the deck they bargained for puts them in their original position; although the garage cost $4,500 to build and will cost $21,477.24 to repair, it is virtually useless for its intended purpose without the repairs; and the defects

in the construction of the driveway are so major as to justify the cost of repair.

Am Jur 2d, Building and Construction Contracts § 79.

4. **Unfair Competition § 1 (NCI3d)— construction and sale of house —unfair and deceptive practice—refusal to settle—attorney fees**

The trial court did not err by finding that there was an unwarranted refusal to settle an action for unfair and deceptive practices and breach of the implied warranty of habitability in the construction and sale of a house, so that attorney fees could be awarded, where defendant offered to increase the size of the deck but plaintiffs refused because of concerns about the quality of defendant's workmanship; plaintiffs offered to settle the lawsuit for $14,000; and defendant rejected that proposal and offered to settle for $2,000.

Am Jur 2d, Building and Construction Contracts § 27; Costs § 72.

5. **Unfair Competition § 1 (NCI3d)— construction and sale of house—unfair and deceptive practices—amount of attorney fees**

The trial court did not err in its award of attorney fees under N.C.G.S. § 75-16.1 where the findings were sufficient to support the award and defendant did not show any abuse of discretion.

Am Jur 2d, Building and Construction Contracts § 27; Costs § 78.

APPEAL by defendant from judgments entered 4 April 1990 and 8 May 1990 by *Judge George R. Greene* in DURHAM County Superior Court. Heard in the Court of Appeals 20 March 1991.

Plaintiffs filed an action on 15 April 1988 against Samco Development Corporation, d/b/a Americraft Builders, alleging that defendant breached the implied warranty of habitability and engaged in unfair and deceptive trade practices in the construction of plaintiffs' home.

In early 1985 Mr. Lapierre drove through a new residential development in Durham County and stopped at a model home there. He spoke to a salesman, who showed him a plat map of the development and the available floor plans. Mr. Lapierre talked with the

salesman on several other occasions. The salesman showed him various lots in the development and discussed the different floor plans and features that were available. Eventually, Mr. and Mrs. Lapierre selected a lot and one of the floor plans called the "Mayberry." They added several optional features including a brick fireplace, a deck, and a single car garage. In April 1985 the parties signed a purchase agreement for the house and defendant Americraft began construction.

The house was completed and the closing was held on 24 September 1985. After plaintiffs moved into the house, they noticed problems with the garage, the deck, and the driveway. When plaintiffs parked their car in the garage, they found that the placement of the brick steps leading from the kitchen to the garage reduced the space in the garage so much that they had to drive the car to the back wall of the garage to have enough room to open the car doors. With the car pulled in so far, there was no room to walk around the car and it was difficult to reach the kitchen door.

The floor plan brochure that defendant provided plaintiffs showed both the dimensions and location of the wooden deck. Americraft built the deck smaller and in a different location than was shown on the brochure. In addition, the driveway surface contained several depressions that collected rainwater in puddles. Defendant attempted to correct the problem by repouring two sections of the concrete driveway. In spite of defendant's attempt, the driveway cracked and the "puddling" problem continued.

The trial court denied defendant's motion for a directed verdict at the close of plaintiffs' evidence. The jury returned a verdict finding that defendant had represented to plaintiffs that it would build a ten foot by sixteen foot wooden deck in the location shown on the "Mayberry" brochure and building plans and then failed to do so. The jury also found that defendant breached an implied warranty of workmanlike quality in the construction of the garage and driveway. Additionally, the jury found that defendant did not represent that it would build an oversize garage and then fail to do so, and that defendant did not breach an implied warranty of workmanlike construction in the construction of plaintiffs' deck. The trial court held that defendant's "misrepresentations" concerning the deck constituted unfair and deceptive trade practices under G.S. 75-1.1 and awarded treble damages and attorneys fees. Defendant appeals.

Maxwell & Hutson, P.A., by James H. Hughes and Graham H. Kidner, for plaintiff-appellees.

Manning, Fulton & Skinner, by Linda K. Wood, for defendant-appellant.

EAGLES, Judge.

[1] Defendant first contends that the trial court erred in denying its motions for a directed verdict, judgment notwithstanding the verdict, and a new trial on plaintiffs' claim for breach of the implied warranty of habitability in the construction of the garage and driveway. We disagree.

Defendant contends that the evidence was insufficient to establish a breach of the implied warranty of habitability in the construction of the garage and the driveway. Defendant argues that the implied warranty of habitability applies only to "hidden, major defects which affect the 'essential utility' of the residence." Defendant contends that the plaintiffs had an opportunity to see the garage before closing and that the Lapierres should have known the size of the garage. Here, the evidence indicates that Mr. Lapierre expressed his concern to the builder about the effect of the steps extending into the garage. The salesman told him "[D]on't worry about it. We'll take care of it." Additionally, plaintiffs had no opportunity to try to park their car in the garage until after they had closed on the house. Defendant also argues that there is no allegation that the garage was "structurally unsound or unusable" or that the driveway was structurally defective.

The implied warranty of habitability means both that "the dwelling, together with all its fixtures, is sufficiently free from major structural defects" and that it "is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction." *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974). In *Lyon v. Ward*, 28 N.C. App. 446, 450, 221 S.E.2d 727, 729 (1976), this Court held that *Hartley* "stand[s] for the proposition that a builder-vendor impliedly warrants to the initial purchaser that a house and all its fixtures will provide the service or protection for which it was intended under normal use and conditions." Additionally, the Supreme Court has said, "The test of a breach of an implied warranty of habitability in North Carolina is not whether a fixture is an 'absolute essential utility to a dwelling house.' The test is whether

there is a failure to meet the prevailing standard of workmanlike quality." *Gaito v. Auman*, 313 N.C. 243, 252, 327 S.E.2d 870, 877 (1985).

Here, plaintiffs put on evidence that the garage was not constructed in a manner that conformed to standards of workmanlike quality. Plaintiffs presented the testimony of two witnesses who were experts in residential construction. One expert testified that the standard width for a single car garage was 12 feet of usable space excluding obstructions such as steps. The other expert testified that the stairway leading from the garage into the kitchen violated the North Carolina Building Code. The Building Code requires a minimum width of thirty-six inches for platforms at building entrances. The Lapierres' garage had a usable width of 11 feet one inch and the stoop in the garage was only 26 and one-half inches wide. The plaintiff testified that once his car was parked in the garage, he had to pull to the back wall of the garage to have enough room to open the door and had to "squeeze" between the side of the car and the stairway to reach the kitchen. Plaintiff also testified that because the stoop was so narrow, the kitchen door could only be opened to a 60 degree angle. From this evidence, we conclude that the jury did not err when it concluded that Americraft breached the implied warranty of habitability by failing to conform to workmanlike standards in constructing the garage.

The testimony of plaintiffs' expert witnesses also supports the conclusion that the driveway was not constructed in a workmanlike manner and did not meet the standard of workmanlike quality then prevailing at the time and place of construction. Both experts testified that the driveway should have been poured in sections with expansion or control joints every twenty feet. One expert testified that the driveway should have been poured "in one process" so that the finished driveway would have been uniform in color. He also testified that the driveway should have sloped in such a way that rainwater would run off rather than collect on the surface. The plaintiff testified that rainwater would collect in several depressions on the driveway surface. Defendant had attempted to correct the problem by taking out strips of concrete and patching it with concrete left over from other jobs. Plaintiff testified that even after the attempts to correct the depressions in the driveway, the water still collected on the surface, the driveway cracked, and stones had begun to "pop out of it." From this evidence we conclude that the jury did not err when it concluded that the

defendant breached the implied warranty of habitability in constructing the driveway.

[2] Defendant next argues that the trial court erred in finding that defendant had engaged in unfair and deceptive trade practices in construction of the deck. We disagree.

Defendant contends that the evidence was insufficient to establish that it had engaged in any unfair or deceptive conduct. In *Marshall v. Miller* the Supreme Court said:

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. As also noted in *Johnson*, under Section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. Consistent with federal interpretations of deception under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act.

Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citations omitted).

Here, the evidence was sufficient to support the trial court's conclusion that defendant engaged in unfair and deceptive trade practices concerning the deck. Defendant Americraft's brochure provided a picture showing the location of the deck and gave its exact dimensions. Americraft's salesman told the plaintiff that the deck would be built according to the description in the brochure. Americraft's vice president testified that because of the location of the ash clean-out door on the chimney, it was impossible to locate the deck where the salesman and the brochure had represented that it would be built. Plaintiffs' expert witness testified that building the deck as represented would have created a fire hazard. Additionally, the model home blueprints or plans for the house indicated that the deck would be built to certain dimensions and in a certain location. Although here plaintiff did not see the plans before the lawsuit was instituted, it is not necessary to show that plaintiff

was actually deceived but only that the tendency or capacity to mislead exists. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

Here, defendant represented through its salesman, sales brochures, and blueprints that it would build the deck in a certain location and to certain dimensions. Defendant knew that it was impossible to build the deck in that location. Defendant relocated the site for the deck and built the deck smaller than represented. We think that these representations have the capacity to mislead consumers. Accordingly, we hold that the trial court did not err in finding that defendant violated G.S. 75-1.1.

[3] Next, defendant contends that the trial court erred because it did not instruct the jury to calculate damages based on diminution of fair market value. Defendant argues that it was inappropriate to instruct the jury on repair value only because here substantial destruction and waste are involved in making the repairs. We find appellant's argument unpersuasive. Plaintiffs here brought an action for unfair and deceptive trade practices under Ch. 75 and for breach of the implied warranty of habitability. We do not think that the trial court erred in instructing the jury on damages under either theory of recovery.

G.S. 75-16 provides:

> [I]f any person shall be injured . . . such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

"An action for unfair or deceptive acts or practices is 'the creation of . . . statute. It is, therefore, sui generis. It is neither wholly tortious nor wholly contractual in nature . . . .' " *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (quoting *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975)), *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984). This Court has also noted that "[t]he statute merely refers to the person being 'injured' and does not state the method of measuring damages. Consequently, there is confusion as to the proper measure of damages in an unfair or deceptive act or practice case." *Id.* at 231, 314 S.E.2d at 585. The Court has also said that

an action for unfair or deceptive acts or trade practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used. "To rule otherwise would produce the anomalous result of recognizing that although G.S. 75-1.1 creates a cause of action broader than traditional common law actions, G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.

The measure of damages used should further the purpose of awarding damages which is "to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money."

Id. at 232, 314 S.E.2d at 585 (citations omitted). Here, plaintiffs were promised a ten foot by sixteen foot deck in the location shown on the "Mayberry" brochure and building plans. In our view, awarding plaintiffs the cost of building the deck they bargained for puts them in their original position and "gives back to [them] that which was lost as far as it may be done by compensation in money." Accordingly, we hold that the trial court's instruction on damages for the deck was proper.

In *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976), the Supreme Court said that where there is a breach of the implied warranty of habitability the measure of damages is either the difference between the reasonable market value of the subject property as impliedly warranted and its reasonable market value in its actual condition or the amount required to bring the property into compliance with the implied warranty. In *Kenney v. Medlin Construction and Realty Co.*, 68 N.C. App. 339, 344-45, 315 S.E.2d 311, 314-15, *disc. review denied*, 312 N.C. 83, 321 S.E.2d 896 (1984) (citations omitted), this Court said:

Our courts have adhered to the general rule that the cost of repair is the proper measure of damages unless repair would require that a substantial portion of the work completed be destroyed. In such case, the diminution in value method may be the better measure of a party's damages.

The policy underlying this general rule recognizes the need to avoid economic waste and undue hardship to the de-

> fendant contractor when, although the building substantially conforms to the contract specifications, a minor defect exists that does not substantially lower its value.
>
> . . . .
>
> While the diminution in value method can avoid economic waste, when the cost of repair does not involve an imprudent expense, the cost of repair method may best ensure the injured party of receiving the benefit of his or her bargain, even if repair would involve destroying work already completed. When defects or omissions in construction are so major that the building does not substantially conform to the contract, then the decreased value of the building constructed justifies the high cost of repair.

Here, the jury found that the defendant breached the implied warranty of habitability in its construction of the driveway and garage. The garage cost $4,500 to build and plaintiffs estimate that it will cost $21,477.24 to repair. Without the repairs, the garage is virtually useless for its intended purpose. Similarly, a new driveway was included in the base price of the house. Plaintiffs' expert testified that it would cost $6,741.19 to repair the driveway. Considering the evidence presented at trial about the condition of the driveway, we think that the defects in the construction of the driveway are so major as to justify the cost of repair. As to the garage and driveway claims, we cannot say that the cost of repair is disproportionately high when compared to the loss in value without the repair.

[4] Finally, defendant argues that the trial court erred in awarding attorneys fees. Defendant first argues that the evidence was insufficient to support the trial court's finding that there was an unwarranted refusal to settle by Americraft. In order to recover attorneys fees, the plaintiff must establish that there was an unwarranted refusal by defendant to fully resolve the matter which gave rise to the claim. G.S. 75-16.1. Here, the trial court found that defendant offered to increase the size of the deck but that plaintiffs declined to accept the offer because of their concern about the quality of defendant's workmanship. The court also found that the plaintiffs offered to settle the lawsuit for $14,000 and that defendant rejected this proposal and offered to pay $2,000 to settle. The trial court then concluded:

2. That the attempt to settle the lawsuit by the defendant, in regard to the wooden deck, was unreasonable in that the offers made by the defendant, considering the judgment entered for the plaintiffs at the conclusion of the trial, were inadequate and constituted an unwarranted refusal by the defendant to resolve the dispute between the parties.

3. That the plaintiffs' offer to settle the entire lawsuit for the sum of $14,000, taken in the light of the Court's award of damages, was reasonable; defendant was unreasonable in refusing to accept that amount or to negotiate or offer some reasonable amount in an attempt to settle the matter.

Here, the evidence is sufficient to support the finding that there was an unwarranted refusal to settle by Americraft. The award of attorneys fees is within the discretion of the trial court. *Morris v. Bailey*, 86 N.C. App. 378, 358 S.E.2d 120 (1987). We find no abuse of discretion.

[5] Defendant also argues that the evidence was insufficient to support the amount awarded for attorneys fees. We disagree. In awarding attorneys fees under G.S. 75-16.1, the trial court must make findings of fact to support the award. Appropriate findings include findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney. *Morris v. Bailey*, 86 N.C. App. 378, 358 S.E.2d 120 (1987). Here, the trial court found:

The time expended by the plaintiffs' attorneys is reasonable considering the nature and difficulty of the case; a reasonably high degree of skill was required to present the case for plaintiffs through to trial, considering the need to involve and examine two expert witnesses and to succeed upon the theories of unfair trade practice and breach of implied warranty of habitability; the hourly rates charged by the plaintiffs' attorneys are appropriate for the work in question considering the age of the plaintiffs' attorneys and the number of years of practice of the plaintiffs' attorneys; the plaintiffs' attorneys demonstrated that they were able and competent attorneys, and, therefore, justified the hourly rates that they billed according to the statement attached to the affidavit of Mr. Hughes.

This finding is supported by the evidence. The plaintiffs' attorney presented a billing statement from the law firm and an affidavit which estimated that one-third of the time spent on the preparation and prosecution of the case was related to the deck. The fees totaled $17,664. The trial court awarded $5,705.73. This amount is slightly less than one-third of the total amount plaintiffs were billed for attorneys' fees. Here, the findings of fact are sufficient to support the award and defendant has not shown any abuse of discretion. Accordingly, this assignment of error is overruled.

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

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

RUSSELL S. CORRELL AND KELLY L. CORRELL, PETITIONERS-APPELLEES v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENTS-APPELLANTS

No. 9027SC218

(Filed 6 August 1991)

Social Security and Public Welfare § 1 (NCI3d) — Medicaid — excess reserve — ownership of principal residence — exclusion of contiguous property

An applicant for Medicaid benefits for medically needy persons must own his primary residence in order for property contiguous to the primary residence to be excluded under N.C.G.S. § 108A-55 from consideration as an available resource in determining the applicant's financial eligibility for such benefits. Therefore, Medicaid benefits were properly denied on the ground that property owned by the applicants which was contiguous to their rented primary residence constituted excess reserve.

Am Jur 2d, Welfare Laws § 40.

APPEAL by respondents from judgment entered 19 December 1989 by *Judge Marvin K. Gray* in GASTON County Superior Court. Heard in the Court of Appeals 20 September 1990.

Turner, Enochs, Sparrow, Boone & Falk, P.A., by Laurie S. Truesdell and Thomas E. Cone, for petitioner-appellees.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane T. Friedensen, for respondent-appellants.

PARKER, Judge.

The question presented by this appeal is whether an applicant for Aid to Families with Dependent Children-Medical Assistance ("Medicaid") who does not own the real property on which he resides, but does own other real property contiguous to his residence, may be denied Medicaid benefits based on ownership of such other property.

The underlying facts are not in dispute. Petitioners rent their primary place of residence and they own in fee simple a lot with a tax value of $3,640.00 located directly across the road from their residence. Petitioner Russell Correll's father lives in a trailer on the property owned by petitioners. The sole basis on which petitioners were denied Medicaid benefits was their ownership of this property.

On 22 November 1988 petitioners applied for Medicaid. On 6 January 1989 the Gaston County Department of Social Services ("DSS") denied the application on grounds that petitioners' real property constituted excess reserve. A local appeal hearing was held on 26 January 1989; the result was a decision upholding the DSS decision. Petitioners requested a State appeal hearing and on 9 May 1989 a hearing officer of respondent Division of Social Services upheld the denial of petitioners' Medicaid application. On 21 June 1989, after reviewing the record and written arguments, the chief hearing officer of respondent Division of Social Services issued a final agency decision upholding the decision to deny petitioners' application.

On 19 July 1989 petitioners filed a petition for judicial review pursuant to N.C.G.S. § 108A-79(k). The superior court's final order reversed and remanded respondent's final agency decision on grounds that it was affected by error of law and unsupported by substantial evidence of record. Respondents appealed to this Court.

Respondents contend the court below erred by reversing and remanding their final agency decision, since the decision was sup-

ported by substantial competent evidence in the record as a whole and by applicable statutes, regulations and policies. We agree.

The North Carolina Administrative Procedure Act governs the standard of initial and appellate review of administrative agency decisions. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). The Act provides that a superior court may affirm, reverse, or modify a final agency decision or remand the case to the agency for further proceedings. N.C.G.S. § 150B-51(b) (1987). A superior court may reverse or modify a final agency decision which is (i) in violation of constitutional provisions, (ii) in excess of the statutory authority or jurisdiction of the agency, (iii) made upon unlawful procedure, or (iv) affected by other error of law. *Id.; Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. at 530, 372 S.E.2d at 889. The standard of judicial review is the whole record test, under which the reviewing court must examine all competent evidence to support the agency's findings and conclusions. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. at 530, 372 S.E.2d at 889. This test does not permit the reviewing court to substitute its own judgment for the agency's as between two reasonable conflicting views. Instead, the reviewing court must "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).

When an appellate court reviews the decision of a lower court, however (as opposed to when it reviews an agency's decision on direct appeal), the scope of review is the same as for other civil cases. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. at 531, 372 S.E.2d at 890. Thus our consideration of the superior court judgment in this case is limited to determining whether the court committed any errors of law. *Id.* Considering the whole record, we must determine whether the superior court judge was correct as a matter of law in concluding that (i) pursuant to N.C.G.S. § 108A-55 petitioners' real property had to be excluded from consideration as a resource without regard to whether petitioners had an ownership interest in their primary place of residence, (ii) it was error for respondents not to exclude petitioners' property from consideration as a resource, and (iii) respondents' decision was unsupported by substantial evidence in view of the entire record as submitted.

The North Carolina statute at issue reads in pertinent part:

> The Department may authorize [payments of the cost of medical care] when the total resources of such person are not sufficient to provide the necessary care. When determining whether a person has sufficient resources to provide necessary medical care, there shall be excluded from consideration the person's primary place of residence and the land on which it is situated, and in addition there shall be excluded real property contiguous with the person's primary place of residence in which the property tax value is less than [$12,000.00] . . . .

N.C.G.S. § 108A-55 (1988).

Medicaid is a cooperative federal-state program providing medical assistance to certain classes of needy persons. *See* 42 U.S.C. §§ 1396 *et seq.*; N.C.G.S. §§ 108A-54 through -65. North Carolina adopted the Medicaid program through the enactment of General Statutes Chapter 108, now recodified as Chapter 108A. Once a state elects to participate in the Medicaid program, it must comply with federal rules and regulations. *Lackey v. Dept. of Human Resources*, 306 N.C. at 235, 293 S.E.2d at 175.

States participating in the Medicaid program are required to provide coverage to "categorically" needy persons. In North Carolina, categorically needy persons include recipients of Aid to Families with Dependent Children ("AFDC") and certain aged, blind, or disabled individuals. *Morris by Simpson v. Morrow*, 783 F.2d 454, 456 (4th Cir. 1986). Participating states may also provide coverage for "medically" needy persons. Medically needy persons are those who meet the nonfinancial eligibility requirements for cash assistance programs, such as AFDC and federal Supplemental Security Income (SSI), but whose income and resources are too high for them to qualify for categorical aid and who nonetheless lack the means to pay their medical expenses. North Carolina provides medically needy coverage to those who meet income and resources limitations established by respondents pursuant to authority delegated by the General Assembly. *See* N.C.G.S. §§ 108A-54 and -55; *Morris by Simpson v. Morrow*, 783 F.2d at 456; 10 N.C. Admin. Code tit. 10, ch. 50.

Relevant federal law provides as follows: "A State plan for medical assistance must . . . provide for taking into account only such income and resources as are . . . available to the applicant

. . . and . . . as would not be disregarded (or set aside for future needs) in determining his eligibility . . . ." 42 U.S.C. § 1396a(a)(17) (1988). The concept of availability of resources also underlies corresponding federal regulations: "To determine eligibility on the basis of resources for medically needy individuals, the agency must . . . consider only the individual's resources and those . . . considered available to him under the financial responsibility requirements for relatives[; and c]onsider only resources available during the period for which income is computed . . . ." 42 C.F.R. § 435.845(a) and (b) (1990). Analogous federal regulations require state plans for family assistance to "[s]pecify the amount and types of real and personal property, including liquid assets, that may be 'reserved,' i.e., retained to meet the current and future needs while assistance is received on a continuing basis." 45 C.F.R. § 233.20(a)(3)(i)(A) (1990). In addition, according to federal family assistance regulations,

> in AFDC—The amount of real and personal property that can be reserved for each assistance unit shall not be in excess of one thousand dollars equity value (or such lesser amount as the State specifies in its State plan) excluding only:
>
> (1) The home which is the usual residence of the assistance unit;
>
> . . . .
>
> (5) Real property for a period of six months (or at the option of the State, nine months) which the family is making a good faith effort (as defined in the State plan) to sell subject to following provisions. The family must sign an agreement to dispose of the property and to repay the amount of aid received during such period that would not have been paid had the property been sold at the beginning of such period, but not to exceed the amount of the net proceeds of the sale. If the property has not been sold within the specified time period, or if eligibility stops for any other reason, the entire amount of aid paid during such period will be treated as an overpayment . . . .

45 C.F.R. § 233.20(a)(3)(i)(B)(1) and (5) (1990).

Respondents' interpretative regulations for medical assistance are codified as Subchapters 50A ("General Program Administration") and 50B ("Eligibility Determinations") of the North Carolina

Administrative Code. As is required by federal law and regulation, only resources actually available to an applicant are included in "reserve." Thus reserve is defined in respondents' regulations as "assets owned by members of the budget unit and which have a market value." N.C. Admin. Code tit. 10 r. 50A.0201(57) (Sept. 1990). Following federal regulations, respondents deem a resource available when it is actually available and when a "budget unit member has a legal interest in the resource and he, or someone acting in his behalf, can take any necessary action to make it available." N.C. Admin. Code tit. 10, r. 50B.0311(1) (Sept. 1990); r. 50B.0403(a) (Jan. 1991). All available resources are to be included in reserve unless subject to a specific exclusion. The upper limit on the value of reserve for an AFDC-related medically needy budget unit consisting of three persons, as does petitioners' family, is $2,350.00. N.C. Admin. Code tit. 10, r. 50B.0311(2)(b) (Sept. 1990). The homesite is excluded from countable resources when it is the principal place of residence for the applicant. The homesite is defined as the house and lot, plus all buildings on the lot, in a city, or the house and site up to one acre, plus all buildings on the acre, in a rural area. N.C. Admin. Code tit. 10, r. 50B.0403(f) (Jan. 1991).

Respondents' Family and Children Medicaid Eligibility Manual interpreting the regulations states that (i) to be excluded from reserve, the principal residence must be owned and (ii) other excluded property must be contiguous to owned property. Family and Children Medicaid Eligibility Manual MA §§ 3240 III.B.1. at 6R-7R (rev. 10-01-90) (formerly MA § 2375 III.B.1.); 3455 III.A.2.b. at 6c (rev. 12-01-90) (formerly MA § 2461 III.A.2.b.).

As noted above, the primary residence of an applicant for Medicaid would by statute be excluded from consideration in determining his eligibility. In addition, real property (i) contiguous with the primary residence and (ii) which has a property tax value under $12,000.00 would also be excluded. Petitioners argue that under the statute as written, an applicant need not own his primary residence in order to take advantage of the exclusion for contiguous property. Petitioners also argue that any of respondents' rules or regulations interpreting the statute to require that an applicant own his principal residence in order to exclude contiguous property must be held invalid. We do not agree.

Respondents' rules and regulations cited herein follow federal edicts which clearly contemplate that reserve consists of real property which an applicant owns. Rental property could not be "available" or "retained" as those terms are used in federal law and regulations. The same concept of ownership also underlies another portion of North Carolina Medical Assistance Program law which restricts the transfer of property owned by an applicant in order to qualify for benefits. *See* N.C.G.S. § 108A-58 (Supp. 1990). *See also Harris v. Lukhard*, 547 F. Supp. 1015, 1017, 1032 (W.D. Va. 1982), *aff'd*, 733 F.2d 1075 (4th Cir. 1984) (individual who owns too much real property cannot qualify for Medicaid benefits; when an individual applies for Medicaid benefits the Commonwealth evaluates the personal and real property owned by the applicant and if these resources exceed a prescribed amount, the applicant is ineligible to receive benefits; by regulation, ownership of a dwelling occupied by the applicant as his home does not affect eligibility).

In construing a statute all words are to be given effect, if possible, and the words are to be given their usual and ordinary meaning unless a contrary intention is apparent from the language in the statute. The wording of N.C.G.S. § 108A-55 is "and in addition there shall be excluded real property contiguous with the person's primary place of residence." Used in their ordinary sense, the words "in addition" are not merely a redundancy, but further define the exclusion. The word "addition" means "something added or joined to increase value." Webster's Third New International Dictionary 24 (1971). Given their position in the sentence the words "in addition" clearly mean in addition to the principal residence. Hence, the property contiguous to the principal residence may be added to the already excluded principal residence. If the principal residence is not excluded, the property contiguous to the principal residence is not excludable as it is not "in addition to." Since property that is not owned cannot be considered as a resource, exclusion of the principal residence from consideration would not be necessary if the principal residence is not owned. Therefore, under the language of N.C.G.S. § 108A-55, property contiguous to the rented primary residence or homesite is not excludable.

Petitioners argue that requiring these applicants to own their residence in order to exclude their contiguous property leads to an absurd result, since applicants with assets much greater than petitioners' may yet qualify for Medicaid benefits. This argument, however, fails to recognize that guidelines designed to protect

homesite property effect the policy of not forcing homeowners to give up their homes in order to qualify for Medicaid benefits. Only if the homesite and contiguous property were owned could they constitute "resources to provide necessary medical care." Only if the exclusion of contiguous property is dependent on the exclusion of an owned homesite would the policy of protecting applicants' ownership of their homes be furthered.

The underlying philosophy of the regulations requires an applicant to utilize his assets effectively to provide for his needs. Under respondents' regulations applicable to the present case, "[r]esources counted in the determination of financial eligibility for medically needy AFDC related cases [include] [e]quity in real property not used as the budget unit's homesite or not producing income, if salable." N.C. Admin. Code tit. 10, r. 50B.0311(7)(l) (Feb. 1990). We also note that respondents' regulations have been revised to specify that equity refers to fee simple interest, tenancy by the entireties, salable remainder interest, or value of burial plots. N.C. Admin. Code tit. 10, r. 50B.0311(8)(l) (Sept. 1990). Respondents' guidelines similarly provide that "[i]tems not counted in the [r]eserve" for the medically needy include "all income producing real property." Family and Children Medicaid Eligibility Manual MA § 3455 III.A.2.a. at 6c (rev. 12-01-90) (formerly MA § 2461 III.A.2.a.). Hence the potential exists for petitioners to qualify for Medicaid benefits by showing their property is not salable. These eligibility limitations safeguard the system from abuse by those able to pay and help assure the availability of funds to those who are truly in need.

Petitioners argue that respondents' Medicaid Eligibility Manual was not adopted in accordance with the Administrative Procedures Act and cannot be the basis for denying benefits. As petitioners did not cross-assign error on this issue, they have waived their right to argue it as a basis for supporting the trial court's order. N.C.R. App. P. 10(d) and 28(c). Moreover, our decision is premised on interpretation of the statute as a matter of law, not on application of the provisions in respondents' manual.

Finally we note that the tax record shows the value of the land as $1,430.00 and the value of the improvements as $2,210.00. The evidence also discloses that Mr. Correll's father owns the trailer located on the property. The record does not reflect a finding of fact as to the nature of the improvement, or whether, if it is the trailer, the trailer is an asset available to petitioners.

For the foregoing reasons, we hold the court below erred in concluding that pursuant to N.C.G.S. § 108A-55, petitioners' property was properly excludable from consideration as a resource without regard to whether they owned their principal residence and in reversing respondents' denial of benefits to petitioners.

Reversed.

Judges JOHNSON and EAGLES concur.

WILLIAM H. MIZELL, PLAINTIFF v. K-MART CORPORATION, DEFENDANT

No. 9018SC969

(Filed 6 August 1991)

1. **Negligence § 57.6 (NCI3d) — slip and fall — length of time liquid on floor — summary judgment for defendant — improper**

The trial court erred by granting summary judgment for defendant in a negligence action arising from plaintiff's fall in defendant's store where plaintiff alleged that he slipped and fell on a puddle of brown liquid which looked like coffee in the vestibule through which customers entered and left the store. Plaintiff presented the affidavit of a customer who sat about 20 feet from the location of plaintiff's fall and who stated that he had had an unobstructed view of patrons walking through the vestibule for approximately 20 minutes prior to plaintiff's fall and that nothing was spilled during that time. There were questions for the jury pertaining to the length of time the liquid was on the floor and whether this period was long enough to lead to the conclusion that defendant was negligent in failing to notice and remove the liquid or warn its customers.

Am Jur 2d, Premises Liability §§ 573, 580.

Liability of operator of store, office, or similar place of business to invitee slipping on spilled liquid or semiliquid substance. 26 ALR4th 481.

2. Negligence § 58 (NCI3d)— slip and fall—contributory negligence—summary judgment for defendant

Defendant failed to establish that plaintiff was contributorily negligent as a matter of law in a slip and fall action where plaintiff's evidence was sufficient to permit a reasonable inference that the liquid might not have been obvious to a customer exercising ordinary care, and a jury could also have reasonably found that a person using ordinary care might not have been looking at the floor in those circumstances.

Am Jur 2d, Premises Liability §§ 800, 801.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiff from judgment entered 10 May 1990 by *Judge William H. Freeman* in GUILFORD County Superior Court. Heard in the Court of Appeals 15 April 1991.

In this civil action, plaintiff appeals from a summary judgment entered for defendant. In his complaint, plaintiff alleged that a puddle of liquid on defendant's floor caused him to slip and fall. Plaintiff alleged that defendant's employees were negligent in failing to notice and remove the liquid. Prior to his fall and for reasons unrelated to this action, plaintiff was blind in one eye and had 20/60 vision with corrective lenses in the other eye. Plaintiff seeks damages for a permanent injury to his left knee, lost wages, and medical expenses.

The evidence before the trial court on defendant's motion for summary judgment indicated that defendant's store opened at 9:30 a.m. on 21 May 1988. Conflicting evidence offered by the parties estimated that plaintiff fell between 10:15 a.m. and 11:00 a.m. After choosing the items he wanted to purchase, plaintiff paid for his merchandise and proceeded to leave carrying his packages.

To leave the store, customers must pass through a vestibule enclosed by two sets of doors. After plaintiff was approximately eight to ten feet beyond the first door, he slipped and fell. At his deposition, plaintiff stated that he remembered his foot sliding and his falling at the same instant. Immediately after his fall, plaintiff noticed to his right on the floor a puddle of brown liquid which looked like coffee and seemed to blend in with the brownish color of the floor. Additionally, he stated that prior to his fall he was

carrying two large bags of yarn and was looking at the exiting customers walking directly in front of him.

Charles Gates, a customer, witnessed plaintiff's fall. For a period of approximately 20 minutes prior to plaintiff's fall, Gates sat on a bench approximately 20 feet from where plaintiff fell. In his affidavit, Gates stated that he had a clear view of the area and that nothing was spilled there during that time. Defendant's internal report taken at the scene stated that the last inspection of the area was performed by the general manager at 8:30 a.m. An employee stated in her affidavit that she had not seen any liquid on the floor when she opened the store at 9:30 a.m. The parties presented no evidence concerning the origin of the liquid.

Defendant's answer denied negligence and alleged that plaintiff was contributorily negligent for failing to keep a proper lookout. On 9 February 1990, defendant moved for summary judgment pursuant to G.S. 1A-1, Rule 56. The motion was granted 10 May 1990. Plaintiff appeals.

Spencer W. White for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Clinton Eudy, Jr., and Amiel J. Rossabi for defendant-appellee.

EAGLES, Judge.

[1] Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. Plaintiff argues that a genuine issue of material fact exists as to whether the liquid remained on the floor for such a length of time that defendant knew or should have known of its existence. We agree.

Under G.S. 1A-1, Rule 56(c), defendant is entitled to summary judgment if the record shows "that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." Defendant, as the party moving for summary judgment, has the burden of establishing the absence of any triable issue of fact. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980). When a trial court rules 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).

Since summary judgment "provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). Our courts have repeatedly stated that summary judgment is rarely appropriate in negligence cases because "it ordinarily remains the province of the jury to apply the reasonable person standard." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982) (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979)). After careful review of the record, we hold that the evidence, when viewed in the light most favorable to plaintiff, raises a genuine issue of material fact. Accordingly, we reverse the entry of summary judgment in favor of defendant and remand for trial.

In order to survive defendant's motion for summary judgment, "plaintiff must allege a *prima facie* case of negligence—defendants owed plaintiff a duty of care, defendants' conduct breached that duty, the breach was the actual and proximate cause of plaintiff's injury, and damages resulted from the injury." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990). Plaintiff was an invitee on defendant's premises because his purpose for entering defendant's store was to purchase merchandise. *Morgan v. Great Atlantic and Pacific Tea Co.*, 266 N.C. 221, 145 S.E.2d 877 (1966). Because the plaintiff was an invitee, defendant has a duty "to keep 'entrances to his business in a reasonably safe condition for the use of customers entering or leaving the premises.'" *Lamm v. Bissette Realty, Inc.*, 327 N.C. at 416, 395 S.E.2d at 115 (quoting *Lamm v. Bissette Realty, Inc.*, 94 N.C. App. 145, 146, 379 S.E.2d 719, 721 (1989).

Additionally, defendant "has a duty to warn invitees of hidden dangers about which [defendant] knew or should have known." *Lamm v. Bissette Realty, Inc.*, 327 N.C. at 416, 395 S.E.2d at 115. Where an unsafe condition is created by a third party, or where there is no evidence of its origin, an invitee cannot recover "unless he can show that the unsafe or dangerous condition had remained there for such length of time that the inviter knew, or by the exercise of reasonable care should have known, of its existence." *Long v. National Food Stores, Inc.*, 262 N.C. 57, 60, 136 S.E.2d 275, 278 (1964).

Defendant contends that plaintiff's forecast of evidence fails to show "how long the liquid was on the floor." We disagree.

Here, plaintiff presented the affidavit of a customer, Charles Gates, who sat approximately 20 feet from where plaintiff fell. Gates stated that he had an unobstructed view of patrons walking through the vestibule for approximately 20 minutes prior to plaintiff's fall. He further stated that nothing was spilled there during that period of time.

From this evidence, the jury could infer that the liquid had remained on the floor for at least 20 minutes. Viewed in the light most favorable to plaintiff, the evidence raises a jury question on the issue of defendant's negligence. Here, there are two factual questions for the jury. The first question pertains to the length of time the liquid was on the floor. The second question pertains to whether this period was long enough to lead to the conclusion that defendant was negligent in failing to notice and remove the liquid or warn its customers. *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985).

In an attempt to sustain its position, defendant relies on *France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 320 S.E.2d 25 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985). *France* is distinguishable. In *France*, the plaintiff slipped in pickle juice on defendant's floor. Plaintiff presented no evidence establishing exactly when the witness had seen the broken jar of pickles on the floor. Accordingly, this Court held that the jury could only speculate as to how long the broken jar had been on the floor. Unlike *France*, this is not a case calling for jury speculation. Here, plaintiff has a witness who was looking directly at the area for at least 20 minutes prior to the fall, who saw nothing being spilled and who was present when the fall occurred. The jury could reasonably find from the evidence that the liquid had been on the floor for at least 20 minutes.

[2] We also note that defendant in its answer alleged that plaintiff was contributorily negligent for failing to keep a proper lookout. Defendant argues that the liquid would have been obvious to plaintiff if he had looked down as he walked. Our Supreme Court has addressed this issue as follows:

> The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff

> failed to keep a proper lookout for her own safety. The question is not whether a reasonably prudent person would have seen the [object] had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.

Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981). *See Rives v. Great Atlantic and Pacific Tea Co.*, 68 N.C. App. 594, 598, 315 S.E.2d 724, 727 (1984) (customer slipped and fell on grapes in grocery store). Furthermore, "[t]he issues of proximate cause and contributory negligence are usually questions for the jury." *Lamm v. Bissette Realty, Inc.*, 327 N.C. at 418, 395 S.E.2d at 116.

Plaintiff's evidence is sufficient to permit a reasonable inference that the liquid might not have been obvious to a customer exercising ordinary care. Plaintiff stated at his deposition that the floor and the liquid were similar in color. Gates stated at his deposition that he did not see the liquid until he actually came over to help the plaintiff after the fall. Taken in the light most favorable to plaintiff, these statements could reasonably lead to the conclusion that the liquid was difficult to discern. *Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 90, 379 S.E.2d 677, 680 (1989).

Furthermore, a jury could reasonably find that a person using ordinary care might not have been looking at the floor in these circumstances. Defendant, carrying two large bags and following other customers, had just opened one door, passed through the doorway, and was only a few feet from the second door. A jury might find that a reasonably prudent person under these circumstances might be looking straight ahead and preparing to go out through the next door. "If different material conclusions can be drawn from the evidence, summary judgment should be denied." *Spector United Employees Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E.2d 319, 322 (1980). We conclude that defendant has failed to establish that plaintiff was contributorily negligent as a matter of law.

Accordingly, we reverse the trial court's grant of summary judgment for defendant and remand this matter for a jury trial.

Reversed and remanded.

Judge WELLS concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

Based on the logic of *France v. Winn-Dixie Supermarket*, 70 N.C. App. 492, 320 S.E.2d 25 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985), I must respectfully dissent from the majority opinion.

Plaintiff's argument on appeal is that the trial court erred in granting summary judgment for defendant because there are genuine issues of material fact and defendant is not entitled to judgment as a matter of law. Plaintiff argues that whether the dangerous condition existed for such a length of time that the defendant knew, or by the exercise of reasonable care should have known, of its existence is a genuine issue of material fact which makes summary judgment improper.

Plaintiff cites and relies on *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App 163, 336 S.E.2d 699 (1985). In that case, the plaintiff slipped and fell in human excrement which was on the floor of defendant's business. The defendant submitted affidavits from two employees which stated that they saw the excrement fall from an elderly woman walking immediately in front of the plaintiff. The plaintiff submitted her own affidavit which stated that the excrement she stepped in was dried and had footprints in it. This Court, in reversing summary judgment for the defendant, found that the evidence showed there were disputed facts as to how long the excrement was on the floor before the defendant stepped in it.

The present case is distinguishable because there are no disputed facts as to how long the puddle was on the floor before plaintiff stepped in it. The evidence in the record shows that the area was checked at 8:30 a.m., and again at 9:30 a.m. when the store opened, and at both times the floor was clean. Testimony was given that plaintiff's fall occurred sometime between 10:15 a.m. and 11:00 a.m. An eyewitness to plaintiff's fall stated in his deposition that he had observed the area for approximately fifteen to twenty minutes prior to the accident, and that he had not noticed the puddle nor had he seen anyone spill any liquid during that time.

Defendant argues that the facts and holding of *France v. Winn-Dixie Supermarket*, 70 N.C. App. 492, 320 S.E.2d 25 (1984), *disc.*

review denied, 313 N.C. 329, 327 S.E.2d 889 (1985), are more closely analogous to the case at bar. In *France*, the evidence tended to show that the plaintiff slipped and fell in a puddle of pickle juice on the floor of the defendant's store. Even though the plaintiff presented evidence that another customer, who had been in the store for fifteen or twenty minutes, had seen the broken jar and juice on the floor before the plaintiff fell, the court concluded that the jury could only speculate as to how long the pickle juice had been on the floor. Therefore, the court logically concluded that a directed verdict for the defendant was appropriate.

In order to hold a store owner liable for injuries suffered by one of its customers in its store, the injured customer must show that the owner negligently created the condition causing the injury, or that the owner negligently failed to correct the condition after actual or constructive notice of its existence. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E.2d 537 (1967). If the unsafe condition causing injury was not created by the store owner or one of its employees, the customer alleging injury must show that the condition had existed for such a length of time that the store owner, by the exercise of reasonable inspection, should have known of its existence in time to have removed the danger or given warning of its presence. *Pratt v. Tea Co.*, 218 N.C. 732, 12 S.E.2d 242 (1940).

Plaintiff does not allege that defendant negligently created the condition causing the injury. Furthermore, there is no evidence in the record showing when the spill occurred or for how long the dangerous condition existed. Testimony offered by the parties merely showed that the floor was clean as late as 9:30 a.m., and that an eyewitness had not observed anyone spill anything for the fifteen to twenty minutes prior to plaintiff's fall. Therefore, it follows that the trier of fact could only speculate as to how long the liquid had been on the floor and whether that length of time was such that defendant knew, or by the exercise of reasonable care should have known, of the existence of the hazard. Plaintiff has failed to meet his burden of proof and the trial court was correct in declining to speculate as to whether the condition had existed long enough to give defendant notice, either actual or implied. Therefore, I would affirm summary judgment for defendant.

DAVID ANDREW ROCK, III, PETITIONER-APPELLANT v. WILLIAM S. HIATT, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT-APPELLEE

No. 903SC551

(Filed 6 August 1991)

1. **Automobiles and Other Vehicles § 126.3 (NCI3d)— impaired driving—willful refusal of chemical test—insufficient findings**

The trial court erred in determining that petitioner "willfully refused" to submit to a chemical test without making findings as to whether petitioner knowingly permitted the prescribed thirty-minute time period to expire before he elected to take the test where the evidence at trial was conflicting on this issue. N.C.G.S. § 20-16.2.

Am Jur 2d, Automobiles and Highway Traffic § 305.

2. **Automobiles and Other Vehicles § 126.2 (NCI3d)— impaired driving—willful refusal of chemical test—implied consent offense—reasonable belief by officer**

In determining that petitioner willfully refused to submit to a chemical test, the trial court's finding that the arresting officer had reasonable grounds to believe that petitioner had committed the implied consent offense of impaired driving was supported by evidence that the officer observed petitioner driving fast out of a motel parking lot; petitioner's vehicle hit a dip and bounced hard as it made a wide turn toward the officer; and after the officer stopped petitioner's vehicle, he noticed that petitioner had a strong odor of alcohol on his breath, petitioner slurred his speech, his eyes were glassy, and he was unable to walk without swaying.

Am Jur 2d, Automobiles and Highway Traffic §§ 304, 305.

APPEAL by petitioner from judgment entered 28 February 1990 by *Judge John R. Friday* in CRAVEN County Superior Court. Heard in the Court of Appeals 5 December 1990.

The Division of Motor Vehicles suspended petitioner's driving privileges for willful refusal to submit to a blood test on 4 December 1988 under N.C. Gen. Stat. § 20-16.2. Petitioner subsequently requested a hearing before the Division of Motor Vehicles hearing officer, and the revocation was upheld on 30 January 1989.

On 23 February 1989, petitioner filed a petition with the Craven County Superior Court for a hearing *de novo*. The matter was heard 19 February 1990. On 20 February 1990, Judge Friday upheld the revocation and allowed a stay pending appeal. At Judge Friday's request, respondent drafted the proposed judgment and mailed it to Judge Friday with a copy to petitioner's attorney on 22 February 1990. Respondent's attorney received the signed copy from Judge Friday on 27 February 1990 and mailed the original and copies to the Clerk of the Craven County Superior Court that day. On 28 February 1990, respondent's attorney received a copy of petitioner's letter to Judge Friday objecting to the proposed judgment. The signed judgment revoking petitioner's driving privileges had not been sent to the Driver License Section of the Division of Motor Vehicles for enforcement pending a hearing and decision by Judge Friday.

Petitioner appeals from the judgment of 28 February 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the respondent-appellee State.

Jeffrey L. Miller for petitioner-appellant.

ORR, Judge.

We note at the outset that petitioner voluntarily abandoned assignment of error three concerning the trial court's signing of the judgment on 22 February 1990 and filing the same on 28 February 1990 prior to considering petitioner's objections to the proposed judgment. We shall now address the remaining assignments of error.

I.

[1] Petitioner's assignments of error focus upon two elements of N.C. Gen. Stat. § 20-16.2. Petitioner first argues that the trial court erred in determining that petitioner had "willfully refused" to submit to a chemical analysis on the grounds that he did not receive the statutory 30-minute waiting period to contact an attorney, that he was denied access to any method of personally communicating with counsel and that he, in fact, asserted his statutory right before the expiration of the 30-minute period and consented to the chemical analysis test. For the following reasons, we hold that the trial court erred in its order of 28 February 1990, in concluding that petitioner willfully refused to submit to a chemical analysis and test to determine his blood alcohol level.

We therefore reverse and remand for additional action consistent with this opinion.

Under N.C. Gen. Stat. § 20-16.2, upon revocation of a petitioner's driving privileges and an appeal *de novo* to the Superior Court, the trial court's review is limited to a determination of whether:

(1) The person was charged with an implied-consent offense;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of his rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

N.C. Gen. Stat. §§ 20-16.2(d) and (e) (1989).

Under the statute, the respondent has the burden of proof to show that petitioner "willfully refused to submit to a chemical analysis." *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 236, 182 S.E.2d 553, 560, *reh'g denied*, 279 N.C. 397, 183 S.E.2d 241 (1971).

Under § 20-16.2(a)(6), a person charged with an implied consent offense (such as driving under the influence of intoxicating liquors) "has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights." N.C. Gen. Stat. § 20-16.2(a)(6) (1989).

In *Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. 453, 259 S.E.2d 544 (1979), our Supreme Court stated that § 20-16.2(a)(4) (now § 20-16.2(a)(6)) gives a petitioner "the right to have advice and support during the testing process, ..." *Id.* at 458, 259 S.E.2d at 548. The Court further stated that "[t]he 30 minute time limit applies to both components of that one right [to call an attorney and select a witness]." *Id.* at 459, 259 S.E.2d at 548.

The *Seders* Court also held that although a petitioner has a statutory right to a 30-minute time limit to contact an attorney,

he does not have a constitutional right to confer with an attorney before deciding to submit to a breathalyzer test. *Id.* at 461, 259 S.E.2d at 550 (citations omitted). This is based on two grounds: (1) these revocation or suspension proceedings are civil, not criminal in nature; and (2) when a person "accepts the privilege of driving upon our highways [he consents] to the use of the breathalyzer test and has no constitutional right to consult a lawyer to void that consent." *Id.* at 462, 259 S.E.2d at 550 (citations omitted).

In 1980, our Supreme Court established a four-part test to determine what constitutes a "willful refusal" under the above statutory scheme. *Etheridge v. Peters, Comr. of Motor Vehicles*, 301 N.C. 76, 269 S.E.2d 133 (1980). Justice Exum (now Chief Justice), writing for the Court, stated that

> a willful refusal to submit to a chemical test within the meaning of [the statute] occurs where a motorist: (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.

Id. at 81, 269 S.E.2d at 136.

This Court has applied the *Etheridge* test in at least two cases. In *Mathis v. Division of Motor Vehicles*, 71 N.C. App. 413, 415, 322 S.E.2d 436, 437-38 (1984), *citing Etheridge*, this Court stated that willful refusal occurs when a petitioner is aware that he must make a choice of whether or not to take the test, aware of the 30-minute time limit to make a decision, voluntarily decides not to take the test, and knowingly allows the time limit to expire before he elects to take the test.

In *In re Vallender*, 81 N.C. App. 291, 294, 344 S.E.2d 62, 64 (1986), this Court held that a petitioner has 30 minutes from the time he was advised of his rights "in which to decide whether to submit to the breath test."

With these general principles in mind, we now turn to the case *sub judice*. On 4 December 1988, petitioner was arrested by Trooper H.M. Bullock of the North Carolina Highway Patrol for driving while impaired. Trooper Bullock testified that he observed petitioner driving fast out of a parking lot of the Sheraton Inn.

Petitioner's vehicle hit a dip in front of the Sheraton and bounced hard as it made a wide right turn toward Trooper Bullock.

When Trooper Bullock stopped petitioner's vehicle, he observed that petitioner had a strong odor of alcohol on his person, petitioner slurred his speech, his eyes were glassy and he was unable to walk without swaying. At the time Trooper Bullock arrested petitioner, petitioner became argumentative and belligerent. Trooper Bullock and petitioner engaged in a scuffle, and petitioner was injured. Trooper Bullock then transported petitioner to Craven County Hospital for medical assistance.

At the hospital, petitioner continued to be belligerent and initially refused treatment. Because of petitioner's potential danger to himself or others, he was handcuffed and placed in a treatment room. He did not have access to a telephone and was not allowed to leave.

Trooper J.W. Brown, chemical analyst, arrived at the hospital to administer the chemical tests. At 2:25 a.m., Trooper Brown notified petitioner of his rights concerning submission to the chemical analysis. Petitioner acknowledged that he understood his rights and stated that he was not "taking any damn tests[.], [n]obody was sticking a needle in him[.] and [n]obody was touching him." Petitioner however requested that Trooper Brown contact his lawyer, Marc Chesnutt. Trooper Brown was unable to locate Mr. Chesnutt after dialing three separate numbers. Trooper Brown testified that he told petitioner that he was unable to locate Mr. Chesnutt, and petitioner responded that he would not take the test until he talked to his attorney. At no time did petitioner request that Trooper Brown attempt to contact another attorney, and Trooper Brown testified that he was not aware of anyone else attempting to contact an attorney on petitioner's behalf. Trooper Brown then determined at 2:36 a.m. that petitioner had "willfully refused" to submit to a chemical analysis and indicated that on the appropriate form.

The above evidence supports the trial court's findings that petitioner was advised of his rights to take or refuse to take the test, that he was aware of the 30-minute time limit to take the test and that he voluntarily elected not to take the test (at least until he contacted his attorney). Findings of Fact 3, 4 and 5. This meets the first three prongs of the *Etheridge* test.

The trial court, however, did not make any findings concerning the fourth prong of the test that the petitioner "knowingly permitted the prescribed thirty-minute time period to expire before he takes the test." The evidence at trial is conflicting on this issue, and the trial court made no attempt to resolve it in its order.

At trial, petitioner testified that about 20 minutes after he had been notified of his rights, "Barry Mills came in and he said the attorney said take the test. In which case at which time they indicated to me that it was too late to take the test, ..." Trooper Bullock had previously testified that to his knowledge, petitioner's friends were unable to locate an attorney for petitioner. The trial court did not address this testimony in its findings.

The trial court then concluded that petitioner had willfully refused the chemical analysis and therefore affirmed the revocation of petitioner's license without any findings addressing the fourth prong of the *Etheridge* test, and no resolution of the conflicting evidence.

A trial court's findings of fact are conclusive on appeal if supported by the evidence, *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E.2d 160 (1979), although the evidence may support contrary findings. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E.2d 835 (1971). While the above evidence supports the trial court's findings, the findings are insufficient under *Etheridge* to support the conclusion that petitioner willfully refused the chemical analysis.

We note two cases from this Court that hold that a "willful refusal" may be directed prior to the expiration of the 30-minute time period when it is obvious to the examiners that a petitioner does not intend to exercise his rights. *McDaniel v. Division of Motor Vehicles*, 96 N.C. App. 495, 386 S.E.2d 73 (1989), *cert. denied*, 326 N.C. 364, 389 S.E.2d 815 (1990); *State v. Buckner*, 34 N.C. App. 447, 238 S.E.2d 635 (1977). *McDaniel* reached its result by distinguishing *Etheridge* on the facts and by noting that its petitioner gave no indication to *anyone* that he wanted a lawyer or witness present. In *Buckner*, decided three years before *Etheridge*, the defendant was advised of his rights and then observed for approximately 20 minutes but would not say whether or not he would submit to chemical analysis. At that point, the breathalyzer operator determined that the defendant had willfully refused to take the test. This Court upheld the trial court's findings that this was a willful refusal within the meaning of the statute and

based this upon the fact that it was obvious that defendant did not intend to exercise his right to contact an attorney or have a witness present. These decisions are not inconsistent with *Etheridge*. The statute is clear, and *Etheridge* dictates that the 30-minute grace period is available only when a petitioner intends to exercise his rights to call an attorney or have a witness present under the statute. In *Buckner* and *McDaniel*, it was clear that the defendants did not intend to exercise their rights at all.

For the above reasons, we hold that the trial court erred in determining the petitioner had "willfully refused" to submit to a chemical analysis under N.C. Gen. Stat. § 20-16.2 and remand to the trial court for additional findings based upon the evidence that petitioner either did or did not allow the 30-minute time period to expire before he agreed to take the test.

II.

[2] Petitioner's remaining assignment of error concerns whether the trial court erred in concluding that petitioner "willfully refused" to submit to chemical analysis under § 20-16.2, because the charging officer did not have reasonable grounds to believe that petitioner committed an implied-consent offense or probable cause to stop petitioner's vehicle and arrest him. We find no error.

As stated in part I above, § 20-16.2 limits the Superior Court's review of a driver's license revocation to a determination of, *inter alia*, whether "[t]he charging officer had reasonable grounds to believe that the person had committed an implied consent offense. N.C. Gen. Stat. § 20-16.2(d)(2) (1989). In this context, the term "reasonable grounds" is treated the same as "probable cause." *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706, *reh'g denied*, 285 N.C. 597 (1973); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988). The *Eubanks* Court stated that probable cause exists if the facts and circumstances at that moment and within the arresting officer's knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the [suspect] had committed or was committing a crime. *Id.* at 559, 196 S.E.2d at 708, *citing Beck v. Ohio*, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964) (other citations omitted).

In the present case, the arresting officer, Trooper Bullock, testified that he observed petitioner's vehicle leaving the parking lot of the Sheraton Inn "running fast" (there is a lounge at the

Sheraton Inn that was closing about that time). Petitioner was driving the vehicle and "hit [a] dip, . . . bounced up hard, [and] made a right turn . . . ." Trooper Bullock testified that after he stopped petitioner's vehicle, he noticed "that his [petitioner's] speech was slurred, his eyes were glassy, he was swaying unsteady on his feet, had a strong odor of some intoxicating beverage on his breath." At that point, Trooper Bullock arrested petitioner for driving while impaired and attempted to take him in for a breathalyzer test.

Under the above principles of law, we find that Trooper Bullock had probable cause or reasonable grounds to believe that petitioner committed the implied-consent offense of driving while impaired. Therefore we find that the trial court did not err on this issue.

For the above reasons, we reverse and remand the trial court's judgment of 28 February 1990.

Reversed and Remanded.

Judges PHILLIPS and GREENE concur.

BELINDA L. LINDSEY, PETITIONER-APPELLANT v. QUALEX, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES

No. 9026SC1104

(Filed 6 August 1991)

Master and Servant § 108.1 (NCI3d)— unemployment compensation —misconduct—attendance

The superior court correctly upheld the decision of the Employment Security Commission to disqualify claimant from receiving unemployment benefits for nine weeks where the employer's attendance policy was reasonable in that each employee was given 100 points; points were deducted for absences commensurate with the degree of departure from expected conduct; the policy was accommodating to employees' needs to deal with the exigencies of everyday life in that an opportunity to regain lost points was provided and counseling was provided for low point totals; all employees were

told early and often that a zero point total would result in discharge; claimant had reasonable control over her ability to conform her conduct to the requirements of the employer's attendance policy; and claimant was constantly and routinely late or tardy and was discharged for excessive tardiness and absenteeism in violation of her employer's attendance policy. In light of the reasonableness of the employment policy and claimant's ability to control her own destiny with respect to that policy, her failure to do so constituted substantial fault.

Am Jur 2d, Unemployment Compensation § 58.

Discharge for absenteeism or tardiness as affecting right to unemployment compensation. 58 ALR3d 674.

APPEAL by petitioner from judgment entered 11 July 1990 by *Judge Raymond A. Warren* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 13 May 1991.

Legal Services of Southern Piedmont, by Deborah A. Nance, for petitioner appellant.

Employment Security Commission, by Chief Counsel T. S. Whitaker and Staff Attorney John B. DeLuca, for respondent appellee.

No brief was filed by appellee Qualex, Inc.

ARNOLD, Judge.

The question presented by this appeal is whether failure to maintain minimum point standards required by the employer's no-fault attendance policy constitutes substantial fault on the employee's part connected with her work not rising to the level of misconduct. N.C. Gen. Stat. § 96-14(2A) (1990). Claimant's conduct does rise to the level of substantial fault. The superior court's judgment upholding the decision of the Employment Security Commission of North Carolina to disqualify claimant from receiving unemployment benefits for a period of nine weeks, pursuant to G.S. § 96-14(2A), is affirmed.

The record discloses the following: Employer Qualex, Inc. had a no-fault attendance policy. The employer did not keep records of an employee's reasons for being absent, tardy, or for leaving

early. The attendance policy was based on a point system. Each employee received 100 points upon hire.

Employees lost points for being absent, tardy, or leaving early. The attendance policy provided the following point deductions:

1. Tardy—more than 10 minutes after scheduled starting time—5 points.

2. Leaving early—less than two hours before scheduled quitting time—5 points.

3. Appointments during shift—less than two hours—5 points, more than 2 hours—15 points.

4. Excused absence—15 points.

5. Unexcused absence—50 points.

Absences covered by employee benefits or other company programs such as sick pay, vacation leave, floating holidays, leaves of absence, workers' compensation, funeral leave, and jury duty were not included in the policy and did not carry penalty points. Fifteen points were added to an employee's point total each time she completed thirty consecutive calendar days with no points deducted. An employee could not exceed a total of 100 points at any given time.

The employee's supervisor would review with the employee her current point standing in accordance with the following schedule: (1) verbal counseling when employee's point total was reduced to 70 points and (2) written warning and counseling when employee's total was reduced to 35 points. An employee would be discharged when her point total fell to zero.

Qualex, Inc. employed claimant Belinda L. Lindsey from November 1986 to October 1989. The employer discharged claimant on 9 October 1989, when her point total fell to zero. Claimant filed a claim for benefits with the Commission. The adjudicator determined that claimant was disqualified for benefits because she was discharged for misconduct connected with her employment. Claimant appealed. The appeals referee concluded that claimant was disqualified from receiving nine weeks of unemployment benefits because she was substantially at fault in her job separation. She again appealed and the Commission affirmed. Claimant then appealed the Commission's decision to the superior court, which af-

firmed the decision in its entirety. From this judgment, claimant appeals.

The standard of review for an appellate court in reviewing the action of the Commission is set out in N.C. Gen. Stat. § 96-15(i) (1990): "In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." In reviewing the Commission's decision, this Court must determine whether the findings of fact are supported by competent evidence and, if so, whether the findings support the conclusion of law. *Baptist Children's Homes v. Employment Sec. Comm'n*, 56 N.C. App. 781, 783, 290 S.E.2d 402, 403 (1982).

The Commission made the following pertinent findings of fact:

> 3. The claimant was discharged from this job for excessive absenteeism and tardiness in violation of employer's "point" system.
>
> * * * *
>
> 5. The claimant violated the reasonable requirements of the job in the following way(s): The claimant, as for all of the employees, was given 100 point[s], 50 to be deducted for any unreported or unexcused absen[ces], 15 deducted for excused absences, 5 deducted for tardiness or leaving early. In addition, an individual can gain 15 points by going 30 days without any tardies or absences.
>
> 6. The last time claimant had a full 100 points was in January of 1987. From there she constantly and routinely had either lates or tardies for work. September, 1987, February, 1988, March, 1988, April, 1988, November, 1988, January, 1989.
>
> 7. The claimant violated the above job requirements because of personal illness. Many of the cases are unknown (although car problems did enter into the tardies).

These findings are supported by the following competent evidence: Claimant knew the requirements of the attendance policy when she was hired in November 1986. The last time she accrued the maximum 100-point total was 11 April 1987. (It should be noted that the Commission committed a harmless error in finding that claimant last had a full 100 points in January 1987.) Claimant was

tardy on two occasions due to car trouble, each resulting in a 5-point deduction. On another occasion she was tardy and subsequently left more than two hours before scheduled quitting time due to her mother's illness, for which 5 points and 15 points were deducted respectively. Also, she was tardy on 9 October 1989 due to personal illness, for which 5 points were deducted. Altogether, these incidents accounted for 35 points in deductions. No evidence was presented concerning other specific point deductions.

During her last five months, from 7 May 1989 to 9 October 1989, claimant was tardy ten times and had three excused absences. Also, during this time, she earned 15 points on three separate occasions for a total of 45 recovery points. As claimant's point total fell, she received counseling several times concerning how she lost points and how she could recover points, and she received warnings that she would be discharged if her point total dropped to zero. On 24 May 1989, she received counseling and a warning because her point total had dropped to 15. She also received counseling concerning her low point total in September 1989. As of 9 October 1989, the date of discharge, her point total was zero.

Thus, there was competent evidence to support the Commission's findings favorable to the employer and these findings are conclusive on appeal. G.S. § 96-15(i); *In re Thomas*, 281 N.C. 598, 604, 189 S.E.2d 245, 248 (1972).

Whether the Commission's findings of fact support its conclusion of law and decision must next be considered. In denying her claim for benefits, the Commission concluded that claimant was discharged for substantial fault connected with her employment. Claimant contends her conduct did not rise to the level of substantial fault because her conduct was due to circumstances beyond her reasonable control. This argument is unpersuasive.

Claimant was disqualified for benefits under G.S. § 96-14(2A), which provides that an individual shall be disqualified for benefits for a period of four to thirteen weeks if her discharge from employment is due to "substantial fault on [her] part connected with [her] work not rising to the level of misconduct." The statute further defines substantial fault

> to include 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 infrac-

> tions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

Id. (emphasis added). The essence of G.S. § 96-14(2A) is that if an employer establishes a reasonable job policy to which an employee can conform, her failure to do so constitutes substantial fault.

What constitutes "reasonable requirements of the job" will vary depending on the nature of the employer's business and the employee's function within that business. In general, however, several factors appear to be relevant when determining the reasonableness of the job policy at issue. They include: (1) how early in the employee's tenure she receives notice of the policy; (2) the degree of departure from expected conduct which warrants either a demerit or other disciplinary action under the policy; (3) the degree to which the policy accommodates an employee's need to deal with the exigencies of everyday life; (4) the employee's ability to redeem herself or make amends for rule violations; (5) the amount of counseling the employer affords the employee concerning rule violations; and (6) the degree of notice or warning an employee has that rule violations may result in her discharge. The reasonableness of the employer's job requirements should be analyzed on a case-by-case basis in light of the totality of the circumstances surrounding the employee's function within the employer's business.

An employee has "reasonable control" when she has the physical and mental ability to conform her conduct to her employer's job requirements. For example, an employee does not have reasonable control over failing to attend work because of serious physical or mental illness. An employee does have reasonable control over failing to give her employer notice of such absences. Also, an employee does not have reasonable control over tardiness caused by an unexpected traffic accident. An employee does have reasonable control over tardiness caused by her failure to maintain her own vehicle. An employee also has reasonable control over her ability to comply with job rules when the employer's policy gives her the opportunity to make up for demerits resulting from circumstances in which she had marginal or little control. Reasonable control coupled with failure to live up to a reasonable employment policy equals substantial fault. *Id.*

Turning to the facts of this case, the employer's attendance policy was reasonable. The Commission found that the attendance policy (1) gave each employee 100 points upon hire, (2) deducted points for being tardy, leaving early, or taking an excused absence, and (3) awarded points for good attendance. Employees received notice of the policy at the beginning of their employment. The policy resulted in point deductions commensurate with the degree of departure from expected conduct. The policy was accommodating to employees' needs to deal with the exigencies of everyday life because (1) employees were given 100 points at the beginning of their employment and (2) the policy gave employees an opportunity to reclaim lost points. It provided for counseling both when the employee's point total fell to 70 points and again when it reached 35. Finally, all employees were told early and often that a zero-point total would result in discharge.

In addition, claimant had reasonable control over her ability to conform her conduct to the requirements of the employer's attendance policy. The Commission found that claimant was constantly and routinely late or tardy, and that she was discharged for excessive tardiness and absenteeism in violation of her employer's attendance policy. Also, the Commission found that personal illness and car trouble explained only some of her policy violations. Moreover, even though claimant could not control the fact that her mother was sick and required her assistance, she could ultimately control the nature of the penalty suffered from tardiness and absenteeism caused by this factor by reclaiming points through the employer's accommodating policy. Nevertheless, claimant allowed her point total to fall to zero. In light of the reasonableness of the employment policy and claimant's ability to control her own destiny with respect to that policy, her failure to do so constituted substantial fault.

The Commission's findings support its conclusion of law that claimant was discharged for substantial fault connected with her employment, and the conclusion of law sustains the Commission's decision. Her disqualification for unemployment benefits for a period of nine weeks was accordingly appropriate.

Judgment is

Affirmed.

Judges WELLS and PHILLIPS concur.

CATHY ELAINE BUSBY, PLAINTIFF v. MARK ANTHONY SIMMONS, DEFENDANT

No. 9010SC1196

(Filed 6 August 1991)

Insurance § 69 (NCI3d)— underinsured motorist coverage—corporation as named insured—injury to owner while riding bicycle

A plaintiff who was struck by an automobile while riding her bicycle was not entitled to recover underinsured motorist benefits under an automobile policy issued to a corporation for which she owned two-thirds of the stock where plaintiff had exclusive business and personal use of a 1988 Mazda owned by the corporation; the Mazda was registered in the name of the corporation for tax benefits; plaintiff reimbursed the corporation for her personal use of the vehicle; the corporation was the named insured and plaintiff was listed in the policy only as an insured driver; plaintiff was not engaged in any activity on behalf of the corporation at the time of the accident; and plaintiff was not occupying the insured automobile or any other automobile at the time of the accident.

Am Jur 2d, Automobile Insurance §§ 246, 311.

APPEAL by plaintiff from judgment entered 6 September 1990 by *Judge Robert H. Hobgood* in WAKE County Superior Court. Heard in the Court of Appeals 4 June 1991.

This action arises from an accident on 9 March 1988, in which plaintiff was struck by an automobile operated by defendant. Plaintiff was riding her bicycle at the time of the accident and sustained severe injuries. Plaintiff filed this cause of action on 20 April 1990.

In addition to compensation from defendant, plaintiff seeks underinsured motorist benefits from the unnamed defendant, State Farm Mutual Automobile Insurance Company (hereinafter State Farm) under N.C. Gen. Stat. § 20-279.21(b)(4) pursuant to an insurance policy State Farm issued to Capital Physical Therapy, Inc. (hereinafter Capital). Plaintiff and her father are employed by and own all stock in Capital.

State Farm filed a motion for summary judgment under Rule 56 of the N.C. Rules of Civil Procedure on 24 July 1990. The trial court granted this motion on 6 September 1990. From this judgment, plaintiff appeals.

Young, Moore, Henderson & Alvis, P.A., by Johnny S. Gaskins, for plaintiff-appellant.

DeBank, McDaniel, Holbrook & Anderson, by Douglas F. DeBank, for unnamed defendant-appellee.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment in State Farm's favor. For the following reasons, we hold that the trial court did not err and affirm the order of 6 September 1990.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990), summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." This remedy permits the trial court to decide whether a genuine issue of material fact exists; it does not allow the court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C. App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In a summary judgment proceeding, the trial court must view all evidence presented in the light most favorable to the nonmoving party and determine if there is a triable material issue of fact. *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), *disc. review denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). A defendant is entitled to summary judgment if he establishes that no claim for relief exists or that the plaintiff cannot overcome an affirmative defense. *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E.2d 61 (1986) (citation omitted).

In the present case, the evidence, viewed in the light most favorable to plaintiff, tends to show that plaintiff owns two-thirds of the stock in Capital. At the time of the accident in question, the corporation owned two automobiles—a 1987 Toyota and a 1988 Mazda. Plaintiff had exclusive business and personal use of the 1988 Mazda and did not use any other vehicle registered in her name. The Mazda was registered in the name of the corporation

and not in plaintiff's name "to take advantage of certain tax benefits." Plaintiff reimbursed Capital approximately $3,000.00 per year for the personal use of the vehicle.

State Farm provided insurance on these vehicles with the insurance policy being issued in the corporate name. The insurance agent involved in issuing the policies advised plaintiff's father that by adding plaintiff as an insured driver, plaintiff would have all of the benefits under the policy available to an individual. Plaintiff's father intended that plaintiff receive all of the benefits which "could have been available to them if they had registered their own personal vehicles in their personal names and obtained liability insurance in their personal names," including uninsured/underinsured motorist benefits under the policy. The named insured, however, remained in Capital's name at all times pertinent to this action.

At the time of the accident, plaintiff was riding her bicycle and was not engaged in any activity on behalf of the corporation or acting in an official capacity. Plaintiff subsequently filed a claim for underinsured motorist coverage benefits for injuries sustained in the accident pursuant to the policy on the 1988 Mazda. State Farm declined to extend such benefits because plaintiff was not the named insured on the policy and she was not occupying the insured automobile or any other automobile at the time of the accident as required by the policy. Based upon these facts, the trial court granted summary judgment in State Farm's favor.

The insurance policy in question provides uninsured (or underinsured) motorists coverage for an "insured."

> "*Insured*" as used in this Part [C] means:
>
> 1. You or any *family member.*
>
> 2. Any other person *occupying*:
>
> a. *your covered auto*; or
>
> b. any other auto operated by you.

(Emphasis in the original.)

Throughout the policy, "you" is referred to as the named insured in the "Declarations." In the present case, the named insured on the Declarations page is Capital Physical Therapy, Inc. Plaintiff's

name appears only as a named driver and person insured for coverage. Her name does not appear anywhere as a named insured.

Plaintiff maintains that because she is an insured driver and the major stockholder in the corporation, she is the same as the corporation (the named insured), and therefore is entitled to underinsured coverage under subsection 1 above. Defendant argues that subsection 1 applies only to the named insured (the corporation itself), therefore placing plaintiff in subsection 2, which requires that she occupy a vehicle to recover her underinsured motorist benefits under the policy. Defendant asserts that because plaintiff was riding a bicycle and not occupying a covered auto or operating any other auto, she may not recover these benefits.

In *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991), our Supreme Court stated that, "[w]hen examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." The type of coverage involved in the present case is underinsured motorist coverage (UIM), and the relevant statute is N.C. Gen. Stat. § 20-279.21(b)(4), which incorporates the definition of "persons insured" under § 20-279.21(b)(3). "Persons insured" means

> the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

N.C. Gen. Stat. § 20-279.21(b)(3) (1983).

Under this statute, there are two classes of "persons insured":

> (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Crowder v. N.C. Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 554, 340 S.E.2d 127, 129-30, *disc. review denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). In the first class, a person is insured whether or not the insured vehicle is involved in the injuries; a person is insured in the second class only when the insured vehicle is involved in the injuries. *Id.* at 554, 340 S.E.2d at 130.

Under this analysis, category (2) does not apply to the case *sub judice*; therefore, plaintiff would be a "person insured" only if she is the "named insured." We hold that she is not. Plaintiff cites no case (and we find no case) which expands the term "named insured" to include officers, directors, or stockholders of a corporation when the named insured is the corporation. "Named insured" has a common sense and explicit meaning. It is the named individual (or corporation) on the declarations page of the policy. "Named insured" is used throughout the above statutory scheme to distinguish it from others covered under a policy. *See*, e.g., § 20-279.21(b): "Such owner's policy of liability insurance: . . . (2) shall insure the person named therein and any other person[.]" and § 20-279.21(b)(3): "For purposes of this section 'persons insured' means the named insured . . . ." Moreover, under the policy, "named insured" means the name appearing on the Declarations page of the policy. Here, it is Capital Physical Therapy, Inc.

Finally, our decision today is consistent with a recent decision from this Court with similar circumstances. In *Brown v. Truck Ins. Exchange*, 103 N.C. App. 59, 404 S.E.2d 172 (1991), this Court held that Brown (the plaintiff was Brown's personal representative in this case because Brown died in the accident) was not an insured motorist for purposes of UIM coverage. Brown was an independent trucker who leased his services and some trucks to the named insured corporation (Schneider National Carriers, Inc.). At the time of the accident, Brown was not engaged in any business covered by his corporate contract and was not in one of his leased trucks. Schneider was the "named insured" on the declarations page of the policy. Applying the same analysis as we have in the present case, Judge Johnson, writing for this Court, concluded that Brown was not entitled to receive UIM benefits under this policy and was not entitled to insurance coverage under the terms of the contract. Judge Johnson further stated that such corporate coverage is not required by the "Financial Responsibility Act and is voluntary additional coverage."

Courts in other jurisdictions have made similar holdings. *See, e.g., Continental Ins. Co. v. Velez*, 134 A.D.2d 348, 520 N.Y.S.2d 824 (1987) (officer, director and shareholder of a named insured company struck while riding his bicycle on a personal mission is not entitled to UM coverage on a policy issued to the corporation); *Buckner v. Motor Vehicle Acc. Indemnification Corp.*, 486 N.E.2d 810, 495 N.Y.S.2d 952 (1985) (corporation cannot suffer bodily injury or have a spouse, relative or household member as designated in an UM policy endorsement); and *Dixon v. Gunter*, 636 S.W.2d 437 (Tenn. App. 1982) (automobile insurance issued to the corporation does not allow UM coverage to the president and sole shareholder of the corporation when such individual was not engaged in corporate business and was injured by a third party).

For the above reasons, we hold that plaintiff is not entitled to claim UIM benefits under the automobile insurance policy issued to Capital Physical Therapy, Inc. Therefore, the trial court did not err in granting summary judgment as a matter of law in favor of State Farm.

Affirmed.

Judges COZORT and WYNN concur.

NOEL WILLIAMS MASONRY, INC., PLAINTIFF v. VISION CONTRACTORS OF CHARLOTTE, INC., MUTUAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE, NORTH CAROLINA, J. L. CARTER, JR., TRUSTEE, GIBSON L. SMITH, JR., TRUSTEE, ASHLEY L. HOGEWOOD, JR., TRUSTEE, R. BRANDT DEAL, TRUSTEE, AND DENNIS W. MCNAMES, TRUSTEE, MCCLURE LUMBER COMPANY AND E. L. MORRISON LUMBER COMPANY, INC., DEFENDANTS

No. 9026SC1073

(Filed 6 August 1991)

1. Rules of Civil Procedure § 56.5 (NCI3d) — summary judgment — findings of fact

The trial court did not err by making findings of fact in an order granting summary judgment where the twenty-

three findings constituted the court's summation of the undisputed facts which supported its judgment.

Am Jur 2d, Summary Judgment § 26.

2. **Reformation of Instruments § 9 (NCI3d)— reformation of deed of trust—relation back—senior security interest**

The trial court did not err by holding that a deed of trust was the senior security interest where the lender originally failed to record a legal description of the property; the contractor defaulted on its payments to the lender and to subcontractors; three subcontractors obtained liens on the property; the lender rerecorded the deed of trust to include the legal description of the property after the dates of attachment of the subcontractors' liens; and the trial court held that the rerecording of the deed of trust related back to the original recording date.

Am Jur 2d, Reformation of Instruments §§ 11, 53.

3. **Mortgages and Deeds of Trust § 11.1 (NCI3d)— deed of trust—subcontractors' liens—not bona fide purchasers for value**

Three subcontractors were not entitled to the status of bona fide purchasers for value where the lender failed to record a legal description of the property; the contractor defaulted; the three subcontractors obtained liens on the property; and the lender rerecorded the deed of trust after the dates of attachment of the subcontractors' liens. There is no evidence that they furnished labor and materials on the faith of ownership clear of any deed of trust and answers to interrogatories indicated that no one checked the public record to determine whether any deed of trust or other instrument had been filed against the property. The trial court's ruling put the subcontractors in exactly the position they thought they held when they supplied the labor and materials.

Am Jur 2d, Mortgages §§ 323, 325, 334, 352.

APPEAL by plaintiff Noel Williams Masonry, Inc., defendant E. L. Morrison Lumber Company, Inc., and defendant McClure Lumber Company from Order of *Judge Samuel A. Wilson, III*, entered 27 June 1990 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 9 May 1991.

Gerdes, Mason, Wilson & Simpson, by David T. Simpson, Jr., and Robert W. Allen, for plaintiff appellant, Noel Williams Masonry, Inc.

Williams, Boger, Grady, Davis & Tuttle, P.A., by Samuel F. Davis, Jr., for defendant appellant, E. L. Morrison Lumber Company, Inc.

Mitchell & Rallings, by Thomas B. Rallings, Jr., for defendant appellant, McClure Lumber Company.

Horack, Talley, Pharr & Lowndes, P.A., by Robert C. Stephens and James H. Pulliam, for defendant appellee, Mutual Savings & Loan Association.

COZORT, Judge.

A lending institute loaned money to a contractor for development of a piece of property in Charlotte. The lender accepted a deed of trust on the property from the contractor as security for the loan; however, when the lender recorded the deed of trust, it failed to record a legal description of the property. The contractor defaulted on its payments to the lender and to subcontractors who provided materials and services. Three subcontractors obtained liens on the property. After the dates of attachment of the subcontractors' liens, the lender rerecorded the deed of trust to include the legal description of the property. In an action to establish the priority of the liens, the trial court below held that the rerecording of the deed of trust related back to the original recording date, giving the lender a lien senior to the liens of the subcontractors. We affirm. The facts follow.

Defendant Vision Contractors of Charlotte, Inc. (Vision), obtained a construction loan on or about 19 August 1988 from defendant Mutual Savings & Loan Association, Inc. (Mutual). The loan, in the original principal amount of $136,000, was evidenced by a deed of trust note, dated 19 August 1988, and was secured by a deed of trust and security agreement of same date. The deed of trust was recorded at the Mecklenburg County Public Registry at 1:20 p.m. on 25 August 1988. The recorded deed of trust failed to include a legal description that specifically identified and described the real property located at 4128 Carmel Forest Drive (Carmel Forest property).

On 25 August 1988, Vision entered into a contract with plaintiff Noel Williams Masonry, Inc. (Williams), and Williams supplied materials and services from 25 August 1988 until 17 October 1988. The total amount of labor and materials furnished pursuant to the Williams contract was in the total principal amount of $14,889.68. Vision defaulted in its obligation to pay Williams. On 3 November 1988, Williams filed a claim of lien against Vision.

E. L. Morrison Lumber Company, Inc. (Morrison), furnished lumber and other materials to the property from 14 October 1988 until 31 October 1988. The total amount due from Vision to Morrison for the lumber and building materials was $19,859.21. Vision defaulted in its obligation to pay Morrison. On 9 November 1988, Morrison filed a claim of lien against Vision. On 17 January 1989, Morrison filed a lawsuit against Vision to recover upon the claim of lien filed 9 November 1988. On 3 January 1990, a judgment was entered against Vision granting a lien upon the property with an effective date of 14 October 1988.

McClure Lumber Company (McClure) provided materials to the property from 21 October 1988 until 24 October 1988. Vision defaulted on its obligation to pay McClure $9,533.48 for those materials. On 10 November 1988, McClure filed a lawsuit to recover the amount owed by Vision and also on that date filed a claim of lien against the Carmel Forest property and other property owned by Vision. McClure obtained a default judgment against Vision. The judgment declared McClure to have a lien against the Carmel Forest property for materials supplied there with an effective date of 21 October 1988. The judgment also provided for an additional amount of $15,583.54 owed by Vision to McClure for materials supplied to a second piece of property owned by Vision. The judgment declared there to also be a specific lien against the Carmel Forest property on the $15,583.54 obligation with an effective date of 10 November 1988.

On 28 November 1988, Mutual rerecorded the deed of trust with the exhibit containing the legal description of the Carmel Forest property.

On 8 February 1989, Williams filed this lawsuit against Vision and Mutual to obtain a judgment against Vision, a lien against the property, and to determine the lien priority between Williams and Mutual. Morrison and McClure were later added as additional parties defendant so that the rights of all lienholders could be

adjudicated in one proceeding. Williams, Mutual, Morrison and McClure moved for summary judgment. The trial court entered an order on 13 July 1990 granting Mutual's motion for summary judgment, ordering

> that the Deed of Trust recorded on August 25, 1988 at 1:20 p.m. be and hereby is reformed to include the legal description with said reformation relating back to August 25, 1988 at 1:20 p.m. and the Deed of Trust held in favor of Mutual hereby is declared to be the first lien security interest on the Property, senior to the liens of Noel Williams, Morrison and McClure.

Williams, Morrison and McClure timely filed written notice of appeal.

[1] The determinative issue on appeal is whether the trial court erred by holding in its order of summary judgment that Mutual's deed of trust is senior to the liens of Williams, Morrison and McClure. We first note that the trial court's order granting summary judgment contained extensive findings of fact and conclusions of law. Orders granting summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56 (1990) do not normally contain detailed findings of fact. *Avriett v. Avriett*, 88 N.C. App. 506, 363 S.E.2d 875, *affirmed*, 322 N.C. 468, 368 S.E.2d 377 (1988). However, if the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. Rather, the findings may be helpful if the facts are not an issue and support the judgment. *PBM, Inc. v. Rosenfeld*, 48 N.C. App. 736, 737-38, 269 S.E.2d 748, 749-50 (1980), *disc. review denied*, 301 N.C. 722, 274 S.E.2d 231 (1981). Our review of the record below leads us to the conclusion that the twenty-three findings of fact entered in the trial court's order of summary judgment below constitute the court's summation of the undisputed facts which supported its judgment. We, therefore, find no error in the court's making findings of fact and conclusions of law.

[2] We now turn to the issue of whether the trial court erred by holding that Mutual's deed of trust was the senior security interest on the Carmel Forest property. In *Arnette v. Morgan*, 88 N.C. App. 458, 363 S.E.2d 678 (1988), we dealt with a similar case involving reformation of a written instrument. In that case, plaintiff grantee filed an action to reform a deed which contained an improper legal description which mistakenly did not convey all of the property the parties intended to be conveyed. The trial

court entered an order reforming the deed to include the description of all the property the parties intended to convey. The court decreed that the reformation related back to the time of the filing of a *lis pendens* by an intervening judgment creditor. *Id.* at 459, 363 S.E.2d at 679. On appeal, we affirmed the trial court's decision to allow reformation of the deed and the relation back of the recording. We held, however, that the reformation should date back to the time of the original conveyance. *Id.* at 463, 363 S.E.2d at 681. In holding that reformation was proper, we noted that registration determines the priority of rights deriving from deeds, mortgages, deeds of trust, and judgments. We also found, however, that trusts created by operation of law do not come within the meaning and purview of the registration statutes. *Id.* at 460, 363 S.E.2d at 679-80. We held that under the facts stated in *Arnette*, the grantor held as a constructive trustee for the grantee that portion of the land the parties intended to be conveyed. The case, therefore, fell outside the registration act and was controlled by the general principles of reformation in North Carolina. *Id.* at 461-62, 363 S.E.2d at 680. We then held:

> The general rule is that reformation will not be granted if prejudice would result to the rights of a bona fide purchaser for value without notice or someone occupying a similar status. . . . Where the issue is raised of whether the party resisting reformation is entitled to the protection given a bona fide purchaser for value without notice, the burden is on the resisting party to prove good faith payment of new consideration.

Id. at 462, 363 S.E.2d at 680-81 (citations omitted). The question before us, then, is whether our reasoning in *Arnette* is applicable to the factual situation below.

Williams, Morrison and McClure contend that *Arnette* should not apply to this case. McClure argues that the current situation is distinguishable from *Arnette* because *Arnette* involved the reformation of a *deed*; whereas, Mutual seeks to have reformed and relate back the reformation of a *deed of trust*. McClure, Morrison and Williams argue that the subcontractors acted in reliance on Vision's ownership and tendered labor and materials for the benefit of the property subject to the deed of trust, entitling them to the protection given a bona fide purchaser for value without notice. We reject these arguments.

We find no reason to distinguish a deed of trust from a deed. In *Crews v. Crews*, 210 N.C. 217, 186 S.E. 156 (1936), the Supreme Court stated that the " 'equity for the reformation of a deed *or written instrument* extends to the inadvertence or mistake of the draftsman who writes the deed or instrument.' " *Id.* at 221, 186 S.E.2d at 158 (quoting *Crawford v. Willoughby*, 192 N.C. 269, 134 S.E. 494 (1926)) (emphasis added). That case specifically upheld the reformation of a deed of trust.

[3] Nor do we find that Williams, Morrison and McClure should be given the status of bona fide purchasers for value. Although each subcontractor contributed labor and materials to the property, there is no evidence that the consideration was given on the faith of the ownership of the property by Vision free and clear of any deed of trust. According to the answers to Mutual's interrogatories filed by Williams, Morrison and McClure, no one checked the public record to determine whether any deed of trust or other instrument had been filed against the Carmel Forest property. Therefore, these subcontractors should not be treated as innocent purchasers for value. Instead, the trial court's holding puts them in exactly the position they thought they held when they supplied the labor and materials to the property: they were entitled to liens which were junior to the deed of trust held by Mutual. We thus find the reasoning we expressed in *Arnette* to be applicable to the facts below, and we hold the trial court did not err in entering an order of summary judgment declaring Mutual's security interest senior to the liens of Williams, Morrison and McClure. The trial court's order is

Affirmed.

Judges ORR and WYNN concur.

RONALD YATES AND CAROL JEAN YATES, PLAINTIFFS v. MICHAEL W. HALEY D/B/A McDONALD'S, DEFENDANT

No. 9026SC917

(Filed 6 August 1991)

Negligence § 57.7 (NCI3d)— restaurant customer—fall on water on floor—negligence and contributory negligence—issues of material fact

In an action to recover for injuries received by plaintiff customer when he slipped and fell on a puddle of water in defendant's restaurant, the evidence before the trial court on defendant's motion for summary judgment presented genuine issues of material fact as to whether the water was a hidden danger about which defendant knew or should have known and whether plaintiff was contributorily negligent in failing to see the water where it tended to show that, after eating breakfast in the restaurant, plaintiff walked toward the men's restroom at the rear of the eating area; snow had fallen before plaintiff had arrived at the restaurant; approximately three to five feet from the restroom door, plaintiff slipped on a puddle of water in front of the back entrance; plaintiff's testimony in a deposition that the puddle was obvious and that he could have seen it had he looked at the floor was some evidence that his view was unobstructed; and plaintiff's forecast of evidence by affidavit and photograph would permit the jury to find that his view of the puddle was obstructed by the rear booth and that the water was obvious to him only when he was on the floor.

Am Jur 2d, Premises Liability §§ 573, 577, 581, 800-802.

Liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow. 20 ALR4th 438.

APPEAL by plaintiff from judgment entered 14 May 1990 by *Judge Samuel A. Wilson III* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 7 May 1991.

In this civil action, plaintiff Ronald Yates appeals from a summary judgment entered for defendant. In his complaint, plaintiff alleged that a puddle of water on defendant's floor caused him

to slip and fall. Plaintiff alleged that he suffered a fractured coccyx as a result of his fall. Plaintiff seeks damages for a 30% permanent disability to his back, lost wages, and medical expenses. His wife, plaintiff Carol Yates, seeks damages for loss of consortium.

The evidence before the trial court on defendant's motion for summary judgment indicated that on 10 January 1988, plaintiffs and their children went to defendant's restaurant for breakfast. After eating, plaintiff Ronald Yates walked toward the men's restroom located at the rear of the eating area.

Customers must walk along a narrow ceramic tile aisle to reach the restrooms. As one travels down the aisle toward the restrooms, a wall is on the left and eating booths are on the right. After one passes the last booth, the back entrance to the restaurant is immediately to the right. The restroom is a few feet beyond the area adjacent to the back entrance and the back of the last booth. Approximately three to five feet from the restroom door, plaintiff slipped on a puddle of water in front of the back entrance. Snow had fallen before plaintiff arrived at defendant's restaurant. After plaintiff fell, he and his family left the restaurant without speaking to any employees. Plaintiff alleges that he suffered back pains that evening.

The next day plaintiff returned to defendant's restaurant to complain to the manager about his fall. At his deposition, plaintiff stated that during this time he overheard the manager angrily chastising his employees for failing to remove the puddle of water.

Plaintiff presented the affidavit of one customer who witnessed his fall. Defendant's answer denied negligence and alleged that plaintiff was contributorily negligent for failing to keep a proper lookout. On 8 January 1990, defendant moved for summary judgment pursuant to G.S. 1A-1, Rule 56. The motion was granted in favor of defendant on 14 May 1990. Plaintiffs appeal.

Tania L. Leon, P.A., for plaintiff-appellants.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson, for defendant-appellee.

EAGLES, Judge.

Plaintiffs contend that the trial court erred in granting defendant's motion for summary judgment. Plaintiffs argue that genuine

issues of material fact exist as to whether the puddle was a hidden danger about which defendant knew or should have known. We agree.

Under G.S. 1A-1, Rule 56(c) defendant is entitled to summary judgment "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 [defendant] is entitled to a judgment as a matter of law." Defendant, the party moving for summary judgment here, has the burden of establishing the absence of any triable issue of fact. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 204, 271 S.E.2d 54, 57 (1980). When a trial court considers 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).

Since summary judgment "provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). Summary judgment is rarely appropriate in negligence cases because "it ordinarily remains the province of the jury to apply the reasonable person standard." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982). After careful review of the record, we hold that the evidence, when viewed in the light most favorable to the plaintiffs, raises a genuine issue of material fact. Accordingly, we reverse the entry of summary judgment in favor of defendant and remand for trial.

In order to survive defendant's motion for summary judgment, "plaintiff must allege a *prima facie* case of negligence—defendants owed plaintiff a duty of care, defendants' conduct breached that duty, the breach was the actual and proximate cause of plaintiff's injury, and damages resulted from the injury." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990). Plaintiff was an invitee on defendant's premises because his purpose for entering defendant's restaurant was to purchase food. *Morgan v. Great Atlantic and Pacific Tea Co.*, 266 N.C. 221, 226, 145 S.E.2d 877, 881 (1966). Because plaintiff was an invitee defendant has a duty "to keep 'entrances to his business in a reasonably safe condition for the use of customers entering or leaving the premises.' " *Lamm*, 327 N.C. at 416, 395 S.E.2d at 115 (quoting *Lamm v.*

Bissette Realty, Inc., 94 N.C. App. 145, 146, 379 S.E.2d 719, 721 (1989)). Additionally, defendant "has a duty to warn invitees of hidden dangers about which [defendant] knew or should have known." *Lamm*, 327 N.C. at 416, 395 S.E.2d at 115.

Defendant contends summary judgment was appropriate because "[w]hen plaintiff was asked [at his deposition] whether he could have seen the puddle had he looked at the floor, plaintiff responded '[y]es, it was obvious.' This is evidence that plaintiff's view was unobstructed . . ., the condition was in plain view . . ., [and] that he failed to focus attention on the condition." Defendant bases much of his argument for summary judgment on the following testimony from plaintiff's deposition:

Q: Did you see the puddle before you fell?

A: No.

Q: When did you first see it?

A: Whenever I got up.

Q: Why didn't you see it before you fell?

A: I was going to the restroom.

Q: Were you looking so that you could see the puddle?

A: I was looking at this door straight ahead (indicating on diagram). Normally—usually someone may be coming out of this door—or whatever, I was looking dead at the door, I was going to the restroom and fell.

Q: Did you look at the ground?

A: No.

Q: If you had looked at the ground could you have seen it?

A: Yes; it was obvious.

While a jury may reasonably find that this is some evidence that plaintiff's view was unobstructed, the same jury may also reasonably find from plaintiff's forecast of the evidence that plaintiff's view was obstructed. On 4 May 1990, plaintiff timely filed an affidavit opposing defendant's motion for summary judgment pursuant to G.S. 1A-1, Rule 56(e). In this affidavit, plaintiff explained his statement regarding the puddle as follows:

> I was able to see, only when I was on the floor, that I had slipped in a large puddle of water. This water was not obvious to me as I was walking toward the restroom door, both because of the narrowness of the hallway and because my view was partially obstructed by the booths in the area.
>
> . . . .
>
> When I read the transcript of my testimony, I realized that I had misunderstood a question that was asked of me. . . . "If you had looked at the ground could you have seen it [the puddle]?" The answer to that question is that the puddle of water was only obvious once I was on the ground. I cannot say how many inches or feet from the surface of the floor I would have had to be to have seen the puddle. I can say that as I approached the restroom, my attention was focused on the path in front of me, including the floor, and the puddle was not obvious.

Additionally, plaintiff attached pictures to his affidavit showing how his view could have been obstructed by the rear booth. From this evidence, a jury could reasonably infer that plaintiff's view was obstructed. "On a motion for summary judgment, *all* pleadings, affidavits, answers to interrogatories, and other materials offered must be viewed in the light most favorable to the party against whom summary judgment is sought." *Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E.2d 316, 318-19 (1979) (emphasis added). When viewed in the light most favorable to plaintiff, the evidence raises a jury question on the issue of defendant's negligence.

Defendant further contends that "[b]ecause of the snow outside, plaintiff should have noticed the puddle in front of the entrance as he approached that area." First, we note that "[t]he issues of proximate cause and contributory negligence are usually questions for the jury." *Lamm*, 327 N.C. at 418, 395 S.E.2d at 116. Secondly, when the evidence is viewed in the light most favorable to plaintiff, "defendant is in no position to deny knowledge" of that morning's weather conditions. *Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E.2d 56, 59 (1960). The mere existence of these weather conditions is not enough to find the plaintiff contributorily negligent as a matter of law on defendant's motion for summary judgment. *Id.* Finally, where defendant attempts to allege plaintiff's contributory negligence as a matter of law, our Supreme Court has addressed the issue as follows:

> The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety. The question is not whether a reasonably prudent person would have seen the [object] had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.

Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981). We conclude that defendant has failed to establish that plaintiff was contributorily negligent as a matter of law.

Accordingly, we reverse the trial court's grant of summary judgment for defendant and remand this matter for a jury trial.

Reversed and remanded.

Judges GREENE and LEWIS concur.

JAMES E. PRICE, SR., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANT

No. 9010IC986

(Filed 6 August 1991)

1. State § 8.3 (NCI3d)— Tort Claims Act—loss of prisoner's partial plate—negligent failure to replace

In a prisoner's tort claim action to recover for a metal partial plate lost by the Department of Correction when plaintiff was transferred from one prison unit to another, the Industrial Commission's conclusion that a named employee of the Department of Correction breached her duty to plaintiff by failing to provide an adequate partial plate replacement was supported by evidence and findings that the employee entered into a binding agreement with plaintiff that the Department of Correction would replace the plate with one of comparable quality, but the plate furnished to plaintiff was plastic rather than metal, did not fit, and impeded plaintiff's speech and ability to chew. The Commission's failure to make findings that the employee's breach was the proximate cause of plain-

tiff's injury and that plaintiff was not contributorily negligent was harmless error where the Department of Correction has never contested the issue of negligence.

Am Jur 2d, Penal and Correctional Institutions §§ 173, 181.

2. **State § 9 (NCI3d)— Tort Claims Act—remedies—monetary damages—specific performance inappropriate**

The Industrial Commission has no authority under the Tort Claims Act, N.C.G.S. § 143-291, to order specific performance rather than award monetary damages. Therefore, the Commission erred in failing to award plaintiff prisoner monetary damages for a metal partial plate lost by the Department of Correction rather than ordering the Department of Correction to furnish a comparable partial plate to plaintiff as it had agreed to do.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 661.

Judge WYNN concurs in the result only.

APPEAL by plaintiff and defendant from the decision and order filed 19 April 1990 by the Industrial Commission. Heard in the Court of Appeals 7 May 1991.

James E. Price, Sr. pro se plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kim L. Cramer, for defendant-appellant.

ORR, Judge.

The dispositive issue on appeal is whether the Industrial Commission erred in awarding plaintiff specific performance for defendant's negligence pursuant to N.C. Gen. Stat. § 143-291. For the following reasons, we hold that the Commission erred and affirm in part, reverse in part and remand for entry of damages not inconsistent with this opinion.

The following facts are pertinent to this case on appeal. On 30 September 1988, plaintiff, an inmate at Odom Prison, filed an affidavit and claim for damages under the Tort Claims Act (N.C. Gen. Stat. § 143-291). The claim alleged that on 28 March 1986, Correctional Officer Madison, in preparing plaintiff for a transfer

to another prison unit, failed to record all of plaintiff's property on the appropriate form. During the transfer, plaintiff's property was lost. The property included a metal upper partial plate, cigars, a pipe and ballpoint pens, the total value of which was $631.80. Plaintiff was not contributorially negligent.

Defendant agreed by letter of 13 May 1987 from Agency Legal Specialist II Patsy Smith Morgan (hereinafter Morgan) to replace the partial plate, but would not allow the work to be done by an outside dental specialist. Morgan maintained that the dental services within the Department of Correction (hereinafter DOC) could "provide a partial dental plate consistent with the one [plaintiff lost] for substantially less cost . . . ."

Plaintiff agreed to this if he received the same kind of plate and of the same quality as before. Instead, he received a plastic partial plate which did not fit and impeded plaintiff's speech and ability to chew. Shortly after receiving the plate, plaintiff broke a front tooth attempting to eat something with the plate in place. Plaintiff contacted his former dentist and mailed the plastic plate to him for his assessment. The dentist confirmed that it was of poor quality and did not fit plaintiff so that it would interfere with speech and mastication.

After several contacts between Ms. Morgan and Richard Giroux, Prisoner Legal Services (who was representing plaintiff in his arbitration efforts with Ms. Morgan), Ms. Morgan offered to have a metal partial plate made for plaintiff with the work to be done this time by a private dentist. Ms. Morgan made this offer contingent upon plaintiff agreeing in writing that "this would be the end of it." Plaintiff refused this offer and filed a claim for monetary compensation under the Tort Claims Act.

Deputy Commissioner Tamara Nance denied plaintiff's claim in an order and opinion filed 28 August 1989. Plaintiff appealed to the Full Commission. In its order filed 19 April 1990, the Full Commission reversed the Deputy Commissioner's decision and made the following findings and conclusions:

> 1. This dispute concerns plaintiff's metal partial plate, which was allegedly lost when plaintiff was being transferred from Central Prison to Caledonia Farm. Defendant Department of Correction (DOC) agreed to replace the plate.

2. Patsy Morgan, defendant's "Agency Legal Specialist II" did not lose the plate, but did enter into a binding agreement to replace the plate with one of comparable quality. When plaintiff received his plate, it was a plastic partial plate rather than the agreed upon metal plate.

3. Because Patsy Morgan and the Department of Correction reneged on the agreement, defendant Department of Correction does have a duty to supply plaintiff with a metal partial plate.

. . . .

CONCLUSION OF LAW

To prevail under the Tort Claims Act, the plaintiff must prove that a named State employee was negligent in the course of and arising out of her employment. *Ayscue v. North Carolina State Highway Commission*, 270 N.C. 100 (1967). Because Patsy Morgan broke the agreement, she had with plaintiff on behalf of the Department of Correction, she breached her duty to him. G.S. 143-291.

The Full Commission then ordered DOC to "make plaintiff a metal partial plate comparable to the one which was made for him in 1978" and pay costs. Defendant filed a motion for reconsideration on 24 May 1990 on the grounds that the order was "contrary to the law and authority of the Industrial Commission."

The Commission denied the motion on 5 July 1990 and stated, "[t]he Commission found that the named employee bore some responsibility for the injurious breach of duty, and that her omission was negligent rather than willful, intentional or fraudulent."

Plaintiff made numerous assignments of error, all of which can be summarized in a single issue of whether the Commission erred in not awarding plaintiff monetary damages instead of specific performance. Defendant contends that the Commission did not have the authority to award specific performance or even to hear the action, which defendant categorizes as a "breach of contract."

Under N.C. Gen. Stat. § 143-291(a) (1990):

> . . . The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, . . . while acting within the scope

> of his office, employment, . . . 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. If the Commission finds that there was such negligence . . ., which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant . . ., the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of such damages . . . .

[1] The scope of review on appeal to this Court under the Tort Claims Act is limited to whether there was any competent evidence before the Commission to support the findings of fact and whether the findings support the legal conclusions and decision. N.C. Gen. Stat. § 143-293 (1990); *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence, whether or not the evidence would support contrary findings. *Id.* We have reviewed the evidence in the present case and find that it supports the above findings of fact, and that those findings support the conclusion that Patsy Morgan breached her duty to plaintiff by failing to provide an adequate replacement.

Although the Commission made no findings of fact or conclusions, as required by § 143-291 that Morgan's breach was the proximate cause of plaintiff's injury and that plaintiff was not contributorially negligent, the issue of the DOC's negligence has never been in dispute. Patsy Morgan acknowledged in her letter of 13 May 1987 that the "appropriate inventory forms were not completed in connection with this transfer" and plaintiff's property was lost. This letter effectively acknowledges that the DOC was negligent in losing plaintiff's property. The DOC has never contested the issue of negligence or the value of plaintiff's property. Therefore, we find that it was harmless error by the Commission in failing to make additional findings of fact on these issues of negligence.

[2] The remaining issue is whether § 143-291 prohibits the Commission from awarding specific performance and not monetary damages. We hold that it does. The statute specifically authorizes the Commission to determine the amount of damages and direct payment of such. The damages may include medical and other

expenses. There is nothing in the statute which allows the Commission to order specific performance, and we find nothing in our research which allows such, regardless of whether the plaintiff is confined to the State Department of Correction. Therefore, we reverse this portion of the Commission's decision and order and remand it to the Commission for entry of damages.

On remand for damages, we order that the Commission award such for *all* of the property defendant lost. The record on appeal reveals that defendant never contested the issue of its negligence in losing plaintiff's cigars, pipe and ballpoint pens, as well as his dentures, nor has defendant contested the total value of the property. Plaintiff renewed his claim for damages for the loss of all the items in his brief before this Court, and defendant failed to respond to such. Therefore, there is no dispute as to the value of such property or defendant's negligence. Plaintiff presented evidence that the uncontested amount of damages in 1988 was $631.80; therefore, on remand, the Commission should order defendant to pay plaintiff at least that amount.

We note in closing that this is a case which, in the interest of judicial economy and in view of this State's fiscal condition, should have been settled long before it reached this Court. The time and expense of litigating this case through the Industrial Commission to this Court and now back could have been better utilized in other areas. This Court cannot condone the expenditure of thousands of tax dollars to avoid paying a few hundred dollars to an individual incarcerated by the State, especially when the Department of Correction assumed responsibility from the beginning for the loss of plaintiff's dentures.

For the above reasons, we affirm in part, reverse in part, and remand to the Commission for entry of damages not inconsistent with this opinion.

The cost of this appeal shall be borne by the defendant.

Judge COZORT concurs.

Judge WYNN concurs in the result only.

CAROL CRAIG, PLAINTIFF v. ROBERT CRAIG, DEFENDANT

No. 918DC233

(Filed 6 August 1991)

Divorce and Separation § 427 (NCI4th)— child support—two children—amount not allocated—one child reaching majority—unilateral reduction

The trial court was without authority to modify past due child support payments where an order was entered in South Carolina in 1985 awarding plaintiff custody of the two children, $402 in child support, and alimony; the older child reached the age of 18 years in 1987; defendant unilaterally reduced the amount of child support by what he thought to be one-half in 1988, although he was actually paying $9 per month less than one-half; defendant was awarded custody of the other child in 1990; and the trial court in this action awarded plaintiff $288, representing the accumulated error in defendant's computation of one-half the original amount. Until an application for modification is made by the supporting parent, and as long as at least one child for whom support was ordered remains a minor, the full amount of the support obligation not allocated by child remains enforceable and continues to accrue and vest as it becomes due. N.C.G.S. § 50-13.10.

Am Jur 2d, Divorce and Separation § 1050.

Comment Note—Propriety and effect of undivided award for support of more than one person. 2 ALR3d 596.

APPEAL by plaintiff from order entered 30 November 1990 by *Judge Kenneth R. Ellis* in WAYNE County District Court. Heard in the Court of Appeals 6 June 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith, for plaintiff-appellant.

H. Jack Edwards for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an order entered 30 November 1990, ordering defendant to pay child support arrearages in the amount of $288.00.

On 5 July 1990 plaintiff registered a foreign support order in the Office of the Clerk of Superior Court in Wayne County pursuant to N.C.G.S. § 52A-29, requesting enforcement of a South Carolina order for child support and collection of arrearages accumulated under the order in the amount of $2,967.12. On 25 July 1991 defendant filed a petition praying that the trial court deny recovery of arrearages, consider the substantial change of circumstances of the parties since the entry of the prior child support order, and reduce the amount of support required to be paid.

On 30 November 1990 the trial court entered an order making the following findings of fact:

> 1. That this matter came before the Court on the Petition of the Plaintiff, Carol Craig, under the provisions of the Uniform Reciprocal Enforcement of Support Act.
>
> 2. An Order was entered in the Family Court in Charleston County, South Carolina on or about March 12, 1985, awarding the Plaintiff, Carol Craig, the custody of the two minor children of the parties, Dawn Collen Craig and Darren Robert Craig, and directing the Defendant, Robert J. Craig, to pay child support in the amount of $402.00 per month and alimony of $298.00 per month.
>
> 3. The older child, Dawn Collen Craig, reached the age of 18 years in December, 1987, leaving one minor child at that time to be supported by the Defendant.
>
> 4. In June 1988, the Defendant reduced the monthly amount of child support by what he thought to be one-half of the amount he had been paying for the support of the two children; the reduction was based on his consideration that one of the children had at that time reached the age of majority.
>
> 5. The Defendant paid the amount of $192.00 per month for the support of Darren Robert Craig from January, 1988, through August, 1990. That during this time, the Defendant thought he was paying one-half of the original amount of support, but was in fact paying a sum that was $9.00 less than one-half of the original support.
>
> 6. As a result of a hearing on August 31, 1990, in the Family Court of the Ninth Judicial District in Charleston County, South Carolina, an order dated September 14, 1990, was

entered by the Honorable Judy C. Bridges, Family Court Judge, awarding custody of the minor child, Darren Robert Craig, to the Defendant, Robert J. Craig; and that the said minor child, who is now thirteen years of age, resides with and has been in the custody of the Defendant, Robert J. Craig, from September, 1990, until the present date.

7. As a result of the change in custody as ordered by the Family Court of Charleston County, South Carolina, there is no need for this Court to consider the question of child support to be paid to the Plaintiff, Carol Craig, for the support of said minor child.

8. At the time the older child attained 18 years of age, the Defendant was entitled to an adjustment in the amount of child support he had been paying for the two minor children and he should not be required to pay the full support from January, 1988, through August, 1990, even though he failed to apply to the South Carolina Court for a modification of the original order.

9. Until the filing of this Petition there was apparently no objection by the Plaintiff, Carol Craig, with regard to the reduced amount of support paid by the Defendant for the remaining minor child.

10. The Plaintiff admits he made an error in his computation and fully intended to pay one-half of the original amount of support for the minor child, Darrell [sic] Robert Craig, and that the difference in what was actually paid is the sum of $288.00 for the period from January, 1988 through August, 1990.

Based on these findings, the trial court ordered that defendant pay plaintiff $288.00 in arrearages. Plaintiff appeals.

The issues are: (I) whether a parent ordered to pay child support may unilaterally reduce the child support payments when there are two or more children, where one of the children obtains to age eighteen, where the order does not allocate the support payment by child, and where the order is silent as to any reduction in support upon one child reaching age eighteen; and (II) whether the trial court may retroactively reduce the arrearages arising from a failure by the supporting parent to comply with a child support order.

Two statutes are pertinent to this case. The first, N.C.G.S. § 50-13.4(c), provides that, with certain exceptions not applicable to this case, "[p]ayments ordered for the support of a child shall terminate when the child reaches the age of 18 . . . ." The second statute provides in part:

> (a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, *if, but only if,* a written motion is filed, and due notice is given to all parties either:
>
> (1) Before the payment is due or
>
> (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.
>
> . . . .

N.C.G.S. § 50-13.10(a) (1987) (emphasis added).

I

Child support obligations ordered by a court terminate upon the child reaching age eighteen, unless the child is otherwise emancipated prior to reaching age eighteen or the trial court in its discretion continues to enforce the payment obligation after the child reaches age eighteen and while the child is in primary or secondary school. N.C.G.S. § 50-13.4(c) (1987). However, when one of two or more minor children for whom support is ordered reaches age eighteen, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. N.C.G.S. § 50-13.7(a) (1987) (support for minor child may be modified or vacated at any time "upon motion in the cause and a showing of changed circumstances . . . ."). *See Brower v. Brower*, 75 N.C. App. 425, 433, 331 S.E.2d 170, 176 (1985) (husband had no authority to unilaterally reduce support payments where

one of two children, for whom support was ordered without allocation by child, reached age eighteen). Thus, until such an application for modification is made by the supporting parent, and as long as at least one child for whom the support was ordered remains a minor, the full amount of the support obligation not allocated by child remains enforceable and continues to accrue and vest as it becomes due.

II

Where one of two minor children reaches the age of eighteen, this Court has previously held that a trial court may retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed. *Brower* at 434, 331 S.E.2d at 176; *Gates v. Gates*, 69 N.C. App. 421, 430, 317 S.E.2d 402, 408 (1984), *aff'd per curiam*, 312 N.C. 620, 323 S.E.2d 920 (1985); *Goodson v. Goodson*, 32 N.C. App. 76, 81, 231 S.E.2d 178, 182 (1977).

These cases, however, were decided before N.C.G.S. § 50-13.10 became effective on 1 October 1987. Under this statute, if the supporting party is not disabled or incapacitated as provided by subsection (a)(2), a past due, vested child support payment is subject to divestment only as provided by law, and "if, but only if, a written motion is filed, and due notice is given to all parties . . . [b]efore the payment is due . . . ." N.C.G.S. § 50-13.10(a)(1) (1987). The record in this case contains no such motion.

We note also that under subsection (d) of this statute,

> [A] child support payment or the relevant portion thereof, is not past due, and no arrearage accrues:
>
> (1) From and after the date of the death of the minor child for whose support the payment, or relevant portion, is made;
>
> (2) From and after the date of the death of the supporting party;
>
> (3) During any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party;

(4) During any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment.

N.C.G.S. § 50-13.10(d) (1987). These exceptions are not applicable in this case, and we need not determine their operation where two or more children are involved in a single support order and there is no allocation of the support between the children.

The trial court was without authority to "modif[y] in any way for any reason" the past due payments. N.C.G.S. § 50-13.10(a) (1987). The case is therefore remanded for entry of an order for defendant to pay the full amount of arrearages which accumulated from January, 1988, through August, 1990.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

T. SANFORD FAUCETTE AND WIFE, SHIRLEY D. FAUCETTE v. ROBERT L. DICKERSON AND WIFE, REBECCA DICKERSON

No. 909DC1069

(Filed 6 August 1991)

1. **Rules of Civil Procedure §§ 55.1, 60 (NCI3d)— entry of default and default judgment—refusal to set aside—no abuse of discretion**

The trial court did not abuse its discretion in refusing to set aside an entry of default pursuant to Rule 55(d) and a judgment by default pursuant to Rule 60(b) on the ground of fraud in an action on a promissory note. N.C.G.S. § 1A-1, Rules 55(d) and 60(b).

Am Jur 2d, Judgments §§ 725, 781.

2. **Appearance § 6 (NCI4th)— motion to claim exempt property—general appearance—waiver of invalid process**

Defendant made a general appearance and submitted herself to the jurisdiction of the court when she filed a motion to claim exempt property after a default judgment was entered,

and her motion to set aside the default judgment on the ground of invalidity of service of process was thus properly denied.

Am Jur 2d, Appearance §§ 30, 31; Judgments §§ 757, 1173.

Motion to vacate judgment or order as constituting general appearance. 31 ALR2d 262.

APPEAL by defendants from order entered 30 April 1990 by *Judge C. W. Wilkinson, Jr.* in VANCE County District Court. Heard in the Court of Appeals 9 May 1991.

On 12 September 1988, plaintiffs filed a complaint in which they alleged that defendants executed a promissory note providing that defendants would pay plaintiffs $30,000 "for the purchase of ten thousand pounds of tobacco, which . . . was previously held and owned by the Plaintiffs" and that they failed to pay in accordance with the note. Defendants did not file answers to plaintiffs' complaint, and Entry of Default was entered by the Clerk of Superior Court of Vance County against the defendants on 21 October 1988. Judgment by Default was entered by the Clerk against the defendants in the amount of $21,357 on the same date.

On 12 December 1988, a notice of right to have exemptions designated was issued in the case as to each defendant and was served 24 January 1989. A motion to claim exempt property was thereafter made by each defendant on 13 February 1989, and an order designating exempt property was filed by the Clerk of Superior Court on 20 February 1989. Execution was issued 20 February 1989, and the property was seized by levy on 28 February 1989. Defendants filed a Chapter 13 petition under the U.S. Bankruptcy Code which was dismissed on 30 October 1989.

Prior to the dismissal of defendants' bankruptcy petition, on 20 October 1989 each defendant filed a motion for relief from the judgment in the original civil case and a motion to set aside entry of default, judgment by default, and a motion for order allowing time to answer the complaint. On 30 April 1990, the trial court entered an order dismissing defendants' motions.

From this order, defendants appeal.

Stainback & Satterwhite, by Paul J. Stainback, for plaintiff-appellees.

Larry E. Norman for defendant-appellants.

ORR, Judge.

The issue on appeal is whether the trial court erred in denying defendants' motions for relief from judgment and motions to set aside entry of default and judgment by default pursuant to N.C. Gen. Stat. § 1A-1, Rules 55 and 60 (1990). For the reasons set forth below, we affirm the order of the trial court.

Defendants argue that the trial court erred in denying defendant Robert Dickerson's motion "to set aside entry of default and judgment by default and motion for relief from judgment." Entry of default by the clerk is proper "[w]hen 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 . . . otherwise." N.C. Gen. Stat. § 1A-1, Rule 55(a). Under Rule 55(d), an entry of default may be set aside:

> (d) *Setting aside default.*—For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

Under Rule 60(b), judgment by default may be set aside for the following reasons:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence . . .;
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, . . .; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

Plaintiff argues that defendant Robert Dickerson moved to set aside entry of default pursuant to Rule 60 instead of Rule 55(d) and contends that "therefore his appeal has no merit." Defendants moved for the trial court to set aside entry of default and default judgment pursuant to Rule 60. "An entry of default may be set aside, not by motion pursuant to Rule 60(b), but by motion pursuant to Rule 55(d) and a showing of good cause." *Bailey v.*

Gooding, 60 N.C. App. 459, 461, 299 S.E.2d 267, 269, *disc. review denied*, 308 N.C. 675, 304 S.E.2d 753 (1983). "The failure to state a particular rule number as the basis for a motion is not a fatal error so long as the substantive grounds and relief desired are apparent and the opponent of the motion is not prejudiced thereby." *Garrison v. Garrison*, 87 N.C. App. 591, 596, 361 S.E.2d 921, 925 (1987).

In defendants' brief they argue in the first question presented that Robert Dickerson's motion to set aside entry of default and judgment by default and motion for relief from judgment should have been granted. Then defendants contend that the default judgment should have been set aside under 60(b)(3) or (4) on the grounds of fraud.

[1] A motion to set aside an entry of default pursuant to Rule 55(d) is within the sound discretion of the trial court and will not be disturbed except for an abuse of discretion. *Coulbourn Lumber Co. v. Grizzard*, 51 N.C. App. 561, 563, 277 S.E.2d 95, 96 (1981). Motions pursuant to Rule 60(b) also are within the sound discretion of the trial court and will be disturbed only for an abuse of discretion. *Vuncannon v. Vuncannon*, 82 N.C. App. 255, 258, 346 S.E.2d 274, 276 (1986); *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975). The trial court's findings of fact are conclusive on appeal if supported by competent evidence. *In re Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985). Upon reviewing the evidence, we conclude that the trial court did not abuse its discretion in refusing to set aside the entry of default and judgment by default.

[2] Defendants also argue that the trial court erred in denying defendant Rebecca Dickerson's motion to set aside entry of default and judgment by default on the grounds that the judgment is void because the service of process was invalid. We disagree.

We need not decide whether the service of process was invalid. A North Carolina court which has subject matter jurisdiction in an action may exercise jurisdiction over a person making a general appearance in an action without service of process. N.C. Gen. Stat. § 1-75.7 (1983). "[T]he concept of a 'general appearance' . . . should be given a liberal interpretation." *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 248, 243 S.E.2d 412, 414, *disc. review denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). "[V]irtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction." *Jerson*

v. Jerson, 68 N.C. App. 738, 739, 315 S.E.2d 522, 523 (1984). "[I]f the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court whether he intended to or not." *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978), *disc. review denied and appeal dismissed*, 296 N.C. 740, 254 S.E.2d 181 (1979).

Here the complaint was filed and summons was issued on 12 September 1988. On 16 September 1988, defendant Robert Dickerson was served, and defendant Rebecca Dickerson was served by the Deputy Sheriff by giving "copy to husband Robert L. Dickerson." Entry of default and judgment by default were entered against defendants 21 October 1988. On 12 December 1988, a notice of right to have exemptions designated was issued as to each defendant and served 24 January 1989. On 13 February 1989, a verified motion to claim exempt property was made by each defendant, and an order designating exempt property was filed by the Clerk of the Superior Court of Vance County on 20 February 1989.

Defendant Rebecca Dickerson filed a motion to claim exempt property which was inconsistent with her later motion for relief from judgment on the grounds of the invalidity of service of process. Therefore, we conclude defendant Rebecca Dickerson made a general appearance, and her subsequent motion for relief from judgment on the grounds of the invalidity of service of process was properly dismissed.

For the reasons above, we affirm the decision of the trial court.

Affirmed.

Judges COZORT and WYNN concur.

IN RE ELLER

[103 N.C. App. 625 (1991)]

IN THE MATTER OF: DEBBIE SUE ELLER

IN THE MATTER OF: NIKKI LOVE GREER

Nos. 9023DC1066
9023DC1098

(Filed 6 August 1991)

Schools § 15 (NCI3d)— disrupting teaching of students—noises in classroom—juvenile adjudications

Respondent juveniles' conduct substantially disrupted, disturbed or interfered with the teaching of students at a public educational institution in violation of N.C.G.S. § 14-288.4(a)(6) so as to support adjudications of delinquency where the State's evidence tended to show that each juvenile, while attending a high school mathematics class of four students, struck a metal radiator covering with her hand, and that a rattling, metallic noise was produced each time the covering was struck, causing the other students to stop what they were doing and to turn to the source of the noise, and causing the teacher to stop her lecture for fifteen to twenty seconds.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 23; Schools §§ 263, 267.

Judge PARKER dissenting.

APPEAL by respondent juveniles from orders entered 17 July 1990 by *Judge Michael E. Helms* in ASHE County District Court. Heard in the Court of Appeals 16 April 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane Rankin Thompson, for petitioner appellee.

Kilby & Hodges, by John T. Kilby, for respondent juvenile appellant Debbie Sue Eller.

Grier J. Hurley for respondent juvenile appellant Nikki Love Greer.

PHILLIPS, Judge.

The appeals are from orders adjudicating the named juveniles delinquent pursuant to G.S. 14-288.4(a)(6). In perfecting the appeals

the appellants incorrectly captioned the cases as *State v. Debbie Sue Eller and State v. Nikki Love Greer*, and the above captions should be used hereafter. Since the cases are based upon the same charges and evidence and were tried together in the District Court, we consolidate them for the purposes of the appeal.

The juveniles were charged with disorderly conduct at Beaver Creek High School in West Jefferson, N. C. in violation of G.S. 14-288.4(a)(6) in that while they and other students were being instructed by a teacher they intentionally interfered with and disrupted the instruction by striking the classroom wall with their hands. G.S. 14-288.4(a)(6) provides as follows:

> (a) Disorderly conduct is a public disturbance intentionally caused by any person who:
>
> . . . .
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

In construing former G.S. 14-273, which made it a misdemeanor to "interrupt or disturb any public . . . school," our Supreme Court said that words in a statute—

> are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.
>
> . . . .
>
> When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean . . . a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled.

State v. Wiggins, 272 N.C. 147, 153-154, 158 S.E.2d 37, 42 (1967) (citations omitted), *cert. denied*, 390 U.S. 1028, 20 L.Ed.2d 285 (1968). Appellants' only contention is that the evidence presented does not support the adjudications of delinquency. Thus, the dispositive question before us is whether the evidence tends to show that the conduct of the two juveniles substantially interfered with,

disrupted, and disturbed the teaching of students of the Beaver Creek High School on the occasion involved.

When viewed in the light most favorable to the State, the evidence tends to show that: While attending a mathematics class with two other students at Beaver Creek High School, each juvenile, while sitting at the rear of the classroom, slung or threw her hand backwards and struck the metal covering of a radiator attached to the wall behind her. The metal covering was struck "more than two or three times." Each time the covering was struck a rattling, metallic noise was produced that caused the other students to stop what they were doing and to turn to the source of the noise, and caused the teacher, Ms. Linda Weant, to stop her lecture for fifteen to twenty seconds. Ms. Weant saw each juvenile strike the radiator at least one time. Ms. Weant did not say anything about the occurrences at the time and the only thing that she did each time was to just stare at the juveniles for fifteen to twenty seconds. After the class was over Ms. Weant reported the incidents to the assistant principal who filed a juvenile petition.

In our opinion this evidence is sufficient to establish each of the material elements of the offense charged, *In re Bass*, 77 N.C. App. 110, 334 S.E.2d 779 (1985), and we affirm. The evidence supports the trial court's finding that each juvenile intentionally produced a noise that had the natural effect of substantially interfering with, disturbing and disrupting the instruction of the school class; that each juvenile was aware of the effect that striking the radiator cover had, and intended its consequences. *State v. Wiggins, supra.*

In arguing that the conduct testified to did not constitute disorderly conduct within the purview of the statute, appellants contrast their behavior with that held to be sufficient in *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970), where a group of students entered the principal's office, locked out the school secretary, defaced school property, and caused classes to be cancelled for the day. That is not the only way that students can substantially interfere with the teaching program of a school. G.S. 14-288.4(a)(6) forbids all substantial disturbances and disruptions of the teaching programs of our public schools, and giving the words of the statute their plain and ordinary meaning, it is clear to us that the rattling, metallic noises that appellants intentionally produced substantially interfered with, disturbed and disrupted

the school's teaching program for the class involved. That counsel for the appellants, as they state, have found no case which holds that conduct similar to appellants' is sufficient to violate G.S. 14-288.4(a)(6) is not persuasive; for we have found no case which holds that conduct similar to that recorded here is *not* sufficient to constitute a material disruption of and an interference with a school's instruction.

Affirmed.

Judge GREENE concurs.

Judge PARKER dissents with a separate opinion.

Judge PARKER dissenting.

I respectfully dissent. In my view the conduct upon which defendants were adjudicated delinquent, *i.e.*, striking the radiator in a class of four students, does not as a matter of law constitute a substantial disruption of the teaching program. *See State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967), *cert. denied*, 390 U.S. 1028, 20 L.Ed.2d 285 (1968); *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970). Unlike that in *Wiggins* and *Midgett*, defendants' conduct did not result in the termination or cancelling of classes, but rather in several repeated minor delays. While in my view a violation of N.C.G.S. § 14-288.4(a)(6) does not necessarily require the dismissal of an entire school or class, something more than mere delay and more disruptive than slapping the radiator must be shown. *See also In re Grubb*, 103 N.C. App. 452, 405 S.E.2d 797 (1991).

I, therefore, vote to reverse as to both defendants.

KIMBERLY DAWN AMOS, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. 9030SC980

(Filed 6 August 1991)

Insurance § 69 (NCI3d)— underinsured motorist coverage—stacking—definition of underinsured

The trial court correctly granted summary judgment for plaintiff in an action in which plaintiff was injured in an automobile accident when the automobile in which she was riding, driven by Coleman, ran off the highway and struck a utility pole; Coleman's policy had bodily injury limits of $50,000 per person; plaintiff's father owned three motor vehicles that were insured by defendant in one policy with limits of $50,000 per person for each of the three vehicles, with a separate premium for each coverage; plaintiff was offered $50,000; and the trial court held that all three underinsured motorist coverages in the aggregate amount of $150,000 are available, reduced by whatever Coleman's insurance company pays under its policy. Although defendant contended that plaintiff was not damaged by an underinsured motorist because Coleman's vehicle had the same limits as the vehicles insured by defendant, the trial court correctly applied *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 437.

Am Jur 2d, Automobile Insurance §§ 322, 329.

Uninsured or underinsured motorist coverage: recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

Judge GREENE dissenting.

APPEAL by defendant from order entered 16 July 1990, *nunc pro tunc* 2 July 1990, by *Judge James U. Downs* in GRAHAM County Superior Court. Heard in the Court of Appeals 9 April 1991.

Zeyland G. McKinney, Jr. and Leonard W. Lloyd for plaintiff appellee.

Willardson & Lipscomb, by William F. Lipscomb, for defendant appellant.

PHILLIPS, Judge.

The facts of this case are not in dispute. Plaintiff, living in the household of her father, Wayne Amos, suffered permanent disabling injuries and substantial medical expense on 28 July 1989 when an automobile operated by Kevin Coleman, in which she was riding as a passenger, ran off the highway and struck a utility pole. The Coleman vehicle was insured by Maryland Casualty Insurance Company, whose policy had bodily injury liability limits of $50,000 per person, which have been offered to plaintiff. Plaintiff's father owned three motor vehicles that were insured by defendant in one policy, which provided bodily injury liability and underinsured motorist insurance limits of $50,000 per person for each of the three vehicles. A separate premium was charged for each coverage. Based upon these facts defendant moved for summary judgment, contending that none of the coverages is available to plaintiff. Plaintiff responded with a similar motion, contending that all three coverages are available to her. The trial court denied defendant's motion and granted plaintiff's. The order specifically holds that under the decision of our Supreme Court in *Sutton v. Aetna Casualty & Surety Company*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), all three underinsured motorist coverages in the aggregate amount of $150,000 are available to pay plaintiff's damages, and that defendant's exposure will be reduced by whatever Maryland Casualty pays under its policy.

Whether the court correctly applied the *Sutton* holding to the facts of this case is the only question raised by defendant's appeal. We hold that the court correctly applied the *Sutton* decision to this case and affirm. In opposition thereto, defendant contends, in gist, that: Under the provisions of G.S. 20-279.21(b)(4) underinsured motorist coverage in any automobile policy written in this state is available only to a claimant that has been damaged by an underinsured motorist; that an underinsured motorist is one whose liability insurance limits are less than the liability limits of the policy that contains the underinsured motorist coverage

that is being sought; that plaintiff was not damaged by an underinsured motorist because Coleman's vehicle had the same liability limits as the vehicles insured by defendant; and that *Sutton* is not authority for holding that defendant's underinsured motorist coverages are available to plaintiff. These contentions are overruled.

In *Sutton*: The negligent motorist who injured the plaintiff was insured by a policy with bodily injury liability limits of $50,000 per person; two of plaintiff's four vehicles were insured by a policy with bodily injury liability and underinsured motorist coverages limits of $50,000 per person; plaintiff's other two vehicles were insured by a policy with limits of $100,000 per person for both bodily injury liability and underinsured motorist coverages; the Court ruled that all four underinsured motorist coverages in the aggregate amount of $300,000 were available to the plaintiff. Obviously the controlling circumstances of *Sutton* are indistinguishable from those in this case, and the decision made there is binding upon us here. That, as defendant points out, the court did not discuss the fact that some of the underinsured motorist coverages made available to *Sutton* were under a policy that had the same liability limits as the tort-feasor's vehicle is immaterial. Of more import is that the coverages were made available to the plaintiff, for that plainly indicates that the Court's understanding is that the availability of underinsured motorist coverage to an injured victim does not depend upon the tort-feasor's liability limits being less than those on the vehicle with the underinsured motorist coverage.

Affirmed.

Judge PARKER concurs.

Judge GREENE dissents with a separate opinion.

Judge GREENE dissenting.

The facts of this case, like the facts in *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 404 S.E.2d 499 (1991) (Greene, J., dissenting), present two distinct issues. The first issue, and the only issue addressed by the defendant, is "whether intrapolicy stacking is appropriately considered in determining if the tort-feasor's vehicle is underinsured." *Id.* at 103-04, 404 S.E.2d at 501. For the reasons stated in my dissent in *Harris*, 103 N.C. App.

at 104-08, 404 S.E.2d at 501-03, I agree with the majority that the tortfeasor's vehicle is an underinsured vehicle.

The second issue is "whether intrapolicy stacking is permitted in determining an insurer's limit of liability when the injured party is a non-named insured." *Id.* at 104, 404 S.E.2d at 501. Although the defendant did not discuss this issue in its brief, I address it pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. For the reasons stated in my dissent in *Harris*, 103 N.C. App. at 108-09, 404 S.E.2d at 503-04, I conclude that intrapolicy stacking is not permitted to determine the defendant's limit of liability where, as here, the injured party is a non-named insured. I would reverse the trial court's order of summary judgment and remand for entry of summary judgment for the defendant.

IN THE MATTER OF ROGER NEAL KENNEDY

No. 9018DC829

(Filed 6 August 1991)

Infants § 20 (NCI3d)— juvenile—neglected—ordered into custody of DSS

The trial court did not err by ordering a juvenile into the custody of the Department of Social Services where there was substantial evidence to support the trial court's findings of fact and the findings amply support the conclusions that the juvenile was neglected and that DSS should have legal and physical custody. Although DSS had difficulty placing the child, that difficulty is not a basis for returning a neglected child to parents who will not provide proper care and supervision.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 29, 30.

APPEAL by respondents from order entered 18 April 1990 and 16 May 1990 by *Judge Sherry F. Alloway* in GUILFORD County District Court. Heard in the Court of Appeals 7 May 1991.

On or about 23 February 1990 the Guilford County Department of Social Services (DSS) filed a juvenile petition alleging that Roger

Neal Kennedy was a neglected juvenile. Respondent Ruth Kennedy is the natural mother of the juvenile and respondent Bobby Ray Kennedy is the stepfather of the juvenile.

After a hearing the trial court made the following findings in an order entered 18 April 1990. First, the trial court found that "said juvenile is a neglected juvenile as defined by law in that his parents have inflicted upon him inappropriate discipline, specifically, the juvenile was forced on numerous occasions to be in a squatting position with his knees bent and arms extended; that on occasion, the juvenile was forced to hold a board placed behind his bent knees with his arms extended; that this type of unusual punishment could last anywhere from five (5) minutes up to an hour; further, the juvenile received numerous whippings from switches or boards which resulted in marks on his buttocks and legs; and that the juvenile was also forced to spend weekends in bed and allowed to get out of bed only to go to the bathroom or to eat on occasion." The trial court further found that "the juvenile is mildly-mentally retarded and emotionally disturbed and was placed in the Department of Social Services' custody in Georgia and out of the parents' home for approximately the past five (5) years; that the juvenile did not return to his parents' home in High Point until approximately January 1989, at which time the parents had removed the juvenile from his previous out-of-home placement in a hospital setting against medical advice; that the juvenile was taking medication at the time that his parents removed him from the Florida treatment facility; that the parents, on their own, terminated this medication without seeking any medical advice; further, since January 1989, the parents have failed to seek or obtain consistent mental health treatment for the juvenile although by their own admission, the juvenile's behavior deteriorated after his initial return to High Point."

The trial court also found that non-corporal punishment had been successful in correcting the juvenile's misbehavior in school and "the inappropriate punishment administered by his parents did not assist in correcting the juvenile's behavior." The trial court found that the juvenile did not want to return home. Finally, the court found that "with regard to the allegations of lack of proper eye care, personal hygiene and the other allegations in the petition, that there may have been some misunderstanding or miscommunication between the school personnel and the parents and that the evidence and allegations do not rise to the level of neglect."

As a result the trial court concluded as a matter of law that the court had subject matter jurisdiction over the parties; that the juvenile is neglected; that DSS' immediate removal of the child from the home was warranted; that it is in the best interest of the child for custody to remain with DSS. The trial court then decreed that the juvenile was neglected because of inappropriate discipline and ordered that legal and physical custody remain with DSS; that the parents enter into a contract with DSS setting forth the terms and conditions of reunification; and "that upon the juvenile's discharge from Baptist Hospital, if the the [sic] Department of Social Services is unable to obtain other suitable placement for the juvenile, Kendall Center is ordered to accept the juvenile into their placement on a temporary basis until other long-term appropriate placement can be obtained." The trial court then continued the matter until 16 May 1990 for further disposition.

After the hearing on 16 May 1990, the trial court found in its order entered 16 May 1990 that DSS was unable to find appropriate placement for the juvenile; that the child did well at Baptist Hospital but had problems adjusting to Kendall Center; that the child's return to high school was unsuccessful; that the juvenile was in need of therapy and a suitable placement; and that despite the parents' request that the child be allowed to return home, it was in the best interest of the child to remain in DSS custody while DSS worked towards placement. The trial court ordered the juvenile's entire family to submit to the Family Environmental Scale/Parenting Stress Index and the MMPI-2 test and that the parents be assigned other appointed counsel for their appeal. The trial court then ordered that legal and physical custody of the juvenile remain with DSS, that the parents be allowed supervised visitation at least once every other week, that Attorney Mary Katherine Nicholson be appointed to handle this appeal, that the matter be reviewed again on 27 June 1990 and that the matter be retained for further orders of the court. Respondents appeal.

Deputy County Attorney Lynne G. Schiftan and Attorney Advocate Avis Goodson for petitioner-appellee.

Mary K. Nicholson for respondent-appellants.

EAGLES, Judge.

Respondents assign as error the trial court's "ordering the juvenile into the custody of the Department of Social Services

in light of the testimony by the Department of Social Services that it was unable, at this time, to provide adequate living and educational facilities for the juvenile." We disagree.

Initially, we note that G.S. 7A-517(21) defines a neglected juvenile as "[a] juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law."

> Under N.C.G.S. § 7A-647(2)c., once a minor is adjudicated neglected, a judge has the authority to place the child in the custody of DSS. "[T]he natural and legal right of parents to the custody, companionship, control and bringing up of their children is not absolute. It may be interfered with or denied for substantial and sufficient reason, and it is subject to judicial control when the interest and welfare of the children require it." Judicial intervention is authorized because the welfare and best interest of the child is always treated as the paramount consideration.

In the Matter of Devone, 86 N.C. App. 57, 61, 356 S.E.2d 389, 391 (1987) (citations omitted).

> The court must also be guided by the express purpose of dispositions as stated in G.S. 7A-646, as follows:
>
> > Sec. 7A-646. Purpose.
> >
> > The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in care, supervision and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level services to be provided to the juvenile and his family in order to strengthen the home situation.

In the Matter of Brenner, 83 N.C. App. 242, 246-47, 350 S.E.2d 140, 144 (1986).

Here, there is substantial competent evidence in the record to support the trial court's findings of fact. The findings of fact amply support the conclusions of law that Roger was a neglected juvenile and that DSS should have legal and physical custody of Roger. *See In the Matter of Devone*, 86 N.C. App. 57, 356 S.E.2d 389 (1987). While the evidence presented conflicts as to the duration of the inappropriate disciplinary measures used against Roger, both parents did in fact admit to the types of disciplinary measures used. Also, respondents discontinued medical treatment for the juvenile without seeking medical advice. Although the parents believed they were justified in disciplining the child for misbehavior in the school and the home, the discipline used was not in the best interest of the child. We note that DSS has had difficulty in placing the child, but that difficulty is not a basis for returning a neglected juvenile to parents who will not provide proper care and supervision. It is incumbent, however, on DSS to provide care and treatment for the juvenile consistent with the juvenile's best interests. Whether DSS breached its duty is not an issue here presented. In view of the evidence of neglect by the juvenile's parents, we find that the trial court acted in the best interest of the child in removing the child from the home while allowing supervised visitation and ordering testing of the family.

For the reasons stated, the trial court's order is

Affirmed.

Judges GREENE and LEWIS concur.

IREDELL MEMORIAL HOSPITAL, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BRYANT STREET ASSOCIATES AND IREDELL HEAD, NECK & EAR SURGEONS, P.A., RESPONDENT-INTERVENORS

No. 9010OAH760

(Filed 6 August 1991)

Administrative Law and Procedure § 56 (NCI4th)— certificate of need—settlement—not a contested case

An appeal to the Court of Appeals from the dismissal by an administrative law judge of a petition for a contested case hearing was dismissed for lack of subject matter jurisdiction where Iredell and Bryant Street both applied for a certificate of need; the applications were considered concurrently but not competitively; both were denied and both filed for contested case hearings in the Office of Administrative Hearings; Bryant Street and DHR settled their claims and DHR issued Bryant a certificate of need; Iredell requested a declaratory ruling from DHR on its right to appeal or compel administrative review of the settlement agreement; DHR ruled that Iredell had a statutory right to appeal the settlement agreement but that DHR lacked authority to withdraw the certificate of need; Iredell filed a second petition for a contested case hearing; Bryant Street intervened and moved to dismiss Iredell's petition; that motion was granted; and Iredell appealed to the Court of Appeals. It is clear that the case was dismissed before a contested case hearing was begun and that the decision appealed from is an agency decision which must be appealed to superior court. N.C.G.S. § 131E-188(b), N.C.G.S. § 150B-45.

Am Jur 2d, Administrative Law §§ 559, 731, 732, 745.

APPEAL by petitioner from Order of Administrative Law Judge Thomas R. West, entered 19 April 1990 in WAKE County Office of Administrative Hearings, Hearing Division. Heard in the Court of Appeals 11 February 1991.

Womble Carlyle Sandridge & Rice, by Anthony H. Brett and Johnny M. Loper, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Meg Scott Phipps, for the respondent appellee, the North Carolina Department of Human Resources.

Poyner & Spruill, by Mary Beth Johnston and Wilson Hayman, for respondent-intervenors appellees, Bryant Street Associates and Iredell Head, Neck & Ear Surgeons, P.A.

COZORT, Judge.

Iredell Memorial Hospital ("Iredell") and Bryant Street Associates and Iredell Head, Neck & Ear Surgeons, P.A. ("Bryant Street"), on 15 June 1989 applied for a Certificate of Need ("CON") from the respondent North Carolina Department of Human Resources ("DHR"). The CON applications were for a license to operate free-standing ambulatory surgical facilities. DHR considered the applications concurrently, but not competitively. On 27 November 1989, DHR denied both Iredell's and Bryant Street's applications. Both Iredell and Bryant Street filed for contested case hearings in the Office of Administrative Hearings ("OAH") to appeal the denial of the applications. Iredell, on 5 February 1990, filed a motion to consolidate the cases. Prior to that motion being heard, Bryant Street and DHR, on 15 February 1990, settled their claims. Also on 15 February 1990, DHR issued Bryant Street a CON, and Bryant Street agreed to take a voluntary dismissal with prejudice on the contested case hearing.

On 27 February 1990, Iredell requested a declaratory ruling from the Director of the Division of Facility Services in DHR as to Iredell's right to appeal or compel an administrative review of the settlement agreement between Bryant Street and DHR. In addition, Iredell sought the withdrawal of Bryant Street's CON. The Director, on 7 March 1990, issued a Declaratory Ruling concluding that Iredell had a statutory right to appeal the settlement agreement, but that the Division of Facility Services lacked statutory authority to withdraw Bryant Street's CON. Iredell then filed a second Petition for a Contested Case Hearing with OAH on 15 March 1990. On 16 March 1990, Bryant Street filed a petition to intervene and a motion to dismiss on the grounds that (1) the administrative law judge ("ALJ") lacked subject matter jurisdiction to hear the contested case, (2) Iredell's petition failed to state a claim upon which relief could be granted, and (3) Iredell failed to join Bryant Street, a necessary party in its contested case.

Bryant Street's petition to intervene was granted 28 March 1990. Bryant Street's motion to dismiss Iredell's petition was granted on 19 April 1990. Iredell appeals. We dismiss the appeal for lack of subject matter jurisdiction.

The right to administrative and judicial review of decisions regarding certificates of need is governed by N.C. Gen. Stat. § 131E-188 (1988). Subsection (a) of that statute provides in part:

> (a) After a decision of the Department to issue, deny or withdraw a certificate of need or exemption, any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days after the Department makes its decision. . . .
>
> A contested case shall be conducted in accordance with the following timetable:
>
> (1) An administrative law judge or a hearing officer, as appropriate, shall be assigned within 15 days after a petition is filed.
>
> (2) The parties shall complete discovery within 90 days after the assignment of the administrative law judge or hearing officer.
>
> (3) The hearing at which sworn testimony is taken and evidence is presented shall be held within 45 days after the end of the discovery period.
>
> (4) The administrative law judge or hearing officer shall make his recommended decision within 75 days after the hearing.
>
> (5) The Department shall make its final decision within 30 days of receiving the recommended decision.

Under Article 3 of Chapter 150B of the General Statutes, judicial review of a final decision under that article is to be had in the Superior Court of Wake County or the superior court of the county where the person seeking review resides. N.C. Gen. Stat. § 150B-45 (1987).

Direct appeal to the Court of Appeals for review of certificate of need decisions is provided for in N.C. Gen. Stat. § 131E-188(b) (1988):

> (b) Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision of the Department shall be taken within 30 days of the receipt of the written notice of decision required by G.S. 131E-187 and notice of appeal shall be filed with the Division of Facility Services, Department of Human Resources and with all other affected persons who were parties to the contested hearing.

The initial issue for our determination is whether Iredell is entitled to appeal directly to this Court the decision by the administrative law judge to dismiss Iredell's Petition for a Contested Case Hearing.

In *Rowan Health Properties, Inc. v. N.C. Dept. of Human Resources*, 89 N.C. App. 285, 365 S.E.2d 635 (1988), we stated:

> In *Charlotte-Mecklenburg Hospital Authority*, we held that, under N.C. Gen. Stat. Sec. 131E-188(b), an actual "contested case hearing" is a jurisdictional prerequisite for a direct appeal to this Court from a final agency decision, and that "parties aggrieved by any other final agency decision are . . . required to appeal to the Wake County Superior Court pursuant to N.C. Gen. Stat. Sec. 131E-191(b) (1985 Cum. Supp.)." *Id.* at 125, 349 S.E.2d at 293. Although a "contested case" resulted from the filing of the various requests for a contested case hearing, no hearing was ever held due to DHR's conclusion that the withdrawal of all parties had terminated the matter. Thus, regardless of whether RHP ever became a party to the contested case, RHP has clearly not been a party in a contested case *hearing* so as to be entitled to appeal to this Court. Indeed, the central issue RHP would now have us resolve—whether RHP is entitled to a contested case hearing—is similar to that which this Court declined to address in *Charlotte-Mecklenburg Hospital Authority.*

Id. at 288, 365 S.E.2d at 637 (emphasis in original). In this case, Iredell appealed the dismissal of its Petition for a Contested Case Hearing. The Order granting Bryant Street's motion to dismiss stated:

> It appearing that the issuance of a Certificate of Need to Bryant Street by virtue of the Settlement Agreement is not a "decision" as that term is used in G.S. 131E-186, 131E-187, or 131E-188. Any conclusion by Respondent to the contrary, as expressed in its Declaratory Ruling, dated March 7, 1990, is binding only on it and Petitioner. The Declaratory Ruling is also of dubious legality since it purports to interpret a statute, G.S. 131E-188, which is not administered by the Department of Human Resources.
>
> It is, therefore, **ORDERED**, that Bryant Street's Motion to Dismiss for a lack of jurisdiction is **GRANTED**. This Contested Case is, therefore, **DISMISSED**.

It is clear that the case below was dismissed *before* a contested case hearing was conducted. Iredell's appeal is thus not an appeal from a final Department decision in a contested case hearing, which gives right of appeal directly to the Court of Appeals under N.C. Gen. Stat. § 131E-188(b). Rather, the decision appealed from below is an agency decision which must be appealed to Superior Court, in accordance with our holding in *Rowan Health Properties*, and in accordance with N.C. Gen. Stat. § 150B-45. We note that a separate panel of this Court has recently reached the same conclusion in a case where the Administrative Law Judge dismissed a petition for a contested case hearing on the basis that the Office of Administrative Hearings lacked subject matter jurisdiction. *Community Psychiatric Centers v. North Carolina Department of Human Resources*, 103 N.C. App. 514, 405 S.E.2d 769 (1991). Iredell's appeal is, therefore,

Dismissed.

Chief Judge HEDRICK and Judge LEWIS concur.

BARBARA FINE, AS GUARDIAN AD LITEM FOR JOHN L. FINE, PLAINTIFF-APPELLEE
v. PAUL I. FINE, DEFENDANT-APPELLANT

No. 9018SC1218

(Filed 6 August 1991)

Appeal and Error § 2 (NCI4th)— failure to follow appellate rules— dismissal of appeal

An appeal is dismissed for failure to comply with the Rules of Appellate Procedure where appellant failed to separately number each assignment of error and confine each assignment of error to a single issue as required by Rule 10(c)(1); appellant failed to separately state each question and argument as required by Rule 28(b)(5); and appellant asserted that this case had been voluntarily dismissed in open court but failed to include in the record a transcript of the proceedings on that occasion, minutes of the clerk, or any affidavit of a court official to support this assertion.

Am Jur 2d, Appeal and Error §§ 489, 658, 661, 662, 906.

Judge PHILLIPS dissenting.

APPEAL by defendant from judgment entered 10 August 1990 by *Judge Lester P. Martin, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 5 June 1991.

According to the record filed in this Court, this action was instituted by the filing of a complaint by plaintiff against defendant and proper service upon defendant. Plaintiff asserted four claims for relief: (1) fraud, (2) breach of custodial and fiduciary duties, (3) conversion, and (4) unfair and deceptive trade practices. Plaintiff sought recovery of compensatory and punitive damages, treble damages, and attorneys' fees.

In her first claim for fraud, plaintiff alleged in summary that prior to May of 1985, John L. Fine was a shareholder in High Point National Furniture Market, Inc. (hereinafter "the Corporation"). The Corporation was dissolved by agreement of its shareholders. As a part of the dissolution of the Corporation, assets in the form of cash in the amount of $199,745.07 were distributed to John L. Fine pursuant to the North Carolina Uniform Transfer to Minors Act. Defendant was designated as custodian of those funds, received such funds as custodian, commingled those funds

with his own property and, or, the property of others, and misappropriated and converted such funds to his own use, after having represented to John Fine that he would keep the custodial property separate and apart from his own property and the property of others, all to the damage of John Fine.

In the second claim for breach of custodial duties, plaintiff realleged the underlying fraud circumstances and alleged that defendant had failed and refused John Fine's repeated legal demands for an accounting.

In the third claim for conversion, plaintiff alleged that defendant had converted John Fine's property to his own use.

In the fourth claim for unfair and deceptive trade practices, plaintiff alleged that in these circumstances defendant was engaged in commerce or in acts affecting commerce.

The complaint and summons were served on defendant on 26 May 1989. On 27 June 1989, defendant not having appeared or answered, plaintiff duly moved for entry of default. By order of the Clerk of Court, default was entered 5 July 1989. On 25 July 1989, plaintiff duly moved for default judgment.

On 11 September 1989, a consent order was entered by Judge James J. Booker, ordering defendant to render an accounting of all property held by defendant for the benefit of John Fine, such accounting to be presented to counsel for plaintiff within forty-five days of that order. The court further ordered defendant to transfer all property held by him for the benefit of John Fine to John Fine within forty-five days of the date of that order. The court further ordered that should defendant fail to so account for and transfer such property to plaintiff's satisfaction, plaintiff should be entitled to any additional remedies plaintiff might have under North Carolina law.

On 13 November 1989, Judge Lester P. Martin, Jr. entered an order stating that John Fine have and recover of defendant the sum of $199,745.07 on plaintiff's claim for compensatory damages, and that plaintiff's claim for punitive damages, treble damages, and attorneys' fees be continued. No post-judgment motions in opposition to that judgment were filed and no appeal from that judgment was noticed or taken.

The matter came on for hearing again before Judge Martin on 6 August 1990 on plaintiff's motion for default judgment for punitive damages, treble damages, and attorneys' fees. In the judgment which was filed on 10 August 1990, Judge Martin found as a fact that no part of the prior judgment for $199,745.07 had been satisfied, allowed plaintiff's additional claims, and entered judgment for plaintiff against defendant for punitive and treble damages in the amount of $599,235.21 and attorneys' fees in the amount of $5,408.10.

On 10 September 1990, defendant gave notice of appeal from the judgment of 10 August 1990.

No brief for plaintiff-appellee.

Robert S. Cahoon for defendant-appellant.

WELLS, Judge.

We first note that no appeal having been taken from the 13 November 1989 judgment awarding plaintiff $199,745.07 in compensatory damages, that judgment is final and not affected by this attempted appeal.

As to this attempted appeal, defendant has violated the North Carolina Rules of Appellate Procedure in several ways. Rule 10(c)(1) of the Appellate Rules requires that assignments of error be separately numbered and that each assignment of error be confined to a single issue of law. Similarly, Rule 28(b)(5) requires that arguments in an appellant's brief follow the pattern of Rule 10 so that each question and argument be separately stated.

Defendant's sole assignment of error is as follows:

ASSIGNMENT OF ERROR NO. 1

> The defendant-appellant assigns as error that the Trial Court erred to his prejudice in signing and entering the judgment against him dated August 9, 1990, and actually signed and entered on August 10, 1990, because the same was signed and entered without the presentation of any evidence or the finding of any facts to support or justify it or the allowance of treble damages of $599,235.21, or attorney fees of $5,408.10, or the sum of $604,643.31, and because the judgment was entered without legal justification and contrary to law, and without granting to the defendant an opportunity to be heard, or to

present evidence, or for trial by jury, and in violation of the defendant's right not to be deprived of property without due process under the laws and Constitution of North Carolina, and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Similarly, defendant's single question and argument in his brief attempts to address or assert at least six issues of law, ranging from asserted trial procedure errors to deprivation of due process.

There are other violations. Defendant asserts, for instance, that by reason of settlement of a companion case, plaintiff gave notice in open court on 6 November 1989 of voluntary dismissal of this case, yet this record includes no transcript of the proceedings on that occasion, no minutes of the clerk on that occasion, nor any affidavit of any court official to support this assertion.

The Rules of Appellate Procedure are mandatory, not merely directory. *See State v. Fennell*, 307 N.C. 258, 297 S.E.2d 393 (1982).

For the reasons stated, this appeal must be and is

Dismissed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the face of the record shows that the judgment appealed from is a nullity and should be vacated for two reasons. First, it shows that more than nine months before the judgment was entered this action came to an end when it was voluntarily dismissed in open court with the approval of the parties and the court alike. *Danielson v. Cummings*, 300 N.C. 175, 265 S.E.2d 161 (1980). Second, the findings of fact do not support the award of treble damages and attorneys' fees.

STATE OF NORTH CAROLINA v. WALTER CLARK LAMB

No. 9118SC127

(Filed 6 August 1991)

Constitutional Law § 280 (NCI4th)— appearance pro se—waiver of right to counsel—inquiry at pretrial hearing—no inquiry by trial judge

There was no error in a prosecution for carrying a concealed weapon where an inquiry was made at a pretrial hearing as to defendant's waiver of counsel and the inquiry was not repeated when defendant was tried before a different judge. Although N.C.G.S. § 15A-1242 states that the trial judge must conduct the inquiry into defendant's choice to represent himself, the statute does not mandate that the inquiry be made by the judge actually presiding at the defendant's trial. A thorough inquiry into the three substantive elements of the statute at a preliminary stage of a proceeding meets the statutory requirements even if it is by a judge other than the judge who presides at trial.

Am Jur 2d, Criminal Law §§ 988-990, 992.

APPEAL by defendant from judgment entered 4 October 1990 by *Judge W. Steven Allen* in GUILFORD County Superior Court. Heard in the Court of Appeals 6 June 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Barbara A. Shaw, for the State.

Assistant Public Defender Linda M. Mitchell for defendant-appellant.

GREENE, Judge.

Defendant was convicted in district court of carrying a concealed weapon in violation of N.C.G.S. § 14-269 (1986). He appealed to superior court where a jury found him guilty of carrying a concealed weapon. He received a suspended six-month term of imprisonment. Defendant appeals.

On 12 September 1990, a pretrial hearing was held in superior court before Judge Russell G. Walker, Jr. Judge Walker asked defendant if he understood that he had a right to counsel and

defendant stated that he did. Judge Walker then informed defendant that if he could not hire his own attorney, one would be appointed to represent him. Judge Walker also told defendant that he had been charged with carrying a concealed weapon, that this offense was punishable by a maximum sentence of six months, and that defendant could receive active prison time as a result of this offense. Defendant indicated that he understood and stated that he was going to represent himself. Defendant also stated that he was ready to try the case immediately. Judge Walker asked defendant to sign a waiver of his right to assigned counsel, which defendant did, and Judge Walker then certified this written waiver. Defendant was arraigned, pled not guilty, and his case was scheduled for trial.

Defendant's case came on for jury trial in superior court on 4 October 1990 before Judge W. Steven Allen. After defendant's case was called for trial, Judge Allen asked defendant if he was representing himself and defendant replied that he was. Judge Allen made no further inquiry at that time. Defendant represented himself at trial and was found guilty by the jury.

The only issue is whether an inquiry made by a judge at a pretrial stage of a proceeding satisfies the mandates of N.C.G.S. § 15A-1242 when that judge does not preside at the subsequent trial.

> A criminal defendant has a constitutional right to the assistance of competent counsel in his defense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Implicit in defendant's constitutional right to counsel is the right to refuse the assistance of counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806 (1975). In its decisions both prior to and after *Faretta*, this court has held that counsel may not be forced on an unwilling defendant. *State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980); *State v. McNeil*, 263 N.C. 260, 139 S.E.2d 667 (1965).

State v. Gerald, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981). Beyond the constitutional protections of the right to counsel afforded individuals, our legislature has regulated the process by which a defendant may elect to represent himself at trial.

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only

after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1988).

Waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary. *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980). The record must affirmatively show that the inquiry mandated by N.C.G.S. § 15A-1242 was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will. *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986), *disc. rev. denied*, 319 N.C. 225, 353 S.E.2d 409 (1987). The inquiry is mandatory and failure to conduct it constitutes prejudicial error. *State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988).

On 12 September 1990, at the pretrial hearing, Judge Walker advised defendant of his right to counsel and of his right to have a court-appointed attorney. Judge Walker also informed defendant of the charge and range of permissible punishments. Defendant indicated that he understood. After the inquiry, defendant signed a written waiver of his right to assigned counsel. This inquiry demonstrates that defendant had been advised of his right to counsel, and comprehended the nature of the charges against him as well as the permissible punishment. Furthermore, defendant's desire to immediately try the case as well as his dialogue with Judge Walker demonstrated that he understood the consequences of the decision to represent himself. This exchange adequately examined the three areas of inquiry required under the statute.

Defendant argues, however, that Judge Walker's inquiry did not satisfy N.C.G.S. § 15A-1242 because this statute required Judge Allen, as the judge presiding at defendant's trial, to make the inquiry. Although N.C.G.S. § 15A-1242 states that the "trial judge"

must make the inquiry into defendant's choice to represent himself, we do not read the statute as mandating that the inquiry be made by the judge actually presiding at the defendant's trial. A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of a proceeding, meets the requirements of N.C.G.S. § 15A-1242 even if it is conducted by a judge other than the judge who presides at the subsequent trial. *See State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986) (where judge conducted inquiry at preliminary hearing on motion to withdraw, statutory requirements of N.C.G.S. § 15A-1242 were satisfied even though different judge presided at trial); *State v. Messick*, 88 N.C. App. 428, 363 S.E.2d 657, *cert. denied*, 323 N.C. 368, 373 S.E.2d 553 (1988) (where an inquiry under N.C.G.S. § 15A-1242 was made by one judge at pretrial hearing, a de novo inquiry was not required by second judge who presided at actual trial). In this case, Judge Walker conducted an inquiry at the pretrial proceeding, which covered the three substantive elements in N.C.G.S. § 15A-1242. The fact that Judge Walker did not later preside over defendant's actual trial does not invalidate compliance with the statute. The statute was fully complied with, and it was therefore unnecessary for Judge Allen to repeat the statutory inquiry.

No error.

Judges ARNOLD and PARKER concur.

McNEARY'S ARBORISTS, INC., PLAINTIFF v. CARLEY CAPITAL GROUP; DAVID CARLEY; JAMES CARLEY; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE; ROBERT E. PERRY, JR.; RICHARD W. WILSON; FRANK J. LANGELOTTI AND WIFE, THERESA M. LANGELOTTI; WILLIAM G. WESTPHAL AND WIFE, BARBARA L. WESTPHAL; BOBBY W. GORDON, JR.; AND HOME SAVINGS OF AMERICA, F.A., DEFENDANTS

No. 9026SC887

(Filed 6 August 1991)

Mortgages and Deeds of Trust § 7 (NCI3d)— construction loan deed of trust—future advances—expiration—intervening mechanic's lien

Where a construction loan deed of trust provided that the period within which the owner's future obligations could be incurred thereunder expired on 3 March 1988, pursuant to N.C.G.S. § 45-68(1) the only obligations incurred by the owner that related back to the recording date of the deed of trust were those incurred through 3 March 1988, and obligations incurred after that date did not have seniority over plaintiff's intervening mechanic's lien even though the owner and the lender later made an agreement to extend the term in which obligations could be incurred.

Am Jur 2d, Mortgages §§ 352, 358, 359.

APPEAL by plaintiff from order entered 1 June 1990 by *Judge Samuel A. Wilson, III* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 6 May 1991.

The appeal is from an order of partial summary judgment holding that plaintiff's mechanics' lien against the property of Carley Capital Group is subordinate in all respects to a deed of trust thereon held by First Federal Savings and Loan Association of Charlotte. The affidavits and other materials before the court establish the following facts:

Plaintiff constructed and installed an irrigation-water system in Carley Capital Group's Welwyn Cluster Homes project in Mecklenburg County and by this action seeks to enforce a lien upon the property in the amount of $12,947.34 under the provisions of G.S. 44A-7, *et seq.* Plaintiff's construction complied with the terms of the contract it had with Carley; the first labor and materials were

furnished on 14 August 1987 and the last on 4 October 1988. On 4 March 1987, several months before plaintiff began its work, a deed of trust securing a construction loan by First Federal was recorded against the project. It contained the following future advances clause:

> WITH RESPECT TO FUTURE LOAN DISBURSEMENTS:
>
> That this deed of trust is executed and delivered partly to secure future obligations which may be incurred hereunder from time to time and pursuant thereto; that the amount of present obligations secured hereby is $75,605.62; that the maximum amount of present and future obligations which may be secured hereby at any one time is $2,234,700.00 (plus accrued and unpaid interest thereon); that Beneficiary's obligation to make future advances is obligatory; and that the period within which future obligations may be incurred hereunder expires March 3, 1988.

On 10 June 1988 Carley and First Federal modified these terms by an agreement that contained the following future advances clause:

> The time period within which future disbursements are to be made is the period between the date hereof and November 30, 1988; provided, however, that said period may be extended by the Lender up to, but not more than, ten years from the date of the Note.

Carley defaulted in its obligations to First Federal in September, 1988, and after this action was filed its property still subject to the deed of trust was foreclosed upon and sold to First Federal for $1,250,000.00. Carley's debt to First Federal then amounted to $1,358,736.54; $522,737.35 of which was incurred between 3 March 1988 and 10 June 1988 and $337,655.01 after 10 June 1988.

In hearing the opposing motions for summary judgment the parties and court alike proceeded upon the premise that First Federal's deed of trust and plaintiff's lien had the same hold upon the sale proceeds that they had on the real property and that First Federal's deed of trust was senior to plaintiff's lien with respect to all obligations that Carley incurred through 3 March 1988. The main issue disputed was whether under the provisions of the deed of trust plaintiff's lien was subordinate to the obligations incurred by Carley after 3 March 1988. The court ruled that it was.

Johnston, Taylor, Allison & Hord, by Greg C. Ahlum and John A. Morrice, for plaintiff appellant.

Parker, Poe, Adams & Bernstein, by Irvin W. Hankins III and Josephine H. Hicks, for defendant appellees.

PHILLIPS, Judge.

The trial court's holding is erroneous, and we reverse it. For a deed of trust or other security instrument to have priority from the date of recordation as to obligations incurred after the instrument is recorded, G.S. 45-68(1) requires that the instrument show three things, one of which is:

> c. The period within which such future obligations may be incurred, which period shall not extend more than 10 years beyond the date of the security instrument.

Under the explicit terms of First Federal's deed of trust, the period within which Carley's future obligations could be incurred expired on 3 March 1988. Thus, under the provisions of G.S. 45-68 the only obligations incurred by Carley that related back to the recording date of the deed of trust were those incurred through 3 March 1988, and the obligations incurred after that date did not have seniority over plaintiff's intervening lien. The agreement later made by Carley and First Federal to extend the term in which obligations could be incurred did not affect plaintiff's rights under the deed of trust as recorded.

The partial summary judgment in favor of defendants is reversed and the case remanded to the trial court for the entry of an order enforcing plaintiff's lien against the sale proceeds held by the trustee.

In their brief defendant appellees argued two other questions but they were not raised in the trial court and cannot be considered.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA EX REL. DEBRA BLOSSOM, PLAINTIFF v. DENNIS LEE MURRAY, DEFENDANT

No. 9012DC644

(Filed 6 August 1991)

1. **State § 4.2 (NCI3d)— illegal garnishment of pay—reimbursement by State—sovereign immunity doctrine inapplicable**

The sovereign immunity doctrine did not deprive the court of jurisdiction to order the State to reimburse defendant for monies it illegally garnished from his military pay for child support and past public assistance pursuant to an order of garnishment obtained by the State.

Am Jur 2d, Bastards § 132; Municipal, County, School, and State Tort Liability §§ 65, 67.

2. **Rules of Civil Procedure § 60.3 (NCI3d)— dismissal of action—jurisdiction to correct deficiency in original order**

The court's dismissal under Rule 41(a) of an action to recover child support and past public assistance after blood tests showed that defendant could not be the father of the child did not deprive the court of jurisdiction under Rule 60(b)(6) to correct a deficiency in the original order by ordering the State to reimburse defendant for monies it illegally garnished from his military pay for child support and past public assistance.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 81, 82.

APPEAL by plaintiff from order entered 20 April 1990, *nunc pro tunc* 5 April 1990, by *Judge Sol G. Cherry* in CUMBERLAND County District Court. Heard in the Court of Appeals 23 January 1991.

In April, 1987 the State of North Carolina, through its Child Support Enforcement Agency, initiated this action to require defendant to support his alleged child, Dominique Shontae Blossom, then one year old, and to indemnify the State for all assistance it had given the child theretofore. Defendant was then in the United States Army stationed in Germany, and while the complaint stated that defendant was "stationed overseas," it did not state that he was in the Army and under the protection of the Soldiers and

Sailors Civil Relief Act. Defendant was served by registered mail on 11 May 1987, and on 25 June 1987, no answer to the complaint having been filed, the State obtained an order establishing that defendant was the father of the child and directing him to thereafter pay $230 a month for the child's support and an additional $20 for past public assistance. The payments ordered not having been made, on 7 July 1988 the State obtained an order of garnishment against defendant's employer, the United States Army, and pursuant thereto received sums periodically taken from defendant's pay that amounted to $2,002.42. On 12 October 1988 defendant moved to quash the complaint and void all orders entered on the ground that his rights under the Soldiers and Sailors Civil Relief Act, 50 U.S.C.A. App. Sec. 520 (1990), had been violated. When the motion came on to be heard, upon it appearing that defendant denied that he was the father of the child, the court ordered that blood testing be done to determine the fatherhood issue. In a hearing attended by the State and defendant's counsel on 4 May 1989, upon it being disclosed that the blood tests showed that defendant could not be the father of the child, the State requested that the court order the dismissal of the action pursuant to the provisions of Rule 41(a), N.C. Rules of Civil Procedure. The order of dismissal that was entered did not refer to either the results of the paternity tests, the order of paternity, or the money garnished from defendant's pay; nor did the order state whether the dismissal was with or without prejudice. On 22 August 1989 defendant moved for a Judgment to Reimburse Defendant for Monies Withheld, and pursuant thereto on 12 October 1989 the court entered an order declaring that defendant was not the father of the child, that $2,002.42 had been improperly garnished from defendant's wages, and requiring the State and plaintiff to reimburse defendant for the monies illegally obtained. The order was not appealed. On 29 March 1990 the State moved under Rule 60(b)(4), N.C. Rules of Civil Procedure, to vacate the order on the ground that the trial court had no subject matter jurisdiction. The appeal is from a denial of that motion.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith, for plaintiff appellant.

No brief filed for defendant appellee.

PHILLIPS, Judge.

The State contends here, as it did below, that the order of reimbursement is void because the court had no subject matter

jurisdiction for two reasons—first, because the action had been ordered dismissed pursuant to the provisions of Rule 41(a), N.C. Rules of Civil Procedure; second, because the State is immune against being sued without its consent and having a money judgment entered against it. Neither contention has merit.

[1] The inapplicability of the sovereign immunity doctrine to this case is obvious. The State has not been sued by defendant; nor has a true money judgment been entered against it. By filing the action to obtain money from defendant, the State submitted to the court's jurisdiction for all matters germane to the case and the order entered is very germane, indeed, since it requires the State to return the money it illegally obtained from defendant and has no right to keep. The court not only had the authority to enter the order, it had a duty to do so.

[2] Nor was the court deprived of jurisdiction by the manifestly deficient order of dismissal that was first entered at the State's behest. Under the provisions of Rule 60, N.C. Rules of Civil Procedure, a trial court always has jurisdiction to re-examine and correct the deficiencies in its judgments and orders and we construe the Motion for Judgment to Reimburse Defendant for Monies Withheld as a motion under Rule 60(b)(6) to revise the order of dismissal to include the just conditions that should have been contained in it to start with and which the court no doubt overlooked. The conclusions that defendant was not the child's father and the State was obligated to reimburse defendant for the monies it illegally garnished from his pay arose as a matter of law from the paternity test results, which plaintiff and the court accepted as binding when the first order was entered, and stating those conclusions and ending the case properly in compliance with the law was the court's duty.

Affirmed.

Judges EAGLES and WYNN concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. KENNETH W. BLACKWELDER, EXECUTOR OF THE ESTATE OF CLYDE WILLARD BLACKWELDER

No. 9019SC1153

(Filed 6 August 1991)

Insurance § 75.4 (NCI3d)— automobile insurance—settlement with plaintiff's insured—subrogation

The trial court erred by granting summary judgment for defendant estate where Maureen Sargeant was injured when her car was struck by a vehicle driven by Clyde Blackwelder, who died the next day; Blackwelder's vehicle was insured by Nationwide and the Sargeant vehicle by State Farm; the Nationwide policy had liability limits of $50,000 per person; the State Farm policy had underinsured motorist limits of $50,000 per person; after Sargeant sued the Blackwelder estate, Nationwide stated to her attorney that it would tender its $50,000 liability limit at an appropriate time and asked that he forward a copy of the commitment to State Farm so it could decide whether to advance the $50,000 and preserve its subrogation rights; State Farm advanced Nationwide's $50,000 limit to Maureen Sargeant, paid its $50,000 underinsured motorist limits to Sargeant, and indicated to Nationwide and the Blackwelder estate that it would not release its subrogation rights against the estate; Nationwide paid its $50,000 liability limit to Sargeant, who released all claims against Nationwide and dismissed her action against the estate with prejudice; Nationwide's $50,000 check in payment of the advancement earlier made was turned over to State Farm; State Farm filed this action to recover the underinsured motorist payment from the estate; and the court dismissed the action by summary judgment. A tortfeasor may not defeat an insurance carrier's subrogation rights when he has knowledge of the subrogated claim and thereafter secures a consent judgment or release from the injured or damaged party. N.C.G.S § 20-279.21(b)(4).

Am Jur 2d, Automobile Insurance §§ 332, 439, 445.

APPEAL by plaintiff from judgment entered 21 August 1990 by *Judge James C. Davis* in CABARRUS County Superior Court. Heard in the Court of Appeals 15 May 1991.

On 21 March 1988 Maureen Sargeant was seriously injured when her car, in which she was a passenger, on its proper side of the road was struck head-on by a vehicle operated by Clyde Willard Blackwelder, who died the next day as a result of the collision. Blackwelder's vehicle was insured by Nationwide Mutual Insurance Company with liability limits of $50,000 per person. State Farm Mutual Automobile Insurance Company insured the Sargeant vehicle and its policy had underinsured motorist coverage with limits of $50,000 per person. On 28 March 1989, after Maureen Sargeant sued the Blackwelder estate, Nationwide, recognizing that Sargeant's damages would exceed its coverage, stated to her attorney by letter that it would tender its $50,000 liability limits at some appropriate time and asked that he forward a copy of the commitment to State Farm so it could decide whether to advance Nationwide's $50,000 to Ms. Sargeant and preserve its subrogation rights. On 24 April 1989 State Farm advanced Nationwide's $50,000 limits to Maureen Sargeant and on 6 November 1989 it paid its $50,000 underinsured motorist limits to her and thereafter indicated to Nationwide and the Blackwelder estate that it would not release its subrogation rights against the estate. On 30 January 1990 Nationwide paid its $50,000 liability limits to Maureen Sargeant, who released all claims that she had against it and also dismissed her action against the Blackwelder estate with prejudice. Nationwide's $50,000 check in payment of the advancement earlier made was turned over to State Farm. On 19 March 1990 State Farm filed this action to recover the payment from the decedent tortfeasor's estate. Based upon the foregoing facts the court dismissed the action by summary judgment.

Hutchins, Tyndall, Doughton & Moore, by Kent L. Hamrick, for plaintiff appellant.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for defendant appellee.

PHILLIPS, Judge.

By paying its underinsured motorist insurance limits to Maureen Sargeant for damages negligently caused by the decedent tortfeasor, Clyde W. Blackwelder, State Farm became subrogated to her rights against the Blackwelder estate. *Dowdy v. Southern Railway Co., Inc.*, 237 N.C. 519, 75 S.E.2d 639 (1953). In dismissing plaintiff's subrogation action against the estate the court was ap-

parently of the opinion that the action was barred by the prior dismissal of Maureen Sargeant's action against the Blackwelder estate, since State Farm, as her subrogee, in effect stood in her shoes. The judgment is erroneous and we reverse.

G.S. 20-279.21(b)(4) provides in pertinent part that:

> An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of such payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle . . . No insurer shall exercise any right of subrogation . . . where the insurer has been provided with written notice in advance of a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of such notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election.

A tort-feasor may not defeat an insurance carrier's subrogation rights when he has knowledge of the subrogated claim and thereafter secures a consent judgment or release from the injured or damaged party. *Nationwide Mutual Insurance Company v. Spivey*, 259 N.C. 732, 131 S.E.2d 338 (1963); *Phillips v. Alston*, 257 N.C. 255, 125 S.E.2d 580 (1962). In *Nationwide Mutual Insurance Company v. Canada Dry Bottling Company*, 268 N.C. 503, 508, 151 S.E.2d 14, 17 (1966) (citations omitted), it was stated:

> After the insured has received payment under a policy, the tort-feasor, having knowledge of this fact, cannot defeat the insurer's right to subrogation by any settlement with the insured. If with knowledge of the previous payment by the insurer the tort-feasor does procure a release from the insured, such release will constitute no defense as against the insurer,

nor will the insurer be allowed to recover the payment made to the insured.

See also 7 Strong's N.C. Index 3d *Insurance* Sec. 75.2; 44 Am. Jur. 2d *Insurance* Secs. 1810, 1811 (1982); Annotation, *Rights and remedies of property insurer as against third-person tortfeasor who has settled with insured*, 92 A.L.R.2d 102 (1963); 46 C.J.S. *Insurance* Sec. 1209 (1946).

Reversed.

Judges ARNOLD and WELLS concur.

IN RE LICENSE OF MARK T. DELK

No. 9030SC1024

(Filed 6 August 1991)

Courts § 46 (NCI4th)— special session—show cause order—entered before commission—invalid

An order disbarring respondent was vacated where Judge Hyatt was commissioned on 1 May 1990 to hold a one-day session of Superior Court in Graham County on 25 May; on 3 May Judge Hyatt ordered respondent-attorney to appear in Graham County Superior Court on 25 May to show cause why he should not be disciplined for criminal offenses for which he had been convicted; and Judge Hyatt disbarred respondent following a hearing on 25 May. The show cause order cannot satisfy the due process requirement of notice because the court did not have jurisdiction to enter that order at the time it was issued. N.C.G.S. § 7A-46.

Am Jur 2d, Attorneys at Law § 29; Courts §§ 29, 49, 97; Motions, Rules and Orders §§ 31, 34.

APPEAL by respondent from order of disbarment entered 25 May 1990 by *Judge J. Marlene Hyatt* in GRAHAM County Superior Court. Heard in the Court of Appeals 10 April 1991.

On 15 June 1989 in Graham County Superior Court, a jury found respondent, a licensed, practicing attorney, guilty of one

felony count of extortion and one felony count of conspiracy. The court sentenced respondent to four years in prison, but entered no order of professional discipline at that time. Respondent entered notice of appeal and began serving his active prison term. He was paroled on 2 February 1990 and later opened a law office in Brevard.

On 3 May 1990 Judge Hyatt ordered respondent to appear in Graham County Superior Court on 25 May 1990 to show cause why he should not be disciplined for the offenses for which he was convicted. At that time Judge Hyatt was not assigned to Graham County. However, on 1 May 1990 the Chief Justice commissioned Judge Hyatt to hold a one-day mixed civil-criminal session of Superior Court in Graham County on 25 May 1990. Following a hearing on 25 May 1990, Judge Hyatt disbarred respondent. Respondent appeals.

Mark T. Delk, respondent-appellant, pro se.

A. Root Edmonson for the North Carolina State Bar.

EAGLES, Judge.

Respondent first contends that the superior court was without jurisdiction on 3 May 1990 to enter the show cause order. We agree and accordingly vacate the trial court's order of disbarment.

G.S. 7A-46 provides:

> Whenever it appears to the Chief Justice of the Supreme Court that there is a need for a special session of superior court in any county, he may order a special session in that county, and order any regular, special, or emergency judge to hold such session. . . . Special sessions have all the jurisdiction and powers that regular sessions have.

We also note the following:

> [J]udgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

State v. Humphrey, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923). "[T]his rule has been stated in various forms, and it has been consistently applied in both criminal and civil cases." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984).

Here, the Chief Justice issued a commission for Judge Hyatt to hold a special session of Superior Court for Graham County "to begin May 25, 1990 and continue one day, or until the business is disposed of." On 3 May 1990 Judge Hyatt issued an order to show cause. At that time, Judge Hyatt was not assigned to Graham County, and the special session did not begin until 25 May 1990. Accordingly, we hold that the show cause order was entered out of term and that the court was without jurisdiction to enter the order.

We are not persuaded by the State Bar's argument that no commission was required for the issuance of the show cause order. The Bar argues that the absence of a valid commission was not fatal to the 3 May order and that "[a] commission could not endow Judge Hyatt with authority to issue the Order to Show Cause on May 3, 1990." The Bar relies on the following language from *State v. Eley*, 326 N.C. 759, 764, 392 S.E.2d 394, 397 (1990), to support its position:

> The issuance of a commission by the Chief Justice assigning a superior court judge to preside over a session of superior court does not endow the judge with jurisdiction, power, or authority to act as a superior court judge. The commission so issued merely manifests that such judge has been duly assigned pursuant to our Constitution to preside over such session of court.

We think that this case is distinguishable from *Eley*. There the administrative assistant to the Chief Justice assigned a superior court judge to preside at a special criminal session of the Superior Court of Hertford County. The administrative assistant's records showed that the commission was properly issued but the document was never received in Hertford County by the Clerk of Court, the District Attorney, or the Judge. In *Eley* it was clear that the trial judge had been assigned to preside at a special session of superior court. Here, Judge Hyatt issued the show cause order at a time when clearly she was not assigned to Graham County.

The practice of law is a property right, and a lawyer may not be deprived of that right without due process of law. *In re*

Burton, 257 N.C. 534, 126 S.E.2d 581 (1962). Because we hold that at the time the show cause order was issued the court did not have jurisdiction to enter the show cause order, that order is a nullity and cannot satisfy the due process requirement of notice. Accordingly, the order of the Superior Court disbarring appellant is vacated.

Based on this holding, we do not address appellant's remaining assignments of error. For the reasons stated, the order is vacated and the matter is remanded for hearing after proper notice.

Vacated and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. JERRY HOOPER, DEFENDANT-APPELLANT

No. 9021SC789

(Filed 6 August 1991)

1. **Rape and Allied Offenses § 4 (NCI3d)— mental retardation of rape victim—expert testimony—qualification of witness**

The trial court's finding that a witness was qualified to give expert testimony as to a rape victim's mental retardation was supported by evidence that the witness was educated to be a school psychologist, had served as a school psychologist for twenty-three years, and had tested the intellectual capacity of approximately 2,000 children and adults.

Am Jur 2d, Expert and Opinion Evidence §§ 178, 180; Rape § 68.

2. **Witnesses § 1 (NCI3d)— mentally retarded victim—competency as witness**

The trial court did not err in finding that a mentally retarded rape and kidnapping victim was qualified to testify where the court noted that it had observed the witness and heard her answers to the questions by both sides and had no doubt as to her ability to answer "yes" or "no" to any of them.

Am Jur 2d, Rape § 103.

APPEAL by defendant from judgments entered 7 December 1989 by *Judge Howard R. Greeson, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 17 April 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, for the State.

David F. Tamer for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of attempted second degree rape in violation of G.S. 14-27.6 and second degree kidnapping in violation of G.S. 14-39. The sex offense was based upon allegations in the indictment that the victim, Vauteria Elaine Moseley, was mentally defective, *see* G.S. 14-27.1, G.S. 14-27.5, and that defendant knew or should have known that. The evidence, all by the State, tends to establish all the facts alleged. Defendant contends that the evidence erroneously includes the expert testimony of Darlena Mixon as to the victim's mental retardation, and the testimony of the victim, who he argues is not a qualified witness. Neither contention has merit and we find no error.

[1] The court's finding that Darlena Mixon was well qualified to give expert testimony as to Vauteria Elaine Moseley's mental retardation is abundantly supported by competent evidence and is therefore conclusive. *State v. Johnson*, 280 N.C. 281, 185 S.E.2d 698 (1972). With respect thereto the evidence shows, *inter alia*, that she was educated to be a school psychologist, had served as a school psychologist for twenty-three years, and had tested the intellectual capacity of approximately 2,000 children and adults, including that of the victim.

[2] Whether Vauteria Elaine Moseley was qualified to testify was a question of fact for the trial judge to determine in his discretion. *State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985). In finding that she was a qualified witness, the court noted that he had observed the witness and heard her answers to the questions asked by both sides and had no doubt as to her ability to answer "yes" or "no" to any of them. Since this indicates that the finding has a rational basis, it cannot be disturbed. *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987).

No error.

Judges PARKER and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 AUGUST 1991

BURNS, DAY & PRESNELL v. LOWDER No. 9010SC1143	Wake (90CVS668)	Affirmed
CITY OF WINSTON-SALEM v. WILLIAMS No. 9021SC306	Forsyth (87CVS188)	No Error
CLEVENGER v. PRIDE TRIMBLE CORP. No. 9020SC1125	Moore (87CVS872)	Affirmed
DOBO v. NEW HANOVER COUNTY BD. OF ADJUSTMENT No. 905SC1022	New Hanover (90CVS538)	Affirmed
ELLIS v. WHITE BROTHERS PLUMBING & BUILDING SUPPLY CO. No. 9022DC497	Davidson (88CVD696)	Affirmed in part, modified & remanded in part
FIRST UNION NATIONAL BANK v. CAGLE No. 9019SC318	Cabarrus (88CVS941)	Affirmed
GENTRY v. CARROLL No. 9110DC124	Wake (89CVD05504)	Affirmed
IN RE ANNEXATION ORDINANCE OF NEWTON No. 9025SC515	Catawba (88CVS2495)	Affirmed
IN RE BURROWS v. CITY OF RALEIGH BD. OF ADJUSTMENT No. 9010SC1059	Wake (90CVS547)	Reversed
IN RE TERRY No. 909DC1244	Vance (89J50)	Vacated & Remanded
IN RE WALLACE No. 9022DC1177	Alexander (87J33)	Affirmed
LOWDER v. LOWDER No. 9020SC998	Stanly (89CVS250)	Affirmed
LYONS v. K-MART APPAREL FASHIONS CORP. No. 9012SC475	Cumberland (89CVS7054)	Affirmed
MILLER v. MILLER No. 9125SC201	Burke (89CVS594)	Affirmed

MURDOCK v. MURDOCK No. 9022DC1243	Iredell (86CVD1386)	No Error
PARKS v. PARKS No. 9112DC54	Cumberland (90CVD1272)	Affirmed
PARSONS v. PARSONS No. 9028DC1110	Buncombe (88CVD577)	Affirmed
PATTERSON v. AT&T TECHNOLOGIES, INC. No. 9021SC404	Forsyth (88CVS2765)	Reversed & Remanded
RAY v. DODD No. 9010SC996	Wake (88CVS3849)	Reversed & remanded for retrial
ROSE v. COOK No. 9121DC264	Forsyth (90CVD2166)	Reversed & Remanded
SHORE v. ANDREWS No. 9023SC1340	Alleghany (90CVS79)	Affirmed
SMITH v. SMITH No. 9110DC283	Wake (90CVD10204)	Affirmed
SMITH-THOMAS v. KROGER CO. No. 9018SC484	Guilford (88CVS8328)	Affirmed
STATE v. BAXLEY No. 9116SC226	Robeson (90CRS3618)	No Error
STATE v. BROOKS No. 9118SC214	Guilford (90CRS8897) (90CRS5928)	No Error
STATE v. COOPER No. 9015SC1279	Alamance (90CRS14040) (90CRS14042) (90CRS14043)	New Trial
STATE v. GWYNN No. 9126SC231	Mecklenburg (90CRS47075)	No Error
STATE v. HEDGEPETH No. 9110SC320	Wake (88CRS47241)	Affirmed
STATE v. HORNE No. 9126SC171	Mecklenburg (90CRS21375)	No Error
STATE v. JACOBS No. 9126SC155	Mecklenburg (90CRS25045)	No Error
STATE v. KRAUSE No. 9012SC1299	Cumberland (89CRS42835)	Appeal Dismissed

STATE v. McCLAIN No. 9026SC751	Mecklenburg (89CRS35383)	No Error
STATE v. MESSER No. 9130SC172	Jackson (90CRS626)	No Error
STATE v. MONEYMAKER No. 9021SC1262	Forsyth (89CRS34213)	No Error
STATE v. OVERMAN No. 9115SC112	Alamance (90CRS8214)	No Error
STATE v. QUINN No. 9126SC132	Mecklenburg (89CRS86399)	Affirmed
STATE v. REDMOND No. 918SC7	Lenoir (87CRS5819)	Affirmed
STATE v. WALKER No. 918SC178	Wayne (89CRS12891)	No Error
STATE v. WILLIAMS No. 911SC100	Pasquotank (89CRS3717) (89CRS3718)	No Error
STATE v. WILLIAMS No. 914SC146	Onslow (90CRS8100)	No Error
STATE v. WILLIAMSON No. 9017SC1288	Rockingham (90CRS2331) (90CRS5142)	No Error
STATE v. WRIGHT No. 9026SC1290	Mecklenburg (89CRS87989)	No Error
SUGG v. WARREN No. 908DC1178	Wayne (90CVD169)	Dismissed
VARONA CONSTRUCTION CO. v. DAVIS No. 907DC539	Wilson (87CVD640)	Reversed
WOODWARD v. R E S RESTAURANTS, INC. No. 9010SC1012	Wake (89CVS00473)	Affirmed in part, reversed in part
YON v. HARDIN No. 9130SC26	Cherokee (88CVS223)	Affirmed

CITY OF CHARLOTTE v. SKIDMORE, OWINGS AND MERRILL, WEISS BROS. CONSTRUCTION CO., INC., AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

WEISS BROS. CONSTRUCTION CO., INC. v. HANOVER-PREST PAVING CO.

No. 9026SC527

(Filed 20 August 1991)

1. **Architects § 10 (NCI4th)— urban streetscape—contractor's deviation from specifications—failure to show deviation—action against designer not dismissed**

In an action for breach of contract and breach of implied warranty against the designer of an urban streetscape, the trial court did not err in denying defendant designer's motions for directed verdict and judgment n.o.v. made on the ground that defendant construction company materially deviated from defendant designer's specifications, since defendant designer's letter to plaintiff about how much water to use in the setting beds under the sidewalks and crosswalks indicated that sufficient water should be added to a cement and sand mixture "to permit the bed to be screeded and trowelled as necessary"; the letter indicated that completely dry sand-cement mix incapable of being screeded did not meet the specifications; defendant construction company judged that inherent moisture in the sand was sufficient without adding extra water; the beds were in fact screeded and trowelled; and the separation of sand and cement in the setting beds was not shown until sometime after defendant construction company had left the site and could have derived from natural causes.

Am Jur 2d, Architects § 23.

Responsibility of one acting as architect for defects or insufficiency of work attributable to plans. 25 ALR2d 1085.

2. **Architects § 10 (NCI4th)— urban streetscape design—defective design—deviation from specifications by contractor—designer not insulated from liability**

In an action for breach of contract and breach of implied warranty against the designer of an urban streetscape, there was no merit to defendant designer's contention that a material deviation from the specifications by defendant construction

company would have completely insulated defendant designer from liability for defective specifications, since the law in North Carolina is that proof of a contractor's deviation simply creates a *prima facie* case as to causation which a contractor may rebut by proving that the damage was not in fact caused by the deviation.

Am Jur 2d, Architects § 23.

Responsibility of one acting as architect for defects or insufficiency of work attributable to plans. 25 ALR2d 1085.

3. **Architects § 10 (NCI4th)— contractor's deviation from contract—plaintiff's acquiescence—recovery against contractor barred—recovery from designer not barred**

The fact that plaintiff's acquiescence in a deviation from specifications barred its recovery from defendant contractor did not bar plaintiff's recovery from defendant designer or absolve defendant designer from paying any portion of the recovery notwithstanding defendant designer's liability; therefore, the trial court did not err in denying defendant designer's motion for judgment n.o.v., but properly granted a new trial on the damages issue after realizing that jury instructions had been inadequate to guide the jury in making distinctions with respect to damages for the setting beds and the pavers and as between the first two crosswalks laid and subsequent crosswalks.

Am Jur 2d, Architects § 23.

Responsibility of one acting as architect for defects or insufficiency of work attributable to plans. 25 ALR2d 1085.

4. **Contracts § 172 (NCI4th)— mall construction contract—defective sidewalks—measure of damages—instructions proper**

In an action for breach of contract and breach of implied warranty against the designer of an urban streetscape, the trial court did not err in its instruction to the jury on the measure of damages for sidewalks where the court instructed that plaintiff was entitled to recover the cost of replacement of or repair to the sidewalks, less salvage value of any parts replaced, since the defects in the sidewalks were not minor; the sidewalks did not conform to the contract; although a substantial amount of the work on the sidewalks would have

to be destroyed, replacement of the sidewalk would not result in economic waste to the mall project; and the evidence did not support an instruction on the value measure of damages.

Am Jur 2d, Architects § 24.

Responsibility of one acting as architect for defects or insufficiency of work attributable to plans. 25 ALR2d 1085.

APPEAL by defendant Skidmore, Owings and Merrill and by plaintiff City of Charlotte from judgment entered 19 December 1989 by *Judge John M. Gardner* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 4 December 1990.

Moore & Van Allen, by Jeffrey J. Davis, Charles E. Johnson, and Margaret Ann Behringer, for plaintiff-appellant/appellee City of Charlotte.

Kirkland & Ellis, by Helen E. Witt and Jeffrey L. Willian, and Parker, Poe, Adams & Bernstein, by Gaston H. Gage, for defendant-appellant/appellee Skidmore, Owings & Merrill.

Waggoner, Hamrick, Hasty, Monteith, Kratt & McDonnell, by S. Dean Hamrick, for defendant-appellees Weiss Bros. Construction Co., Inc., and Fidelity and Deposit Company of Maryland.

PARKER, Judge.

I.

This is a civil action for breach of contract and breach of implied warranty. Desiring to upgrade and beautify downtown Charlotte, North Carolina, plaintiff on 11 January 1982 contracted with defendant Skidmore, Owings and Merrill ("SOM") to design an urban streetscape to be known as Tryon Street Transit Mall. The mall was to cover eleven city blocks, nine on Tryon Street and two on Trade Street. Defendant SOM's design provided for a system of sidewalks, crosswalks, roadways, storm drainage, curbing, bus shelters, benches, light posts, and trash receptacles. The plan included reducing vehicular traffic on Tryon Street from six lanes to four and widening sidewalks to encourage pedestrian traffic. Plaintiff eventually paid $7,967,772.70 for construction of the mall.

On 22 November 1983, plaintiff contracted with defendant Weiss Brothers Construction Company, Inc., ("Weiss") to do the actual work of constructing the mall. The work included removing the

old curbs and gutters and installing new granite curbing and taking up the old concrete sidewalks and laying new and bigger sidewalks. In addition, the streets were newly paved and new pedestrian crosswalks harmonious with the design of the sidewalks were installed. Defendant Weiss also installed a new electrical system.

Defendant SOM's design called for the use of granite and concrete blocks ("pavers"), eighteen inches square, in the mall sidewalks and crosswalks. The pavers in the central area of the mall were pink; those in other areas were in two shades of grey. Underneath all the pavers were setting beds supported by eleven-inch concrete subslabbing. The sidewalks were designed to bear only pedestrian traffic and were constructed of pavers two inches thick, but crosswalks and driveways were designed to withstand vehicular traffic and used three-inch pavers. In addition, some pavers laid over utility vaults were only one inch thick. The original contract specifications for setting beds included the following:

> 1. Pedestrian areas (General): Portland cement/sand bed with latex additive bond coat for setting pavers such as Laticrete 4237 or Tec-crete by Fuller Co.
>
> 2. Pedestrian areas (minimum depth): Thinset sand/cement mortar mix.
>
> 3. Vehicular areas (roadway and drives): Liquid latex additive as above, Portland cement/sand bed with cement/latex additive bond coat for setting pavers.

The sand-cement bed was to be two inches thick in vehicular areas and one inch thick in pedestrian areas. Setting bed materials were to be (i) spread evenly over the entire area to be paved and (ii) screeded to a minimum level that would provide the minimum thickness indicated when the pavers had been put in place. Other contract specifications as to granite paving listed materials in the setting beds but included only Portland cement, sand, and a latex additive bond coat. Instructions as to execution of granite paving included the following:

> B. *Granite paving*:
>
> 1. Setting Bed: The sand/cement bedding course shall consist of sand and Portland Cement in the proportions of one (1) part cement and three (3) parts sand by volume, mixed dry until the mass is of uniform color. Mixing may

> be done in an approved batch mixer or by hand on a clean type surface. The bedding course of moist mortar shall be placed and shaped upon the base so that finish depth shall not be less than as indicated. The bedding shall be shaped to a true surface, parallel with the surface of the finished paving by means of a template and the bed shall be struck off until proper alignment is secured. After final shaping, the bedding shall not be disturbed prior to applying the latex additive bond coat and laying the stone.
>
> 2. *Latex Additive Bond Coat*: apply in accordance with the manufacturer's instructions and recommendations and as approved.

According to the contract between plaintiff and defendant SOM, all plaintiff's instructions to the contractor were to be issued through SOM. SOM was to make monthly trips to the project site to observe construction activities, render decisions in the field, and interpret drawings during construction. SOM was to "endeavor to guard [plaintiff] against defects and deficiencies in the work of the Contractor" but was not required to make exhaustive or continuous on-site observations to check the quality or quantity of the work. Although under the proposed contract SOM was to provide a full time site representative, this provision did not appear in the final agreement. The contract provided that SOM's observations did not render it responsible for construction means, methods, techniques, or procedures or for the contractor's failure to carry out the work in accordance with the contract documents. Supplementary conditions to the specifications for the project generally reiterated that SOM would not have control or charge of such matters. SOM agreed to perform all services under the contract "in conformity with the standards of reasonable care and skill of [its] profession."

A. Setting Bed Problems

Construction of the project began in January of 1984. Defendant Weiss prepared two crosswalk setting beds by mixing sand and cement in a ratio of three to one. No additional water or other wetting agent was added. When defendant Weiss began to lay pavers in these crosswalk setting beds, the latex bond coat called for by the contract specifications would not adhere to the sand-cement mixture. Discussions of two issues ensued among representatives of plaintiff and defendants SOM and Weiss.

First, as to latex, it became clear that defendant Weiss did not believe the contract specifications required latex as an additive in any of the setting beds. Plaintiff asked defendant SOM to determine whether latex was needed. Defendant SOM's representative eventually told plaintiff's representative that all use of latex, as additive or bond coat, could be omitted.

The second issue involved how much water to use in preparing the setting beds. After a meeting on 10 May 1984, SOM wrote to plaintiff as follows:

> In response to your requests of May 3, 1984[,] and May 10, 1984[,] to confirm the proper setting bed for the precast concrete and granite pavers, we have contacted the National Building Granite Quarries Association, National Concrete Masonry Association, paving manufacturers, granite fabricators, latex additive manufacturers, contractors, [and] our consultants, and have examined this item within SOM and have the following recommendation:
>
> 1. The setting bed for the pedestrian and vehicular areas should consist of a "dry sand-cement" setting bed at the specified 3/1 ratio with sufficient water added to the mix to permit the bed to be screeded and trowelled as necessary. Thoroughly mix the sand and cement to a visually uniform color consistency throughout. Guage [sic] the sand-cement setting bed with a sufficient quantity of water to bring the setting bed materials to the proper consistency for placing the pavers. The 1″ setting beds for the pedestrian areas should remain as per the contract documents. The 2″ setting beds for the vehicular traffic areas should remain as per the contract documents.
>
> We have been advised on May 11, 1984[,] by Jim McChesney of Weiss Brothers Construction Corporation that the labor and material credit for the deletion of the latex additive bond coat is $37,879.00.
>
> . . . .
>
> We observed the installation of portions of the precast concrete pavers at the Marriott while on site Thursday, May 10, 1984. At the west end of the north side of Trade Street, in front of the Marriott, the pavers were not being installed properly.

> Specifically, the sand-cement mix was completely dry and was not, therefore, able to be screeded or properly prepared. This is not an acceptable installation and does not meet the intent of the documents or our position as stated herein. This was brought to the attention of the Contractor.

Even after plaintiff received this letter and sent a copy to defendant Weiss, water continued to be an issue. Plaintiff asked defendant SOM for an exact measure of the water required by the new instructions, but SOM would not state an exact quantity. At the end of May, representatives of plaintiff, defendant SOM, defendant Weiss, and the latter's paving subcontractor, Coastal Contractors, again discussed water. Hydration, the chemical process whereby cement reacts with water to form a solid mass, was also discussed. Defendant SOM indicated water sufficient to cause hydration to start needed to be added to the setting bed mixture. The precise amount of water necessary to effect hydration would vary, according to the amount of inherent moisture in the sand used and on-site environmental conditions, and had to be judged by the contractor.

B. Crosswalks

In the first two crosswalk setting beds prepared by defendant Weiss, the only water came from inherent moisture in the sand, which was at least sufficient to permit the beds to be trowelled and screeded. Soon after these crosswalks were opened to traffic in June of 1984, they began to deteriorate. The pavers began to tip, rock, and move against each other under heavy traffic loads. Defendant SOM again advised that water sufficient to cause the setting beds to work, or hydrate, must be used. Defendant Weiss began to experiment to determine how much water to use in the remaining crosswalk setting beds. In September of 1984, two of defendant SOM's employees were present when defendant Weiss installed at a third crosswalk a setting bed mixture of sand, cement, and water premixed and poured from a cement mixing truck. Afterward, one of the SOM employees wrote that the finished results were very good. Defendant Weiss installed the rest of the mall crosswalks on setting beds of sand, cement, and water premixed and poured from cement mixing trucks.

At first the crosswalks with poured setting beds seemed more durable than those laid over "dry" setting beds. Nevertheless, sometime after the mall opened, crosswalks over the poured setting beds also began to fail. Vehicular traffic over the crosswalks caused

the pavers to crack and to jump out of the setting beds. Loose pavers emitted a hollow, clanging sound when cars passed over them. In 1985, all the crosswalks were replaced with scored concrete designed to harmonize with the appearance of the rest of the mall. The replacement crosswalks were designed according to specifications prepared by defendant SOM.

C. Sidewalks

Defendant Weiss installed the mall sidewalks over setting beds similar to those used in the first two crosswalks. No wetting agent was included other than moisture inherent in the sand. Over time the sidewalks also failed. From late 1984 until the time of trial, pavers cracked, broke, buckled, and came loose from the setting beds. Defendant Weiss had to reset and level pavers as part of its warranty obligation under its contract. After defendant Weiss left the mall in 1985, the sidewalks continued to deteriorate. Plaintiff's employees performed maintenance on them, which over the five year period leading up to the time of trial included replacing 400 to 500 cracked, broken, and uneven pavers and resetting hundreds of others. The total number of pavers used in constructing all mall sidewalks was about 80,000.

Plaintiff continually reset or replaced pavers which represented a safety hazard. Whether a paver was replaced or merely reset, it was first pried out of the setting bed. The old setting bed was removed and a new setting bed laid. New setting beds consisted of sand and cement in a ratio of three to one, gauged with water sufficient to effect hydration. Each paver took one worker approximately thirty-five to forty-five minutes to replace. Under many of the pavers, plaintiff's employees found inconsistently mixed sand and cement.

Plaintiff had not replaced the sidewalks at the time of trial but presented evidence of the cost of replacement of the sidewalks. Plaintiff's expert testified that the construction cost of replacing the sidewalks with an adequately designed system would be $2,577,000.00. Plaintiff also incurred additional costs of $79,191.82 for the sidewalk replacement design and $34,497.00 for testing of the defective sidewalks.

Testimony by plaintiff's expert witnesses showed that as to crosswalks and sidewalks, defendant SOM's design was defective. William Perenchio, an expert in paving system designs and in the

properties of Portland cement, testified that (i) the design failed to provide for protection against freeze-thaw cycles; (ii) the setting bed specification was defective; and (iii) the amended specification did not create a satisfactory bond between the pavers and setting beds. The crosswalks and sidewalks could not withstand freeze-thaw cycles because the design did not include an air-entraining agent. Such agents prevent freeze-thaw damage within a rigid mass by incorporating tiny air bubbles. A liquid latex additive such as that originally specified by defendant SOM can act as an air-entraining agent to protect against freeze-thaw damage. While the setting bed specifications omitted any air-entraining agent, specifications for another part of the design, the concrete subslab, included entrained air. Perenchio also testified that without latex, a sand-cement setting bed would fail over time, regardless of whether the sand and cement were properly mixed and regardless of the amount of water used. Based on test results introduced into evidence, he concluded that the mall sidewalks would continue to fail in the future, even if broken and loose pavers were repaired. He testified further that the pavers specified were too large.

Another expert, landscape architect Gwen Cook, testified that defendant SOM failed to use reasonable care and skill in design because its specifications failed to provide for freeze-thaw cycles and because the pavers specified were too large for the crosswalks and sidewalks. Cook's employer participated in designing a replacement system for the sidewalks. The replacement system used small pavers in a herringbone pattern laid on a setting bed, consisting of manufactured sand only, over the existing concrete subslab. Cook testified the replacement system would have been less expensive to install initially and more durable than SOM's design.

D. Liability and Damages Issues

Issues of liability and damages were tried separately. Liability issues were answered by the jury as follows:

> 1. Was the City damaged by SOM's failure, if any, to perform its services in conformity with the standard of reasonable care and skill of its profession with respect to specifying the size of the pavers in the First and Second Street crosswalks?
>
> ANSWER: Yes.
>
> 2. Was the City damaged by SOM's failure, if any, to perform its services in conformity with the standard of reasonable care

and skill of its profession with respect to the design of the setting beds for the First and Second Street crosswalks?

ANSWER: Yes.

3. Was the City damaged by Weiss' material deviation, if any, from the plans and specifications with respect to the construction of the setting beds [for] the First and Second Street crosswalks?

ANSWER: No.

. . . .

5. Was the City damaged by SOM's failure, if any, to perform its services in conformity with the standard of reasonable care and skill of its profession with respect to specifying the size of the pavers in the remaining crosswalks?

ANSWER: Yes.

6. Was the City damaged by SOM's failure, if any, to perform its services in conformity with the standard of reasonable care and skill of its profession with respect to the design of the setting beds in the remaining crosswalks?

ANSWER: Yes.

7. Was the City damaged by Weiss' material deviation, if any, from the plans and specifications with respect to construction of the setting beds for the remaining crosswalks?

ANSWER: Yes.

8. If the answer to Issue 7 is "Yes," did the City, through its employees, have knowledge of and acquiesce in Weiss's material deviation from the plans and specifications with respect to construction of the remaining crosswalks?

ANSWER: Yes.

9. Was the City damaged by SOM's failure, if any, to perform its services in conformity with the standard of reasonable care and skill of its profession with respect to specifying the size of the pavers in the sidewalks?

ANSWER: Yes.

10. Was the City damaged by SOM's failure, if any, to perform its services in conformity with the standard of reasonable care and skill of its profession with respect to the design of setting beds for the Mall sidewalks?

ANSWER: Yes.

11. Was the City damaged by Weiss' material deviation, if any, from the plans and specifications with respect to construction of the setting beds for the Mall sidewalks?

ANSWER: No.

After rendering its verdicts as to liability, the jury heard arguments and instructions on damages. Damage issues and answers included the following:

1. What amount is the City entitled to recover from SOM for damages to the Mall crosswalks?

ANSWER: $570,000.

2. What amount is the City entitled to recover from SOM for damages to the Mall sidewalks?

ANSWER: $2,127,000.

The trial judge granted defendant SOM's motion for new trial on damages issue Number 1 and denied its motions for judgment notwithstanding the verdict and new trial on all other issues.

II.

[1] Defendant SOM first contends the trial court erred by denying SOM's motions for directed verdict and judgment notwithstanding the verdict or for a new trial on the liability issues as to (i) the first two crosswalks and (ii) all the sidewalks. Defendant argues the jury's finding that defendant Weiss did not materially deviate from SOM's specifications was improper as a matter of law. We disagree.

Defendant's motions for directed verdict and for judgment notwithstanding the verdict present the same question for review, namely, whether the evidence taken in the light most favorable to plaintiff was sufficient to entitle the plaintiff to have a jury pass on it. *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E.2d 549, 554 (1973). All the evidence which supports the claim of the

party opposing the motion must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. *Penley v. Penley*, 314 N.C. 1, 11, 332 S.E.2d 51, 57 (1985).

Plaintiff's evidence showed defendant SOM's letter of 14 May 1984 controlled the setting beds for the first two crosswalks and the sidewalks. The amended specifications as to water indicated "sufficient water added to the mix to permit the bed to be screeded and trowelled as necessary" and "sufficient quantity of water to bring the setting bed materials to the proper consistency for placing the pavers." In addition, the letter indicated that completely dry sand-cement mix incapable of being screeded did not meet the specifications. Evidence showed that in preparing the first two crosswalk setting beds, defendant Weiss judged that inherent moisture in the sand was sufficient, and these two setting beds were in fact screeded and trowelled. Thus all the evidence, viewed most favorably for plaintiff, permitted the inference that with respect to the two crosswalks, defendant Weiss did not materially deviate from the new specifications.

With respect to the sidewalk setting beds, evidence showed defendant Weiss again judged that inherent moisture in the sand was sufficient. Although evidence showed that at a later date some sand and cement were not thoroughly mixed, other evidence showed rainwater could enter the beds through the paver joints and that cementitious material tends to float. Additional evidence showed freeze-thaw cycles could affect the beds, and there had been at least one such cycle. Resolving inconsistencies in plaintiff's favor and giving plaintiff the benefit of every inference, separation of sand and cement was not shown until sometime after defendant Weiss had left the mall and may have derived from natural causes. We conclude that viewed in the light most favorable to plaintiff, the evidence would suggest a finding that defendant Weiss did not materially deviate from the 14 May 1984 specifications with respect to the sidewalk setting beds.

[2] Defendant SOM also contends that a material deviation by defendant Weiss would have completely insulated defendant SOM from liability for defective specifications. We disagree, for in our view North Carolina law does not support such a holding.

This Court has enunciated the following rules of contractor liability:

> [W]here a contractor is required to and does comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications. . . .
>
> Where the contractor does not comply with the plans and specifications provided by the owner, notwithstanding the fact that they are defective, the contractor proceeds at his peril, assuming the risk of any deviations from the plans and guaranteeing the suitability of the work.

Bd. of Education v. Construction Corp., 50 N.C. App. 238, 241-42, 273 S.E.2d 504, 507 (citations omitted), *disc. rev. improvidently granted*, 304 N.C. 187, 282 S.E.2d 778 (1981). However, the Court went on to say that damages for injury following a breach in the usual course of events are always recoverable, provided plaintiff proves such injury actually occurred as a result of the breach. Thus where defendants contended and produced evidence that plaintiff's damages were caused solely by defective designs of the architect, the trial court properly required defendants to carry the burden of proof on the question of causation. *Id.* at 242, 273 S.E.2d at 507.

The basis for the rule holding contractors liable for failure to follow plans and specifications "is that, absent an agreement to the contrary, there is an implied warranty by the owner that the plans and specifications are suitable for the particular purpose, and that if they are complied with[,] the completed work will be adequate to accomplish the intended purpose." *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 362-63, 328 S.E.2d 849, 857, *disc. rev. denied*, 314 N.C. 329, 333 S.E.2d 485 (1985). In an action against an owner for breach of an implied warranty, as in any action for damages, proof of causation is essential. The burden of proof is on the contractor to prove that (i) the plans and specifications were adhered to, (ii) they were defective, and (iii) the defects were the proximate cause of the deficiency in the completed work. *Id.*

Under Illinois law cited by defendant SOM, a deviating contractor is "liable for whatever may subsequently happen to the structure, without resort to any formal proof of causation if the deviation

was 'material.' " This rule "denies the contractor even the ability to offer an affirmative defense that the damage was caused by something other than his deviation." *Havens Steel Co. v. Randolph Engineering Co.*, 613 F. Supp. 514, 529 (W.D. Mo. 1985) (citing *Clark v. Pope*, 70 Ill. 128 (1873)), *aff'd*, 813 F.2d 186 (8th Cir. 1987). However under North Carolina law, proof of a contractor's deviation simply creates a *prima facie* case as to causation, which a contractor may rebut by proving that the damage was not in fact caused by the deviation. *Bd. of Education v. Construction Corp.*, 50 N.C. App. at 242, 273 S.E.2d at 507. *See also Havens Steel Co. v. Randolph Engineering Co.*, 613 F. Supp. at 529.

Defendant SOM does not cite and we are aware of no case which holds that where an owner sues both architect and contractor, proof of material deviation by the contractor insulates the architect from liability for defects in plans and specifications. Instead, in such a case in North Carolina, upon the owner's showing that the contractor materially deviated from the specifications, the burden of proof as to causation would shift to the contractor. If evidence showed his deviation did not cause any damage, the jury could find no liability as to the contractor.

[3] Defendant SOM next argues that the trial court erred by submitting damage issue Number 1, which dealt with the crosswalks, to the jury and by denying SOM's motion for judgment notwithstanding the verdict on this damage issue. Defendant SOM argues the jury's findings that plaintiff (i) was damaged by and (ii) acquiesced in defendant Weiss's material deviation from the specifications for the crosswalk setting beds for nine of the crosswalks absolved SOM of any liability for them as a matter of law. We do not agree.

As shown above, plaintiff's experts testified defendant SOM's design for the mall was defective in two separate respects, (i) the pavers and (ii) the setting beds. As to the pavers in all the crosswalks, there was no issue of material deviation by defendant Weiss. With respect to the setting beds only, the jury found plaintiff was damaged by defendant Weiss' material deviation from the specifications for nine of the crosswalks and that plaintiff acquiesced in Weiss' actions.

Defendant SOM's argument is premised on the same theory that we rejected in overruling its contention that a directed verdict should have been entered in its favor, namely, that any deviation

from the specifications by the contractor insulates the architect from liability and makes damages purely speculative. The jury, however, found that plaintiff was damaged by both SOM's defective contract specifications and Weiss' deviation. The fact that plaintiff's acquiescence in the deviation bars its recovery from defendant Weiss does not bar plaintiff's recovery from defendant SOM or absolve SOM from paying any portion of the recovery notwithstanding SOM's liability. As the trial court realized subsequent to trial, the jury instructions on the extent of defendant SOM's liability were not adequate to guide the jury in making distinctions with respect to damages for the setting beds and the pavers and as between the First and Second Street crosswalks and the remaining crosswalks. The trial court accordingly properly granted a new trial on damages issue Number 1 and denied defendant SOM's motion for judgment notwithstanding the verdict.

[4] Defendant's next contention is that the court erred in its instruction to the jury on the measure of damages for the sidewalks, damages issue Number 2. We disagree.

Discussing the principles of measuring damages, the North Carolina Supreme Court has said

> "The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a . . . construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the circumstances of the case. . . . [W]here the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone . . . the [owner] is not permitted to recover the cost of making the change, but may recover the difference in value." 9 Am. Jur., Building and Construction Contracts, sec. 152, p. 89; *Twitty v. McGuire*, 7 N.C. [(3 Mur).] 501, 504 [(1819)]. The difference referred to is the difference between the value of the [structure] contracted for and the value of the [structure] built—the values to be determined as of the date of tender or delivery of possession to the owner.

Robbins v. Trading Post, Inc., 251 N.C. 663, 666, 111 S.E.2d 884, 887 (1960).

"Our courts have adhered to the general rule that the cost of repair is the proper measure of damages unless repair would require that a substantial portion of the work completed be destroyed." *Kenney v. Medlin Construction & Realty*, 68 N.C. App. 339, 344, 315 S.E.2d 311, 314, *disc. rev. denied*, 312 N.C. 83, 321 S.E.2d 896 (1984). Where such destruction is required, a different measure of damages, the diminution in value measure, may be used. However, the value measure is to be used only where the structure substantially conforms to the contract specifications and only a minor defect exists which does not substantially lower the value of the structure. *Id.*

In *Kenney*, defendant agreed to build a house for plaintiff at a cost of $50,625.00. Plaintiff sued after moving in and observing numerous structural problems with the house. At trial, plaintiff's expert witnesses testified that due to various structural problems the house did not meet standards of workmanlike quality. One expert testified that to remedy the problems, he would need to tear down the house to the footing at a cost of at least $35,000.00. Another expert testified that determining the extent of the damage would require stripping the house down to its frame and foundation at a cost of between $50,000.00 and $60,000.00. *Id.* at 340-41, 315 S.E.2d at 312-13.

On appeal defendant contended the trial court had erred by instructing the jury to measure plaintiff's damages by the amount required to bring subject property into compliance with the implied warranty. *Id.* at 343, 315 S.E.2d at 314. This Court held the trial court had not erred, stating, "We do not find the cost of repair awarded plaintiff to be disproportionately high as compared to the loss in value without such repair." *Id.* at 345, 315 S.E.2d at 315.

The cost of completion or repair rule is generally preferred: "Th[is] rule is applied in cases where the landowner will not get substantially what he bargained for unless he in fact gets the repair, replacement or completion." D. Dobbs, *Handbook of the Law of Remedies* § 12.21 (1973). Moreover,

> The policies in support of the value measure of damages arise only when the contractor has substantially performed, so that the building he furnishes will function substantially

> as the landowner bargained for. In such a case the breach does not seriously impede the landowner's purpose. Where such a case occurs and it is also a case where completion or repair will be inordinately expensive, the policy against economic waste suggests use of the value formula rather than the cost formula. But it is not economic waste alone that triggers this approach; it is economic waste plus substantial performance.

Id. § 12.21 at 899. Or, as restated by this Court, "When defects or omissions in construction are so major that the building does not substantially conform to the contract, then the decreased value of the building constructed justifies the high cost of repair." *Kenney v. Medlin Construction & Realty*, 68 N.C. App. at 345, 315 S.E.2d at 315. *See also* Restatement (Second) of Contracts § 348 comment c (1981) (if performance is defective, it may not be possible to prove the loss in value with reasonable certainty, but the injured party can usually recover damages based on cost to remedy defects even if this gives a recovery in excess of the loss in value to him).

This Court has found error where the trial court failed to instruct as to both measures of damages. *E.g., Stiles v. Charles M. Morgan Co.*, 64 N.C. App. 328, 307 S.E.2d 409 (1983) (purchase price of newly constructed house was $51,500.00 but total cost of correcting defects was only $5,570.67; *Warfield v. Hicks*, 91 N.C. App. 1, 370 S.E.2d 689 (where cost of house was $214,837.54 but appraisal of defective conditions showed a lessening in value of only $35,000.00, jury should have been allowed to determine which measure of damages was appropriate), *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988). *Cf. Lagasse v. Gardner*, 60 N.C. App. 165, 298 S.E.2d 393 (1982) (where defendant did not attempt to show alleged defects could be remedied without substantial destruction of house but plaintiff's evidence showed the contrary, court should have determined if defects could be readily remedied without substantial destruction and if a substantial part of what had been done must be undone). Where it is unclear whether only a minor repair is involved or whether substantial undoing "resulting in economic waste," *Warfield v. Hicks*, 91 N.C. App. at 11, 370 S.E.2d at 695, will be required, the factfinder must determine which measure of damages is appropriate. By contrast, where it is clear that substantial undoing is needed but plaintiff will not receive the benefit of his bargain without such undoing or that substantial undoing is not required, a trial court may properly instruct as

to the cost measure only. *See Kenney v. Medlin Construction & Realty*, 68 N.C. App. at 345-46, 315 S.E.2d at 315; *Board of Education v. Construction Corp.*, 64 N.C. App. 158, 306 S.E.2d 557 (1983) (where no evidence showed repairing roof would require substantial destruction of school, cost of repair was proper measure of damages), *disc. rev. denied*, 310 N.C. 152, 311 S.E.2d 290 (1984).

In the case under review, the instruction as to damages issue Number 2 read in pertinent part:

> Now, you have found that the City has suffered damages to the sidewalks as a proximate result of SOM'S failure to use reasonable care and diligence in specifying the pavers and designing the setting beds for the Mall's sidewalks.
>
> Therefore, the City is entitled to recover the reasonable cost of replacement of or repair to the Mall's sidewalks less salvage value, if any, of the parts replaced.
>
> So, I instruct you on this issue, you should award the City damages in such amount as you find by the greater weight of the evidence represents the reasonable cost of repairing or replacing the damaged Mall's sidewalks less the salvage value, if any, of the parts replaced.

Plaintiff's evidence showed the sidewalks would fail and continue to fail because their setting beds were defective. To correct this defect, it would be necessary to remove all the pavers and the granite curbing and install new setting beds, curbing, and pavers. The evidence also showed, however, that the sidewalk was only a part of the eight million dollar transit mall improvement. Replacement of the sidewalk would result in loss of some materials in the sidewalk such as the eighteen-inch square pavers and the granite curbing, but the concrete subslab, a high cost item, would remain intact. Furthermore, the remainder of the improvements, the lights, the kiosks, the benches and the street pavement, would be protected and undisturbed. (As shown above, at the time of trial the crosswalks had already been replaced.)

Applying the principles set out above to these facts, we are unable to say the trial court erred in instructing as it did. The defects were not minor, and the sidewalks did not conform to the contract. Moreover, although a substantial amount of the work on the sidewalks would have to be destroyed, replacement of the sidewalk would not result in economic waste to the mall project.

Under *Kenney*, the evidence did not support an instruction on the value measure of damages. We also note that although plaintiff's evidence showed the replacement cost to be $2,577,000.00 and that plaintiff had incurred additional costs of $79,191.82 for sidewalk replacement design and $34,497.00 for testing of the defective walks, the jury awarded plaintiff only $2,127,000.00. We, therefore, conclude that the trial court did not err in instructing the jury on this issue.

Defendant SOM also argues it is entitled to a new trial on all issues. We disagree. "It is within the discretion of this Court whether to grant a new trial on one issue. A new trial as to damages only should be ordered if the damage issue is separate and distinct from the other issues and the new trial can be had without danger of complication with other matters in the case." *Fortune v. First Union Nat. Bank*, 323 N.C. 146, 151, 371 S.E.2d 483, 486 (1988). In the instant case, as in *Fortune*, the liability and damages issues as to the mall sidewalks were distinct from each other and from other liability and damages issues. The trial court bifurcated jury deliberations on liability and damages, and the jury heard arguments and instructions on damages only after it rendered its liability verdict. There was no compromise verdict. The trial court did not err in denying defendant SOM's motion for new trial on the liability issues.

We have already addressed defendant SOM's final contention concerning measurable value of the sidewalks in our holding on the jury instruction as to measure of damages.

III. Plaintiff's Appeal

Plaintiff's sole contention on appeal is that the trial court erred in allowing defendant SOM's motion for a new trial on damages issue Number 1. This issue has been resolved in our resolution of defendant SOM's appeal.

Affirmed as to award of new trial on damages issue Number 1; no error as to liability or damages issue Number 2.

Judges ARNOLD and EAGLES concur.

ROBERT C. LONON AND LINDA C. LONON, PLAINTIFFS v. THOMAS LEE TALBERT, III, AND THE CITY OF CHARLOTTE, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANTS

No. 9026SC343

(Filed 20 August 1991)

1. **Municipal Corporations § 15 (NCI3d)— automobile accident at intersection—temporary traffic controls—negligence of city**

Plaintiffs' evidence was sufficient to withstand the city's motions for directed verdict and judgment n.o.v. as to breach of duty in an action arising from an automobile-motorcycle collision at an intersection with temporary traffic controls. While a municipality cannot be held liable for failure to design, install and maintain a traffic control device unless its actions are so unreasonable as to constitute an abuse of discretion, a municipality which is under a duty to conform its traffic control devices to the Manual on Uniform Traffic Control Devices (MUTCD) and which has also waived immunity for civil liability is subject to liability. Defendant city has adopted an ordinance mandating compliance with the MUTCD, and plaintiffs' evidence suggested that the device here did not conform to MUTCD requirements.

Am Jur 2d, Highways, Streets, and Bridges § 491.

Liability of highway authorities arising out of motor vehicle accident allegedly caused by failure to erect or properly maintain traffic control device at intersection. 34 ALR3d 1008.

2. **Municipal Corporations § 16 (NCI3d)— automobile accident at intersection—liability of city—negligence of driver**

The trial court did not err by denying defendant city's motions for a directed verdict and judgment n.o.v. on the issue of insulating negligence in an action arising from an automobile-motorcycle collision at an intersection with temporary traffic controls. Although defendant city contended that it was entitled to benefit from an approaching motorist's right to assume that all other travelers will observe the law and not turn left until the movement can be made in safety, the city was not in the position of the approaching driver. The expert testimony left room for reasonable minds to differ as to whether

the driver's negligent execution of the left turn insulated any negligence on the part of the city.

Am Jur 2d, Highways, Streets, and Bridges § 377.

3. Municipal Corporations § 16 (NCI3d)— automobile accident at intersection—liability of city—instruction on insulating negligence—not sufficient

The trial court erred in an action arising from an automobile-motorcycle collision at an intersection with temporary traffic controls by not instructing the jury on the doctrine of insulating negligence as requested by the city. The jury instruction on proximate cause mentioned foreseeability one time and gave little explanation as to the meaning of that term; the jury may have reached a different result with proper instructions on insulating negligence.

Am Jur 2d, Highways, Streets, and Bridges § 377.

APPEAL by defendant City of Charlotte from judgment entered 24 October 1989 by *Judge Marvin K. Gray* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 23 October 1990.

Bailey, Patterson, Caddell & Bailey, P.A., by Jerry N. Ragan and Michael A. Bailey, for plaintiff-appellees.

Frank B. Aycock, III, for defendant-appellant City of Charlotte.

Parker, Poe, Adams & Bernstein, by Max E. Justice and David N. Allen, for defendant-appellant City of Charlotte.

PARKER, Judge.

Plaintiffs instituted this personal injury action against defendant Talbert to recover damages arising out of a motorcycle-automobile accident at the intersection of Fairview Road with a driveway giving access to the Sears Automotive Center at Southpark Mall in Charlotte ("Sears intersection"). Later plaintiffs amended their complaint to join as a party defendant the City of Charlotte ("City"). Plaintiffs alleged that various acts by City in connection with a temporary traffic control system at the Sears intersection constituted negligence which proximately caused plaintiff Robert Lonon's injury. Upon finding both defendants negligent, a jury awarded plaintiffs the sum of $8,702,312.42. Defendant City appealed, assigning as error the denial of its motions for directed verdict, judgment

notwithstanding the verdict, and new trial. We hold defendant City's motion for directed verdict and judgment notwithstanding the verdict were properly denied but award a new trial on account of error in the jury instructions.

At least as early as 1985, City's Transportation Department was aware of traffic problems and congestion on Fairview Road in the Southpark Mall area. At the Sears intersection, Fairview Road consisted of seven lanes, namely three eastbound through lanes, three westbound through lanes, and a center storage lane for left turns. Eastbound traffic was separated from westbound traffic by a narrow concrete median; an opening in the median accommodated turning traffic. The Sears intersection was not protected by a traffic control signal; but the intersections immediately to the east and west were so protected. To the west of the Sears intersection was the Barclay Downs-Telstar intersection. West of this intersection Fairview Road narrowed to four lanes. To the east of the Sears intersection was a Southpark Mall entrance intersection.

To ease congestion, City's Transportation Department planned to widen Fairview Road west of Barclay Downs-Telstar and later install a median on it from the Barclay Downs-Telstar intersection all the way east to Sharon Road. Traffic planners were also aware that during peak morning hours, left turns at the Sears intersection were dangerous: Westbound through traffic on Fairview Road, slowed by the signal at the Barclay Downs-Telstar intersection, backed up in the two inner lanes, blocking the Sears intersection; but traffic in the outer or northernmost westbound lane continued without slowing. Drivers in the two inner lanes tended to create an opening for eastbound left turning traffic to cross their path; but drivers making the turn through this opening could not see traffic approaching at speed in the northernmost westbound lane of Fairview Road, and thus a pattern of accidents developed. The speed limit on Fairview Road was thirty-five miles per hour.

Knowing Fairview Road west of Barclay Downs-Telstar would be widened and the median closed all the way to Sharon Road, City planners decided to install temporary controls which would prohibit left turns by eastbound traffic at the Sears intersection. A plan was created which included (i) using barrels to block access to the eastbound left turn lane; (ii) installing overhead signs prohibiting left turns and U-turns; and (iii) placing, in the barrels

closest to the median opening, signs prohibiting both left turns and U-turns. Prohibiting U-turns was necessary because between the Sears intersection and the Barclay Downs-Telstar intersection, another driveway gave access from the northernmost westbound lane of Fairview Road into the Sears Automotive Center parking area.

The barrels, overhead signs, and barrel signs were installed in July of 1985. Although the original plan called for the two barrel signs to be mounted on separate barrels, they were in fact mounted on one barrel with the no left turn sign atop the no U-turn sign. The overhead signs were mounted on a span between two utility poles slightly to the east of the Sears intersection. These signs were approximately eighty-eight and one-half feet away from where the median opening began on the west side of the Sears intersection. The white left turn arrow on the pavement in the blocked off lane was not removed.

In November of 1985, a large truck made an illegal left turn through the Sears intersection and dragged the barrel with the two signs all the way across the westbound lanes of Fairview Road and into the parking area near the Sears Automotive Center. The accident sheared off the upper no left turn sign but left in place the lower no U-turn sign. At the time of plaintiff's accident, the no left turn sign had not been replaced. No City records showed any maintenance work at the Sears intersection between August of 1985 and November of 1986. Nevertheless, except for the accident in which the left turn sign was demolished, there was no evidence of other accidents arising from illegal left turns during the same period.

On 9 November 1986, a clear and dry Sunday, around 1:00 p.m., defendant Talbert drove to the Sears store at Southpark Mall. Inadvertently missing the left turn access to the mall at Barclay Downs-Telstar, he proceeded east on Fairview, intending to turn at the Sears intersection. The barrels described above prevented access to the left turn lane, so defendant Talbert, in the innermost eastbound through lane, drove to the end of the row of barrels, slowing and signalling for a left turn; turned left past them; and stopped at the median opening. The rear part of his 1984 Buick station wagon partially blocked the through lane from which he began his turn. He remained stopped for four to five seconds. He had seen the no U-turn sign on the barrel, but

having no intention of making a U-turn, he looked for a no left turn sign. He never saw the two overhead signs to the east of the Sears intersection.

While stopped, defendant Talbert looked to the left, towards Barclay Downs-Telstar, then to the right, towards the Southpark Mall intersection, and then again to the left. He began to cross westbound Fairview Road but in the center or middle lane collided with a 1984 Honda motorcycle driven by plaintiff Robert Lonon on which plaintiff Linda Lonon was a passenger. Plaintiffs, travelling west on Fairview Road, had previously stopped for the traffic signal at the Southpark Mall intersection, approximately 220 feet west of the Sears intersection. When the traffic light was green, Robert Lonon started forward. He had reached a speed of between thirty and thirty-five miles per hour at the time of the collision, and his motorcycle headlight was burning.

All these events were witnessed by a driver whose car was immediately behind that of defendant Talbert. She testified that when she first saw the motorcycle, it was just coming through the traffic signal at the Southpark Mall entrance, moving in the middle lane of westbound Fairview Road with its headlight burning. As soon as she saw the motorcycle, she looked back at defendant Talbert's car. As he began to turn, she could see the motorcycle. Although plaintiff Robert Lonon swerved to the right, the vehicles collided in the middle lane, the front of the motorcycle striking the right front of defendant Talbert's Buick. Plaintiff Linda Lonon was thrown into the air, fell on her head, and then began crawling to where plaintiff Robert Lonon was lying beside the right front tire of defendant Talbert's car. Plaintiff Robert Lonon suffered severe injury to his back, which resulted in permanent loss of body movement from his shoulders to his feet.

City first contends it was entitled to a directed verdict, and is, therefore, entitled to a reversal of the judgment against it; because (i) City's conduct was not the proximate cause of plaintiff's injury and (ii) plaintiff failed to prove City abused its discretion in the design, installation, and maintenance of the traffic control system at the Sears intersection. In a negligence case, defendant's motions for directed verdict and judgment notwithstanding the verdict raise the same evidentiary question, namely whether the evidence, construed in the light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference, permits

a finding that defendant was negligent and that his negligence proximately caused plaintiff's injury. *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E.2d 549, 554 (1973).

[1] We first address City's argument concerning abuse of discretion as the applicable standard of care and review the law pertinent to City's alleged negligence. In general, to make out a case of actionable negligence, plaintiff

> must introduce evidence tending to show that (1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed.

Jordan v. Jones, 314 N.C. 106, 108, 331 S.E.2d 662, 663 (1985).

Absent a statute imposing liability, cities "acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit . . . are not liable for the tortious acts of their officers or agents." *Hamilton v. Hamlet*, 238 N.C. 741, 742, 78 S.E.2d 770, 771 (1953). A city may by ordinance control vehicular traffic on its public streets. N.C.G.S. § 160A-300 (1987). Installing and maintaining a traffic light system constitutes the exercise of a discretionary governmental function. *Hamilton v. Hamlet*, 238 N.C. at 742, 78 S.E.2d at 771; *Talian v. City of Charlotte*, 98 N.C. App. 281, 286-87, 390 S.E.2d 737, 741, *aff'd per curiam*, 327 N.C. 629, 398 S.E.2d 330 (1990); *Rappe v. Carr*, 4 N.C. App. 497, 499, 167 S.E.2d 48, 49 (1969).

That a city has authority to make discretionary decisions does not mean the city is thereby under any obligation. Authority or power to control traffic does not create a mandate of action. *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 173, 293 S.E.2d 235, 236 (1982). Courts will not interfere with discretionary powers conferred on a municipality for the public welfare unless the exercise or nonexercise of such powers is so clearly unreasonable as to constitute an oppressive and manifest abuse of discretion. *Id.* *See also Riddle v. Ledbetter*, 216 N.C. 491, 493-94, 5 S.E.2d 542, 544 (1939).

A city may waive its immunity from civil liability in tort by purchasing liability insurance. No formal action other than the pur-

chase of liability insurance is required to waive immunity from tort liability, and no city is deemed to have waived its tort immunity by any action other than the purchase of such insurance. N.C.G.S. § 160A-485 (1987). "Except where waived under authority of statute the common law rule of governmental immunity is still the law in North Carolina." *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 72, 178 S.E.2d 18, 20 (1970), *cert. denied*, 277 N.C. 727, 178 S.E.2d 831 (1971).

As to traffic control devices, a governmental subdivision which has waived immunity from civil liability in tort may be liable for its negligent failure to conform to a published standard such as the Manual on Uniform Traffic Control Devices ("MUTCD"). *See Jordan v. Jones*, 314 N.C. at 109, 331 S.E.2d at 664. With respect to state roads within municipal corporate limits, traffic signs, signals, markings, islands, and all other traffic-control devices must be installed or erected in substantial conformance with the specifications of the MUTCD. N.C.G.S. § 20-169 (1989). The City of Charlotte is under a more comprehensive self-imposed duty:

> All traffic-control devices shall conform to the manual and specifications approved by the state board of transportation or resolution adopted by the city council. All traffic-control devices so erected and not inconsistent with the provisions of state law or this chapter shall be official traffic-control devices.

Charlotte, NC, Code § 14-57(d) (1985). "Official traffic-control device" means "a sign, signal, marking or device . . . which is designed and intended to regulate vehicular or pedestrian traffic." Charlotte, NC, Charter § 6.21(b) (1985).

In sum, under the rule of *Cooper*, a municipality cannot be held liable for the failure to design, install and maintain a traffic control device unless its actions are so unreasonable as to constitute an abuse of discretion. Nevertheless, under *Jordan*, a municipality which is under a duty to conform its traffic control devices to the MUTCD and which has also waived immunity for civil liability in tort is subject to possible liability for designing or installing a traffic control device not in substantial conformity with MUTCD specifications.

An exception to the doctrine of municipal immunity imposes liability on a city or town for damages resulting from the failure to exercise ordinary care in keeping its streets and sidewalks in

a reasonably safe condition for the purposes for which they are intended. *Hodges v. Charlotte*, 214 N.C. 737, 742, 200 S.E. 889, 892 (1939) (Barnhill, J., concurring). General Statutes, Chapter 160A, codifies this kind of exception:

> (a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:
>
> (1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper repair;
>
> (2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions[.]

N.C.G.S. § 160A-296 (1987).

As noted in *Hodges*, our courts have consistently distinguished between the governmental or discretionary function of designing, installing and maintaining traffic control devices and the ministerial function of keeping the streets repaired, free from defects and safe for public passage. Our research discloses no North Carolina cases applying subsection (a)(1) of General Statute 160A-296 to a municipality's installation or maintenance of a traffic control device. Nevertheless, where foliage obscured a traffic sign, this Court held that a genuine issue of fact existed as to whether the city was negligent under subsection (a)(2) of the same statute. *Stancill v. City of Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976). And where a municipality improved the area bordering both sides of railroad tracks by planting trees and shrubbery and was responsible for pruning the plants which blocked the view of the tracks, the trial court erred in directing a verdict in defendant municipality's favor on the issue of negligence. *Cooper v. Town of Southern Pines*, 58 N.C. App. at 174, 293 S.E.2d at 237. In this context the Court in *Cooper* observed that an obstruction under N.C.G.S. § 160A-296(a)(2) "can be anything, including vegetation, which renders the public passageway less convenient or safe for use." *Id.* The statute, however, prohibits only unnecessary obstructions.

Applying these principles to the evidence adduced at trial, we conclude that the evidence was sufficient to withstand defendant City's motions for directed verdict and judgment notwithstanding the verdict as to breach of duty. Though contradicted by defendant City, plaintiff's evidence suggested that the placement of the overhead "no left turn" and "no U-turn signs," the use of the barrels to close off the lane, and the failure to replace the "no left turn" sign on the barrel at the intersection did not conform to the requirements of the MUTCD. Defendant City having adopted an ordinance mandating compliance with the MUTCD, its failure to comply would be some evidence of negligence. Thus notwithstanding that the decision to close the lane to prohibit left turn traffic in order to reduce early morning accidents was a discretionary one, conflicting evidence of City's compliance with the MUTCD in performing this function raised a question of fact for the jury as to whether City exercised due care.

[2] Defendant City also argues that its negligence, if any, was not the proximate cause of plaintiff's injury as a matter of law in that plaintiff's injury was not a foreseeable consequence of City's negligence and defendant driver's negligence insulated City's negligence. We disagree.

The doctrine of insulating negligence is more easily stated than applied. In *Butner v. Spease and Spease v. Butner*, 217 N.C. 82, 6 S.E.2d 808 (1939), the Court discussed the doctrine as follows:

> "The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. . . . The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."
>
> . . . .
>
> The rule is, that if the original act be wrongful, and would naturally prove injurious to some other person or persons, and does actually result in injury through the intervention

of other causes which are not in themselves wrongful, the injury is to be referred to the wrongful cause, passing by those which are innocent. *Scott v. Shepherd*, 2 Bl., 892 (*Squib case*). But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the last wrong as the proximate cause, and not to the first or more remote cause. Cooley on Torts, sec. 50. . . .

The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. *Newell v. Darnell, supra; Beach v. Patton, supra; Hinnant v. R.R., supra; Balcum v. Johnson*, 177 N.C., 213, 98 S.E. 532. "The test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected." *Harton v. Tel. Co.*, 141 N.C., 455, 54 S.E., 299. "The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Osborne v. Coal Co.*, 207 N.C., 545, 177 S.E., 796; *Beach v. Patton, supra.*

Id. at 87-89, 6 S.E.2d 811-12. *See also Riddle v. Artis*, 243 N.C. 668, 91 S.E.2d 894 (1956); *Riggs v. Motor Lines and Breeze v. Motor Lines*, 233 N.C. 160, 63 S.E.2d 197 (1951).

While "[t]he law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible," *Phelps v. Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967), the plaintiff need only prove "that in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission." *Hart v. Curry*, 238 N.C. 448, 449, 78 S.E.2d 170, 170 (1953) (citation omitted).

In this jurisdiction, questions of proximate cause and insulating negligence are for the jury "except in cases so clear there can be no two opinions among men of fair minds . . . whether the

intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 238, 311 S.E.2d 559, 567 (1984).

Defendant City argues that as a matter of law it was not required to foresee defendant driver's conduct. City posits this contention on the principle that a driver who has the right of way, in the absence of anything which gives or should give notice to the contrary, is not under a duty to anticipate that a motorist approaching would fail to yield the right of way as required by N.C.G.S. § 20-155. This statute requires a driver intending to turn left within an intersection to yield the right of way to any vehicle approaching from the opposite direction that "is within the intersection or so close as to constitute an immediate hazard." N.C.G.S. § 20-155(b) (1989). *See Hudson v. Transit Co.*, 250 N.C. 435, 443-44, 108 S.E.2d 900, 906 (1959). Defendant City argues that if a motorist has the right to assume that all other travelers will observe the law and not turn left until the movement can be made in safety, *Harris v. Parris*, 260 N.C. 524, 526, 133 S.E.2d 195, 197 (1963), then the City is entitled to benefit from the same standard of foreseeability. Defendant City, however, was not in the position of the approaching driver operating a motor vehicle who of necessity must rely on fellow motorists' obedience to the rules of the road.

On the record in this case, the expert testimony as to the effect of the barrels and lack of a "no left turn" sign on the barrel at the intersection leaves room for reasonable minds to differ as to whether the driver's negligent execution of the left turn insulated any negligence on the part of defendant City. The trial court, therefore, did not err in denying the motions for directed verdict and judgment notwithstanding the verdict.

[3] Defendant City also argues in the alternative that the trial judge erred in failing to instruct the jury on the doctrine of insulating negligence, as requested by defendant City. We agree and award a new trial on this basis.

The evidence in this case, in our view, permits the inference that the placement of the barrels and the signs, though negligent, would not have caused injury to plaintiff but for the negligence of defendant driver and that it was reasonably unforeseeable that by closing off the turn lane with barrels, a common traffic channelizing device, a driver would become so confused and excited by

the presence of the barrels as to execute a left turn without looking for oncoming traffic. The purpose of placing the barrels beside the turn lane and of putting the sign overhead was to prohibit left turns and to protect motorists in morning rush hour traffic. No evidence suggests that defendant driver's view of plaintiff's approach was in any manner obstructed by the barrels or that the barrels prevented defendant driver from exercising due care. In this regard the present case is clearly distinguishable from those cases where a governmental authority allowed shrubbery or some other obstacle to obsure a driver's view of a stop sign, thereby preventing the driver from determining which motorist had the right of way and creating the risk of the driver's wrongful conduct. *See Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E.2d 235 (1982); *Stancill v. City of Washington*, 29 N.C. App. 707, 225 S.E.2d 834 (1976).

The jury instruction on proximate cause mentioned foreseeability one time and gave little explanation as to the meaning of that term. With proper instructions as to the doctrine of insulating negligence, the jury may have reached a different result, and defendant City was prejudiced by the trial court's failure to give such instruction.

Because we reverse and remand for new trial on this assignment of error, we do not address defendant's remaining assignments.

New trial.

Judges JOHNSON and EAGLES concur.

JUDITH P. POWERS v. WAYNE P. POWERS

No. 9014DC749

(Filed 20 August 1991)

1. Divorce and Separation § 38 (NCI4th)— separation agreement—order of court—specific performance inappropriate

The trial court erred by granting specific performance for the enforcement of a separation agreement incorporated into a consent judgment entered in 1982, before the distinction

between consent judgments approved by the court and those adopted by the court was abolished. Specific performance is a remedy which applies to the enforcement of a contract, not to the enforcement of a court order.

Am Jur 2d, Divorce and Separation §§ 857, 858.

Specific performance of provisions of separation agreement other than those for support or alimony. 44 ALR2d 1091.

2. **Divorce and Separation § 41 (NCI4th)— separation agreement—enforcement—contempt**

There was competent evidence to support each disputed finding of fact in an action in which defendant was held in contempt for not complying with a separation agreement provision requiring him to provide a college education for a child.

Am Jur 2d, Divorce and Separation §§ 859, 1063, 1066.

3. **Divorce and Separation § 41 (NCI4th)— separation agreement—college education—finding of contempt**

The trial court correctly found defendant in contempt for failing to comply with a provision in a separation agreement incorporated into a consent judgment in that he unreasonably withheld his consent to his daughter attending UNC-Wilmington.

Am Jur 2d, Divorce and Separation §§ 859, 1063, 1066.

4. **Divorce and Separation § 520 (NCI4th)— separation agreement—enforcement—attorney fees**

The trial court erred by awarding plaintiff attorney fees in an action to hold defendant in contempt for failing to abide by a portion of a separation agreement. Attorney fees are not recoverable either as an item of damages or of costs absent express statutory authority. Previous cases allowing the award of attorney fees to a plaintiff prevailing in a civil contempt action are distinguished in that here no award is authorized by statute and neither child support nor equitable distribution are involved.

Am Jur 2d, Divorce and Separation §§ 598, 597.

Judge WELLS concurring in part and dissenting in part.

POWERS v. POWERS

[103 N.C. App. 697 (1991)]

APPEAL by defendant from Order and Judgment entered 20 March 1990 in DURHAM County District Court by *Judge David Q. LaBarre*. Heard in the Court of Appeals 12 March 1991.

James B. Craven III for plaintiff-appellee.

Coleman, Bernholz, Bernholz, Gledhill & Hargrave, by Kim K. Steffan, for defendant-appellant.

WYNN, Judge.

I

Plaintiff and defendant were married on 24 August 1968 in Ocean City, New Jersey. Thereafter, they lived together as husband and wife in Durham County, North Carolina until May 1980, at which time they separated and entered into a separation agreement. The parties subsequently obtained a divorce in the State of Texas in May 1981; however, the separation agreement executed in North Carolina apparently was not mentioned in the Texas divorce decree. Following the parties' divorce, the defendant remarried and moved to the State of Idaho. At the time this action was commenced, plaintiff was a citizen and resident of the State of New Hampshire and defendant was a citizen and resident of the State of Idaho.

In August 1981, plaintiff filed a complaint against the defendant seeking the specific performance of certain provisions contained in the May 1980 separation agreement. In particular, it was alleged that the defendant had failed to comply with provisions for the support of the parties' daughter, Jennifer Lesley Powers, then ten years old, and for the payment of certain medical expenses.

In August 1982, the parties entered into a consent judgment which, *inter alia*, modified the parties' May 1980 separation agreement and incorporated it. As modified, the separation agreement provided that the defendant would "provide and pay for four years of college education for Jennifer at a college to be selected by the Husband and Jennifer, provided however, that the Husband shall not unreasonably withhold his consent to Jennifer's selection of a college." (After it became apparent that Jennifer and her father could not agree on which college Jennifer should attend, Jennifer, following her graduation from high school in June 1989, elected to attend the University of North Carolina at Wilmington (UNC-Wilmington) in the fall of 1989.) The consent judgment also

provided that the defendant's financial obligation to provide a college education for Jennifer would be at least equal to the cash surrender value of a "whole life" insurance policy which the defendant was obligated to carry on his life under the terms of the original separation agreement.

After entry of the consent judgment, the defendant continued to disregard certain terms of the modified separation agreement. Plaintiff then filed a motion on 27 December 1989 seeking, *inter alia*, an order requiring the defendant to show cause why he should not be held in contempt of court for failing to comply with the terms of the consent judgment. Most pertinent to this appeal, the plaintiff alleged that the defendant had failed to "provide and pay for four years of college education for Jennifer." Pursuant to plaintiff's motion, a show cause order was issued and a hearing was held on 26 February 1990.

Following the hearing, the court concluded that the defendant was in contempt of the "college expenses" provision of the consent judgment because he had unreasonably withheld consent to Jennifer's attending UNC-Wilmington. (The defendant claimed that his withholding of consent to Jennifer's attending UNC-Wilmington was reasonable because he could not afford to send her to school there.) In order to purge himself of the contempt, the defendant was ordered to pay the plaintiff the sum of $10,501.68 (the amount of tuition in arrears, plus reimbursement for $841.00 in medical expenses); the full cost of Jennifer's college expenses in subsequent years; and the plaintiff's attorney fees. In addition, although the plaintiff did not specifically request it as relief, the court's Order and Judgment concluded that the plaintiff was entitled to the defendant's specific performance of the obligations set forth in the parties' modified separation agreement. From the Order and Judgment finding the defendant in contempt and ordering specific performance, the defendant appeals.

II

Defendant makes several assignments of error, many of which are duplicative in nature. In essence, defendant contends that several of the trial court's findings of fact are unsupported by the evidence and that the totality of the findings do not support the judgment holding him in contempt of the consent judgment and ordering him to pay for his daughter's education at UNC-Wilmington. De-

fendant also contends that the trial court erred by awarding the plaintiff attorney's fees.

[1] We note initially that the consent judgment in this case was entered in 1982, and is therefore not controlled by our Supreme Court's decision in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), which abolished the tradition of treating "court-approved" and "court-adopted" separation agreements differently. The ruling in that case was expressly limited to the consent judgment in that case and to consent judgments entered after 11 January 1983, the date of that opinion. *Id.* at 386, 298 S.E.2d at 342.

For those consent judgments entered prior to *Walters*, the courts of this State recognized a distinction between two types of consent judgments: (1) consent judgments in which the court merely approved of agreements between parties; and (2) consent judgments in which the court fully adopted agreements between parties as its own determination of the parties' respective rights and obligations. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964).

A consent judgment of the first type was not considered to be an order of the court; rather, it was considered to be "nothing more than a contract between the parties made with the approval of the court." *Id.* As such, a party who wished to enforce the rights or obligations under such a consent judgment was required to do so through traditional contract channels. *Walters*, 307 N.C. at 385, 298 S.E.2d at 341.

A consent judgment of the second type, on the other hand, *was* considered to be an order of the court. Consequently, the rights and obligations arising under this type of consent judgment were enforceable through the court's contempt powers. *Id.*

The consent judgment in the instant case expressly "incorporated" the parties' 1980 separation agreement, as modified, and "made it a part [t]hereof." "When the parties' agreement . . . is incorporated in the judgment, their contract is superceded by the court's decree." *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967). "The obligations imposed are those of the judgment, which is enforceable as such. In such a case [a party] has the option of enforcing the judgment by a rule of contempt or by execution, or both." *Id.* (citations omitted). It is clear that the consent judgment in the instant case is indeed of the second type

discussed above and is therefore enforceable through the court's contempt powers. *See also Bunn*, 262 N.C. at 69, 136 S.E.2d at 243; *Rowe v. Rowe*, 305 N.C. 177, 183, 287 S.E.2d 840, 844 (1982).

Since the consent judgment in this case *sub judice* is to be considered and enforced as an order of the court, we first find that the trial court improvidently granted the plaintiff specific performance as a remedy for the defendant's failure to comply with the consent judgment. Specific performance is a remedy which applies to the enforcement of a contract, not to the enforcement of a court order. Accordingly, that portion of the trial court's Order and Judgment ordering specific performance is vacated.

[2] Turning to the defendant's assignments of error, we note that our review of contempt proceedings is confined to a determination of whether there is competent evidence to support the findings of fact and whether the findings support the judgment. *Koufman v. Koufman*, 97 N.C. App. 227, 388 S.E.2d 207 (1990); *McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E.2d 134 (1985). In this case, the defendant contends both that certain findings of fact are unsupported by the evidence, and that the totality of the findings do not support the judgment finding him in contempt.

The trial court's Order and Judgment contains several findings of fact made en route to concluding that the defendant had unreasonably withheld his consent to Jennifer's attending UNC-Wilmington and that the defendant should, therefore, be held in contempt. For the sake of simplicity, we have renumbered and paraphrased the findings of fact which the defendant claims are unsupported by the evidence; they include the following:

(1) that the defendant had been unwilling, up to the date of the hearing, to pay at least the cash surrender value of his life insurance policy;

(2) that the defendant had contributed up to $4000 per year toward his stepson's college education at Fresno State University and at the University of Idaho;

(3) that the defendant paid some portion of the expenses for his current wife and stepson to go to Switzerland on a band trip;

(4) that Jennifer had no interest in attending college in Idaho or the State of Washington;

(5) that the defendant gave his "qualified endorsement" to Jennifer's attending the University of North Carolina at Chapel Hill (UNC-Chapel Hill), where he had gone to college; and

(6) that the defendant was willing to agree only to Jennifer's attendance at the University of Idaho.

After reviewing the transcript and the record, we conclude that each of these findings of fact is supported by the evidence.

With respect to finding number 1, although the defendant testified that he "offered" the cash surrender value of his life insurance policy for Jennifer's college education, we can find no evidence, and the defendant points to none, that the defendant has in fact "offered" that sum. There is no evidence that the cash surrender value of the life insurance policy was ever *tendered* to either Jennifer or her mother for their immediate use for Jennifer's educational expenses. Contrary evidence to which the defendant points reveals only that he said he would pay that amount. There is no indication that the defendant ever followed through with his "offer" and thus this finding of fact is supported by the evidence.

Finding number 2 is also supported by the evidence. The defendant testified that he paid a portion of "the balance" of his stepson's tuition expenses after a "scholarship" had been exhausted. The defendant's testimony as to the exact amount which he paid was, at best, equivocal. He first testified that he paid the entire balance of his stepson's education, which was $2,000 per semester. Then he testified that his total contribution was "$2,500 perhaps," but that it was "hard to say." Finally, he estimated that his total contribution was only $2,000. While this testimony is not unambiguous, it certainly supports the finding that the defendant contributed *up to* $4,000 per year for his stepson's college education.

The defendant also contends that there was no evidence that he "had the means to send his family to Switzerland." We note initially that the trial court did not find that the defendant had the means to send his family to Switzerland; rather, the trial court found that the defendant "paid some portion of the expenses for his current wife and [stepson] to go to Switzerland on a band trip." This finding is also supported by the defendant's own testimony. The defendant testified that "[he and his wife] had to borrow the money from the bank." He also testified that they paid the loan back. Although the defendant later testified that it was his wife

alone who procured the bank loan, the trial court was free to question the credibility of this assertion, especially since it contradicted his earlier testimony. In any event, it was not unreasonable for the court to find or conclude that the defendant helped repay the loan. Finding number 3 is also supported by the evidence.

The finding that Jennifer had no interest in attending the University of Idaho is reasonably inferred from the fact that she did not submit an application for admission to that school. The defendant contends that the evidence is to the contrary of the trial court's finding. The defendant points to the fact that Jennifer visited the University of Idaho campus while visiting her father in Idaho. In this regard, we note that Jennifer's trip to that campus was at the behest of her father. There is no evidence that it was her desire to make the visit. The trial court's finding here is supported by the evidence.

The finding that the defendant gave his "qualified endorsement" to Jennifer's attending UNC-Chapel Hill is equally supported by the evidence. The defendant's own testimony reveals that he encouraged Jennifer to apply to UNC-Chapel Hill, which the evidence indicates is a more expensive school to attend than UNC-Wilmington. The defendant's assertion that he never intended to imply that he could single-handedly afford the cost of attending UNC-Chapel Hill only serves to strengthen the trial court's finding that the defendant's endorsement of UNC-Chapel Hill was *qualified.*

The defendant's final contention with respect to the findings of fact is that there was no evidence that he was unwilling to agree to colleges other than the University of Idaho and UNC-Chapel Hill. To be sure, the evidence on this point is in sharp conflict; however, there was competent evidence to support the trial judge's finding. The testimony of Jennifer and her mother tended to show that the defendant did not give Jennifer practical alternatives to the University of Idaho. Moreover, Jennifer was not admitted to UNC-Chapel Hill. The defendant's evidence, on the other hand, tended to show that he suggested many "viable" alternatives for Jennifer to attain her educational goals. For instance, he testified that he asked Jennifer to consider attending many different colleges, including, but not limited to, the University of Idaho. He also suggested that if Jennifer was determined to attend UNC-Wilmington, there were ways to limit the expenses, such as living with her North Carolina-resident grandparents for

a year in order to attain in-state residency, or attending a less-expensive junior college for two years and then transferring to UNC-Wilmington.

As stated by this court in *McAulliffe v. Wilson*, 41 N.C. App. 117, 254 S.E.2d 547 (1979):

> When there are competing inferences arising from testimony of witnesses in a case, it is for the trier of fact to decide between them. The findings of fact by a trial court in a non-jury trial have the force and effect of a verdict by a jury and are conclusive on appeal if supported by competent evidence, even though the evidence might sustain findings to the contrary . . . . The trial court, having had the fullest opportunity to hear the testimony and observe the demeanor of the parties . . . should be accorded deference unless his findings and conclusions are manifestly unsupported by the record.

Id. at 121, 254 S.E.2d at 550.

After carefully reviewing the record, we conclude that there was competent evidence to support each of the disputed findings of fact. Defendant's assignment of error on this point is, therefore, overruled.

III

[3] We now consider whether, as the defendant contends, the totality of the trial court's findings of fact fail to support the judgment holding the defendant in civil contempt.

N.C. Gen. Stat. § 5A-21(a) provides, in pertinent part that, "[f]ailure to comply with an order of a court is a continuing civil contempt as long as . . . (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order." Although the language of section 5A-21(a) does not expressly so state, it has nevertheless been held that one may not be held in civil contempt for failure to comply with an order of the court unless his failure be willful. *Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

In the instant case, the trial court concluded that the defendant was in contempt of court because he failed to comply with the consent judgment by unreasonably withholding his consent to

Jennifer's attending UNC-Wilmington. The defendant, on the other hand, contends that the findings of fact do not support the conclusion that his withholding of consent was unreasonable.

We need look no further than the trial court's finding that the defendant was unwilling to pay the cash surrender value of his life insurance policy toward Jennifer's education to substantiate the trial court's conclusion. The defendant himself testified that he was covered under a $42,000 life insurance policy which, at the time of the hearing, had a cash surrender value of between $13,000 and $15,000. The consent judgment entered into by the parties provided that the defendant's obligation to provide a college education for his daughter would be "*at least equal to*" this cash surrender value. Although the defendant maintains that he offered this amount to Jennifer and her mother for educational expenses, we believe, as the trial court apparently did, that such "offer" was illusory. We therefore hold that the trial court was correct in concluding that the defendant unreasonably withheld his consent to Jennifer's attending UNC-Wilmington. It follows that the trial court was correct in thereafter finding the defendant in contempt of the consent judgment since the requirements of N.C. Gen. Stat. § 5A-21(a) had been met.

IV

[4] Defendant's final contention is that the trial court erred in awarding the plaintiff attorney's fees in the amount of $5,850.50 and in awarding the plaintiff costs.

With respect to the award of costs to the plaintiff, we hold that the defendant has failed to properly preserve this question for appellate review because it has not been made the subject of an assignment of error. It is, therefore, beyond our scope of review and we decline to address it. N.C.R. App. P. 10(a). The defendant has, however, properly preserved for appeal the issue of attorney's fees. After carefully reviewing the law on this subject, we are of the opinion that the trial court was without authority to award the plaintiff attorney's fees.

The law is clear in North Carolina that absent express statutory authority for doing so, attorney fees are not recoverable either as an item of damages or of costs. *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973); *Bowman*

v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967). In *United Artists*, this court squarely held that neither the provisions of N.C. Gen. Stat. § 6-18 (when costs allowed to plaintiff as a matter of course), nor the provisions of N.C. Gen. Stat. § 6-20 (allowance of costs in discretion of court) was applicable to an action for civil contempt. 18 N.C. App. at 188, 196 S.E.2d at 602.

We are aware that previous cases from this court have held that a trial court may properly award attorney's fees to a plaintiff who prevails in a civil contempt action. *See, e.g., Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971); *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970) (both cases holding that attorney's fees were properly awarded in a civil contempt action to enforce a child support order since attorney's fees could have been awarded in the original action for child support). However, we find these cases immediately distinguishable because they involved the instance where an award of attorney's fees was expressly authorized by statute.

More recently, two other decisions of this court extended the holding in *Blair* to allow attorney fees in contempt actions to enforce equitable distribution awards, even though attorney's fees in equitable distribution actions were not authorized by statute. See *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990); *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E.2d 349 (1986). We, however, distinguish the case at hand in that it involves neither a child support order (the child support provision under the consent judgment expired when the child reached 18 years of age and the provision here was made separate and apart from the child support provision) nor an equitable distribution award. As such, we decline to further extend the holding of *Blair* to contempt actions for the enforcement of a consent judgment under the facts of this case.

We conclude that the trial court was without authority to award the plaintiff attorney's fees. The order allowing plaintiff attorney's fees is, therefore, vacated.

For the reasons discussed above, those portions of the trial court's Order and Judgment which granted the plaintiff the remedy of specific performance and attorney's fees are vacated. The trial court's Order and Judgment is in all other respects affirmed.

Affirmed in part and vacated in part.

Judge GREENE concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS concurring in part and dissenting in part.

I concur in all aspects of the majority opinion except that portion which deals with the awarding of counsel fees to plaintiff.

The consent judgment which was the basis of the present action was entered on 24 August 1982, when Jennifer was eleven years old. That judgment provided for *Jennifer's support* in two ways: (1) monthly payments to plaintiff for Jennifer's support until Jennifer reached the age of 18, at which time those payments to plaintiff would terminate, and (2) payment for Jennifer's college education. Thus, this present action was an action to enforce defendant's obligation of support for his minor child entered into on 24 August 1982, and I therefore am of the opinion that the trial court properly awarded plaintiff attorney's fees for the enforcement of defendant's obligation of support.

STATE OF NORTH CAROLINA v. ERIC A. HUDSON

No. 9026SC910

(Filed 20 August 1991)

1. Searches and Seizures § 12 (NCI3d) — temporary tag illegible — stopping of vehicle lawful

Testimony by an officer that the 30-day temporary tag on the car which defendant was driving was illegible because both the expiration date and the numbers were "faded out" was sufficient competent evidence from which to conclude that the officer had an articulable and reasonable suspicion that the tag may have been more than 30 days old in violation of N.C.G.S. § 20-79.1(h) and that the vehicle may have been improperly registered in violation of N.C.G.S. § 20-50, and defendant's vehicle was therefore lawfully stopped.

Am Jur 2d, Searches and Seizures §§ 39, 43.

2. Searches and Seizures § 9 (NCI3d)— failure to produce driver's license and registration card—warrantless arrest proper

Failure of defendant to produce a driver's license and a registration card after an officer lawfully stopped his vehicle gave officers sufficient probable cause to place defendant under arrest for these offenses.

Am Jur 2d, Arrest § 43; Searches and Seizures § 43.

3. Searches and Seizures § 9 (NCI3d)— failure to produce driver's license and vehicle registration—officer's request of defendant to step outside vehicle—request proper

An officer was justified in asking defendant to step out of his car after he failed to produce a driver's license or vehicle registration, since the safety of an officer exposed to heavy traffic during a stop for a traffic violation is a legitimate concern and justifies the officer's request that the driver step out of the vehicle to a place nearby where the inquiry may be pursued with greater safety.

Am Jur 2d, Arrest § 43; Searches and Seizures § 43.

4. Searches and Seizures § 12 (NCI3d)— auto passenger—suspicion of hidden weapon—officer's request to step out of car proper

Because of an automobile passenger's lack of identification, an unmoved newspaper spread fully across her lap for five to ten minutes, and the likely inability to read because of the darkness, the trial court had sufficient competent evidence to conclude that an officer possessed an articulable and reasonable suspicion that the passenger may have been trying to hide a weapon, and the officer could properly ask the passenger to step out of the car.

Am Jur 2d, Arrest § 43; Searches and Seizures §§ 43, 45, 96.

5. Searches and Seizures § 11 (NCI3d)— auto passenger trying to hide weapon—request to step out of car—reasonableness—gun protruding from briefcase—plain view doctrine—further search of briefcase—contraband admissible

Where an officer had an articulable and reasonable suspicion that a passenger may have been trying to hide a weapon, and he properly asked her to step out of the car, the officer properly seized, under the plain view doctrine, a gun which he had observed partially sticking out of a briefcase lying

on the floorboard of the automobile; furthermore, the officer was justified in conducting a more thorough search of the briefcase for his own protection, and contraband other than weapons found in the briefcase did not have to be suppressed.

Am Jur 2d, Searches and Seizures § 88.

Validity of seizure under Fourth Amendment "plain view" doctrine—Supreme Court cases. 75 L. Ed. 2d 1018.

6. Searches and Seizures § 11 (NCI3d)— search of briefcase in another's possession—defendant's rights not infringed

Defendant failed to show that the search and seizure of a "purse/briefcase" in the possession of a passenger in his automobile infringed upon his own personal rights under the Fourth Amendment, and defendant's motion to suppress its contents was properly denied by the trial court.

Am Jur 2d, Searches and Seizures §§ 85, 97.

APPEAL by defendant from order entered 16 January 1990 by *Judge Samuel A. Wilson III* and judgment entered 24 April 1990 by Judge Robert M. Burroughs in MECKLENBURG County Superior Court. Heard in the Court of Appeals 8 April 1991.

Defendant Eric A. Hudson was indicted for trafficking in cocaine by transportation and possession in violation of G.S. 90-95(h), possession of drug paraphernalia in violation of G.S. 90-113.22, and carrying a concealed weapon in violation of G.S. 14-269. On 9 October 1989, defendant filed a motion to suppress evidence found during the warrantless search of the automobile he was driving on 7 January 1989. After hearing testimony and arguments on defendant's motion to suppress, the trial court made the following findings of fact and conclusions of law:

1. That on or about January 7, 1989, Charlotte Police Officer William R. Thompson operating a marked Police vehicle and wearing a Police uniform, observed a 1982 white Oldsmobile, Northbound on I-85; said 1982 Oldsmobile Cutlass had a 30-day tag and Officer Thompson could not read the expiration date, pulled in behind this vehicle, turned on his blue light and the vehicle pulled over approximately two miles from Beatties Ford Road. He asked the driver whom Officer Thompson identified to the Court as the Defendant, Eric A. Hudson, for

Driver's License and Registration; the Defendant Hudson stated he did not have either.

2. Defendant Hudson informed Officer Thompson that the white Oldsmobile Cutlass was a friend's vehicle; Officer Thompson requested Eric Hudson to step outside, instructed him to get into the Police vehicle while he checked the Vehicle Registration, while he checked with Department of Motor Vehicles. The Defendant informed Officer Thompson that his name was Eric Antonio Hudson.

3. Officer Mullhall came up behind Officer Thompson and asked Officer Thompson if he could assist. Officer Thompson asked him to run the vehicle identification number. Officer Thompson observed, Officer Mullhall speaking to the female seated in the front passenger seat of the white Oldsmobile although his main attention was to the driver. Officer Thompson upon finding that Defendant Hudson did not have a Driver's License, intended to cite him for No Operators License. His intention was not to place him under arrest. Defendant Hudson gave Officer Thompson no reason to search his vehicle, no consent to search his vehicle. Officer Thompson had no Warrant to search his vehicle.

4. The white Oldsmobile was not stolen, the VIN check later did not reveal that it was stolen.

5. Officer Thompson did not intend to cite Defendant Mobley and he observed no contraband or gun in plain view.

6. Officer P. J. Mullhall, Charlotte Police Officer for two and a half years on January 7, 1989, arrived at the scene in which Officer Thompson stopped the white Oldsmobile at approximately 5:45 p.m. He came up and saw Defendant Hudson in the back of Thompson's car. Thompson asked him to run the VIN number. He went to the white Oldsmobile and was writing down the VIN number. He asked the Defendant Mobley while he was at the car if she had an I.D. She said, "No." He walked up on the passenger, he observed at this time a newspaper in her lap. He then, after running the VIN check, walked up on the passenger side of the car. He again asked for identification. He was concerned because of the newspaper open on her lap, that Officer [possessed a] reasonable, projected feared [sic] that there might be a weapon beneath the newspaper

due to the placement of the newspaper, the newspaper was lying in her lap and not at an angle in which one would expect one to read a newspaper. To eliminate and alleviate his concern for his safety, he asked her to step out of the vehicle. At this time Defendant Mobley exited the vehicle with a purse/briefcase. The Officer also observed in plain view another briefcase on the floorboard of the vehicle with the butt of a gun out of it. Officer Mullhall then opened this briefcase in the vehicle and observed two handguns, one .41 magnum and a .357 magnum, a sum of money and two boxes of Manitol [sic]. Officer Mullhall then took the briefcase way [sic] from the Defendant Mobley that she had on her person and found within it two bags of what has been stipulated to be cocaine and a .22 caliber revolver. Officer [sic] Mobley did not say anything to Officer Mullhall at this time. Although when he did ask her if the briefcase she was holding was hers, she said, "Yes." He then placed her under arrest and advised Officer Thompson what he had.

7. Defendant [sic] Thompson then told Officer Mullhall that he wanted his money. Officer Mullhall asked if he was "owning up" to being the owner of the briefcase in the floor and Defendant Hudson said "yes." Other than these statements, no statements were made after [Defendants were] placed under arrest. At the time Officer Mullhall was getting the VIN number, it was dusk.

8. At the time that he arrived at the scene where Thompson had stopped, at the time Officer Mullhall arrived at the scene where the Oldsmobile was stopped, some cars had lights on and some didn't. Officer Mullhall, the first time he was at the car could observe the newsprint on [sic] the vehicle. After he ran the VIN check, the vehicle came back not stolen and was registered under a current 30-day tag. Officer Mullhall observed nothing in plain view until the newspaper was moved.

Officer Mullhall both when he was first getting the VIN number off the vehicle and when he again approached the car to ask Mobley, Defendant Mobley for her I. D., was in fear that she was hiding something although she remained in the car. Officer Mullhall also noted that the light was not on and the newspaper was still in her lap. Officer Mullhall took approximately five to ten minutes to do the VIN check

from the time he got the VIN number until he re-approached the car. After Defendants Mobley and Hudson were arrested and taken to Charlotte Law Enforcement Center, Officer McCain went with Defendant Mobley to the rest room after being requested to do so by Officers investigating the case. This, of course, was Charlotte Police procedure to get female Officers to go with Defendants to the rest room. She removed her handcuffs and her jacket and patted her down to make sure she had no weapon. Defendant Mobley went into the stall but did not flush when she was finished because she had told Officer McCain she was not sure if she was supposed to do so. Officer McCain did not observe anything in the commode in the nature of contraband. Following this, Officer McCain told Defendant Mobley that she was going to search her coat which she did so and then she instructed Defendant Mobley to pull out the front part of her bra. Officer demonstrated this and when Defendant Mobley pulled out her bra, a white bag later determined being cocaine fell out. Defendant Mobley stated she did not know where that, that the bag was in there. Officer McCain patted her down in the rest room for her own safety and further search of her coat and of her bra were pursuant to a lawful arrest.

WHEREFORE, based on the forgoing [sic] Findings of Fact, the Court makes the following Conclusions of Law:

1. That the Defendant Hudson along with Defendant Mobley were lawfully stopped by Officer W. R. Thompson.

2. That Officer P. J. Mullhall had reasonable, articuable [sic] suspicion to ask the Defendant Hudson [sic] to exit the vehicle.

3. That the butt of the gun was in plain view following Defendant Mobley exiting the vehicle.

4. That Officer Mullhall had a reasonable belief that the Defendant Hudson [sic] might pose a threat to his safety and the safety of Officer Thompson. That the Defendant Hudson [sic] was in close proximity to a deadly weapon at the time that Officer Mullhall formed his belief that she could be dangerous in getting control of the weapon. That the search of the briefcase on the person of Defendant Hudson [sic] was made to ensure Officer Mullhall and Thompson's physical safety.

5. That cocaine seized from Ms. Mobley following Officer McCain's search was pursuant to a lawful arrest.

6. And, that the statements that Defendant Mobley made concerning the cocaine were not the fruit of unconstitutional arrest or an unconstitutional search.

WHEREFORE, based on the foregoing Findings of Fact and Conclusion of Law, it is Ordered, Adjudged and Decreed that Defendant Hudson's Motion to Suppress Evidence seized is DENIED.

The motion to suppress was denied on 16 January 1990. After the State presented its evidence at trial on 23-24 April 1990, defendant pled guilty to all charges pending against him and pursuant to G.S. 15A-979(b) reserved his right to appeal the denial of his motion to suppress. On 24 April 1990, defendant was sentenced to serve eleven years in prison and was fined $50,000. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Joseph P. Dugdale, for the State.

Goodman, Carr, Nixon & Laughrun, by George V. Laughrun II, for defendant-appellant.

EAGLES, Judge.

Defendant argues that the trial court erred in denying his motion to suppress. Defendant contends that the trial court erred in concluding that the stop and the subsequent search were constitutionally permissible. After careful review of the record, we find no error.

When reviewing a trial court's order denying a motion to suppress, the scope of appellate review is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

When the police seize evidence from a vehicle, the first inquiry involves ascertaining the lawfulness of the activity by which the police obtained access to the vehicle and entered it. *State v. Gray*, 55 N.C. App. 568, 286 S.E.2d 357 (1982). Defendant contends that

the police lacked reasonable suspicion of illegal conduct to make the stop. Defendant further argues that the investigatory stop was merely a pretext for an unlawful exploratory search and that the evidence arising from this search should be suppressed. We disagree.

[1] On this record the evidence is adequate to support the trial court's conclusion that the defendant's vehicle was lawfully stopped by Officer Thompson.

> A police officer may conduct a brief investigative stop of a vehicle where justified by specific, articulable facts which give rise to a reasonable suspicion of illegal conduct. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 880, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607, 616 (1975); *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889, 909 (1968). However, police may not make *Terry*-stops merely on the pretext of a minor traffic violation. *United States v. Smith*, 799 F.2d 704, 710-11 (11th Cir. 1986).
>
> In determining the traffic stop was pretextual, the trial court should look at what a reasonable officer *would* do rather than what an officer validly *could* do. *Id.* [Emphasis in original.]

State v. Morocco, 99 N.C. App. 421, 427, 393 S.E.2d 545, 548 (1990). The officer testified at the hearing that the 30-day temporary tag was illegible because both the expiration date and the numbers were "faded out." G.S. 20-79.1(e) states that the date of issuance and expiration are to appear "clearly and indelibly on the face of each temporary registration plate." *See* G.S. 20-79.1(k), 20-63(c). From this testimony, the trial court had sufficient competent evidence from which to conclude that the officer had an articulable and reasonable suspicion that the tag may have been more than thirty days old in violation of G.S. 20-79.1(h) and that the vehicle may have been improperly registered with the Department of Motor Vehicles in violation of G.S. 20-50. A violation of either G.S. 20-50 or G.S. 20-79.1 is a misdemeanor offense. G.S. 20-176(a). *See State v. Gray*, 55 N.C. App. 568, 286 S.E.2d 357 (1982). Defendant's reliance on *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) is misplaced. In *Prouse*, the Court held that an articulable and reasonable suspicion that an automobile was not registered was a valid ground for stopping an automobile and detaining the driver in order to check his driver's license and vehicle registration. *Id.* at 663, 99 S.Ct. at 1401, 59 L.Ed.2d at 673.

[2] Immediately after stopping defendant's vehicle here, Officer Thompson asked defendant for his driver's license and for the vehicle's registration. "Any person operating or in charge of a motor vehicle, when requested by an officer in uniform . . . who shall refuse, on demand of such officer . . . to produce his license and exhibit same to such officer . . . for the purpose of examination . . . shall be guilty of a misdemeanor." G.S. 20-29. Defendant stated that he did not have a driver's license. Operating a motor vehicle without being licensed by the Division of Motor Vehicles is a misdemeanor. G.S. 20-7(a), (o). Failure to carry one's license "at all times while engaged in the operation of a motor vehicle" is also a misdemeanor. G.S. 20-7(n), (o). Accordingly, the officers had sufficient probable cause to place defendant under arrest for these violations. *See U.S. v. Dixon*, 729 F. Supp. 1113, 1116 (W.D.N.C. 1990). Defendant stated that he did not have the vehicle registration card because the vehicle belonged to a friend. A registration card must be carried "at all times . . . in the vehicle to which it refers" and must be displayed "upon demand" of the officer. G.S. 20-57(c). Failure to comply with G.S. 20-57 is also a misdemeanor. G.S. 20-176(a). The faded condition of the temporary tag combined with the failure of the defendant to produce his driver's license and the vehicle's registration was enough to create an articulable and reasonable suspicion that the vehicle might have been stolen.

[3] We believe that the officer was also justified in asking the defendant to step out of his car after he failed to produce a driver's license or vehicle registration. The officer testified that there was a considerable amount of traffic on I-85 and that he asked the defendant to sit in the police car "so I could run his name through D.M.V. for my safety because it was dangerous on 85." The safety of an officer exposed to heavy traffic during a stop for a traffic violation is a legitimate concern and justifies the officer's request that the driver step out of the vehicle to a place nearby where the inquiry may be pursued with greater safety. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (per curiam). *See State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990). Furthermore, "out of a concern for the safety of the police, the Court has held that officers may, consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a

weapon." *New York v. Class*, 475 U.S. 106, 115, 106 S.Ct. 960, 967, 89 L.Ed.2d 81, 91 (1986).

[4] After defendant got out of the car, Officer Thompson asked Officer Mullhall to go to defendant's car and write down the vehicle identification number (VIN). Automobiles sold in the United States are marked with a unique identifying number which must be placed in a particular location on the automobile. *See* 49 C.F.R. 571.115 (1990). This number is used in a computer check to determine if the vehicle has been reported as stolen. An officer who has lawfully stopped a vehicle may locate and examine this number due to its importance and to the lack of a significant privacy interest in the number itself. *New York v. Class*, 475 U.S. at 111-14, 106 S.Ct. at 964-66, 89 L.Ed.2d at 88-90.

During the time Officer Mullhall was writing down the VIN, he noticed the passenger in the front seat with a newspaper opened fully and spread across her lap. The officer testified that his suspicion was aroused because it was dusk at this time and the newspaper was not being held at an angle suitable for reading. Officer Mullhall asked to see the passenger's identification. The passenger replied that she had no identification. After he completed the computer check on the VIN, Officer Mullhall returned to again ask the passenger if she had any identification. The officer testified that upon his return to the vehicle "[s]he was still sitting up there with the newspaper unfolded on her lap. Now, it takes time to run the VIN . . . it was close to darkness with no street lights on. The dome light was not on in the car." The officer also testified there was not enough light to read the newspaper at this time and that just minutes earlier he had had to use a flashlight to read the number on the VIN plate.

Based on his suspicion that the passenger may have been hiding a weapon under the newspaper, Officer Mullhall testified that he feared for his own safety and asked the passenger to step out of the car. "[P]olice may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous." *Michigan v. Long*, 463 U.S. 1032, 1047-48, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201, 1219 (1983). Furthermore, we note that the Court stated in *Terry* that

> [t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in

> the circumstances would be warranted in the belief that his safety or that of others was in danger. . . . And in determining whether the officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909 (citations omitted). Because of the passenger's lack of identification, the unmoved newspaper spread fully across her lap for five to ten minutes, and the likely inability to read because of the darkness, the trial court had sufficient competent evidence to conclude that Officer Mullhall possessed an articulable and reasonable suspicion that the passenger may have been trying to hide a weapon.

[5] Officer Mullhall testified that as defendant Mobley was stepping out of the car, he observed the butt of a gun sticking out of a briefcase lying on the floorboard of the automobile. We conclude from the record before us that the evidence in question was properly seized under the "plain view" doctrine.

> "When an officer's presence at the scene is lawful (and at least if he did not anticipate finding such evidence), he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime, even though the 'incident to arrest' doctrine would not apply; and such evidence is admissible."

State v. Bagnard, 24 N.C. App. 54, 57, 210 S.E.2d 93, 95 (1974), *cert. denied*, 286 N.C. 416, 211 S.E.2d 796 (1975) (citation omitted). Officer Mullhall was in a lawful position to make a plain view observation of the briefcase lying on the floorboard with the butt of a gun exposed. Additionally, the Supreme Court has upheld the validity of protective searches notwithstanding the plain view doctrine by stating

> the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or *hidden*, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of the weapons.

> . . . If a suspect is "dangerous," he is no less dangerous simply because he is not arrested.

Michigan v. Long, 463 U.S. at 1049-50, 103 S.Ct. at 3481, 77 L.Ed.2d at 1220 (emphasis added; footnote and citations omitted). *See California v. Acevedo*, --- U.S. ---, 59 U.S.L.W. 4559, 4564, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619, 634 (1991). ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.") Upon seeing the gun protruding from the briefcase, Officer Mullhall was justified in conducting a more thorough search of the briefcase for his own protection, as the trial court had sufficient competent evidence from which to conclude that he possessed an articulable and reasonable belief that the suspect was armed and could gain immediate control of the weapons. *Pennsylvania v. Mimms*, 434 U.S. at 111-12, 98 S.Ct. at 333-34, 54 L.Ed.2d at 337-38. Upon opening the briefcase, he saw a second gun, the money, and the two boxes of mannitol. "If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Michigan v. Long*, 463 U.S. at 1050, 103 S.Ct. at 3481, 77 L.Ed.2d at 1220 (citations omitted). The trial court's conclusion of law regarding the lawful seizure of the briefcase lying on the floorboard is amply supported by the findings of fact. Accordingly, defendant's argument is without merit.

[6] Defendant also contends that Officer Mullhall lacked sufficient probable cause to conduct a warrantless search of the other "purse/briefcase" that the passenger held onto when she got out of the car. When Officer Mullhall asked the passenger if this briefcase was hers, she responded, "Yes." Defendant has failed to show any ownership or possessory interest in this "purse/briefcase." "It is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another. . . . Absent ownership or possessory interest in the premises or property, a person has no standing to contest the validity of a search." *State v. Greenwood*, 301 N.C. 705, 707-08, 273 S.E.2d 438, 440 (1981) (citations omitted). Defendant has failed to meet his burden of proving that he had a legitimate expectation of privacy in the passenger's property. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Accordingly, we hold that defendant

failed to show that the seizure and search of the "purse/briefcase" infringed upon his own personal rights under the Fourth Amendment and that defendant's motion to suppress its contents was properly denied by the trial court.

Accordingly, we conclude that there is ample competent evidence to support the trial court's findings of fact and that the findings of fact support the trial court's conclusions of law.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

IN THE MATTER OF: J. A., RESPONDENT-APPELLANT

No. 9014DC596

(Filed 20 August 1991)

1. **Infants § 18 (NCI3d); Assault and Battery § 26 (NCI4th)—juvenile delinquency proceeding—assault by pointing gun—sufficiency of evidence**

Evidence was sufficient to withstand a motion to dismiss a delinquency petition for assault by pointing a gun where the four-year-old victim testified that the juvenile took a gun from one of her father's briefcases and pointed it at her.

Am Jur 2d, Assault and Battery § 31; Juvenile Courts and Delinquent and Dependent Children § 54.

2. **Infants § 18 (NCI3d); Rape and Allied Offenses § 5 (NCI3d)—juvenile delinquency proceeding—first degree sexual offense—sufficiency of evidence**

Evidence in a juvenile delinquency proceeding was sufficient to support a conviction of first degree sexual offense where it tended to show that an expert in pediatric social work interviewed the child victim who told her that the juvenile put his penis in her vagina and then demonstrated anal intercourse with anatomically correct dolls to show what the juvenile had done to her; this evidence was corroborated by the testimony of a Durham Police Department investigator and the victim's mother, both of whom were present at the inter-

view between the social worker and the victim; testimony by the physician who examined the victim the day after the incident revealed symptoms consistent with her claim of anal intercourse; and the victim herself testified that the juvenile placed his penis in her anus.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 54; Rape §§ 97, 98, 101; Sodomy §§ 45, 71, 72.

3. **Criminal Law § 73.5 (NCI3d)— statement for purpose of medical diagnosis or treatment—admissible hearsay**

Testimony by a pediatric social worker with the Duke Child Protection Team that the four-year-old victim told her that the juvenile anally penetrated the victim, though hearsay, was admissible as a statement for the purpose of medical diagnosis or treatment. N.C.G.S. § 8C-1, Rule 803(4).

Am Jur 2d, Expert and Opinion Evidence § 255; Infants § 17.5.

4. **Criminal Law § 73.1 (NCI3d)— improper hearsay testimony—similar testimony already properly admitted—error not prejudicial**

Inasmuch as a social worker's hearsay testimony was properly admitted, the fact that a Durham police investigator testified to information overheard at the same time as the social worker negated the possibility that defendant was prejudiced by its admission.

Am Jur 2d, Expert and Opinion Evidence § 255; Infants § 17.5.

5. **Constitutional Law § 349 (NCI4th)— hearsay testimony—witness available for cross-examination—right of confrontation not violated**

There was no merit to respondent's contention that he did not have an opportunity to cross-examine a sexual offense victim as to the hearsay testimony of a pediatric social worker and a police investigator, and that his constitutional right of confrontation was therefore violated, since the victim was available, testified at trial, and was subject to cross-examination; on direct examination the victim answered questions to establish her competency to testify, but at no point during or after her testimony did respondent challenge the competency of

her testimony; and respondent did not attempt to recall the witness.

Am Jur 2d, Criminal Law § 957.

APPEAL by respondent from order entered 12 December 1989 in DURHAM County District Court by *Judge Richard G. Chaney.* Heard in the Court of Appeals 17 January 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.

Ann F. Loflin for respondent-appellant.

WYNN, Judge.

Respondent appeals from an order adjudicating him delinquent and placing him on probation for one year following convictions of first degree sexual offense and assault by pointing a gun. For the reasons that follow, we find no error.

I

On 27 July 1989, Mrs. L and her husband, Mr. L (hereinafter referred to jointly as "the L's"), attended a concert leaving their four-year-old daughter, CL, and Mrs. L's seven-year-old stepbrother, KS, in the care of a thirteen-year-old neighborhood boy, JA (the parties' names were omitted from the record). Testimony at trial by the State's witnesses tended to show that during the evening, while playing a game of strip checkers, JA took off some of his clothes; he watched obscene movies with the children and they looked at magazines in which there were pictures of nude people; he touched CL's rectal area and he put something on her vagina which felt like water; he obtained a gun and pointed it at CL.

Upon returning from the concert, CL's parents noticed that their bedroom was messy. They also noticed that CL behaved strangely and exhibited explicit sexual behaviors. Shortly thereafter, CL informed Mrs. L that JA had touched her and that she along with JA and KS had watched a movie of people having sex.

The L's contacted Dr. St. Claire, who examined CL the morning after the alleged incident. She found that CL had a moderately red vaginal area with a moderate amount of cloudy discharge; the perianal and anal areas were red and irritated with a mucoid discharge that was not normally present.

Additional evidence for the State included testimony from Donna Mansour-Norris, a social worker with the Duke Child Protection Team and an expert in pediatric social work; S.M. Barringer, a youth investigator with the Durham Police Department; and, Carolyn Cole, Director of the Trauma Treatment Service at the Community Guidance Clinic, specializing in child sexual abuse. Their testimony based on their various separate interviews with CL tended to show that on the night that JA babysat for CL and KS, JA played strip checkers with the children; JA took off his pants and underwear and touched CL's vaginal area with his penis; JA put his penis inside CL's vagina; CL put cream on JA's penis and he put cream on her vagina; they looked at pictures of nude people in magazines and they watched movies showing nude people.

The respondent, JA, presented evidence which tended to show that during the evening in question, he, and the children went into the bedroom looking for a ball. While in the bedroom, KS found a game of strip checkers and asked if they could play with it. JA agreed and after playing with the game for a few minutes, KS took off his pants and underpants and told CL to do the same. CL took off her clothes and then put them back on. Afterwards, JA put the games back and they watched television until CL's parents returned. JA denied taking off any of his clothes; touching or fondling CL; looking at any adult magazines or movies; and pointing a gun at CL.

II

Respondent first assigns error to the trial judge's denial of his motion to dismiss the two petitions in this case on the ground that there was insufficient evidence to sustain a finding of guilt as to either first degree sexual offense or assault by pointing a gun.

From the outset, it should be noted that a motion to dismiss a juvenile petition is recognized by North Carolina statutory and case law. N.C. Gen. Stat. § 7A-631 provides that "all rights afforded adult offenders" are conferred upon respondents in juvenile adjudication hearings, subject to certain exceptions which are not applicable to the case at bar. In *In re Dulaney*, 74 N.C. App. 587, 328 S.E.2d 904 (1985), this court held that a juvenile respondent "is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *Id.* at 588, 328 S.E.2d at 906.

As in adult proceedings, "in order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged." *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985); *see also State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577 (1982). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence. *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

We will consider each charge in the case at bar separately to determine whether the evidence, in the light most favorable to the State, establishes the material elements of each charge sufficient to withstand a motion to dismiss.

A. Assault By Pointing A Gun.

[1] As to the charge that the respondent committed assault by pointing a gun, he contends that the evidence is insufficient to show that he intentionally and deliberately pointed the gun at CL. We disagree. CL testified that JA extracted the gun from one of her father's briefcases and pointed it at her. N.C. Gen. Stat. § 14-34 provides, in pertinent part,

> If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault . . . .

The pointing of a gun need only be done without legal justification to constitute assault under Section 14-34. *State v. Thornton*, 43 N.C. App. 564, 259 S.E.2d 381 (1979). As respondent does not contend that he had a legal justification to point the gun at the victim, the evidence in the light most favorable to the State compels us to find that there was sufficient evidence to withstand a motion to dismiss the petition for assault by pointing a gun.

B. First Degree Sexual Offense.

[2] The respondent next alleges that the evidence was insufficient to support the conviction of first degree sexual offense. Specifically, he contends that the State failed to establish that there had been a sexual act committed. The elements of first degree sexual offense as applied to the facts of this case where the child-prosecutrix is 4 years old, are set forth in N.C. Gen. Stat. § 14-27.4(a)(1) which states as follows:

(a) 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:

The term "sexual act" as used in this statute means cunnilingus, fellatio, analingus, or anal intercourse. *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986). It also means the penetration, however slight, by any object into the genital or anal opening of another's body. *Id.*

Testimonial evidence by Ms. Mansour-Norris, an expert in pediatric social work, established that CL told her that JA put his penis in her vagina and that CL demonstrated with anatomically correct dolls, the male doll's penis going into the female doll's buttocks to show what JA did to her. This evidence was corroborated by the testimony of Investigator Barringer of the Durham Police Department and CL's mother, both of whom were present at the interview between Ms. Mansour-Norris and CL.

Additionally, testimony by the physician, Dr. St. Claire, who examined and treated CL the day after the incident revealed that CL's anal area was red and irritated with a mucoid discharge that had not been present at previous examinations. Dr. St. Claire opined that the redness and discharge in the anal area "could be consistent with anal penetration." Further, Carolyn Cole testified that in an interview with her, CL stated that JA hurt her "bum" with his penis and that he touched and hurt her.

Most significantly, CL testified as follows:

Q. CL, when JA touched you, did he touch you on the inside or on the outside?

A. Outside.

Q. On the outside? Did he ever touch you with anything on the inside?

A. Hmm . . . unh-unh.

. . . .

Q. All right. And can you tell me where it is that your body got touched?

A. Hmm . . . just on my bum.

Q. And who touched your bum?

A. Hmm . . . JA.

Q. What did he touch your bum with?

A. His penis.

This evidence, in the light most favorable to the State and allowing every reasonable inference to be resolved in favor of the State, is sufficient to establish each element of sexual offense to withstand a motion to dismiss.

III

Respondent next assigns error to the admission of hearsay testimony to substantively prove an element of first degree sexual offense. His argument is two-fold: 1) that the trial court improperly allowed as evidence inadmissible and prejudicial hearsay testimony, and 2) that such evidence was admitted in violation of his constitutional right to confrontation. We will address each of these contentions separately.

A. Admissibility of the Hearsay.

Respondent contends that the hearsay statements of Mrs. L, Carolyn Cole, Donna Mansour-Norris and Investigator Barringer were improperly admitted and that the admission of such evidence requires dismissal of the charge of first degree sexual offense.

First, we note that the testimony of Carolyn Cole was admitted for purposes of corroboration only. Respondent does not contend that the statements of this witness were not corroborative of the statements of CL. As such, we find that her testimony was properly admitted for that purpose.

[3] As to the hearsay testimony of Ms. Mansour-Norris, respondent contends that the testimony was not admissible hearsay because the interviews conducted with CL were for the purpose of preparing for litigation and not for the purpose of medical diagnosis. With respect to statements made for purposes of medical diagnosis and treatment, N.C.R. Evid. 803(4) (1988) provides that the following statements are not excluded by the hearsay rule:

> (4) Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or

> treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

In defining the pertinency of medical diagnosis or treatment, this court, in *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988), stated that:

> In determining the purpose of a medical examination our Courts have considered the following factors: (1) whether the examination was requested by persons involved in the prosecution of the case; (2) the proximity of the examination to the victim's initial diagnosis; (3) whether the victim received a diagnosis or treatment as a result of the examination; and (4) the proximity of the examination to the trial date.

Id. at 591, 367 S.E.2d at 144 (citations omitted).

Considering the facts of this case in light of the factors set forth in *Jones*, we find that: 1) CL was brought to Dr. St. Claire by her mother for medical evaluation the day after she revealed the incident to her mother. Moreover, the Duke Child Protection Team coordinated its findings with the physician to constitute the team's medical evaluation. 2) The proximity of the examination to diagnosis was one day; Mrs. L took CL to the clinic the next day after seeing Dr. St. Claire. 3) CL was seen by Ms. Mansour-Norris for one month after she was first diagnosed as being sexually abused. She was seen again by Dr. St. Claire for follow-up on the treatment which she recommended. 4) The trial was held approximately three months after the last visit with Dr. St. Claire. On these facts, we find that the statements CL made to Ms. Mansour-Norris were for the purpose of medical diagnosis or treatment. Accordingly, Ms. Mansour-Norris' testimony that CL told her that JA anally penetrated her is admissible as a statement for the purpose of medical diagnosis or treatment within the meaning of Rule 803(4). *See Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (hearsay statements made to a Duke Child Protective Team social worker held admissible despite the fact that the victim's mother took her to Duke Medical Center Pediatric Clinic on the recommendation of the prosecuting attorney).

As to the hearsay statements of Investigator Barringer, respondent contends that this testimony did not qualify as a state-

ment made for the purpose of medical diagnosis within the meaning of N.C. R. Evid. 803(4) (1988) as Investigator Barringer was neither a physician nor a psychiatrist.

[4] Investigator Barringer's testimony does not fall within any recognized hearsay exception, and thus, should not have been admitted. However, as Investigator Barringer heard the out of court declarations at the same time and under the same circumstances as Ms. Mansour-Norris, the admission of Investigator Barringer's hearsay testimony is harmless error. Inasmuch as we have determined that Ms. Mansour-Norris' hearsay testimony was properly admitted, the fact that Investigator Barringer testified to information overheard at the same time as Ms. Mansour-Norris negates the possibility that defendant was prejudiced by its admission. We find that there was no prejudicial error in the admission of Investigator Barringer's hearsay testimony. This assignment of error is overruled.

B. The Right to Confrontation.

[5] Respondent further assigns error to the trial judge's admission of hearsay testimony against him when the declarant testified in court and did not testify as to the hearsay evidence presented by other witnesses. He contends that he was denied his constitutional right to cross-examination in that the declarant was available and the admitted hearsay testimony did not fit into any exceptions to the hearsay rule.

The Supreme Court of the United States set forth the following two-part test for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause:

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . ., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."

Idaho v. Wright, --- U.S. ---, ---, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638, 651-652 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed.2d 597 (1980)).

In *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), the United States Supreme Court explained that the effect of the Confrontation Clause is to bar admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. The Court, in *Green*, also set forth the relationship between hearsay rules and the Confrontation Clause:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

Id. at 155-56, 26 L.Ed.2d at 495 (citations omitted).

Further, in *Green*, the Court set forth the underlying purpose for the Confrontation Clause:

> Our own decisions seem to have recognized at an early date that *it is [the] literal right to confront the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause*:
>
> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-243, 39 L. Ed. 409, 411 (1985).

Green, 399 U.S. at 157-58, 26 L.Ed.2d at 496-97 (emphasis added).

The crucial difference between the requirements of the Confrontation Clause and the hearsay rule is the unavailability of the witness for cross-examination. The exceptions under which the hearsay testimony in this case was admitted do not require the witness to be unavailable. However, for purposes of the Confrontation Clause the declarant must be unavailable, either legally or factually.

Respondent alleges that he did not have an opportunity to cross-examine CL as to the hearsay testimony of Ms. Mansour-Norris and Investigator Barringer. The facts clearly do not support his argument. CL was available and, indeed, testified at trial and was subject to cross-examination. On direct examination, CL answered questions to establish her competency to testify and at no point during or after her testimony did respondent challenge the competency of her testimony. As such, she was not unavailable for cross-examination. Respondent could have recalled the witness, subject to the trial judge's discretion. Having failed to do so, he cannot be heard to complain on appeal and, therefore, this assignment of error is overruled.

IV

For the foregoing reasons, we find

No error.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., CENTRAL TELEPHONE COMPANY—NORTH CAROLINA, GTE SOUTH, INC., CAROLINA TELEPHONE AND TELEGRAPH COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE ATTORNEY GENERAL OF NORTH CAROLINA, AND THE PUBLIC STAFF—UTILITIES COMMISSION, APPELLEES v. CENTEL CELLULAR COMPANY, RALEIGH/DURHAM MSA LIMITED PARTNERSHIP, FAYETTEVILLE MSA LIMITED PARTNERSHIP, TELESPECTRUM, INC., CENTEL CELLULAR COMPANY OF NORTH CAROLINA, CAROLINA METRONET, INC., TRIAD METRONET, INC., FAYETTEVILLE CELLULAR TELEPHONE COMPANY, MCCAW CELLULAR COMMUNICATIONS, INC., METRO MOBILE CTS OF CHARLOTTE, INC., VANGUARD CELLULAR SYSTEMS, INC., AND GTE MOBILE COMMUNICATIONS INCORPORATED, APPELLANTS; UNITED STATES CELLULAR CORPORATION OF NORTH CAROLINA, CROSS-APPELLANT

No. 9010UC1133

(Filed 20 August 1991)

Telecommunications § 1.2 (NCI3d) — cellular telephones — wide area call reception — rates

The Utilities Commission did not err by ordering cellular telephone carriers to pay access charges to local exchange companies when providing wide area call reception (WACR) to customers, even though WACR technology has now eliminated part of the connection process so that the landline interexchange carrier (IXC) and one of the local exchange companies (LECs) are bypassed and even though a traditional long distance call may be local on cellular. In discharging its regulatory responsibilities the Commission must consider the charges that telephone companies make for their services and their impact on the local exchange customers and only permit additional service if the Commission finds that it will not jeopardize reasonably affordable local exchange service. Cellular calls displace remunerative revenues that traditionally go to the LECs and IXCs and which directly contribute to the maintenance of reasonable local rates. N.C.G.S. § 62-110(b).

Am Jur 2d, Public Utilities § 240; Telecommunications § 20.

Judge GREENE concurring.

APPEAL by applicants from order entered 11 May 1990 by the North Carolina Utilities Commission. Heard in the Court of Appeals 13 May 1991.

On 9 May 1989 Raleigh/Durham MSA, Fayetteville MSA, United TeleSpectrum, and Centel Cellular Company (carriers) filed with the North Carolina Utilities Commission a revised tariff to offer wide area call reception (WACR). The new service would allow cellular customers to receive calls placed to their local cellular telephone number when traveling outside their home service area. The Public Staff for the North Carolina Utilities Commission (Public Staff) moved to suspend the tariffs on 19 July 1989 on the grounds that "these tariffs raise substantial generic questions and that the Commission should suspend these tariffs until it has determined whether cellular carriers should be allowed to offer long distance service between service areas, and, if so, under what terms and conditions." On 31 July 1989 the Commission granted the motion prohibiting Centel from carrying traffic between Metropolitan Statistical Areas (MSAs) over its own facilities (except as previously authorized) pending an investigation and hearing. The Attorney General and the following companies were allowed to intervene: United States Cellular Corporation of North Carolina, AT&T Communications of the Southern States, Inc., Carolina Metronet, Inc., Fayetteville Cellular Telephone Company, Triad Metronet, Inc., Carolina Telephone and Telegraph Company, Central Telephone Company, Vanguard Cellular Systems, Inc., Southern Bell Telephone and Telegraph Company, McCaw Cellular Communications, Inc., GTE South, Inc., and Metro Mobile CTS of Charlotte, Inc. By order issued on 11 May 1990 the Commission approved Wide Area Calling but required cellular carriers to pay access charges to the local exchange companies for calls carried from one cellular service area to another over cellular facilities (interCGSA). All the cellular carriers appealed the imposing of such charges.

Traditional telephone companies and long distance providers have long had a system of charges for long distance calls. LECs (local exchange companies, such as Southern Bell) provide long distance service between exchanges within their service areas—local access transport areas (LATAs). IXCs (landline interexchange carriers, such as AT&T) carry calls between different LATAs. With the introduction of cellular phone service the Utilities Commission had to allocate charges therefor. When the problem of integrating cellular service within the state's traditional landline

service first arose the technology of the cellular companies could only provide service within specific geographical areas, called Cellular Geographic Service Areas (CGSAs). But now a cellular company's service area may cover one or more traditional LEC exchanges; all or part of more than one LATA; and parts of one or more than one state; and even intraCGSA service can consist of calls which, if placed by traditional means, would have been local, intraLATA long distance, interLATA long distance, or interstate long distance. Since the cellular service areas are superimposed on the service areas of traditional local and long distance telephone companies, what would have been a LEC long distance call to a neighboring town may be a local call on cellular service and what would have been a traditional long distance call may be local on cellular. Although the CGSAs are larger than the traditional LATAs, the Commission treated these areas as LATAs. The FCC and the Utilities Commission made concessions for the cellular companies by authorizing their service in the CGSA without regard to whether the calls would have been intraexchange, interexchange, interLATA, intraLATA, or interstate.

Before WACR, the cellular customer had difficulty communicating as he traveled out of his home CGSA, and a landline caller faced many obstacles in trying to reach a cellular customer. Cellular companies could not carry calls as customers moved from one CGSA to another, and the calls would have to be redialed. Landline callers trying to reach a cellular customer could only do so if they knew both the location of that customer and the distinct roamer access number associated with the area. WACR technology allows a caller to reach a traveling cellular customer by simply dialing that cellular customer's local cellular number. WACR applies to interCGSA calls only. The cellular system, using existing facilities, will automatically locate the cellular customer and complete the call. Another benefit of WACR is the ability to sustain ongoing conversations without the necessity of redialing the call once out of range of a particular CGSA. WACR service applies to (1) calls from a land-based telephone to a mobile cellular phone, (2) calls from a mobile telephone to a local land-based telephone, and (3) calls from a mobile cellular phone to another mobile cellular phone.

WACR technology eliminates part of the connection process for calls from one CGSA to another. Prior to WACR an interCGSA land-to-mobile call was routed from the land-based telephone through

a "local" land-based LEC, through a long distance interexchange carrier (IXC), through a "foreign" LEC, through a "foreign" cellular company to a mobile cellular telephone. Under WACR, the same call would be routed from the land-based telephone to a LEC, to a local cellular company, to a mobile cellular telephone; the IXC and the foreign LEC would be bypassed. The Commission's order requires the cellular companies to pay an access charge to the LECs for these calls.

Originally, the certificates of public convenience and necessity that were issued to the cellular companies gave each company a geographical service area or CGSA. The certificates did not authorize carriage of traffic between the areas. Analogizing the CGSA areas to LATAs and the cellular companies to LECs, the Public Staff asserts that by expanding their services to interCGSA the cellular companies take on the characteristics of IXCs and should be treated as such with respect to the LECs. The Utilities Commission agreed and in a well reasoned order found, *inter alia*:

> 5. The service eliminates the need for a person calling a cellular subscriber outside of his home service area (a "roamer") to dial an access number for the MSA in which the subscriber is located prior to dialing his mobile telephone number. The Applicants propose to carry calls themselves from the MSA in which the call is delivered to the cellular company to the subscriber in a distant MSA.
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> . . . .
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> 7. The rate structure for cellular companies to provide WACR should generally be based on the access charges paid by IXCs.

The Commission concluded that since cellular companies act like IXCs when they provide interCGSA service, it is only "fair and appropriate that cellular carriers should be required to pay access charges in these circumstances. The use of intrastate access charges will not thwart the use of wide area calling technology but it will minimize the prospect of harm to local rates and to subscribers of local service." The supporting evidence and conclusions stated in the order pertinent to this appeal were that WACR is analogous to long distance service and therefore:

1. The cellular company should pay the appropriate access charge from the access tariff of its connecting LEC for all intra and interLATA traffic carried over its own facilities.

2. The cellular company should pay the same rates charged to resellers—i.e., a WATS charge plus access charges—for intraLATA traffic carried over LEC facilities.

The Commission recognized that with the introduction of WACR the LECs would lose some revenues and the cellular companies would be directly competing with the IXCs for revenues.

Robert P. Gruber, Executive Director; Antoinette Wike, Chief Counsel, by Robert B. Cauthen, Jr., Staff Attorney, for Public Staff—North Carolina Utilities Commission, appellee.

Vice President-Administration/General Counsel Dwight W. Allen and Senior Attorney Jack H. Derrick for Carolina Telephone and Telegraph Company, appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos; and General Attorney Edward L. Rankin, III and General Attorney David M. Falgoust, for Southern Bell Telephone and Telegraph Company, intervenor-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, intervenor-appellee.

Crisp, Davis, Schwentker, Page & Currin, by Robert F. Page, for Centel Cellular Company, Raleigh/Durham MSA Limited Partnership, Fayetteville MSA Limited Partnership, TeleSpectrum, Inc., and Centel Cellular Company of North Carolina, appellants.

Parker, Poe, Adams & Bernstein, by Henry C. Campen, Jr., for GTE Mobile Communications Incorporated, Vanguard Cellular Systems, Inc., Carolina Metronet, Inc., Triad Metronet, Inc., and Fayetteville Cellular Telephone Company, appellants.

Law offices of Mitchell Willoughby, by John F. Beach and Mitchell Willoughby; and Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Kaylor, for Metro Mobile CTS of Charlotte, Inc., intervenor-appellants.

James E. Holshouser; and Law Offices of Mitchell Willoughby, by Mitchell Willoughby and John F. Beach, for McCaw Cellular Communications, Inc., intervenor-appellant.

No brief filed for United States Cellular Corporation of North Carolina, cross-appellant.

PHILLIPS, Judge.

The appellants' variously stated contentions amount to the following: The Utilities Commission erred by ordering cellular carriers to pay access charges to local exchange companies when providing wide area call reception to their cellular customers; the Commission should not have required the cellular carriers to compensate the LECs for lost tolls due to the implementation of WACR; paying these charges will thwart the development of WACR technology; the rate structure for cellular service should be divorced from the traditional rate structure for landline service because the technology is different.

After reviewing the whole record as required by G.S. 62-94 and finding that the Commission's order is supported by substantial evidence, we cannot agree. In discharging its regulatory responsibilities the Commission must consider the charges that telephone companies make for their services and their "impact on the local exchange customers and only permit such additional service if the Commission finds that it will not jeopardize reasonably affordable local exchange service." G.S. 62-110(b). Access charges were initially designed to provide the same levels of contribution to local rates that existed prior to AT&T's divestiture and the implementation of access charges. Some toll revenues have been lost as a result of WACR. The evidence indicates that most cellular calls are made in business hours, the highest rate period, and in the absence of WACR would have been placed over the landline facilities. Thus, cellular calls displace remunerative revenues that traditionally go to the LECs and IXCs; revenues which directly contribute to the maintenance of reasonable local rates. Under the appellants' scheme, a cellular customer faced with the choice of paying the long distance charges during business hours at the landline rate or paying the equivalent of the local rate under WACR will naturally use his cellular telephone as often as possible, thus cutting into LEC revenues.

The Commission has to view the disputed tariffs in light of the whole regulatory scheme, rather than in the isolated context of a new technology. The Commission's decision is supported by both evidence and reason. That a different decision could have been reached is no basis for reversing the decision that was made. *State ex rel. Utilities Commission v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987).

Affirmed.

Judge WELLS concurs.

Judge GREENE concurs in the result with a separate opinion.

Judge GREENE concurring in the result.

I agree with the majority that the Utilities Commission did not err in ordering cellular carriers to pay access charges to local exchange companies when providing WACR to their cellular customers. I disagree, however, that the speculative evidence of alleged lost toll revenues supports the Commission's order.

If the only justification for the Commission's order is the alleged lost toll revenues, the position suggested by the majority, then this Court must reverse the order for being "[u]nsupported by competent, material and substantial evidence in view of the entire record as submitted" and for being arbitrary. N.C.G.S. § 62-94(b)(5), (6) (1989). Although the testimony before the Commission established a *potential* for lost toll revenues, the evidence did not quantify the amount of any such lost revenues with any competent, empirical evidence. *See In re Cellular Radio Telecommunications Companies*, Docket No. P-100, Sub. 79, 75 P.U.R. 4th 327, 344 (N.C.U.C., June 6, 1986) (no competent, empirical evidence to quantify lost toll revenues). Furthermore, in a subsequent reconsideration order in which the Commission concluded that access charges were inappropriate for mobile-to-mobile interCGSA traffic, the Commission reasoned that the absence of evidence of the alleged lost toll revenues prohibited a finding that the access charges be assessed because of alleged lost toll revenues. *In re Tariff Filings by Raleigh/Durham MSA, Fayetteville MSA, United Telespectrum, and Centel Cellular Co. to Establish Rates for Wide Area Call Reception*, Docket No. P-100, Sub. 109 at 5 (N.C.U.C., Oct. 10, 1990). The Commission's reasoning in the reconsideration order

applies equally to the order under consideration. Accordingly, the speculative evidence of the alleged lost toll revenues cannot provide a basis for the access charges for land-to-mobile and mobile-to-land interCGSA traffic. A contrary holding would violate N.C.G.S. § 62-94(b)(5). Furthermore, in light of the reconsideration order which does not provide for access charges for mobile-to-mobile traffic because of the absence of competent, empirical evidence of the lost toll revenues, the order, which provides for access charges for land-to-mobile and mobile-to-land traffic based on speculative alleged lost toll revenues, is an arbitrary order prohibited by N.C.G.S. § 62-94(b)(6).

Nevertheless, based upon evidence that cellular companies function like IXCs when providing WACR to their cellular customers engaged in land-to-mobile and mobile-to-land calls, the Commission concluded

> when . . . [cellular companies] do provide . . . [interCGSA] service, they behave functionally like an IXC. A structure of access charges has already been erected, one of the major purposes of which is to provide support for the local network. This local network is important not only in an economic and technical sense as a gateway to landline subscribers but as a social nexus, the value of which increased as the society approaches universal service. There is no reason that cellular companies, when they behave like IXCs, should not share the costs and responsibilities of IXCs. This means payment of access charges.

In re Tariff Filings by Raleigh/Durham MSA, Fayetteville MSA, United TeleSpectrum, and Centel Cellular Co. to Establish Rates for Wide Area Call Reception, Docket No. P-100, Sub. 109 at 10 (N.C.U.C., May 11, 1990). The cellular companies argue that because technology, price, size, and competition distinguish cellular carriers from IXCs, the Commission acted arbitrarily in concluding that cellular carriers behave functionally like IXCs when providing WACR. However, various witnesses testified that in offering WACR for land-to-mobile and mobile-to-land traffic, the cellular companies operated much like IXCs because they use local exchange companies to originate and terminate calls. Accordingly, the Commission's conclusion on this point is supported by "competent, material and substantial evidence in view of the entire record as submitted," is not arbitrary, and supports the order that the cellular carriers

pay to local exchange companies access charges competitive with the access charges paid by the IXCs. N.C.G.S. § 62-94(b)(5), (6). I would affirm the Commission's order.

MANEOLA JENNINGS v. HELOISA JESSEN

No. 9021SC827

(Filed 20 August 1991)

1. **Rules of Civil Procedure § 37 (NCI3d)— case remanded for new findings, conclusions, and order—trial court not required to hear new evidence**

In an action for alienation of affections where the trial court entered default judgment for plaintiff because of defendant's repeated failure to comply with discovery requests, then entered judgment for plaintiff on her claim for damages, and the Supreme Court remanded to the trial court for "new findings, new conclusions, and the entry of a new order," the trial judge was not required to hear new evidence and make new findings of fact and conclusions of law, since, pursuant to N.C.G.S. § 1A-1, Rule 37(b)(2)(b), defendant was not entitled to offer evidence on any claim or defense; rather, it was within the trial judge's discretion to sanction defendant for violations of discovery orders.

Am Jur 2d, Appeal and Error § 974.

2. **Husband and Wife § 26 (NCI3d)— alienation of affections—loss of support—value to plaintiff—no evidence of lost income to plaintiff**

In an action for alienation of affections, plaintiff has the burden of proving not only that a loss of support proximately resulted from the tortious acts of defendant but also the value of such loss of support; therefore, there was insufficient evidence to show that plaintiff suffered compensatory damages of $200,000 where there was no evidence of income lost by plaintiff as a result of defendant's actions.

Am Jur 2d, Husband and Wife §§ 482, 491.

3. Husband and Wife § 26 (NCI3d)— alienation of affections— sufficiency of evidence to support punitive damages

Plaintiff in an action for alienation of affections presented sufficient evidence to entitle her to an award of $300,000 in punitive damages where the evidence tended to show that defendant and plaintiff's husband engaged in sexual intercourse and that the affair was replete with aggravating circumstances, specifically, that defendant had cohabited for several weeks with plaintiff's husband and was audacious enough to call plaintiff's home in an attempt to discover her husband's whereabouts.

Am Jur 2d, Husband and Wife § 485.

Punitive or exemplary damages in action by spouse for alienation of affections or criminal conversation. 31 ALR2d 713.

4. Husband and Wife § 26 (NCI3d)— evidence of compensatory damages insufficient—punitive damage award able to stand alone

Even though the trial court's order of compensatory damages was not supported by the evidence, its order regarding punitive damages could nevertheless stand alone, since plaintiff obtained a judgment by default, established her cause of action, and was at the very least entitled to nominal damages.

Am Jur 2d, Husband and Wife § 485.

Punitive or exemplary damages in action by spouse for alienation of affections or criminal conversation. 31 ALR2d 713.

5. Husband and Wife § 25 (NCI3d)— damages in alienation of affections action—expert witness

A witness's experience, knowledge, and training were sufficient for the judge in an alienation of affections action to conclude that the witness would be helpful in making a determination as to plaintiff's damages.

Am Jur 2d, Expert and Opinion Evidence §§ 33, 55-58; Husband and Wife § 487.

Judge GREENE dissenting.

APPEAL by defendant from Judgment entered 29 March 1990 in FORSYTH County Superior Court by *Judge John R. Friday*. Heard in the Court of Appeals 13 February 1991.

Theodore M. Molitoris for plaintiff-appellee.

William L. Durham for defendant-appellant.

WYNN, Judge.

Plaintiff commenced this alienation of affections action against defendant on 6 March 1987 requesting compensatory and punitive damages. On 16 April 1987, plaintiff served defendant with a notice of deposition to be held on 22 May 1987. On 18 May 1987, defendant motioned for a protective order seeking relief from the noticed deposition. On the scheduled deposition date, defendant failed to appear, and her motion for a protective order was denied this same date. Plaintiff next filed a motion to compel discovery which order was granted on 14 July 1987 and defendant was ordered to appear on 10 August 1987 to be deposed. Again, defendant failed to appear.

On 12 August 1987, plaintiff, pursuant to N.C. Rules of Civ. Procedure 26 and 37(b)(2) motioned to strike the defendant's answer and for a default judgment. During the scheduled hearing date of 31 August 1987, the trial judge deferred his ruling to give defendant until 4 September 1987 to present herself for deposition. Following defendant's third failure to appear, the trial court entered an order pursuant to Rules 37(b)(2), and 37(d) striking defendant's answer and granting plaintiff a default judgment and an evidentiary hearing concerning damages pursuant to Rule 55 of the North Carolina Rules of Civil Procedure.

Evidence was presented on the question of damages on 4 September 1987 and 15 September 1987. Defendant did not appear for either of these hearing dates. On 15 September 1987, the trial judge entered judgment in plaintiff's favor finding that defendant had damaged plaintiff in the amount of $200,000 compensatory damages and $300,000 in punitive damages. Defendant appealed, and her case was heard in this court on 26 January 1989. *See Jennings v. Jessen*, 93 N.C. App. 731, 379 S.E.2d 53 (1989).

A divided panel of this court upheld the decision of the trial court with Greene, J., dissenting. On appeal as of right our Supreme Court, in a per curiam decision, see *Jennings v. Jessen*, 326 N.C. 43, 387 S.E.2d 167 (1990), reversed the decision of this court and ordered the case remanded to the trial court for "new findings, new conclusions, and the entry of a new order."

On remand, the trial judge held a hearing on 10 February 1990 during which he heard additional arguments of counsel. On 26 March 1990, the trial judge entered additional findings of fact and conclusions of law, and reinstated his previous damages award to plaintiff. Defendant also made an oral motion to reopen the evidence which motion was denied. From these orders defendant appeals.

I

[1] First, defendant alleges that the trial court erred by denying her motion to reopen the evidence.

In the instant case, it was within the trial judge's discretion to enter a judgment by default for defendant's repeated failure to comply with discovery requests. G.S. 1A-1, Rule 37(b)(2)(c). *Accord McCraw v. Hamrick*, 88 N.C. App. 391, 363 S.E.2d 201 (1988). Additionally, the trial judge complied with Rule 55(b)(2) of the N.C. Rules of Civil Procedure and held an evidentiary hearing to determine the amount of plaintiff's damages. Defendant was given ample notice of this hearing and in fact had two chances to present evidence since the hearing was begun on 4 September 1987 and continued until 14 September 1987. Defendant chose not to attend, nor present any evidence at either of these scheduled hearings. Now defendant alleges that once the case was reversed by our Supreme Court that the trial judge was required to hear new evidence and make new findings of facts and conclusions of law. We do not agree.

On remand, a trial judge may find that pursuant to Rule 37(b)(2)(b), defendant is not entitled to offer evidence on any claim or defense. It is within the trial judge's discretion to sanction a party for violations of discovery orders. Moreover, defendant failed to comply with discovery three times, and obviously did not find it necessary to present any evidence at either evidentiary hearing. To hold that defendant is now entitled to present evidence because plaintiff has not established the amount of her damages would render meaningless the ability of a trial judge to enter default based on abuses of discovery orders. We, therefore, find no error.

II

Defendant next assigns error to the trial judge finding facts, making conclusions of law based upon those facts and entering judgment thereon. She contends that there was insufficient evidence

that plaintiff suffered compensatory damages of Two hundred thousand dollars ($200,000.00) and that she was entitled to punitive damages in the amount of ($300,000.00).

[2] The measure of damages in an action for the alienation of affections is the present value of support, consortium, health, feelings, reputation and proximate result of the defendant's wrongful conduct. *Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E.2d 104, 115 (1969). The plaintiff has the burden of proving not only that a loss of support proximately resulted from the tortious acts of defendant, but also the value of such loss of support. *Id.* at 213, 170 S.E.2d at 111. At the hearing on damages, plaintiff presented the same affidavit she presented to the court in her action for support against her husband detailing her expenses and income as of the time of the alienation of her husband's affections 1986-87. The affidavit does not provide evidence of income lost by plaintiff as a result of defendant's actions. As such, the evidence of loss is insufficient to support the findings of fact and the entry of the order in this case.

[3] Defendant next argues that plaintiff failed to prove that there were circumstances in aggravation of defendant's conduct to support an award of punitive damages. "Where the court sits as judge and juror, its findings of fact have the effect of a jury verdict and are conclusive on appeal if there is evidence to support them. Contradictions and discrepancies are to be resolved by the trier of facts." *Camp v. Camp*, 75 N.C. App. 498, 503, 331 S.E.2d 163, 166 (1985). Our review of this issue is limited to whether the findings of fact are supported by any evidence to support the conclusion that plaintiff recover of the defendant punitive damages in the amount of $300,000.

In this case the trial judge made the following pertinent findings of fact:

> 5. The Court finds in its orders that the defendant is a woman of some wealth and means in that she had traveled extensively before this action was commenced and has traveled extensively since that time.
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> . . . .
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> 9. . . . The defendant alienated the affections of Charles H. Jennings in that she traveled with him, provided a location in Brazil for him to regularly visit her and further came to

the United States and co-habited with him at a townhouse owned by Charles H. Jennings and Maneola S. Jennings.

10. The evidence further shows that during the plaintiff's marriage to Charles H. Jennings, the defendant spent two weeks on one occasion and three weeks on another occasion with the plaintiff's husband in a condominium owned by the plaintiff and her husband. During this time, the defendant called and telephoned the plaintiff from Brazil looking for the plaintiff's husband, Charles H. Jennings.

. . . .

12. The defendant's conduct has been wilful and malicious in that she purposely alienated the affections of Charles H. Jennings by her conduct with him and by engaging in sexual intercourse with him.

Our Supreme Court has held that punitive damages may be awarded in an action for alienation of affections where the conduct of the defendant was wilful, aggravated, malicious, or of a wanton character. *Powell v. Strickland*, 163 N.C. 393, 79 S.E. 872 (1913).

Defendant relies upon *Heist v. Heist*, 46 N.C. App. 521, 265 S.E.2d 434 (1980), to support her argument that the plaintiff was not entitled to punitive damages. In *Heist, supra*, there was no evidence that the defendant had engaged in sexual intercourse with the plaintiff's husband. In the case at bar, the court specifically found as fact that the defendant and plaintiff's husband had engaged in sexual intercourse and that the affair was replete with aggravating circumstances, specifically, that defendant had cohabited for several weeks with plaintiff's husband and was audacious enough to call plaintiff's home in an attempt to discover her husband's whereabouts. We find that the evidence supports the findings of fact and the conclusion that plaintiff was entitled to punitive damages of $300,000.00.

[4] Having concluded that the order of punitive damages was supported by the evidence, and that the order of compensatory damages was not supported by the evidence, we are left with the question of whether that part of the trial judge's order regarding punitive damages can stand alone. In *Hawkins v. Hawkins*, 101 N.C. App. 529, 400 S.E.2d 472 (1991), this court reiterated the general rule that once a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, which

in turn support an award of punitive damages. *Id.* at 532, 400 S.E.2d at 474 (citations omitted). This court further reasoned, "the failure of the plaintiff to actually receive an award of either nominal or compensatory damages is immaterial. The question thus becomes one of whether plaintiff in this case has established her cause of action for assault and battery." *Id.*

In the case *sub judice*, plaintiff obtained a judgment by default. She established her cause of action and is at the very least entitled to nominal damages. *Id.* Having so concluded, *Hawkins* compels the conclusion that the order awarding plaintiff punitive damages must be affirmed.

III

[5] Finally, defendant assigns error to the trial judge allowing Grady Adams to testify as an expert witness. Defendant contends that Adams did not have the requisite training, experience and knowledge to qualify as an expert witness. We do not agree.

A trial judge is afforded wide latitude in determining whether to allow expert testimony. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). His decision to allow expert testimony will be reversed only for an abuse of discretion. *State v. Parks*, 96 N.C. App. 589, 386 S.E.2d 748 (1989). With respect to qualifying a witness as an expert, this court has held, "It is not necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession." *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App. 512, 517-18, 361 S.E.2d 909, 913 (1987), *cert denied*, 321 N.C. 474, 364 S.E.2d 924 (citing *Bullard, supra*). The test for the admissibility of an opinion of an expert witness under Rule 702 is helpfulness to the trier of fact. *Matter of Wheeler*, 87 N.C. App. 189, 360 S.E.2d 458 (1987) (citations omitted).

In this case, Adams testified that he has thirty-five years in the finance field, that he had taken special courses, attended college in South Dakota and had been engaged in financial consulting for five years. Defendant argues that Adams' experience is primarily in evaluating investments in real estate and thus, he cannot qualify as an expert in determining the financial loss to a wife as a result of her separation from her husband. We do not agree. Adams demonstrated that his expertise is in placing figures provided by plaintiff into an equation to determine the present value of her

loss. We conclude that Adams' experience, knowledge and training were sufficient for the judge to conclude that he would be helpful in making a determination as to plaintiff's damages. Accordingly, we affirm the decision of the trial judge to qualify Adams as an expert.

For the foregoing reasons, the decision of the trial judge as to punitive damages is affirmed and the decision as to compensatory damages is vacated and remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part; vacated in part.

Judge WELLS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority opinion except for the part affirming the amount awarded as punitive damages after vacating the award of compensatory damages.

The amount awarded as punitive damages is a matter left to the sound discretion of the finder of fact. *Tripp v. American Tobacco Co.*, 193 N.C. 614, 618, 137 S.E. 871, 873 (1927). This discretion, however, is not without limits. This Court, and our Supreme Court, have noted certain factors which are to be considered in assessing the appropriate award of punitive damages. For example, the amount awarded "may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case." *Id.* The outrageous nature of the defendant's conduct is also a key consideration. *Cavin's Inc. v. Atlantic Mutual Ins. Co.*, 27 N.C. App. 698, 702, 220 S.E.2d 403, 406 (1975). Furthermore, although punitive damages are not *measured* by the extent of injury to the plaintiff, *Cavin's* at 702, 220 S.E.2d at 406, and although an award of punitive damages far in excess of actual damages may be sustained, actual damages to the plaintiff is a proper factor to be *considered* by the finders of fact in determining the amount of punitive damages. *See* 25 C.J.S. *Damages* § 126(1) p. 1164 (1966) ("[c]onsideration should be given to the actual damages. . . ."). Furthermore, this Court has observed the substantial likelihood that the amount of compensatory damages is taken into considera-

tion by the finder of fact when determining punitive damages. *See Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 617, 306 S.E.2d 519, 527 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E.2d 294 (1984) (where plaintiff established entitlement to punitive damages, but court erred in instruction on compensatory damages, new trial was required on issue of punitive damages because "there is a substantial likelihood that the two issues [compensatory and punitive damages] were so intertwined in the minds of the jurors that it would result in an injustice to remand this case for a new trial on one issue only") (quoting *Carawan v. Tate*, 53 N.C. App. 161, 167, 280 S.E.2d 528, 532 (1981), *modified and aff'd*, 304 N.C. 696, 286 S.E.2d 99 (1982)).

The United States Supreme Court recently acknowledged the relevance of the compensatory damages award to the punitive damages award. *Pacific Mutual Life Ins. Co. v. Haslip*, --- U.S. ---, 113 L.Ed.2d 1 (1991). In holding that the punitive damages award at issue was constitutional, the Court observed the fact that all punitive damages awards in Alabama are subject to post-verdict review by the Alabama Supreme Court, thus ensuring "that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* at ---, 113 L.Ed.2d at 22.

This interrelationship between compensatory and punitive damages therefore requires that if the compensatory damages award is vacated and remanded, the punitive damages award must also be vacated and remanded. Accordingly, in this case the award of punitive damages must be vacated, and the amount of punitive damages must be readdressed after the new compensatory damages award is set.

DEEMUS A. PULLIAM, JR. AND WIFE, LINDA C. PULLIAM, PLAINTIFFS-APPELLANTS v. CITY OF GREENSBORO, DEFENDANT-APPELLEE

No. 9018SC1222

(Filed 20 August 1991)

1. **Municipal Corporations § 21 (NCI3d)— sewage overflow—tort liability—no municipal immunity**

Defendant city was not immune from tort liability in an action in which plaintiffs sought damages for the negligent maintenance, operation, and repair of defendant's sewer lines, resulting in an overflow into plaintiffs' home. It seems to be the accepted practice in North Carolina for cities and towns to compete with private enterprise by the ownership and operation of public enterprises, including sewer services. Additionally, N.C. courts have clearly stated that municipalities act in a proprietary role in setting rates for public enterprise services. The modern tendency to restrict the application of governmental immunity must apply in this case.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 363.

Municipal operation of sewage disposal plant as governmental or proprietary function, for purposes of tort liability. 57 ALR2d 1336.

2. **Municipal Corporations § 21 (NCI3d)— sewage overflow—negligence of city—summary judgment improper**

The trial court improperly granted summary judgment for defendant city in a negligence action arising from a sewage overflow where the evidence showed that defendant had been notified of other blockages of this same sewer main and had failed to adequately inspect the mains for subsequent blockage; plaintiffs had suffered no damage to their home before defendant's crew responded to repair the clog; defendant possessed adequate equipment, if used properly, to unclog the sewer main; and raw sewage was forced through plaintiffs' sewer pipes and into plaintiffs' home during defendant's attempts to unclog the sewer main. This forecast of evidence was sufficient to raise the issues of whether defendant negligently failed to inspect its sewer lines or acted negligently in repairing the sewer lines.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 376, 388.

Municipality's liability for damage resulting from obstruction or clogging of drains or sewers. 59 ALR2d 281.

3. Municipal Corporations § 21 (NCI3d)— sewage overflow— application of city ordinance—absence of backflow valve— summary judgment

The trial court improperly granted summary judgment for defendant city in an action arising from a sewage overflow into plaintiffs' home where defendant alleged that the action was barred by a city ordinance concerning plumbing fixtures below street level and by the failure of plaintiffs to install a back-flow valve. The applicability of the ordinance would not absolve defendant, but would raise issues of whether plaintiffs' plumbing fell within the ordinance and whether such conditions contributed to their injury. The backflow valve issue was highlighted but not settled by the forecast of evidence.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 360.

APPEAL by plaintiffs from order dated 10 September 1990 in GUILFORD County Superior Court by *Judge W. Stephen Allen, Jr.* granting defendant's motion for summary judgment and dismissing plaintiffs' action.

The forecast of evidence in this record tends to show the following facts and circumstances. Since 11 June 1977 plaintiffs have owned a residence located at 515 Rocky Knoll Road in Greensboro, served by defendant's sewer system, subject to defendant's rates and charges for such service. On 30 July 1989 plaintiffs reported to defendant that raw sewage was overflowing from a manhole and running down Rocky Knoll Road. Defendant's responding crew used a power rodder to unclog the sewer main that was clogged by tree roots. While defendant's crew attempted to remove the obstruction from the sewer mains, raw sewage backed up and was forced through plaintiffs' connecting sewer line and overflowed into plaintiffs' home.

The overflow caused considerable damage to the lower floor of plaintiffs' home, including damage to plaintiffs' carpets, furniture and personal keepsakes. The sewage overflow also forced plaintiff

Linda Pulliam to temporarily close the business she operated inside their home.

On 29 December 1989 plaintiffs filed this action against defendant seeking damages for negligent maintenance, operation and repair of defendant's sewer lines. Defendant answered with general denials, asserted contributory negligence and also asserted the defense of governmental immunity. On 5 July 1990 defendant filed a motion for summary judgment. In an order dated 10 September 1990, the trial court granted defendant's motion for summary judgment and dismissed plaintiffs' action. Plaintiffs appeal.

Rivenbark, Kirkman, Alspaugh & Moore, by Jewel A. Farlow, for plaintiffs-appellants.

Nichols, Caffrey, Hill, Evans and Murrelle, by Joseph R. Beatty and Polly D. Sizemore, for defendant-appellee.

WELLS, Judge.

Plaintiffs assign error to the trial court's granting of summary judgment in favor of defendant. Plaintiffs contend that questions of material fact exist as to whether defendant's operation and maintenance of its sewer lines was a proprietary or governmental function; if a governmental function, then whether defendant waived its governmental immunity by participating in a risk pool; and if so, whether plaintiffs' forecast of evidence presented a material question of fact regarding defendant's negligence.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. 1A-1, Rule 56(c). A movant may show that he is entitled to summary judgment as a matter of law by presenting a forecast of evidence that shows an essential element of the opposing party's claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his or her claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974).

I. *Governmental Immunity*

[1] Plaintiffs contend that defendant was engaged in a proprietary function in the operation and maintenance of its sewer line. Defend-

ant contends that it was engaged in a governmental function in the operation and maintenance of its main sewer line and that immunity bars negligent liability.

Whether a municipality may be held liable for negligence depends on whether it acts in its governmental or proprietary capacity:

> "When power conferred has relation to public purposes and for the public good, it is to be classified as governmental in its nature and appertains to the corporation in its political capacity. But when it relates to the accomplishment of private purposes in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation."

McCombs v. City of Asheboro, 6 N.C. App. 234, 170 S.E.2d 169 (1969) (*quoting Metz v. Asheville*, 150 N.C. 748, 64 S.E.2d 881 (1909)).

Our courts have long noted that drawing the line between municipal operations which are proprietary and subject to tort liability versus operations which are governmental and immune from such liability is a difficult task. *Millar v. Wilson*, 222 N.C. 340, 23 S.E.2d 42 (1942) (noting that maintenance of public roads and highways is recognized as governmental while imposing liability on a municipality for negligent failure to keep its streets and sidewalks in reasonably safe condition as an "illogical" but uniformly applied exception); *Sides v. Hospital*, 287 N.C. 14, 213 S.E.2d 297 (1975) (First, noting that courts have applied one classification to an activity in general while applying the opposite classification to certain phases of the same activity; Second, noting that courts have applied a proprietary classification to the exact activities that courts have previously determined that expenditures for such activities, *e.g.* airports, garbage removal and public parks, are for a public purpose.). The "application of the [governmental-proprietary distinction] to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972).

Defendant's principal argument seems to be that due to the public's vital interest in sanitary sewer service, such service should be regarded as a governmental function. While this argument has superficial appeal, we do not find it to be dispositive.

In 1971, the General Assembly extensively revised and rewrote the statutory law relating to cities and towns in North Carolina. *See* Chapter 160A of the North Carolina General Statutes. In doing so, the legislature adopted a new Article 16, entitled Public Enterprises. G.S. § 160A-311 defines public enterprises:

§ 160A-311. Public enterprise defined.

As used in this Article, the term "public enterprise" includes:

(1) Electric power generation, transmission, and distribution systems;

(2) Water supply and distribution systems;

(3) Sewage collection and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems;

(4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase and/or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without;

(5) Public transportation systems;

(6) Solid waste collection and disposal systems and facilities;

(7) Cable television systems;

(8) Off-street parking facilities and systems;

(9) Airports.

N.C. Gen. Stat. § 160A-311 (1987). G.S. § 160A-314 provides:

§ 160A-314. Authority to fix and enforce rates.

(a) A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and pen-

alties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.

(b) A city shall have power to collect delinquent accounts by any remedy provided by law for collecting and enforcing private debts. . . .

N.C. Gen. Stat. § 160A-314 (1987). G.S. § 160A-319 provides:

§ 160A-319. Utility franchises.

A city shall have authority to grant upon reasonable terms franchises for the operation within the city of any of the enterprises listed in G.S. 160A-311 and for the operation of telephone systems. No franchise shall be granted for a period of more than 60 years, and cable television franchises shall not be granted for a period of more than 20 years. Except as otherwise provided by law, when a city operates an enterprise, or upon granting a franchise, a city may by ordinance make it unlawful to operate an enterprise without a franchise.

N.C. Gen. Stat. § 160A-319 (1987).

Over the years, an interesting pattern of public enterprise activity has emerged in North Carolina. While it appears that the dominant pattern of sewer services in municipalities is serviced by the municipality, according to the records of the North Carolina Utilities Commission, there are at least four municipalities in the State in which sewer service is provided by privately owned public utilities. In addition, there are eighty-eight privately owned public utilities providing service in non-municipal areas. There are seventy-two municipalities which provide electric service, both inside and outside municipal limits. There are eight municipalities which own and operate natural gas distribution systems. There are some municipalities which own and operate airports.

Thus, it seems to be an accepted practice in North Carolina for cities and towns to compete with private enterprise by the ownership and operation of these public enterprises recognized by the General Assembly. Additionally, our courts have clearly stated that in setting rates for public enterprise services, municipalities act in a proprietary role. *See Aviation, Inc. v. Airport Authority*, 288 N.C. 98, 215 S.E.2d 552 (1975), and *Town of*

Spring Hope v. Bissette, 53 N.C. App. 210, 280 S.E.2d 490 (1981). In *Aviation, Inc., supra*, the court flatly stated that "A municipality operating an airport acts in a proprietary capacity."

While we recognize the public's vital interest in dependable sanitary sewer service in municipal areas and that people living in cities and towns expect to have such service, it may be said that in today's society, electric service is also vital and that almost no one tries to live without its benefits. We also note with interest that those customers who don't pay their water and sewer bills are doomed to deprivation of that service however vital to clean living that service may be.

In the light of all this background, we are persuaded that the modern tendency to restrict the application of governmental immunity must apply in this case.

> . . . [W]e recognize merit in the modern tendency to restrict rather than to extend the application of governmental immunity. This trend is based, *inter alia*, on the large expansion of municipal activities, the availability of liability insurance, and the plain injustice of denying relief to an individual injured by the wrongdoing of a municipality. A corollary to the tendency of modern authorities to restrict rather than to extend the application of governmental immunity is the rule that in cases of doubtful liability application of the rule should be resolved against the municipality. (Citations omitted.)

Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897, *reh'g denied*, 281 N.C. 516 (1972).

Accordingly, we hold that defendant city is not immune from tort liability in the operation of its sewer system and is answerable to these plaintiffs for any negligent act which may have caused them injury and damage.

II. *Negligence*

[2] Plaintiffs next contend that their forecast of evidence presents a material question of fact regarding defendant's negligence. We agree.

A *prima facie* case of negligence liability is alleged when plaintiffs show that defendant owed a duty of care; defendant breached that duty; the breach was actual and the proximate cause of plaintiffs' injury; and damages resulted from the injury. *Frendlich v.*

Vaughan's Foods, 64 N.C. App. 332, 307 S.E.2d 412 (1983). Summary judgment is rarely appropriate in negligence cases where the standard of the reasonable prudent person is to be applied. *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988). In ruling on a motion for summary judgment, the court must consider the evidence in the light most favorable to the nonmovant, *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986), and give the non-movant all favorable inferences which may reasonably be drawn from the evidence. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E.2d 289 (1974). The moving party's "papers are carefully scrutinized and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

Viewed in the light most favorable to the non-movant, plaintiffs' evidence shows the following facts and circumstances. Prior to the events giving rise to this action, defendant had been notified of other blockages of this same sewer main and defendant failed to adequately inspect the mains for subsequent blockage. Despite the clogged sewer, plaintiffs had suffered no damage to their home before defendant's crew responded to repair the clog. Defendant possessed the adequate equipment, if used properly, to unclog the sewer main. During defendant's attempt to unclog the sewer main, raw sewage was forced through plaintiffs' sewer pipes and into plaintiffs' home. This forecast of evidence is sufficient to raise the issues of whether defendant negligently failed to inspect its sewer lines or acted negligently in repairing the sewer lines.

[3] Defendant further contends that the trial court properly granted defendant's motion for summary judgment because plaintiffs' claim is barred by Greensboro Code of Ordinance § 6-262, § 110.1 which states:

> If the owner of any building or structure starts and installs any plumbing fixtures in or above a floor which is below the level of the center line of the street in which the sewer line is serving the building is located, the city shall not be liable for any damage arising from such installation, and the owner shall be deemed to have released the City of Greensboro from any claim for damage caused by sewage backing up into any such plumbing fixtures.

The applicability of the ordinance would not absolve defendant in this case, but would raise the issues of: (1) whether plaintiffs'

plumbing fell within the purview of the ordinance, and (2) if so, whether such conditions contributed to plaintiffs' injury.

Defendant also asserts that the failure of plaintiffs to install a backflow valve on the sewer lateral on their property was a contributing cause of their injury and that such contributory negligence should bar plaintiffs' claim. The forecast of evidence merely highlights that issue; it does not settle it beyond question.

For the reasons stated, we hold that the trial court erred in granting summary judgment in favor of defendant.

Reversed.

Judges ARNOLD and PHILLIPS concur.

IN RE: FORECLOSURE OF DEED OF TRUST OF MICHAEL WEINMAN ASSOCIATES, GENERAL PARTNERSHIP

No. 9026SC1233

(Filed 20 August 1991)

1. **Mortgages and Deeds of Trust § 25 (NCI3d)— foreclosure—power of sale—refusal to release partial tract—defense**

The refusal of the seller to release a part of a tract of land from a deed of trust after a payment could be raised as a defense to the seller's right to foreclose. The trustee would exceed his authority under the deed of trust by foreclosing on the remainder of the property, including the disputed second tract, if respondent is entitled to have that tract released. N.C.G.S. § 45-21.16(d).

Am Jur 2d, Mortgages § 468.

2. **Mortgages and Deeds of Trust § 25 (NCI3d)— foreclosure—power of sale—refusal to release partial tract—failure to pay taxes**

The trial court correctly found in a foreclosure action that the seller's refusal to release a portion of the tract from the deed of trust was not justified by respondent's failure to pay ad valorem taxes where the deed of trust provided

that any failure to comply with its covenants would empower the trustee to sell where the default was not cured after written notice. Petitioner never notified respondent that taxes were owed until more than a year after respondent had paid for the partial tract.

Am Jur 2d, Mortgages §§ 284, 554.

Judge GREENE dissenting.

APPEAL by North Mecklenburg Associates from order denying authorization to proceed with foreclosure entered 21 September 1990 by *Judge Kenneth A. Griffin* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 5 June 1991.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by John W. Ervin, Jr., for petitioner.

Weinstein & Sturges, P.A., by L. Holmes Eleazer, Jr., T. LaFontine Odom and Thomas D. Myrick, for respondent.

LEWIS, Judge.

On 7 April 1988 petitioner, North Mecklenburg Associates (North Mecklenburg), conveyed to respondent, Michael Weinman Associates General Partnership (Weinman), a parcel of land in Mecklenburg County of approximately 400 acres. At the time of the conveyance Weinman executed a promissory note in favor of North Mecklenburg which was secured by a deed of trust upon the 400 acres. The terms of the deed of trust and note essentially required that Weinman pay off the note in four equal payments. One-fourth of the purchase price of $1,400,566.50 was to be paid immediately upon closing on 7 April 1988. The remaining three-fourths of the purchase price was to be paid in equal amounts on 7 April 1989, 7 April 1990, and 7 April 1991, along with accrued interest.

At the closing on 7 April 1988, Weinman paid $350,139.13 and received a release of a 100-acre tract of land from North Mecklenburg. The deed of trust contained a provision for further releases of land upon payments by Weinman, specifically:

> The Beneficiary agrees to release additional tracts of land from the Deed of Trust in direct proportion to principal payments made by the Grantor to the Beneficiary under the Promissory Note which is secured by this Deed of Trust. As to such Releases,

> the Grantor and the Beneficiary have agreed as follows: Approximately 100 acres of land shall be released on each of the principal payment dates, to wit, April 7, 1989, April 7, 1990 and April 7, 1991.

The deed of trust provided, however:

> Notwithstanding anything herein contained, Grantor shall not be entitled to any release of property unless Grantor is not in default and is in full compliance with all of the terms and provisions of the Note, this Deed of Trust, and any other instrument that may be securing said Note.

The deed of trust also required that "[Weinman] shall pay all taxes . . . lawfully levied against said Premises within thirty (30) days after the same shall become due."

On 7 April 1989 Weinman made a payment of $444,676.68 representing $350,139.12 of principal plus accrued interest. North Mecklenburg did not, nor has it ever, released a second 100-acre tract. On 7 April 1990 Weinman failed to make the third payment of principal and interest which was then due and has never made this payment. Weinman also failed to pay part of the 1988 ad valorem property taxes on the property when due and these taxes remained outstanding as of 10 August 1990.

After Weinman failed to make the 7 April 1990 principal payment, North Mecklenburg initiated foreclosure proceedings under the deed of trust. On 28 June 1990 a hearing was held before the assistant clerk of the Superior Court of Mecklenburg County who denied North Mecklenburg authorization to foreclose. North Mecklenburg appealed to Superior Court for a de novo hearing which was held 20 August 1990. At the conclusion of that hearing, the trial judge held that North Mecklenburg's right to foreclose was barred by its failure to release the second 100-acre tract of land upon payment by Weinman on 7 April 1989. The judge denied North Mecklenburg's petition to foreclose. North Mecklenburg appeals.

The issues are (I) whether Weinman's claim that it was entitled to the release of a 100-acre tract of land from the deed of trust could be raised as a defense to North Mecklenburg's right to foreclose at a hearing under N.C.G.S. § 45-21.16 (1984); and (II) whether Weinman's failure to pay a portion of the property taxes defeats its right to a release of the second 100-acre tract.

I

[1] A foreclosure sale pursuant to a power of sale contained in a deed of trust will be authorized only if the existence of the following four elements is found:

> (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such. . . .

N.C.G.S. § 45-21.16(d) (1984). In this case, the parties do not dispute that three of the four elements of § 45-21.16(d) are present. The only element in dispute is § 45-21.16(d)(iii), North Mecklenburg's "right to foreclose under the instrument." The right to foreclose exists "if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case." *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918, *appeal dismissed*, 301 N.C. 90, 273 S.E.2d 296 (1980).

Weinman argues that North Mecklenburg has a contractual obligation to release the second 100-acre tract prior to foreclosure because that tract was paid for, and that North Mecklenburg's failure to do so is a defense to the petition for foreclosure. Specifically, Weinman argues that the third element of § 45-21.16(d) is not present because North Mecklenburg has no right to foreclose the second 100-acre tract.

If Weinman is entitled to have the second tract released, the trustee would exceed his authority under the instrument by foreclosing on the remainder of the property including the second tract. The issue of the release of the second tract is therefore directly related to whether there is a "right to foreclose" under the instrument. The petitioner argues that the issue of the release may not be considered because such is not expressly provided in the statute. This Court has clearly stated that "[l]egal defenses which negate any of the requisite findings [necessary for foreclosure] are properly considered," because "to preclude presentation of legal defenses to the four requisites to authorization of sale would render the hearing provided by this statute a largely purposeless formality." *In re Foreclosure of Deed of Trust*, 55 N.C. App. 373, 375-76, 285 S.E.2d 615, 616 (1982), *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982).

II

[2] Weinman covenanted in the deed of trust to pay all taxes which would be levied against the property. The trial court found as fact, which is not disputed on appeal, that Weinman failed to timely pay a portion of the 1988 ad valorem property taxes.

However, the trial court was correct in finding that the petitioner's refusal to release the second tract was not justified by Weinman's failure to pay 1988 ad valorem taxes. The Deed of Trust provides that any failure to comply with the covenants contained therein will empower the trustee to sell where "such default is not cured within fifteen days after written notice." The record shows that North Mecklenburg never notified Weinman that taxes were owed and that neither petitioner nor Weinman knew that taxes were owed until more than a year after Weinman had paid for the second tract. The trustee is not empowered to foreclose on the second tract until demand or notice of nonpayment of taxes is given and Weinman fails to comply within fifteen days. *See Oliver v. Piner*, 224 N.C. 215, 29 S.E.2d 690 (1944). The trial court was therefore correct in finding that petitioner's failure to release the second tract bars its right to foreclose.

Affirmed.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

Assuming without deciding that Weinman's claim is of a type that can be raised in a foreclosure hearing, Weinman's failure to pay the property taxes defeats its right to a release of the second 100-acre tract of land.

Weinman covenanted in the deed of trust to pay all taxes which would be levied against the property within thirty (30) days after they became due. It is not disputed that Weinman failed to timely pay a portion of the 1988 ad valorem property taxes. Real property taxes are due on 1 September of the fiscal year in which they are levied. N.C.G.S. § 105-360(a) (1988) (applicable statute); *In re Foreclosure of Deed of Trust (Lorraine Corp.)*, 41 N.C. App. 563, 566, 255 S.E.2d 260, 262, *disc. rev. denied*, 298

N.C. 297, 259 S.E.2d 914 (1979). Ad valorem taxes for 1988 were due on 1 September 1988. The thirty-day grace period for payment of taxes provided for in the deed of trust expired on 30 September 1988. Thereafter, by failing to pay these taxes, Weinman was not in compliance with the terms of the deed of trust.

The deed of trust explicitly provides that "[n]otwithstanding anything herein contained, Grantor shall not be entitled to any release of property unless Grantor . . . is in full compliance with all of the terms and provisions of . . . this Deed of Trust . . . ." Because Weinman was not in compliance with the deed of trust at the time of the second payment of principal and interest, such noncompliance defeated Weinman's right to a release of the second 100-acre tract.

The majority holds that North Mecklenburg is precluded from foreclosing on the basis of the failure to pay taxes because North Mecklenburg failed to give proper written notice in accordance with the terms of the deed of trust. Although this may be true, the foreclosure sale was sought on the basis of the failure to make the 7 April 1990 payment of principal and interest, not the failure to pay the taxes. Thus, the issue is not whether North Mecklenburg could foreclose based upon the failure to pay taxes, but whether such failure to pay taxes defeats Weinman's right to a release.

The majority relies on the case of *Oliver v. Piner*, 224 N.C. 215, 29 S.E.2d 260 (1944), for the proposition that default on the deed of trust does not occur "relative to taxes until demand or notice is given and [Weinman] fails to comply." This reliance is misplaced for two reasons. First, the foreclosure in *Oliver* was based on the failure to pay taxes, whereas in this case, foreclosure was based on failure to make the second principal and interest payment. The failure to pay taxes here relates only to the right to a release. Second, the deed of trust in *Oliver* did not specify a time when taxes were due. Hence, the Supreme Court held notice was therefore necessary before initiating foreclosure. In this case, however, the time when taxes were due was clearly specified in the deed of trust. *See Lorraine Corp.* at 565, 255 S.E.2d at 262 (holding that *Oliver* does not control when deed of trust designates specific time when payment of taxes is due).

Because Weinman has no right to have the 100-acre tract released, North Mecklenburg's failure to release does not constitute a defense to the petition for foreclosure under N.C.G.S. § 45-21.16.

Accordingly, the trial court erred in refusing to authorize the foreclosure sale and I would reverse and remand this case for entry of an order authorizing the foreclosure sale to proceed.

Furthermore, Weinman is not without recourse. Weinman may file a suit to enjoin this foreclosure sale under N.C.G.S. § 45-21.34 in which it may assert any equitable ground sufficient to enjoin the foreclosure sale. *See* N.C.G.S. § 45-21.34 (1984) (injunction may be sought for any "equitable ground which the court may deem sufficient"); *In re Foreclosure of Deed of Trust (Helms)*, 55 N.C. App. 68, 72, 284 S.E.2d 553, 555 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 149 (1982) (equitable defenses to foreclosure should be asserted in action under N.C.G.S. § 45-21.34); *Burgess* at 604, 267 S.E.2d at 918 (action under N.C.G.S. § 45-21.34 available to remedy any prejudice after sale is authorized under N.C.G.S. § 45-21.16).

PEOPLES SAVINGS AND LOAN ASSOCIATION v. CITICORP ACCEPTANCE COMPANY, INC.

No. 9011SC1183

(Filed 20 August 1991)

Automobiles and Other Vehicles § 265 (NCI4th)— mobile home— perfection of security interest—first lien not lost by attaching mobile home to realty

The trial court properly concluded that the notation of a security interest on the certificate of title of a manufactured home pursuant to N.C.G.S. § 20-58 *et seq.* perfected the security interest in the home, and defendant's security interest did not lose its priority once the owner of the home removed the tongue, wheels, and axles, placed the home on brick and block foundation walls, and attached a front porch, rear deck, and septic system to the mobile home, since N.C.G.S. § 20-4.01(23) states that a "motor vehicle" includes "every vehicle designed to run upon the highway"; the North Carolina Supreme Court has held that a mobile home is designed to be operated upon the highways; and the word "designed" refers to the initial manufacturing design of a mobile home.

Am Jur 2d, Secured Transactions § 157.

APPEAL from order entered 15 August 1990 by *Judge Robert L. Farmer* in JOHNSTON County Superior Court. Heard in the Court of Appeals 5 June 1991.

On 28 March 1980, Iris Pennington purchased a mobile home. To finance the purchase, she signed a security agreement for a fifteen year mortgage provided by defendant. As purchaser of the mobile home, Pennington applied for a certificate of title from the Department of Motor Vehicles. G.S. 20-50, 20-52. At the time of Pennington's application, defendant placed a notation of lien on the certificate of title. G.S. 20-58. Defendant was listed as the first and only lienholder on the certificate of title issued to Pennington on 1 May 1980. Pennington transported the mobile home to Johnston County and placed it on a 3.4 acre tract of land purchased by her in 1979. The tongue, wheels, and axles were removed. Pennington placed the mobile home on brick and block foundation walls and attached a front porch, rear deck, and septic system to the mobile home.

On 13 August 1985, Iris Pennington Easter (the original purchaser) and her husband Gerald D. Easter executed a promissory note for a principal debt of $33,126.49 plus interest in favor of Freedlander, Inc. The Freedlander note was secured by a deed of trust on the 3.4 acre tract of land in Johnston County. The records of the Johnston County Tax Administrator's office for the 3.4 acre lot contained both a drawing of the dwelling which was labelled "mobile home" and a listing of the dwelling as a "mobile home" under the "Summary of Buildings." Freedlander did not contact the Department of Motor Vehicles to determine whether any prior liens were listed on the certificate of title nor did Freedlander record a lien in its own name on the certificate of title at this time.

The Easters made none of the payments required by the Freedlander note and also stopped making payments on their debt to defendant. On 16 March 1986, defendant repossessed the mobile home from the Johnston County site pursuant to its security interest recorded on the certificate of title issued 1 May 1980. On 20 November 1987, Freedlander conducted a foreclosure sale on the 3.4 acre tract of land pursuant to its deed of trust and received a high bid of $12,000. Plaintiff received an assignment of Freedlander's interest under the Freedlander note.

On 12 December 1988, plaintiff filed a complaint against defendant. Plaintiff alleged that it was unable to satisfy the indebtedness it originally secured by the deed of trust, leaving a $29,431.33 deficiency upon foreclosure. Plaintiff sought damages for conversion, trespass, and unfair trade practices.

Defendant moved for summary judgment on 10 July 1989. This motion was denied on 7 September 1989.

On 24 July 1990, plaintiff moved for summary judgment on the issue of liability. On 15 August 1990, plaintiff's motion for partial summary judgment was denied. The trial court made the following conclusion of law: "A security interest in a vehicle of a type for which a Certificate of Title is required shall be perfected only as provided in [G.S.] Chapter 20. Chapter 20 is applicable in determining any issues regarding the perfection of a security interest in the mobile home in this case." Plaintiff appeals.

Nichols, Miller & Sigmon, P.A., by R. Bradley Miller, for plaintiff-appellant.

Moore & Van Allen, by Robert D. Dearborn, for defendant-appellee.

EAGLES, Judge.

On the merits, this case involves a priority dispute between two parties claiming a security interest in a mobile home. The issue presented by this appeal is whether the trial court erred in denying plaintiff's partial summary judgment motion. Plaintiff argues that the trial court erred in "concluding that the notation of a security interest on the certificate of title of a manufactured home perfected the security interest in the home once the home became a fixture." We disagree with plaintiff and affirm the trial court's denial of plaintiff's motion for partial summary judgment.

Plaintiff argues that the order denying plaintiff's motion for partial summary judgment denied plaintiff a jury trial and "effectively determined the action" in favor of defendant. We agree. We note that *usually* "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). However, here we find that the order affects a substantial right and is appealable under G.S. 1-277 and 7A-27. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 148, 229 S.E.2d 278, 281 (1976) (allowing review on merits

from partial summary judgment order in a case involving priority of claims between two competing creditors).

Under our statutes, mobile homes are defined as motor vehicles. G.S. 20-4.01(23) defines a "motor vehicle" as "[e]very vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle." Our Supreme Court has held that "[a] mobile home is classified by statute as a motor vehicle. . . . A mobile home is designed to be operated upon the highways; and an owner who intends to so operate it is required to make application to the Department of Motor Vehicles for, and obtain, the registration thereof and issuance of a certificate of title for such vehicle. G.S. 20-50; G.S. 20-52." *King Homes, Inc. v. Bryson*, 273 N.C. 84, 88-89, 159 S.E.2d 329, 332 (1968). Here, the purchaser of the mobile home received the certificate of title on 1 May 1980.

G.S. 20-58 provides that "a security interest in a vehicle of a type for which a certificate of title is required shall be perfected *only* as hereinafter provided." (Emphasis added.) "A security interest in a mobile home is subject to the same perfection requirements as is an automobile." *In re Carraway*, 65 Bankr. 51, 55 (E.D.N.C. 1986). G.S. 20-58.2 provides that perfection of a security interest in a motor vehicle occurs when the application and proper fee are delivered to the Department of Motor Vehicles. Here, defendant perfected its security interest on 11 April 1980. Accordingly, defendant was listed as the first and only lienholder on the certificate of title issued to the purchaser on 1 May 1980.

Defendant's security interest, therefore, was already perfected when Freedlander received its promissory note from the Easters on 13 August 1985. "The security interest in a vehicle for which a certificate of title is required under Chapter 20 shall be perfected and valid against subsequent creditors of the owner, transferees, and holders of security interests and liens on the vehicle by compliance with the provisions of G.S. 20-58 *et seq.*" *Bank of Alamance v. Isley*, 74 N.C. App. 489, 493, 328 S.E.2d 867, 870 (1985). Plaintiff disagrees and argues that defendant's security interest lost its priority because once Pennington "made the home a fixture [she] no longer intended to operate it upon a highway." We disagree with plaintiff. G.S. 20-4.01(23) specifically states that a "motor vehicle" includes "every vehicle designed to run upon the highway" and our Supreme Court in *King Homes, Inc. v. Bryson*, 273 N.C.

84, 159 S.E.2d 329 (1968), held that "[a] mobile home is designed to be operated upon the highways" and is thus classified as a motor vehicle. In order to move the mobile home to Johnston County, the purchaser was required to have a certificate of title, which she applied for and received. Defendant properly perfected its security interest which is valid against subsequent creditors such as plaintiff. *Bank of Alamance v. Isley*, 74 N.C. App. 489, 328 S.E.2d 867 (1985). We note with approval the holding of *General Electric Credit Corporation v. Nordmark*, 68 Or. App. 541, 684 P.2d 1, *review denied*, 297 Or. 601, 687 P.2d 795 (1984), a case which also involved the priority of security interests in a mobile home. After concluding that under its statutes the word "designed" referred to the initial manufacturing design of a mobile home, the Oregon court held that despite the fact that the mobile home was attached to realty, the structure "was and remained a 'mobile home' " because "a building that is a mobile home as it leaves the manufacturer probably 'is forever a mobile home.' " *Id.* at 545, 684 P.2d at 3 (quoting *Clackamas County v. Dunham*, 282 Or. 419, 426, 579 P.2d 223, 226, *appeal dismissed*, 439 U.S. 948, 99 S.Ct. 343, 58 L. Ed. 2d 340 (1978)). Despite plaintiff's argument, the assumption that Pennington "no longer intended to operate [the mobile home] upon the highway" does not nullify defendant's properly perfected security interest in the mobile home. Furthermore, under our statutes even "[t]he cancellation of a certificate of title shall not, in and of itself, affect the validity of a security interest noted on it." G.S. 20-58.7. *See* G.S. 20-57(h).

Defendant contends that no fixture filing was required because G.S. 20-58 *et seq.* provides the exclusive method for a first mortgagee like itself to perfect a security interest in a mobile home. We agree. "[T]he provisions of Article 9 of the Uniform Commercial Code pertaining to the filing, perfection and priority of security interests do not apply to a security interest in any personal property required to be registered pursuant to Chapter 20, entitled 'Motor Vehicles,' unless such property is held as inventory and the security is created by the inventory seller. G.S. 25-9-302(3)(b)." *Bank of Alamance v. Isley*, 74 N.C. App. at 492, 328 S.E.2d at 869. *See Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972). G.S. 25-9-302(3) provides that "[t]he filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to . . . the following statute of this State: G.S. 20-58 *et seq.* as to any personal property required

to be registered pursuant to Chapter 20 of the General Statutes . . . ." The North Carolina Comment to G.S. 25-9-302 specifically states that "North Carolina has adopted Alternative A of subsection (3). The effect of that alternative is to preserve the operation of the North Carolina certificate of title law relating to motor vehicles and the perfection of security interests therein. G.S. 20-58 through 20-58.10." G.S. 25-9-302(4) provides that "[c]ompliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith. . . ."

Based on the language of G.S. 20-58 *et seq.*, we believe the legislature intended that this statute provide the exclusive method for a first mortgagee to perfect a security interest in a mobile home. As to the soundness of this policy, we also find convincing the reasoning of the Kansas Court of Appeals from a similar case:

> We find unconvincing the argument . . . that subsequent parties with an interest in the real estate are often unable to ascertain whether the structure on the property is a mobile home. While it may not be readily apparent whether the structure is or is not a mobile home, these parties can protect their interests by more careful inspection, by questioning the home owner, or by checking for a certificate of title. As a policy matter, it is more reasonable to require a party who subsequently obtains an interest in specific real estate to make inquiry concerning a structure located on the property than to require a party with a security interest in a mobile home to maintain constant vigilance regarding the whereabouts and alleged fixture status of the mobile home.

Beneficial Finance Company of Kansas, Inc. v. Schroeder, 12 Kan. App. 2d 150, 153-54, 737 P.2d 52, 55, *review denied*, 241 Kan. 838 (1987). *Accord Barnett Bank of Clearwater, N.A. v. Rompon*, 377 So.2d 981 (Fla. App. 1979). Parenthetically, we note that here, plaintiff, the subsequent creditor, had record notice from the records of the tax administrator's office that the dwelling on the 3.4 acre tract of land was a mobile home. Consequently, plaintiff was in the best position to protect its own interests.

From the record, it is clear that there are no factual issues remaining for trial. Additionally, at oral argument counsel for both

parties conceded that there were no factual disputes and that the only legal issue concerned the priority of liens. We conclude that the defendant's lien recorded on the certificate of title has priority. Accordingly, the trial court's order denying plaintiff's motion for partial summary judgment is affirmed and we remand with instructions for entry of summary judgment for defendant.

Affirmed and remanded.

Judges GREENE and LEWIS concur.

NORTH CAROLINA RAILROAD COMPANY v. FERGUSON BUILDERS SUPPLY, INC., A CORPORATION; MOREHEAD BUILDERS SUPPLY CO., A CORPORATION; BECKER BUILDING SUPPLY CO., A CORPORATION; PINE STATE CREAMERY COMPANY, A CORPORATION; MART L. BELL AND SONS PAVING CONTRACTORS, A CORPORATION; MART L. BELL, SR. AND HIS WIFE, MARY G. BELL; WADE & LEWIS, INC., A CORPORATION; WADE & LEWIS HEATING & AIR CONDITIONING, INC., A CORPORATION; PAUL W. LEWIS AND HIS WIFE, SANDRA S. LEWIS; WACHOVIA BANK & TRUST COMPANY, N.A., EXECUTOR OF THE ESTATE OF GEORGE R. BALLOU; WACHOVIA BANK & TRUST COMPANY, N.A., TRUSTEE; MILDRED H. BALLOU; HOBERT KELLY AND HIS WIFE, PATRICIA M. KELLY; JOHN HAMAD; BOLTON CORPORATION, A CORPORATION

No. 903SC768

(Filed 20 August 1991)

1. **Rules of Civil Procedure § 12.1 (NCI3d)— voluntary dismissal— two dismissal rule—motion to dismiss—treated as summary judgment**

The trial court erred by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) where defendants raised the two dismissal rule of N.C.G.S. § 1A-1, Rule 41(a)(1). In order to conclude that the action was barred by the two dismissal rule, the court necessarily had to consider both the complaints filed in the prior actions and the notices of dismissal. Complaints filed in prior actions are matters outside the pleadings

and the motion should be treated as a motion for summary judgment.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 23, 73.

2. Rules of Civil Procedure § 41.2 (NCI3d)— two dismissal rule— second dismissal by court order—not applicable

The trial court erred by dismissing plaintiff's complaint under the two dismissal rule of N.C.G.S. § 1A-1, Rule 41(a)(1) where the second dismissal was by order of the judge, not by the filing of a notice of voluntary dismissal.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 76.

What dismissals preclude a further suit, under federal and state rules regarding two dismissals. 65 ALR2d 642.

APPEAL by plaintiff from Order entered 16 April 1990 in CARTERET County Superior Court by *Judge James D. Llewellyn.* Heard in the Court of Appeals 12 February 1991.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by J. Christy Maroules, for plaintiff-appellant.

Bennett, McConkey, Thompson, Marquardt & Wallace, P.A., by Thomas S. Bennett and Samuel A. McConkey, Jr., for defendants-appellees.

WYNN, Judge.

On 18 December 1980, the Atlantic and East Carolina Railway Company (hereinafter "A&EC") instituted a civil action against the above-named defendants or their predecessors in title. The complaint alleged, *inter alia*, that A&EC, as a lessee, was in possession of certain lands upon which the defendants were continuously trespassing. The complaint also alleged that Atlantic and North Carolina Railroad Company (hereinafter "A&NC") was the owner of the land; however, A&NC was not a party to the action. On the day the case came on for trial, 24 June 1985, A&EC filed a notice of voluntary dismissal without prejudice, pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

On 23 June 1986, A&EC instituted another action against the above-named defendants or their predecessors in title. The com-

plaint made the same allegations and claims for relief as did A&EC's 1980 action, including the fact that A&EC was the lessee in possession of lands owned by A&NC. Again, as in the previous action, A&NC was not named as a party; however, pursuant to an order of the court, A&NC was made to intervene in the action. Thereafter, A&NC appeared in the action as an intervening plaintiff.

On 30 November 1988, pursuant to a motion made by A&NC, in which A&EC joined, the court entered an order dismissing this second action without prejudice pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure.

On 27 November 1989, A&EC and A&NC, as joint plaintiffs, applied to the Carteret County Clerk of Superior Court for an Order Extending Time To File Complaint. The Clerk granted the request and issued an order on 27 November 1989 which extended the time for filing to 18 December 1989. However, A&EC and A&NC did not subsequently file a complaint; instead, North Carolina Railroad Company (hereinafter "NCRC"), the plaintiff in this case, filed the present action on 27 November 1989 against the above-named defendants.

NCRC's complaint, like A&EC's 1980 complaint and the joint claims of A&EC and A&NC in 1986, alleged, *inter alia*, a continuing trespass on the part of the defendants. The complaint also alleged that NCRC's existence was the result of a merger with A&NC and that NCRC was the current owner of the disputed land.

In response to NCRC's complaint, the defendants asserted contrarily that NCRC's existence was attributable to a merger between A&EC and A&NC and was therefore subject to the two-dismissal rule under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. The trial court agreed with the defendants' contention and granted their motion to dismiss. The plaintiff now appeals.

I

[1] NCRC's sole assignment of error is that the trial court erred in granting the defendants' Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim upon which relief could be granted.

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which the motion is directed. *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984), *rev'd in*

part and aff'd in part, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 93 L.Ed.2d 75 (1986). A complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. *Renwick v. News & Observer Publishing Co.*, 63 N.C. App. 200, 304 S.E.2d 593 (1983), *rev'd on other grounds*, 310 N.C. 312, 312 S.E.2d 405 (1984).

It should be noted that the complaint in this case does not disclose the fact that its claims for relief were previously asserted in two different actions brought by A&EC; nor does it disclose the fact that both of these actions were voluntarily dismissed. In order for the trial court to have properly reached the conclusion that NCRC's action was barred by the "two dismissal" rule of Rule 41(a)(1), it necessarily had to consider both of the complaints filed in the prior actions and the notices of dismissal. Notices of voluntary dismissal filed in previous actions have been held to be matters outside the pleadings. *Caldwells' Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 732, 340 S.E.2d 518, 520 (1986). Similarly, we find that complaints filed in prior actions are matters outside the pleadings. *But cf. Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) (holding that where a complaint incorporates by reference, as an exhibit, a complaint filed in a different action, the complaint filed in the different action is not a matter outside the pleadings). Where matters outside the pleadings are received and considered by the court in ruling on a motion to dismiss under Rule 12(b)(6), the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in G.S. 1A-1, Rule 56. *See Roach v. City of Lenoir*, 44 N.C. App. 608, 609, 261 S.E.2d 299, 300 (1980).

[2] Upon considering defendants' Rule 12(b)(6) motion as a Rule 56 motion for summary judgment, the critical questions for determination on appeal become whether there were any genuine issues of material fact and whether the movant was entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981). The plaintiff does not contend that there were genuine issues of material fact in the case *sub judice*; rather, it contends that the defendants were not entitled to judgment as a matter of law. We agree.

At the motions hearing, the defendants asserted that the plaintiff's complaint was barred by the "two dismissal rule" contained in Rule 41(a)(1) of the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 41 provides, in part, as follows:

> (a) Voluntary dismissal; effect thereof.—
>
> (1) **By Plaintiff; by Stipulation.**— . . . an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, ... Unless otherwise stated in the notice of dismissal . . . , the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . .
>
> (2) **By Order of Judge.**— Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

It has been recognized that when Rule 41(a) is distilled to its essence, three methods by which a civil action may be voluntarily dismissed become apparent. *Parrish v. Uzzell*, 41 N.C. App. 479, 483, 255 S.E.2d 219, 221 (1979). An action may be voluntarily dismissed (1) by the plaintiff's filing of a notice of dismissal at any time before he rests his case, (2) by the filing of a stipulation of dismissal which has been signed by all of the parties appearing in the action, and (3) by order of the judge "upon such terms and conditions as justice requires." *Id.* It has also been recognized that unless otherwise specified, a voluntary dismissal effected by any one of the three methods is without prejudice. *Id.* The only exception to this "without prejudice" rule is that " 'a *notice* of

dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.' " *Id.*

Applying these principles to the facts before us, we must conclude that the trial court erred in dismissing the plaintiff's action. We note initially that the record fails to reflect any convincing evidence which tends to show that NCRC's existence is the result of a merger between A&EC and A&NC. The complaint certainly does not disclose that fact and NCRC has not admitted it. However, even if we were to assume that A&EC and A&NC had merged to form NCRC, we would still be of the opinion that the trial court erred.

While the record discloses that A&EC voluntarily dismissed the same action twice, the second voluntary dismissal, obtained in 1988, was by *order* of the judge, not by the filing of a notice of voluntary dismissal. This court's holding in *Parrish* makes it clear that the second dismissal rule does not apply to make voluntary dismissals by stipulation or by order of court "on the merits," even when they follow a previously filed notice of voluntary dismissal. *Id.* Here, the 1988 order granting A&EC a voluntary dismissal expressly stated that the dismissal was without prejudice. Thus, even if A&EC had merged with A&NC to form NCRC, the voluntary dismissal obtained by A&EC in 1988 would not have operated as an adjudication of its claims on the merits under the facts of this case. It follows that NCRC was not precluded from bringing the present action.

II

For the reasons discussed above, we conclude that the trial judge erred in dismissing the plaintiff's complaint. The trial judge's order of dismissal is

Reversed.

Judges WELLS and GREENE concur.

EDWARD K. ISBEY, JR., PLAINTIFF v. COOPER COMPANIES, INC., FORMERLY COOPERVISION, INC., DEFENDANT

No. 9028SC1152

(Filed 20 August 1991)

Fraud § 12.1 (NCI3d)— surgical pack design—marketing firm's misrepresentation as to interest—summary judgment for defendant improper

In an action for fraud where plaintiff alleged that defendant falsely represented to plaintiff that defendant was interested in marketing plaintiff's design for an improved custom surgical kit, that plaintiff reasonably relied on defendant's misrepresentations and delayed marketing his design with other marketing companies to his detriment, and that during this delay other companies marketed similar designs thus diminishing plaintiff's potential share of the market, the trial court erred in entering summary judgment for defendant since plaintiff's forecast of evidence showed that defendant engaged in a course of seductive misrepresentation as to its own interest in the custom surgical pack business and as to plaintiff's custom surgical kit design, and the questions of deception and whether plaintiff reasonably relied on defendant's representations to his damage were for determination at trial.

Am Jur 2d, Fraud and Deceit §§ 68, 69, 233.

APPEAL by plaintiff from judgment entered 14 August 1990 in BUNCOMBE County Superior Court by *Judge Robert D. Lewis* granting defendant's motion for summary judgment. Heard in the Court of Appeals 15 May 1991.

On 7 November 1989 plaintiff filed this action against CooperVision, Inc. [hereinafter "Cooper"] alleging breach of a confidential disclosure agreement, unfair and deceptive trade practices and fraud. On 20 February 1990 Cooper filed a motion for summary judgment. Following a hearing, the trial court granted Cooper's motion for summary judgment as to all three actions on 14 August 1990. Plaintiff appeals solely as to his cause of action for common law fraud.

Morris, Bell & Morris, by William C. Morris, Jr., for plaintiff-appellant.

Roberts Stevens and Cogburn, P.A., by Isaac N. Northup, Jr., for defendant-appellee.

WELLS, Judge.

Plaintiff assigns error to the trial court's granting defendant's motion for summary judgment on plaintiff's common law fraud cause of action. Plaintiff contends that defendant falsely represented to plaintiff that defendant was interested in marketing plaintiff's design for an improved custom surgical kit. Plaintiff further contends that he reasonably relied on defendant's misrepresentations and delayed marketing his design with other marketing companies to his detriment. During this delay, other companies marketed similar designs thus diminishing plaintiff's potential share of the market.

It is well stated that summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). A movant may show that he is entitled to summary judgment as a matter of law by presenting a forecast of evidence that shows an essential element of the opposing party's claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his or her claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). If the moving party has met this initial burden, the nonmoving party may overcome this burden by a forecast of evidence demonstrating that he or she will be able to make out a *prima facie* case at trial. *See Johnson v. Beverly Hanks & Assoc.*, 328 N.C. 202, 400 S.E.2d 38 (1991).

In ruling on a motion for summary judgment, the court must consider the evidence in the light most favorable to the non-movant, *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986), and give the non-movant all favorable inferences which may reasonably be drawn from the evidence. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E.2d 289 (1974). The moving party's "papers are carefully scrutinized and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

In discussing the elements constituting common law fraud our Supreme Court has stated:

> While fraud has no all embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); *Johnson, supra.* Although summary judgment may be proper when absence of genuine issue is clearly established, summary judgment is generally improper in an action for fraud. *Bank v. Belk*, 41 N.C. App. 328, 255 S.E.2d 430, *cert. denied*, 298 N.C. 293, 259 S.E.2d 299 (1979).

The forecast of evidence before the trial court tends to show the following facts and circumstances. In the late 1970's many companies had developed and marketed custom surgical packs which included surgical and post-operative items relevant and necessary to a particular patient's surgical needs. These custom surgical packs oftentimes included sterilized equipment needed by surgeons for various types of surgery as well as other post-operative supplies for both the surgeon and patient. By 1982, ten major companies were manufacturing and marketing custom packs for eye surgery. In 1981, Cooper had begun development of a custom pack for eye surgery known as "SuperPak," which combined Cooper's own previously available and successful standardized equipment pack, "Unipak," in the same package with other disposable surgical products. Following an unsuccessful marketing attempt, Cooper discontinued its customized "SuperPak" by late 1983. Although marketing its customized surgical pack was unsuccessful, Cooper continued to market its standardized surgical packs with success.

On 25 October 1983, plaintiff, a practicing ophthalmologist, filed a patent application with the United States Patent and Trademark Office for an improved custom surgical kit containing disposable surgical trays which house various surgical and post-operative supplies. During the fall of 1983, Dr. Isbey met with Mike Shell, a Cooper sales representative, regarding matters related to Dr. Isbey's patent application. Mike Shell arranged for Dr. Isbey to meet with Robert Morris, Cooper's marketing manager.

On 31 October 1983 plaintiff met Morris at an American Academy of Ophthalmology Convention to discuss marketing plaintiff's custom surgical kit. During this meeting, the two signed a

confidential disclosure agreement that referenced plaintiff's improved surgical kit. Plaintiff then discussed his idea for an improved custom surgical kit with Morris and either showed or gave to Morris a copy of his patent application. Plaintiff testified through deposition that Morris was very enthusiastic about his idea. Mike Shell testified through affidavit that during this meeting plaintiff made a written list of reasons why and how plaintiff's custom surgical kit would benefit Cooper. Shell further testified that Morris later stated that Cooper did not want to pay plaintiff royalties, but was interested in plaintiff's ideas and would be willing to pay plaintiff for the use of them. John Buster, Cooper's Vice President and Manager of Medical Supplies, testified through affidavit that during the following month, November 1983, Cooper began searching for a manufacturer of customized surgical packs and actively considered acquiring Sterile Design, Inc.

Following their discussion, plaintiff had no contact with Morris until plaintiff received a letter from Morris dated 27 February 1984, stating the following:

> We recently market tested your pak concept. The results were very promising. Your concept is extremely applicable within the context of a custom surgery pak. Unfortunately, CooperVision, at this time, is not ready to enter the custom pak business. However, we are very interested in your design and would appreciate hearing from you as soon as you receive patent status from your attorney. Please do not hesitate to call me on this matter. Hope to see you soon.

Despite Morris' letter stating that Cooper was not ready to enter the custom pack business, John Buster further testified that on or about March 1984, Cooper began negotiations with Southwest Medical Packaging, Inc. [hereinafter "Southwest"], an established manufacturer of custom surgical packs. Plaintiff testified through deposition that a few months following the receipt of Morris' letter, during the summer of 1984, Mike Shell and Cooper's regional director from Kentucky, Bo Bandura, visited plaintiff at plaintiff's office. Plaintiff stated that the three had lunch together, during which time plaintiff fully discussed his custom surgical kit idea with Bandura.

On 7 January 1985 Cooper and Southwest signed an exclusive distribution agreement, whereby Southwest agreed to supply Cooper with ophthalmologic packs and gave Cooper exclusive rights to

distribute, promote and sell these packs. In a letter dated 7 March 1985 Janet K. Fencl, Cooper's marketing manager of medical supplies, rejected plaintiff's design. Fencl testified through affidavit that Dr. Isbey's concept was not economically sound or feasible. In her deposition responding to questions concerning defendant's delay in responding to plaintiff regarding plaintiff's concept, Fencl stated, that plaintiff's concept was not unique and that Cooper was never seriously interested in it. On 17 May 1985, Cooper acquired ownership of Southwest and Cooper once again entered the market for customized surgical packs.

Defendant contends that plaintiff's claim is defective because defendant made no misrepresentations to plaintiff regarding its interest in plaintiff's custom surgical kit or its desire or ability to reenter the custom pack market. We disagree.

This forecast fairly exudes deception, which is at the heart of every fraud. Viewed in the light most favorable to plaintiff, the forecast shows that defendant engaged in a course of seductive misrepresentation as to its own interest in the custom surgical pack business and as to plaintiff's custom surgical kit design. The questions of deception and whether plaintiff reasonably relied on Cooper's representations to his damage are for determination at trial.

Plaintiff having established a *prima facie* case, the granting of summary judgment on plaintiff's fraud claim was in error and must be reversed.

Reversed.

Judges ARNOLD and PHILLIPS concur.

VULCAN MATERIALS COMPANY, INC., THEODORE R. TEMPLETON, SR., NOMARLE C. TEMPLETON, THEODORE R. TEMPLETON, JR., RUTH D. TEMPLETON, JAMES M. TEMPLETON AND PEGGY R. TEMPLETON, PLAINTIFFS v. IREDELL COUNTY, IREDELL COUNTY DIRECTOR OF INSPECTIONS, DEFENDANTS

No. 9022SC1251

(Filed 20 August 1991)

Municipal Corporations § 30.20 (NCI3d)— moratorium on building permits pending zoning—no notice before ordinance adopted—ordinance invalid

An ordinance passed by the Iredell County Board of Commissioners imposing a moratorium on building permits pending zoning was invalid, since there was no notice to the public or advertised public hearing prior to adoption of the ordinance as required by N.C.G.S. § 153A-323.

Am Jur 2d, Zoning and Planning §§ 72, 74, 338.

APPEAL by defendants from order entered 13 September 1990 by *Judge Julius A. Rousseau, Jr.*, in IREDELL County Superior Court. Heard in the Court of Appeals 6 June 1991.

In February 1990 plaintiff Vulcan Materials Company, Inc. ("Vulcan") either applied for a building permit for structures to be placed on unzoned property in Iredell County where it planned to develop a quarry or simply made inquiries regarding the permit process (the date of application is disputed by the parties). Vulcan was told that in order to obtain a building permit, it would need to install a septic tank, obtain an erosion control permit (or a determination that a permit would not be required), and obtain a driveway permit.

On 14 March 1990, after Vulcan had taken the necessary steps, the Iredell County Inspections Department denied Vulcan's request for a building permit because on 6 March 1990 the Iredell County Board of Commissioners ("Board") had passed an ordinance placing a 60-day moratorium on the issuance of building permits. Prior to Vulcan's efforts to obtain a building permit, the Board had taken steps to enact a complete countywide zoning ordinance covering the property upon which Vulcan planned to construct its quarry. A Land Development Plan had been adopted in October 1987, but

no zoning ordinance covering the property was in place during the pertinent period of time in this case.

Because there had been requests for building permits in this unzoned area of the county "for structures that [were] out of compliance with the land use study and [would] be out of compliance with the proposed zoning of the area under the countywide zoning plan," the Board adopted an ordinance on 6 March 1990 restricting "any building permits being issued in all areas not currently zoned if the building permit calls for uses of the land other than that stated in the land use plan." The ordinance provided that the restriction was to be in force "for sixty days unless extended by the board of commissioners. . . ."

The denial of Vulcan's application for the permit was confirmed by letter dated 19 March 1990 from the Director of Inspections stating that the Board's "action does not allow issuance of permits for uses not in compliance with the county's adopted Land Development Plan."

Plaintiffs brought this action requesting the trial court declare the moratorium to be void and seeking a mandatory injunction directing the defendant Director of Inspections to issue the requested building permit. On 10 July 1990, plaintiff Vulcan moved for summary judgment. On 13 September 1990, the trial court granted the summary judgment motion and ordered the Department of Inspections to issue the requested building permit.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr. and M. Elizabeth Gee, for plaintiff-appellees.

Pope, McMillan, Gourley, Kutteh & Parker, by William P. Pope, for defendant-appellants.

ORR, Judge.

Defendants contend that the trial court erred in granting summary judgment on the grounds that genuine issues of material fact exist and that plaintiffs are not entitled to judgment as a matter of law. For the reasons set forth below, we affirm the order of the trial court.

"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). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E.2d 584 (1980). "This remedy allows the trial court to decide whether a genuine issue of fact exists, but it does not permit the trial court to decide an issue of fact." *Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C. App. 533, 537, 386 S.E.2d 439, 442 (1989), *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990). "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).

Here the trial court made findings of fact and conclusions of law. "While it is not advisable to make findings of fact in a summary judgment proceeding, such findings do not render the summary judgment invalid." *Summey*, 96 N.C. App. at 537, 386 S.E.2d at 442.

> A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Shuford, N.C. Practice and Procedure, Sec. 56-6 (1977 Supp.). Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E.2d 162 (1975).

White v. Town of Emerald Isle, 82 N.C. App. 392, 398, 346 S.E.2d 176, 179-80, *disc. review denied*, 318 N.C. 511, 349 S.E.2d 874 (1986) (quoting *Mosley v. National Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. review denied*, 295 N.C. 467, 246 S.E.2d 9 (1978)).

* * *

Under N.C. Gen. Stat. § 153A-45 (1987), notice and public hearing are not mandated for the adoption of ordinances. However, before adopting any ordinance authorized by Article 18 of Chapter 153A of the General Statutes, which governs county planning and regulation of development, certain procedural and notice requirements must be met. N.C. Gen. Stat. § 153A-323 (1987). N.C. Gen. Stat. § 153A-323 states: "Before adopting or amending any ordinance authorized by this Article . . ., the board of commissioners shall hold a public hearing on the ordinance or amendment. The board shall cause notice of the hearing to be published once a week for two successive calendar weeks. . . ." Article 18 governs zoning, subdivision regulation, building inspection (including issuance of building permits), and community development. *See* N.C. Gen. Stat. §§ 153A-320 to -377.

Here the record does not reveal under which provision the moratorium on building permits was enacted. Although no specific authority exists for the imposition of a moratorium on the issuance of building permits pending zoning, we must ultimately decide whether this type of ordinance is within the purview of Article 18. We conclude that it is. The trial court found that the defendants had conceded "that the moratorium ordinance had the effect of making the unzoned areas of the County subject to zoning restrictions prior to the adoption of a zoning ordinance applicable to those areas." Zoning is covered by Article 18, and the ordinance deals specifically with the issuance of building permits, which is also covered by Article 18.

> If an ordinance substantially affects land use, it must be enacted under the procedures which govern zoning and rezoning. To entirely prohibit a person from building upon his property even temporarily is a substantial restriction upon land use. Consequently, it is not too much to ask that a municipality follow the same procedures with respect to notice and hearing before it puts such a moratorium into effect.

City of Sanibel v. Buntrock, 409 So.2d 1073, 1075 (Fla. D. Ct. App. 1981), *disc. review denied*, 417 So.2d 328 (Fla. 1982).

Here there was no notice to the public or advertised public hearing prior to adoption of the ordinance as required by N.C. Gen. Stat. § 153A-323. Therefore, we affirm the trial court's conclusion that the ordinance passed by the Board imposing the moratorium on building permits pending zoning is invalid.

Defendants also argue that the trial court erred in finding that Vulcan actually applied for a building permit on 14 February 1990 prior to the enactment of the moratorium. It is clear, however, from the record that Vulcan did apply for a permit on 14 March 1990 prior to the enactment of the zoning ordinance and was denied the permit on the basis of the moratorium. Because we concluded above that the moratorium was invalid, the trial court's finding was unnecessary for its determination as to the ordinance's invalidity. Further, defendants also assigned as error the trial court's finding that the ordinance was not enacted as required by N.C. Gen. Stat. § 153A-45; however, we concluded above that this ordinance is within the purview of Article 18 and must be enacted in compliance with N.C. Gen. Stat. § 153A-323.

For the reasons above, we affirm the order of the trial court.

Affirmed.

Judges COZORT and WYNN concur.

TERESA H. SHINGLEDECKER, PLAINTIFF v. TERRY ALLAN SHINGLEDECKER, DEFENDANT

No. 9030DC906

(Filed 20 August 1991)

1. Divorce and Separation § 336 (NCI4th)— child custody—child in North Carolina—father in Florida—North Carolina proper forum

The trial court properly exercised jurisdiction in making its child custody order, though defendant was living in the state of Florida when plaintiff filed her complaint, since the child's home state was North Carolina and she was residing in North Carolina at the time plaintiff filed her complaint. N.C.G.S. § 50A-3(a)(1).

Am Jur 2d, Divorce and Separation § 964.

2. Appeal and Error § 114 (NCI4th)— motion to dismiss based on insufficiency of allegations—motion denied—trial on merits—denial of motion not reviewable on appeal

There was no merit to defendant's contention that plaintiff's complaint, which alleged constructive abandonment, cruel and barbarous treatment, and indignities as a basis for divorce from bed and board, was fatally defective because it failed to allege that the actions were perpetrated without adequate provocation, since an unsuccessful movant may not on an appeal from the final judgment seek review of the denial of his motion to dismiss, which was grounded on an alleged insufficiency of the facts to state a claim for relief, where the case thereupon proceeds to judgment on the merits.

Am Jur 2d, Appeal and Error § 105.

APPEAL by defendant from Order entered 28 March 1990 in JACKSON County District Court by *Judge John J. Snow*. Heard in the Court of Appeals 13 March 1991.

Haire, Bridgers & Spiro, P.A., by James M. Spiro and B. David Steinbicker, Jr., for plaintiff-appellee.

Robert G. Cowen for defendant-appellant.

WYNN, Judge.

Plaintiff and defendant were married on 28 January 1989 in Jackson County, North Carolina. Thereafter, the parties moved to the State of Florida on a temporary basis, although the family home remained in the State of North Carolina.

In January 1990, plaintiff instituted this action seeking a divorce from bed and board and alleging, as grounds therefor, constructive abandonment, cruel and barbarous treatment and indignities. In her complaint, plaintiff alleged that on 13 December 1989, she was forced to flee from the defendant and the State of Florida back to North Carolina after the defendant had perpetrated several acts of mental and physical abuse against her and the parties' minor daughter, Kimberly Crystal Shingledecker. Plaintiff also requested both temporary and permanent child custody and child support.

Defendant responded to plaintiff's complaint by filing pre-answer motions to dismiss plaintiff's complaint based upon North Carolina Rules of Civil Procedure 12(b)(2) and 12(b)(6), lack of personal jurisdic-

tion and failure to state a claim upon which relief could be granted. Following a hearing on 28 March 1990, Judge John J. Snow entered an order denying both of defendant's motions and granting plaintiff temporary child custody and child support. Following defendant's failure to appear at a subsequent hearing held on 26 April 1990, Judge Steven J. Bryant entered a judgment granting plaintiff a divorce from bed and board, permanent child custody and child support. From the Order denying his motions to dismiss, defendant appeals.

I

[1] In his first assignment of error, defendant contends that the trial court erred in denying his 12(b)(2) motion to dismiss the plaintiff's complaint. He argues that since he was living in the State of Florida when the plaintiff filed her complaint, the trial court could not properly exercise jurisdiction over his person in determining the issue of child custody. We disagree.

The jurisdiction of the courts of this State to make child custody determinations is governed by N.C. Gen. Stat. § 50A-3 (1989), the jurisdiction provision of the Uniform Child Custody Jurisdiction Act (UCCJA). *See* N.C. Gen. Stat. § 50-13.5(c)(2) (1990). Under the UCCJA, "A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (1) This State (i) is the home state of the child at the time of commencement of the proceeding . . . ." N.C. Gen. Stat. § 50A-3(a)(1).

In its 28 March 1990 order, the trial court specifically found as fact that "the State of North Carolina [was] the home state of the child at the time of the commencement of this proceeding . . . ." Section 50A-3(a)(1) makes it clear that the existence of such a fact is all that is required in order to invoke a court's jurisdiction to make child custody determinations. Moreover, personal jurisdiction over the nonresident is not required under the UCCJA. *Hart v. Hart*, 74 N.C. App. 1, 7, 327 S.E.2d 631, 635 (1985). We conclude that the trial court properly exercised jurisdiction in making the child custody order entered below.

II

[2] Defendant next contends that the trial court erred in refusing to dismiss plaintiff's complaint for failure to state a claim upon

which relief could be granted. He contends that plaintiff's complaint, which alleges constructive abandonment, cruel and barbarous treatment and indignities as a basis for divorce from bed and board, is fatally defective because it failed to allege that the actions were perpetrated without adequate provocation. To be sure, defendant's contention was supported by cases decided prior to the enactment of the North Carolina Rules of Civil Procedure at G.S. § 1A-1. *See, e.g., Brooks v. Brooks*, 226 N.C. 280, 284, 37 S.E.2d 909, 912 (1946) (stating that the failure of a complaint seeking a divorce from bed and board on the grounds of abandonment to allege "lack of adequate provocation" is a fatal defect); *Ollis v. Ollis*, 241 N.C. 709, 711, 86 S.E.2d 420, 421 (1955) (In alleging cruel and barbarous treatment, "[i]t is not enough for the wife to allege the husband has been abusive and violent towards her, that she has been made to fear for her safety. She must go further and allege specific acts and conduct on the part of the husband . . . . [S]he must [also] set forth what, if anything, she did to start or feed the fire of discord . . . ." *Id.* at 711, 86 S.E.2d at 422. " 'The omission of such allegation[s] is fatal.' " *Id.*); *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964) (One who bases a claim for alimony without divorce on the ground of indignities is required "not only to set out with particularity those . . . acts which . . . constituted such indignities . . . but also to show that those acts were without adequate provocation . . . ." *Id.* at 187, 139 S.E.2d at 222. An omission to make the necessary allegations is fatal. *McDowell v. McDowell*, 243 N.C. 286, 288, 90 S.E.2d 544, 545 (1955)).

Following the enactment of the Rules of Civil Procedure in 1967, this court, in *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E.2d 755, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986), specifically addressed the propriety of appealing motions of this type. There, we fashioned the following rule of procedural law:

> [W]here an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss.

Id. at 682-83, 340 S.E.2d at 758-59.

Inasmuch as we find *Concrete Service Corp.* to be controlling on this issue, we conclude that defendant's motion to dismiss is not properly presented by this appeal.

For the reasons discussed above, the order appealed from is

Affirmed.

Judges WELLS and GREENE concur.

THOMAS A. MORROW, PLAINTIFF v. CAROLYN M. MORROW, DEFENDANT

No. 907DC1239

(Filed 20 August 1991)

Divorce and Separation § 38 (NCI4th) — separation agreement — child support during post-secondary education — specific performance

The trial court correctly concluded that it did not have jurisdiction to hear defendant's motion in the cause for specific performance of provisions of a separation agreement that were not part of any court order. A separation agreement which is not incorporated into a court order remains a contract between the parties and is enforceable only as an ordinary contract. While the court had authority to enforce or modify the provisions of the agreement while the parties' son was a minor, defendant alleges here that plaintiff is contractually obligated to support a child who is no longer a minor. N.C.G.S. § 1A-1, Rule 3.

Am Jur 2d, Divorce and Separation §§ 847, 1020, 1021, 1079.

Judge GREENE concurring.

APPEAL by defendant from order entered 27 August 1990 by *Judge Albert S. Thomas, Jr.*, in EDGECOMBE County District Court. Heard in the Court of Appeals 5 June 1991.

Plaintiff and defendant married on 22 June 1968 and divorced on 15 November 1976. The parties have a son born 12 May 1971. On 4 November 1975 the parties entered a separation agreement

which was not submitted to any court for approval and was not incorporated into any court order. Defendant filed a motion in the cause on 17 August 1990 that alleged that the plaintiff had failed to support the parties' son while he pursued his post-secondary education as provided in the agreement. Defendant sought specific performance. The trial court concluded that it did not have jurisdiction to hear the matter and the defendant's motion in the cause for specific performance was dismissed. Defendant appeals.

William W. Aycock, Jr. for plaintiff-appellee.

Moore, Diedrick, Carlisle & Hester, by J. Edgar Moore, for defendant-appellant.

EAGLES, Judge.

The sole issue presented in this case is whether the trial court erred in concluding that it did not have jurisdiction to hear defendant's motion in the cause for specific performance of provisions of a separation agreement that were not a part of any court order. We hold that the court did not err and affirm the order of the trial court.

Defendant is correct when she contends that in some cases a court may order the specific performance of a separation agreement that has not been made part of a divorce decree. Defendant cites a number of cases, including *Moore v. Moore*, 297 N.C. 14, 252 S.E.2d 735 (1979), which stand for that proposition.

While we agree that specific performance may be an available remedy, we do not agree with defendant's argument that here "the court ruled that since it was a separation agreement, that there was a remedy at law and therefore the court had no jurisdiction to order specific performance."

The court found as follows:

> The defendant by her *Motion* seeks to enforce a provision of the Separation Agreement, which has not been incorporated into a Court Order, but rather has remained a contract between the parties. As such it is enforceable only as an ordinary contract and this Court is without jurisdiction to hear the matter.

(Emphasis added.) When a separation agreement is not incorporated into a court order and remains a contract between the parties, it is enforceable only as an ordinary contract. *DeGree v. DeGree*,

72 N.C. App. 668, 325 S.E.2d 36, *disc. review denied*, 313 N.C. 598, 330 S.E.2d 607 (1985). An exception to this rule is that "parents cannot in a separation agreement, or any other contract, enter into an agreement dealing with the custody and support of their children which will deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of minors." 2 R. Lee, *N.C. Family Law* § 189 (1980). While the parties' son was a minor, the court had authority to enforce or modify the provisions of the separation agreement, and the parties could properly bring a motion in the cause.

Here, however, defendant alleges that plaintiff is contractually obligated to support the parties' child who is no longer a minor. G.S. 1A-1, Rule 2 provides: "There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action." G.S. 1A-1, Rule 3 sets out the way to commence a civil action. Rule 3 makes no provision for a motion in the cause to enforce a contract. Accordingly, on this record we hold that the trial court correctly concluded that it was without jurisdiction to hear defendant's motion in the cause.

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

Affirmed.

Judge LEWIS concurs.

Judge GREENE concurs in the result in a separate concurring opinion.

Judge GREENE concurring in the result.

I concur, for different reasons, that the trial court was without jurisdiction to hear defendant's motion for specific performance of the separation agreement.

The action in which defendant's motion for specific performance was filed was established in 1976 when plaintiff filed for a divorce. Because there was a child born of the marriage between plaintiff and defendant, that action remained pending until 13 August 1990, the date on which the trial court terminated the plaintiff's obligation to pay child support on the grounds that the child was nineteen years old and had graduated from high school. *See Blackley*

v. Blackley, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974) (trial court "acquires jurisdiction over the custody of the unemancipated children of the marriage" when a divorce action is brought and it continues until children are emancipated). Therefore, there existed no pending action on 17 August 1990 in which to file a motion for specific performance and the trial court was without jurisdiction to entertain such a motion. *See* 60 C.J.S. *Motions and Orders* § 3 (1969) (a "motion implies the pendency of a suit between the parties and is confined to incidental matters in the progress of the cause . . .").

PATRICIA L. RAY, PLAINTIFF v. JEFFREY CHARLES RAY AND TERESA LONG RAY, DEFENDANTS

No. 905DC1241

(Filed 20 August 1991)

Divorce and Separation § 383 (NCI4th)— step-grandparent—right to bring action for visitation

The trial court erred in dismissing plaintiff's complaint on the ground that N.C.G.S. § 50-13.1 (as amended in 1989) did not give the plaintiff step-grandmother a right to bring a claim for visitation, since that statute provides that "Any parent, relative or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child. . . . Unless a contrary intent is clear, the word 'custody' shall be deemed to include custody or visitation or both."

Am Jur 2d, Divorce and Separation § 1002.

Visitation rights of persons other than natural parent or grandparents. 1 ALR4th 1270.

Grandparents' visitation rights. 90 ALR3d 222.

Judge EAGLES concurring.

APPEAL by plaintiff from an order entered 8 October 1990 by *Judge John W. Smith* in NEW HANOVER County District Court. Heard in the Court of Appeals 5 June 1991.

James L. Nelson and Jerry A. Mannen, Jr. for plaintiff-appellant.

Shipman, Lea & Allard, by James W. Lea, III, for defendant-appellees.

LEWIS, Judge.

This case presents the Court with one issue: whether the trial court erred in dismissing the plaintiff's complaint on the ground that N.C.G.S. § 50-13.1 (as amended in 1989) did not give the plaintiff step-grandmother a right to bring a claim for visitation.

The plaintiff is the step-grandmother of the minor child, Elissa Ashley Ray, who was born in 1985. The plaintiff was married to defendant Jeffrey C. Ray's father, Glenn M. Ray, who is now deceased. The minor child's biological parents, the defendants in this case, are married but currently living apart.

The plaintiff filed a complaint alleging:

> That this plaintiff is step-grandmother to the minor child, ELISSA ASHLEY RAY, and that this plaintiff at all times maintained a significant and meaningful relationship with the minor child, ELISSA ASHLEY RAY.
>
> . . .
>
> That this plaintiff has served and continues to serve as Executrix of the Estate of her deceased husband, GLENN MEAD RAY, and that beginning December 27, 1988, the defendants began totally depriving ELISSA ASHLEY RAY from her relationship with this plaintiff and that it was contrary to the best interests of the minor child to not permit the child to see, be with or talk with this plaintiff; that this plaintiff and the child, ELISSA ASHLEY RAY, love one another dearly and spent a lot of time together developing an extremely close relationship; that this plaintiff was a stability factor to the child ELISSA ASHLEY RAY; that the defendants wrongfully interfered with the relationship and withheld the child from the plaintiff solely for reasons related to the administration of the estate of GLENN MEAD RAY.

After a hearing on the defendants' motion to dismiss for failure of the complaint to state a claim upon which relief can be granted, the trial judge dismissed the plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Judge Smith

found in his order that there was "no biological or adoptive relationship between the defendants and the plaintiff or between the minor child and the plaintiff." Judge Smith further found in pertinent part:

> That the pleading alleges no other pending action or proceeding by which the Court has custody jurisdiction over the defendants or the minor child, and defendant concedes in argument that there exists no basis for jurisdiction other than an argued "right" conferred upon plaintiff by virtue of recent amendments to G.S. 50-13.1.
>
> The Court has considered the argument of counsel for plaintiff that allowing an amendment to the pleadings to claim a specific "right" to visitation under 50-13.1 would remedy any defect in her pleadings; and specifically rejects plaintiff's argument that the legislature intended to overturn the general case law which asserts that, with certain specific statutory exceptions, the parents with lawful custody of a child have the prerogative of determining with whom their children shall associate (*Moore v. Moore*, 89 N.C. App. 351).
>
> The legislature has carved out specific exceptions for both "biological grandparents" and "adoptive grandparents," and has made no other exceptions for non-biological, non-adoptive "step-grandparents," particularly where the relationship by affinity has terminated by divorce or, as in this case, by death of the biological relative on whom the affinity depends.
>
> Nor is the Court persuaded, as counsel for plaintiff argues, that G.S. 50-13.1 was ever intended by the legislature to confer upon strangers the right to bring custody or visitation actions against the parents of children unrelated to them. Such an interpretation would nullify any need for G.S. 50-13.2(b1) and 50-13.2A, neither of which have been repealed.

The issue before the Court on a Rule 12(b)(6) motion is whether the complaint states a claim upon which relief can be granted on any theory. *Harris v. NCNB National Bank*, 85 N.C. App. 669, 670-71, 335 S.E.2d 838, 840 (1987). For the purposes of the motion, the allegations in the complaint are treated as true. *Id.*

The plaintiff's complaint is based on her right to bring an action for visitation under N.C.G.S. § 50-13.1(a). The statute provides:

> Any parent, relative or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

N.C.G.S. § 50-13.1(a).

The plain language of the statute allows the plaintiff's action as an "other person." However, citing *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E.2d 715, *disc. rev. denied*, 293 N.C. 360, 238 S.E.2d 149 (1977), and *Moore v. Moore*, 89 N.C. App. 351, 365 S.E.2d 662 (1988), the defendants argue that North Carolina law grants parents who have lawful custody of their minor children the prerogative of determining with whom their children will associate. We agree that in *Moore* and *Acker* the North Carolina Court of Appeals stated that parents have such a prerogative to determine with whom their children associate. However, we hold that in 1989 when the legislature changed N.C.G.S. § 50-13.1(a) so that it includes the right to bring an action for visitation, that law changed.

Other statutes which allow actions for visitation (i.e. N.C.G.S. §§ 50-13.2A, 50-13.2(b1) and 50-13.5(j)) are merely supplemental. These statutes do not in any way contradict N.C.G.S. § 50-13.1(a) nor do they create an exception to the step-grandparent's right to bring an action for visitation in this case.

In *In re Rooker*, 43 N.C. App. 397, 258 S.E.2d 828 (1979), the North Carolina Court of Appeals held that a stranger, qualifying as an "other person" has a right to claim custody under the statute. Since that case, the statute was amended to include visitation. Therefore, we hold that the step-grandmother in this case qualifies as an "other person" and is entitled to claim visitation.

We note that this subject may involve constitutional issues relating to the substantive due process interests in the care and custody of one's children. As neither party has brought the issue before this Court, we do not address it. Thus we hold that the lower court erred in dismissing the plaintiff's claim in this 12(b)(6) proceeding.

Reversed and remanded.

Judge GREENE concurs.

Judge EAGLES concurs separately.

Judge EAGLES concurring.

I concur. I agree that the express language in G.S. 50-13.1 dictates the result in this case. I write separately only to emphasize that the amended version of G.S. 50-13.1 undermines the traditional prerogative of parents to determine with whom their minor children associate. In my view, the Legislature did not intend this result when it amended the statute.

ALLSTATE INSURANCE COMPANY, PLAINTIFF v. BOWERS ROBINSON AND WIFE, KATHERINE ROBINSON AND TIMOTHY CHARLES ROBINSON; REVA M. SHOWALTER AND AIRWAY FOAM INDUSTRIES, INC., AND STASSA FERIKES; AND LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANTS

No. 9028SC1227

(Filed 20 August 1991)

Insurance § 121 (NCI3d)— fire insurance—actions leading to fire arising out of business pursuit—summary judgment improper

In a declaratory judgment action to determine whether a homeowners policy issued by plaintiff to defendants covered a fire started by their son which destroyed a building which appellant owned and was using in his foam rubber business, the trial court erred in holding by summary judgment that the policy did not cover the fire involved on the ground that the actions which led to the fire arose out of a business pursuit, since the conflicts and contradictions concerning the son's activities and purpose in striking the matches which caused the building and its contents to be destroyed raised an issue of fact which was material.

Am Jur 2d, Insurance § 478.

APPEAL by defendants from judgment entered 23 August 1990 by *Judge C. Walter Allen* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 5 June 1991.

Roberts Stevens & Cogburn, P.A., by Frank P. Graham, for plaintiff appellee.

Joseph A. Ferikes for defendant appellants.

PHILLIPS, Judge.

This declaratory judgment action was brought to determine whether a homeowners policy plaintiff issued to defendants Bowers Robinson and wife covered a fire started by their son, Timothy Charles Robinson, which destroyed a building that appellant Showalter owned and Airway Foam Industries, Inc. was using in its foam rubber business. Following discovery and a hearing the trial court by summary judgment held that the policy does not cover the fire involved.

The materials of record clearly establish that Timothy Charles Robinson was an insured under the terms of the policy, and the only genuine question raised by the appeal is whether the policy also covered his activities in starting the fire. Plaintiff being of the view, apparently, that no point in a lawsuit should go unargued, argues that whether Timothy Robinson was an insured is still an open question and must be resolved by us. In so arguing plaintiff ignores the fact that its own materials answered that question in the affirmative when the action was filed. For plaintiff's policy in pertinent part defines "insured" as meaning "you and residents of your household who are . . . your relatives," and its complaint states that the policyholders are Timothy Robinson's parents and that he was living in their household at the time of the fire and had been for two months. Plaintiff does not argue that Timothy Robinson is not related to the policyholders or was not living in their household; nor does it argue that the policy does not define "insured" as above stated; instead, plaintiff argues that Timothy Robinson was not an "insured" because he was paying his parents $30 a week for his lodging, meals and laundry service!

As to whether the policy covered Timothy Robinson's activities in starting the fire, Section II of the policy, entitled "Exclusions," provides as follows:

1. Coverage E—Personal liability . . . do[es] not apply to bodily injury or property damage:

. . . .

b. arising out of business pursuits of the Insured . . . .

This exclusion does not apply to:

1. activities which are usual to non-business pursuits.

These provisions make it clear that if Timothy Robinson's actions leading to the fire arose out of a business pursuit they are not covered by the policy. In entering summary judgment the court in effect ruled as a matter of law that the materials of record show without contradiction that the actions which led to the fire arose out of a business pursuit. This was error. For the materials bearing upon the nature and purpose of Timothy Robinson's activities in starting the fire are sharply conflicting, as the following summary shows:

On the morning of 23 November 1987 a shipment of foam rubber buns for a special order that would take two days to fill was delivered to the Airway warehouse. Each bun was shaped like a giant loaf of bread, weighed approximately 200 to 250 pounds, had to be sawed into the proper proportions, and was highly flammable. One of Timothy Charles Robinson's tasks as an Airway employee was to select the buns and saw or split them into the sizes and proportions that the orders called for. He stated in his deposition that: At about 12:30 o'clock, immediately after lunch, he went to the storage room in the back of the warehouse where the buns for the special order were; the room had no window, the overhead light controlled by a switch at the other end of the building was not on and he struck two matches so that he could see to select a bun of the proper type; after selecting a bun he threw the spent matches to the floor and worked the bun out of the room to where the saw and slitter were situated, and about thirty minutes later was sawing the bun into parts when a coworker, James Bass, saw the flames and warned him to get out of the building; the company had a no smoking policy but did not enforce it; Bass frequently smoked while working around the buns and he had seen Bass light matches in the storeroom. *Harley Shuford*, the City of Asheville's Chief Arson Investigator, stated by his affidavits that: Timothy Robinson told him that on the afternoon in question he struck some matches in the storage room, watched them burn out and threw them on the floor, and said nothing at that time about lighting the matches because the electric light in the room was not working. *James Bass* stated by his affidavit that the buns Robinson was to process were not located

in the storage room and that the overhead light in the storage room was on when he discovered the fire. *Ralph Showalter*, President of Airway Foam Industries, Inc., stated by his affidavit that the storage room contained only unuseable scraps, and that Robinson's work did not require him to go there that day.

The conflicts and contradictions concerning Timothy Robinson's activities and purpose in striking the matches that caused the building and its contents to be destroyed raise an issue of fact that is very material, indeed. For if, as he testified, Timothy Robinson went to the storage room to get a bun to work on and struck the matches in order to see while selecting a bun, that activity arose out of a business pursuit and plaintiff's policy did not cover it. On the other hand, if the buns that Robinson was supposed to work on were not in the storage room, as Bass and Showalter testified, and Robinson was in the room not to perform a task for his employer, but to strike matches for his own amusement, as the affidavits of the arson investigator indicate, his acts were not in pursuit of his or his employer's business and are covered by the policy. Thus, the summary judgment must be and is reversed and the case remanded to the trial court for a resolution of the factual issue stated above.

The appellants also ask that we determine whether the court erred in denying their various attempts to examine a sworn statement that Timothy Robinson made to Allstate a few days after the fire; but since other statements by Timothy Robinson and his deposition are on file and the court's action was discretionary, we decline to do so.

Reversed.

Judges ARNOLD and WELLS concur.

BOONE LUMBER, INC., PLAINTIFF v. ED SIGMON, ANDY SIGMON, AND JOHN SIGMON, DEFENDANTS

No. 9024SC1232

(Filed 20 August 1991)

1. **Rules of Civil Procedure §§ 50.1, 50.5 (NCI3d)— motion for directed verdict—effect of failure to renew at close of evidence**

By introducing evidence, defendants waived their Rule 50(a) motion for directed verdict made at the close of plaintiff's evidence. Furthermore, defendants cannot have the denial of their motion for judgment notwithstanding the verdict reviewed on appeal because they failed to renew the motion for directed verdict at the close of all the evidence. N.C.G.S. § 1A-1, Rule 50(b)(1).

Am Jur 2d, Trial § 539.

2. **Evidence § 34.1 (NCI3d)— admission of party opponent**

Testimony by plaintiff's president that one defendant told him that he and another defendant were operating a business with the financial backing of the third defendant and that there was no problem with plaintiff being paid for their account was competent as an admission of a party opponent under N.C.G.S. § 8C-1, Rule 801(d).

Am Jur 2d, Evidence § 658.

3. **Rules of Civil Procedure § 11 (NCI3d)— no contradiction between affidavit and testimony—Rule 11 sanctions properly denied**

There was no contradiction between the affidavit of plaintiff's president and his subsequent trial testimony which would support defendants' motion for Rule 11(a) sanctions against plaintiff.

Am Jur 2d, Witnesses § 618.

APPEAL by defendants from judgment entered 1 February 1990 by *Judge Chase B. Saunders* in WATAUGA County Superior Court. Heard in the Court of Appeals 5 June 1991.

Plaintiff Boone Lumber, Inc., sued defendants individually in this civil action for the unpaid balance of $23,460.00 for materials

sold and delivered to defendants on an open account. On 29-30 January 1990, the matter was tried before a jury. John Greene, plaintiff's president, testified that plaintiff agreed to establish an open account for defendants at the request of defendant Andy Sigmon who told him that all three defendants would be financially responsible for the account. Additionally, Greene testified that the account was opened under the name of "Smokey Gap Log Homes" and that this name appeared on plaintiff's records and on billings sent to defendants. Greene further testified that Andy Sigmon and John Sigmon each stated on different occasions that the owners of Smokey Gap Log Homes were Ed Sigmon, Andy Sigmon, and John Sigmon. Greene also testified that defendants never indicated to plaintiff that the account was for a corporation and that throughout his business relationship with defendants, he believed that Smokey Gap Log Homes was a partnership.

At the close of plaintiff's evidence, defendants' motion for directed verdict was denied. Defendants then introduced evidence to prove that they were not individually liable on the open account and that only Smokey Gap Log Homes, Inc., a North Carolina corporation, owed the debt to plaintiff. Defendants Andy Sigmon and John Sigmon testified. At the close of all the evidence, defendants failed to renew their motion for a directed verdict. The jury's verdict found defendants jointly and severally liable to plaintiff in the amount of $23,460.00. The trial court denied defendants' motion for a judgment notwithstanding the verdict. Defendants appeal.

Miller and Moseley, by Paul E. Miller, Jr., for plaintiff-appellee.

Corne, Pitts, Corne, Grant & Edwards, P.A., by Ray G. Corne, for defendant-appellants.

EAGLES, Judge.

In this appeal, defendants bring forth three assignments of error. First, defendants contend that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict. Second, defendants contend that the trial court erred in allowing plaintiff's witness to testify in the form of an opinion on the ultimate issue in this case. Third, defendants contend that the trial court erred in failing to grant their motion for Rule 11 sanctions against plaintiff. We disagree and accordingly find no error.

[1] Regarding defendants' first assignment of error, we initially note that defendants introduced evidence after their motion for directed verdict was denied. By introducing evidence, defendants waived their G.S. 1A-1, Rule 50(a) motion for directed verdict made at the close of plaintiff's evidence. *Rice v. Wood*, 82 N.C. App. 318, 346 S.E.2d 205, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 599 (1986). Defendants failed to renew their motion for directed verdict at the close of all evidence. "A motion for directed verdict at the close of all evidence is an absolute prerequisite to the post verdict motion for judgment notwithstanding the verdict. G.S. 1A-1, Rule 50(b)(1); *Graves v. Walston*, 302 N.C. 332, 338, 275 S.E.2d 485, 489 (1981)." *Jansen v. Collins*, 92 N.C. App. 516, 517, 374 S.E.2d 641, 643 (1988). Defendants cannot have the denial of their motion for judgment notwithstanding the verdict reviewed on appeal because they failed to renew the motion for directed verdict at the close of all evidence. *Id.*

[2] Next, defendants assign as error the trial court's admission of John Greene's answer to the question: "Based on your conversations with [defendant] Mr. Andy Sigmon, who did you believe was responsible for paying for the materials purchased from Boone Lumber?" Greene responded, "Andy told me that the financial backing was through Ed Sigmon, their father, that he and John was [sic] operating the business and there was no problem with us being paid for account [sic]." Defendants contend that the trial court allowed plaintiff's witness "to testify beyond concrete facts within his own knowledge, observation, and recollection . . . [and] to testify in the form of an opinion the ultimate issue in this case which was whether [defendants] were individually liable to [plaintiff] on an open account." We disagree.

G.S. 8C-1, Rule 801(d) provides that "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity." While the question may have called for an answer that embraced the ultimate issue, the answer *actually* given was only a recital of what defendant Andy Sigmon had told the witness. Additionally, we note that Andy Sigmon testified when defendants presented their evidence. The jury had the opportunity to weigh the credibility of both John Greene and Andy Sigmon. Accordingly, we find no prejudicial error.

[3] Finally, defendants contend that the trial court erred in failing to grant their motion for Rule 11 sanctions against plaintiff because of an alleged contradiction between John Greene's affidavit and his subsequent testimony at trial. "The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). In his affidavit, Greene stated that he "investigated the integrity and financial condition of the individual defendants, particularly the defendant, Ed Sigmon." At trial, Greene testified that reputable people in the community told him that Sigmon had a good reputation, that he heard on several occasions that Ed Sigmon's "net worth" was "pretty good," and that upon recalling his past dealings with the defendants, he found "no reason to question their [defendants'] credit." Assuming without deciding that the execution of the affidavit is a document referred to in Rule 11, we find no contradiction and conclude that defendants' assignment of error is without merit.

We find no error in the trial court's denial of defendants' motions for directed verdict and judgment notwithstanding the verdict and in the trial court's admission of the testimony of John Greene. We affirm the trial court's denial of Rule 11 sanctions against plaintiff.

In the trial, no error; as to Rule 11 sanctions, affirmed.

Judges GREENE and LEWIS concur.

DEBORAH BRIGGS FREEMAN (NOW WATSON), PLAINTIFF v. SAMMY GRAY FREEMAN, DEFENDANT

No. 9121DC388

(Filed 20 August 1991)

Parent and Child § 7.2 (NCI3d) — emancipation of child — jurisdiction to award past child support

The trial court did not lack jurisdiction to hear a motion for past child support because the child had become emancipated and the custody issue had become moot. Nor did de-

fendant father waive his right to seek reimbursement for past child support expenditures by failing to schedule notice of a hearing on the issue prior to the child's emancipation. N.C.G.S. § 1-52(2).

Am Jur 2d, Parent and Child §§ 69, 80.

APPEAL by defendant from *Alexander (Abner), Judge*. Order entered 1 February 1991 in District Court, FORSYTH County. Heard in the Court of Appeals 6 August 1991.

On 14 August 1987 plaintiff filed a complaint seeking absolute divorce from defendant and an equitable distribution of the marital property. In his answer, filed on 14 October 1987, defendant requested child custody and support. The divorce was granted on 21 October 1987. The equitable distribution hearing was held on 8 November 1990, where defendant asked for accumulated child support. The judge at the equitable distribution hearing refused to address the issue of child support. Notice was sent by defendant to plaintiff of a hearing on the issue of child support to be held on 16 November 1990. Plaintiff filed a motion to dismiss and a motion for summary judgment, alleging the child had turned eighteen on 11 May 1990 and graduated from high school in June 1990. By order entered 1 February 1991 the trial court dismissed defendant's claim for child support stating that due to the emancipation of the said child "this Court is divested of any authority to determine the child's custody and consequently cannot enter into a determination as to child support." Defendant appeals that order.

Morrow, Alexander, Tash, Long & Black, by Charles J. Alexander, II, and Ronald B. Black, for plaintiff, appellee.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for defendant, appellant.

HEDRICK, Chief Judge.

The sole issue raised on appeal is whether the court erred in determining that it had no jurisdiction to hear the issue of child support. Defendant contends that because the issue had been properly raised and was pending before the court, it was error to dismiss the claim for lack of jurisdiction. Plaintiff argues that since the child became emancipated prior to the entry of an order or judgment awarding support or custody, the court lost its authority to enter such an award.

We first note that the trial court is incorrect in its presumption that because the issue of custody has become moot, it may not address the issue of support. N.C. Gen. Stat. § 50-13.4(a) does not specifically require a judicial determination of custody before a person or agency can bring an action for support. *Craig v. Kelley*, 89 N.C. App. 458, 366 S.E.2d 249 (1988). What remains for this Court to determine is whether defendant waived his right to support by failing to schedule notice of a hearing on the issue prior to the child's emancipation. We hold he has not.

It is well accepted in North Carolina that the courts have no authority to order child support for a child who has reached the age of majority and has become emancipated. *See Bridges v. Bridges*, 85 N.C. App. 524, 355 S.E.2d 230 (1987). However, the limitations placed upon the court once a child reaches an age of majority concern the authority of the State to impose support obligations beyond that time. Until the child reaches the age of emancipation under North Carolina law each parent is equally obligated to support that child. *Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980). A parent's obligation to support his child arises when the child is born, not when the courts order a specific amount to be paid. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976). Clearly, as a parent's past obligations of support do not disappear simply because the child has turned eighteen years of age, neither does the custodial spouse's right to seek reimbursement for past support expenditures. *See Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989). The sole limitation on defendant's right to reimbursement for documented past support expenditures is imposed by N.C. Gen. Stat. § 1-52(2) which limits recovery to those expenditures incurred within three years before the date the action for support is filed.

For these reasons, we find the trial court erred in holding it lacked jurisdiction to hear a motion for child support in this case. We reverse the order dismissing the above action and we remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges COZORT and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 AUGUST 1991

BRYANT v. N.C. DEPT. OF HUMAN RESOURCES No. 908SC836	Wayne (90CVS53)	Reversed
DOUGLAS v. CHRYSLER MOTORS No. 9019SC1146	Rowan (89CVS1215)	Affirmed
DUNLEAVY v. YATES CONSTRUCTION CO. No. 9018SC333	Guilford (89CVS6030)	Affirmed
FIRST CITIZENS BANK & TRUST CO. v. KNIRK No. 9010SC449	Wake (87CVS9598)	Affirmed
GILL v. ERICKSON No. 9024SC1176	Watauga (88CVS481)	Reversed in part & remanded
HILL-GATEWOOD REALTY v. BULLINGTON No. 9028SC672	Buncombe (89CVS594)	Affirmed in part; reversed in part & remanded for entry of judgment in accordance with this opinion
HUGHES v. DILLS No. 9118SC375	Guilford (90CVS5037)	Affirmed
IN RE ESTATE OF ALFORD No. 909SC1041	Franklin (83E195)	Vacated & Remanded
IN RE ROY No. 9022DC1160	Iredell (89J76)	Affirmed in part; vacated in part and remanded
IN RE TURNER No. 9123DC328	Ashe (89J20)	Affirmed
JONES v. ROBERTS No. 9010SC1261	Wake (89CVS6131)	Appeal Dismissed
LANGSTON v. HAMILTON No. 908SC733	Lenoir (86CVS1355) (86CVS1356)	Affirmed
PEELE v. PEELE No. 9110DC340	Wake (90CVD4191)	Dismissed

ROACH v. MOORE No. 903DC1217	Craven (89CVD1720)	Affirmed in part, reversed in part and remanded
STATE v. BRIGHT No. 918SC98	Lenoir (89CRS9993) (89CRS9994)	No Error
STATE v. CLARK No. 915SC345	New Hanover (90CRS17283)	No Error
STATE v. COX No. 9114SC418	Sampson (89CRS2113)	No Error
STATE v. DAWKINS No. 9128SC469	Buncombe (90CRS13760)	Affirmed in part; vacated & remanded for resentencing in part
STATE v. DEMINDS No. 9126SC291	Mecklenburg (90CRS55206) (90CRS55214)	No Error
STATE v. DIXON No. 9124SC414	Watauga (89CRS93)	No Error
STATE v. GLOVER No. 9126SC227	Mecklenburg (90CRS43485)	No Error
STATE v. INGRAM No. 9118SC526	Guilford (90CRS16920) (90CRS16921)	No Error
STATE v. KARBLEY No. 9117SC504	Surry (90CRS7715) (90CRS7716)	Affirmed
STATE v. MASSEY No. 9126SC202	Mecklenburg (90CRS47994)	Dismissed
STATE v. MATTHEWS No. 903SC1305	Craven (89CRS8495)	No Error
STATE v. MAXWELL No. 9119SC355	Rowan (90CRS003783)	Affirmed
STATE v. McCLELLAND No. 9122SC293	Davidson (90CRS15238)	Affirmed

STATE v. MILLER No. 9125SC270	Catawba (90CRS011748)	Judgment & conviction of felonious larceny is affirmed. Judgment & conviction of possession of stolen goods is vacated
STATE v. MOORE No. 9125SC428	Catawba (90CRS14822)	No Error
STATE v. PARSONS No. 9123SC354	Wilkes (90CRS2792) (90CRS2793)	No Error
STATE v. ROGERS No. 9110SC384	Wake (90CRS33783) (90CRS33784) (90CRS33785)	No Error
STATE v. SWANSON No. 9130SC216	Clay (90CRS33) (90CRS34) (90CRS35)	No Error
STATE v. THRIFT No. 9129SC300	Rutherford (84CRS2887) (84CRS2887(A))	Affirmed
STATE v. WHISNANT No. 9125SC219	Burke (89CRS463) (89CRS8149) (89CRS9130) (89CRS9131)	No Error
STATE v. WHITWORTH No. 9127SC344	Cleveland (90CRS5644)	No Error
STATE v. WOMACK No. 9118SC285	Guilford (89CRS51772) (90CRS20402) (90CRS20403)	No Error
SUPERIOR COURT OF COWETA COUNTY v. HONEYCUTT No. 9127SC346	Cleveland (90CVD1379)	Reversed & Remanded
WEBB v. SCARLETT No. 9021SC1123	Forsyth (85CVS3016)	No error in part & vacated in part

WILLIAMS v. ROWLAND No. 917SC378	Nash (90CVS1215)	Dismissed
WILLIAMS v. WILLIAMS No. 9125DC314	Burke (86CVD674)	Affirmed

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS

§ 11 (NCI4th). Abatement on ground of pendency of prior action arising out of domestic relationship

Where the appellate court held that defendant wife was not entitled to alimony without divorce and attorney fees because she was not a dependent spouse, the husband, now deceased, filed a motion in the cause in the district court seeking a refund of alimony and attorney fees already paid, and plaintiff executor was substituted as party defendant in the alimony action, the doctrine of prior action pending abated an action filed by plaintiff executor in the superior court to recover the alimony and attorney fees paid prior to the appellate court decision. *Caldwell v. Caldwell*, 380.

ADMINISTRATIVE LAW AND PROCEDURE

§ 40 (NCI4th). Evidence, generally

A contested case hearing regarding the issuance of a permit to build a marina in the open waters of Chocowinity Bay would be supported by petitioner's new evidence consisting of the affidavit of a landscape architect that the marina could be constructed on an upland basin site which would require no alteration of wetlands or estuarine habitat, but the trial court must determine whether the new evidence should reasonably have been presented before or during petitioner's petition for a contested case hearing. *Pamlico Tar River Foundation v. Coastal Resources Comm.*, 24.

§ 56 (NCI4th). What are "contested cases" subject to judicial review

Petitioner was not entitled to a contested case hearing where there was no evidence to support a finding that petitioner would have had a substantial likelihood of prevailing if a contested case hearing were held. *Pamlico Tar River Foundation v. Coastal Resources Comm.*, 24.

Petitioner's appeal in a certificate of need case is dismissed for lack of subject matter jurisdiction under G.S. 131E-188(b) where no "contested case hearing" was held because the Administrative Law Judge granted DHR's motion to dismiss upon finding that a letter from petitioner was not a valid petition and that a verified petition thereafter received from petitioner was not timely. *Community Psychiatric Ctrs. v. N.C. Dept. of Human Resources*, 514.

An appeal to the Court of Appeals from the dismissal of a petition for a contested case hearing by the Administrative Law Judge was dismissed for lack of subject matter jurisdiction where the case was dismissed before a contested case hearing was begun and the decision was an agency decision which must be appealed to superior court. *Iredell Mem. Hosp. v. N.C. Dept. of Human Resources*, 637.

§ 60 (NCI4th). Judicial review under other statutes or rules; generally

The defendant's argument that a workers' compensation award for disfigurement was not supported by the evidence failed where defendant did not provide the appellate court with the record of evidence in the case. *Crews v. N.C. Dept. of Transportation*, 372.

ADVERSE POSSESSION

§ 36 (NCI4th). Life tenant and remainderman

The trial court erroneously granted summary judgment for defendants in an action to establish a boundary and the case was remanded for entry of summary

ADVERSE POSSESSION—Continued

judgment for plaintiff where defendants were remaindermen claiming adverse possession but their possession was not adverse in that it was with the acquiescence and permission of the life tenant, their mother, and the twenty-year period was not met. *Cassada v. Cassada*, 129.

ANIMALS, LIVESTOCK, OR POULTRY

§ 15 (NCI4th). Horses, mules and ponies

The trial court erred by directing a verdict for defendant stable owners in an action brought by plaintiff for injuries sustained when her car struck a horse which had escaped from defendants through an electric fence. *Garrett v. Overman*, 259.

APPEAL AND ERROR

§ 2 (NCI4th). Mandatory nature of appellate rules

An appeal is dismissed for failure to comply with the Rules of Appellate Procedure. *Fine v. Fine*, 642.

§ 89 (NCI4th). What constitutes order affecting substantial right

Defendants' contentions in a wrongful death action that the trial court erred by denying their motions to dismiss for failure to state a claim upon which relief could be granted and for failing to join decedent's parents as necessary parties were not considered because the orders complained of were interlocutory. *Greer v. Parsons*, 463.

§ 114 (NCI4th). Motions based on failure to state claim

The denial of defendant's motion to dismiss plaintiff's complaint for failure to state a claim for relief could not be reviewed on appeal where the case proceeded to judgment on the merits. *Shingledecker v. Shingledecker*, 783.

§ 118 (NCI4th). Appealability; summary judgment denied

The denial of plaintiff's motion for summary judgment as to all of her claims was not reviewable on appeal. *Carter v. Foster*, 110.

§ 134 (NCI4th). Orders relating to attorneys or representation by attorney

An issue of attorney fees on a note was not reviewable because plaintiff did not appeal from the denial of attorney fees on that note. *Carter v. Foster*, 110.

§ 147 (NCI4th). Generally; necessity of request, objection or motion

Defendant in an action for a deficiency judgment could not raise on appeal the argument of retention of collateral after repossession where it was not raised before the trial court. *Fritts v. Selvais*, 149.

There was evidence in an action for a deficiency judgment to support the trial court's finding that the sale price of collateral was commercially reasonable; defendant cannot argue the incompetency of the evidence on appeal because he failed to object or move to strike at trial. *Ibid.*

Defendant's assignments of error to the cross-examination of its expert witnesses with learned treatises were not properly presented and there was no error in the exclusion of testimony concerning comparative risk where there was no offer of proof. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 288.

APPEAL AND ERROR—Continued

§ 315 (NCI4th). Civil actions and special proceedings

Defendant's argument that a workers' compensation award for disfigurement was not supported by the evidence failed where defendant did not provide the appellate court with the record of evidence in the case. *Crews v. N.C. Dept. of Transportation*, 372.

§ 341 (NCI4th). Failure to properly assign error

Defendant's appeal is dismissed where it failed to set out the assignments of error in its brief or in the record. *Edelstein v. Pinnacle Inn Condominium Owners' Assn.*, 86.

An assignment of error was inadequate to preserve alleged error for review where defendant's assignment of error to certain expert testimony referred to 29 pages inclusively, encompassing testimony on at least 12 documents or letters. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 288.

§ 342 (NCI4th). Cross-assignments of error by appellee

Defendants' contentions in a wrongful death action that the trial court erred by denying their motions to dismiss for failure to state a claim upon which relief could be granted and for failing to join decedent's parents as necessary parties were not considered because defendants were not cross-appellants. *Greer v. Parsons*, 463.

§ 359 (NCI4th). Record on appeal; omission of matters relating to evidence, witnesses

A child support order contained insufficient findings of fact as to the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents and an affidavit regarding plaintiff's employment and earnings attached to her brief was not part of the record on appeal. *Smith v. Smith*, 488.

§ 382 (NCI4th). Powers and duties of trial court in settling case on appeal

The trial court did not abuse its discretion in a wrongful discharge action by not allowing plaintiff's motion to include her response to defendant's summary judgment motion and attachments thereto in the record on appeal and the transcript of the hearing. *Battle v. Nash Tech. College*, 120.

§ 447 (NCI4th). Issues first raised on appeal

The State was precluded from raising for the first time on appeal the issue of defendant's lack of standing to allege a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. *S. v. Green*, 38.

§ 510 (NCI4th). Frivolous appeals in appellate division

Upon review of the more than twenty appeals brought to the Court of Appeals in this case, and considering appellant's 75 page brief setting forth precisely the same argument as in his motion to dismiss in the trial court and in previous appeals, a notice was issued that appellant was to show cause why sanctions pursuant to Appellate Rule 34 should not be imposed. *Lowder v. All Star Mills*, 500.

APPEARANCE

§ 6 (NCI4th). Effect of appearance on waiver of claim asserting improper process

Defendant made a general appearance when she filed a motion to claim exempt property after a default judgment was entered, and her motion to set aside the

APPEARANCE—Continued

default judgment on the ground of invalidity of service of process was thus properly denied. *Faucette v. Dickerson*, 620.

ARBITRATION AND AWARD

§ 34 (NCI4th). Fees and expenses of arbitration

The superior court had authority to award attorney fees under G.S. 6-21.2 in the first instance upon review of an arbitration award. *Nucor Corp. v. General Bearing Corp.*, 518.

ARCHITECTS

§ 10 (NCI4th). Negligence and breach of contract

In an action for breach of contract and breach of implied warranty against the designer of an urban streetscape, the trial court did not err in denying defendant designer's motions for directed verdict and judgment n.o.v. made on the ground that defendant construction company materially deviated from defendant designer's specifications for crosswalk and sidewalk setting beds. *City of Charlotte v. Skidmore, Owings and Merrill*, 667.

A material deviation from the specifications by defendant construction company would not have completely insulated defendant designer from liability for defective specifications since proof of a contractor's deviation simply creates a prima facie case as to causation which a contractor may rebut by proving that the damage was not in fact caused by the deviation. *Ibid.*

The fact that plaintiff city's acquiescence in a deviation from specifications barred its recovery from defendant contractor did not bar plaintiff's recovery from defendant designer or absolve defendant designer from paying any portion of the recovery, and the trial court properly granted a new trial on the damages issue after realizing that jury instructions had been inadequate to guide the jury in making distinctions with respect to damages for setting beds and pavers and as between the first two crosswalks laid and subsequent crosswalks. *Ibid.*

ASSAULT AND BATTERY

§ 26 (NCI4th). Sufficiency of evidence of felonious assault where weapon is a firearm

The evidence was sufficient to withstand a motion to dismiss a delinquency petition for assault by pointing a gun. *In re J. A.*, 720.

ATTORNEYS AT LAW

§ 7.4 (NCI3d). Fees based on provisions of notes or other instruments

A trial court did not err by awarding attorney fees in an action on a debt where there were no provisions for payment of such fees in the evidence of indebtedness. *Carter v. Foster*, 110.

§ 38 (NCI4th). Withdrawal from case

The trial court did not abuse its discretion by denying defense counsel's motion to withdraw in order to serve as a witness for defendant. *S. v. Moore*, 87.

AUTOMOBILES AND OTHER VEHICLES

§ 45.6 (NCI3d). Accident reports, photographs, charts, tables, diagrams, and results of blood tests

An officer was not improperly permitted to state a conclusion as to who ran a red light when the trial court allowed the officer to testify in detail as to what he found at the scene by referring to or reading from his accident report. *Mickens v. Robinson*, 52.

§ 126.2 (NCI3d). Blood and breathalyzer test; generally

In determining that petitioner willfully refused to submit to a chemical test, the trial court's finding that the arresting officer had reasonable grounds to believe that petitioner had committed the implied consent offense of impaired driving was supported by the evidence. *Rock v. Hiatt*, 578.

§ 126.3 (NCI3d). Blood and breathalyzer test; qualification of expert; manner and time of administration of test

The trial court erred in determining that petitioner willfully refused to submit to a chemical test without making findings as to whether petitioner knowingly permitted the prescribed thirty-minute time period to expire before he elected to take the test where the evidence at trial was conflicting on this issue. *Rock v. Hiatt*, 578.

§ 265 (NCI4th). Priority of security interest in vehicles

The notation of a security interest on the certificate of title of a manufactured home perfected the security interest in the home, and the priority of the security interest was not lost when the owner of the home removed the tongue, wheels, and axles, placed the home on brick and block foundation walls, and attached a front porch, rear deck, and septic system to the home. *Peoples Savings and Loan Assn. v. Citicorp Acceptance Co.*, 762.

§ 563 (NCI4th). Driver's willful and wanton conduct

Any error in excluding evidence of decedent's intoxication in a wrongful death action was harmless where defendants failed to show that decedent's intoxication alone would have been sufficient for actionable negligence, much less willful or wanton negligence. *Boyd v. L. G. DeWitt Trucking Co.*, 396.

§ 833 (NCI4th). Warrantless arrest generally

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress evidence seized from his person after an arrest in Virginia by a North Carolina highway patrolman. *S. v. Gwyn*, 369.

BILLS AND NOTES

§ 20 (NCI3d). Presumptions and burden of proof, sufficiency of evidence and nonsuit

Plaintiff was not entitled to summary judgment in an action on a note where defendants' evidence established a genuine issue of material fact as to the amount of the debt. *Triad Bank v. Educational Consultants, Inc.*, 483.

BURGLARY AND UNLAWFUL BREAKINGS

§ 80 (NCI4th). Identification of defendant as perpetrator

The trial court did not err in a prosecution for multiple first degree burglaries by denying defendant's motion for nonsuit where defendant was linked to one

BURGLARY AND UNLAWFUL BREAKINGS—Continued

burglary by a witness and a key found at his home, and to another because there was no explanation offered for defendant's presence in the victim's motel room at 1:30 a.m. even though nothing was taken. *S. v. Cummings*, 138.

CONSPIRACY

§ 36 (NCI4th). Conspiracies involving drugs

The trial court did not err by denying defendant's motion to dismiss charges of conspiring to traffic in cocaine for insufficient evidence. *S. v. Jackson*, 239.

CONSTITUTIONAL LAW

§ 251 (NCI4th). Identity of confidential informant

The trial court did not err in a prosecution for trafficking in cocaine by denying defendant's motion for disclosure of a confidential informant's identity. *S. v. Jackson*, 239.

§ 280 (NCI4th). Right to appear pro se generally

There was no error in a prosecution for carrying a concealed weapon where an inquiry was made at a pretrial hearing as to defendant's waiver of counsel and the inquiry was not repeated when defendant was tried before a different judge. *S. v. Lamb*, 646.

§ 349 (NCI4th). Right of confrontation; cross-examination of witnesses

Defendant was not denied his right to cross-examine a sexual offense victim as to the hearsay testimony of a pediatric social worker and a police investigator where the victim was available, testified at trial, and was subject to cross-examination, and the victim answered questions on direct examination to establish her competency to testify but respondent did not challenge the competency of her testimony or attempt to recall her as a witness. *In re J. A.*, 720.

§ 374 (NCI4th). Cruel and unusual punishment; life imprisonment generally

The mandatory life sentence for first degree sexual offense did not constitute cruel and unusual punishment. *S. v. Young*, 415.

CONTRACTS

§ 172 (NCI4th). Construction contracts not involving buildings

In an action for breach of contract and breach of implied warranty against the designer of an urban streetscape, the trial court did not err in instructing the jury on the measure of damages for sidewalks that plaintiff was entitled to recover the cost of replacement of or repair to the sidewalks less salvage value of any parts replaced. *City of Charlotte v. Skidmore, Owings and Merrill*, 667.

COSTS

§ 30 (NCI4th). Attorney's fees

In personal injury actions or property damage suits the trial court could award attorney fees under G.S. 6-21.1 to a defendant who prevailed on a counterclaim for less than the stated amount, and the court was not required to make findings of fact allocating the time spent on this case between work required to defend

COSTS—Continued

against plaintiff's claim and that required to forward her counterclaim. *Mickens v. Robinson*, 52.

§ 33 (NCI4th). Actions to collect debts

The superior court had authority to award attorney fees under G.S. 6-21.2 in the first instance upon review of an arbitration award. *Nucor Corp. v. General Bearing Corp.*, 518.

A stock purchase agreement was an "evidence of indebtedness" within the meaning of G.S. 6-21.2. *Ibid.*

The trial court did not err in awarding attorney fees of 15% of the debt sued on without receiving evidence as to the reasonable value of the services performed. *Ibid.*

COURTS

§ 46 (NCI4th). Special sessions

An order disbarring respondent was vacated where respondent was disbarred at a special one-day session of superior court and the show cause order was issued before that date at a time when the court did not have jurisdiction to enter that order. *In re Delk*, 659.

CRIMINAL LAW

§ 34 (NCI4th). Compulsion and government authorization; particular circumstances

The trial court did not err in a prosecution arising from a sit-in at a clinic offering abortions by refusing to instruct the jury on the defense of necessity. *S. v. Thomas*, 264.

§ 34.4 (NCI3d). Admissibility of evidence of other offenses

The trial court in a prosecution for felony child abuse and murder properly admitted evidence of alleged acts of misdemeanor child abuse for which defendant and her boyfriend had been charged four months before the incident in question. *S. v. West*, 1.

§ 34.5 (NCI3d). Admissibility of other offenses to show identity of defendant

The trial court did not err by admitting into evidence testimony regarding defendant's prior alleged sexual misconduct with two other victims where the State was attempting on redirect examination to have the witness explain an answer given during cross-examination. *S. v. Moore*, 87.

§ 34.8 (NCI3d). Admissibility of other offenses to show modus operandi or common plan, scheme or design

Even if defendant's motion to sever burglary charges had been granted, evidence of the other two offenses would have been admissible at each trial to show both the common scheme or plan and identity. *S. v. Cummings*, 138.

§ 46.1 (NCI3d). Flight of defendant as implied admission; competency and sufficiency of the evidence

The State's evidence of police efforts to locate defendant was admissible and was sufficient to support an instruction on flight. *S. v. Patterson*, 195.

§ 68 (NCI3d). Other evidence of identity

Police sketches of an armed robbery suspect were properly authenticated but were not admissible where the State failed to prove the accuracy of either sketch. *S. v. Patterson*, 195.

§ 69 (NCI3d). Telephone conversations

The trial court erred in a prosecution for felonious possession of a controlled substance by denying defendant's motion to suppress evidence seized pursuant to a search warrant based on a telephone conversation between defendant and another man which was tape recorded by the other man's mother. *S. v. Shaw*, 268.

§ 73 (NCI3d). Hearsay testimony in general

There was no prejudicial error in an armed robbery prosecution from the erroneous admission of police sketches of suspects because it cannot be said that a sketch based on oral assertions alone is not a statement, but the State had two unequivocally positive identifications of defendant from witnesses on the stand. *S. v. Patterson*, 195.

§ 73.5 (NCI3d). Hearsay testimony; medical diagnosis or treatment

Testimony by a pediatric social worker that the four-year-old victim told her that respondent anally penetrated the victim was admissible under the medical diagnosis or treatment exception to the hearsay rule. *In re J. A.*, 720.

§ 76.5 (NCI3d). Voir dire hearing; findings of fact generally; necessity for findings

A plea of no contest was stricken and the cause was remanded where there was evidence from which it could be inferred that at least one of defendant's statements to officers made prior to a videotaped confession was involuntary. *S. v. Barlow*, 276.

§ 82.2 (NCI3d). Physician-patient and similar privileges

The trial court in an arson prosecution properly excluded testimony and records concerning a witness's mental and emotional condition and treatment where the court examined the medical records in camera and found no good reason to violate the confidentiality of the physician-patient relationship. *S. v. Adams*, 158.

§ 83 (NCI4th). Pretrial motions; waiver by failing to file

The failure of the prosecutor to file a notice of reinstatement of indictment did not void an armed robbery conviction where defendant failed to file a motion addressed to the pleading before trial. *S. v. Patterson*, 195.

§ 89.7 (NCI3d). Impeachment; mental capacity of witness

The trial court in an arson prosecution properly excluded testimony and records concerning a witness's mental and emotional condition and treatment. *S. v. Adams*, 158.

§ 101 (NCI4th). Discovery; defendant's statement

The trial court did not err by admitting a statement possessed by the State containing defendant's admission of another offense where the State had not revealed the statement in response to defendant's discovery request but defendant opened the door. *S. v. Moore*, 87.

CRIMINAL LAW—Continued

§ 307 (NCI4th). Consolidation of multiple offenses against property

The trial court did not err by denying defendant's motion to sever offenses where the court could find a scheme or plan to deprive motel occupants of their property while they slept. *S. v. Cummings*, 138.

§ 314 (NCI4th). Joinder or consolidation of charges against multiple defendants generally

The trial court did not abuse its discretion in an arson prosecution by denying defendant's motion to join or consolidate his trial with that of a codefendant; a defendant may not independently assert his preference for joinder. *S. v. Adams*, 158.

§ 501 (NCI4th). Court's inquiry into numerical split of jury

There was no error in an armed robbery prosecution where the court inquired into the division of the jury. *S. v. Patterson*, 195.

§ 505 (NCI4th). Requiring deliberations to continue

There was no error in an armed robbery prosecution where the court twice sent the jury back to deliberate after it indicated it was deadlocked. *S. v. Patterson*, 195.

§ 750 (NCI4th). Instructions on reasonable doubt; presumption of innocence generally

The trial court did not err in a prosecution for second degree sexual offense and burglary in its instruction on reasonable doubt. *S. v. Whitaker*, 386.

§ 1086 (NCI4th). Findings of aggravating and mitigating factors where two or more convictions are consolidated for judgment

Where the consolidated judgment for first degree sexual offense and attempted indecent liberties with a child did not exceed the maximum sentence allowable for the more serious felony, defendant was not prejudiced by the trial court's failure to make separate findings of aggravating and mitigating factors for each offense. *S. v. Turner*, 331.

§ 1099 (NCI4th). Aggravating factors; evidence of facts underlying original charge after plea bargain

Defendant's due process rights were not violated by the trial court's finding as an aggravating factor for attempted first degree sexual offense and attempted indecent liberties with a child to which defendant pled guilty that there was vaginal penetration by defendant. *S. v. Turner*, 331.

The trial court's finding as an aggravating factor for attempted sexual offense and attempted indecent liberties that there was vaginal penetration by defendant was supported by a preponderance of the evidence. *Ibid.*

§ 1148 (NCI4th). Especially heinous, atrocious or cruel aggravating factor; cases involving death of victim generally

The trial court did not err in finding the especially heinous, atrocious, or cruel aggravating factor for involuntary manslaughter where the evidence tended to show that defendant forced her child to drink a large amount of water, and that the child vomited many times in a short time frame, screamed in pain, and experienced seizures before dying. *S. v. West*, 1.

CRIMINAL LAW—Continued

§ 1166 (NCI4th). Aggravating factors; mental infirmity, particular cases

The evidence supported the trial court's finding as an aggravating factor for attempted sexual offense and attempted indecent liberties that the twelve-year-old victim was especially vulnerable in that she had an I.Q. in the mildly handicapped range and her development age was six years and two months. *S. v. Turner*, 331.

§ 1187 (NCI4th). Aggravating factors; conviction while defendant was indigent and without assistance of counsel

Where defendant failed to object or move to suppress the evidence of a prior conviction, he is precluded from raising on appeal the issue of his indigency and lack of counsel on the prior conviction. *S. v. Turner*, 331.

§ 1195 (NCI4th). Mitigating factors under the Fair Sentencing Act generally

An arson defendant's argument that he was deprived of potential mitigating factors at sentencing by the denial of his joinder motion was rejected. *S. v. Adams*, 158.

§ 1218 (NCI4th). Mitigating factors; passive participant generally

The trial court did not err in failing to find as a mitigating factor that defendant is of good character where the record established only an absence of bad character. *S. v. Turner*, 331.

DAMAGES

§ 16.4 (NCI3d). Sufficiency of evidence of pain, suffering, and mental anguish

A verdict of $6,000 for personal injury was supported by evidence of lost wages of $225, medical bills of $155, soreness and bruising. *Mickens v. Robinson*, 52.

§ 38 (NCI4th). Cost of repairs

The trial court did not err in an action for unfair and deceptive practices and breach of the implied warranty of habitability arising from the construction and sale of a house by instructing the jury only on repair value. *Lapierre v. Samco Development Corp.*, 551.

§ 80 (NCI4th). Punitive damages for negligent acts generally

The trial court properly denied defendants' motions for a directed verdict and for judgment notwithstanding the verdict on plaintiff's claim for punitive damages arising out of defendant truck company's negligent entrustment of the truck to defendant driver. *Boyd v. L. G. DeWitt Trucking Co.*, 396.

§ 84 (NCI4th). Punitive damages for driving while intoxicated

The trial court properly denied defendants' motions for directed verdict and for judgment n.o.v. on plaintiff's claim for punitive damages arising from defendant's negligence in driving his truck while intoxicated into the rear of decedent's vehicle. *Boyd v. L. G. DeWitt Trucking Co.*, 396.

§ 173 (NCI4th). Lost earnings and profits

Plaintiffs were not entitled to lost rentals from a beach condominium on a negligent construction claim where they amended their complaint but did not amend their prayer for damages. *Bonestell v. North Topsail Shores Condominiums*, 219.

DAMAGES – Continued

§ 178 (NCI4th). Verdict generally; excessive or inadequate award

The trial court did not err by denying defendants' motion for a new trial on punitive damages based on an excessive award. *Boyd v. L. G. DeWitt Trucking Co.*, 396.

DEATH

§ 31 (NCI4th). Matters compensable

The trial court erred by dismissing the claim for punitive damages in a wrongful death action arising from the death of a fetus in an automobile collision. *Greer v. Parsons*, 463.

The trial court did not err in a wrongful death action arising from the death of a fetus in an automobile collision by dismissing claims for loss of the child's companionship, services, and society. *Ibid.*

DEEDS

§ 64 (NCI4th). Personal covenants

The trial court properly dismissed plaintiffs' action to enforce a restrictive covenant where no recorded document stated that the restrictions benefited successors. *Runyon v. Paley*, 208.

§ 82 (NCI4th). Waiver of right to enforce restrictive covenants; estoppel

A plaintiff who participated in the exchange of a subdivision lot with knowledge of defendants' intended use of the lot will be estopped from asserting that a restrictive covenant prohibited such use, and a plaintiff who knew of the planned use and consented or acquiesced in the plan waived his right to assert the restrictive covenant. *Easterwood v. Burge*, 507.

§ 85 (NCI4th). Residential only covenants

The trial court correctly granted summary judgment for plaintiffs in an action to enforce a restrictive covenant where defendant was operating a licensed day care in her residence. *Walton v. Carignan*, 364.

A restrictive covenant confining use of a subdivision lot to "residential purposes only" for the construction of "one detached single family dwelling" was violated by the owners' use of the lot for an access road to a tract of land outside the subdivision. *Easterwood v. Burge*, 507.

§ 86 (NCI4th). Effect of change in character of neighborhood

Plaintiff's acquiescence in other business or professional activities in their subdivision did not amount to a waiver of the right to enforce restrictions against commercial or business activity. *Walton v. Carignan*, 364.

DIVORCE AND SEPARATION

§ 15 (NCI4th). Separation agreement; construction generally

The trial court properly granted summary judgment for plaintiff in an action to enforce a provision in a separation agreement requiring defendant to pay plaintiff one-fourth of any net recovery after attorney fees for a medical malpractice claim. *Harrington v. Perry*, 376.

DIVORCE AND SEPARATION—Continued

§ 28 (NCI4th). Modification of separation agreement; particular provisions

A court-ordered consent judgment contained property settlement as well as support provisions where it required the parties to convert the formal ownership of the marital home "to tenant in common with right of survivorship," and an evidentiary hearing was required to determine whether the provisions were integrated or whether the alimony provisions were separate and modifiable. *Lemons v. Lemons*, 492.

§ 37 (NCI4th). Enforcement generally

The trial court did not err by granting summary judgment for plaintiff in an action to enforce a provision in a separation agreement granting plaintiff a share in defendant's medical malpractice claim. *Harrington v. Perry*, 376.

§ 38 (NCI4th). Specific performance

The trial court erred by granting specific performance for the enforcement of a separation agreement incorporated into a consent judgment. *Powers v. Powers*, 697.

The trial court correctly concluded that it did not have jurisdiction to hear defendant's motion in the cause for specific performance of provisions of a separation agreement that were not part of any court order. *Morrow v. Morrow*, 787.

§ 41 (NCI4th). Contempt

There was competent evidence to support each disputed finding of fact in an action in which defendant was held in contempt for not complying with the separation agreement provision requiring him to provide a college education for a child. *Powers v. Powers*, 697.

§ 112 (NCI4th). Property subject to equitable distribution, generally

The court did not err in failing to classify, value, and distribute a leased car as a marital asset. *Fox v. Fox*, 13.

§ 129 (NCI4th). Pension, retirement, and other deferred compensation rights

An increase in the husband's pension benefits after the date of separation because of his election to participate in an early retirement incentive plan offered by his employer was separate rather than marital property. *Boger v. Boger*, 340.

§ 137 (NCI4th). Date of valuation for equitable distribution

The trial court did not err in failing to consider the current fair market value of all of the marital assets in making an equitable distribution. *Fox v. Fox*, 13.

§ 140 (NCI4th). Valuation of partnerships

The trial court did not err in valuing defendant's partnership interest in an accounting firm by using the withdrawal formula found in the partnership agreement. *Fox v. Fox*, 13.

§ 143 (NCI4th). Equitable division of property generally; "equitable" and "equal" distinguished

The trial court made sufficient findings to support its decision that an equal division of marital property was equitable. *Fox v. Fox*, 13.

The trial court correctly granted summary judgment against defendant wife where defendant and her ex-husband had purchased land as entireties property, plaintiff obtained a judgment against the ex-husband, defendants divorced, and

DIVORCE AND SEPARATION—Continued

defendant wife was awarded the entire ownership of the property. *Union Grove Milling and Manufacturing Co. v. Faw*, 166.

§ 155 (NCI4th). Maintenance or development of property after separation

The trial court properly considered plaintiff's payments for the mortgage, property taxes and homeowner's insurance premiums in its distribution of marital property. *Fox v. Fox*, 13.

§ 162 (NCI4th). Equitable distribution; agreements dividing property generally; separation agreements

Where the parties stipulated to a division of their personal property by which plaintiff received $10,500 worth of property and defendant $3,000 worth of property, and they further stipulated that defendant would receive a $5,000 credit, the court erred in including the personal property in its calculation of the marital estate, dividing the estate, determining how much plaintiff needed to pay defendant to make the division equal, and then giving defendant the $5,000 credit. *Fox v. Fox*, 13.

§ 168 (NCI4th). Pension, retirement, or deferred compensation benefits; determination of award

An issue of fact existed as to whether defendant had vested retirement benefits, and the trial court erred in failing to make findings and conclusions about defendant's retirement interest. *Fox v. Fox*, 13.

§ 201 (NCI4th). Who is a dependent spouse

The trial court did not err in concluding that defendant wife is a dependent spouse and plaintiff husband is the supporting spouse even though the wife has substantial assets. *Lamb v. Lamb*, 541.

§ 218 (NCI4th). Alimony; needs of parties; standard of living

The trial court did not err in determining that an award of alimony was necessary to maintain defendant wife's standard of living, and defendant was not required to deplete plaintiff's monthly payments to her on the principal of a note given in equitable distribution before being entitled to alimony. *Lamb v. Lamb*, 541.

§ 219 (NCI4th). Earnings and earning capacity; ability to pay

The trial court did not fail to consider the effect of equitable distribution on plaintiff husband's ability to pay alimony, and the trial court did not err in awarding defendant wife the same amount of permanent alimony as she had been receiving as temporary alimony prior to equitable distribution. *Lamb v. Lamb*, 541.

§ 336 (NCI4th). Child custody generally; court's discretion

The trial court properly exercised jurisdiction in making its child custody order though defendant was living in Florida when plaintiff filed her complaint. *Shingledecker v. Shingledecker*, 783.

§ 383 (NCI4th). Grandparents' visitation rights

A step-grandmother had a right under G.S. 50-13.1 to bring a claim for child visitation. *Ray v. Ray*, 790.

§ 394 (NCI4th). Child's needs generally

A child support order contained insufficient findings of fact as to the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. *Smith v. Smith*, 488.

DIVORCE AND SEPARATION—Continued

§ 421 (NCI4th). Enforcement of child support orders; arrest and bail; injunction; garnishment

The trial court could properly enter an order to withhold plaintiff's wages to collect child support arrearages which had been reduced to judgment. *Griffin v. Griffin*, 65.

§ 427 (NCI4th). Modification of support order generally

The trial court was without authority to modify past due child support payments where there was one unallocated payment for two children, one child reached majority and the supporting spouse unilaterally reduced the payment, and no application for modification was made by the supporting spouse. *Craig v. Craig*, 615.

§ 520 (NCI4th). Enforcement of separation agreement

The trial court erred by awarding plaintiff attorney fees in an action to hold defendant in contempt for failing to abide by a portion of a separation agreement. *Powers v. Powers*, 697.

§ 539 (NCI4th). Insufficiency of dependent spouse's means; inability to defray legal expenses

The trial court erred in awarding attorney fees of $12,235 to defendant wife in an alimony action where both parties had substantial estates. *Lamb v. Lamb*, 541.

EQUITY

§ 2.2 (NCI3d). Applicability of laches to particular proceedings

The doctrine of laches prohibited defendants from asserting as a defense to a county's action to recover 1985-88 ad valorem taxes that the constitutional amendment passed in 1970 which empowered the county to increase property taxes violated due process because the ballot failed adequately to inform voters of the substance of the amendment. *Franklin County v. Burdick*, 496.

EVIDENCE

§ 30 (NCI3d). Ancient documents

The trial court properly admitted documents relating to experiments between 1930 and 1943 in an action for fraudulent concealment of the hazards of asbestos. *Rowan County Bd. of Education v. U. S. Gypsum Co.*, 288.

§ 34.1 (NCI3d). Admissions and declarations; admissions against interest

Testimony by plaintiff's president that one defendant told him that he and another defendant were operating a business with the financial backing of the third defendant and that there was no problem with plaintiff being paid for their account was competent as an admission of a party opponent. *Boone Lumber, Inc. v. Sigmon*, 798.

FRAUD

§ 11 (NCI3d). Competency and relevancy of evidence

The trial court did not err by admitting post-sale evidence in an action for fraud alleging that the manufacturer of acoustical ceiling plaster had concealed information concerning asbestos. *Rowan County Bd. of Education v. U. S. Gypsum Co.*, 288.

FRAUD — Continued

§ 12.1 (NCI3d). Sufficiency of evidence; nonsuit

The trial court correctly denied defendant manufacturer's motions for a directed verdict and judgment n.o.v. as to plaintiff school system's claims for fraud, misrepresentation and punitive damages arising from acoustical ceiling plaster containing asbestos. *Rowan County Bd. of Education v. U. S. Gypsum Co.*, 288.

The trial court erred in entering summary judgment for defendant in an action for fraud based on allegations that defendant falsely represented to plaintiff that defendant was interested in marketing plaintiff's design for an improved custom surgical kit and that plaintiff relied on defendant's misrepresentations and delayed marketing his design with other marketing companies to his detriment. *Isbey v. Cooper Companies, Inc.*, 774.

§ 13 (NCI3d). Instructions and damages

The trial court did not err in its instructions to the jury in an action for fraudulently concealing the risk of asbestos. *Rowan County Bd. of Education v. U. S. Gypsum Co.*, 288.

HOMICIDE

§ 21.9 (NCI3d). Sufficiency of evidence of guilt of manslaughter

The evidence was sufficient for the jury in a prosecution for involuntary manslaughter by forcing defendant's child to drink such a large amount of water in such a short period of time that it made him violently ill and resulted in his death. *S. v. West*, 1.

HOSPITALS

§ 2.1 (NCI3d). Control and regulation; selection of hospital site

Petitioner's appeal in a certificate of need case is dismissed for lack of subject matter jurisdiction under G.S. 131E-188(b) where no "contested case hearing" was held. *Community Psychiatric Ctrs. v. N.C. Dept. of Human Resources*, 514.

HUSBAND AND WIFE

§ 2.1 (NCI3d). Construction of antenuptial agreements; effect of fraud or duress

Plaintiff widow was barred from recovering a year's allowance and from receiving a life estate in the marital home by her antenuptial agreement which relinquished all claim to any property of her husband. *In re Estate of Cline*, 83.

§ 25 (NCI3d). Alienation of affections; competency and relevancy of evidence

A witness was properly permitted to testify as an expert on plaintiff's damages in an action for alienation of affections. *Jennings v. Jessen*, 739.

§ 26 (NCI3d). Alienation of affections; damages and instructions

There was insufficient evidence to show that plaintiff suffered compensatory damages of $200,000 where there was no evidence of income lost by plaintiff as a result of defendant's actions, but plaintiff's evidence was sufficient to support an award to her of $300,000 in punitive damages. *Jennings v. Jessen*, 739.

HUSBAND AND WIFE—Continued

Where plaintiff obtained judgment by default and was entitled to at least nominal damages, plaintiff could recover punitive damages even though the trial court's order of compensatory damages was not supported by the evidence. *Ibid.*

INFANTS

§ 2.1 (NCI3d). Liability of infant on contracts for necessaries

Defendant child is not liable under the necessaries doctrine for hospital services furnished to her by plaintiff following an automobile accident where the services were furnished at the request of the child's parents who expressly contracted with plaintiff to pay for them. *N.C. Baptist Hospitals v. Franklin*, 446.

§ 18 (NCI3d). Admissibility and sufficiency of evidence in juvenile hearings

The evidence in a juvenile delinquency proceeding was sufficient to support respondent's convictions of assault by pointing a gun and first degree sexual offense. *In re J. A.*, 720.

§ 20 (NCI3d). Judgments and orders; dispositional alternatives

The trial court did not err by ordering a juvenile into the custody of the Department of Social Services; although DSS had difficulty placing the child, that difficulty is not a basis for returning a neglected child to parents who will not provide proper care and supervision. *In re Kennedy*, 632.

INSURANCE

§ 3 (NCI3d). Nature and elements of contract and policy

The trial court did not err in an action to determine insurance coverage by determining that the claimant's 1985 lawsuit was outside the policy period and not covered by a 1983 claims made policy. *State ex rel. Long v. Beacon Ins. Co.*, 144.

§ 68.7 (NCI3d). Automobile insurance; provisions as to medical payments

A genuine issue of material fact was presented as to whether an insurance settlement was only for plaintiff's uninsured motorist claim or included plaintiff's claim under the medical payments provision. *Lindsey v. N.C. Farm Bureau Mut. Ins. Co.*, 432.

Defendant insurer failed to show that it was entitled to summary judgment in plaintiff's action to recover under the medical payments provision of an automobile policy issued to her mother where it submitted an affidavit that plaintiff was not a family member of the insured but the policy was not included in the record on appeal. *Ibid.*

§ 69 (NCI3d). Protection against injury by uninsured or underinsured motorist generally

Summary judgment for defendant was reversed where plaintiff filed an action involving stacking of underinsured motorist coverage. *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 272.

A vehicle insurance policy issued to a company which leased trucks owned by deceased and the services of deceased did not provide underinsured motorist coverage for the deceased who was killed while a social passenger in a car owned by a third party. *Brown v. Truck Ins. Exchange*, 59.

The trial court correctly granted summary judgment for plaintiffs in a declaratory judgment action to determine whether plaintiffs were entitled to stack the UIM

coverages of three separate vehicles covered under a single Nationwide policy. *Harris v. Nationwide Mut. Ins. Co.*, 101.

The trial court correctly granted summary judgment for plaintiff and allowed stacking of underinsured motorist coverage where plaintiff was injured in an automobile accident when the automobile in which she was riding ran off the highway and struck a utility pole, and the driver's vehicle had the same insurance limits as the vehicles insured by defendant. *Amos v. N.C. Farm Bureau Mut. Ins. Co.*, 629.

A plaintiff who was struck by an automobile while riding her bicycle was not entitled to recover underinsured motorist benefits under an automobile policy issued to a corporation for which she owned two-thirds of the stock. *Busby v. Simmons*, 592.

§ 75.4 (NCI3d). Subrogation; full payment by insurer

The trial court erred by granting summary judgment for defendant estate where plaintiff's insured was injured in a collision with decedent's vehicle; decedent's insurance company paid its liability limit to plaintiff's insured who released all claims and dismissed her action against defendant estate; plaintiff insurance company paid its underinsured motorist limits to its insured; and plaintiff refused to release its subrogation rights against defendant estate. *State Farm Mutual Auto. Ins. Co. v. Blackwelder*, 656.

§ 121 (NCI3d). Fire insurance; provisions excluding liability

The trial court erred in holding by summary judgment that a homeowners policy did not cover a fire started by insureds' son which destroyed a building used in a foam rubber business because the actions which led to the fire arose out of a business pursuit. *Allstate Ins. Co. v. Robinson*, 794.

§ 122 (NCI3d). Conditions; forfeiture

The trial court correctly granted summary judgment for defendant on a fire insurance claim where plaintiff refused to be examined under oath until after suit was filed. *Baker v. Independent Fire Insurance Co.*, 521.

§ 134 (NCI3d). Fire insurance; persons entitled to payment

Although the husband entered into a fire insurance contract while he was separated from plaintiff wife and was living on the property, and the policy listed the husband as the named insured and included his spouse only if a resident of the same household, the exclusionary clause was ineffective to exclude the wife as a named insured, and she was entitled to one-half of the fire insurance proceeds. *Worrells v. N.C. Farm Bureau Mut. Ins. Co.*, 69.

§ 143 (NCI3d). Construction of property damage policies generally; liability insurance

Plaintiff's forecast of evidence that some of the floors of his house have sagged from one to two inches because of termite damage was sufficient to present a material issue of fact for the jury in an action to recover under the collapse provision of a homeowner's policy. *Thomasson v. Grain Dealers Mut. Ins. Co.*, 475.

JUDGMENTS

§ 55 (NCI3d). Right to interest

An award of interest on a judgment at eight percent was partially correct and partially incorrect. *Speron Construction Co. v. Musselwhite*, 510.

JURY

§ 1 (NCI3d). Nature and extent of right to jury trial

There is no right to a jury trial of a claim for remission of forfeiture of a vehicle used in violation of the controlled substances laws. *S. v. Morris*, 246.

LANDLORD AND TENANT

§ 8.4 (NCI3d). Negligence on part of tenant; knowledge of dangerous condition

Plaintiff tenant's action to recover for injuries received in a fall on a stairway based on defendant landlords' alleged negligent construction and maintenance of the stairs was barred by plaintiff's contributory negligence where plaintiff knew of the dangerous condition of the stairs but failed for six months to notify the landlords of the condition or to take any other corrective action. *Diorio v. Penny*, 407.

LIBEL AND SLANDER

§ 11 (NCI3d). Absolute privilege

Allegedly slanderous statements made by defendant dentist about plaintiff dentist to an attorney representing a patient during a pre-deposition conference in a dental malpractice case were absolutely privileged and thus not actionable. *Rickenbacker v. Coffey*, 352.

LIMITATION OF ACTIONS

§ 4.2 (NCI3d). Negligence actions

Summary judgment was properly granted for defendant Nationwide on the moisture claim of a negligent construction action. *Bonestell v. North Topsail Shores Condominiums*, 219.

§ 12.4 (NCI3d). Amendment of pleadings

The trial court properly granted summary judgment for defendant Nationwide on a fire stop claim in an action for negligent construction of condominiums where an amendment to plaintiffs' claim did not relate back. *Bonestell v. North Topsail Shores Condominiums*, 219.

MASTER AND SERVANT

§ 10.2 (NCI3d). Actions for wrongful discharge

The trial court did not err by granting summary judgment for defendant on a wrongful discharge claim where plaintiff was discharged for failure to repay student loans. *Battle v. Nash Tech. College*, 120.

§ 55 (NCI3d). Injuries compensable generally

The evidence was sufficient to support findings by the Industrial Commission that plaintiff suffered an injury by accident when she slipped on a piece of paper on a factory aisleway and fell to the floor, that she suffered a period of temporary

total disability, and that she had a 10% permanent partial disability of the back and both legs. *Evans v. AT&T Technologies*, 45.

§ 62 (NCI3d). Injuries on the way to or from work

The Industrial Commission correctly denied plaintiff's workers' compensation claim where plaintiff was injured in an automobile accident after attending a required meeting. *Wright v. Wake County Public Schools*, 282.

§ 69 (NCI3d). Amount of recovery generally

Defendant employer was entitled to a "week-by-week" rather than "dollar-for-dollar" credit for payments it made to plaintiff under its sickness and disability plan while she was unable to work and her right to workers' compensation was being contested. *Evans v. AT&T Technologies*, 45.

The Industrial Commission erred by increasing a workers' compensation award for brain injury from $10,000 to $20,000 where the statutory limit was raised after the injury. *Crews v. N.C. Dept. of Transportation*, 372.

§ 79.2 (NCI3d). Persons entitled to payment; spouse

The Industrial Commission erred by finding that appellant did not qualify for death benefits as a widow who was separated from her husband for justifiable cause. *Rogers v. University Motor Inn*, 456.

§ 90 (NCI3d). Notice to employer of accident

A finding by the Industrial Commission that plaintiff failed without reasonable excuse to give his employer written notice of the accident within 30 days of its occurrence was not supported by the evidence where plaintiff gave immediate notice to the employer's warehouse manager, he notified his employer two months after the accident when his leg became numb, and it was not until this time that he realized the nature and seriousness of his injury. *Jones v. Lowe's Companies*, 73.

§ 94.3 (NCI3d). Rehearing and review by Commission

A final award in a workers' compensation case was remanded where defendant intended to pay plaintiff the benefits to which she was entitled but did not know that she was disabled and plaintiff accepted a settlement without knowing that a disabled widow who does not remarry is entitled to lifetime benefits. *Cockrell v. Evans Lumber Co.*, 359.

§ 96 (NCI3d). Conclusiveness of findings of fact in general

The Industrial Commission findings in a workers' compensation action that plaintiff did not suffer an accident and had no excuse for not timely reporting it were binding. *Elliot v. A. O. Smith Corporation*, 523.

§ 96.5 (NCI3d). Specific instances where findings are conclusive or sufficient

The Industrial Commission's findings were sufficient to support an award of workers' compensation for disfigurement, and there was no error in failing to separately specify the compensation for bodily and for facial disfigurement. *Crews v. N.C. Dept. of Transportation*, 372.

§ 108.1 (NCI3d). Unemployment compensation; effect of misconduct

The superior court correctly upheld the decision of the Employment Security Commission to disqualify claimant from receiving unemployment benefits where the employer's attendance policy gave each employer one hundred points, points

MASTER AND SERVANT—Continued

were deducted for absences commensurate with the degree of departure from expected conduct, and petitioner was discharged for excessive tardiness and absenteeism. *Lindsey v. Qualex, Inc.*, 585.

MORTGAGES AND DEEDS OF TRUST

§ 7 (NCI3d). Construction as to debts secured

Where a construction loan deed of trust provided that the period within which the owner's future obligations could be incurred thereunder expired on 3 March 1988, obligations incurred by the owner after that date did not have seniority over plaintiff's intervening mechanic's lien pursuant to G.S. 45-68(1) even though the owner and the lender later made an agreement to extend the term in which obligations could be incurred. *McNeary's Arborists v. Carley Capital Group*, 650.

§ 11.1 (NCI3d). Priorities

Three subcontractors were not entitled to the status of bona fide purchasers for value where a lender failed to record a legal description of the property, the three subcontractors obtained liens on the property, and the lender rerecorded the deed of trust with a property description after the dates of attachment of the subcontractors' liens. *Noel Williams Masonry v. Vision Contractors of Charlotte*, 597.

§ 25 (NCI3d). Foreclosure by exercise of power of sale in the instrument

The refusal of the seller to release a part of a tract of land from a deed of trust after a payment could be raised as a defense to the seller's right to foreclose, and the trial court correctly found that the seller's refusal to release a portion of the tract was not justified by respondent's failure to pay ad valorem taxes. *In re Foreclosure of Weinman Associates*, 756.

§ 32.1 (NCI3d). Restriction of deficiency judgments respecting purchase money mortgages and deeds of trust

The trial court erred in awarding attorney fees to defendants in a declaratory judgment action to determine defendants' right to attorney fees arising from a foreclosure on a purchase money note. *Colson & Colson Construc. Co. v. Maultsby*, 424.

MUNICIPAL CORPORATIONS

§ 15 (NCI3d). Warnings, barriers and lights

Plaintiffs' evidence was sufficient to withstand the city's motions for directed verdict and judgment n.o.v. as to breach of duty in an action arising from an automobile-motorcycle collision at an intersection with temporary traffic controls. *Lonon v. Talbert*, 686.

§ 16 (NCI3d). Contributory negligence and duty of travelers

The trial court did not err by denying defendant city's motions for a directed verdict and judgment n.o.v. on the issue of insulating negligence in an action arising from an automobile-motorcycle collision at an intersection with temporary traffic controls. *Lonon v. Talbert*, 686.

The trial court erred in an action arising from an automobile-motorcycle collision at an intersection with temporary traffic controls by not instructing the jury on the doctrine of insulating negligence as requested by the city. *Ibid.*

MUNICIPAL CORPORATIONS—Continued

§ 21 (NCI3d). Injuries in connection with sewers and sewage disposal; construction of sewage system

Defendant city was not immune from tort liability and the trial court improperly granted summary judgment for defendant city in an action in which plaintiff sought damages for the negligent maintenance, operation, and repair of defendant's sewer lines, resulting in an overflow into plaintiff's home. *Pulliam v. City of Greensboro*, 748.

§ 30.13 (NCI3d). Billboards and outdoor advertising signs

The trial court correctly granted summary judgment for defendant in an action for compensation for the removal of a sign or for the rescission of the order to remove the sign. *Appalachian Outdoor Advertising Co. v. Town of Boone*, 504.

§ 30.20 (NCI3d). Procedure for enactment or amendment of zoning ordinances

An ordinance passed by the Iredell County Board of Commissioners imposing a moratorium on building permits pending zoning was invalid where there was no notice to the public or advertised public hearing prior to adoption of the ordinance as required by G.S. 153A-323. *Vulcan Materials Co. v. Iredell County*, 779.

NARCOTICS

§ 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 charges of trafficking in cocaine for insufficient evidence. *S. v. Jackson*, 239.

§ 6 (NCI3d). Forfeitures

There is no right to a jury trial of a claim for remission of forfeiture of a vehicle used in violation of the controlled substances laws. *S. v. Morris*, 246.

The evidence did not support the trial court's determination that a claimant for remission of a seized vehicle under G.S. 90-112.1 did not have an interest in the vehicle acquired in good faith prior to the seizure, and on remand the trial court must make findings with respect to claimant's knowledge or reasonable belief as to the use of the vehicle in violation of the controlled substances laws and the value of claimant's interest in the vehicle. *Ibid.*

NEGLIGENCE

§ 53.6 (NCI3d). Duty owed by proprietors of theatres, recreational facilities and scenic attractions

Summary judgment was correctly entered for the sponsor of a Civil War re-enactment in a negligence action brought by a participant who received shotgun injuries during the battle. *Blevins v. Taylor*, 346.

§ 53.8 (NCI3d). Duty owed by other proprietors

The trial court erred by granting a directed verdict for defendant in an action seeking damages for personal injuries sustained when plaintiff was attacked and stabbed with a knife in defendant's Hardee's restaurant in Hickory. *Abernethy v. Spartan Food Systems, Inc.*, 154.

NEGLIGENCE—Continued

§ 57.6 (NCI3d). Slippery floor; foreign matter on floor

The trial court erred by granting summary judgment for defendant in a negligence action arising from plaintiff's fall in defendant's store where there were questions for the jury pertaining to the length of time the liquid was on the floor and whether this period was long enough to lead to the conclusion that defendant was negligent in failing to notice and remove the liquid or warn its customers. *Mizell v. K-Mart Corporation*, 570.

§ 57.7 (NCI3d). Sufficiency of evidence in actions by invitees; water, ice, or snow on floor

The evidence before the trial court on defendant's motion for summary judgment in an action to recover for injuries received by plaintiff customer when he slipped and fell on a puddle of water in defendant's restaurant presented genuine issues of material fact as to whether the water was a hidden danger about which defendant knew or should have known and whether plaintiff was contributorily negligent in failing to see the water. *Yates v. Haley*, 604.

§ 57.8 (NCI3d). Wax or oily or greasy places on floor

Summary judgment was improperly entered for defendant in a negligence action arising from a fall in a parking lot where plaintiff slipped in a grease spot two and a half or three feet in size which plaintiff described as automobile grease; the question of whether the grease constituted an obvious condition of which plaintiff and defendant are charged with having equal knowledge must be left to the jury, as well as the question of obviousness. *Roumillat v. Simplistic Enterprises, Inc.*, 440.

§ 58 (NCI3d). Nonsuit for contributory negligence of invitee

Defendant failed to establish that plaintiff was contributorily negligent as a matter of law in a slip and fall action. *Mizell v. K-Mart Corporation*, 570.

PARENT AND CHILD

§ 2.1 (NCI3d). Liability of parent for injury or death of child generally

The parental immunity doctrine did not bar actions by two minor girls against their father for willfully assaulting, abusing, molesting and raping them. *Doe v. Holt*, 516.

§ 2.2 (NCI3d). Child abuse

The trial court did not err in allowing physicians who treated and performed an autopsy on a deceased child to give expert testimony concerning the sodium level in the child's blood, the amount of water required to reduce the sodium level to that of the victim, and their opinions that a child would not ingest that amount of fluid voluntarily. *S. v. West*, 1.

The trial court in a prosecution for felony child abuse and murder properly admitted evidence of alleged acts of misdemeanor child abuse for which defendant and her boyfriend had been charged four months before the incident in question. *Ibid.*

§ 7.2 (NCI3d). Parental duty to support; effect of majority or emancipation of child

The trial court did not lack jurisdiction to hear a motion for past child support because the child had become emancipated and the custody issue had become moot, and defendant father did not waive his right to seek reimbursement for

PARENT AND CHILD—Continued

past child support expenditures by failing to schedule notice of a hearing on the issue prior to the child's emancipation. *Freeman v. Freeman*, 801.

PARTNERSHIP

§ 4 (NCI3d). Rights and liabilities of partners as to third persons ex contractu

Plaintiff's evidence was sufficient to show that defendant and her husband entered into a partnership and that defendant was liable on a note executed by the husband as an agent of the partnership. *Hines v. Arnold*, 31.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 11 (NCI3d). Malpractice generally; duty and liability of physician

A directed verdict was properly granted for a surgeon on the issue of vicarious liability in a malpractice action where it was undisputed that the nurse anesthetist negligently caused the injury and the nurse anesthetist was employed by the hospital. *Harris v. Miller*, 312.

§ 15 (NCI3d). Competency and relevance of evidence generally

The trial court did not abuse its discretion in a medical malpractice action by excluding the deposition of an expert in orthopedic surgery. *Harris v. Miller*, 312.

§ 15.2 (NCI3d). Who may testify as experts

The trial court did not err in a medical malpractice action by excluding the expert testimony of a nurse anesthetist concerning the instructions and supervision a surgeon should give an anesthetist during a medical crisis. *Harris v. Miller*, 312.

PROFESSIONS AND OCCUPATIONS

§ 1 (NCI3d). Generally

Where the Court of Appeals held that the Board of Registration for Professional Engineers could suspend petitioner's license for two years or fine him $500, but not both, the double jeopardy clause did not prohibit the Board on remand from refunding the $500 and entering a two-year suspension of petitioner's license. *In re Bruce*, 81.

RAPE AND ALLIED OFFENSES

§ 4 (NCI3d). Relevancy and competency of evidence

The trial court did not err in finding that a school psychologist was qualified to give expert testimony as to a rape victim's mental retardation. *S. v. Hooper*, 662.

§ 4.1 (NCI3d). Improper acts, solicitations, and threats; proof of other acts and crimes

The trial court did not err in a prosecution for rape, first degree sexual offense, and taking indecent liberties by allowing the State to cross-examine defendant about specific acts of sexual abuse of two other victims. *S. v. Moore*, 87.

The trial court did not err in a prosecution for second-degree sexual offense and burglary by admitting evidence that defendant had committed a similar break-in and sexual offense about one month earlier. *S. v. Whitaker*, 386.

Testimony by a friend of a child sexual offense victim that, when she visited the victim six to seven years prior to the crimes in question, defendant removed the witness from the victim's bedroom, told her to drop her pants, and then touched her "private" was admissible to show defendant's plan of sexual activity with young girls. *S. v. Young*, 415.

Where a child rape and sexual offense victim testified that defendant would show her magazine pictures depicting sexual acts before performing sexual acts upon her, sexual magazines possessed by defendant were admissible to show defendant's intentions or plans to commit sexual acts on the victim. *Ibid.*

The exclusion of letters written by the thirteen-year-old alleged rape and sexual offense victim to her boyfriends did not deny defendant the right to present his defense that physical evidence of sexual activity by the victim could be explained by her sexual encounters with others where the letters did not refer to sexual activity. *Ibid.*

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The trial court did not err by refusing to dismiss a prosecution for defendant's rape of his daughter for insufficient evidence. *S. v. Moore*, 87.

There was no fatal variance between indictments which alleged that a rape occurred on 27 September 1988 and that a sexual offense occurred on 29 September 1988 and testimony by the child victim that intercourse occurred on 29 September and oral sex took place on 27 September. *S. v. Young*, 415.

The evidence in a juvenile delinquency proceeding was sufficient to support respondent's conviction of first degree sexual offense against a four-year-old girl. *In re J. A.*, 720.

§ 6 (NCI3d). Instructions

The trial court did not err in instructing the jury that it could find defendant guilty of first degree rape and first degree sexual offense against a child victim if it found that defendant committed the offenses "on or about" the dates listed in the indictments. *S. v. Young*, 415.

§ 7 (NCI3d). Verdict; sentence and punishment

The mandatory life sentence for first degree sexual offense did not constitute cruel and unusual punishment. *S. v. Young*, 415.

RECEIVERS

§ 11 (NCI3d). Proof of claims, allowance and disallowance

The trial court properly entered an order dismissing claims against a corporation in receivership if an accounting was not provided within thirty days. *Lowder v. All Star Mills*, 479.

The trial court was justified in denying all claims Jeanne Lowder made with her husband against a receivership until an accounting is made in compliance with a court order. *Ibid.*

Jeanne Lowder's claims against a corporation in receivership arose from and depended on the role of her husband as an officer of the corporation and she is subject to the court's authority over the receivership even if she is not a necessary party to the derivative action. *Ibid.*

REFORMATION OF INSTRUMENTS

§ 9 (NCI3d). Rights of third persons

The trial court did not err by holding that a deed of trust was senior to subcontractors' liens where the deed of trust was initially recorded without a proper description, the deed of trust was rerecorded with a proper description after the liens attached, and the court held that the rerecording of the deed related back to the original recording date. *Noel Williams Masonry v. Vision Contractors of Charlotte*, 597.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 2.1 (NCI3d). Acquisition and control of property

The evidence presented a jury question as to whether defendant local church intended to establish a connectional relationship with plaintiff denominational church with respect to church property so as to give the denominational church the right to control such property. *Looney v. Community Bible Holiness Church*, 469.

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court had more than ample basis for imposing sanctions under Rule 11 where a motion to dismiss and motion for summary judgment were based on the same grounds that have proven baseless in past motions and appeals and were patently frivolous. *Lowder v. All Star Mills*, 500.

There was no contradiction between the affidavit of plaintiff's president and his subsequent trial testimony which would support defendants' motion for Rule 11(a) sanctions against plaintiff. *Boone Lumber, Inc. v. Sigmon*, 798.

§ 12.1 (NCI3d). Defenses and objections; when and how raised

The trial court erred by dismissing plaintiff's complaint under G.S. 1A-1, Rule 12(b)(6) where defendants raised the two dismissal rule of Rule 41. *N.C. Railroad Co. v. Ferguson Builders Supply*, 768.

§ 13 (NCI3d). Counterclaim and crossclaim

The trial court properly dismissed a claim arising from a truck accident where the claim was originally filed as a counterclaim, was voluntarily dismissed, and was later filed again. *Furr v. Noland*, 279.

§ 37 (NCI3d). Failure to make discovery; consequences

Where the trial court entered default judgment for plaintiff in an action for alienation of affections because of defendant's failure to comply with discovery requests and entered a judgment for damages after a hearing, and the Supreme Court remanded to the trial court for "new findings, new conclusions, and the entry of a new order," the trial judge was not required to hear new evidence and make new findings and conclusions as to whether to sanction defendant. *Jennings v. Jessen*, 739.

§ 41 (NCI3d). Dismissal of actions generally

Voluntary dismissal without prejudice of plaintiff's original action occurred when written notice was received and filed by the clerk on 11 May 1987, not when plaintiff's attorney called the office of defendant's attorney on 8 May 1987 and left a message that plaintiff was taking a voluntary dismissal or when plaintiff's attorney mailed defendant's attorney a copy of the dismissal dated 8 May 1987,

and a new action filed by plaintiff on 11 May 1988 was filed within one year after the voluntary dismissal. *Johnson v. Hutchens*, 384.

§ 41.2 (NCI3d). Dismissal in particular cases

The trial court erred by dismissing plaintiff's complaint under the two dismissal rule where the second dismissal was by order of the judge rather than by filing a notice of voluntary dismissal. *N.C. Railroad Co. v. Ferguson Builders Supply*, 768.

§ 50.1 (NCI3d). Motions for directed verdicts and judgments notwithstanding verdicts; relation to other rules

By introducing evidence, defendants waived their Rule 50(a) motion for directed verdict made at the close of plaintiff's evidence. *Boone Lumber, Inc. v. Sigmon*, 798.

§ 50.5 (NCI3d). Motions for judgments notwithstanding verdicts; appeal

Defendants cannot have the denial of their motion for judgment notwithstanding the verdict reviewed on appeal because they failed to renew the motion for directed verdict at the close of all the evidence. *Boone Lumber, Inc. v. Sigmon*, 798.

§ 55.1 (NCI3d). Setting aside default

The trial court erred in entering an order relieving plaintiff from the amount of a default judgment for rent due for space in a shopping center and reopening the case for hearings on the amount due. *Kimzay Winston-Salem, Inc. v. Jester*, 77.

The trial court did not abuse its discretion in refusing to set aside an entry of default pursuant to Rule 55(d) in an action on a promissory note. *Faucette v. Dickerson*, 620.

§ 56.3 (NCI3d). Summary judgment; necessity for and sufficiency of supporting material; moving party

Plaintiff waived objection to the admissibility of affidavits submitted by defendants in support of a motion for summary judgment by failing to object to the affidavits or to move to strike them. *Lindsey v. N.C. Farm Bureau Mut. Ins. Co.*, 432.

§ 56.5 (NCI3d). Summary judgment; findings of fact and conclusions of law

The trial court did not err by making findings of fact in an order granting summary judgment where the findings constituted the court's summation of the undisputed facts. *Noel Williams Masonry v. Vision Contractors of Charlotte*, 597.

§ 59 (NCI3d). New trials; amendment of judgments

The trial court has the power to amend its judgment on its own initiative within the ten-day period provided by Rule 59(e). *Fox v. Fox*, 13.

§ 60 (NCI3d). Relief from judgment or order

The trial court did not err in refusing to set aside a default judgment on the ground of fraud in an action on a promissory note. *Faucette v. Dickerson*, 620.

§ 60.2 (NCI3d). Relief from judgment or order; grounds for relief

The trial court erred by denying defendant's motion for a new trial under Rule 60 in an action on a debt where defendant received a calendar request four days prior to the session of court rather than a trial calendar four weeks prior, and forecast a meritorious defense in that she contended that the money had been repaid as part of a separate transaction. *Dollar v. Tapp*, 162.

RULES OF CIVIL PROCEDURE—Continued

§ 60.3 (NCI3d). Relation to other rules

The court's dismissal under Rule 41(a) of an action to recover child support and past public assistance did not deprive the court of jurisdiction under Rule 60(b)(6) to correct a deficiency in the original order by ordering the State to reimburse defendant for monies it illegally garnished from his military pay for child support and past public assistance. *State ex rel. Blossom v. Murray*, 653.

SALES

§ 6.4 (NCI3d). Warranties in sale of house by builder-vendor

The trial court did not err by denying defendant's motions for a directed verdict, judgment n.o.v., and a new trial on a claim for breach of the implied warranty of habitability in the construction of a garage and driveway. *Lapierre v. Samco Development Corp.*, 551.

SCHOOLS

§ 15 (NCI3d). Interrupting or disturbing public school

Respondent juvenile's conduct in talking to another student in a loud and disruptive voice during a high school class did not substantially disrupt, disturb or interfere with the teaching of students at a public educational institution within the meaning of G.S. 14-288.4(a)(6) so as to support an adjudication of delinquency. *In re Grubb*, 452.

Respondent juveniles' conduct in striking a metal radiator covering with their hands during a mathematics class substantially disrupted, disturbed or interfered with the teaching of students at a public educational institution in violation of G.S. 14-288.4(a)(6) so as to support adjudications of delinquency. *In re Eller*, 625.

SEARCHES AND SEIZURES

§ 9 (NCI3d). Search and seizure incident to arrest for traffic violation

A warrantless search of the glove compartment of defendant's car was illegal and cocaine and heroin seized therefrom should have been suppressed where the officer had stopped defendant because his car was weaving and had ceased to search for weapons at the time he opened the glove compartment. *S. v. Green*, 38.

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress evidence seized from his person after an arrest in Virginia by a North Carolina highway patrolman. *S. v. Gwyn*, 369.

Failure of defendant to produce a driver's license and a registration card after an officer lawfully stopped his vehicle gave officers sufficient probable cause to place defendant under arrest for these offenses. *S. v. Hudson*, 708.

An officer was justified in asking defendant to step out of his car after he failed to produce a driver's license or vehicle registration. *Ibid.*

§ 11 (NCI3d). Search and seizure of vehicles

A motion to suppress in a cocaine trafficking prosecution based on the alleged invalidity of the consent to a search of a car was properly denied. *S. v. McDaniels*, 175.

SEARCHES AND SEIZURES—Continued

There was no Fourth Amendment violation in the S.B.I.'s handling of a briefcase during its investigation of the inside of a car driven by suspected cocaine couriers at an airport. *Ibid.*

Where an officer had an articulable and reasonable suspicion that a passenger may have been trying to hide a weapon, and he properly asked her to step out of the car, the officer properly seized, under the plain view doctrine, a gun which he had observed partially sticking out of a briefcase lying on the floorboard of the car, and the officer was justified in conducting a more thorough search of the briefcase for his own protection and seizing contraband other than weapons found therein. *S. v. Hudson*, 708.

Defendant failed to show that the search and seizure of a purse/briefcase in the possession of a passenger in his car infringed upon his own personal rights under the Fourth Amendment. *Ibid.*

§ 12 (NCI3d). "Stop and frisk" procedures

A stop of a car containing suspected drug couriers late at night at an airport was supported by reasonable suspicion and was constitutional. *S. v. McDaniels*, 175.

Defendant's vehicle was lawfully stopped because the officer had an articulable and reasonable suspicion that the temporary tag on the car may have been more than 30 days old and that the vehicle may have been improperly registered where both the expiration date and numbers on the tag were faded out and illegible. *S. v. Hudson*, 708.

An officer possessed an articulable and reasonable suspicion that a passenger may have been trying to hide a weapon and could properly ask the passenger to step out of the car because of the passenger's lack of identification, an unmoved newspaper spread fully across her lap for five to ten minutes, and the likely inability to read because of the darkness. *Ibid.*

§ 23 (NCI3d). Necessity and sufficiency of showing of probable cause; cases where evidence is sufficient

There was probable cause to issue a warrant to search for narcotics in a briefcase where a dog alerted to the briefcase inside a car. *S. v. McDaniels*, 175.

SHERIFFS AND CONSTABLES

§ 2 (NCI3d). Deputies sheriff

The decision of the North Carolina Sheriffs' Education and Training Standards Commission not to certify handicapped petitioners was not supported by substantial evidence and was arbitrary and capricious. *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 527.

The North Carolina Sheriffs' Education and Training Standards Commission erred by finding that the Assistant Course Administrator of a Basic Law Enforcement Training course concluded that the handicapped petitioners were not proficient in certain areas where the evidence did not support that finding. *Ibid.*

The evidence did not support the argument of the North Carolina Sheriffs' Education and Training Standards Commission that handicapped petitioners did not perform in the same manner as other trainees in a Basic Law Enforcement Training course. *Ibid.*

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1 (NCI3d). Generally

The Division of Social Services erred in an AFDC determination by deciding that a husband's impairments no longer substantially reduced his ability to support his children where the evidence upon which that determination was made was not materially different from the evidence before the agency originally. *Huffstetler v. N.C. Dept. of Human Resources*, 284.

The Division of Social Services erred in an AFDC determination by deciding that a husband's medical condition failed to render him incapacitated for purposes of supporting his children. *Ibid.*

An applicant for Medicaid benefits must own his primary residence in order for property contiguous to the primary residence to be excluded under G.S. 108A-55 from consideration as an available resource in determining the applicant's financial eligibility for such benefits. *Correll v. Division of Social Services*, 562.

STATE

§ 4.2 (NCI3d). Particular actions against the state; sovereign immunity

The sovereign immunity doctrine did not deprive the court of jurisdiction to order the State to reimburse defendant for monies it illegally garnished from his military pay for child support and past public assistance. *State ex rel. Blossom v. Murray*, 653.

§ 8.3 (NCI3d). Negligence of state employee; particular actions; prisoners

In a prisoner's tort claim action to recover for a metal partial plate lost by the Department of Correction when plaintiff was transferred from one prison unit to another, the evidence supported the Industrial Commission's conclusion that a named employee of the Department of Correction breached her duty to plaintiff by failing to provide an adequate partial plate replacement to plaintiff after she reached an agreement with plaintiff that the Department of Correction would replace the plate with one of comparable quality. *Price v. N.C. Dept. of Correction*, 609.

§ 9 (NCI3d). Amount of recovery in tort claim action

The Industrial Commission has no authority under the Tort Claims Act to order specific performance rather than award monetary damages. *Price v. N.C. Dept. of Correction*, 609.

TAXATION

§ 25 (NCI3d). Assessment and levy of ad valorem taxes generally

The doctrine of laches prohibited defendants from asserting as a defense to a county's action to recover 1985-88 ad valorem taxes that the constitutional amendment passed in 1970 which empowered the county to increase property taxes violated due process on the ground that the ballot failed adequately to inform voters of the substance of the amendment. *Franklin County v. Burdick*, 496.

TELECOMMUNICATIONS

§ 1.2 (NCI3d). Determination of rate charged by public utility

The Utilities Commission did not err by ordering cellular telephone carriers to pay access charges to local exchange companies when providing wide area call reception. *State ex rel. Utilities Commission v. Centel Cellular Co.*, 731.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

The trial court did not err in finding that defendant had engaged in unfair and deceptive practices in the construction of a deck where defendant represented that it would build the deck in a certain location and to certain dimensions knowing that it was impossible to build the deck in that location, then relocated the site of the deck and built the deck smaller than represented. *Lapierre v. Samco Development Corp.*, 551.

The trial court did not err by finding that there was an unwarranted refusal to settle an action for unfair and deceptive practices and breach of the implied warranty of habitability in the construction and sale of a house, so that attorney fees could be awarded. *Ibid.*

The trial court did not err in its award of attorney fees where the findings were sufficient to support the award and defendant did not show any abuse of discretion. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 3 (NCI3d). Application

The trial court erred by dismissing a crossclaim by a lessee against an equipment supplier in an action against the lessee to recover the balance due on an equipment lease. *Coastal Leasing Corp. v. O'Neal*, 230.

§ 10 (NCI3d). Warranties in general

A crossclaim by a lessee of ice-making equipment against the supplier of the equipment was not barred by lack of privity where the lessee alleged that he directly negotiated a purchase with the seller. *Coastal Leasing Corp. v. O'Neal*, 230.

Allegations in a crossclaim for defects in leased ice-making equipment were sufficient to raise the inference that any defects existed at the time of sale. *Ibid.*

§ 15 (NCI3d). Exclusion or modification of warranties

Warranty disclaimers in a lease were immaterial to a crossclaim by the lessee against the supplier of the equipment where the disclaimer language applied to the lessee alone and referred the lessee to the seller for claims involving breach of warranties. *Coastal Leasing Corp. v. O'Neal*, 230.

§ 46 (NCI3d). Public sale of collateral; requirement of commercial reasonableness

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Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina