NORTH CAROLINA COURT OF APPEALS REPORTS

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104 N.C. App.

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3. Appointed 3 October 1991 to replace Stafford G. Bullock who became Chief Judge.
4. Retired 31 December 1991.
5. Appointed 6 September 1991 to replace James A. Harrill, Jr. who became Chief Judge.
6. Appointed 3 January 1992 to replace Charles P. Ginn who resigned 31 March 1991.

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JEFFERSON L. EVERS, PLAINTIFF v. PENDER COUNTY BOARD OF EDUCATION AND HAYWOOD DAVIS, SUPERINTENDENT, DEFENDANT

No. 905SC921

(Filed 3 September 1991)

1. **Schools § 13.2 (NCI3d)— suspension—action not begun within 90 days—action not barred**

While N.C.G.S. § 115C-325(f1) clearly requires the reinstatement of a teacher who has been suspended with pay once ninety days have passed without the initiation of dismissal proceedings, it does not prohibit the subsequent initiation of dismissal proceedings against the teacher.

Am Jur 2d, Schools § 208.

2. **Schools § 13.2 (NCI3d)— teacher dismissal—witnesses not on furnished list—failure to object**

Plaintiff waived any objection when he failed to object in response to a specific call by the Board Chairman for objections to the testimony of two witnesses called by the Board who were not on the list of witnesses given plaintiff prior to the hearing.

Am Jur 2d, Schools §§ 192, 194.

3. Schools § 13.2 (NCI3d)— teacher dismissal—Board of Education's attorney—acting as judge—no error

Plaintiff teacher was not denied due process of law at his dismissal hearing where the Board of Education's attorney was allowed to act as an "impartial law judge" and make certain procedural and evidentiary rulings. It is clear from the record that the Board did not use any of the notes prepared by its attorney during the investigation and there was thus no danger that the Board was biased by the prior investigatory notes. There was also no showing that plaintiff was in any way prejudiced by the Board's use of its attorney's hearing notes during deliberations; indeed, plaintiff manifested his acquiescence in the Board's use of the notes.

Am Jur 2d, Schools §§ 192, 193.

4. Schools § 13.2 (NCI3d)— teacher dismissal—rumors—no error

There were sufficient indicia that the Board acted impartially and was not influenced by rumors at plaintiff teacher's dismissal hearing in the instruction given the Board by its attorney and the Board Chairman's assurance that the Board would consider nothing more than the evidence presented during the hearing. Prior knowledge and discussion of the facts relating to a given adjudicatory hearing are inevitable aspects of the multi-faceted roles which Board members play. Plaintiff here not only fails to indicate the exact nature of the rumors which the Board is alleged to have considered, but also fails to point out how the Board may have been biased by the rumors.

Am Jur 2d, Schools §§ 193, 194.

5. Schools § 13.2 (NCI3d)— teacher dismissal—pre-hearing communications between superintendent and Board members—no error

Pre-hearing communications between a school superintendent and Board of Education members did not bias the Board against plaintiff teacher at his dismissal hearing where the superintendent merely advised the Board, as he was required to do by statute, that he recommended the dismissal of plaintiff. Plaintiff failed to show how the Board may have been biased by the pre-hearing communication between the superintendent and the Board.

Am Jur 2d, Schools §§ 193, 198.

6. Schools § 13.2 (NCI3d)— teacher dismissal—admission of evidence—chain of custody

An SBI serologist was properly allowed to testify as to the results of tests he had performed on towels in a proceeding to dismiss a teacher where a proper chain of custody was established with respect to the towels. The Rules of Evidence are not applicable to teacher dismissal hearings before a board of education; as long as the evidence which is proffered at a teacher dismissal hearing can be said to be of a kind commonly relied upon by reasonably prudent persons in the conduct of serious affairs, such evidence is competent and may properly be admitted into evidence.

Am Jur 2d, Schools § 194.

7. Schools § 13.2 (NCI3d)— teacher dismissal—admission of evidence—remoteness in time

A bucket and cloths recovered from a closet some 36 days after plaintiff teacher last had access to the closet were admissible at plaintiff's dismissal hearing. Remoteness in time goes to the weight of the evidence and not to its admissibility.

Am Jur 2d, Schools § 194.

8. Schools § 13.2 (NCI3d)— teacher dismissal—sufficiency of evidence

There was substantial evidence from which the Pender County Board of Education could properly conclude that the grounds for the superintendent's recommendation to dismiss plaintiff were true and substantiated by a preponderance of the evidence. The evidence shows that Helen Sidbury alleges engaging in sexual relations with plaintiff, her teacher, between 2:30 and 3:00 p.m. on 3 April 1989; while plaintiff staunchly denies this allegation and states that he was elsewhere during the critical time period, two witnesses testified that they saw plaintiff's vehicle in the school parking lot during the time which plaintiff claims he was away from campus in that vehicle; only one of those who testified that they saw plaintiff returning to campus could say that he possibly saw plaintiff leaving the campus prior to 3:00 p.m.; the bulk of the evidence came from 38 witnesses, and their credibility unquestionably played a major role in the Board's decision;

and the documentary and physical evidence tipped the scale in favor of substantiating the charges.

Am Jur 2d, Schools §§ 164, 176, 184, 201.

Sexual conduct as ground for dismissal of teacher or denial or revocation of teaching certificate. 78 ALR3d 19.

Judge WELLS concurring.

Judge GREENE dissenting.

APPEAL by plaintiff from Order entered 4 May 1990 in PENDER County Superior Court by *Judge James R. Strickland.* Heard in the Court of Appeals 13 March 1991.

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for plaintiff-appellant.

Hogue, Hill, Jones, Nash & Lynch, by William L. Hill, II, for defendant-appellee.

WYNN, Judge.

In the spring of 1989, plaintiff, Jefferson L. Evers ("Evers"), was employed by the defendant Pender County Board of Education as a teacher at Pender High School. His duties at the school included teaching, and coaching the school's baseball and football teams. His classroom was located in the school's gymnasium.

In 1986, Evers became acquainted with Helen Sidbury who, at the time, was a ninth grade student at Pender High School. Over the next three years, Evers' relationship with Helen Sidbury developed to the point where Helen began to depend on Evers as a close friend and confidante. Helen wrote poems for Evers, and after class, Evers would often walk with Helen from the gymnasium to the main campus.

On 25 April 1989, Evers was asked to meet with Dr. Haywood Davis, the Pender County Superintendent of Schools. At that time, he was advised that there had been allegations of improper conduct occurring between him and Helen Sidbury. Specifically, it was alleged that on 3 March 1989 and again on 3 April 1989, Evers had engaged in sexual relations with Helen during school hours and on school grounds. Following the meeting, the superintendent gave Evers a letter notifying him that effective 25 April 1989,

he was on suspension with pay from his teaching position at Pender High School pending an investigation into the allegations.

Following his investigation, the superintendent notified Evers on 10 August 1989 that it was his intention to recommend to the Pender County Board of Education that Evers be dismissed. At Evers' request, a hearing concerning the allegations against him began on 12 September 1989.

During Evers' dismissal hearing, Helen Sidbury was the main witness against him. She testified that on 3 April 1989, she was allowed to leave her sixth period class, which began at 2:05 p.m., in order to go see Ms. Shane Covil, a teacher at Pender High School and the school's softball coach. Helen testified that since the softball team was having a game on that day, she decided to ask Ms. Covil if she needed any help in preparing for the day's game. During sixth period, Ms. Covil taught girl's physical education, so her classroom, like Evers', was located in the school gymnasium. Helen left her sixth period class at about 2:20 p.m. or 2:25 p.m. and went straight to the gymnasium. Upon arriving there, she could not find Ms. Covil, so she decided to go talk to Mr. Evers in his classroom. When Helen arrived at Evers' classroom, she knocked on the door and Evers answered. She went inside and they sat down and talked for for about five minutes. After this five minute conversation, Evers went to the back of the classroom where a closet containing sports equipment was located and requested Helen to come back to the room. The two went inside the closet, embraced, and began kissing. Helen testified that after the two had been kissing for a "minute or two," Evers asked her if she wanted to make love and she replied, "Okay." When asked on cross-examination at the hearing whether she had in fact wanted to make love to Evers, Helen testified that she "wanted to do whatever he wanted me to do."

Helen went on to testify that Evers told her to lie down and that, when she did, he began to "finger" her, which she explained to mean that he inserted his finger into her body. According to Helen, Evers then performed cunnilingus on her. During this act, she testified, someone knocked at Evers' classroom door and Evers quickly stood up and told her not to move. Once the knocking had stopped, Evers pulled Helen up by the hands and the two began to kiss again. Helen testified that Evers then lifted her shirt, unhooked her bra, and fondled and placed his mouth on her

breast. Following this act, Evers asked Helen to perform fellatio on him, which she did. After performing fellatio, Helen testified that she lay down again and Evers again "fingered" her and performed cunnilingus on her. Thereafter, the two engaged in intercourse. Helen testified that after about three or four minutes, Evers withdrew his penis and ejaculated on her stomach. Evers then grabbed a towel which had been in a bucket or trash can and used it to wipe the semen off her stomach and to wipe off himself.

Following the intercourse, Helen testified that she and Evers stood up, embraced and kissed. They then got dressed, but Evers left the closet first to make sure that no one could see them leaving the closet. Once back inside the classroom, Helen testified, she and Evers conversed for about three minutes while sharing a soft drink, and then the final school bell rang, at which time Helen left to go home.

A few days later, Helen, fearing that she was pregnant, told Ms. Covil about the incident with Evers. Ms. Covil informed school's Athletic Director and that ultimately led to the charges which were the subject of Evers' dismissal hearing.

Testimony given by various other witnesses tended to corroborate certain aspects of Helen's allegations.

Teacher Shane Covil testified that as the softball coach, she was responsible for preparing the playing field for a softball game scheduled for 3 April 1989. On that date, she first "dragged" the infield, which she explained to be a process by which the surface of the infield is smoothed over by dragging a "grate" behind a tractor, however, after dragging the softball field, she did not have time to "lime" the field, which is the process by which the foul lines and batters' boxes are marked.

Covil testified that between fifth and sixth period, she went to Evers' classroom and asked him where the field "limer" was located. Apparently, she misunderstood him to say that the "limer" was located in the press box. (Later, the "limer" was found in the ticket booth.) After getting her sixth period physical education class started at 2:05 p.m., Covil went to the softball field at 2:20 p.m. where Amy Carr and Joy Ramsey, students at Pender High School, were waiting to help her lime the field. On the way to the field, she noticed that Evers' truck was parked in the parking lot. At the softball field, unable to find the "limer," Covil sent

Amy Carr and Joy Ramsey to look for Evers and again ask where the items were. Meanwhile, Covil and Tommy White, a man who helped out with the junior varsity baseball team, continued to look around the press box for the items. The two students came back to the softball field at about 2:40 p.m. and reported that even though Evers' truck was in the parking lot, they were unable to find him.

Covil then left the softball field at about 2:40 p.m. or 2:45 p.m. to go to the gymnasium herself to look for Evers. When she arrived at Evers' classroom, she knocked on the door but there was no answer. She noticed Evers' truck was still in the parking lot and she decided to wait in the gymnasium and periodically looked out of the windows at his truck so that she would not miss him when he left the school grounds for the day. When the final school bell rang at 3:00 p.m., Covil's team manager, Adam Williamson, entered the gymnasium and informed her that the field limer had been found in the ticket booth and Covil returned to the softball field.

Covil further testified that Evers drove up to the softball field at about 3:20 p.m. or 3:25 p.m. After determining that Covil had found the "limer," he remained on the field for about five minutes and then drove away. She further testified that she did not see Evers with any of his baseball players when he was at the softball field.

Amy Carr testified at the hearing that when she and Joy Ramsey looked for Evers to ask him where the "limer" was located, they noticed that his truck was parked in the parking lot, but they were unable to find him. They knocked on Evers' classroom door, but there was no answer. Thereafter, she and Joy peeked through a window and saw that Evers' classroom was dark. She also testified that the door to the classroom was locked.

Of the several witnesses who testified that they had seen Evers on the afternoon of 3 April 1989, none could testify that he/she knew his whereabouts between 2:15 p.m. and 3:00 p.m., except Tommy White. He testified that he saw Evers "pulling out" of the campus parking lot somewhere between 2:30 p.m. and 3:00 p.m. on 3 April 1989, however, he could not be any more certain of the time that he saw Evers. Of the other witnesses who testified as to having seen Evers that afternoon, Jeff Johnson, who was the baseball team manager, testified that he saw Evers

drive up to the softball field area at about 3:10 p.m. or 3:15 p.m.; Matthew Barnhill, who was a baseball player at Pender High School on 3 April 1989, testified that Evers arrived at the softball field at about 3:05 p.m.; Wendy Brown, who was a softball player for the high school at the time, testified that she did not see Evers at the field until 3:20 p.m., although she admitted that she did not see him drive up; and Keith Daniels, another former baseball player at Pender High School, testified that Evers pulled into the softball field somewhere between 3:05 p.m. and 3:20 p.m.

Throughout Evers' dismissal hearing, various pieces of documentary and physical evidence which tended to corroborate certain aspects of the alleged incident were admitted into evidence. Among them were four poems which Helen testified that she wrote for Evers. One of the poems was dated 6 March 1989, three days after the alleged incident of 3 March 1989. It reads as follows:

I Can't Help But Doubt

You always said be careful
There's only one thing some guys want
They convince you you want to do
Something, when deep inside you don't.

They say that you can trust them,
That they will be your friend.
But once you give them what they want,
They're never seen again.

And though I've grown to trust you,
I can't help but doubt.
That you may be one of those,
You used to warn about.

/s/ Helen Sidbury
March 6, 1989

In addition to the four poems, Helen's personal calendar was admitted into evidence. In essence, Helen testified that her personal calendar served as a combination diary/appointment book, on which entries were made "usually that day or sometime right after or if it is something that is coming up, then . . . before [the day] gets there." In addition to several benign entries, the calendar contained the following notations: (1) February 23—"*K w/JE"—Helen testified that the "K" stood for a kiss and "JE" meant that

it was with Jefferson Evers. The asterisk always indicated that an entry dealt with Jefferson Evers; (2) March 3, 1989—"1st BJ + F *JE"—Helen testified that this notation meant that it was the first time anything "really" happened. She said that "BJ" meant that she gave a "blow job," "F" meant that she was "fingered," and "*JE" meant that it was with Jefferson Evers; (3) April 3, 1989—"1st time *JE"—"1st time" meant that it was the first time she had ever had sex and "*JE" meant that it was with Jefferson Evers.

David J. Spittle, a forensic serologist with the SBI, examined two cloths which were found in a bucket located in the closet in Evers' classroom. He testified that the larger of the two towels tested positive for the presence of spermatozoa, which is the male reproductive cell found in semen.

Based upon this and other evidence, the Pender County Board of Education adopted a Resolution which found that with respect to the incident alleged to have occurred 3 April 1989, the charges against Evers were "true and substantiated by a preponderance of the evidence." The Board failed to find, however, that the alleged incident of 3 March 1989 was true and substantiated by a preponderance of the evidence. Based on its findings regarding the 3 April 1989 incident, the Board concluded that Evers should be dismissed. Evers subsequently filed a petition for judicial review of the Board's Resolution in Pender County Superior Court. From the Order of the superior court affirming the Board's resolution, Evers now appeals. Additional facts appear in the body of the opinion as necessary.

I

[1] In his first assignment of error, plaintiff contends that the Pender County Board of Education's Resolution was made (1) in excess of statutory authority or jurisdiction; and (2) upon unlawful procedure. As such, he argues that under the provisions of N.C. Gen. Stat. § 150B-51, the trial court erred in affirming the Board's Resolution.

We note initially that while N.C. Gen. Stat. § 150B-2(1) expressly excepts local boards of education from the coverage of the Administrative Procedure Act (Chapter 150B of the General Statutes), our Supreme Court has nonetheless held that the standards for judicial review set forth in N.C. Gen. Stat. § 150A-51 (now section

150B-51) apply to appeals from school boards. *See Overton v. Goldsboro City Bd. of Educ.*, 304 N.C. 312, 283 S.E.2d 495 (1981). Although the *Overton* Court specifically focused on subsection (5) of section 150A-51 (now subsection (b)(5) of section 150B-51), given the Court's rationale for doing so, we conclude that the intention was to make each of the subsections of section 150A-51 applicable to an appeal from a decision of a board of education. *See Overton*, 304 N.C. at 316-17, 283 S.E.2d at 498 (Since no other statute provided guidance for judicial review of school board decisions, and in the interest of maintaining uniformity in the review of administrative board decisions, the Court concluded that N.C. Gen. Stat. § 150A-51 should be applied to appeals from school board decisions).

North Carolina General Statutes section 150B-51(b) provides, in part, that a court reviewing the decision of a board of education may reverse such decision if it finds that "the substantial rights of the [petitioner] may have been prejudiced because the [board's] findings, inferences, conclusions, or decisions [were]: . . . (2) In excess of statutory authority or jurisdiction . . . ; or (3) Made upon unlawful procedure . . . ." N.C. Gen. Stat. § 150B-51(b)(2) and (b)(3) (1987). Plaintiff contends that the requirements for reversal contained in these subsections were met because the Pender County Superintendent of Schools failed to timely initiate dismissal proceedings against him as required by N.C. Gen. Stat. § 115C-325(f1), which provides as follows:

> (f1) Suspension with Pay.—If a superintendent believes that causes may exist for dismissing or demoting a probationary or career teacher for any reasons specified in G.S. 115C-325(e)(1)b through 115C-325(e)(1)j, but that additional investigation of the facts is necessary and circumstances are such that the teacher should be removed immediately from his duties, the superintendent may suspend the teacher with pay for a reasonable period of time, not to exceed 90 days. The superintendent shall immediately notify the board of education of his action. *If the superintendent has not initiated dismissal or demotion proceedings against the teacher within the 90-day period, the teacher shall be reinstated to his duties immediately and all records of the suspension with pay shall be removed from the teacher's personnel file at his request.*

N.C. Gen. Stat. § 115C-325(f1) (1990) (emphasis added).

The record reveals that plaintiff was suspended with pay on 25 April 1989, and that the superintendent made his recommendation of dismissal to the Board of Education on 10 August 1989. It is therefore given that the superintendent did not "initiate" dismissal proceedings against plaintiff until 107 days after plaintiff was suspended with pay.

Plaintiff asserts that because the superintendent failed to initiate dismissal proceedings within ninety days of plaintiff's suspension with pay, the only course of action which section 115C-325(f1) authorized the superintendent to take was to reinstate plaintiff to his duties. He further argues that the clear legislative intent of section 115C-325(f1) is to foreclose the superintendent's ability to initiate dismissal proceedings against a teacher who has been suspended with pay once ninety days without the initiation of dismissal proceedings have passed. For the reasons which follow, we are of the opinion that the General Assembly, in enacting N.C. Gen. Stat. § 115C-325(f1), did not intend to prohibit the initiation of dismissal proceedings against a teacher who has been suspended with pay once ninety days beyond the date of such suspension have lapsed.

The legislative intent of a statute should be ascertained from the language of the statute, the nature and purpose of the statute, and the consequences which would follow from a construction one way or the other. *Campbell v. First Baptist Church of City of Durham*, 298 N.C. 476, 259 S.E.2d 558 (1979). Where a statute's language is clear and unambiguous, the language must be given effect, and its clear meaning may not be evaded by the courts under the guise of construction. *State v. Felts*, 79 N.C. App. 205, 339 S.E.2d 99, *disc. review denied*, 316 N.C. 555, 344 S.E.2d 11 (1986).

In the instant case, the language of N.C. Gen. Stat. § 115C-325(f1) is clear and unambiguous: If the superintendent fails to initiate dismissal proceedings against a teacher who has been suspended with pay within ninety days of such suspension, the teacher must be reinstated. However, we believe that the language of N.C. Gen. Stat. § 115C-325(f1) is equally clear that reinstatement from suspension and upon request removal of the suspension action from the teacher's record are the *only* consequences which follow from a superintendent's failure to timely initiate dismissal proceedings. Section 115C-325(f1) does not provide that the failure to initiate dismissal proceedings within the statutorily prescribed time limit

will forever bar the initiation of dismissal proceedings; the statute merely requires that the teacher be removed from suspension. Were we to construe section 115C-325(f1) as plaintiff would have us construe it, we would be inserting language into the statute which is not there.

Moreover, we believe that utilizing plaintiff's interpretation of section 115C-325(f1) would lead to absurd results. Under plaintiff's interpretation of the statute, *any* teacher who has been suspended with pay, regardless of his misconduct, would be entitled to defend dismissal proceedings by pleading the "lapse of ninety days." This would mean that a teacher suspected of dealing drugs to students, or of the rape or murder of a student, would be entitled to permanent reinstatement to his teaching position once ninety days without the initiation of dismissal proceedings against him had lapsed. It is to be presumed that the legislature acted in accordance with reason and common sense, and did not intend "untoward results." *State ex rel. Comr. of Ins. v. North Carolina Rate Bureau*, 43 N.C. App. 715, 720, 259 S.E.2d 922, 925, *disc. review denied*, 299 N.C. 735, 267 S.E.2d 670 (1980). Clearly, the examples mentioned above would lead to absurd results; however, these results would be required were plaintiff's interpretation of section 115C-325(f1) given effect.

We hold that while N.C. Gen. Stat. § 115C-325(f1) clearly requires the reinstatement of a teacher who has been suspended with pay once ninety days without the initiation of dismissal proceedings have lapsed, it does not prohibit the subsequent initiation of dismissal proceedings against such teacher. Since the plaintiff challenges only the initiation of dismissal proceedings against him on 10 August 1989, and not the superintendent's failure to reinstate him to his position after ninety days, we need not address the latter point. Plaintiff's assignment of error is overruled.

II

[2] In his second assignment of error plaintiff contends the Board of Education exceeded its statutory authority by calling two of its own witnesses to testify at the dismissal hearings. Plaintiff contends that since the witnesses' names were not on a list of witnesses which the superintendent was required to give to plaintiff prior to the hearing, a majority vote of the Board of Education was required before the witnesses could be called.

N.C. Gen. Stat. § 115C-325(j) provides, in pertinent part, as follows:

> (5) At least five days before the hearing, the superintendent shall provide to the teacher a list of witnesses the superintendent intends to present, a brief statement of the nature of the testimony of each witness and a copy of any documentary evidence he intends to present. At least three days before the hearing, the teacher shall provide to the superintendent a list of witnesses the teacher intends to present, a brief statement of the nature of the testimony of each witness and a copy of any documentary evidence he intends to present. *Additional witnesses or documentary evidence may not be presented except upon consent of both parties or upon a majority vote of the board or panel.*

N.C. Gen. Stat. § 115C-325(j)(5) (1990) (emphasis added).

After carefully reviewing the record and transcript, it is unclear whether or not the Board actually voted to allow the witnesses to testify. Nonetheless, in response to a specific call by the Board Chairman for objections to the testimony of these two witnesses, plaintiff remained silent and failed to object. Since an objection to testimony not taken in apt time is deemed to be waived, *State v. Hensley*, 29 N.C. App. 8, 222 S.E.2d 716, *cert. denied*, 290 N.C. 95, 225 S.E.2d 325 (1976), plaintiff's assignment of error is overruled.

III

[3] Plaintiff next contends that he was denied due process of law because, throughout the dismissal hearing, the Pender County Board of Education's attorney was allowed to act as an "impartial law judge" and to make certain procedural and evidentiary rulings. We disagree.

In *Thompson v. Wake County Board of Education*, this court held that absent a showing that the participation of a Board of Education's attorney in dismissal hearings resulted in biasing the Board or prejudicing the petitioner, such participation is not a violation of due process. 31 N.C. App. 401, 414, 230 S.E.2d 164, 172 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977). Plaintiff contends that he was prejudiced because Richard Von Biberstein, Jr., the Board's attorney, was involved in the superintendent's pre-hearing investigation of the allegations against plaintiff, and because the Board used Von Biberstein's notes during

its deliberations. Prior to the Board's deliberations, the following exchange took place:

> BY [PLAINTIFF'S COUNSEL]: When the Board deliberates, will Mr. Von Biberstein's notes be a part of that deliberation?
>
> BY CHAIRMAN TAYLOR: Yes. The notes that he has taken in this proceeding.
>
> BY [PLAINTIFF'S COUNSEL]: What about the notes he took when he was representing [the superintendent] in the investigation . . . ?
>
> BY CHAIRMAN TAYLOR: No, sir; only the notes of this proceeding, and the documents that have been introduced into evidence.
>
> BY [PLAINTIFF'S COUNSEL]: Okay.
>
> BY [BOARD MEMBER]: The notes he has are the notes that we have.
>
> BY [PLAINTIFF'S COUNSEL]: I think you can understand why I asked that question.
>
> BY CHAIRMAN TAYLOR: I certainly do.
>
> BY MR. BIBERSTEIN: The only thing to be considered by this Board is the evidence presented at this hearing.

It is clear from the above discussion that the Board did not consider any of the notes prepared by its attorney during the investigation. Thus, there was no danger that the Board was in any way biased by Von Biberstein's prior investigatory notes. Similarly, there has been no showing that the plaintiff was in any way prejudiced by the Board's use of Von Biberstein's hearing notes during deliberations. Indeed, plaintiff manifested his acquiescence in the Board's use of Von Biberstein's notes by saying, "Okay" when told that only the notes which Von Biberstein took during the hearing would be used. Plaintiff cannot now be heard to complain that he suffered any prejudice by Von Biberstein's participation in the hearings. Plaintiff's assignment of error is without merit and is, therefore, overruled.

IV

[4] Plaintiff's next assignment of error makes an inarticulate reference to "rumors" concerning the plaintiff which the plaintiff

now contends biased the Board of Education against him and influenced its decision to dismiss him. He also contends that the superintendent admitted to having communicated with the Board about the "Evers matter" prior to the hearing and to having communicated his belief of plaintiff's guilt to the Board. As such, plaintiff asserts that he was denied his due process right to "a fair trial in a fair tribunal." *See Crump v. Board of Educ. of the Hickory Admin. School Unit*, 93 N.C. App. 168, 178, 378 S.E.2d 32, 38 (1989), *modified and aff'd*, 326 N.C. 603, 392 S.E.2d 579 (1990).

Our Supreme Court has noted that "[a]n unbiased, impartial decision-maker is essential to due process." *Crump v. Board of Educ. of the Hickory Admin. School Unit*, 326 N.C. 603, 615, 392 S.E.2d 579, 585 (1990). Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction." *See id.* "Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination." *Id.* However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way. *Id.*

As mentioned, plaintiff contends that both rumors and prehearing communications between the superintendent and the Board infected the Board and caused it to develop a preconceived notion of plaintiff's guilt of the actions alleged. With respect to the alleged "rumors," plaintiff's counsel brought the subject up during the dismissal hearing while cross-examining Joe Clay Jones, a teacher and coach at Pender High School. The transcript reveals that the subject was addressed as follows:

> Q: Mr. Jones, has anyone ever spread any false rumors or accusations or lies about you that you are aware of or have been made aware of?
>
> A: Not that I have been made aware of. Now, they could have done it and I was not aware of it.
>
> Q: Is it a possibility?
>
> A: Yes.
>
> BY MR. BIBERSTEIN: In that context, Mr. Chairman, I think the Board probably needs to be told, at this point, that the presence of rumors is not proof of anything and this Board

should not consider the fact that there were rumors involved in this particular incident as proof of anything. This Board has to find facts, not rumors, before they can substantiate and find true the charges of the superintendent.

The Board needs to understand the fact that somebody is spreading a rumor or talking about a rumor does not constitute evidence of anything against Mr. Evers.

BY CHAIRMAN TAYLOR: We understand that and let the record reflect that this Board has heard nothing but rumors and has worked diligently to disregard the rumors. All we are after is the facts.

BY [PLAINTIFF'S COUNSEL]: Thank you. I thank you. That is all I was getting at. If it please the Board, thank you. I just wanted to make it known that students and people in general do spread rumors and do gossip, but that does not make it true, and I know that we are all human and you all are doing a fine job, and I want this to be on the record, you know, sorting this out, but I think we need to say it, and that is all I wanted to bring out.

Our Supreme Court has recognized that prior knowledge and discussion of the facts relating to a given adjudicatory hearing are inevitable aspects of the multi-faceted roles which Board members play. *See Crump*, 326 N.C. at 616, 392 S.E.2d at 579. As long as Board members are able to set aside their prior knowledge and preconceptions concerning the matters at issue, and to base their considerations solely upon the evidence presented during the hearing, constitutionally impermissible bias does not exist. *Id.* at 617, 392 S.E.2d at 579. We similarly conclude that exposure to rumors is not, in and of itself, cause to believe that Board members have been biased.

In the instant case, plaintiff not only fails to indicate the exact nature of the rumors which the Board is alleged to have considered, but he also fails to point out how the Board may have been biased by the rumors. In short, there is no indication that the Board based its conclusions on anything other than the evidence which was adduced at the hearing. Under such circumstances, we conclude that the instruction which attorney Von Biberstein gave to the Board regarding rumors and the Board Chairman's assurance that the Board would consider nothing more than the evidence presented

during the hearing are sufficient indicia of the fact that the Board was not influenced by rumors and that it acted impartially.

[5] We likewise conclude that the pre-hearing communications between the superintendent and the Board members did not bias the Board against plaintiff. During plaintiff's counsel's cross-examination of the superintendent, the following testimony was elicited:

> Q: Doctor Davis, because of the seriousness of the charges, I need to ask you the next question. Do you recall whether or not you have discussed the allegations in this case with the Board members?
>
> A: As soon as I suspended Mr. Evers, I got on the phone and notified the members of the Board of Education.
>
> Q: Individually?
>
> A: Yes.
>
> Q: Via telephone?
>
> A: Correct.
>
> Q: And do you remember what you told them?
>
> A: I told them the nature of the charges and simply that there had been charges made concerning Mr. Evers having sex with a student and that, based on the seriousness of the charges, I had suspended him with pay pending an investigation.
>
> Q: I do not want to infer the wrong thing. So your actual decision to suspend him was really based upon the "seriousness of the charges" itself; sex with a student?
>
> A: Yes.
>
> Q: And that alone?
>
> A: Correct.
>
> Q: Have you discussed this case with them on any other occasion other than that first notice?
>
> A: Yes.
>
> Q: Have you communicated to them any feelings that you may have about Mr. Evers' guilt or innocence?

A: Directly, no; indirectly, possibly so, in terms of the action that has been taken.

Q: That is fine. . . .

In *Crump*, the Supreme Court made it clear that mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of Board members at a later adversary hearing. 326 N.C. at 617, 392 S.E.2d at 579. As with his contention regarding "rumors," plaintiff has failed to show how the Board may have been biased by the prehearing communication between the superintendent and the Board. The superintendent merely advised the Board, as he was required to do by statute, that he recommended the dismissal of plaintiff. *See* N.C. Gen. Stat. § 115C-325(f1). It is also important to note that the superintendent did not admit to having directly told the Board that he thought plaintiff was guilty; rather, the superintendent indicated that his belief in plaintiff's guilt was implicit from the action he took in recommending plaintiff's dismissal. In sum, we conclude that plaintiff has failed to rebut the presumption that the actions of the Pender County Board of Education were correct and free from bias against plaintiff. This assignment of error is overruled.

V

[6] Plaintiff next assigns error to the Board's admission of the forensic serologist's testimony regarding the results of the laboratory tests which he performed on the two cloths found in the closet in Evers' classroom. Plaintiff contends that the testimony was incompetent because the chain of custody of the cloths was not properly established and because the evidence was too remote to link the plaintiff to it.

We note initially that the Rules of Evidence are not applicable to teacher dismissal hearings before a board of education. N.C. Gen. Stat. § 115C-325(j)(4) (1990). Rather, boards of education "may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs." *Id.* In *Faulkner v. New Bern-Craven Board of Education*, 311 N.C. 42, 316 S.E.2d 281 (1984), our Supreme Court recognized an apparent tension between N.C. Gen. Stat. § 115C-325(j)(4) and -325(l)(1) and (2). 311 N.C. at 57, 316 S.E.2d at 290. The latter two subsections refer to the necessity of evidence upon which a board makes its

decision being "competent." While the phrase "competent evidence" is not defined in N.C. Gen. Stat. § 115C-325, we agree with the *Faulkner* Court's belief that a strong argument could be made that "competent evidence," for the purposes of teacher dismissal hearings, refers to "evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs." *See id.* We therefore conclude that as long as evidence which is proffered at a teacher dismissal hearing can be said to be of a kind commonly relied upon by reasonably prudent persons in the conduct of serious affairs, such evidence is competent and may properly be admitted into evidence.

In the instant case, we believe that the cloth towels were properly authenticated and that there was a sufficient showing that they may have been connected to the plaintiff.

With respect to the chain of custody, Dr. Haywood Davis testified that on 31 May 1989, after Evers had been suspended, he first learned in an interview with Mr. Charles Sidbury, Helen's father, that a towel had allegedly been used to wipe off Helen's stomach after intercourse with Evers. The superintendent testified that immediately upon hearing this information, he went to Pender High School and asked the Pender High School principal to let him into Evers' former classroom so that he could inspect the closet where the alleged sexual relations took place. The principal unlocked the door to the closet and once inside, the superintendent noticed a bucket in the corner of the closet. Upon further inspection of the bucket, the superintendent testified, he found a cloth which "appeared to have something on it." The superintendent testified that he confiscated the bucket and its contents and kept them in his office until 15 June 1989, at which time he turned them over to the Pender County Sheriff's Department. Pender County Sheriff's Detective Warren Days testified that the bucket and its contents were locked in his locker for safekeeping for a few days until it was forwarded by certified mail to the State Bureau of Investigation ("SBI") for analysis. Sometime later, the SBI returned the items to the Sheriff's Department via first class mail along with its analysis. Detective Warren subsequently returned these items to the superintendent who had been asked to turn the items over to Evers so that Evers could have the items analyzed by his own expert.

Based upon this evidence, we are of the opinion that a proper chain of custody was established with respect to the towels and that, therefore, the SBI forensic serologist was properly allowed to testify as to the results of the tests he performed on the towels.

[7] Plaintiff also contends that since the bucket and the cloths were not recovered from the closet until some thirty-six days after Evers last had access to the closet, both the towels and any evidence relating to them were inadmissible. We disagree.

"Generally, remoteness in time goes to the weight of the evidence and not to its admissibility." *State v. Schultz*, 88 N.C. App. 197, 203, 362 S.E.2d 853, 857 (1987) (citing *State v. Brown*, 280 N.C. 588, 187 S.E.2d 85, *cert. denied*, 409 U.S. 870, 34 L.Ed.2d 121 (1972)). We therefore conclude that the towels which were found in the closet in Evers' classroom, and the results of the tests performed upon them were properly admitted.

VI

[8] In his final assignment of error, plaintiff contends that the Board's decision to dismiss him was unsupported by substantial evidence in view of the entire record. As such, he argues that the trial court erred in failing to reverse the Board's decision. For the reasons which follow, we are of the opinion that the trial court properly affirmed the decision of the Pender County Board of Education.

In its resolution, the Pender County Board of Education set forth the following statutory grounds for plaintiff's dismissal: (1) Inadequate performance of teaching duties; (2) Immorality; (3) Neglect of duty; (4) Failure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State; and (5) Conduct which constitutes grounds for the revocation of a career teacher's teaching certificate. *See* N.C. Gen. Stat. § 115C-325(e)(1)a, b, d, i, and k.

As previously mentioned, N.C. Gen. Stat. § 150B-51 sets forth the appropriate standard of review for appeals from school boards. It provides that the trial court may reverse the decision of the school board if it finds that the decision is unsupported by substantial evidence in view of the entire record. *See* N.C. Gen. Stat. § 150B-51(b)(5) (1987). The standard of review set forth in section 150B-51(b)(5) has come to be known as the "whole record" test. *Henderson v. North Carolina Dept. of Human Resources*, 91 N.C.

App. 527, 530, 372 S.E.2d 887, 889 (1988). As stated by our Supreme Court:

> The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it . . . . On the other hand, the "whole record" rule requires the court, in determining the substantiality of the evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence.

Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citations omitted).

In determining this issue, then, we must consider "all of the evidence, both that which supports the decision of the Board and that which detracts from it" in order to determine whether the decision is supported by substantial evidence. *Overton v. Goldsboro City Bd. of Educ.*, 304 N.C. 312, 318, 283 S.E.2d 495, 499 (1981). Since the Board failed to find that the charges relating to 3 March 1989 were true and substantiated, we need only focus on the events of 3 April 1989.

For the sake of brevity, the evidence adduced at the hearing which tends to support the Board's decision is summarized as follows:

> 1. Helen Sidbury's testimony that on 3 April 1989, she left her sixth period class at about 2:20 p.m. or 2:25 p.m. in order to go see teacher Shane Covil; that when she could not find Covil, she decided to go see Evers; that when she arrived at Evers' classroom, she and Evers talked for about five minutes, and then Evers went to a closet in the backroom; that Evers called her back to the closet and once inside, the two engaged in various sexual acts; that after Evers ejaculated onto her stomach, he used a cloth or towel to wipe off both Helen and himself; that after she and Evers left the closet, the final school bell rang and she left.
>
> 2. Shane Covil's corroborative testimony that she could not find Evers between 2:20 p.m. and 3:00 p.m., despite searching diligently and despite the fact that she saw his vehicle parked on campus.

3. Amy Carr's corroborative testimony that she also could not find Evers between about 2:25 p.m. or 2:30 p.m. and 2:40 p.m., despite searching diligently and despite having seen his vehicle in the parking lot.

4. Out of five witnesses who testified on behalf of Evers, only one claimed to have seen him before 3:05 p.m.

5. The four poems which Helen Sidbury wrote conveying romantic feelings toward Evers.

6. Helen's personal calendar which contained secret codes detailing acts which allegedly occurred between Helen and Evers. Helen testified that these entries were made "usually that day or sometime right after or if it is something that is coming up, then . . . before [the day] gets there."

7. Superintendent Davis' testimony that he found a bucket containing two cloths in Evers' classroom closet. His testimony that one of the cloths "appeared to have something on it."

8. The forensic serologist's testimony that the stains on the larger hand towel tested positive for spermatozoa, indicating that semen was present on the towel.

As previously indicated, in determining the substantiality of the evidence supporting the Board's decision, we must take into account not only that evidence which supports the Board's decision, but also that which detracts from it.

Evers' defense was primarily based on his claim that he was not on school grounds at the time of the alleged incident. In addition, he attempted to picture Helen as an emotionally disturbed girl who was prone to fantasize and start rumors about having relationships with other men.

Evers testified that for him, sixth period at Pender High School was a planning period, which meant that did not have a class to teach. He testified that right before sixth period began on 3 April 1989, around 2:00 p.m., he went across campus to the main building so that he could turn in the day's attendance and so that he could talk to Dr. John Davis, the school principal. When he arrived there, Evers testified, Dr. Davis' secretary informed him that the principal was engaged in other business at that time. After waiting for awhile, Evers testified that he left the office area with the intent of going home to get some baseball practice

gear. He testified that because his wife also taught at Pender High School, his usual routine when going home during the day would be to stop by his wife's classroom, tell her that he was leaving campus, and ask her if she needed him to bring her anything. Evers could not say for certain whether he followed this custom on 3 April 1989.

Evers went on to testify that he left the campus in his Ford Bronco around 2:35 p.m. and that, on the way out of the parking lot, he saw Tommy White, a parent volunteer for the school's junior varsity baseball team. Upon arriving at home, which was approximately four miles from the school, Evers testified that his father was about to leave for work. After gathering the practice gear and changing clothes, he got back into his vehicle and drove back toward the school. He further testified that on the way back to the school, he stopped at a store for a soft drink. According to Evers, he arrived back at the school around 3:10 p.m. or 3:15 p.m.. Upon arriving there, he drove directly to the softball field because he knew that there was a softball game that day. Evers testified that he parked his vehicle and began talking with some of his baseball players who had come to watch the softball game. He further testified that at about 3:20 p.m., his wife walked up to his vehicle and asked him whether he wanted her to bring him something to eat. Evers responded that he did and, about thirty minutes later, she returned with the food. Finally, Evers testified that at around 4:45 p.m., he and his baseball players left the softball game for baseball practice, which was to begin at 5:00 p.m. on the baseball field.

We note here that Evers' explanation of his whereabouts between 2:15 p.m. and 3:00 p.m. must be viewed with some skepticism. With the exception of Tommy White, none of the people with whom Evers claims he had contact during this time period testified on his behalf. Especially conspicuous is the absence of testimony by Evers' father, who could have substantiated the fact that Evers came home that afternoon. Nor did he produce the grocery store clerk who sold him the soft drink he allegedly bought on the way back to the campus. Finally, Evers' wife did not testify on his behalf. While Evers could not be sure that he stopped by her classroom prior to leaving the campus on that day, he testified that it was his usual practice to do so. Moreover, Evers' wife could have testified that she did, in fact, see Evers at the softball game.

Evers offered the testimony of William Best, an expert in the field of forensic chemistry. Best testified that he too examined the stains which were found on the towel taken from the closet in Evers' classroom. It was his testimony, that while his examination of the larger of the two towels did in fact reveal the presence of spermatozoa, the examination did not reveal the presence of vaginal epithelial cells. Best explained that these vaginal epithelial cells would always be present following vaginal intercourse. He further testified that the absence of vaginal epithelial cells from the towel tested made it unlikely to him that the towel could have been used to wipe off both the female and the male. Near the conclusion of Best's testimony, Board Chairman Taylor asked the following question:

> BY CHAIRMAN TAYLOR: Explain to me, if you can, Mr. Best—here again, understand that we are neither Forensic Chemists nor a professional jury. We are just struggling along here trying to determine the truth of this matter. How can an ejaculation onto a stomach, wiped off with a towel, show [vaginal] epithelial cells?
>
> BY THE WITNESS: That alone will not, but if there is any contact with the male—the penis—you are going to pick them up. . . .

Finally, two witnesses who testified on Evers' behalf indicated that Helen Sidbury had lied about having affairs before. Margaret Lisa Lane, whose husband was the manager of a store where Helen worked part time, testified that after Evers had been suspended from his job, Evers' wife, who also worked at Pender High School, called her on the phone and told her that Lane's husband was going to be subpoenaed to testify at the Evers hearing. Lane also testified that Evers' wife told her that Helen had been circulating rumors at the school that Helen was having an affair with Lane's husband. She also testified that upon confronting Helen, Helen admitted to having told friends that Lane's husband was her boyfriend. During Helen's testimony she denied having told anyone that she was involved with Lane's husband.

Cheryl Peverett testified that she had known Helen Sidbury very well prior to moving away three years earlier. It was Peverett's testimony that Helen had confessed to being in love with Peverett's husband and to "wanting him." Peverett further testified that a friend of Helen's had told Peverett that Helen, while spending

the night with the friend, did not get much sleep because she was preoccupied with a picture of Peverett's husband. On cross-examination, however, Peverett admitted that she had not had a "deep" conversation with Helen for almost three years.

Having painstakingly reviewed the entire record, we are of the opinion that there was substantial evidence in the record to support the decision of the Board. " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' " *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (quoting *Comr. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)). " 'Substantial evidence is more than a scintilla or a permissible inference.' " *Id.* (quoting *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 205, 214 S.E.2d 98, 106 (1975)).

When the whole record is viewed, the evidence shows that Helen Sidbury alleges engaging in sexual relations with her teacher, friend and confidante, Jefferson Evers, between 2:30 p.m. and 3:00 p.m. on 3 April 1989. While Evers staunchly denies this allegation and states that he was elsewhere during the critical time period, it cannot be ignored that two witnesses testified that they saw Evers' vehicle in the school parking lot during the time which Evers claims he was away from campus in the vehicle spotted. With respect to those who testified that they saw Evers "returning" to campus that afternoon, only Tommy White could say that he "possibly" saw Evers leaving the campus prior to 3:00 p.m.

It must be kept in mind that bulk of the evidence in this case came from the testimony of thirty-eight witnesses. Thus, the credibility of these witnesses unquestionably played a major role in the Board's decision. A school board's decision to dismiss need only be based on a preponderance of the evidence. *See* N.C. Gen. Stat. § 115C-325(k)(2).

In our opinion, the documentary and physical evidence presented at trial provide the weight which "tips the scale" in favor of substantiating the charges against Jefferson Evers. We find the four poems written by Helen Sidbury, especially that which has been reproduced in this opinion, to be especially telling. We also find Helen's personal calendar quite probative, due particularly to its graphic and spontaneous nature.

Lastly, the testimony regarding the presence of semen on the towel found in the closet in Evers' former classroom had a corroborative, if not sobering impact. The fact that neither expert was able to identify the presence of vaginal epithelial cells on the towel, in our opinion, goes only to the weight of the evidence.

In view of the entire record, we conclude that there was substantial evidence from which the Pender County Board of Education could properly conclude that the grounds for the superintendent's recommendation to dismiss plaintiff were true and substantiated by a preponderance of the evidence. Accordingly, the trial court was correct in affirming the decision of the Board of Education. The order from which the plaintiff appeals is, therefore

Affirmed.

Judge WELLS concurs in separate opinion.

Judge GREENE dissents in separate opinion.

Judge WELLS concurring.

I concur in the majority opinion, but point out one area of due process concern. The record makes it clear that in its deliberations, the Board used the notes taken by its attorney at the hearing. This was improper. As the triers of the facts, the Board should have relied entirely on its own recollections of the proceedings, not on its attorney's notes. As the majority opinion points out, plaintiff acquiesced in this action and therefore should not now be allowed to assert it as a basis for denial of due process.

Judge GREENE dissenting.

I concur with the majority's opinion except for its holding that a violation of N.C.G.S. § 115C-325(f1) does not bar the subsequent initiation of dismissal proceedings against a career teacher. Because N.C.G.S. § 115C-325(f1) was violated, I would reverse the dismissal of Jefferson L. Evers (teacher). I therefore dissent.

The statute provides a summary method by which a superintendent of a school system may suspend a career teacher with pay:

> If a superintendent believes that cause may exist for dismissing or demoting a probationary or career teacher for any reasons

> specified in G.S. 115C-325(e)(1)b through 115C-325(e)(1)j, but that additional investigation of the facts is necessary and circumstances are such that the teacher should be removed immediately from his duties, the superintendent may suspend the teacher with pay for a reasonable period of time, not to exceed 90 days. The superintendent shall immediately notify the board of education of his action. If the superintendent has not initiated dismissal or demotion proceedings against the teacher within the 90-day period, the teacher shall be reinstated to his duties immediately and all records of the suspension with pay shall be removed from the teacher's personnel file at his request.

N.C.G.S. § 115C-325(f1) (1987). Superintendent Davis invoked this section of the statute and suspended teacher with pay on 25 April 1989. On 24 July 1989, 90 days had elapsed without Superintendent Davis having initiated dismissal proceedings. At that time, teacher requested in writing that he be reinstated and that all records of his suspension be removed from his file. Despite this request, teacher was left on suspension and his file was not expunged. Dismissal proceedings were not initiated against teacher until 10 August 1989, 107 days after the suspension began. The statute explicitly authorizes the suspension to last "a reasonable period of time, not to exceed 90 days." Teacher's suspension lasted well beyond the prescribed period, despite his active attempt to be reinstated. I agree with the majority's conclusion that Superintendent Davis violated N.C.G.S. § 115C-325(f1) by not reinstating teacher at the end of 90 days.

I disagree, however, that this procedural violation does not warrant reversing teacher's dismissal. Our standard of review for the dismissal of a career teacher is governed by N.C.G.S. § 150B-51 of the Administrative Procedure Act. *See Overton v. Goldsboro City Bd. of Educ.*, 304 N.C. 312, 316, 283 S.E.2d 495, 498 (1981) (holding that standard of review of school board decisions is N.C.G.S. § 150A-51, now § 150B-51). In reviewing the final decision of the school board, this Court may "reverse or modify the agency's decision if the substantial rights of the [individual] may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are . . . [m]ade upon unlawful procedure . . . ." N.C.G.S. § 150B-51(b)(3) (1987). Teacher's status as a career teacher is a "substantial right." *See* N.C.G.S. § 115C-325(d)(1) (1987) (career teacher not subject to annual appointment and has protections of other

parts of statute); *Crump v. Board of Educ.*, 326 N.C. 603, 613-14, 392 S.E.2d 579, 584 (1990) (career teacher has a cognizable property interest in continued employment); *Thompson v. Wake County Bd. of Educ.*, 31 N.C. App. 401, 407, 230 S.E.2d 164, 168 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977) (career teacher status carries with it various rights and privileges). Teacher's substantial rights may not be taken away after the school board has violated statutory procedures in the course of teacher's dismissal proceedings. *See Rose v. Currituck County Bd. of Educ.*, 83 N.C. App. 408, 412, 350 S.E.2d 376, 379 (1986) (board cannot dismiss career teacher without affording teacher statutorily mandated procedures of notice and hearing); *Thompson* at 407, 230 S.E.2d at 168 ("career teacher may not be dismissed or demoted except upon specified grounds and in accordance with the statutory procedures provided"). Here, teacher's rights as a career teacher have been affected as a result of procedure which was unlawful.

A school superintendent is free to investigate any career teacher and initiate dismissal or demotion proceedings for conduct occurring up to three years in the past. N.C.G.S. § 115C-325(e)(4) (1983). However, when a teacher is not only investigated, but put on suspension, the superintendent's actions have immediate consequences upon the teacher's career, daily life, and reputation in the community. When a superintendent places a career teacher in this position, it is incumbent on the superintendent to move quickly toward the initiation of formal proceedings. The need to expedite the process in this situation is reflected in the 90-day limitation on a suspension with pay imposed by the General Assembly. This 90-day limit protects teachers from the deleterious consequences of a long-term suspension. When a superintendent takes this action, he or she must be prepared to initiate proceedings within 90 days or reinstate the teacher as required. Where a teacher is suspended under N.C.G.S. § 115C-325(f1) and the superintendent fails to initiate dismissal or demotion proceedings within 90 days *and* fails to reinstate the teacher by the end of the 90-day period, the superintendent is barred from initiating proceedings in the future.

Superintendent Davis failed to initiate formal proceedings within 90 days and refused to reinstate teacher as N.C.G.S. § 115C-325(f1) requires. While formal proceedings were eventually initiated against teacher, there was nothing, if the position of the majority is accepted, to prevent Superintendent Davis from keeping teacher on suspension for up to three years prior to initiation of proceedings.

N.C.G.S. § 115C-325(e)(4). The statute, N.C.G.S. § 115C-325(f1), does not allow such a suspension.

North Carolina Gen. Stat. § 115C-325 imposes procedural deadlines on both teacher and defendants. Defendants cannot selectively disregard part of the statute, while at the same time invoking other parts of it to effect teacher's dismissal. Superintendent Davis' failure to reinstate teacher after failing to proceed within 90 days bars any further disciplinary action in this matter. The trial court's order affirming the decision of the Pender County Board of Education, dismissing teacher, should therefore be reversed.

DARLENE HULL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RONALD LEE HULL, ET AL., PLAINTIFFS v. E. PRESTON OLDHAM, ET AL., DEFENDANTS

JOEL A. CANTRELL, AS ADMINISTRATOR OF THE ESTATE OF CRYSTAL SUZANNE CANTRELL, ET AL., PLAINTIFFS v. E. PRESTON OLDHAM, ET AL., DEFENDANTS

No. 9021SC308

(Filed 3 September 1991)

1. **Sheriffs and Constables § 4 (NCI3d); Public Officers § 9 (NCI3d)— law officers—duty to protect individuals from criminal acts of others**

Ordinarily, law enforcement agencies and officials are not under a duty to protect individuals from criminal actions of others unless there is a special relationship between the injured person and the police or a special duty arising because the police have promised protection to a particular individual.

Am Jur 2d, Sheriffs, Police, and Constables § 94.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 ALR3d 700.

2. **Sheriffs and Constables § 4 (NCI3d); Public Officers § 9 (NCI3d)— victims shot by sniper—no breach of duty by sheriff and deputies**

A sheriff and his deputies did not breach any duty to three victims who were shot by a sniper while riding in vehicles

when they misinformed relatives of the sniper about involuntary mental commitment procedures before the shootings occurred. Therefore, the sheriff and deputies were not liable in damages for the deaths of two victims and injuries to the third victim on the basis of negligence or gross negligence in giving the erroneous advice.

Am Jur 2d, Sheriffs, Police, and Constables § 94.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 ALR3d 700.

3. **Sheriffs and Constables § 4 (NCI3d); Public Officers § 9 (NCI3d)— shootings by sniper—no special duty by sheriff to protect victims**

No special relationship existed between three victims who were shot by a sniper while riding in vehicles and defendants, a sheriff and his deputies, which gave rise to a special duty by defendants to protect the victims from being shot after defendants had misinformed the sniper's relatives about involuntary mental commitment procedures and after defendants had learned that the sniper had shot into another person's vehicle where the complaints do not allege that defendants promised protection to the victims, and there was no allegation that defendants assumed any greater duty to the victims than that owed to the general public.

Am Jur 2d, Sheriffs, Police, and Constables § 94.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 ALR3d 700.

4. **Principal and Surety § 3 (NCI3d)— actions on sheriffs' bonds—statements of claims for relief**

Plaintiffs' complaints stated claims against the sheriffs of two counties on their official bonds in an action to recover for deaths and injuries from shootings by a sniper who fired at passing motorists. N.C.G.S. § 58-76-5; N.C.G.S. § 162-8.

Am Jur 2d, Sheriffs, Police and Constables §§ 203, 205.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 ALR3d 700.

5. Sheriffs and Constables § 1 (NCI3d) — claims against sheriffs — jurisdiction of superior court

Sheriffs are local rather than state officers so that claims against them were not required to be brought in the Industrial Commission but were properly instituted in the superior court.

Am Jur 2d, Sheriffs, Police and Constables § 2.

APPEAL by plaintiffs and defendants from judgment entered 20 December 1989 by *Judge Marvin K. Gray* in FORSYTH County Superior Court. Heard in the Court of Appeals 21 February 1991.

On 17 July 1988, Michael Hayes shot and killed four people including Ronald Lee Hull and Crystal Suzanne Cantrell and injured several others including plaintiff Darlene Hull. One year later, plaintiffs Darlene Hull and Joel A. Cantrell filed separate actions against Preston Oldham, individually and as Sheriff of Forsyth County, several Forsyth County deputies and lieutenants, Paul McCrary, individually and as Sheriff of Davidson County, and a Davidson County deputy, alleging negligence, and against the bonding companies on the sheriffs' bonds.

Michael Lewis for plaintiff-appellants, plaintiff-appellees.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Michael K. Curtis, for plaintiff-appellants, plaintiff-appellees.

Womble Carlyle Sandridge & Rice, by Richard T. Rice, Kurt C. Stakeman and James Daniel McNatt, for defendant-appellants, defendant-appellees.

Frank B. Aycock, III for defendant-appellees.

ORR, Judge.

Procedural History

Both plaintiffs alleged in their complaints five claims for relief: (1) gross negligence or negligence on the part of each individual defendant; (2) liability of defendant Oldham and his bonding company, United States Fidelity and Guaranty Company, under his official bond; (3) liability of defendant Oldham's deputies and lieutenants and another bonding company, Hartford Accident and Casualty Company, under a separate bond issued to Forsyth County; (4) liability of defendant McCrary as Sheriff of Davidson County and his bonding company, Western Surety Company, under his

official bond; and (5) liability of defendant McCrary's deputy and Western Surety Company under a separate bond issued to Davidson County.

Defendants filed motions to dismiss in both cases pursuant to Rule 12(b)(6) and Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction. On 7 September 1989, both plaintiffs filed notices of voluntary dismissal pursuant to Rule 41 as to all claims against Hartford Accident and Casualty Company, effectively dismissing their third claims. In addition, plaintiff Cantrell filed notice of voluntary dismissal as to his claims against defendants Aronhime, Crawley and Chadwick of the Forsyth County Sheriff's Department, Davidson County Sheriff McCrary, Deputy Godfrey, and Western Surety Company, effectively dismissing his fourth and fifth claims.

On 20 December 1989, the trial court in each case allowed all motions to dismiss pursuant to Rule 12(b)(6) regarding the first claims for relief alleging gross negligence and denied all motions regarding the second claims. The trial court denied all motions to dismiss Hull's fourth claim pursuant to Rule 12(b)(6) but granted motions to dismiss Hull's fifth claim. The trial court denied all Rule 12(b)(1) motions in both cases. Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the trial court entered final judgment as to the first and fifth claims and found no just reason to delay the appeal.

From this judgment, plaintiffs and defendants appealed. Defendants petitioned this Court to issue a writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure as to the trial court's denial of defendants' motions to dismiss under Rules 12(b)(6) and 12(b)(1), and the plaintiffs joined in that petition. The petition was allowed 11 April 1990.

Facts

Plaintiffs allege the following facts regarding the events which took place over a three day period in 1988:

July 15

A Forsyth County deputy was dispatched to Edwards' Moped Shop, which was run by Michael Hayes. Part of his conversation with Hayes "centered around firearms and how [he] could procure

certain firearms." Hayes asked how he could mount a shotgun on a moped because he said he was "going to Hanging Rock the next day and planned to shoot the tires out of any car that tried to run him off the road."

July 16

On the evening of July 16, Hayes was seen making obscene gestures and shooting into the air. At 4:17 p.m., his mother called the Forsyth County Sheriff's Department and told them Hayes was crazy, needed to be in a mental hospital, and had a shotgun. Three officers from the Forsyth County Sheriff's Department went to the moped shop and talked with Hayes. "Hayes was cursing and very arrogant and advised the deputies to 'Come on back I have something for you.' " The officers did not check his criminal record on which there was a warrant outstanding for his arrest.

Later that day his stepfather, Garris Edwards, went to the shop. "Hayes became angry, and smashed both fists against a wall, apparently breaking his hand." Edwards took him to North Carolina Baptist Hospital. Edwards then talked with a Forsyth County deputy sheriff about having Hayes committed, but the deputy erroneously told him Hayes could not be involuntarily committed at that time and not in Forsyth County. "The deputy had radioed a dispatcher . . . to ask about commitment procedures, and was told that because Hayes lived in Davidson County, he would have to be committed in that county."

At 7:45 p.m. an unidentified person called the Forsyth County Sheriff's Department to inform them Hayes was "having a nervous breakdown" and had a shotgun. Five minutes later, Hayes's uncle, James Starling, called the Forsyth County Sheriff's Department and told them Hayes was threatening to kill Edwards. At 7:55 p.m. three deputies were dispatched to the moped shop and were told to "use caution because Hayes had a gun." The deputies observed Hayes on the porch, and then "decided to pull back their location to the Griffith Volunteer Fire Department."

July 17

Around 4:00 a.m. Edwards called the Forsyth County Sheriff's Department and was told that Hayes could be involuntarily committed that day but that "the commitment process would take about eight hours, and could probably not be done in Forsyth County."

Five times before the shooting began, Hayes's family members and friends called the Forsyth County Sheriff's Department about Hayes. "Sheriff Oldham and his deputies not only ignored these pleas for help, but in fact gave erroneous and misleading information regarding available and appropriate commitment proceedings."

At 11:40 a.m. Edwards called the Forsyth County Sheriff's Department, told an officer "that Hayes had had a nervous breakdown and had threatened to kill him." He pleaded for commitment procedures to begin. He was told that he should go to Davidson County, that magistrates " 'don't like to be called out unless it is a dire emergency,' " and that " 'it would probably be better to do something tomorrow.' " He was also told the Sheriff's Department would take Hayes to the county line. At around 11:15 p.m. a Davidson County Sheriff's Department dispatcher was called after a pickup truck driven by Gene Petty was shot at near the moped shop, and a Davidson County deputy arrived soon after to check the damage to the truck at a service station. Two Forsyth County deputies drove past him on their way to the moped shop while he was writing the report, and he "ignored the shooting which was occurring in front of his own eyes, and continued to do nothing to assist in the apprehension of Hayes until after Hayes was arrested."

At 11:24 p.m. the Winston-Salem Police Department was notified that Hayes was shooting at passing cars. Subsequently, additional calls were made to the Forsyth County Sheriff's Department including one from Garris Edwards saying that "there was a person laying [sic] in the parking lot and Hayes was going to kill someone else." At 11:27 the Police Department notified the Sheriff's Department that Hayes was shooting at passing cars. At 11:32 p.m. the Davidson County Sheriff's Department reported to the Forsyth County Sheriff's Department that they had " 'the subject that was shot,' " and around this time Crystal Suzanne Cantrell, who had been heading south on Old Salisbury Road, was killed by Hayes.

Again at 11:33 p.m. the Forsyth County Sheriff's Department received another call about the shooting, and someone reported "his truck had been hit by gun fire." Around 11:34 p.m. the Forsyth dispatcher noted that Hayes was the same person who was having problems the prior evening. Several others were subsequently wounded by Hayes. At 11:39 the Forsyth County Sheriff's Department confirmed Hayes was the same individual they had dealt with the prior evening, and around this time Thomas Nicholson was shot

and killed. At 11:41 the first Forsyth deputy arrived on the scene followed by several others.

Around this time, Ronald Hull, his wife, and son were heading home on Friedburg Road. "Their customary and shortest route was to turn right onto Old Salisbury Road, heading south." When they reached the stop sign at the intersection of Friedburg and Old Salisbury roads, the Forsyth County deputies had blocked the road so that they could not turn right so he turned left. There were no warnings, blue lights, or sirens warning of the danger, and Ronald Hull was shot and killed by Hayes and plaintiff Darlene Hull was injured when they neared the shop. Around 11:54 p.m., a deputy shot Hayes, and he was then arrested.

Plaintiff Darlene Hull sustained a severe and permanent injury. She seeks to recover for her own injuries and for the wrongful death of Ronald Hull. Plaintiff Cantrell seeks to recover for the wrongful death of Crystal Suzanne Cantrell.

I.

The first issue on appeal is whether the trial court erred in granting defendants' motions to dismiss plaintiffs' negligence claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). Where a motion to dismiss is made pursuant to Rule 12(b)(6), "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

In order for there to be liability in tort, defendants must have been under a legal duty of care. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). "Actionable '[n]egligence is the failure to exercise proper care in the performance of a *legal duty* which [a] defendant owe[s] the plaintiff under the circumstances surrounding them.' " *Id.* at 192, 366 S.E.2d at 5 (quoting *Moore v. Moore*, 268 N.C. 110, 112, 150 S.E.2d 75, 77 (1966)). It "presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law." *Vickery v. Olin Hill Construction Co.*, 47 N.C. App. 98, 103, 266 S.E.2d 711, 715, *disc. review denied*, 301 N.C. 106 (1980).

"The breach of duty may be by negligent act or a negligent failure to act." *Moore*, 268 N.C. at 112-13, 150 S.E.2d at 77.

[1] The general rule followed in this state is that ordinarily law enforcement agencies and officials are not under a duty to protect individuals from criminal actions of others unless there is a "special relationship" between the injured person and the police or a "special duty" arising because the police have promised protection to a particular individual. *Coleman*, 89 N.C. App. at 193-94, 366 S.E.2d at 6; *Lynch v. N.C. Dep't of Justice*, 93 N.C. App. 57, 376 S.E.2d 247 (1989); *Braswell v. Braswell*, 98 N.C. App. 231, 390 S.E.2d 752, *disc. review allowed*, 327 N.C. 137, 394 S.E.2d 168 (1990). "[I]nstead their duty is to preserve the peace and arrest lawbreakers for the protection of the general public." *Lynch*, 93 N.C. App. at 60, 376 S.E.2d at 249.

Plaintiffs acknowledge in their brief the existence of controlling case law in this state applying the "public duty doctrine" but urge this Court to overrule or modify this doctrine. Although some states have abandoned or restricted this doctrine, we are bound by the prior decisions of this Court and have no authority to overrule these decisions. *See In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (a Court of Appeals panel may not overrule a prior decision of a different panel on the same issue in a different case unless the prior decision has been overturned by a higher court).

A.

[2] Plaintiffs first contend that defendants Sheriff Oldham and his deputies should have foreseen Hayes's conduct and are liable for gross negligence or negligence in giving erroneous advice regarding the commitment procedures to Hayes's relatives which plaintiffs allege proximately caused the deaths of plaintiffs' decedents and injury to plaintiff Darlene Hull. We disagree.

Here plaintiffs' complaints allege Sheriff Oldham was grossly negligent in training and supervising his deputies as to the appropriate procedure for involuntary mental commitment and for his deputies' failure "to handle properly mental commitment procedures." Plaintiffs further alleged that he was grossly negligent in "failing to transport Hayes to an area facility for mental examination . . . after he took command of the situation, and assumed,

or should have assumed custody of Hayes." Plaintiffs alleged a Forsyth County deputy and lieutenant were grossly negligent in failing to handle mental commitment procedures properly and failing to communicate information among the various shifts.

We do not believe that the existing law of this state allows us to impose on the defendants any duty to the victims arising out of the giving of advice to Hayes's relatives. Plaintiffs argue that because the officers were aware Hayes was armed and mentally disturbed and they undertook to give advice which was incorrect, they assumed a duty and are liable. The only North Carolina case cited by plaintiffs regarding liability for the giving of erroneous advice is *Ferguson v. Williams*, 92 N.C. App. 336, 374 S.E.2d 438 (1988), where the defendant pharmacist gave advice to the victim upon request and the victim relied on the advice in taking the medicine. This Court stated: "[w]hile a pharmacist has only a duty to act with due, ordinary care and diligence, this duty, like all others, expands and contracts with the circumstances." *Id.* at 341, 374 S.E.2d at 440. Further, the Court stated: "[w]hile a pharmacist has no duty to advise absent knowledge of the circumstances . . ., once a pharmacist is alerted to the specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly." *Id.*

Significantly, there the pharmacist gave advice to the *victim* who relied to her detriment on the advice. In contrast, in the present case neither the sheriff nor the deputies gave any advice to the victims on which they relied to their detriment but instead misinformed relatives of the perpetrator of the crimes. We therefore are bound to conclude that defendants did not owe plaintiffs any duty in the giving of advice; thus, plaintiffs cannot sustain their claim of negligence.

B.

[3] Plaintiffs next contend that because the erroneous advice prevented Hayes's relatives from having him committed, thereby increasing the danger to the victims, and because a deputy had "constructive control" of Hayes at the hospital, a special relationship arose between the victims and the defendants, who had "special training and special knowledge of danger," giving rise to a duty to control Hayes and prevent further harm.

As we noted above, there are exceptions to the general rule of no liability where a special relationship exists between the victim and law enforcement, such as where the victim is in police custody, or where law enforcement officials have promised protection to a particular person, the protection is not given, and the "reliance on the promise of protection is causally related to the injury suffered." *Coleman*, 89 N.C. App. at 193-94, 366 S.E.2d at 6; *Lynch*, 93 N.C. App. at 60, 376 S.E.2d at 249. In *Lopez v. City of San Diego*, 190 Cal. App. 3d 678, 681, 235 Cal. Rptr. 583, 585 (Cal. Ct. App. 1987), the California Court of Appeals stated that a relationship which does give rise to a legal duty "has been held to depend on representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed."

In *Martin v. Mondie*, 94 N.C. App. 750, 381 S.E.2d 481 (1989), plaintiff, who was injured in an accident involving an automobile driven by defendant Mondie and owned by defendant Flinchum, who was a passenger in the car, sought to recover against the Town of Mount Airy on the grounds that the police department was negligent in failing to serve three outstanding warrants on Mondie for driving violations. This Court cited *Coleman* and the two exceptions therein and held that summary judgment was proper since there was no allegation or forecast of evidence of any "special duty" arising out of a promise to plaintiffs for protection which was not given and no forecast of evidence of any "special relationship" as mentioned in *Coleman*. *Martin*, 94 N.C. App. at 753, 381 S.E.2d at 483. The Court stated that the outstanding arrest warrants created a duty only to the public at large. *Id.*

Here the complaints do not allege the defendants had promised protection to Cantrell and the Hulls. Further, the plaintiffs did not allege that there was *any* relationship between the victims and the defendants much less a special relationship as in the other cases. Further, there is no allegation showing defendants assumed any greater duty to the victims than that owed to the general public. Thus we conclude that the defendants were not under any special duty to the victims.

C.

Next plaintiffs contend that there should be a duty because defendants had "actual knowledge of imminent danger from an

identified individual at an identified location, in which potential victims could be identified as motorists passing that location and in which harm could have been prevented by warnings to the motorists, by cutting off access and by controlling the perpetrator sooner. . . ." Plaintiffs alleged that defendant sheriffs were negligent in training and supervising deputies in sniper shooting incidents, isolating the crime scene, failing to take action to arrest and in failing to provide communication. Plaintiffs further alleged that deputies were negligent in failing to isolate the crime scene, failing to respond to sniper shooting and protecting the victims. Plaintiffs next contend that regardless of whether defendants had previously assumed control of the situation, they clearly took charge on July 17 following the shooting of the truck. Plaintiffs argue that the response should have been quick in light of the events of the prior two days, access to Hayes should have been cut off, and clear warnings given. Plaintiffs also argue once the defendants took charge in this instance, they were under a duty to prevent harm to plaintiffs. However, we concluded above that because the defendants were not under any legal duty of care and there was no special relationship between the defendants and the victims or special duty, the trial court did not err in dismissing plaintiffs' negligence claims.

II.

[4] The second issue on appeal is whether the trial court erred in denying defendants' motions to dismiss plaintiffs' second claims and plaintiff Hull's fourth claim pursuant to Rule 12(b)(6) regarding the liability under the sheriffs' official bonds. Defendants argue that "an official bond does not create liability for the principal where no liability exists without it."

A bond is required under N.C. Gen. Stat. § 162-8 (1987) which provides:

> The sheriff shall furnish a bond payable to the State of North Carolina for the due execution and return of process, the payment of fees and moneys collected, and the faithful execution of his office as sheriff, which shall be conditioned as follows:
>
> The condition of the above obligation is such that . . . he shall well and truly execute and due return make of all process . . . and *in all other things well and truly and faithfully execute the said office of sheriff during his continuance therein,*

> then above obligation to be void; otherwise . . . . (Emphasis added.)

N.C. Gen. Stat. § 58-76-5 (1989), providing for liability and right of action on official bonds, states:

> Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment is given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty is recovered; and *every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.* (Emphasis added.)

In *State ex rel. Williams v. Adams*, 288 N.C. 501, 503, 219 S.E.2d 198, 200 (1975), our Supreme Court stated: "G.S. 109-34 [predecessor to § 58-76-5] gives plaintiff a cause of action against the officers and the surety." The Court further stated:

> G.S. 109-34 has been broadly construed over its long history to cover not only acts done by the officer but also acts that should have been done. The last clause of the statute has been held to enlarge the conditions of the official bond to extend to all official duties of the office.

288 N.C. at 504, 219 S.E.2d at 200 (citations omitted).

Therefore, under section 58-76-5 a cause of action is available to plaintiffs for the "neglect, misconduct or misbehavior" of defendants independent of their negligence claims.

In their second claims, plaintiffs alleged that the conduct and certain acts of defendant Oldham constitute "neglect, misconduct or misbehavior" and are therefore a breach of his duty. Further, plaintiff Hull in his fourth claim alleged that acts and conduct of defendant McCrary constitute "neglect, misconduct or misbehavior." We conclude that the allegations of plaintiffs' complaints are sufficient to state a claim upon which relief may be granted, and therefore the trial court did not err in denying defendants' motions to dismiss.

III.

[5] Defendants also argue in the alternative that the trial court erred in denying their motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (1990) on the grounds that a sheriff and deputies are state officers and thus under N.C. Gen. Stat. § 143-291 (1990), jurisdiction for these claims lies with the North Carolina Industrial Commission. We disagree.

Article VII of the North Carolina Constitution entitled "Local Government" provides that "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities, and towns." N.C. Const. art. VII, § 1. Article VII further provides: "[i]n each county a Sheriff shall be elected by the qualified voters thereof at the same time and places as members of the General Assembly are elected and shall hold his office for a period of four years, subject to removal for cause as provided by law." N.C. Const. art. VII, § 2. In providing for the organization of local governments, our Constitution does not make sheriffs state rather than local officers. In an Alabama case cited by defendants, *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987), the court held that a sheriff is a state officer where the state constitution explicitly stated that "[t]he executive department shall consist of a governor . . . and a sheriff for each county." *Id.* at 443. Our courts have consistently exercised jurisdiction on appeal from the superior courts. *See Braswell*, 98 N.C. App. 231, 390 S.E.2d 752; *Helmly v. Bebber*, 77 N.C. App. 275, 335 S.E.2d 182 (1985); *Williams*, 288 N.C. 501, 219 S.E.2d 198. Defendants have cited no North Carolina case in which sheriffs were not considered local officers.

Affirmed.

Judges JOHNSON and PARKER concur.

E. V. FERRELL, JR., DOUGLAS DILLARD AND ROSENA F. DILLARD v. DEPARTMENT OF TRANSPORTATION

No. 9021SC1154

(Filed 3 September 1991)

1. **State § 4 (NCI3d)— eminent domain—surplus property—sovereign immunity—exceptions**

The trial court did not err by denying defendant's motion to dismiss, based on sovereign immunity, in an action arising from a DOT determination to sell property which it had previously acquired by eminent domain. There is an exception to sovereign immunity when public officers whose duty it is to supervise and direct a state agency attempt to invade or threaten to invade the personal or property rights of a citizen in disregard of the law. Plaintiffs' complaint clearly alleges that public officials of DOT have invaded the property rights of plaintiffs by refusing to sell the surplus land back to plaintiffs at the original purchase price.

Am Jur 2d, Eminent Domain § 115.

2. **Declaratory Judgment Actions § 7 (NCI4th)— eminent domain—surplus property—justiciable controversy**

An actual and justiciable controversy existed in an action arising from a DOT determination to sell property which it had previously acquired by eminent domain where plaintiffs were placed in a position in which their statutory rights under N.C.G.S. § 136-19 were in peril. It is unreasonable to require plaintiffs to wait until the Board, the Council of State and the Governor approve the disposition of the property before taking action.

Am Jur 2d, Declaratory Judgments §§ 25, 29, 31, 178.

3. **Eminent Domain § 6 (NCI4th)— surplus property—reconveyed—compensation returned with interest—State not allowed profit**

N.C.G.S. § 136-19, when read consistently with N.C.G.S. § 40A-63 and N.C.G.S. § 40A-65 as well as the Fifth Amendment to the U.S. Constitution, dictates that the State not profit from overreaching seizures by eminent domain. To allow the State to sell the land back to the original landowner at

current fair market value, in this case nearly ten times the value of the original purchase price, would be to allow the State to profit from its own injudicious and excessive taking at the expense of the landowner. To put the parties back in the position they would have occupied had the land not been condemned, the original landowners or their successors in interest should return the compensation they received, plus interest, and the State should reconvey the land to plaintiffs.

Am Jur 2d, Eminent Domain § 115.

Judge GREENE dissenting.

APPEAL by defendant, the Department of Transportation, from a judgment entered 9 August 1990 by *Judge William H. Freeman* in FORSYTH County Superior Court. Heard in the Court of Appeals 15 May 1991.

Petree, Stockton and Robinson, by F. Joseph Treacy, Jr. and Kenneth S. Broun, for plaintiffs-appellees.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Archie W. Anders and Associate Attorney General Elaine A. Dawkins, for defendant-appellant.

LEWIS, Judge.

This is a declaratory judgment action also seeking injunctive relief. On 17 April 1972 the Department of Transportation, [DOT], acquired by eminent domain 34.93 acres of an 86.08 acre tract in Forsyth County owned in fee simple by E. V. Ferrell, Jr. and J. C. Smith. By consent judgment dated 14 October 1975 the DOT paid Ferrell and Smith a total of $303,500.00 in compensation. An additional 5.84 acres was claimed by DOT in 1986. The DOT acquired this property for the construction of a portion of Corporation Freeway, which was later incorporated into Interstate 40 bypass. Due to changes in plans and designs, 29.107 acres of the acquired property has not been and will not be used by the DOT.

Since the time of the acquisition of the subject property in 1972 by the DOT, the ownership of the adjacent property has changed. Smith conveyed his 20% undivided interest in fee simple in the 45.31 remaining acres to the plaintiffs Dillard on 31 December 1987. Included were all rights under N.C.G.S. § 136-19, which states in part:

> If any parcel is acquired in fee simple as authorized by this section and the Department of Transportation later determines that the parcel is not needed for highway purposes, first consideration shall be given to any offer to repurchase made by the owner from whom said parcel was acquired or the heirs or assigns of such owner.

Plaintiffs contacted the Board of Transportation on or about 25 August 1988 for the purpose of re-acquiring the unused 29.107 acres. In response to these inquiries the DOT had two appraisals made of the property. W. R. Weir, Jr., a fee appraiser hired by DOT, valued the property at $1,819,175.00 in November 1988, and Max Loflin, a staff appraiser in DOT's Winston-Salem office, valued the property at $2,294,500.00 during the same month. The DOT's Right of Way Branch determined the lower figure to be more accurate and DOT wrote to plaintiff Ferrell on 6 January 1989 that the appraised value was $1,819,175.00. Mr. Ferrell objected to the value and cited an appraisal he had made of the property reflecting a value of $1,018,750.00. Attorneys from both sides met to reach a settlement on 12 September 1989. No agreement was reached.

On 17 October 1989 DOT informed plaintiff Ferrell, by letter, that it had reevaluated its position and would not be willing to sell the property for less than $2,294,500.00, and that this offer would be held open only until 8 November 1989.

Plaintiffs instituted this action on 6 November 1989 seeking declaratory and injunctive relief pursuant to N.C.G.S. § 136-19. Plaintiffs contend that N.C.G.S. § 136-19 and accompanying departmental rules dictate that the DOT must sell the subject property to the plaintiffs at the same price DOT paid for it seventeen years earlier, plus interest at the legal rate.

After a hearing on 30 July 1990, the court granted plaintiffs' summary judgment motion and denied defendant's motion to dismiss and for summary judgment. The trial court interpreted N.C.G.S. § 136-19 to require DOT to reconvey the property to plaintiffs at the original purchase price of $252,905.18 plus interest at the legal rate compounded annually, amounting to $821,938.25. The trial court enjoined the DOT from disposing of the property to anyone other than the plaintiffs and stated that the injunction would be dissolved if plaintiffs did not tender the amount within the time frame set forth in the judgment.

[1] The DOT contends that the trial court erred in denying its motion to dismiss pursuant to North Carolina Rule of Procedure 12(b)(1) and (2). The defendant maintains that the trial court lacked jurisdiction over the DOT because DOT has not consented to be sued or otherwise waived its sovereign immunity.

As an agency of the state, the DOT is entitled to absolute immunity in the absence of consent or statutory waiver, *Schloss v. State Highway and Public Works Commission*, 230 N.C. 489, 491-92, 53 S.E.2d 517, 518 (1949), with two exceptions: (1) when public officers whose duty it is to supervise and direct a state agency attempt to invade or threaten to invade the personal or property rights of a citizen in disregard of law, or (2) where plaintiffs as taxpayers attempt to prevent an expenditure of money that is either unauthorized by statute or in disregard of the law. *Orange County v. Department of Transportation*, 46 N.C. App. 350, 378, 265 S.E.2d 890, 909 (1980).

Plaintiffs' complaint clearly alleges that public officials of the DOT have invaded the property rights of the plaintiffs by refusing to sell the surplus land back to the plaintiffs at the original purchase price. This case thus falls within the first of the two exceptions enumerated by this Court in *Orange County v. Department of Transportation, id.*, insofar as the plaintiffs allege that public officials have interfered with their property rights under N.C.G.S. § 136-19.

[2] Defendant next argues that the trial court erred in denying defendant's motion for summary judgment because the complaint does not allege a justiciable controversy and is not ripe for adjudication. In an action for declaratory judgment under N.C.G.S. § 1-253, two factors to be considered in determining whether or not a justiciable controversy exists are whether some actual controversy exists beyond a mere difference of opinion between the parties and whether or not litigation appears to be unavoidable. *Gaston Board of Realtors v. Harrison*, 311 N.C. 230, 235, 316 S.E.2d 59, 61-62 (1984). Appellant argues that this case is not a justiciable controversy because negotiations are still under way, the DOT has not yet declared the property to be surplus, and the Board of Transportation, Council of State and Governor have not approved the disposition of the property.

We hold that an actual and justiciable controversy does exist. *Id.* The DOT has effectively declared the property surplus by offer-

ing it to the plaintiffs at a stated price. The DOT required an answer by 8 November 1989 conditioning plaintiffs' rights under N.C.G.S. § 136-19 on assent to the Department's offered price. The plaintiffs were placed in a position where their statutory rights under N.C.G.S. § 136-19 were placed in peril. The declaratory action is therefore a justiciable controversy insofar as litigation is unavoidable, and the dispute involves more than a mere disagreement about the rights of the parties. *Id.* Where the Board of Transportation, the Council of State and the Governor approve the disposition only after a price is agreed to and the terms of a sale arranged, and where the plaintiffs contend that they are being deprived of their statutory rights with respect to the terms of the sale, it is unreasonable to require plaintiffs to wait until the Board, the Council of State and the Governor approve of the disposition of the property before taking action.

[3] The appellant contends the trial court erred in interpreting N.C.G.S. § 136-19 to require that the State sell the land back to the original landowner at the original purchase price where the statute states only that "first consideration" should be given to any offer made by the landowner. Statutes are to be construed consistently with other statutes treating the same subject matter, *Town of Morehead City v. North Carolina Department of Transportation*, 74 N.C. App. 66, 70, 327 S.E.2d 602, 604 (1985), and with constitutional principles. The right to compensation for property taken under the power of eminent domain does not rest solely upon statute because property owners have a constitutional right to just compensation for takings. *Browning v. North Carolina State Highway Commission*, 263 N.C. 130, 137, 139 S.E.2d 227, 231 (1964). The Fifth Amendment to the United States Constitution states that private property may not be taken for public purpose without just compensation. The existence of a public use is a prerequisite to the exercise of the power of eminent domain by the DOT to condemn private property. *State Highway Commission v. Batts*, 265 N.C. 346, 355, 144 S.E.2d 126, 173 (1965).

The law of North Carolina is clear that neither the State nor other authorities with the right of eminent domain are allowed to profit from the increase in market value due to condemnation proceedings. The relevant statutes state as follows:

> The determination of the amount of compensation shall reflect the value of the property immediately prior to the filing of

> the petition . . . and except as provided in the following section shall not reflect an increase or decrease due to the condemnation.
>
> The value of the property taken . . . does not include an increase or decrease in value before the date of valuation that is caused by (i) the proposed improvement or project for which the property is taken, (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

N.C.G.S. § 40A-63; N.C.G.S. § 40A-65. *See also Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E.2d 219 (1959). Where the legislature clearly intends that the landowner should not profit from the increase in value of the land due to the condemnation, neither should the State profit upon resale of surplus property. To allow the State to sell the land back to the original landowner at current fair market value, in this case nearly ten times the value of the original purchase price, would be to allow the State to profit from its own injudicious and excessive taking at the expense of the landowner. The taking of land by the State from a property owner by eminent domain is unlike other transfers of property in that the property owner is deprived of the right to dispose of her property as she chooses or to select the time, method or price for the transfer. Where land taken by eminent domain turns out not to be required for public use, the legislature has stated that "first consideration should be given to any offer made by the original owner or their heirs or assigns," N.C.G.S. § 136-19, and where the legislature has also expressly intended that "just compensation" does not include the increase in market value due to the condemnation, N.C.G.S. § 40A-63, N.C.G.S. § 40A-65, we are of the opinion that the State should not be allowed to profit from the condemnation and the parties should, as far as possible, be put back into the position they would have been in but for the condemnation.

In *First American National Bank v. State of Minnesota*, 322 N.W. 2d 344 (Minn. 1982), the Supreme Court of Minnesota was faced with the same issue. The Minnesota statute analogous to N.C.G.S. § 136-19 stated that the surplus land "shall first be offered for reconveyance to such previous owner or surviving spouse," and, like N.C.G.S. § 136-19, did not specify the terms of repurchase. The Minnesota Supreme Court found:

> We think an overriding objective of . . . (the statute) is to restore, to the extent possible the *status quo ante*. . . . Put another way, we do not think the legislature intended the state to profit from sudden appreciation in land values occasioned by public improvements for which the land was taken but never used. To hold otherwise would be to . . . encourage a practice of condemning more land than is reasonably necessary for public purposes. . . . We are also persuaded by common law principles of eminent domain which we think are applicable in ascertaining intent. . . . As we stated [previously] [citation omitted] 'just compensation within the meaning of the . . . Fifth and Fourteenth Amendments of the federal Constitution, does not include the right to any increment in value resulting from the taking.' Conversely, when the state reconveys the land, it should not profit from the sudden appreciation in land values due to public improvements.

Id. To put the parties back in the position they would have been had the land not been condemned, the original landowners or their successors in interest should return the compensation they received, plus interest, and the State should reconvey the land to the plaintiffs.

We hold that N.C.G.S. § 136-19, when read consistently with N.C.G.S. § 40A-63, and N.C.G.S. § 40A-65 as well as with the Fifth Amendment to the U.S. Constitution, dictates that the State not profit from overreaching seizures by eminent domain.

The decision of the trial court is therefore

Affirmed.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority that the trial court properly denied the defendant's motion to dismiss. I further agree that this case presents an actual and justiciable controversy. I do not agree, however, that this case presents an issue of an "injudicious and excessive" taking by the State of North Carolina. Whether the amount of land taken is consistent with the purpose of the taking is an issue that must be raised at the time of the taking. N.C.G.S.

§ 40A-47 (1984); N.C.G.S. § 136-108 (1986). Here, there is no dispute regarding the appropriateness of the taking, and therefore whether the taking may have been "injudicious and excessive" is not now presented. This case instead relates to the manner for disposing of condemned property which is no longer needed by the Department of Transportation for highway purposes.

Pursuant to N.C.G.S. § 136-19 (1986 & Supp. 1990), the Department of Transportation "possesses the sovereign power of eminent domain, and by reason thereof can take private property [in fee simple] for public use for highway purposes." *Moore v. Clark*, 235 N.C. 364, 367, 70 S.E.2d 182, 185 (1952). When a governmental unit or other condemnor pays just compensation to a property owner for his private property and takes the property in fee simple for a public use, "upon a change or abandonment of the public use the land can be disposed of by the government agency or condemnor without limitation as to any rights of the former owner." J. Webster, Webster's Real Estate Law in North Carolina § 400 (3d ed. 1988); *see also Mainer v. Canal Auth. of Florida*, 467 So.2d 989, 992 (Fla. 1985); *Indigo Realty Co. v. City of Charleston*, 314 S.E.2d 601, 602 (S.C. 1984); 26 Am. Jur. 2d *Eminent Domain* §§ 142, 147 (1966). Therefore, absent a statute to the contrary, if the governmental unit or other condemnor abandons the public use for which the property was originally acquired and decides to sell the property to a third party, the former owner of such property cannot require the governmental unit or other condemnor to sell the property back to him at the original purchase price. *Indigo*, 314 S.E.2d at 602-03 (approximately nine months after acquiring property under threat of condemnation for public purpose, city decided to sell property to private developer for private purpose).

Consistent with the common law, our General Assembly has provided that

> [w]hen any property condemned by the condemnor is no longer needed for the purpose for which it was condemned, it may be used for any other public purpose or may be sold or disposed of in the manner prescribed by law for the sale and disposition of surplus property.

N.C.G.S. § 40A-10 (1984). Our General Assembly has modified the common law, however, in the context of surplus property originally condemned for highway purposes. *See* N.C.G.S. § 4-1 (1986). By statute,

> [i]f any parcel is acquired in fee simple as authorized by this section and the Department of Transportation later determines that the parcel is not needed for highway purposes, first consideration shall be given to any offer to repurchase made by the owner from whom said parcel was acquired or the heirs or assigns of such owner.

N.C.G.S. § 136-19.

As authorized by N.C.G.S. §§ 40A-10, 136-18(2) (1986 & Supp. 1990), 136-19, and 143B-350(f), (g) (1990), the Department of Transportation has promulgated the following pertinent regulations relating to the sale of surplus lands:

> Should the Department of Transportation purchase a property *in its entirety* for right of way purposes and at a later date reduce the right of way, thus creating a residue, the original owner shall be offered the first refusal to purchase the residue. The purchase price is to be negotiated with the *former owner* or other prospective buyers taking into consideration the purchase price paid by the Department of Transportation, the current value of the property, and the proportionate part of the entire tract being retained by the Department of Transportation. In the event the former owner does not desire to repurchase the residue area, the residue shall be offered for sale at public sale with the right reserved to reject all bids.

N.C. Admin. Code tit. 19A, ch. 2, sub. ch. 2B, sec. .0143(b) (Feb. 1989) (emphases added).

When a court construes a statute, it must "ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Legislative purpose is first ascertained from the plain words of the statute." *Id.* Furthermore, "[t]he construction of statutes adopted by those who execute and administer them is evidence of what they mean." *Commissioner of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 67, 241 S.E.2d 324, 329 (1978). The Department has interpreted the "first consideration" requirement of N.C.G.S. § 136-19 to mean that "the original owner shall be offered the first refusal to purchase" the surplus property and that the Department shall negotiate with the original owner the repurchase price. N.C. Admin. Code tit. 19A, ch. 2,

sub. ch. 2B, sec. .0143(b). This interpretation of the "first consideration" requirement is reasonable in light of the plain words of N.C.G.S. § 136-19. However, the Department's regulations are not entirely consistent, as they must be, with the provisions of N.C.G.S. § 136-19. *In re Trulove*, 54 N.C. App. 218, 221, 282 S.E.2d 544, 546 (1981), *disc. rev. denied*, 304 N.C. 727; 288 S.E.2d 808 (1982) ("[a]dministrative regulations must be drafted to comply with statutory grants of power and not vice-versa").

Section .0143(b) of the Department's regulations, which section incorporates the Department's method for implementing the "first consideration" requirement of N.C.G.S. § 136-19, applies only when the Department of Transportation acquired the property "in its entirety." It does not apply to situations, as here, where the Department acquired only a portion of the owner's entire tract. North Carolina Gen. Stat. § 136-19, however, applies to "any parcel" acquired in fee simple. Furthermore, the Department's regulations do not mention, as does N.C.G.S. § 136-19, the owner's heirs' or assigns' rights to purchase the surplus property. To the extent that the regulations are inconsistent with the statutory requirements, the statutory requirements prevail. Therefore, "first consideration" as used in N.C.G.S. § 136-19 means that the former owner, his heirs, or assigns shall be offered the first refusal to purchase the surplus property, regardless of whether the Department condemned the entire tract owned by the former owner or only a portion of the former owner's property. The price for the surplus property is to be negotiated by the Department as described in Section .0143(b) of the Department's regulations. If the Department and the former owner, his heirs, or assigns are unable to negotiate a purchase price, the surplus property "shall be offered for sale at public sale with the right reserved to reject all bids." N.C. Admin. Code tit. 19A, ch. 2, sub. ch. 2B, sec. .0143(b).

Accordingly, the trial court erred in requiring the Department to reconvey the surplus property to the plaintiffs for the original purchase price plus interest. I would reverse and remand the order of the trial court.

DR. GLENN E. WOODLIEF, D.D.S. v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

No. 909SC1126

(Filed 3 September 1991)

1. **Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—dental license hearing—expert testimony—information from dental assistants and records as basis**

The State Board of Dental Examiners did not err in permitting a clinical dentist at a state mental hospital to give expert testimony based on her personal observations of petitioner's treatment of his patients and her own follow-up examinations of petitioner's patients. Furthermore, it was within the Board's discretion to permit this witness to state her own "findings" based on talking to dental assistants and on the notes and reports of petitioner and other doctors where the patients were clients at a state mental hospital who were unable to testify because of their mental condition. N.C.G.S. § 140B-41(a).

Am Jur 2d, Physicians, Surgeons, and Other Healers § 113.

Necessity of expert evidence in proceeding for revocation or suspension of license of physician, surgeon, or dentist. 74 ALR4th 969.

2. **Physicians, Surgeons, and Allied Professions § 5 (NCI3d)—dentist practicing in state mental hospital—standard of care**

The State Board of Dental Examiners did not err in finding that a general dentist practicing in a state mental institution was subject to the same standard of care applicable to general dentists treating private patients.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 218, 267.

3. **Physicians, Surgeons, and Allied Professions § 6.2 (NCI3d)—suspension of dental license—negligence and malpractice—sufficiency of evidence**

A decision by the State Board of Dental Examiners suspending petitioner's license to practice dentistry for two years based on its findings and conclusions that petitioner's actions in the treatment of ten patients constituted negligence in the

practice of dentistry in violation of N.C.G.S. § 90-41(a)(12) and his actions in the treatment of twelve patients constituted malpractice in violation of N.C.G.S. § 90-41(a)(19) was supported by substantial competent evidence and was not arbitrary or capricious.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 96.

APPEAL by petitioner from judgment entered 20 June 1990 by *Judge Robert H. Hobgood* in VANCE County Superior Court. Heard in the Court of Appeals 14 May 1991.

This is a civil case in which Dr. Glenn E. Woodlief (Dr. Woodlief) seeks appellate review of the trial court's judgment affirming the final agency decision of the North Carolina State Board of Dental Examiners (the Board). Based upon its findings and conclusions that Dr. Woodlief committed acts constituting negligence and malpractice, the Board suspended Dr. Woodlief's license to practice dentistry for two years. The trial court affirmed the Board's decision and we affirm the trial court's judgment.

Dr. Woodlief served as the Director of Dental Services at John Umstead Hospital, a regional state mental institution in Butner. The hospital operates under the auspices of the Division of Mental Health, Mental Retardation and Substance Abuse Services of the Department of Human Resources and serves both long-term and short-term patients in need of full-time inpatient mental health services. Dr. Sue Minneman, a licensed dentist at the hospital's dental clinic working under the direction of Dr. Woodlief, filed a complaint with Larry C. Jones, the patient advocate at the hospital, concerning Dr. Woodlief's treatment of patients. The complaint alleged *inter alia* that Dr. Woodlief had used wrist and ankle restraints to subject unwilling patients to "aggressive dental behavior" and unnecessary treatment. On 9 March 1988, Jones sent the Board a memorandum, alleging that Dr. Woodlief was "causing unnecessary pain and suffering to patients under his care and that in some cases has caused disfigurement and irreparable damage." Jones included with this memorandum a list of persons who could be interviewed concerning these allegations and handwritten notes regarding Dr. Woodlief's treatment of patients. The Board had an investigator conduct interviews, take affidavits, and examine medical records. The Board conducted a five day hearing on 10-11 February and 7-9 April 1989.

Based on the evidence and testimony presented at the hearing, the Board, in its findings of fact, found that the following actions by Dr. Woodlief constituted violations of the standard of care: using sedation and mechanical restraints to force a legally competent but unwilling patient "to undergo an elective procedure, prophylaxis with a cavitron . . . resulting in the mutilation of tissue in [the patient's] oral cavity"; performing an elective dental procedure by restraining a patient "so fragile that she has suffered broken bones by being moved from her bed to a chair [and] is fed through a nasal gastric tube" by the wrists, legs, and feet without first advising the patient's treating physician as previously requested, risking "possibly severe" injury to the patient, "including aspiration pneumonia, fractures, or laceration of skin and mucus membranes"; utilizing "unpadded tongue blades to pry and wedge [an uncooperative patient's] teeth apart," resulting in splinters which lacerated the oral tissues; utilizing forceps without sedation in an attempt to pry a patient's mouth open for the extraction of one tooth when he could have referred the patient to an oral surgeon to have the extraction performed under general anesthesia, causing three additional teeth "to break, necessitating their extraction"; proceeding to perform several "elective dental procedures" on a patient after ignoring an assistant's warning that the patient "had soiled himself" and refusing to allow the patient to be cleaned; failing to request the presence of a sign language interpreter while performing a "relining" of a deaf mute patient's dentures and failing "to communicate to [the patient] that the hard reline material would become hot in his mouth and that he should signal [Dr. Woodlief] when the heat became painful," thus causing "unnecessary pain and suffering" when Dr. Woodlief left "the relined dentures in [the patient's] mouth after the point when the hard reline material had become hot"; "forcing elective dental prophylaxis [with a cavitron] on [five] elderly, frail patients" by placing them "below 30 degrees above the horizontal" and using mechanical wrist restraints; and failing to recognize and properly diagnose a "large cystic lesion" which resulted in a patient's "loss of facial bone."

Accordingly, the Board, in its conclusions of law, stated that Dr. Woodlief's actions in the treatment of ten patients constituted negligence in the practice of dentistry in violation of G.S. 90-41(a)(12) and his actions in the treatment of twelve patients constituted malpractice in the practice of dentistry, in violation of G.S. 90-41(a)(19).

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn, II, for petitioner-appellant.

Bailey & Dixon, by Alan J. Miles, for respondent-appellee.

Moore & Van Allen, by Dean M. Harris, for the Academy of Dentistry for the Handicapped, amicus curiae.

EAGLES, Judge.

Dr. Woodlief brings forward eleven questions for review from his assignments of error. The first eight questions address the issue of whether the findings of fact and conclusions of law of the Board, affirmed by the trial judge, are supported by substantial evidence in view of the whole record as submitted. The other three assignments of error address the issue of whether the Board applied the correct standard of care. All twelve questions challenge the Board's actions as being arbitrary and capricious. After careful review of the record, we disagree and affirm the trial court's judgment.

Judicial review of the decisions of administrative agencies is governed by the whole record test pursuant to General Statutes Chapter 150B, the Administrative Procedure Act. Upon reviewing an agency's decision, a trial court may "reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are . . . (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or (6) Arbitrary or capricious." G.S. 150B-51(b). The whole record test "properly takes into account the specialized expertise of the staff of an administrative agency. . . ." *High Rock Lake Assoc. v. Environmental Management Comm'n*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981). Accordingly, the whole record test requires that

> "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." In this context substantial evidence has been held to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Therefore, in reaching its decision, the reviewing court is prohibited from replacing the Agency's findings of fact with its own judgment of how credible, or incredible, the testimony

appears to them to be, so long as substantial evidence of those findings exist in the whole record.

Little v. Board of Dental Examiners, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983) (citations omitted). Additionally, the whole record test does not allow the trial court "to replace the agency's judgment when there are two reasonably conflicting views, although the court could have reached a different decision had the matter been before it *de novo.*" *White v. N.C. State Board of Examiners of Practicing Psychologists*, 97 N.C. App. 144, 153-54, 388 S.E.2d 148, 154, *appeal dismissed and disc. rev. denied*, 326 N.C. 601, 393 S.E.2d 891 (1990).

[1] Dr. Woodlief contends that "the testimony of Dr. Minneman should be excluded as incompetent" and that the trial court erred in concluding that the Board's decision was supported by substantial competent evidence. G.S. 150B-41(a) states that "the rules of evidence as applied in the trial division of the General Court of Justice shall be followed . . ." G.S. 8C-1, Rule 702 provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." Our Supreme Court has stated that "[i]t 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." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

Here, Dr. Minneman was a licensed dentist. When tendered as a witness at the hearing, she testified that she was a 1985 graduate of the University of North Carolina School of Dentistry. She received her license on 20 May 1985. She stated that she commenced her practice as a clinical dentist at Umstead on 1 August 1985. She also testified that for seven years prior to becoming a dentist, she had worked as a dental assistant in a private practice and at the Wake County Health Department. The Board decided that she was appropriately qualified to testify as an expert in the practice of dentistry. Once the Board made the determination that Dr. Minneman was appropriately qualified as an expert, she was allowed to testify as to her observations and opinion. G.S. 8C-1, Rule 702. Much of her testimony was based on personally observing Dr. Woodlief treat his patients and on her own perform-

ance of follow-up examinations on many of Dr. Woodlief's patients. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing." G.S. 8C-1, Rule 703. Dr. Minneman also testified as to the same standard of care that the Board later used in its findings of fact (see discussion *infra*).

Dr. Woodlief contends that the Board erred by admitting into evidence Dr. Minneman's statements which were based on "her own 'findings' from talking to dental assistants" in "unsworn interviews" and on the notes and reports of Dr. Woodlief and other doctors. We conclude that no prejudicial error occurred. G.S. 8C-1, Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985). Initially, we note that the hearing here differed from other licensing hearings conducted by the Board where patients have provided testimony regarding a dentist's actions. Here, the patients were clients at Umstead Hospital who were unable to testify because of their mental conditions. Given these circumstances, it was within the Board's discretion to allow the admission of Dr. Minneman's statements. G.S. 150B-41(a) further provides that "when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available." The Board admitted Dr. Minneman's statements and noted that in doing so it was attempting "to get as much information as possible" under the circumstances. Furthermore, in addition to Dr. Minneman's testimony, the Board heard the sworn testimony of the clinic's two dental assistants, whose statements were consistent with Dr. Minneman's testimony. Another dentist, Dr. William P. Webster, also testified against Dr. Woodlief. In an administrative proceeding,

> it is the prerogative and duty of that administrative body, once all the evidence has been presented and considered, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts,

> and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness."
>
> * * *
>
> It is within the province of the Board as an administrative agency to apply its own expertise in its conduct and evaluation of a disciplinary hearing. In the process of accepting or rejecting expert testimony the law does not require the Board to identify its method of reasoning or its method of determining credibility.

Little v. Board of Dental Examiners, 64 N.C. App. at 68-69, 75, 306 S.E.2d at 536, 539 (citations omitted). Under G.S. 150B-41(a), we conclude that no prejudicial error occurred in the trial court's affirming the Board's admission of Dr. Minneman's statements.

Upon review of the whole record, though there is some evidence supporting a contrary conclusion, we hold that the trial court properly concluded that there is substantial competent evidence to support the Board's findings. Dr. Woodlief's first eight assignments of error are without merit and the trial court's conclusion that the Board's findings must stand is affirmed.

[2] Dr. Woodlief further contends that the trial court erred by affirming the Board's finding that "[t]here is one standard of care for general dentists practicing in North Carolina. General dentists practicing in an institutional setting are required to render professional services to their patients in accordance with the same standard of care applicable to general dentists in a private practice setting." Dr. Woodlief argues that the Board should have used a different standard of care because he was practicing in an institution which is operated by the Department of Human Resources under G.S. 122C-181(a)(1)(c). We disagree.

When construing a statute, "we are guided by the primary rule of construction that the intent of the legislature controls. *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978). . . . We must avoid a construction which will defeat or impair the object of a statute, and should give the statute a construction which, when practically applied, will tend to suppress the evil which the legislature sought to avoid." *N.C. Board of Examiners for Speech and Language*

Pathologists and Audiologists v. N.C. State Board of Education, 77 N.C. App. 159, 161, 334 S.E.2d 503, 505 (1985) (affirming Board of Examiner's narrow interpretation of statute disallowing exemption sought by employees of local school boards who were certified by State Board of Education and Department of Public Instruction). Concerning the practice of dentistry, the intent of the General Assembly and the evil sought to be avoided are stated in G.S. 90-22:

> The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

G.S. 90-29 provides that "[n]o person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners." Dr. Woodlief received his dentist's license on 21 July 1975.

As a licensed dentist practicing dentistry in North Carolina, Dr. Woodlief was bound to follow the rules and regulations promulgated by the Board. G.S. 90-28, 90-41. The Board was the only appropriate body to determine the standard of care necessary in the dental treatment of the patients at Umstead Hospital. The Board correctly decided to use a single standard of care and the trial court correctly affirmed that decision. Our Supreme Court has stated:

> The Dental Practice Act [G.S. Chapter 90, Article 2] is silent as to the standard of practice by which a dentist's negligence or incompetence is to be measured. In considering the regulatory, licensing and disciplinary functions of the North Carolina State Board of Dental Examiners, we hold that a statewide standard must be applied. That is, prior to invoking disciplinary measures as authorized under G.S. 90-41(a), the Board must first be satisfied that the care provided by the licensee was not in accordance with the standards of practice

among members of the dentistry profession situated throughout the State of North Carolina at the time of the alleged violation.

The North Carolina State Board of Dental Examiners, like all other professional licensing boards, was created to establish and enforce a uniform statewide minimum level of competency among its licensees. Applicants are required to meet a minimum statewide standard prior to being granted a license, G.S. 90-30; and licensees are required, irrespective of location in the State, to comply with the rules and regulations promulgated by the Board. Likewise, we believe that the decision of whether an applicant or licensee has violated *any* of the factors enumerated in G.S. 90-41 authorizing disciplinary action must also be viewed in the context of a uniform statewide standard.

In re Dailey v. Board of Dental Examiners, 309 N.C. 710, 722-23, 309 S.E.2d 219, 226-27 (1983) (footnote omitted) (emphasis in original). As a licensed dentist employed at a state mental hospital, Dr. Woodlief was bound to follow both the rules and regulations of the Department of Human Resources, which regulate employees at those institutions, and the rules and regulations of the Board of Dental Examiners, which regulates the practice of *all* dentists practicing in North Carolina. There is no provision in our statutes which exempts dentists working for state hospitals or agencies from the licensing requirements or from mandatory compliance with the rules and regulations promulgated by the Board of Dental Examiners.

[3] Dr. Woodlief contends that the Board's findings and ultimate suspension of his license for a period of two years are arbitrary and capricious. We disagree. This Court has stated that

> [t]he "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith" or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ."

Lewis v. N.C. Dept. of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citations omitted). We find nothing in the record to indicate that the Board acted in such a manner. From its investigation and hearings, the Board made detailed find-

ings concerning Dr. Woodlief's treatment of twelve different patients. After making the necessary findings, the Board was clearly acting within its statutory authority when it suspended Dr. Woodlief's license. G.S. 90-41(a)(3). The Board's final decision was supported by substantial competent evidence on the whole record as submitted. Accordingly, we find the Board's suspension of Dr. Woodlief's license was neither arbitrary nor capricious.

We have carefully reviewed Dr. Woodlief's assignments of error and find each of them to be without merit. The judgment of the trial court below is affirmed.

Affirmed.

Judges GREENE and LEWIS concur.

DONALD MICHAEL ANDERS, PLAINTIFF v. HYUNDAI MOTOR AMERICA CORPORATION, D/B/A HYUNDAI MOTOR AMERICA, VANN YORK PONTIAC, INC., AND GENERAL MOTORS ACCEPTANCE CORPORATION, DEFENDANTS

No. 9018SC752

(Filed 3 September 1991)

1. **Automobiles and Other Vehicles § 254 (NCI4th)— failure to conform to warranties—remedies—manufacturer's disclosure**

The trial court improperly granted summary judgment for defendants in an action arising from the purchase of an allegedly defective automobile where the undisputed facts permit plaintiff to clear the initial eligibility hurdles in the New Vehicles Act, N.C.G.S. § 20-351.5, in that the same nonconformity continued to exist after four or more repairs and plaintiff had not been able to use the car for a cumulative total of 20 or more business days because of the nonconformity, and the manufacturer's deficient disclosure that written notification of a nonconformity is required relieved plaintiff from the written notice requirement as well as the requirement that the manufacturer be allowed a reasonable time to make repairs. Moreover, even if defendant Hyundai's disclosure was sufficient, a genuine issue of material fact exists as to whether plaintiff in fact gave notice to the manufacturer.

Am Jur 2d, Consumer Product Warranty Acts §§ 66-69.

Validity, construction, and effect of state motor vehicle warranty legislation (lemon laws). 51 ALR4th 872.

2. Unfair Competition § 1 (NCI3d)— sale of defective automobile—replacement vehicle—representation of additional sums required—summary judgment proper

The trial court properly granted summary judgment for defendant Hyundai on an unfair and deceptive practice claim where plaintiff alleged defects in his automobile and representations by defendant that he would have to pay substantial additional sums of money to obtain a comparable replacement vehicle. Breach of an express warranty is not in and of itself a violation of N.C.G.S. § 75-1.1, and plaintiff must show that he suffered actual injury to recover for a deceptive trade practice. The record here reflects that plaintiff elected a refund rather than replacement. N.C.G.S. § 75-1.1.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 714, 735.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

APPEAL by plaintiff from 7 May 1990 order by *Judge Russell G. Walker, Jr.*, in GUILFORD County Superior Court. Heard in the Court of Appeals 25 January 1991.

Stephen E. Lawing for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by M. Keith Kapp and Daniel K. Bryson, for defendant-appellee Hyundai Motor America.

Keziah, Gates & Samet, by Andrew S. Lasine, for defendant-appellee Vann York Pontiac, Inc.

Robert V. Suggs for defendant-appellee General Motors Acceptance Corporation.

PARKER, Judge.

Plaintiff Anders instituted this action against the Hyundai Motor America Corporation ("Hyundai"), Vann York Pontiac, Inc., ("dealership") and General Motors Acceptance Corporation ("GMAC") pursuant to N.C.G.S. §§ 20-351 *et seq.*, the New Motor Vehicles War-

ranties Act ("New Vehicles Act") and N.C.G.S. § 75-1.1 for unfair and deceptive trade practices to recover losses incurred on account of his purchase of an allegedly defective Hyundai automobile. The trial court entered summary judgment against plaintiff as to all defendants. Plaintiff's motion to withdraw his appeal and dismiss the action as to the dealership and GMAC was allowed.

On appeal plaintiff contends that the trial court erred in ruling as a matter of law that plaintiff was not entitled to any relief pursuant to N.C.G.S. §§ 20-351.3 and 20-351.5 or under N.C.G.S. §§ 75-1.1 and 75-16. We agree in part and reverse as to plaintiff's claim under the New Vehicles Act; we affirm as to plaintiff's claim for unfair and deceptive trade practice.

I. FACTS

Plaintiff bought his car on 26 July 1989 and soon experienced problems both with engine operation and with vibration at highway speeds. Between 26 July and 10 November plaintiff took the car back to the dealership for repair of these problems on about twenty different dates. The problems were never resolved to plaintiff's satisfaction and finally the dealership offered to contact a Hyundai representative, which it did.

Plaintiff test drove the car with Ben Hall, the manufacturer's representative, on 14 November. Hall explained that the vibration evident at about sixty miles per hour was probably the result of weight imbalance and that rebalancing "should correct the condition . . . to a normal or acceptable level for the Hyundai Excel." According to another part of Hall's written report, plaintiff "agreed . . . during the test drive" that engine power was sufficient in "gradual or normal acceleration [and] under a load condition test" but performance was less good "during hard acceleration." When Hall offered to repair the car to plaintiff's satisfaction and to provide a loaner vehicle in the interim, plaintiff refused the offer and told Hall he no longer wanted the car and wished Hyundai to repurchase the vehicle. Plaintiff further informed Hall that he would go to court; Hall responded "that the . . . offer [to repair] will remain open if [you] . . . decide to have the vehicle repaired." On 17 November plaintiff's attorney requested in writing that Hyundai accept return of the car and reimburse plaintiff for enumerated expenses. The letter also stated that failure to respond appropriately would result in legal proceedings. This action for "refund" was filed on 15 December 1989.

II. THE NEW VEHICLES ACT

[1] N.C.G.S. §§ 20-351 to 20-351.10 establish a private remedy for a consumer against an automobile manufacturer for failure to conform a vehicle to express warranties. The New Vehicles Act is applicable to plaintiff and defendant Hyundai under the definitions of "consumer" and "manufacturer" in N.C.G.S. §§ 20-351.1(1) and (2). The next section of the Act imposes a duty on the manufacturer post-sale to conform the car to express warranties.

> If a new motor vehicle does not conform to all applicable express warranties . . . and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer . . . , the manufacturer shall make, or arrange to have made, repairs necessary to conform the vehicle to the express warranties.

N.C.G.S. § 20-351.2 (1988 Cum. Supp.).

The remedy for consumers arises upon the occurrence of certain conditions.

> If the manufacturer is unable, after a reasonable number of attempts, to conform the motor vehicle to any express warranty by repairing . . . or arranging for the repair . . . of[ ] any defect or condition . . . which substantially impair[s] the value . . . to the consumer, . . . the manufacturer shall, at the option of the consumer, replace the vehicle . . . or accept return . . . and refund to the consumer the following[.]

N.C.G.S. § 20-351.3 (1988 Cum. Supp.).

To assist a consumer in showing a manufacturer's failure to conform the vehicle to express warranties, the New Vehicles Act creates a statutory presumption as to what constitutes a reasonable number of attempts to conform. The statute provides:

> (a) It is presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties if:
>
> (1) The same nonconformity has been presented for repair to the manufacturer, its agent, or its authorized dealer four or more times but the same nonconformity continues to exist; or

(2) The vehicle was out of service to the consumer during or while awaiting repair of the nonconformity or a series of nonconformities for a cumulative total of 20 or more business days during any 12-month period of the warranty,

provided that the consumer has notified the manufacturer directly in writing of the existence of the nonconformity or series of nonconformities and allowed the manufacturer a reasonable period, not to exceed 15 calendar days, in which to correct the nonconformity or series of nonconformities. The manufacturer must clearly and conspicuously disclose to the consumer in the warranty or owners manual that written notification of a nonconformity is required before a consumer may be eligible for a refund or replacement of the vehicle and the manufacturer shall include in the warranty or owners manual the name and address where the written notification may be sent. Provided, further, that notice to the manufacturer shall not be required if the manufacturer fails to make the disclosures provided herein.

N.C.G.S. § 20-351.5(a) (1988 Cum. Supp.).

The undisputed facts in this case permit plaintiff to clear the initial eligibility hurdles in the presumption provision in that "the same nonconformity continue[d] to exist" after four or more repairs, N.C.G.S. § 20-351.5(a)(1), and plaintiff had not been able to use the car "for a cumulative total of 20 or more business days" because of the nonconformity, N.C.G.S. § 20-351.5(a)(2). The issue is whether plaintiff was required to comply with the notice requirements in the presumption provision. Plaintiff contends that under the statute notice was not required and defendant manufacturer was not entitled to fifteen days to repair because the owner's manual failed to make the requisite disclosure. Defendant Hyundai contends that the dealer, not plaintiff, gave notice of the existence of the nonconformities; and even if its owner's manual failed to satisfy the statutorily mandated disclosure requirement, defendant manufacturer is, in any event, entitled to fifteen days to make repairs to conform the vehicle to the express warranty.

An examination of the plain language of the statute reveals that the obvious purpose of the notice requirement is to give the manufacturer at least fifteen days to repair the vehicle. However, a condition to the notice requirement is that the manufacturer

make a specific disclosure to the consumer. Thus if the purchaser's direct notification to the manufacturer is waived by the manufacturer's failure to disclose, the opportunity to make repairs is also waived. Without notification, the opportunity to repair is nullified. In this regard we note that the notification requirement by the purchaser directly to the manufacturer in the presumption section of the statute differs from the reporting requirement in N.C.G.S. § 20-351.2, which allows reporting to the "manufacturer, its agent, or its authorized dealer." The happenstance that in this particular case the dealer notified the manufacturer does not control or alter the statutory interpretation that the opportunity to repair is at least implicitly tied to notification. On first blush this interpretation may appear unduly harsh, but the manufacturer can protect itself by making the necessary disclosure.

The question then is whether in the case under review defendant Hyundai's warranty or owner's manual disclosed the necessary information. We hold that it did not.

Hyundai's manual, which plaintiff received, contains procedures to be followed in case a buyer has "a concern with a Hyundai product." These procedures appear under the caption "HELPFUL INFORMATION" in a larger section of the owner's manual called "CONSUMER INFORMATION."

> The following sequence will provide the fastest response to your concern:
>
> Talk to your Hyundai Dealer first.
>
> Your Hyundai Dealer is in the best position to assist you with your concern. He employs trained technicians and can supply the necessary parts for your Hyundai. Every Hyundai Dealer is ultimately responsible for your continued satisfaction.
>
> Please talk to the Service Manager or the Consumer Affairs Manager, explaining your situation. In the event your concern has not been resolved, then speak with the owner of the dealership who is interested in your satisfaction and long term patronage.
>
> In the unlikely event you and your Dealer were unable to reach an understanding, then contact the Regional Consumer Affairs Department responsible for your area (see page 9).

Page 9 provides a map of Hyundai's regional centers in the United States with the address and phone numbers for each.

Nowhere in this "helpful information" is there any statement which "clearly and conspicuously disclose[s] to the consumer . . . that written notification of a nonconformity is required before a consumer may be eligible for a refund or replacement of the vehicle." N.C.G.S. § 20-351.5(a). In fact, written notification is not mentioned and the clear implication is that the dealer, who has trained technicians, is the manufacturer's representative for making repairs. The New Vehicles Act, also commonly known as a "lemon law," is a consumer protection statute. To allow the manufacturer the benefit of the opportunity to repair without compliance with the statute's mandates thwarts the underlying purpose of the Act.

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56. As we have held that the manufacturer's deficient disclosure relieved plaintiff from the written notice requirement as well as the requirement that the manufacturer be allowed a reasonable time to make repairs, defendant Hyundai was not entitled to summary judgment on plaintiff's claim under the New Vehicles Act. Moreover, even if defendant Hyundai's disclosure were sufficient, on the record in this case, a genuine issue of material fact exists as to whether plaintiff in fact gave notice to the manufacturer. In his sworn answers to defendant's interrogatories, plaintiff stated that he sent a letter to defendant Hyundai in September. On summary judgment the court does not weigh the credibility of the evidence. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

Finally we note that a consumer's inability to satisfy the conditions creating the presumption of a reasonable number of attempts to repair does not preclude him from proving, without benefit of the presumption, that the manufacturer was unable to conform the vehicle to the express warranty by correcting defects which substantially impair the value of the vehicle. N.C.G.S. § 20-351.5(b).

Summary judgment on plaintiff's claim under the New Vehicles Act is reversed.

III. UNFAIR TRADE PRACTICE

[2] Plaintiff also contends that defendant Hyundai violated N.C.G.S. § 75-1.1 when its representative informed him that he would have to pay "substantial additional sums of money" to obtain a comparable replacement vehicle. Plaintiff argues that this statement was deceptive and shows defendant's oppressive, unethical and unscrupulous dealing. We disagree.

Initially we note that the breach of an express warranty is not in and of itself a violation of N.C.G.S. § 75-1.1. *Stone v. Park Homes, Inc.*, 37 N.C. App. 97, 106, 245 S.E.2d 801, 807, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

Furthermore, to recover for a deceptive trade practice, plaintiff must show that he suffered actual injury as the result of the alleged deceptive act. *Bailey v. LeBeau*, 79 N.C. App. 345, 339 S.E.2d 460, *modified and aff'd*, 318 N.C. 411, 348 S.E.2d 524 (1986). In the present case, the record reflects that plaintiff told Hyundai's representative that he wanted defendant Hyundai to repurchase the vehicle. This election of refund rather than replacement was also reflected in plaintiff's attorney's letter dated 17 November 1989 just three days after plaintiff's meeting with the Hyundai representative. In both that letter and in the complaint in this action, the monetary demands are consistent with a "refund" pursuant to N.C.G.S. §§ 20-351.3(a)(1), (2), (3) and (4). Where defendant shows that an essential element of plaintiff's claim is nonexistent, summary judgment is appropriate. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). On the record in this case plaintiff cannot show any injury resulting from the alleged deceptive statement. Accordingly, summary judgment on the unfair and deceptive trade practice claim is affirmed.

Affirmed in part; reversed in part.

Judges COZORT and GREENE concur.

THOMAS E. BRICKHOUSE, PLAINTIFF v. MARGIE H. BRICKHOUSE, DEFENDANT

No. 901SC1195

(Filed 3 September 1991)

1. Wills § 9.3 (NCI3d)— action to quiet title—not a caveat

The trial court had jurisdiction over an action to quiet title arising from a will where plaintiff was not attacking the validity of the will, which would require a caveat, but asking the court to construe the will to determine who could take under the will. A civil action for construction of a will may be brought under the Declaratory Judgment Act. Moreover, the clerk probated a certified copy of the Virginia probate proceeding, and a trial judge may allow an action to determine whether there are any supernumerary witnesses who were not a part of the foreign probate findings of fact.

Am Jur 2d, Declaratory Judgments §§ 138, 178.

2. Wills § 3.1 (NCI3d)— disinterested witnesses—judgment on the pleadings—improper

The trial court erred by granting plaintiff's motion for judgment on the pleadings in an action to quiet title arising from a will where there was a factual issue as to whether Lucy B. Carr qualified as an attesting witness to the will. N.C.G.S. § 31-10(a); N.C.G.S. § 31-3.3.

Am Jur 2d, Wills § 289.

APPEAL by defendant from a judgment signed 9 October 1990 by *Judge G. K. Butterfield* in CAMDEN County Superior Court. Heard in the Court of Appeals 4 June 1991.

John W. Halstead, Jr. for plaintiff-appellee.

Twiford, O'Neal & Vincent, by Russell E. Twiford and Branch W. Vincent, III, for defendant-appellant.

LEWIS, Judge.

The two issues in this case are: 1) whether the trial court erred in finding that it had subject matter jurisdiction over this action and 2) whether the trial court erred in granting the plaintiff's motion for judgment on the pleadings.

Thomas E. Brickhouse, Sr. died on 18 August 1989 in Norfolk, Virginia. He was a resident of Suffolk, Virginia. He was survived by his wife, Margie Brickhouse, who is the defendant in this case, and his son, Thomas E. Brickhouse, Jr., who is the plaintiff in this case. The decedent left a self-proving will dated 21 July 1989. The will provided in pertinent part:

> I give and devise my Texaco Service Station located in South Mills, North Carolina, to include the real estate and any personal property which I have at my death used in connection with the service station to my wife, Margie H. Brickhouse, for the term of her life, or until she remarries. At the death of the said Margie H. Brickhouse, or at the time she remarries, the said real property and any remaining personal property used in connection with the service station is to pass to Thomas E. Brickhouse, Jr.
>
> . . .
>
> All the rest, residue and remainder of my property, real and personal, tangible and intangible, wheresoever situate and howsoever held, herein referred to as my Residuary Estate, I give, devise and bequeath to my wife, Margie H. Brickhouse, if she survives me, to the express exclusion of any child of mine now living or hereafter born, but if my wife predeceases me, then I give, devise and bequeath my Residuary Estate to Thomas E. Brickhouse, Jr. Should both Margie H. Brickhouse and Thomas E. Brickhouse, Jr. predecease me, then I devise and bequeath my Residuary Estate to the children of Thomas E. Brickhouse, Jr., share and share alike.

The will was executed by the testator by his mark. Margie Brickhouse and G. Blair Harry were the named witnesses to the will and also signed the affidavits at the end of the will (the self-proving portion of the will). Lucy B. Carr witnessed the testator's mark in his execution of the will and in his signing of the self-proving portion of the will. Lucy B. Carr also notarized the self-proving portion of the will.

The will was probated in the Clerk's Office of the Circuit Court of the City of Suffolk, Virginia, on 28 August 1989. The Certificate of Probate from the State of Virginia stated that the will was "duly and fully proved by the affidavits of G. Blair Harry and Margie Brickhouse, the attesting witnesses. . . ."

It appears from the record that on 12 September 1989, a copy of the self-proving will of Thomas Edward Brickhouse, Sr. along with a copy of the Virginia probate was filed with the Clerk of the Superior Court of Camden County, North Carolina. On 12 September 1989, the Clerk of Camden County issued a certificate of probate stating:

> A paper-writing dated as indicated above, purporting to be the Last Will and Testament or codicil thereto of the above named deceased has been exhibited before me. Sufficient proof of the due execution thereof has been taken as set forth in the accompanying affidavits which are incorporated and made a part hereof;
>
> It is Adjudged that the paper-writing and every part thereof is the Last Will and Testament or codicil thereto of the deceased, and the same is ordered admitted to probate.

On 1 November 1989, the plaintiff brought a civil action in Camden County Superior Court to remove cloud upon title. On 31 August 1990, two affidavits entitled "affidavits of Subscribing Witnesses for Probate of Will" were filed with the Clerk of Superior Court of Camden County. The affiants, Lucy B. Carr and G. Blair Harry, swore that they attested to the will of Thomas Edward Brickhouse as required by N.C.G.S. § 31-3.3. There is no indication that these affidavits were part of the original probate which had already occurred. Also, there was no indication in the trial judge's final judgment in this case that he considered the affidavits.

On 16 October 1990, a judgment was filed in Camden County Superior Court whereby Judge G. K. Butterfield, treating the plaintiff's civil action as a declaratory judgment action, allowed the plaintiff's motion for judgment on the pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c) and denied the defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b). The defendant appeals.

Jurisdiction

[1] The defendant contends that the trial court lacked jurisdiction over the civil action filed by the plaintiff. The defendant argues that the plaintiff's action is a collateral attack upon the last will and testament of Thomas E. Brickhouse, Sr. and that the plaintiff is required to file a caveat proceeding in order to properly have the issues resolved. We disagree.

A caveat "is a proceeding in rem having as its only purpose the function of ascertaining whether the paperwriting purported to be a will is in fact the last will and testament of the person for whom it is propounded." *In re Morrow's Will*, 234 N.C. 365, 368, 67 S.E.2d 279, 281 (1951). The attack on a will which has been offered for probate must be direct and by caveat. "A collateral attack is not permitted." *In re Will of Charles*, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965) (citation omitted).

Here, however, the plaintiff was not attacking the validity of the will but was asking the court to construe the will to determine who could take under the will. An attack on the validity of a will most commonly deals with issues involving undue influence and testamentary capacity. Here, the court need only decide who could take under the will which had already been probated. A civil action for construction of a will may be brought under the Declaratory Judgment Act, N.C.G.S. § 1-253 *et seq.; see Brown v. Byrd*, 252 N.C. 454, 113 S.E.2d 804 (1960). Whether or not Mrs. Brickhouse is allowed to take under the will pursuant to N.C.G.S. § 31-10, the will is still valid unless it is attacked by caveat.

We also note that the Clerk of Camden County probated a certified copy of the Virginia probate proceeding of Thomas E. Brickhouse's will, as required by N.C.G.S. § 31-27(b). According to the statute, the clerk may probate the certified copy from Virginia as though it were the original will of the testator. N.C.G.S. § 31-27. There is no indication in the statute that the findings in the foreign probate proceeding are any more binding than the findings of a probate proceeding in North Carolina. Therefore, a trial judge may allow an action to determine whether there are any supernumerary witnesses that were not a part of the foreign probate findings of fact. This action would not be contrary to any findings made in the probate, but would only involve additional findings for the proper construction of the will. Thus, we hold that the trial court had jurisdiction over the plaintiff's action.

Attesting Witnesses

[2] The plaintiff alleged in his complaint that there were not two disinterested witnesses to the will. The defendant denied that allegation. The trial judge granted the plaintiff's motion for judgment on the pleadings. A motion for judgment on the pleadings should not be granted unless "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to

judgment as a matter of law." *American Bank & Trust Co. v. Elzey*, 26 N.C. App. 29, 32, 214 S.E.2d 800, 802, *cert. denied*, 288 N.C. 252, 217 S.E.2d 662 (1975) (citation omitted).

N.C.G.S. § 31-10(a) provides:

> A witness to an attested written or a nuncupative will, to whom or to whose spouse a beneficial interest in property, or a power of appointment with respect thereto, is given by the will, is nevertheless a competent witness to the will and is competent to prove the execution or validity thereof. However, if there are not at least two other witnesses to the will who are disinterested, the interested witness and his spouse and anyone claiming under him shall take nothing under the will, and so far only as their interests are concerned the will is void.

Therefore, one of the issues before the trial judge was whether Lucy B. Carr, who had no interest in the testator's estate, could qualify as a witness.

N.C.G.S. § 31-3.3 states:

> (a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.
>
> (b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.
>
> (c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.
>
> (d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

Whether the testator impliedly requested the witnesses attest the will is ordinarily a factual question for the jury. *In re Kelly's Will*, 206 N.C. 551, 553, 174 S.E. 453, 455 (1934). Evidence that the testator made his mark in the presence of the witnesses is sufficient to imply that the testator requested the witnesses attest the testator's signature. *In re Will of King*, 80 N.C. App. 471,

476, 342 S.E.2d 394, 397, *review denied*, 317 N.C. 704, 347 S.E.2d 43 (1986).

We hold that it was error for the trial court to grant the plaintiff judgment on the pleadings, as there remained the factual issue of whether Lucy B. Carr qualified as an attesting witness. Ms. Carr's failure to sign in the same place as the other two witnesses does not prevent her from being an attesting witness. *In re Will of Williams*, 234 N.C. 228, 235, 66 S.E.2d 902, 907 (1951) (when signature is essential to the validity of the will, it is not necessary that signature appear at the end of the will unless the statute uses the word "subscribe"). Also, Ms. Carr's failure to sign below and subscribe to the attestation clause does not prevent her from being an attesting witness, as § 31-3.3 does not require an attestation clause. N. Wiggins, Wills and Administration of Estates in North Carolina § 85 (2nd ed. 1983). Furthermore, Ms. Carr's signing as notary does not prevent her from also signing as a witness.

In his judgment, the judge indicated that he granted judgment on the pleadings and did not mention Lucy B. Carr's affidavit in his findings. We remand the case to have the trial court consider the issue of whether Lucy B. Carr qualified as an attesting witness under N.C.G.S. § 31-3.3. On remand, the trial court may consider the affidavit that was filed with the record of this case and should determine whether it should be admitted into evidence. We also note that N.C.G.S. § 1-261 allows for a jury trial, in the event the court finds that factual issues are in dispute.

Affirmed as to jurisdiction.

Reversed and remanded.

Judges EAGLES and GREENE concur.

IN RE HESS

[104 N.C. App. 75 (1991)]

IN THE MATTER OF: BEULAH M. HESS, DECEASED

No. 9029SC1068

(Filed 3 September 1991)

Wills § 61 (NCI3d) — dissent to will — sufficiency of acknowledgment

The acknowledgment on a dissent to a will substantially complied with the requirements of N.C.G.S. § 47-38 where the name and title of the official taking the acknowledgment, a notary, was provided; the dissent was signed by the maker and his witness; their personal appearance was indicated by the phrase "sworn to and subscribed before me"; the date and year of the acknowledgment were provided; and the notary's signature and seal were affixed thereto.

Am Jur 2d, Acknowledgments §§ 12, 24, 31; Wills § 844.

APPEAL by respondent from order entered 18 July 1990 in HENDERSON County Superior Court by *Judge William C. Griffin.* Heard in the Court of Appeals 20 March 1991.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Michelle Rippon and Robert H. Haggard, for petitioner-appellee.

Prince, Youngblood, Massagee & Jackson, by Kenneth Youngblood and Sharon B. Ellis, for respondent-appellant.

WYNN, Judge.

In this appeal, respondent seeks to overturn the order allowing amendment of a certificate of acknowledgement to a dissent filed by petitioner, Selvin J. Hess, ("Selvin"). For the reasons which follow, we affirm the decisions of the trial judge.

Beulah M. Hess died testate on 23 September 1988. She was survived by her widower, the petitioner in this action, Selvin J. Hess, ("Selvin") and her son, the respondent, Macklin Lamar Hess, ("Macklin").

Mrs. Hess's will was admitted to probate and respondent, Macklin, qualified as executor pursuant to the will on October 17, 1988. On February 15, 1989, petitioner filed a "Notice of and Election of Dissent From the Will of Deceased." The notice was signed by petitioner and witnessed by W.J.W. Howe. Below their signatures appeared the following:

SWORN TO AND SUBSCRIBED BEFORE ME,
this the 14th day of
February, 1989.
Tillie B. Cairnes /s/
Notary Public
My commission expires: August 14, 1990.

Ms. Cairnes's notary public seal was appended to the page.

Upon motion of the estate, the clerk dismissed petitioner's dissent to the will on the grounds that the dissent failed to comply with the mandates of N.C. Gen. Stat. § 30-2(b) in that the acknowledgement did not state that the execution of the dissent was made personally and voluntarily.

On appeal to the Superior Court for Henderson County, the trial judge reversed the Clerk's order and allowed amendment to correct the defects in the acknowledgement and allowed the dissent. From that order, petitioner appealed to this court.

I

Respondent contends that the dissent in this case was invalid because the purported acknowledgement failed to state that the affiant personally and voluntarily acknowledged the making of the dissent. He also argues that since the dissent failed to comply with N.C. Gen. Stat. § 30-2(b), the trial judge was without jurisdiction to allow the dissent to be amended to conform with the statutory requirements.

In support of his first argument, respondent cites *In re Estate of Burleson*, 24 N.C. App. 136, 210 S.E.2d 114 (1974). In *Burleson*, this court stated,

> An acknowledgement is a formal declaration or admission before an authorized public officer by a person who has executed an instrument that the instrument is his voluntary act and deed. It is different from an attestation in that an attestation is the act of a third person who witnessed the actual execution of an instrument and subscribed his name as a witness to that fact, ...

Id. at 138, 210 S.E.2d at 115 (citations omitted).

In *Burleson*, the petitioner filed a purported dissent that was only signed by herself and a witness. This court held that the

signature of a subscribing witness without more was insufficient to meet the requirements of the statute for an acknowledgement. In the case at hand, we are asked to decide whether the signatures of the maker and witness attested by a notary public are sufficient to meet the requirements of Section 30-2(b).

Section 30-2(b) provides that an acknowledgement is required for a dissent to be valid, however, it does not provide the requirements for the form of such an acknowledgement. The requirements for the form of an acknowledgement are provided in N.C. Gen. Stat. § 47-38 (1984) which states:

> Where the instrument is acknowledged by the grantor or maker, the form of acknowledgement shall be *in substance* as follows:
>
> North Carolina, ... County.
>
> I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the . . . . . day
> (Official seal.)
> of . . . . (year).
>
> . . . . . .
> (Signature of officer.)

(Emphasis added.)

There is no requirement that the acknowledgement itself contain any magical language to show that it was executed personally and voluntarily by the affiant. In *Freeman v. Morrison*, our Supreme Court stated,

> The courts uniformly give to certificates of acknowledgement a liberal construction, in order to sustain them if the substance be found, and the statute has been substantially observed and followed. It is accordingly a rule of universal application that a literal compliance with the statute is not to be required of a certificate of acknowledgement, and that, if it substantially conforms to the statutory provisions as to the material facts to be embodied therein, it is sufficient.

214 N.C. 240, 244, 199 S.E. 12, 14 (1938) (citations omitted).

The *Freeman* court interpreted Section 3323 of the N.C. Code (1935), the verbatim precursor to Section 47-38, to require that the acknowledgement state in substance (1) the name and title of the official taking the acknowledgement; (2) the name of the maker; (3) personal appearance of the maker before the officer; (4) acknowledgement of the maker to the officer, and if required by law otherwise, the notary's seal. *Freeman*, 214 N.C. at 243, 199 S.E. at 13-14.

In the case at bar, the name and title of the official taking the acknowledgement, Tillie B. Cairnes, notary, is provided; the names of the maker as well as the witness, Selvin Hess and W.J.W. Howe, are provided; their personal appearances are ascribed by the phrase "sworn to . . . before me"; the date and year of the acknowledgement are provided; and, the notary's signature and her seal are affixed thereto. Further, the phrase "sworn to and subscribed before me" appears prominently below the signatures of the maker and witness. We find that this acknowledgement sufficiently complied with the requirements of *Freeman* in that it substantially conforms to the statutory provisions of Section 47-38. *Accord Manufacturers' Fin. Co. v. Amazon Cotton Mills Co.*, 182 N.C. 408, 109 S.E. 67 (1921) (holding that an instrument which was "subscribed and sworn to before" a notary public was equivalent to its being acknowledged).

Having concluded that the acknowledgement was properly executed, we need not address the question of whether the amendment was properly allowed, nor need we address the petitioner's cross-assigned error.

For the foregoing reasons, the decision of the Superior Court judge to allow the dissent is

Affirmed.

Judges ARNOLD and JOHNSON concur.

TOWN OF PINE KNOLL SHORES, PLAINTIFF v. WALLACE N. EVANS, II AND WIFE, LENORA H. EVANS, DEFENDANTS

No. 903SC1053

(Filed 17 September 1991)

1. **Municipal Corporations § 30.11 (NCI3d)— zoning—other separate structures—deck included**

The trial court erred in an action brought by the Town for injunctive relief and an order of abatement requiring removal of a deck by concluding that defendants' deck is not a separate structure and does not violate the zoning ordinances. Those ordinances allow construction of single family residences, prohibit other separate structures, and define structures as anything constructed or erected requiring location on land, with express exceptions. The deck constructed by defendants is plainly prohibited as it is not on the list of exceptions in the definitional section of the ordinance.

Am Jur 2d, Zoning and Planning §§ 109, 245, 252.

2. **Municipal Corporations § 30.11 (NCI3d)— zoning—deck in violation of ordinance—remedies—civil penalty—not authorized**

The trial court was without authority to allow defendants to avoid removal of a deck erected in violation of a zoning ordinance by payment of a civil penalty where a civil penalty is not authorized by the ordinance and is not authorized by N.C.G.S. § 160A-175(e). N.C.G.S. § 160A-175(c).

Am Jur 2d, Zoning and Planning §§ 248, 252.

Judge LEWIS dissenting.

APPEAL by plaintiff from judgment entered 14 June 1990 in CARTERET County Superior Court by *Judge James D. Llewellyn.* Heard in the Court of Appeals 7 May 1991.

Kirkman, Whitford & Jenkins, P.A., by Neil B. Whitford, for plaintiff-appellant.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by Claud R. Wheatly, Jr. and George L. Wainwright, Jr., for defendant-appellees.

GREENE, Judge.

The plaintiff, Town of Pine Knoll Shores (Town), appeals from a judgment of the trial court permitting the defendants to avoid, by payment of $2,000.00 to Town, removing a "deck" which Town contends the defendants constructed in violation of Town zoning ordinance.

Town is a municipality located on a barrier island in Carteret County. Defendants own a home in Pine Knoll Shores which is situated along an artificially-made canal which is connected with Bogue Sound. Town has enacted a comprehensive zoning code pursuant to its power under N.C.G.S. § 160A-381. The code classifies the property within Pine Knoll Shores into zoning categories and imposes various restrictions upon the use of private land. Alleged violations of some of these zoning ordinances are the basis of this dispute.

On 30 May 1987, defendants began construction of a "deck" in their backyard between their house and the canal. The parties dispute whether this construction project is technically a "deck" or merely a "ground cover," but there is no factual dispute that it consists of precisely sized wooden boards connected to one another so as to form a level, continuous surface covering a substantial area of the lot between the canal and house. Defendants did not hire a professional contractor to build this "deck," but did it themselves with the assistance of family and friends. Defendants never secured a building permit for this work. On the same day construction began, the Building Inspector for Town went to defendants' property and ordered them to stop construction immediately because defendants had failed to apply for, receive, and post a building permit as required by the Code of Pine Knoll Shores. Defendants ceased work on the "deck" at that time.

On 8 June 1987, defendants went before the Pine Knoll Shores Community Appearance Committee to bring up the subject of their "deck." At that time, defendants were informed that their partially constructed "deck" was in fact in violation of some of the local zoning ordinances. Despite this knowledge, on or about 15 May 1988, defendants resumed construction and completed their "deck."

On 17 June 1988, Town instituted this action against defendants seeking a mandatory injunction and order of abatement requiring removal of the "deck." As a basis of the complaint, Town

alleged that the "deck" violated several sections of the local zoning ordinance including the following:

> 21-5.2 *Moving Buildings, Etc.; Permit from Building Inspector.* No building, seawall, or other structures shall be erected, moved, extended, or structurally altered until the Building Inspector has issued a permit for such work.
>
> 21-8.1 *Restrictions of Residential Property Zones.* Only single family residences shall be erected in Residential Property Zones R-1, R-2, R-3, and R-4; and they shall be subject to the rules and regulations set forth in this Chapter. No other separate structure shall be permitted.
>
> 21-8.3 *Required Setback.* . . . No building may be constructed nearer than thirty (30') feet to the mean high water mark of any interior waterway or canal to include decks and porches.
>
> . . .

This matter came on for trial on 14 May 1990. After each party presented its case, the trial court entered the following pertinent conclusions and order:

> a. Section 21-5.2 of the Code of Pine Knoll Shores required the Defendants to receive from the building inspector for the Town of Pine Knoll Shores a building permit before commencing construction of the deck in question;
>
> . . . .
>
> d. Defendants failed to apply for, receive, and post, a building permit pursuant to the Code of Pine Knoll Shores and thus violated Sections 21-5.2, . . . of the Code;
>
> . . . .
>
> f. Defendants' deck is not a "separate structure" from the single-family residence on the property and thus does not violate Section 21-8.1 of the Code of Pine Knoll Shores;
>
> . . . .
>
> WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:
>
> a. Verdict pursuant to Rule 50 of the Rules of Civil Procedure is directed in favor of [Town] . . . against Defendants for Defendants' construction of a deck on their property without

having applied for, received and posted a building permit for construction of the deck in violation of Sections 21-5.2 . . . of the Code of [Town] . . . and as a result, Defendants are ordered to abate their violation of said sections of the Code by removing the deck within fourteen days after the entry of this order; provided, however, that Defendants may purge themselves of this violation and avoid the order of abatement by paying into the office of the Clerk of Superior Court for the use and benefit of [Town] . . . the sum of Two Thousand Dollars within fourteen days following entry of this judgment.

b. Verdict is directed in favor of the Defendants against [Town] . . . with respect to all other issues and this action is dismissed as to such issues.

. . . .

Town appeals the decision of the trial court that the "deck" did not violate Section 21-8.1 of the zoning ordinance and the decision of the trial court to allow defendants to purge themselves of the order of abatement by paying a $2,000.00 civil penalty.

The dispositive issues are (I) whether the deck is a "structure" as defined by Town ordinance; and (II) whether the trial court may, in the absence of authorization in a town ordinance, permit a party who has violated a town ordinance to avoid an order of abatement by paying a civil penalty.

Town generally argues that the defendants constructed the "deck" in violation of several sections of the Town ordinance and that the remedy for such a violation is removal of the "deck." The defendants argue that the construction of the "deck" did not violate the Town ordinance, and if it did, the trial court is authorized to allow payment of a fine to Town in lieu of removal of the "deck."

I

[1] We first reject defendants' argument that Section 21-8.1 does not prohibit the construction of the "deck." Section 21-8.1 of the zoning ordinance of Town allows construction on defendants' property of "single family residences" and expressly prohibits "other separate structures." Section 21-2 of the ordinance defines "structures" as "anything constructed or erected requiring location on

land except fences, mailboxes, flagpoles, lampposts, doghouses, birdhouses, and well pump covers." The words used in the ordinance are plain and unambiguous and no statutory construction is necessary in order to ascertain the meaning of the ordinance. *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973). Therefore, it is this Court's duty to apply the ordinance irrespective of any opinion we may have as to its wisdom, for it is our duty to "declare what the law is . . . [not] what the law ought to be." *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 633 (1968), *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1969). Accordingly, the "deck" constructed by the defendants on their land is plainly prohibited by Section 21-8.1 as it is not among the list of exceptions in the definitional section of the ordinance. In deciding otherwise, the trial court erred.

In addition to a violation of Section 21-8.1, the defendants violated Section 21-5.2 in that they failed to receive a building permit. This violation is reflected in the order of the trial court and the defendants did not appeal that decision of the trial court nor do they argue otherwise. In that the defendants violated both Sections 21-5.2 and 21-8.1, we need not address the alleged violation of Section 21-8.3.

II

[2] Remedies for violations of the ordinance include removal of the offending structure. Section 21-17.2. The trial court ordered the removal of the "deck" and allowed the defendants to avoid the removal by paying a $2,000.00 civil penalty to Town. Town argues that the trial court was without authority to allow the defendants to avoid removal by payment of the $2,000.00. We agree.

Enforcement of city building ordinances is governed by two separate sections of Chapter 160A, both entitled "Enforcement of ordinances." The first of these two enforcement provisions applies only to Article 19 of Chapter 160A and reads:

> Subject to the provisions of the ordinance, any ordinance adopted pursuant to authority conferred by this Article may be enforced by any remedy provided by G.S. 160A-175.

N.C.G.S. § 160A-365 (1987). The second enforcement provision, referred to in N.C.G.S. § 160A-365, is N.C.G.S. § 160A-175 and is found in Article 8, governing the general police power of cities and towns. It states, in part:

(a) A city shall have power to impose fines and penalties for violation of its ordinances, and may secure injunctions and abatement orders to further insure compliance with its ordinances as provided by this section.

. . . .

(c) An ordinance may provide that violation shall subject the offender to a civil penalty to be recovered by the city in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance.

(d) An ordinance may provide that it may be enforced by an appropriate equitable remedy issuing from a court of competent jurisdiction. In such case, the General Court of Justice shall have jurisdiction to issue such orders as may be appropriate, and it shall not be a defense to the application of the city for equitable relief that there is an adequate remedy at law.

(e) An ordinance that makes unlawful a condition existing upon or use made of real property may be enforced by injunction and order of abatement, and the General Court of Justice shall have jurisdiction to issue such orders. When a violation of such an ordinance occurs the city may apply to the appropriate division of the General Court of Justice for a mandatory or prohibitory injunction and order of abatement . . . .

(f) Subject to the express terms of the ordinance, a city ordinance may be enforced by any one, all, or a combination of the remedies authorized and prescribed by this section.

N.C.G.S. § 160A-175(a), (c), (d), (e), (f) (1987).

North Carolina Gen. Stat. §§ 160A-175(f) and 160A-365 demonstrate a general intent by the legislature to defer to the decisions of cities on which remedies and penalties shall be used to achieve enforcement of planning and zoning ordinances. North Carolina Gen. Stat. § 160A-175(f) begins, "[s]ubject to the express terms of the ordinance . . ." and N.C.G.S. § 160A-365 begins, "[s]ubject to the provisions of the ordinance . . . ." The use of these introductory phrases indicates that the choice of remedies and penalties remains with the city. The choice of remedies and penalties, however, is limited to those remedies and penalties available in

N.C.G.S. § 160A-175. Therefore, civil penalties and orders of abatement available under N.C.G.S. § 160A-175(c) and (d) must be authorized in a city's ordinance in order to be imposed by a court. That authorization may be either specific or general. *See New Hanover County v. Pleasant*, 59 N.C. App. 644, 648, 297 S.E.2d 760, 762 (1982) (language of ordinance authorizing "any lawful action needed to prevent or remedy a violation" encompasses all available statutory remedies). Nonetheless, the trial court may in the absence of authorization in a city ordinance, and upon the request of the city, issue injunctions and orders of abatement for violation of ordinances that "makes unlawful a condition existing upon or use made of real property . . . ." N.C.G.S. § 160A-175(e).

In this case, the Code of Pine Knoll Shores authorizes four remedies for a building permit violation:

> 21-17.2 . . . [T]he Building Inspector on behalf of the Town, or the Board of Commissioners, may initiate proceedings before a court of competent jurisdiction to obtain enforcement of any provision of this Zoning Chapter by *prohibitory injunction, mandamus, affirmative injunction, or order of abatement*, as provided by North Carolina General Statute, Section 160-175. Enforcement may be by one, all or a combination of such remedies. [Emphasis added.]

An order of abatement is one of four authorized remedies under the ordinance for a building permit violation. A civil penalty, although available under N.C.G.S. § 160A-175(c), is not authorized by the ordinance and is not authorized by N.C.G.S. § 160A-175(e), leaving the trial court without authority to impose it. The fact that the civil penalty was to be paid at the option of defendants is immaterial. Where a party violating a city ordinance is given the option of paying a civil penalty, such optional penalty must nonetheless be authorized by the ordinance. Therefore, the imposition of a $2,000.00 civil penalty in this case was improper and must be vacated.

We therefore vacate the civil penalty and affirm the order of abatement.

Affirmed in part, vacated in part.

Judge WELLS concurs.

Judge LEWIS dissents with separate opinion.

Judge LEWIS dissenting.

While I agree with the majority that the trial court acted without authority in imposing the civil penalty, I would not require the defendants to dismantle the deck.

Section 21-8.3 of the Code of the Town of Pine Knoll Shores provides that "No building may be constructed nearer than 30 feet to the mean high water mark of any interior waterway canal to include decks and porches." Section 21-2 defines "Building"

> "Building" shall mean any structure built for the support, shelter or enclosure of persons, animals, chattels or property of any kind, which has enclosing walls for fifty percent or more of its parameter. The term "building" shall be construed as if followed by the words "or parts thereof" including porches, decks, carports, garages, sheds, roof extensions and overhangs and any other *projections*.

(Emphasis added). The definition of "Building" contained in Section 21-2 suggests that the thirty foot set back restriction applies only to "decks" projecting or extending from another structure. The restriction is in my view at least ambiguous in application to the construction at issue here. Zoning ordinances are in derogation of the right to property, *In Re Couch*, 258 N.C. 345, 346, 128 S.E.2d 409, 411 (1962), and where possible should be construed in favor of freedom of use. *In Re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968). I therefore agree with the trial court that the Evans have not violated Section 21-8.3 of the Code of Pine Knoll Shores.

Section 21-8.1 of the Zoning Ordinance states: "Only single family residences shall be erected. . . . No other separate structures shall be permitted." The term "structure" is defined in Section 21-2 of the zoning ordinance as "anything constructed or erected requiring location on land except fences, mailboxes, flagpoles, lamp-posts, doghouses, birdhouses, and well pump covers."

Zoning ordinances must be construed to ascertain and effectuate the intent of the legislative body. *Id.* The apparent intent of this ordinance is to restrict each lot to one residence as well as to preserve an uncluttered appearance. While aesthetic considerations may serve as a basis for zoning regulations, restrictions must be reasonably related to the purpose they are designed to serve. *State v. Jones*, 305 N.C. 520, 530-31, 290 S.E.2d 675, 681

(1982). To apply section 21-8.1 to prohibit the flat and unobstructive construction of the Evans' deck would be to impose a restriction unrelated to any clearly reasonable purpose and as such would render the ordinance vague and overbroad in its application. Zoning laws should be upheld only insofar as they reasonably regulate or restrict use of private property and accomplish the purpose for which they are intended. *See Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968). I would uphold the trial court's determination that this zoning ordinance does not clearly prohibit the construction at issue.

The trial court ruled against defendants only for failing to "apply for, receive or post a permit" for construction. However, the record shows that Mrs. Evans appeared before the community appearance committee on 8 June 1987, and the plaintiff's complaint admits that the defendants officially applied for a permit on 14 July 1987 and that this application was denied because the city determined that the construction would violate the thirty foot set back rule.

Insofar as the construction violates neither the thirty foot set back rule nor the prohibition against separate structures, the town wrongfully denied the permit. While the defendants should have appealed the town's denial of their permit before resuming construction, ordering the defendants to dismantle an improvement for which they should have received and still should receive a permit, violates the principle that the court should avoid economic waste where possible. *See LaPierre v. Samco Development Corporation*, 103 N.C. App. 551, 406 S.E.2d 646 (1991); *Warfield v. Hicks*, 91 N.C. App. 1, 11, 370 S.E.2d 689, 695 (1988), *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988). Were we to strike the civil penalty remedy and leave the remainder of the trial court's ruling intact, defendants will be required to dismantle the deck but can then reapply for and receive a permit to rebuild the same.

I would reverse the trial court's directed verdict for the plaintiff town and remand the case to the trial court to determine whether an order should issue requiring the town to issue a building permit *nunc pro tunc*.

JAMES H. TOMS AND TOMS AND BAZZLE, P.A., PLAINTIFFS v. LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA; THE HOME INDEMNITY COMPANY; AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, DEFENDANTS

No. 9029SC1259

(Filed 17 September 1991)

1. **Insurance § 150 (NCI3d)— professional liability insurance— insurer's duty to defend—failure to obtain aircraft liability insurance—acting as attorney—professional services to others—issues of material fact**

In an action to determine whether defendant insurer was obligated by a professional liability policy to provide a legal defense to plaintiff attorney and plaintiff law firm in an action arising out of the crash of an airplane owned by a nonprofit corporation, the facts admitted and alleged in the verified answers and crossclaims in the underlying lawsuits raised genuine issues of material fact as to whether plaintiff attorney was acting in his capacity as an attorney or acted only as a part owner of the airplane when he undertook and failed to obtain aircraft liability insurance, and whether plaintiff attorney's failure to obtain aircraft liability insurance involved rendering professional services to others within the purview of the policy. Therefore, the trial court erred in entering summary judgment in favor of defendant insurer.

Am Jur 2d, Attorneys at Law § 197; Insurance § 726.

2. **Insurance § 150 (NCI3d)— professional liability insurance— professional services—procurement of liability insurance**

An attorney's procurement of liability insurance can constitute the rendering of "professional services" within the meaning of a professional liability policy.

Am Jur 2d, Attorneys at Law § 197; Insurance § 726.

3. **Insurance § 150 (NCI3d)— professional liability insurance— rendering professional services "to others"—issue of material fact**

A genuine issue of material fact was raised as to whether plaintiff attorney was rendering professional services "to others" within the meaning of a professional liability policy when he undertook and failed to obtain liability insurance for an airplane

owned by a nonprofit corporation or whether plaintiff's actions came within the business activities exclusion of the policy where plaintiff testified that, although he thought he was purchasing an interest in the nonprofit corporation that owned the airplane, he actually acquired no interest in the corporation.

Am Jur 2d, Attorneys at Law § 197; Insurance § 726.

APPEAL by plaintiffs from Judgment of *Judge Marvin K. Gray* entered 21 September 1990 in HENDERSON County Superior Court. Heard in the Court of Appeals 4 June 1991.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire, for plaintiff appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Roy W. Davis, Jr., and Michelle Rippon, for defendant appellee Lawyers Mutual Liability Insurance Company.

COZORT, Judge.

Plaintiffs instituted this declaratory judgment action against Lawyers Mutual Liability Insurance Company (Lawyers Mutual) seeking to establish Lawyers Mutual's obligation to defend the plaintiffs and provide coverage pursuant to a professional liability insurance policy in two underlying lawsuits against plaintiffs in the Superior Court of Henderson County. Superior Court Judge Marvin Gray granted the defendant's motion for summary judgment. We reverse on the duty to defend issue and remand.

Plaintiff James Toms is an attorney practicing with plaintiff Toms and Bazzle, P.A. (the Professional Association), in Henderson County. In 1981, James Wilkins, Edwin Hicks, and Roger Ward formed a corporation, Mountain Scenic Aero, Inc. (MSA), for the purpose of owning and flying a Cessna 172 airplane. Mr. Wilkins served as president and Mr. Jones served as secretary. In 1984, Mr. Jones purportedly sold his interest in the corporation to Mr. Toms and delivered all the corporate records to Mr. Toms. Mr. Toms informed Mr. Wilkins that a liability insurance policy on the airplane had expired at the end of 1984. With Mr. Wilkins' permission, Mr. Toms obtained a quote on the annual premium for a liability policy; however, he failed to pay the premium because of insufficient funds in MSA's bank account.

In June 1985, the airplane crashed, resulting in injury to one minor passenger and death to two passengers. As a result of the crash, two lawsuits were brought in the Henderson County Superior Court, one on 18 April 1986 and one on 12 January 1987.

On 6 June 1988, Mr. Toms and the Professional Association filed suit against Lawyers Mutual seeking a declaratory judgment that Lawyers Mutual was obligated to provide legal defense and coverage on behalf of Mr. Toms and the Professional Association in the two underlying suits. (Other insurance carriers were also defendants in this action; however, they are not parties to this appeal, and will not be further mentioned.) On 21 September 1990, the trial court granted the defendant's motion for summary judgment. From this judgment, plaintiffs appeal.

On appeal, plaintiffs contend that the trial court erred in concluding as a matter of law that Lawyers Mutual had no duty to defend the plaintiffs as insureds. We agree.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986); N.C. Gen. Stat. § 1A-1, Rule 56(c). "A properly verified pleading which meets all the requirements for affidavits may effectively 'set forth specific facts showing that there is a genuine issue for trial.' " *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 212-13 (1972). "An issue is material if facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). "[T]he burden is upon the moving party to establish the lack of any triable issue of fact." *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975).

In *Waste Management of Carolinas, Inc.*, 315 N.C. at 691-92, 340 S.E.2d at 377-78 (1986), the North Carolina Supreme Court summarized the scope of an insurer's duty to defend an insured:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the

pleadings; its duty to pay is measured by the facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 318 (1968); 7C J. Appleman, *Insurance Law and Practice* § 4683 (1979 & Supp. 1984). (Footnote omitted.) Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage. 7C J. Appleman, *Insurance Law and Practice* § 4683. . . . In addition, many jurisdictions have recognized that the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources. Even though the insurer is bound by the policy to defend "groundless, false or fraudulent" lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend. *See generally* 14 Couch on Insurance 2d § 51:46 (rev. ed. 1982); 7C J. Appleman, *Insurance Law and Practice* § 4684.01.

* * * *

. . . Any doubt as to coverage is to be resolved in favor of the insured.

Id. (citations omitted). "[I]f the pleadings allege any facts which disclose a possibility that the insured's potential liability is covered under the policy, then the insurer has a duty to defend." *Wilkins v. American Motorists Ins. Co.*, 97 N.C. App. 266, 269, 388 S.E.2d 191, 193 (1990).

Plaintiffs' insurance policy provides in pertinent part:

I. **Coverage**

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as money damages because of any claim or claims . . . *arising out of any act or omission of the Insured in rendering or failing to render professional services for others in the Insured's capacity as a lawyer* or notary public . . . except as excluded or limited by the terms, conditions and exclusions of this policy.

* * * *

EXCLUSIONS

This policy does not apply:

* * * *

(g) to any claim arising out of the Insured's acts or omissions as an officer, director, partner, trustee or employee of a business enterprise or charitable organization or of a pension, welfare, profit sharing, mutual or investment fund or trust;

* * * *

(i) to any claim arising out of or in connection with the conduct of any business enterprise (including the ownership, maintenance or care of any property in connection therewith) owned by any insured or in which any insured is a partner, or which is directly or indirectly controlled, operated or managed by any insured either individually or in a fiduciary capacity. (Emphasis added.)

[1] Defendant contends that it was not obligated to provide a defense in the underlying lawsuits because the pleadings did not allege facts indicating that the event was covered under the policy. Specifically, defendant argues that (1) plaintiff Toms did not undertake to obtain liability insurance in his capacity as an attorney and (2) the failure to obtain liability insurance did not involve rendering *professional services to others*. Although the defendant's assertions may be proven correct at trial, we find the pleadings and depositions in the underlying lawsuits raise genuine issues of material fact which make this lawsuit inappropriate for summary judgment.

First, Lawyers Mutual argues in its brief that plaintiff Toms was not acting as an attorney for MSA, rather, he was assuming the duties of the former corporate secretary. Moreover, pointing to Mr. Toms' deposition testimony that he did not consider his relationship with MSA to be an attorney-client relationship, Lawyers Mutual argues that there is no evidence that Mr. Toms acted as attorney for MSA. We disagree. The facts admitted and alleged in the verified answers and crossclaims in the two underlying lawsuits raise a genuine issue of material fact as to whether Mr. Toms was acting as an attorney for MSA when he failed to obtain the aircraft liability insurance.

In the first underlying action, Civil Action No. 86 CVS 351, the plaintiffs therein asserted seven negligence claims against MSA, Mr. Wilkins, Mr. Hicks, the pilot Mr. Ward, and Mr. Toms. In pertinent part, plaintiffs therein made the following allegations to support the claim that Mr. Toms had breached his contract as attorney for MSA in failing to obtain liability and property insurance for the airplane and its occupants:

> 25. James Toms is a member of the Bar of the State of North Carolina and is licensed to practice law and does practice law in Hendersonville, North Carolina.
>
> 26. On or before June 16, 1985 James Toms contracted to act as attorney for the partnership, joint venture, or Defendant nonprofit corporation . . . and in doing so undertook to purchase and provide liability and property damage insurance for the subject aircraft and its occupants.
>
> 27. On or before June 16, 1985, the Defendant James Toms, acting as an attorney as aforesaid, breached his contract with the partnership, joint venture or corporation to secure liability and property damage insurance for the subject aircraft in that he failed to obtain, or allowed to lapse, said liability and property damage insurance for the subject aircraft even though the other Defendants herein had provided him with the monies sufficient to obtain or maintain said insurance.

In their verified Answer and Crossclaim in the underlying action, Wilkins and Hicks asserted a crossclaim against Mr. Toms alleging that as corporate attorney for MSA Mr. Toms acted negligently in failing (1) to obtain and make payment for the aircraft liability policy, (2) to notify any person connected with MSA of

the need for more money to pay the premiums, (3) to inform MSA that the policy had been cancelled, and (4) to obtain a renewal of the old policy or to obtain a new policy.

In his Answer and Crossclaim in the underlying action, Mr. Ward admitted that Mr. Toms had contracted to act as corporate attorney and had failed to obtain the liability insurance. Mr. Ward also asserted a crossclaim against Mr. Wilkins and Mr. Toms alleging, in part, that Mr. Toms was a licensed attorney who, in his capacity as attorney or part owner of the aircraft, undertook to obtain liability insurance on the aircraft and negligently failed to do so.

MSA made similar admissions, claims, and allegations in its verified Answer.

In the second underlying action, Civil Action No. 87 CVS 13, plaintiffs therein asserted four claims: (1) against the Professional Association for negligently and wrongfully appropriating the aircraft and entrusting it to the Professional Association's employees; (2) against both Toms and the Professional Association for negligence in allowing the aircraft liability insurance to lapse without informing the MSA members; (3) against Toms for intentional wrongdoing in allowing the insurance to lapse; and (4) against the Professional Association for gross negligence of its alleged agent, Mr. Wilkins, in failing to properly maintain the aircraft and to warn other members of MSA that certain equipment was inoperative.

We find the verified answers and crossclaims raise a genuine issue of material fact as to whether Mr. Toms undertook to obtain the liability insurance in his capacity as an attorney.

Lawyers Mutual next argues that it has no duty to defend Mr. Toms because his failure to obtain liability insurance was not a "professional service rendered to others" within the meaning of the policy language. The insurance policy, however, does not define the phrase "professional services" and our research revealed no North Carolina cases interpreting a professional services provision in a professional liability policy for lawyers.

N.C. Gen. Stat. § 84-2.1 (1985) does offer some guidance, by defining the phrase "practice law" as

> performing any legal service for any other person, firm or corporation, with or without compensation, specifically including

> the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: *Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition.*

Id. (emphasis added). The last sentence of the definition makes it clear that the statute does not encompass *all* the activities that could be considered the practice of law.

[2] Although we agree with defendant that "the mere fact that someone is an attorney does not automatically transform everything he or she does into professional services," we cannot agree that as a matter of law obtaining liability insurance can never be a "professional service." An attorney often undertakes to perform services in a professional capacity that a non-attorney could also legally perform.

The New Jersey Supreme Court has stated the test for defining "professional services" as follows:

> [T]he controlling circumstance is whether the attorney was in fact engaged for the purpose of obtaining his legal services. If he was so engaged, then the fact that in the course of the rendition of the services he stepped beyond the strictly legal role to undertake to render services which a non-lawyer could render, would not justify the conclusion that he was engaged other than as a lawyer.

Ellenstein v. Herman Body Co., 23 N.J. 348, 352, 129 A.2d 268, 270 (1957). The United States Court of Appeals for the Fourth Circuit applied this test in *Continental Cas. Co. v. Burton*, 795 F.2d 1187 (4th Cir. 1986).

Similarly, in the case before us, the key to whether Mr. Toms performed a professional service is not the act of obtaining liability insurance, but rather the capacity in which he undertook the performance of the act.

A jury could find that Mr. Toms was acting in his capacity as attorney and performed a professional service when he undertook to procure the liability insurance. For example, in *American Fire and Casualty Co. v. Kaplan*, 183 A.2d 914 (D.C. Mun. Ct. 1962), an attorney representing both the buyer and seller in a real estate transaction undertook but failed to obtain a fire insurance policy on the real estate which was subsequently damaged by fire. On appeal, the court found that the jury instructions were consistent with the policy requirement that the insured was covered only when acting as an attorney since "[t]he jury could have found on the uncontradicted testimony of Kaplan that he was acting in the capacity of an attorney (rather than as an insurance broker as defendant argued)." *Id.* at 916.

Since the verified answers and crossclaims admit and allege that Mr. Toms in his capacity as attorney for MSA undertook to obtain liability insurance, there is a genuine issue of material fact whether this act was a professional service within the terms of the policy.

[3] Defendant also contends that Mr. Toms did not render professional services "to others" within the meaning of the policy since the underlying pleadings allege that he held an interest in the aircraft. Defendant further relies upon allegations of Mr. Toms' ownership interest in the aircraft to argue no coverage and no duty to defend because of the policy's business activities exclusions.

In deciding a summary judgment motion, however, the trial court must review the " 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits [to] show that there is no genuine issue as to any material fact.' " *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830. In a 2 September 1986 deposition, Mr. Toms testified that, although he thought he was purchasing an interest in MSA in 1984, he actually acquired no interest in the non-profit corporation. This testimony raises a genuine issue of material fact as to Toms' ownership interest in the aircraft and the applicability of the business activities exclusions relied upon by Lawyers Mutual in denying any duty to defend.

Since the pleadings and depositions in the underlying lawsuits raise genuine issues of material fact concerning Lawyers Mutual's duty to defend, the trial court's order granting summary judgment must be reversed and the case remanded for resolution of the disputed issues.

Reversed and remanded.

Judges ORR and WYNN concur.

STATE OF NORTH CAROLINA v. ANDREW WAYNE GROSS

No. 9025SC1137

(Filed 17 September 1991)

1. **Criminal Law § 34.2 (NCI3d)— sexual offense—prior offense too remote—erroneous admission not prejudicial**

There was no prejudicial error in a prosecution for sexual offense, kidnapping and attempted first degree sexual offense where the court admitted testimony from a witness who had been sexually assaulted by defendant approximately seven years before the crimes alleged here. The passage of time between the alleged assaults on the witness and those against the victims here was so great as to make the existence of any plan or scheme tenuous at best; however, the State had already introduced corroborated testimony from 3 witnesses who had been sexually assaulted by defendant and there was no reasonable possibility that the outcome of the trial would have been any different had the testimony not been allowed.

Am Jur 2d, Evidence §§ 320, 330.

2. **Criminal Law § 169 (NCI3d)— sexual offense—evidence of prior record excluded—answer not recorded—issue not preserved**

Defendant in a prosecution for sexual offense and kidnapping did not preserve for appeal the question of whether the court erred by refusing to allow him to testify about his criminal

record where the record does not indicate what the witness would have answered.

Am Jur 2d, Appeal and Error §§ 603, 604.

3. **Rape and Allied Offenses § 5 (NCI3d)— sexual offense—sufficiency of evidence**

There was sufficient evidence of attempted first degree sexual offense and multiple counts of first degree sexual offense.

Am Jur 2d, Sodomy § 45.

4. **Kidnapping § 1.2 (NCI3d)— first degree kidnapping—parental consent—evidence sufficient**

There was sufficient evidence of the first degree kidnapping of a 15 year old victim, despite defendant's contention that the victim's mother was never asked whether she had consented, where the mother testified that she returned home to find a note from her son saying that he was going out with a friend and would be back around 11:30 p.m.; she fussed at him the next morning when he came home; and she did not even know defendant at that time. This evidence was sufficient for the jury to infer a lack of parental consent.

Am Jur 2d, Abduction and Kidnapping §§ 15, 16.

5. **Rape and Allied Offenses § 6.1 (NCI3d)— first degree sexual offense—no instruction on second degree sexual offense—error**

The trial court erred in a prosecution for first degree sexual offense by not giving an instruction on second degree sexual offense where defendant presented exculpatory evidence in addition to his general denials which warranted an instruction on second degree sexual offense.

Am Jur 2d, Sodomy §§ 30, 95; Trial §§ 1427, 1428.

APPEAL by defendant from judgments entered 2 August 1990 by *Judge Forrest A. Ferrell* in CATAWBA County Superior Court. Heard in the Court of Appeals 28 August 1991.

Defendant was indicted and convicted of four counts of first degree sexual offense, two counts of first degree kidnapping, and one count of attempted first degree sexual offense. Defendant was sentenced to imprisonment for each of the respective crimes as follows: four life terms; two seven year terms; and one five year term.

Because of the victim's ages, and because of the very nature of the crimes alleged, we refer to the victims by their first names only.

Lewis testified for the State that in June 1989 he was 16 years old. He went to the defendant's trailer at Baker's Mountain, and while there Lewis drank a few beers and smoked pot along with other boys who were there. After finishing the beer and pot everyone went to bed. The defendant asked Lewis to come back to his bedroom with him. In the bedroom the defendant told Lewis he did not need to sleep on the floor, but that he should sleep in the bed with him. The defendant also told Lewis that he did not allow street clothing in his bed. Lewis removed his jeans and climbed into bed. Lewis was later awakened by the defendant who was "messing" with Lewis' "privates" with his hand. Lewis pulled the defendant's hand away and "told him that [he] was not that way." The defendant then handcuffed Lewis, placed a .380 automatic pistol against Lewis' "kidney," and took Lewis to a barn outside. The defendant told Lewis that he would kill him if he awoke any of the other boys. Once inside the barn the defendant pulled down Lewis's pants, put him on the floor, engaged in anal intercourse with him and ejaculated inside of him.

Keith, age 15, testified that around 30 July 1989 he went to the defendant's home. When Keith arrived several other people were there. Keith drank beer and liquor and played poker. Between 12:00 a.m. and 1:00 a.m. the defendant began to "run everyone off and started to go to bed." Keith and two others remained for the night. The defendant told Keith that he "could bunk with him." Keith went to the defendant's bedroom and after a short conversation the defendant told him "you don't have to sleep in your clothes, I ain't going to mess with you." Keith took off his pants, shirt and shoes. Later Keith woke up and "looked down and [saw that the defendant] was rubbing his hands on [Keith's] private parts." Keith demanded that the defendant stop. The defendant pulled out a gun and told Keith that "if [he] didn't quiet down [ ] he would kill [him]." The defendant then handcuffed Keith's hands behind his back and took him out to the barn. In the barn the defendant performed fellatio on Keith and forced Keith to perform fellatio on him. Afterwards, a car drove into the driveway. The defendant then took Keith into the barn's loft, sat him on a sofa and told him not to move or make a sound. While the defendant was looking to see who it was, Keith managed to pull

the handcuffs down behind his legs so that the handcuffs were in front of him. The defendant then took Keith out of the barn, through a field and up to the back corner of the defendant's house. The defendant told Keith that he was going back to the house to get Keith's clothing and for Keith not to leave. Keith waited about five minutes and then ran to the front door, went inside and woke Chuck, another boy who was spending the night there. Keith told Chuck, "lets get out of [ ] here, [defendant] is queer and been trying to do all kinds of stuff to me." Keith then "heard somebody coming and [ ] went to the corner and put a blanket over [his] head and set [sic] down." The defendant walked over to Keith and pulled the blanket off of him. Defendant then picked Keith up and carried him back to his bedroom. The defendant again handcuffed Keith's hands behind his back and left the room. When the defendant returned, he placed Keith on a bed and attempted to have anal intercourse but was unable to penetrate him. The defendant then told Keith, "[i]f [he] told anybody he would kill [him]." Keith then got up, put his clothes on and left.

Phillip testified that at age 14 in November 1989 he went to the defendant's trailer with some others. When Phillip arrived at the defendant's trailer he began drinking beer and liquor, smoking pot, and playing poker. Later that evening everyone left except a boy named Wayne, the defendant, and Phillip. The defendant then told Phillip to go back to his bedroom. Phillip did and when the defendant got there he "got the gun [from the dresser] and said that [Phillip] had to take off [his] clothing and to get in the bed and said that if [Phillip] said anything or did anything that he would kill [him]." The gun was a .20 gauge sawed off double barrelled shotgun. Mr. Gross then had anal sex with Phillip.

The State also called Michael Joe Reep, age 24, to the stand. Mr. Reep testified that approximately seven years earlier (when he was 17) he was living in his uncle's trailer. At that time the defendant came over to the trailer and threatened to beat him up if he did not have anal sex with the defendant. He also testified that the defendant hit him in the face with his fist which had a large class ring on it.

On 13 December 1989 Detective Crouse of the Catawba County Sheriff's Department obtained a search warrant for the defendant's premises. In his search Detective Crouse seized the .20 gauge dou-

ble barrelled shotgun, but was unable to locate a .380 caliber pistol on the premises.

The defendant testified that he knew Lewis, Keith, and Phillip. The defendant also testified that he did drink but did not smoke marijuana nor allow the boys to smoke marijuana at his trailer. He stated that he had never made any sexual advances toward any of the boys, including Mr. Reep, and he had never used a firearm against them. Defendant further testified that he had never engaged in any homosexual acts, that he had lived with two or three different women, and had fathered four children. Defendant admitted that he once owned a .380 automatic pistol, but stated that he had sold it to his brother in February or March of 1989. Defendant also found a broken pair of handcuffs in 1981 which he kept in his tool box. The tool box containing the handcuffs was stolen from his front porch in April 1989. Defendant also testified that he had lost his high school class ring before entering the Army in 1968 and that he did not attend college.

Keith Collins, age 19, testified that he lived with defendant during a portion of the summer of 1989. He was never assaulted by the defendant and as far as he knew neither James nor Keith spent the night at the defendant's home in June of 1989. Mr. Collins also testified that the defendant kept a broken pair of handcuffs in a tool box.

The defendant's evidence also showed that Mr. Ronald Gray stayed at the defendant's trailer on Baker's Mountain from 17 November 1989 through 27 November 1989. Mr. Gray testified that during his stay with the defendant, Phillip stayed there about three days, and that nothing unusual happened during those three days.

Other witnesses for the defense testified that the victim Keith's reputation for honesty was not very good. From verdicts of guilty and judgment imposing sentences, defendant appeals.

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

Christian, Houck, Sigmon & Green, by Daniel R. Green, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first contends that the trial court committed prejudicial error by admitting Michael's testimony that he had been sexually assaulted by the defendant approximately seven years before the crimes alleged here. We disagree that the error was prejudicial.

> [E]vidence of prior sex acts may have some relevance to the question of a defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity. *See State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988); *State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986). Such evidence is not offensive to the general prohibition against character evidence because it is admitted not to prove defendant acted in conformity with conduct on another occasion but rather as circumstantial proof of defendant's state of mind. *State v. Weaver*, 318 N.C. 400, 348 S.E.2d 791 (1986). Indeed, . . . we have stated that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." [Citation omitted.]
>
> * * *
>
> Nonetheless, the admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted.

State v. Jones, 322 N.C. 585, 588, 369 S.E.2d 822, 823-824 (1988).

The defendant relies upon *State v. Jones*, 322 N.C. 585, 369 S.E.2d 194 (1988). In Jones, the defendant was convicted of two counts of first degree rape and three counts of taking indecent liberties with a child. The acts allegedly occurred over the course of almost three years, and were committed against the defendant's twelve year old stepdaughter. *Id.* at 586, 369 S.E.2d at 822. During the State's presentation of evidence, a witness testified that she had also been sexually assaulted by the defendant on numerous occasions. *Id.* The alleged assaults occurred some seven years before

and were carried out in much the same manner. *Id.* The court ordered a new trial stating:

> Evidence of other crimes must be connected by point of time and circumstance. Through this commonality, proof of one act may reasonably prove a second. However, the passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous. Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

Id. at 590, 369 S.E.2d at 824.

Here, we hold that it was error to admit Michael Reep's testimony. The passage of time between the alleged assaults upon Mr. Reep and those against the victims here is so great as to make the existence of any plan or scheme tenuous at best. The issue before us now is whether the admission of this testimony was prejudicial error. After careful review of the record before us, we conclude it was not prejudicial error.

"An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed. N.C. Gen. Stat. § 15A-1443." *State v. Smith*, 87 N.C. App. 217, 222, 360 S.E.2d 495, 498 (1987), *disc. review denied*, 321 N.C. 478, 364 S.E.2d 667 (1988). Here, the State had already introduced testimony from Lewis, Keith, and Phillip that each had been sexually assaulted by the defendant. Each boy's story was corroborated by their parents or friends. While Michael Reep's testimony was inadmissible, "the defendant here has not persuaded us that there exists any reasonable possibility that the outcome of the trial would have been any different had the testimony not been allowed." *Id.* at 222, 360 S.E.2d at 498. Defendant's first assignment of error is overruled.

II

[2] Defendant next argues the trial court erred in refusing to allow him to testify about his criminal record. However, the record does not indicate what the witness would have answered had he been permitted to do so. The defendant has failed to properly

preserve this issue for appeal. *State v. Kirby*, 276 N.C. 123, 132-133, 171 S.E.2d 416, 423 (1970).

III

[3] By his next assignment of error defendant argues the trial court erred by denying defendant's motions to dismiss all charges other than the first degree kidnapping of Keith. We disagree. The defendant admits in his brief that the State introduced "evidence of each element of each offense." Indeed, the record is replete with evidence sufficient to support each conviction.

IV

[4] Defendant also argues the trial court erred by failing to dismiss the charge of first degree kidnapping involving Keith, the 15 year old alleged victim. G.S. 14-39 defines kidnapping as follows:

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

Defendant contends the conviction should be set aside because Keith's mother, who "was present in the court and testified for the State, [] was never asked whether or not she consented to the defendant's alleged confinement, restraint or removal o[f] her son." This argument is wholly without merit. Keith's mother testified that she returned home to find a note from her son saying that he was going out with a friend and would be back around 11:30 p.m. When Keith came home the next morning his mother "started fussing at him for not calling or not coming home. . . ." Further, Keith's mother testified on cross-examination that she did not even know the defendant at the time. This evidence is sufficient for the jury properly to infer a lack of parental consent. This assignment is overruled.

V

[5] Finally, defendant contends the trial court in the first degree sexual offense case involving Lewis erred in refusing to instruct the jury on the lesser included offense of second degree sexual offense. " 'The trial court is required to submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees.' [Citations omitted.]" *State v. Watkins*, 89 N.C. App. 599, 604, 366 S.E.2d 876, 879, *disc. review denied*, 323 N.C. 179, 373 S.E.2d 123 (1988) (quoting *State v. Jones*, 304 N.C. 323, 330-331, 283 S.E.2d 483, 487-488 (1981)).

> "The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense [], and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial court should properly exclude from jury consideration the possibility of a conviction of [a lesser offense]. *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658."
>
> Where a defendant denies having committed a complete offense, [], but there is evidence as to every element which negates that denial, application of *Strickland* would indeed be proper. In that situation, the jury would be correctly charged to find the defendant guilty of [the offense] or not guilty. However, [], where the only evidence of the defendant's innocence as to a particular *element* may rest solely on the defendant's denial, then reliance on *Strickland* would be misplaced.

State v. Williams, 314 N.C. 337, 352-53, 333 S.E.2d 708, 718-19 (1985).

In the instant case the defendant did not deny an element of first degree sexual offense. Rather, he denied the complete offense for each of the indictments, and the State presented evidence to negate each denial. Defendant testified:

> Q: Did you ever assault any of these three boys sir?
>
> A: No sir.
>
> Q: Or this Mickeal [sic] Joe Reep[?]
>
> A: No sir.

Q: Did you ever make any sexual advances or assaults on any of these people.

A: No sir.

The issue before us now is whether the defendant presented any exculpatory evidence other than his general denials. Here, the defendant admitted that he once owned a .380 caliber pistol, but testified that he had sold the weapon before the alleged assaults on Lewis. Keith Collins testified that the defendant had sold that pistol, and Ronald Gray testified that he saw the defendant sell the pistol to his brother. Nathan Dellinger also testified that while he had seen the .380 pistol in March of 1989 he did not see the gun in June or July despite visiting the defendant on the weekends. Finally, Detective Crouse testified that he was unable to locate the pistol during his search of defendant's trailer.

This evidence warrants an instruction on second degree sexual offense in the alleged assault on Lewis which allegedly involved a .380 caliber pistol. Accordingly, we reverse the first degree sexual offense conviction involving Lewis and remand for a new trial. Because the defendant did not present any other exculpatory evidence other than his own general denials, we find no error in the remaining first degree sex offense convictions.

As to No. 90 CrS 1007-1011, 1013, no error.

As to No. 90 CrS 1006, reversed and remanded for new trial.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. RUDOLPH LEE BUNCH

No. 906SC1085

(Filed 17 September 1991)

1. **Narcotics § 4.2 (NCI3d)— sale or delivery of cocaine—possession with intent to sell—sufficiency of evidence**

The State's evidence was sufficient to support defendant's convictions of the sale or delivery of cocaine and possession of cocaine with intent to sell or deliver where it tended to

show that, when an undercover officer approached defendant and another man, defendant asked, "How Many?" and the officer replied that he "wanted one"; defendant told the officer to drop the money on the ground, and the officer put a twenty dollar bill on the ground; defendant handed a tinfoil packet to the other man, who picked up the money and handed the tinfoil packet to the officer; and the packet contained one rock of crack cocaine.

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

2. Narcotics § 3.3 (NCI3d)— common practice in drug transactions—testimony by police officer

The trial court did not err in permitting a police officer to testify that it was a common practice in drug transactions for one person to hold the money and for another person to carry the drugs so that, in the event of an arrest, one individual would not have possession of both the money and the drugs. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Drugs, Narcotics, and Poisons § 46.

3. Criminal Law § 482 (NCI4th)— remarks by district attorney—presence of jury venire—improper communication—absence of prejudice

Although remarks by the district attorney concerning the workload of the district attorney's office and the necessity of weekend work in order to prepare cases for trial, made in the presence of the jury venire in response to the trial court's remarks the previous day about disorganization and inefficient use of court time, may have violated Professional Conduct Rule 7.8(a), defendant was not prejudiced by these remarks where the remarks were not made during defendant's trial or on the same day as his trial; they were only tangentially related to the proceedings involving the defendant; and defense counsel never requested cautionary instructions, explored any potential prejudice by questioning the venire, or exhausted his challenges to the panel.

Am Jur 2d, Trial §§ 499, 1478.

4. Criminal Law § 1114 (NCI4th)— failure to admit guilt—improper aggravating factor

The trial court erred in aggravating defendant's sentences for narcotics offenses because defendant failed to admit guilt.

Am Jur 2d, Criminal Law § 599; Drugs, Narcotics, and Poisons § 48.

APPEAL by defendant from Judgments entered 15 June 1990 by *Judge Samuel T. Currin* in HERTFORD County Superior Court. Heard in the Court of Appeals 22 August 1991.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles J. Murray, for the State.

Overton and Carter, by Larry S. Overton, for defendant-appellant.

COZORT, Judge.

Rudolph Lee Bunch was convicted of one count of felonious sale or delivery of cocaine and one count of felonious possession with the intent to sell a controlled substance. Defendant was sentenced to the ten-year maximum sentence on each charge to run consecutively. Defendant contests on appeal the following: (1) the trial court's denial of defendant's motion to dismiss the charges for insufficiency of the evidence; (2) the admission of a police officer's testimony concerning common practices among individuals involved in drug transactions; (3) the trial court's denial of defendant's motion for a continuance and motion for a mistrial based on comments made by the district attorney in the presence of the jury venire; and (4) the trial court's consideration of defendant's denial of guilt as a non-statutory aggravating factor in determining his sentence. We find no reversible error in the trial. We remand for resentencing.

[1] The State's evidence at trial tended to show that, on the evening of 23 September 1989, Agent Scott J. Parker, an undercover agent working for the Bertie-Hertford-Northampton Tri-County Drug Task Force, went to the intersection of First and Maple Streets in Ahoskie, North Carolina. Agent Parker observed defendant Rudolph Bunch, (known as "Root Doctor"), and another male, Michael Britt, as they approached passing automobiles in the area. Agent Parker watched as defendant handed small tinfoil packages

to Britt, who then handed the packs to the passengers in the stopped vehicles. As Agent Parker approached the men, defendant asked, "how many?" to which Agent Parker replied that he "wanted one." Defendant told the officer to "drop the money on the ground." Agent Parker put a twenty-dollar bill on the ground. Defendant handed one of the packets to Britt who picked up the money and then handed the pouch to Parker. Agent Parker did not see Britt give the $20.00 to defendant. The tinfoil packet contained one rock of crack cocaine. The defendant offered no evidence.

Defendant argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. This argument is without merit. "In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences which can be drawn therefrom. If there is 'substantial evidence' of each element of the charged offense, the motion should be denied." *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citations omitted). First, defendant contends that the State failed to prove the charge of sale or delivery of cocaine. Defendant argues that Agent Parker never delivered any money directly to defendant, nor did the agent see Mr. Britt deliver any money to defendant. This argument fails. Defendant cites *State v. Wall*, 96 N.C. App. 45, 384 S.E.2d 581 (1989), to support his position. We find *Wall* distinguishable. In *Wall*, defendant was indicted for sale and delivery of cocaine to Robert McPhatter. The State's evidence tended to show that McPhatter gave $25.00 to Tabatha Riley, who actually purchased the cocaine from defendant Wall. There was no evidence defendant knew Riley was buying the cocaine for McPhatter. This Court found a fatal variance between the indictment and the evidence, because the defendant had no knowledge that the middleman was acting on behalf of the undercover police officer. The present case is distinguishable. Defendant had direct contact with Agent Parker and even spoke to him about buying a package of cocaine. Therefore, the trial court did not err in denying the motion to dismiss the sale or delivery charge.

Second, defendant asserts that the State failed to present evidence sufficient to sustain a conviction on the charge of possession with the intent to sell or deliver. This argument also fails. The court in *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985), stated, "[i]t is the *intent* of the defendant that is the gravamen of the offense" of possession with the intent to sell or deliver.

Id. at 129, 326 S.E.2d at 28 (emphasis in original). Therefore, the defendant need not complete the sale to be found guilty of possession with the intent to sell or deliver. In the present case, defendant's words and actions established the intent to sell, despite his not having physically received the money from the transaction. The trial court did not err in denying the defendant's motion to dismiss as to the possession charge.

[2] Defendant next argues that the trial court erred in admitting into evidence a police officer's testimony concerning the common practices of drug dealers. We find no error as to the admissibility of the testimony in this particular case. Evidence is admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," N.C. Gen. Stat. § 8C-1, Rule 401 (1988), and if it has probative value which outweighs any potential prejudice to the defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (1988). The test for prejudicial error is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Heard*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974). Under N.C. Gen. Stat. § 8C-1 Rule 701 (1988), opinion testimony from a lay witness is permitted when it is "rationally based on the perception of the witness" and is helpful to the jury. As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible.

At trial, Agent Parker testified that it was common practice in drug transactions in Ahoskie for one person to hold the money and for another person to carry the drugs. The purpose for such practice was that in the event of an arrest, one individual would not have possession of both the money and the drugs. Other courts have found similar testimony as being non-prejudicial. In *State v. Givens*, 95 N.C. App. 72, 381 S.E.2d 869 (1989), we held that admission of testimony that scales on defendant was drug paraphernalia was not prejudicial. In *State v. Hart*, 66 N.C. App. 702, 311 S.E.2d 630 (1984), we found admission of testimony regarding use of quinine and manitol as common practice of drug dealers was not prejudicial. Since the evidence in this case was relevant, based on personal knowledge, and non-prejudicial, the trial judge did not err in admitting the police officer's testimony.

[3] Defendant further alleges that the trial court committed reversible error by denying defendant's motion for a continuance and motion for a mistrial based on comments made by the District Attorney in the presence of the jury venire. Although we find the District Attorney's speech before the jury to have been inappropriate, we find no prejudicial error. On Monday, 15 June 1990, Judge Samuel T. Currin, the presiding judge, commented in open court, out of the presence of the jurors called for jury service that week, upon what he perceived to be the disorganization and inefficient use of time in court. When court opened on Tuesday, 16 June 1990, the District Attorney responded to the remarks the judge made on Monday. The District Attorney's statements were made in open court and in the presence of the jurors called for jury service that week. The speech consisted of the following:

> Your Honor, I have several matters but the first matter for trial, I would like to say this if I may in front of the jury concerning remarks yesterday about being disorganized. This is the third straight week that I've been in Superior Court. We only have, I have two assistants that work with me and we have three counties. Last week we had Superior Court going on in two different counties. On Memorial Day, our office worked on Memorial Day. Last weekend we worked. When we finished work last week on Thursday or Friday, we had finished court on Wednesday in Bertie County. I held court in, on Thursday, in District Court and Friday District Court and worked Saturday afternoon and Sunday afternoon getting these cases ready for court this week. We only have one person to get these cases ready for court when we do that. I'd like for the jury to be aware of this, the time that we spent. I'm not complaining about the time that we spent on the weekends or the night time because I enjoy my job and I, I wouldn't be doing it if I did not. I want the jury to be aware of the time that we have to get these cases ready. When you have three straight weeks of Superior Court, it's difficult to get them ready, to get them ready the way you would like to do so. We make every opportunity to do so. As far as Mr. Flower, I met with Mr. Flower Friday afternoon to go over about 12 of his cases and some of his folks that he had yesterday, it was the first time that he had an opportunity to talk with them because he had been in custody for, for the entire time. I'd like for the jury to be aware of the

> time that we spent. Sometimes they don't know. You know, you don't do this job for perhaps the money. I do it because I, I feel like I'm trying to do something good and uh, and you'd like to be appreciated for the work that you do do. I wanted the jury to be aware of the time that, the time that I had spent over the past three weeks and the weekends that I give up from my family to get these cases ready for trial.

Defendant's case was called for trial the day following the District Attorney's speech. Prior to jury selection, defense counsel moved to continue the matter alleging the prejudicial effect the District Attorney's speech had on the jurors who were in court. The motion was denied. A later motion for a mistrial based on the same grounds was also denied. We find no reversible error.

A motion for a continuance pursuant to N.C. Gen. Stat. § 15A-952(b)(1) (Cum. Supp. 1990) is generally addressed to the sound discretion of the trial judge whose ruling is not subject to review absent a gross abuse of discretion. *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981). A trial court's ruling on a motion for a mistrial pursuant to N.C. Gen. Stat. § 15A-1061 (1988) is also not reviewable on appeal absent the appearance of a manifest abuse of discretion. *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990). We find the defendant has failed to demonstrate an abuse of discretion. The District Attorney's speech in the present case was only tangentially related to the proceedings involving the defendant. The remarks were not made during defendant's trial nor on the same day as his trial. The record reflects that defense counsel never requested cautionary instructions, explored any potential prejudice by questioning the venire, or exhausted his challenges to the panel. Consequently, defendant cannot show any unfair prejudicial effect which would justify a finding of abuse of discretion.

We hasten to add that this Court's decision should not be interpreted as approval of the District Attorney's speech. The District Attorney's speech appears to run afoul of Professional Conduct Rule 7.8(a) (1991) which states: "Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case." The official comment following Rule 7.8(a) stresses that there should be no extrajudicial communication with veniremen prior

to trial or with jurors during trial by or on behalf of a lawyer connected with the case.

[4] Finally, we turn to defendant's assertion that the trial court erred by imposing the maximum sentence on defendant because the defendant denied guilt. We agree, finding this case undistinguishable from *State v. Williams*, 98 N.C. App. 68, 389 S.E.2d 830 (1990), in which this Court held that while the admission of guilt by a defendant may be a mitigating factor, the failure to admit guilt cannot be used as a factor in aggravation. In the present case, the judge entered the maximum sentence on each charge and stated:

> Mr. Bunch, I imposed the sentence I have in this case because based on the evidence that I have heard and have seen here, just the impression that you have been a major drug dealer in Ahoskie and Ahoskie has a very major drug problem and I do not know anything else to do in your case especially even in the face of your guilt you stand up here and deny it, I . . . impose the maximum sentence that I can to teach you a lesson as well as to protect society and to protect the people of Ahoskie.

Defendant is entitled to a new sentencing hearing.

No error in trial, remand for resentencing.

Judges ORR and LEWIS concur.

ELTON EUGENE SHAW AND EVELYN MARIE THOMPSON SHAW, PLAINTIFFS v. LARRY MILTON BURTON, REX OIL CO., INC. AND MARGARET FOSTER KNIGHT, DEFENDANTS

No. 8918SC1401

(Filed 17 September 1991)

1. Automobiles and Other Vehicles § 665 (NCI4th)— automobile accident—contributory negligence—directed verdict for defendants—proper

The trial court properly directed a verdict for defendants Burton and Rex Oil Company in an action arising from an

automobile accident where the evidence shows without contradiction that before being hit the male plaintiff stood in the highway for two or three minutes when not under a disability and not engaged in an emergency task, without watching for vehicles entitled to use the way.

Am Jur 2d, Automobiles and Highway Traffic §§ 422, 475.

2. **Automobiles and Other Vehicles § 571 (NCI4th)— automobile accident—last clear chance—directed verdict improper**

The trial court erred in an action arising from an automobile accident by ruling that last clear chance did not apply to defendant Knight and directing a verdict in her favor where defendant Knight was nearly a half mile away traveling on a straight, level highway at a speed of only 35-40 miles per hour in clear weather on a dark night when an accident scene came into view; the accident scene consisted of two lighted vehicles and three men astride her line of travel; facing her as she drove along were lights that ran along the side of a 45-foot tanker and the taillights and red reflectors of an automobile; and she saw neither the men nor vehicles and made no attempt to stop the car until it was virtually upon them.

Am Jur 2d, Automobiles and Highway Traffic §§ 438-441.

APPEAL by plaintiffs from judgment entered 8 August 1989, *nunc pro tunc* 3 August 1989, by *Judge Lester P. Martin, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 23 August 1990.

Plaintiffs seek damages for injuries allegedly sustained by the male plaintiff in two accidents that occurred within a few minutes of each other during the early morning of 28 October 1986 at the same place on Chimney Rock Road in Greensboro. The first accident occurred at about 5:20 a.m. when a southbound oil tanker driven by Larry Burton, an employee of Rex Oil Company, turned left to enter an oil terminal on the east side of the road and collided with Shaw's northbound automobile. The second accident happened three or four minutes later when Shaw, defendant Burton, and another man were struck by the northbound automobile of defendant Margaret Foster Knight while they stood in the highway near the wrecked vehicles. The complaint alleges that Shaw was injured in both accidents; that defendants Burton and Rex Oil Company are jointly and severally responsible for the damages resulting

from the first accident; and that all three defendants are jointly and severally responsible for the damages resulting from the second accident. In answering the complaint all the defendants alleged that Shaw contributed to the second accident by negligently standing in the road inattentive to Ms. Knight's approaching car. In their reply to defendant Knight's answer plaintiffs alleged that she had the last clear chance to avoid the accident. At the close of plaintiffs' evidence pursuant to defendants' motions, the court ruled that the evidence establishes the male plaintiff's contributory negligence as a matter of law but does not support the last clear chance doctrine, and directed verdicts against all of plaintiffs' claims based upon the second accident. In trying the issues based upon the first accident, the jury found that Shaw was not injured in that accident by the negligence of defendants Burton and Rex Oil Company and judgment was entered on the verdict.

In regard to the second accident plaintiffs' evidence, when viewed in the light most favorable to them, tends to show the following: The accident occurred about 5:23 a.m. while it was still dark. At the point involved Chimney Rock Road runs north and south, is approximately 23½ feet wide, and has a wide, level shoulder. After the first collision plaintiff's car and the 45 foot oil carrying rig completely blocked both lanes of the road. The tractor was headed into the oil terminal at a southeasterly angle and the front part of its left side was off the traveled part of the highway; the tanker, still attached to the tractor, extended to the opposite side of the road at a northwesterly angle. Plaintiffs' 1985 Oldsmobile was slightly to the south of the tanker, headed in a northeasterly direction; its right front was opposite the right front wheels of the tanker and its left rear was at the center line of the road. Shaw immediately got out of his car, the lights of which were left on, and looked at the damage done. Immediately after the impact Burton radioed another Rex Oil driver in the area, who called the police, and in getting out of the tractor he left the engine running and all of the rig's lights on. The tractor's headlights were shining in the direction of the oil terminal; the lights along the right side of the tanker faced south and its rear lights shined in a northwesterly direction. The headlights on plaintiff's car shined in a northeasterly direction, its taillights and red reflectors faced northbound traffic. The area was also illuminated to some extent by overhead lights at the front of the adjacent oil terminal. Neither Burton nor Shaw activated any flashers or put any flares or other

warning devices on the roadway. Shaw's vehicle was substantially damaged and he was visibly upset. Shaw asked Burton what he was doing in crossing in front of his car like that. Burton said, "Calm down, take it easy. I did not see you. . . . It was my fault. I will take care of everything." Neither appeared to be injured and each asked the other if he was hurt. Shaw replied that he felt pain in his back, shoulder and neck. While Shaw and Burton looked at the damages Richard Brown, a worker at the oil terminal, joined them in the road next to the vehicles. About three minutes after the collision while standing between the car and the tanker, and while facing in a northwesterly direction Shaw, Burton and Brown were hit by defendant Knight's northbound car, the first vehicle to approach the scene after the collision. The weather was clear. The pavement was smooth, dry, straight and level; south of the scene no obstruction blocked the view of northbound traffic for approximately a half a mile. The Knight car approached the scene at a lawful speed of 35 to 40 miles per hour with its headlights on low beam and hit the three men in the back, knocked them under the oil tanker, collided with the right rear of the tractor, and ended up just to the right of plaintiffs' car. Ms. Knight did not see Shaw's automobile, the oil tanker, or the three men "until right before the accident." The horn was not sounded and her car left 29 feet of skid marks. A moment or two later, traveling the same route that Knight had, the police officer who responded to the call about the first accident saw the accident scene as he approached and had no trouble stopping.

Smith Helms Mulliss & Moore, by McNeill Smith and George Kimberly, for plaintiff appellants.

Henson Henson Bayliss & Sue, by Jack B. Bayliss and James H. Slaughter, for defendant appellees Larry Milton Burton and Rex Oil Co., Inc.

Frazier, Frazier & Mahler, by Robert A. Franklin and James D. McKinney, for defendant appellee Margaret Foster Knight.

PHILLIPS, Judge.

The only questions of substance presented for our determination are whether the court erred in directing verdicts against plaintiffs' claims based upon the second accident. Other questions are posed but they either have no basis or are superfluous. Plaintiffs' arguments that the court erred in refusing to instruct the jury

as to their damages in the second accident and the negligence of defendants Burton and the oil company in causing it serve no purpose; for if the verdict directed in the defendants' favor is upheld the refusals to instruct were proper, and if it is not a new trial will be ordered. Their other argument—that they were prejudiced during the trial by the court, over plaintiffs' "repeated objections," permitting defendant Knight to cross-examine plaintiff with photographs that counsel refused to let plaintiffs' counsel see—has no foundation as the record contains no objection to the cross-examination involved.

[1] As to the verdict directed in favor of defendants Burton and Rex Oil Company, plaintiffs' evidence does establish the contributory negligence of the male plaintiff in regard to the second accident as a matter of law and the verdict directed in favor of these defendants with respect thereto was proper. All persons *sui juris* are required to exercise reasonable care for their own safety, *Garmon v. Thomas*, 241 N.C. 412, 85 S.E.2d 589 (1955), and the evidence clearly establishes that such care was not exercised by the male plaintiff in regard to the second accident. For their evidence shows without contradiction that before being hit by defendant Knight's car the male plaintiff stood in the highway or road for two or three minutes, when not under a disability and not engaged in an emergent task of any kind, without watching out for vehicles entitled to use the way. Such indifference to one's own safety is not reasonable care; it can only be characterized as negligence. *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967).

[2] But, contrary to the court's ruling, plaintiffs' evidence does give rise to the last clear chance doctrine and the verdict directed in favor of defendant Knight was error. In ruling that the doctrine does not apply to defendant Knight, the court in effect concluded that the only inference that can reasonably be drawn from the evidence is that in driving her car along the road under the conditions that then existed defendant Knight in the exercise of reasonable care could not or should not have discovered that the two vehicles and the three men were in the roadway in time to avoid striking them. We view the evidence differently. When viewed in its most favorable light for the plaintiffs the evidence indicates, in gist, that defendant Knight was nearly a half mile away traveling on a straight, level highway at a speed of only 35-40 miles per hour in clear weather, on a dark night, when the accident scene consisting of two lighted vehicles and three men astride her line of

travel came into her view, and that facing her as she drove along were lights that ran along the side of a 45-foot tanker and the taillights and red reflectors of an automobile, and that she saw neither the men nor vehicles and made no attempt to stop the car until it was virtually upon them. This evidence does not necessarily lead to the conclusion that defendant could not have discovered the perilous situation in time to avoid the collision. It can reasonably be inferred from it, we think, that had defendant maintained a proper lookout as she drove along she could have discovered the peril in ample time to stop her car before colliding with either the men or the vehicles. In *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968), under circumstances that were somewhat similar, but less favorable to the injured person than are those in this case, the last clear chance doctrine was applied. In *Exum*: The motorist at 55 m.p.h. was traveling 15 or 20 miles an hour faster than defendant Knight, and thus required a longer distance in which to stop than she did; the motorist's maximum visibility was 200 yards, only a fraction of defendant Knight's half mile; the person injured was barely on the edge of the pavement and his car was a foot or so off the pavement, whereas in this case two lighted vehicles and three men were in the middle of defendant's lane of travel. As indicated in *Exum* it is not essential to the application of the doctrine that defendant Knight saw or in the exercise of reasonable care could have seen the imperilled men as she drove along; it is enough that she could see the lighted vehicles blocking the highway; for from its inception the doctrine has applied to imperilled property as well as persons, *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842), and the lighted vehicles in the highway were an indication to defendant not only that they would be damaged if she did not stop, but also that some dismounted passengers might be near.

No error is found in the judgment dismissing all of plaintiffs' claims against defendants Burton and Rex Oil Company. The judgment dismissing plaintiffs' claims against defendant Knight is reversed and the matter remanded to the Superior Court for a new trial in accordance with this opinion.

No error in part; reversed in part; and remanded.

Judges JOHNSON and PARKER concur.

CENTURY 21, TRENT PROPERTIES, LTD., AND ELWOOD MANESS, PLAINTIFFS v. GEORGE W. DAVIS, JR., JACK P. HUDDLE, AND JACK P. LEAVEL, DEFENDANTS

No. 903SC1005

(Filed 17 September 1991)

1. **Brokers and Factors § 23 (NCI4th); Contracts § 116 (NCI4th)— option to purchase—provision for broker fee—broker as third party beneficiary**

Where an option to purchase land required the buyers to pay a 6% commission to the real estate broker who negotiated the sale, the broker had a right as a third party beneficiary of the option contract to enforce the buyers' promise to the sellers to pay the commission.

Am Jur 2d, Brokers § 188.

2. **Brokers and Factors § 31 (NCI4th)— option to purchase—provision for broker fee—ten-day closing requirement not condition precedent**

Where an option to purchase land required the buyers to pay a 6% commission to the real estate broker who negotiated the sale upon the exercise of the option and the closing of the sale, a requirement in the option that closing occur within ten days after the buyers gave notice of intent to exercise the option was not a condition precedent to the buyers' obligation to pay the 6% commission, and the broker was entitled to recover the commission from the buyers even though the closing of the sale occurred well after the ten-day time limit for closing had passed and only after the buyers filed suit against the sellers to compel conveyance of the land.

Am Jur 2d, Brokers § 188.

APPEAL by defendants from order entered 20 June 1990, *nunc pro tunc* 30 May 1990, in CRAVEN County Superior Court by *Judge James D. Llewellyn*. Heard in the Court of Appeals 10 April 1991.

Ernest C. Richardson, III, for plaintiff-appellee Century 21, Trent Properties, Ltd.

Ward, Ward, Willey & Ward, by Thomas M. Ward, for plaintiff-appellee Elwood Maness.

Henderson, Baxter & Alford, P.A., by David S. Henderson, for defendant-appellants.

WYNN, Judge.

This appeal questions the entitlement of plaintiff-appellees to recover real estate sales commissions allegedly due under the terms of a contract giving the defendant-appellants an option to purchase two separate tracts of land. The pertinent facts are as follows.

In April 1975, Alton Harris and his wife, Evelyn Harris, executed a contract giving defendant George W. Davis, Jr., two separate options to purchase two separate tracts of land. Each Option to Purchase provided that once the Harrises were notified of an intent to exercise an option, they were to convey the tract of land within ten days of the notice. Upon the exercise of the first option, the Harrises were to receive $300,000.00 and, upon the exercise of the second, $500,000.00. Prior to exercising the first option, Davis assigned partial interests in the Options to Purchase to defendants Jack P. Huddle and Jack P. Leavel.

The defendants exercised the first option under the agreement without incident. However, when the defendants notified the Harrises on 5 August 1988 of their intent to exercise the second option, the Harrises requested additional time within which to close the sale. Despite the ten-day closing requirement, defendants agreed to postpone the closing until 26 August 1988. When that date arrived, the Harrises either failed or refused to convey the subject property.

Defendants subsequently filed suit against the Harrises in an attempt to compel the conveyance of the second tract of land. In a letter dated 30 December 1988, defendants and the Harrises agreed to settle the lawsuit. In the letter, it was agreed that the Harrises would convey the subject property to the defendants in exchange for the previously agreed upon purchase price of $500,000.00, less the Harris' pro rata share of ad valorem taxes, and less the payoff amount of two pre-existing deeds of trust.

Following the settlement and subsequent dismissal of the suit between the defendants and the Harrises, the plaintiffs herein demanded $30,000.00 in real estate sales commissions from the defendants who, under the terms of the Option to Purchase, had agreed to pay six (6%) percent of the sales price "to Century 21

Trent Properties, Ltd., as a fee for negotiating [the] sale." When the defendants refused to pay the commission, Century 21 and Elwood Maness, a real estate agent employed by Century 21, brought this action against the defendants alleging that as third-party beneficiaries of the Option to Purchase contract between defendants and the Harrises, they were entitled to the benefit of the defendants' promise to the Harrises to pay the real estate sales commission. The defendants answered by generally denying that they were indebted to the plaintiffs, and by asserting as an affirmative defense the Harris' initial failure to convey the property in accordance with the terms of the Option to Purchase.

Following discovery, plaintiffs moved for summary judgment. After a hearing on the motion, the trial court granted summary judgment for plaintiffs. From the entry of summary judgment in favor of the plaintiffs, defendants appeal.

I

Defendants' sole assignment of error in this appeal is that the trial court erred in granting summary judgment in favor of the plaintiffs. For the reasons which follow, we disagree and, therefore, affirm the judgment of the trial court.

Summary judgment is properly granted where the pleadings, discovery documents and affidavits, when viewed in the light most favorable to the non-movant, support a finding that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Frendlich v. Vaughan's Foods of Henderson, Inc.*, 64 N.C. App. 332, 334, 307 S.E.2d 412, 414 (1983).

Defendants first contend that summary judgment was improperly granted because there was a genuine issue of material fact. They argue that because the land which the Harrises were essentially "forced" to sell under the threat of suit was not conveyed within the agreed upon time limitation, a question of fact existed as to whether the conveyance was made in accordance with the terms of the Option to Purchase. In our opinion, this does not raise a question of fact.

A determination of whether the land contemplated by the second option was conveyed in accordance with the terms of the Option to Purchase is a question of law which is determined by applying the language of this particular contract and the law of contracts in general to the facts of this case. Moreover, even if this were

a factual matter, there is no question but that the second parcel of land was not conveyed within the agreed upon time limitation. Accordingly, we find no genuine issue of material fact in this case.

[1] Defendants next contend that the plaintiffs were not entitled to judgment as a matter of law. We note initially that the case before us is atypical of the usual case involving the entitlement of a real estate broker to a sales commission. The usual case involves the situation where a seller, pursuant to a "listing agreement," contracts *with the broker* to pay the broker a sales commission in exchange for the broker's promise to procure a buyer for the seller's real property. *See, e.g., Ross v. Perry*, 281 N.C. 570, 189 S.E.2d 226 (1972); *S & W Realty Bonded Commercial Agency, Inc. v. Duckworth & Shelton*, 274 N.C. 243, 162 S.E.2d 486 (1968); *Bonn v. Summers*, 249 N.C. 357, 106 S.E.2d 470 (1959). In this case, however, the sellers contracted *with the buyers* for the buyers to pay the broker's commission. Thus, the general rule, which states that "when a broker, pursuant to an agreement *with the owner of certain real property*, procures a purchaser for that property who is ready, willing and able to buy the property upon the terms offered, he is entitled to his commission," *Tryon Realty Co. v. Hardison*, 62 N.C. App. 444, 448, 302 S.E.2d 895, 898 (1983) (emphasis added), is inapplicable. Instead, the basic rules relating to contracts for the benefit of third parties are more appropriate under the facts of this case.

" 'It is well-settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach . . . .' " *Alva v. Cloniger*, 51 N.C. App. 602, 606, 277 S.E.2d 535, 538 (1981) (quoting *Howell v. Fisher*, 49 N.C. App. 488, 493, 272 S.E.2d 19, 23 (1980)). In determining whether one is an intended beneficiary, the Restatement (Second) of Contracts § 302 (1979) provides useful guidance:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right of performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

In the instant case, it is clear that plaintiffs, having been expressly designated by name in the Option to Purchase to receive the benefit of a sales commission from the defendants, were intended beneficiaries of the promise made by the defendants to the Harrises. Our analysis of the parties' relationship in this case is consistent with the positions which they have respectively taken. In their complaint, plaintiffs expressly predicate their right to recovery on being third-party beneficiaries of the contract between defendants and the Harrises. Similarly, the defendants concede in their brief that the plaintiffs' right to recover, if any, arises out of "an obligation by the vendees to the vendor to pay . . . commissions . . . ." Having established that plaintiffs have a right to enforce the defendants' promise to the Harrises, we now turn to consider whether the trial judge was correct in determining that they should recover the benefit of that promise.

Paragraph (f) of the Option to Purchase provides, in pertinent part, as follows:

(4) If [the second] option is exercised as herein provided, the purchase price is Five Hundred Thousand and NO/100 Dollars ($500,000.00) and shall be paid in full in cash at closing. The purchase price shall be paid and each party shall execute any and all documents or papers that may be necessary within ten (10) days from the date of delivery of the notice of exercise of such option.

Paragraph (g) goes on to provide that,

(g) [i]f [the second option is] exercised and closed, a fee of six percent (6%) of the purchase price . . . shall be paid by George W. Davis, Jr. or assigns to Century 21 Trent Properties, Ltd., as a fee for negotiating this sale. The Seller shall not be responsible to any party for any commission in connection with this transaction.

[2] The defendants contend that since the closing of the second land sale was accomplished well after the ten-day time limit for closing had passed and then, only after suit to compel the sale had been commenced, they should not now be required to pay the sales commission which they had previously promised to pay. They argue that the ten-day closing requirement was a condi-

tion precedent to the performance of their obligation to pay the plaintiffs' commission. We find this argument unavailing.

While we have been unable to discover any cases in this State which set forth the defenses which are available to a promisor who is defending a suit brought by a third-party beneficiary, we again find the Restatement (Second) of Contracts instructive on the issue. There, it is provided that,

> (2) If a contract ceases to be binding in whole or in part because of impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.

Restatement (Second) of Contracts § 309(2) (1979).

Thus, under the Restatement view, the defendants would have a complete defense to the plaintiffs' action if they were able to establish that the ten-day closing requirement was a condition precedent to their obligation to pay the sales commission.

Careful scrutiny of paragraph (g) of the Option to Purchase clearly reveals that the only conditions precedent to the defendants' obligation to pay the six percent "fee" are the exercise of the second option and the subsequent closing of the sale. In our opinion, only a strained reading of the Option to Purchase could lead one to the conclusion that the ten-day closing requirement mentioned in subparagraph (f)(4) was intended to be a condition precedent to the defendants' obligation to pay the six percent fee. While the terms of the contract require a closing to occur before the defendants' duty to pay the fee arises, it was not a condition precedent that the transaction be closed within ten days of the defendants' exercise of the option in order to obligate the defendants to pay the fee.

We hold that the trial court was correct in concluding that the plaintiffs were entitled to recover from the defendants and in entering summary judgment in their favor. The judgment entered below is, therefore

Affirmed.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. WILLIE WOOTEN

No. 903SC953

(Filed 17 September 1991)

1. **Criminal Law § 86.5 (NCI3d)— cross-examination of defendant—possession of bags with cocaine residue—admissibility for impeachment**

Where defendant testified in a prosecution for narcotics offenses that he had never possessed any cocaine, the district attorney could properly impeach defendant by asking him about plastic bags containing cocaine residue found in defendant's vehicle at the time of his arrest.

Am Jur 2d, Witnesses §§ 524, 527, 536.

2. **Narcotics § 3.1 (NCI3d)— possession of large amount of money—cross-examination of defendant—no prejudicial error**

Assuming arguendo that the trial court in a prosecution for narcotics offenses erred in permitting the district attorney to question defendant about his possession of over a thousand dollars at the time of his arrest, this error was not prejudicial where defendant was permitted during cross-examination to explain his possession of the money.

Am Jur 2d, Witnesses §§ 524, 536.

3. **Narcotics § 5 (NCI3d)— sale and delivery of cocaine—single transaction—separate sentences improper**

Defendant could not be convicted and sentenced under N.C.G.S. § 90-95(a)(1) for both the sale and the delivery of a controlled substance arising from one transaction.

Am Jur 2d, Drugs, Narcotics, and Poisons § 41; Indictments and Informations § 223.

4. **Criminal Law § 1183 (NCI4th)— prior DUI conviction—aggravating factor—proof by defendant's admission—punishable by more than sixty days' imprisonment**

The trial court could properly consider defendant's prior conviction for driving under the influence as an aggravating factor on the basis of defendant's admission during cross-examination that he had been convicted of this offense. Furthermore, this offense was punishable by more than 60 days'

imprisonment within the meaning of N.C.G.S. § 15A-1340.4(a)(1)o where the statute provided for punishment of "no less than 30 days nor more than six months" at the time of defendant's conviction.

Am Jur 2d, Criminal Law § 599; Habitual Criminals and Subsequent Offenders §§ 15, 15.5.

APPEAL by defendant from judgments entered 5 April 1990 by *Judge Henry W. Hight, Jr.* in PITT County Superior Court. Heard in the Court of Appeals 20 August 1991.

Defendant was indicted and convicted of the felonies of possession of cocaine with intent to sell, selling cocaine and delivering cocaine. He was sentenced to 10 years for the sale of cocaine, 10 years for the delivery of cocaine, and 10 years (suspended) for possession with intent to sell.

On the night of 6 April 1989 Detective Murphy, a drug agent with the Greene County Sheriff's Department, was operating as an undercover agent in a drug interdiction campaign in Pitt County. He was assisted by Deputy Sheriff Hill, who was the surveillance officer. At approximately 9:50 p.m. Detective Murphy drove his vehicle into the Bellvoir Estates Mobile Home Park in anticipation of making a cocaine purchase from a suspected cocaine dealer. Detective Murphy approached a group of three men, which included his confidential informant, the defendant and Mr. Johnson. Detective Murphy purchased cocaine from Mr. Johnson. Because Mr. Johnson did not have correct change, the defendant gave Detective Murphy $5.00, the change he was due. Detective Murphy returned to his vehicle where he began talking to his confidential informant. The defendant then called the confidential informant back over to him and criticized Mr. Johnson's deal. The defendant claimed that Mr. Johnson's cocaine had a lot of "shake in it," baking soda, and that it "wouldn't get you high." Detective Murphy then walked over to the two men and the defendant offered to sell Detective Murphy cocaine for $20.00. The defendant stated that his drugs "might be smaller, but they're more powerful." Detective Murphy purchased a small white rock in a plastic bag from the defendant for $20.00. The white rock was later identified as crack cocaine.

On 9 December 1989 Deputy Hill arrested the defendant. Deputy Hill had received a tip that a vehicle matching the description of the one known to belong to the defendant would be used in

delivering cocaine to Bellvoir Estates around 3:00 p.m. Deputy Hill placed the defendant's car under surveillance and later stopped the defendant as he was preparing to drive into Bellvoir Estates. In a search of the defendant's car incident to arrest Deputy Hill discovered seven plastic bags, each containing cocaine residue and $1,109.25 in cash. At trial the prosecutor inquired into the defendant's possession of the cocaine and money found upon his arrest.

Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Edwin B. Hatch, for the State.

Willis A. Talton for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first contends that the trial court erred in allowing the prosecution to inquire about the seven plastic bags containing cocaine residue and the $1,109.25 found in the defendant's possession when he was arrested. This contention is without merit.

At trial the defendant testified in his own behalf. During cross-examination by the district attorney the defendant testified as follows:

Q: Mr. Wooten, have you ever sold any cocaine, sir?

A: Have I ever sold any?

Q: Yes.

A: No. I haven't.

Q: Do you ever use any cocaine?

A: I don't even drink no liquor no more.

Q: Ever possessed any cocaine?

A: No, sir.

Upon further questioning the following exchange took place.

Q: And, at the time you were stopped, you were almost directly in front of Bellvoir Estates, weren't you?

A: I was—I was almost to the store.

Q: Had you got to Bellvoir Estates yet?

A: When I was arrested?

Q: Uh-huh?

A: That's where they arrested me; at the store.

Q: At Bellvoir Estates?

A: Uh-Huh. No; at convenience store. That's where they arrested me at.

* * *

Q: And, in your car, Mr. Wooten, you had several bags—

TALTON: Objection.

Q: —cocaine residue?

COURT: Overruled.

A: I told you those bags—this guy, I picked him up that morning. He left that pouch in my car. . . .

This was proper impeachment.

> [I]t is well settled in this jurisdiction that when a defendant becomes a witness and testifies in his own behalf, he is subject to cross-examination like any other witness, G.S. § 8-54 (1981), and, for purposes of impeachment, he may be cross-examined by the district attorney concerning any specific acts of misconduct which tend to impeach his character.

State v. Galloway, 304 N.C. 485, 497, 284 S.E.2d 509, 517 (1981) (citing *State v. Herbin*, 298 N.C. 441, 259 S.E.2d 263 (1979) and *State v. Purcell*, 296 N.C. 728, 252 S.E.2d 772 (1979)). Further, " '[a]ny act of the witness which tends to impeach his character may be inquired about or proven by cross-examination.' " *State v. Poole*, 289 N.C. 47, 52, 220 S.E.2d 320, 324 (1975) (citing *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938)).

Here, the defendant first testified that he had never possessed any cocaine. It was then proper impeachment for the district attorney to ask the defendant about the bags containing cocaine residue found in the defendant's possession when he was arrested.

Defendant argues the testimony is not admissible under Rule 404(b) and relies on *State v. Brady*, 238 N.C. 404, 78 S.E.2d 126

(1953), and *State v. Emery*, 91 N.C. App. 24, 370 S.E.2d 456 (1988). Regardless of whether this testimony would otherwise be allowable under Rule 404(b), in this circumstance it is proper impeachment testimony and is therefore admissible.

[2] Defendant also contends that it was error to permit the State to question the defendant as follows:

Q: And, you on that day had in your pocket over a thousand dollars in cash money—

TALTON: Objection.

Q: —didn't you?

TALTON: Objection.

COURT: Overruled.

Q: Is that correct, sir?

A: Yes, sir.

Assuming *arguendo* that the trial court committed error by allowing this testimony, it was not prejudicial error. The defendant was given ample opportunity to explain his possession of the money, and in fact did so during cross-examination. The defendant testified:

Q: Where did that money come from?

A: I told you. I got it, I saved it on the job. I had got paid, and I was taking that money to go Christmas shopping and send my kids some money up north.

Defendant's first assignment of error is overruled.

II

[3] Defendant next contends that the trial court committed error by imposing consecutive sentences for the possession of cocaine with intent to sell or deliver, sale of cocaine and delivery of cocaine because the charges arose from a single transaction. We agree.

The Supreme Court has squarely addressed this issue in *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990). In *Moore*, two bills of indictment charged the defendant with possession of a controlled substance with intent to sell or deliver, sale of a controlled substance, and delivery of a controlled substance. *Id.* at 380, 395 S.E.2d at 125. The defendant was found guilty of possession of a controlled

substance (a lesser included offense) and possession with intent to sell; two counts of sale of a controlled substance, and two counts of delivery of a controlled substance. *Id.* As in the instant case each indictment stemmed from a single transaction, and the trial court imposed consecutive sentences for both the sale and delivery of the controlled substance. *Id.* In remanding for re-sentencing the court stated:

> "A defendant may be indicted and tried under N.C.G.S. § 90-95(a)(1) in such instances for the transfer of a controlled substance, whether it be by selling the substance, or by delivering the substance, or both. We conclude that a defendant may not, however, be convicted under N.C.G.S. § 90-95(a)(1) of both the sale *and* delivery of a controlled substance arising from a single transfer. Whether the defendant is tried for transfer by sale, by delivery, or by both, the jury in such cases should determine whether the defendant is guilty or not guilty of transferring a controlled substance to another person."

Id. at 382-383, 395 S.E.2d at 127.

Accordingly, we vacate the defendant's sentences for sale and delivery and remand for entry of judgment and re-sentencing for transferring a controlled substance.

III

[4] Finally, the defendant assigns as error the length of the sentences ordered by the trial court on the basis that they inappropriately exceed the presumptive sentences set by the North Carolina Fair Sentencing Act. We disagree.

The defendant claims the trial court erred in considering the defendant's previous conviction for driving under the influence as an aggravating factor because the State failed to prove the conviction in accordance with G.S. 15A-1340.4(e) which provides:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction . . . .

Id.

This argument is wholly without merit. The Supreme Court addressed this issue in *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983). There the court stated:

> We disagree that these are the exclusive methods by which prior convictions may be shown. As we emphasized in *State v. Thompson*, [309] N.C. [421], 307 S.E.2d 156 (1983), this Court and the Court of Appeals have repeatedly held that the enumerated methods of proof of N.C. Gen. Stat. § 15A-1340.4(e) are permissive rather than mandatory. [Citations omitted.] . . . Clearly the conviction could have been proven by . . . defendant's admission.

Id. at 593, 308 S.E.2d at 316. Here, the defendant testified on cross-examination as follows:

> Q: Ah, Mr. Wooten, that picture was taken when you were arrested for driving while impaired. Is that right?
>
> A: I think so.
>
> Q: Back in the early '80's wasn't it?
>
> A: Yes, sir.
>
> * * *
>
> Q: You don't remember going down to the jail on September 11, 1982 and having a picture taken?
>
> A: Well, I know I got a DUI, and I remember I took a picture.

The defendant also claims the conviction does not meet the statutory requirements because the statute provided for punishment of "no less than 30 days nor more than six months" at the time of his conviction. This argument also fails. G.S. § 15A-1340.4(a)(1)o only requires that the "criminal offenses [be] punishable by more than 60 days' confinement."

Finally the defendant contends that the application of maximum sentences for each of the crimes is "grossly unjust." "The 'weight to be given mitigating and aggravating factors is a matter solely within the trial court's discretion.' *State v. Penly*, 318 N.C. 30, 52, 347 S.E.2d 783, 796 (1986). The defendant has shown no abuse of discretion in the present case, and his assignment of error is overruled." *State v. Swann*, 322 N.C. 666, 675, 370 S.E.2d 533, 538 (1988).

Remanded for re-sentencing.

Judges JOHNSON and PARKER concur.

BOBBY A. SLATE v. DANIEL WALTER MARION; C. RICKY BOWMAN, TRUSTEE; AND RONALD C. SHROPSHIRE AND WIFE, GLENDA S. SHROPSHIRE

No. 9017SC1094

(Filed 17 September 1991)

Mortgages and Deeds of Trust § 2 (NCI3d)— deed of trust—not purchase money deed of trust—priority of judgment lien

The trial court correctly held in a declaratory judgment action that defendants' deed of trust was not a purchase money deed of trust and that plaintiff's judgment lien is entitled to priority over defendants' deed of trust. The deed of trust cannot be classified as a purchase money deed of trust because Daniel, who borrowed the money so that he could purchase land owned by his parents, never actually used the loan proceeds to purchase the property; rather, his parents allowed him to keep the money and use it in his own business and conveyed their interest in the land without consideration.

Am Jur 2d, Mortgages §§ 13, 348-350.

APPEAL by defendants from judgment entered 17 July 1990 in SURRY County Superior Court by *Judge W. Douglas Albright.* Heard in the Court of Appeals 17 April 1991.

Folger and Folger, by H. Lee Merritt, Jr., for plaintiff-appellee.

Donnelly, Stevens & DiRusso, by Gus L. Donnelly, for defendant-appellants.

WYNN, Judge.

This appeal arises out of a declaratory judgment action in which plaintiff, Bobby A. Slate, sought to determine the status of a deed of trust executed by defendant Daniel Walter Marion ("Daniel") conveying certain real property to defendant C. Ricky Bowman, as trustee, for the benefit of defendants Ronald C. Shropshire and his wife, Glenda (the "Shropshires"). The parties stipulated to the following pertinent facts.

In 1982, plaintiff obtained a money judgment against Daniel in the amount of $8,929.23. Following its entry, the judgment was

duly docketed in the office of the Clerk of Superior Court for Surry County, North Carolina.

In late December 1987, Daniel asked the Shropshires for a loan of $30,000 so that he could purchase a tract of land located in Surry County and owned by his parents, Howard and Mary Ellen Marion. The Shropshires agreed to lend Daniel the money and thereafter Howard and Mary Ellen Marion executed a deed conveying their interest in the subject property to Daniel. On 4 January 1988, Daniel executed a promissory note and a deed of trust to evidence the indebtedness. The promissory note itself contained the following language: "This note is given as a purchase money note, and is secured by a purchase money deed of trust." The deed of trust, however, contained no language indicating that it was a purchase money deed of trust; it merely contained a reference to the promissory note executed by Daniel in the amount of $30,000.

At 2:24 p.m. on 5 January 1988, the deed was recorded in the office of the Surry County Register of Deeds. At 2:26 p.m. on the same date, the deed of trust which Daniel delivered to the Shropshires was recorded.

On 6 January 1988, the proceeds of the loan that the Shropshires agreed to make were disbursed by a check which was made payable only to Daniel. Apparently, Daniel's father, Howard Marion, picked the check up from the Shropshires' business, but later gave it to Daniel telling him to "keep the money and use [it] in his own business." Daniel then deposited the check into his business account.

On 26 June 1989, plaintiff filed the instant action and requested the court to determine, by way of a declaratory judgment, which lien, his judgment lien or the lien created by the Shropshires' deed of trust, was a "first lien" on the subject property. Because Daniel failed to file an answer to the plaintiff's verified complaint, a default judgment was obtained against him. The remaining defendants timely filed verified answers to the plaintiff's complaint and thereafter the proceedings continued in Daniel's absence.

After considering the above-mentioned factual stipulations, the trial court made the following pertinent conclusions of law:

> 2. The conveyance of the real property from HOWARD D. MARION and wife, MARY ELLEN MARION, to defendant, DANIEL WALTER MARION, as shown in deed recorded in record book

453, page 1421, Surry County Registry, was without monetary consideration and was a gift.

3. Notwithstanding the wording contained in the promissory note, the deed of trust from defendant, DANIEL WALTER MARION, to C. RICKY BOWMAN as Trustee for defendants, RONALD C. SHROPSHIRE and wife, GLENDA S. SHROPSHIRE, recorded in record book 453, page 1423, Surry County Registry, is not a purchase money deed of trust.

4. The judgment of plaintiff, BOBBY A. SLATE, in case number 82-CVD-800 docketed in the office of the Clerk of Superior Court of Surry County, North Carolina, in judgment docket 30, page 343, is a lien against the real property described in deed recorded in record book 453, page 1421, Surry County Registry, and said judgment is superior to and has priority over the lien of the deed of trust recorded in record book 453, page 1423, Surry County Registry.

From the entry of judgment declaring the plaintiff's claim of lien to be a first lien on the subject property, the Shropshires appeal.

I

The sole issue presented by this appeal is whether the deed of trust executed by Daniel Marion in favor of C. Ricky Bowman, as Trustee, for the benefit of Ronald and Glenda Shropshire is a purchase money deed of trust. The answer to this question will determine which of the parties' liens is entitled to priority over the other.

Defendants contend that although the deed of trust does not expressly reflect its "purchase money" nature, it was nonetheless intended to be a purchase money deed of trust. As such, they argue that the deed of trust is entitled to priority over the plaintiff's previously-docketed judgment and, in so doing, implicitly rely upon the doctrine of "instantaneous seisin" to support their position. Plaintiff, on the other hand, contends that the deed of trust at issue does not constitute a "purchase money deed of trust" and that his judgment lien is superior to and entitled to priority over the lien created by the defendants' deed of trust.

Ordinarily, a docketed judgment creates a lien on after-acquired lands in the same county the moment title vests in the judgment debtor, and the lien thereby gains priority over any subsequently

recorded deed or mortgage covering the same property. 49 C.J.S. *Judgments* § 466(a) (1947); *see also Moore v. Jordan*, 117 N.C. 86, 23 S.E. 259 (1895); *Cowen v. Withrow*, 112 N.C. 736, 17 S.E. 575 (1893). The doctrine of instantaneous seisin, however, provides an exception to this general rule. Under the doctrine of instantaneous seisin,

> [w]hen a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to *all* others. *E.g.*, [*Smith Builders Supply, Inc. v. Rivenbark*, 231 N.C. 213, 56 S.E. 2d 431 (1949)]. . . . . The policy supporting the doctrine is that a vendor who parts with property and supplies the purchase price does so on the basis of having a first priority security interest in the property. The vendor who advances purchase money relies on the assurance that he or she will be able to foreclose on the land if the purchase price is not repaid. It is thus equitable and just that the vendor have a first priority security interest and be protected from the possibility of losing both the land and the money in the transaction.

Carolina Builders Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 232, 324 S.E.2d 626, 631, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985) (citations omitted and emphasis added). It has been said that the doctrine is "equally applicable where a third party loans the purchase price and accepts a deed of trust to secure the amount so loaned." *Pegram-West, Inc. v. Hiatt Homes, Inc.*, 12 N.C. App. 519, 525, 184 S.E.2d 65, 68 (1971).

With respect to the applicability of the doctrine, the parties do not dispute the fact that the deed and the deed of trust were executed, delivered and recorded as part of the same transaction; rather, they dispute whether the deed of trust qualifies as a purchase money deed of trust.

"[A] deed of trust is a purchase money deed of trust only if it is made as part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price." *Friedlmeier v. Altman*, 93 N.C. App. 491, 494, 378 S.E.2d 217, 219 (1989) (quoting *Dobias v. White*, 239 N.C. 409, 80 S.E.2d 23 (1954)). Applying this rule of law to the stipulated facts, we are compelled to conclude that the defendants' deed of trust is not a purchase money deed of trust.

We agree with plaintiff's contention that since Daniel never actually used the loan proceeds to *purchase* the property, the deed of trust cannot be classified as a purchase money deed of trust. The definition of a purchase money deed of trust, as set forth in *Friedlmeier*, makes it clear that "a deed of trust is a purchase money deed of trust *only* if it is made as part of the same transaction *in which the debtor purchases land.*" *Id.* Here, Daniel never purchased the land; rather his parents allowed him to "keep the money and use [it] in his own business." Under such circumstances, we conclude that the trial court was correct in concluding that Howard and Mary Ellen Marion conveyed their interest in the land without consideration, and that such conveyance was a gift. Accordingly, we hold that the trial court was further correct in concluding that defendants' deed of trust is not a purchase money deed of trust and that, therefore, plaintiff's judgment lien is entitled to priority over defendants' deed of trust.

For the reasons discussed above, the decision of the trial court is

Affirmed.

Judges ARNOLD and JOHNSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 SEPTEMBER 1991

NEW HANOVER CO. DEPT. OF SOCIAL SERVICES EX REL. BRAYE v. HYMAN No. 915DC295	New Hanover (90CVD3463)	Affirmed in part & reversed & remanded in part
STATE v. BURT No. 9114SC278	Durham (90CRS12607)	No Error
STATE v. CATHEY No. 9130SC329	Haywood (87CRS5016) (87CRS5017) (88CRS1158) (90CRS2394) (90CRS3120) (90CRS3125) (90CRS3126)	Affirmed
STATE v. CRUMMY No. 9113SC330	Brunswick (90CRS2313) (90CRS2315) (90CRS2316)	No Error
STATE v. DAVY No. 914SC391	Onslow (89CRS2275) (89CRS2276)	Affirmed
STATE v. HILL No. 9121SC342	Forsyth (89CRS13358)	Affirmed
STATE v. SMITH No. 9126SC301	Mecklenburg (89CRS19470) (89CRS87386)	No Error
STATE v. STALLING No. 9119SC308	Rowan (90CRS3782)	Affirmed
TIDWELL v. STANDARD UNIFORM SERVICES No. 9110IC277	Ind. Comm. (928902)	Affirmed
VAN GORDER v. PRUDENTIAL BACHE SECURITIES No. 9130SC297	Cherokee (90CVS307)	Dismissed

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 SEPTEMBER 1991

ALBRITTON v. N.C. DEPT. OF TRANSPORTATION No. 908SC1254	Lenoir (90CVS174)	Affirmed
ATKINSON v. BURRUS No. 911SC498	Dare (90CVS361)	Affirmed
BOSTICK v. BOSTICK No. 903DC1162	Pitt (87CVD29)	Reversed
BRANCH BANKING & TRUST CO. v. BIGGERSTAFF No. 9026SC1235	Mecklenburg (77CVS739)	Affirmed
CARRIS v. CARRIS No. 9030DC838	Macon (89CVD288)	Affirmed
CROWELL v. McCASKILL No. 905SC1289	Pender (87CVS343)	Affirmed in part, reversed in part
DISHER v. DISHER No. 9121DC470	Forsyth (90CVD5408)	Dismissed
FIRST FEDERAL SAVINGS & LOAN ASSN. v. PATTERSON No. 9110SC462	Wake (90CVS9952)	Dismissed
FRYE v. KELLEY No. 9119DC420	Rowan (86CVD1612)	As to the appeal of defendant Kelley—Dismissed. As to the appeal of the defendant Bowen—Dismissed.
GODWIN v. N.C. DEPT. OF TRANSPORTATION No. 9010IC1197	Ind. Comm. (639283)	Affirmed
GOLDSTON v. AMERICAN MOTORS CORP. No. 8914SC914	Durham (84CVS1327)	Affirmed
GOODWIN v. INVESTORS LIFE INS. CO. OF NORTH AMERICA No. 9014SC1129	Durham (88CVS3348)	Affirmed
GRIFFITH v. PIEDMONT NATURAL GAS No. 9010IC929	Ind. Comm. (820497)	Affirmed

HALEY v. HALEY No. 9012DC1091	Cumberland (85CVD4758)	Affirmed
HTS CORP. v. CAROLINA SAVINGS BANK No. 9013DC1213	Brunswick (89CVD796)	Affirmed
McFADDEN v. McFADDEN No. 9020DC1276	Moore (88CVS208)	Affirmed
NELLO L. TEER CO. v. ORANGE COUNTY No. 9015SC1303	Orange (90CVS615)	Vacated
NELSON v. N.C. DEPT. OF HUMAN RESOURCES No. 9017SC1190	Rockingham (90CVS638)	Affirmed
RUSSELL v. TOWN OF HUNTERSVILLE No. 9026SC1265	Mecklenburg (89CVS8637)	Affirmed
SMITH v. LOVINGOOD No. 9027SC919	Gaston (89CVS2169)	Reversed
SMITH v. SMITH No. 9120DC411	Richmond (88CVD756)	Affirmed
STACHLOWSKI v. STACH No. 899DC887	Person (88CVD264)	Affirmed
STATE v. BROOKS No. 9021SC1089	Forsyth (89CRS45080) (89CRS45079)	No Error
STATE v. BUCHANON No. 9120SC547	Union (90CRS10057) (90CRS10058)	No Error
STATE v. CARTER No. 9118SC580	Guilford (88CRS20440) (88CRS28695)	Affirmed
STATE v. CHEE No. 9011SC958	Harnett (89CRS9460) (89CRS9545)	No Error
STATE v. CLAY No. 9126SC461	Mecklenburg (90CRS93194) (90CRS93195) (90CRS93196) (90CRS93197) (90CRS93198) (91CRS3658)	No Error

STATE v. CLAY No. 918SC484	Wayne (90CRS3242)	Affirmed
STATE v. COVINGTON No. 9120SC543	Union (90CRS10060) (90CRS10061)	No Error
STATE v. GLENN No. 9110SC510	Wake (89CRS45173)	No Error
STATE v. HEMBY No. 904SC1017	Onslow (88CRS9503) (88CRS9504) (88CRS9505) (88CRS9506) (88CRS9507) (88CRS9508) (88CRS9509) (88CRS9510) (88CRS9511) (88CRS9512) (88CRS9513) (88CRS9514)	Affirmed
STATE v. HUNT No. 9016SC1102	Robeson (89CRS17251) (89CRS17252)	Remand for resentencing
STATE v. JOHNSON No. 9126SC527	Mecklenburg (88CRS5686)	Affirmed
STATE v. MATTHEWS No. 9119SC521	Randolph (89CRS5021) (89CRS5058) (89CRS5059) (89CRS5159) (89CRS5160)	No Error
STATE v. McGILL No. 9026SC1057	Mecklenburg (89CRS40693) (89CRS40694)	No Error
STATE v. MORSE No. 9125SC519	Burke (90CRS3860) (90CRS3862) (90CRS5119)	Affirmed
STATE v. NAPIER No. 9120SC450	Richmond (90CRS4421)	No Error
STATE v. SIMMONS No. 9018SC1060	Guilford (89CRS75533)	No Error
STATE v. TAYLOR No. 914SC494	Onslow (90CRS8480)	No Error

STATE v. TURNER No. 9119SC572	Rowan (90CRS697)	No Error
STATE v. WOODARD No. 9011SC933	Harnett (87CRS5237) (87CRS5238) (87CRS5239)	No Error
STROUD v. N.C. DEPT. OF NATURAL RESOURCES No. 905SC1171	New Hanover (89CVS2062)	Affirmed
WELLMAN v. PADGETT MOTORS, INC. No. 914DC471	Onslow (90CVD2559)	Affirmed
WHITE v. TOBACCO INDUSTRIES, INC. No. 9017SC1248	Surry (89CVS215)	Affirmed

IN RE ESTATE OF SHIRLEY ALLRED TUCCI

No. 9021SC1010

(Filed 1 October 1991)

1. **Appeal and Error § 257 (NCI4th)— dissent from will—attorney fees—appeal from clerk**

The trial court did not err by hearing the merits of an estate's appeal from an order of the Clerk of Superior Court taxing the estate with attorney fees as part of the costs incurred in an unsuccessful attempt to dissent from the will where the dissenter, Tucci, filed a voluntary dismissal of his petition for attorney fees, Tucci stipulated that the Clerk's order had been satisfied, and the estate withdrew its appeal. Tucci's purported voluntary dismissal of the petition for attorney fees came after the Clerk had entered a final order on the petition and was therefore of no legal efficacy; Tucci did not have the capacity to stipulate that the Clerk's order had been satisfied because the Clerk's order indicated that the fees should be paid directly to the law firm; and the estate's withdrawal of its appeal was ineffective because an appellant cannot withdraw an appeal which has been perfected without first obtaining the consent of the appellate court.

Am Jur 2d, Appeal and Error § 922.

2. **Compromise and Settlement § 3 (NCI4th)— dissent from will—attorney fees—order from clerk—settlement by parties—not allowed to negate order**

The trial court did not void the essential terms of a settlement agreement involving attorney fees between an estate and a spouse who had unsuccessfully dissented from the will where the Clerk had previously entered a final order requiring payment of attorney fees by the estate directly to the law firm as a part of the costs of the dissent, and the only documents filed with the court were a voluntary dismissal, a stipulation, and a withdrawal of the appeal to superior court. Since there was no written settlement agreement filed with the trial court, the court could not and did not nullify the terms of the agreement. The court instead merely ruled that the documents filed could not deprive it of the authority to order the costs paid.

Am Jur 2d, Compromise and Settlement § 327.

3. Clerks of Court § 11 (NCI4th)— dissent from will—hearing on attorney fees—ex parte—no prejudice

An estate did not suffer prejudice by reason of an ex parte hearing before the Clerk to determine whether the estate should pay attorney fees for an unsuccessful dissent where the estate had the opportunity to oppose the petition for attorney fees at a *de novo* review in superior court.

Am Jur 2d, Wills §§ 1094, 1095.

4. Compromise and Settlement § 3 (NCI4th)— dissent from will—attorney fees—ruling that settlement not allowed to negate clerk's order—no motion required

The trial court made a proper ruling on its own motion in a proceeding to determine whether an estate should pay attorney fees for an unsuccessful dissent where the Clerk had ordered the estate to pay the fees, the estate appealed for a *de novo* review in superior court, and the court ruled that the parties' settlement could not negate the Clerk's order.

Am Jur 2d, Wills §§ 1094, 1095.

5. Rules of Civil Procedure § 6 (NCI3d)— dissent from will—hearing on attorney fees—notice

An estate was not entitled to five days' notice of a hearing on the merits of its appeal to superior court under N.C.G.S. § 1A-1, Rule 6(d) where the Clerk had entered a final order that the estate pay the attorney fees for an unsuccessful dissent from the will. Rule 6(d) relates only to the hearing of motions and the hearing of the estate's appeal was not pursuant to a motion. Moreover, the estate knew that the hearing was originally scheduled for 25 June and would have been held on that date, rather than 29 June, but for the estate's motion for continuance on 18 June.

Am Jur 2d, Wills §§ 1094, 1095.

6. Discovery and Depositions § 55 (NCI4th)— dissent from will—superior court hearing on attorney fees—motion for discovery—denied

The trial court properly exercised its discretion in denying a motion to compel discovery in a proceeding to determine whether an estate should pay attorney fees for an unsuccessful dissent where the underlying facts were already available or

could have been made available during the hearing through affidavits and statements of counsel.

Am Jur 2d, Wills §§ 949, 1095.

7. **Trial § 3.1 (NCI3d)— continuance—denied—no abuse of discretion**

The trial court did not err by denying a motion to continue a hearing concerning the award of attorney fees arising from an estate. The refusal of a continuance was within the sound discretion of the trial court. This appeal arises out of dissent proceedings instituted more than five years ago, the issues before the court were relatively simple, and there was no abuse of discretion.

Am Jur 2d, Wills §§ 1094, 1095.

8. **Wills § 61 (NCI3d)— dissent from will—unsuccessful—attorney fees**

The trial court did not err in awarding attorney fees for an unsuccessful dissent from a will where the dissenting husband contended that a reconciliation with his wife manifested an intent to rescind their separation agreement; the clerk agreed that the agreement had been rescinded and determined that the husband had regained his right to dissent; the superior court held that the Clerk's findings were supported by competent evidence and that the evidence supported the conclusions of law; the majority of the Court of Appeals panel stated that the statutory right to dissent was barred by the separation agreement; and one judge filed a dissenting opinion. The husband obviously advanced a good faith legal argument which led to considerable disagreement; since substantial merit under N.C.G.S. § 6-21(2) does not require success on the merits, there was no abuse of discretion.

Am Jur 2d, Wills §§ 1094, 1095.

9. **Attorneys at Law § 55 (NCI4th)— dissent from will—attorney fees—reasonableness**

The attorney fees awarded by the trial court in an unsuccessful dissent from a will were proper where the dissenting spouse's attorneys filed detailed, itemized statements showing the hours they had expended, including summary descriptions of the actual work performed, and sworn affidavits attesting

to the accuracy of the entries contained on the statements; four attorneys practicing in the same area supplied affidavits attesting to the reasonableness of the hourly fees; and the presence of the husband's contingency fee arrangement with his attorneys does not prevent the discretionary award of statutory attorney's fees.

Am Jur 2d, Wills §§ 1094, 1095.

10. Constitutional Law § 108 (NCI4th) — hearing — right to present evidence

An estate's contention that its right to due process of law was violated by the trial court's refusal to allow it to present evidence during the hearing of its appeal from the Clerk of Superior Court was without merit where the estate failed to avail itself of its opportunity to present evidence.

Am Jur 2d, Wills § 948.

APPEAL by Estate of Shirley Allred Tucci from Orders entered 29 June 1990 and 24 July 1990 in FORSYTH County Superior Court by *Judge Julius A. Rousseau, Jr.* Heard in the Court of Appeals 10 April 1991.

Womble, Carlyle, Sandridge & Rice, by Michael E. Ray and Kurt C. Stakeman, for appellant-estate.

A. Wayland Cooke and Michael C. Landreth have filed a brief in response to the estate's appeal.

WYNN, Judge.

Appellant, the Estate of Shirley Allred Tucci ("Estate"), appeals from an order of the Forsyth County Superior Court taxing the Estate with the payment of attorney's fees, as part of the costs incurred in an unsuccessful attempt by James Michael Tucci ("Tucci") to dissent from the will of his wife, Shirley Allred Tucci.

On 25 May 1990, following his unsuccessful bid to dissent, Tucci filed a petition pursuant to N.C. Gen. Stat. § 6-21(2) requesting the Forsyth County Clerk of Superior Court to tax the attorney's fees which he incurred in undertaking the dissent against the Estate. Attached to and tendered in support of the petition was "a statement for professional services rendered and costs advanced on behalf of James Michael Tucci by the law firm of Harrison, North,

Cooke & Landreth" ("the Harrison firm"). Neither a copy of the petition, nor a notice of hearing was served upon the Estate. After reviewing the petition, the clerk found as fact that Tucci's dissent had substantial merit, and that the attorney's fees incurred were fair and reasonable in every respect. Thereafter, the clerk entered an order requiring the Estate to pay "the attorney's fees and costs of James Michael Tucci, . . . to the law firm of Harrison, North, Cooke & Landreth."

Pursuant to the provisions of N.C. Gen. Stat. §§ 1-272 and 7A-251, the Estate appealed to the Superior Court of Forsyth County on 29 May 1990 for a *de novo* review of the clerk's order. In its notice of appeal, the Estate asserted that it had been denied due process of law because it had not been afforded an opportunity to respond to the petition for attorney's fees. The Estate also objected to the Clerk's findings of fact and conclusions of law, and alleged that the Clerk had abused her discretion in taxing Tucci's attorney's fees against it. Also on 29 May 1990, in an effort to discover the factual basis for Tucci's petition, the Estate served on Tucci's counsel a notice to take Tucci's deposition and a request for the production of documents. The deposition and the date by which the documents were to be returned was 27 June 1990.

On 30 May 1990, Tucci's counsel sent a request to the court that the Estate's appeal be calendared for 25 June 1990, two days prior to the time Tucci was to respond to discovery. Notwithstanding the Estate's objection to this request, the appeal was calendared for 25 June 1990 before Judge Julius A. Rousseau, Jr. Upon receiving this information, the Estate served a *subpoena duces tecum* on Tucci and his attorneys to appear, to testify, and to produce documents at the June 25th hearing. The Estate also filed a motion to continue the hearing from June 25th.

On 15 June 1990, counsel for Tucci filed a response to the Estate's notice of deposition and request for documents, and indicated that Tucci would refuse to appear and testify at the deposition and that there would be no further production of documents.

On 18 June 1990, the Estate filed a motion to compel discovery, and its motion to continue was heard by Judge Judson D. DeRamus, Jr. via telephone. As a result of the hearing, Judge DeRamus entered an order allowing the Estate's motion to continue, and setting the Estate's motion to compel discovery for hearing on 25 June 1990 before Judge Rousseau. In light of the granting of

its continuance, the Estate agreed to withdraw its *subpoena duces tecum.*

At the June 25th hearing of its motion to compel discovery, the Estate explained to Judge Rousseau that the reasons for its discovery requests were threefold: (1) To uncover the factual basis underlying the petition for attorney's fees; (2) To uncover the factual basis for the descriptive entries, time estimates and hourly fees shown on the statement for professional services which was attached to the petition; and (3) To uncover the factual basis for the contention that Tucci's dissent had "substantial merit."

Judge Rousseau concluded that the issues of whether Tucci's dissent had substantial merit and whether his attorney's fees were reasonable were to be decided solely upon the existing record of the case and upon affidavits relating to the reasonableness of attorney's fees. Over the Estate's objection, Judge Rousseau also set a hearing on the merits of the Estate's appeal for 29 June 1990. Judge Rousseau's written order was entered 29 June 1990.

Prior to the hearing on the Estate's appeal, counsel for the Estate offered to settle Tucci's petition for attorney's fees by letter dated 26 June 1990. The terms of the offer were that in exchange for Tucci's withdrawing and dismissing his petition for attorney's fees and his filing of a statement that the Clerk's order had been satisfied, the Estate would purchase a house in which both Tucci and his minor son could live and would dismiss its appeal of the clerk's order. On 27 June 1990, Tucci's counsel responded to the Estate's offer with a letter indicating that Tucci desired to settle, but that the Harrison firm would no longer represent Tucci.

Tucci's new counsel and the Estate subsequently filed their respective notices of withdrawal and informed Judge Rousseau that because the matter had been resolved, there was no need for a hearing on the Estate's appeal. In spite of these events, Judge Rousseau proceeded to conduct a hearing on 29 June 1990. At the hearing, Judge Rousseau ruled, *ex mero motu,* that the documents filed by Tucci and the Estate were ineffective insofar as they attempted to deprive the court of its jurisdiction to review the clerk's order taxing costs against the Estate. Following the hearing, Judge Rousseau entered a written order dated 24 July 1990 which, based upon his findings of fact, concluded that Tucci's dissent had substantial merit, and that attorney's fees in the amount of $128,199.21 (representing the previously awarded amount, less

$1,500 which Tucci had paid) were reasonable and should, in the court's discretion, be taxed as costs against the Estate. From Judge Rousseau's 29 June 1990 and 24 July 1990 orders denying the Estate's motion to compel discovery and ordering the payment of attorney's fees, respectively, the Estate now appeals.

We note initially that in spite of the fact that Tucci and the Estate purport to have settled their differences, and in spite of the fact that Tucci is no longer represented by attorneys A. Wayland Cooke and Michael C. Landreth of the Harrison firm, Cooke and Landreth have filed a brief opposing the appellant titled "Appellee's Brief." Because the North Carolina Rules of Appellate Procedure generally speak in terms of actions which a "party" to a proceeding must take on appeal, it is implicit that any appellate brief must be filed on behalf of one of those parties.

In the interests of justice, and as a matter of appellate grace, we hereby vary the Rules of Appellate Procedure's implicit requirement that a brief be filed on behalf of a party to a proceeding. Appellate Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2. Rule 28(i) of the Rules of Appellate Procedure allows the filing of an *amicus curiae* brief in response to a request by the appellate court on its own motion. *See* N.C.R. App. P. 28(i). Although this court did not officially request Messrs. Cooke and Landreth to file an *amicus curiae* brief, we nonetheless elect to use N.C.R. App. P. 2 to treat their brief as such. *See State v. Sanderson*, 327 N.C. 397, 404, 394 S.E.2d 803, 807 (1990). We wish to make it clear, however, that but for the extraordinary procedural posture of this case, we would not be inclined to do so. We now turn to address appellant's several assignments of error.

I

[1] In its first assignment of error, the Estate contends that the trial court erred in hearing the merits of the Estate's appeal because

of Tucci's voluntary dismissal of his petition for attorney's fees, Tucci's stipulation that the clerk's order had been satisfied, and the Estate's withdrawal of its appeal. The Estate asserts that each of these acts obviated the need for a hearing on the merits of its appeal. We disagree.

First, a voluntary dismissal under Rule 41 is proper only when made prior to the entry of final judgment. *Wood v. Wood*, 37 N.C. App. 570, 574-75, 246 S.E.2d 549, 552 (1978), *rev'd on other grounds*, 297 N.C. 1, 252 S.E.2d 799 (1979). After final judgment, any correction, modification, amendment, or setting aside of the judgment can be done only by the court. *Id.* at 575, 246 S.E.2d at 552. In the instant case, Tucci's notice of voluntary dismissal came after the clerk entered a final order on Tucci's petition for attorney's fees. Tucci's purported voluntary dismissal of the petition for attorney's fees was, therefore, of no legal efficacy. *See id.*

Second, Tucci did not have the capacity to stipulate that the clerk's order had been satisfied. As noted by our Supreme Court:

> There is a clear difference between including attorney's fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorney's fees. When costs are taxed, they establish a liability for payment thereof, and if a fund exists which is the subject matter of the litigation, costs may be ordered paid out of the fund prior to distribution of the balance thereof to the persons entitled. If no such fund exists, the satisfaction of the judgment for costs may be obtained by methods as for the enforcement of any other civil judgment.

Smith v. Price, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986) (citations omitted).

In contrast, when a court orders the payment of attorney's fees *to an interested party*, the award of attorney's fees becomes an order of the court, rather than a civil judgment, and is enforceable by contempt for disobedience. *Id.*

Here, the Estate was taxed with the payment of Tucci's attorney's fees pursuant to N.C. Gen. Stat. § 6-21(2). As such, the attorney's fees are considered to be an item of costs. Since the clerk's order indicated that the attorney's fees should be paid directly "to the law firm of Harrison, North, Cooke & Landreth," and not to Tucci, it is clear that only the law firm of Harrison, North, Cooke & Landreth could stipulate that the clerk's order had been

satisfied. Indeed, since the order for costs, if not paid, can be satisfied by the clerk's issuance of an execution, the Harrison firm would be the proper party to institute proceedings for such an execution. It follows, therefore, that Tucci did not have the capacity to stipulate to the satisfaction of the clerk's order.

Finally, the Estate's withdrawal of its appeal of the clerk's order was also ineffective. It is well established that "[w]hen an appeal has been perfected, [an] appellant cannot withdraw it without first obtaining the consent of the appellate court. That court may allow or deny the motion in the exercise of its sound discretion." *Town of Davidson v. Stough*, 258 N.C. 23, 24, 127 S.E.2d 762, 763 (1962). Since "the act of the clerk in taxing the costs is ministerial and is subject to revision by the trial judge," *Leary v. Nantahala Power and Light Co.*, 76 N.C. App. 165, 179, 332 S.E.2d 703, 717 (1985), we conclude that there was no abuse of discretion in the trial court's refusal to allow the Estate to withdraw its appeal. Appellant's assignment of error on each of the above points is overruled.

II

[2] Appellant next contends that the trial court committed reversible error in voiding essential terms of the settlement between the Estate and Tucci. The Estate claims that by nullifying the settlement terms, the trial court erroneously interfered with the parties' right to settle their dispute. We disagree.

Neither the Estate nor Tucci filed a settlement agreement with the court. The only documents which were filed were Tucci's voluntary dismissal and stipulation, along with the Estate's withdrawal of its appeal. Since there was no written settlement agreement filed with the court, the trial court could not and did not nullify the terms of their agreement. Instead, the trial court merely ruled that "the 'Notice of Withdrawal of Petition and Satisfaction of the Order', and the 'Notice of Withdrawal of Appeal,' were null and void and of no effect insofar as they attempt[ed] to defeat the attorneys' right to an attorney fee." In sum, the court concluded that the filing of the documents could not deprive it of the authority to order costs paid to the persons entitled thereto. Since N.C. Gen. Stat. § 1-272 gives the superior court jurisdiction to review the clerk's order on appeal, the parties could not, through the terms of their purported settlement agreement, deprive the court

of that jurisdiction. Appellant's assignment of error is without merit and is, therefore, overruled.

III

In its next assignment of error, appellant contends that the Estate was denied due process of law in several respects:

(1) The Estate was not given notice or an opportunity to be heard at the hearing before the clerk;

(2) There was no motion pending before the court when it abrogated terms of the settlement agreement;

(3) The Estate was denied five days' notice of the hearing on the merits of its appeal, in violation of N.C.R. Civ. P. 6(d);

(4) The Estate was denied the opportunity to conduct discovery; and

(5) By denying the Estate's motion to continue the hearing of the merits of its appeal, the trial court denied the Estate an opportunity to effectively prepare for the hearing.

For the reasons which follow, we find each of these contentions to be without merit.

[3] First, we do not believe that the Estate suffered any prejudice by reason of the *ex parte* hearing before the clerk. When Judge Rousseau conducted a *de novo* review of the clerk's order, the Estate was given not only notice of the proceedings, but also an opportunity to be heard and to present evidence. A party asserting error on appeal must show from the record that the trial court committed error, and that he was prejudiced as a result. *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). Because the appellant had an opportunity to oppose the petition for attorney's fees in superior court, we conclude that it was not prejudiced as a result of the entry of the clerk's order.

[4] Second, a motion was not required in order for the court to rule that the parties' settlement could not negate the clerk's order. Since the trial court was free to disallow the Estate's withdrawal of appeal, it necessarily had to consider the impact of the settlement agreement on the proceedings before the court. It is important to keep in mind that the trial court did not alter the settlement agreement as between the parties; rather, the court ruled that regardless of what the parties may have agreed to do

as between themselves, their agreement could not interfere with or vitiate the clerk's order. We conclude that the trial court made a proper ruling on its own motion.

[5] Third, the Estate was not entitled to five days' notice of the hearing on the merits of its appeal pursuant to the provisions of N.C.R. Civ. P. 6(d). Rule 6(d) relates only to the hearing of motions. The hearing of the Estate's appeal of the clerk's order, held on 29 June 1990, was not pursuant to a motion. Moreover, the Estate knew that Judge Rousseau originally intended to hear the merits of its appeal on 25 June 1990. But for Judge DeRamus' granting the Estate's motion for a continuance on 18 June 1990, such hearing would have been held on the 25th. Under the circumstances of this case, the Estate had an adequate opportunity to prepare its case for appeal and was not entitled to five days' notice of the hearing of its appeal.

[6] Fourth, the trial court was not required to grant the Estate's motion to compel discovery. "[O]rders regarding matters of discovery are within the trial court's discretion and are reviewable only for abuse of that discretion." *Weaver v. Weaver*, 88 N.C. App. 634, 638, 364 S.E.2d 706, 709, *disc. rev. denied*, 322 N.C. 330, 368 S.E.2d 875 (1988).

The evidence in this case indicates that the facts underlying the petition for attorney's fees, the descriptive entries, time estimates and hourly fees shown on the statement for professional services rendered, and the contention that Tucci's dissent had substantial merit were already available or could have been made available during the hearing through affidavits and statements of counsel. The affidavits filed by attorneys Cooke and Landreth, together with the existing record in the case, provided sufficient information from which the trial court could make a sound determination regarding attorney's fees. We conclude that the trial court properly exercised its discretion in denying the appellant's motion to compel discovery.

[7] Finally, the Estate contends that the trial court erred in denying its motion to continue the hearing of the Estate's appeal beyond 29 June 1990. The refusal of a continuance is also within the sound discretion of the trial court. *Freeman v. Monroe*, 92 N.C. App. 99, 373 S.E.2d 443 (1988). We agree with the statement in the trial court's order of 29 June 1990 that the instant case "has been a protracted one and should be disposed of as soon as practically

possible, upon adequate notice to all the parties." This appeal arises out of dissent proceedings instituted more than five years ago. The issues which were before the trial court were relatively simple, and we conclude that there was no abuse of discretion in the denial of the Estate's motion to continue.

IV

[8] In its next assignment of error, the Estate contends that the trial court erred in concluding that attorney's fees could properly be taxed in dissent proceedings, that Tucci's dissent had substantial merit, and that the attorney's fees were reasonable in amount.

The relevant statute, N.C. Gen. Stat. § 6-21, provides,

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.

N.C. Gen. Stat. § 6-21(2) (1986).

Appellant's first argument is entirely without merit. Our Supreme Court squarely addressed this issue with the following statement:

> Where a surviving spouse is forced to engage in litigation to determine whether a right of dissent exists, we hold that the discretionary power given the trial judge under G.S. 6-21(2) includes the power to award attorneys' fees for the surviving spouse when, in the opinion of the trial court, the proceeding was one with substantial merit.

In re Kirkman, 302 N.C. 164, 169, 273 S.E.2d 712, 716 (1981). Thus, as long as a dissent has substantial merit, the court may exercise its discretion in awarding reasonable attorney's fees.

Upon careful review of the record in this case, we are also of the opinion that Tucci's dissent indeed had substantial merit.

The substantial merit requirement does not mean success on the merits; in its sound discretion, the trial court may award attorney's fees even to unsuccessful caveators. *See In re Will of Ridge*, 47 N.C. App. 183, 266 S.E.2d 766 (1980), *rev'd on other grounds*, 302 N.C. 375, 275 S.E.2d 424 (1981). In the underlying dissent, Mr. Tucci contended that a reconciliation between him and his wife following their separation manifested an intent to rescind their separation agreement. The Clerk of Superior Court agreed that the separation agreement had been rescinded and concluded that the provisions of the agreement which were executory at the time of the Tuccis' reconciliation, of which Mr. Tucci agreed to relinquish the statutory right to dissent, were terminated upon reconciliation. As a result, the clerk determined that Mr. Tucci had regained his statutory right to dissent. The Estate appealed the clerk's decision to the superior court, which held that the clerk's findings of fact were supported by competent evidence and supported the conclusions of law.

The Estate then appealed the superior court's decisions to this court. In an opinion authored by Judge Greene and reported at 94 N.C. App. 428, 380 S.E.2d 782 (1989), a majority of the panel stated that because the statutory right to dissent was a property right, reconciliation between Mr. Tucci and his wife would rescind Mr. Tucci's agreement to release that right only if the Tuccis' continued separation was a part of the consideration for, or was an implied condition of, Mr. Tucci's agreement to release the right. The court also noted that if the continued separation of the Tuccis was not a part of the consideration for Mr. Tucci's agreement to release his right to dissent, it was immaterial whether Mr. Tucci's release was executory at the time of the Tuccis' reconciliation. Upon concluding that the Tuccis' continued separation was not consideration for Mr. Tucci's release of the right to dissent, the majority held that Mr. Tucci's statutory right of dissent was barred by their separation agreement. In a *per curiam* opinion, the Supreme Court affirmed the decision the Court of Appeals. 326 N.C. 359, 388 S.E.2d 768, *reh'g denied*, 326 N.C. 602, 393 S.E.2d 879 (1990).

Judge Eagles filed a dissenting opinion in *Tucci*. He disagreed with the majority's conclusion that Mr. Tucci's release was a part of a property settlement. Judge Eagles was of the opinion that Mr. Tucci's release was part and parcel of a "pure" separation agreement. As such, he would have concluded that the executory

nature of Mr. Tucci's release required a finding that the Tuccis' reconciliation rescinded the release provision.

In *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *disc. rev. denied*, 328 N.C. 274, 400 S.E.2d 461 (1991), a unanimous Court of Appeals criticized the *Tucci* Court for making a distinction between the property provisions of a separation agreement and the rest of the agreement, and for disregarding the executory nature of Tucci's agreement to release his right of dissent.

Mr. Tucci obviously advanced a good faith legal argument which has led to considerable disagreement. Since substantial merit under N.C. Gen. Stat. § 6-21(2) does not require success on the merits, we conclude that the trial court did not abuse its discretion in awarding attorney's fees.

[9] We next consider the Estate's contention that the attorney's fees awarded by the trial court were unreasonable. In this regard, the Estate contends that there was no proof of the actual work performed, and that a contingency fee agreement between Tucci and his attorneys should have barred the award of attorney's fees.

An award of attorney's fees must be supported by evidence and findings of fact showing the reasonableness of the award. *Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff'd in part, rev'd in part*, 326 N.C. 470, 389 S.E.2d 803 (1990). In the instant case, Tucci's attorneys filed detailed, itemized statements showing the hours which they expended on Tucci's dissent, including summary descriptions of the actual work performed. Along with these itemized statements, Tucci's attorneys filed sworn affidavits, attesting to the accuracy of the entries contained on the statements. Finally, four attorneys practicing in the same area as Tucci's attorneys supplied affidavits which attested to the reasonableness of Tucci's attorney's hourly fees. We would also note that counsel for the Estate did not dispute that their firm had billed the Estate over $287,000. We conclude that there was ample proof of the actual work performed by Tucci's attorneys.

The presence of Tucci's contingency fee arrangement with his attorneys does not prevent the discretionary award of statutory attorney's fees. *Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988). While a trial court may consider the customary fee for similar work and whether the fee is fixed or contingent, a contingent fee contract does not control the trial court's determination.

Id. at 600, 369 S.E.2d at 105. Attorney's fees under N.C. Gen. Stat. § 6-21(2) are discretionary. In the instant case, the trial court made findings of fact as to the reasonable amount of time required for Tucci's attorney's services and the reasonableness of the hourly rates. We conclude that due to the complex nature of the services provided by Tucci's attorneys and due to the amount of time expended, the trial court's award of attorney's fees in this case was proper. *See Barker*, 93 N.C. App. at 544, 378 S.E.2d at 571.

V

[10] In its final assignment of error, appellant contends that its right to due process of law was violated by the trial court's refusal to allow it to present evidence during the hearing of its appeal. This assignment of error is without merit.

Indeed, the Estate failed to avail itself of its opportunity to present evidence. During the hearing on 25 June 1990, Judge Rousseau made the following statement to counsel for the Estate:

> [I]f you have some witnesses, I'll let you stand up and state for the record, to make a showing for the record what they would say if they were here.

Not only did the Estate fail to make a showing at the 29 June 1990 hearing, but it also failed to offer any affidavit or evidence to contradict the affidavits supplied by Tucci's attorneys. We hold that the Estate was given an ample opportunity to present its side of the case. Appellant's assignment of error, therefore, is overruled.

We have examined appellant's remaining assignments of error and find them to be without merit. For the reasons discussed above, the order of the superior court taxing attorney's fees against the Estate as costs is,

Affirmed.

Judges ARNOLD and JOHNSON concur.

IN THE MATTER OF: JAMES LOUIS FINNICAN, A JUVENILE, ROBERTA PALUMBO, PETITIONER v. JAMES JOHN GARNEY, RESPONDENT, AND GREGORY J. FINNICAN, INTERVENOR

No. 9026DC1074

(Filed 1 October 1991)

1. **Adoption or Placement for Adoption § 49 (NCI4th)— challenge to adoption—no standing by adoptive parent**

An adoptive parent had no standing to challenge the legitimacy of the child's adoption.

Am Jur 2d, Adoption §§ 72, 74.

2. **Process § 9.1 (NCI3d)— nonresident individual—insufficient contacts with N. C.**

A father who resided in New York had insufficient contacts with North Carolina to justify the court's exercise of personal jurisdiction over him in an action to terminate his parental rights where his only contact with this state was that his child was brought here by his former wife to whom he paid no support. Accordingly, the judgment terminating the father's parental rights was void and should have been set aside pursuant to the father's motion under N.C.G.S. § 1A-1, Rule 60(b)(4).

Am Jur 2d, Adoption § 51; Process §§ 186, 191.

3. **Infants § 9 (NCI3d)— termination of parental rights—action to set aside order—guardian ad litem for child**

The trial court did not err in appointing a guardian ad litem to represent a child in an action to set aside an order terminating the natural father's parental rights where the natural father's suit to set aside the termination order was being financed by the adoptive father who instigated the order.

Am Jur 2d, Adoption § 51; Parent and Child § 7.

4. **Rules of Civil Procedure § 11 (NCI3d)— termination of parental rights—father's motion to set aside order—improper purpose—basis in law and fact—sanctions precluded**

Although the natural father may have sought to set aside an order terminating his parental rights for an improper purpose, his motions to set aside the order and for summary

judgment had a sufficient basis in both fact and law to preclude the imposition of Rule 11 sanctions against him where the court that entered the termination order did not have personal jurisdiction over him.

Am Jur 2d, Adoption §§ 72, 74.

5. **Rules of Civil Procedure § 11 (NCI3d)— termination of parental rights—adoptive father's motion to set aside—absence of basis in law—improper purpose—sanctions**

Rule 11 sanctions were properly entered against an adoptive father for his Rule 60(b) and summary judgment motions seeking to set aside an order terminating the parental rights of the natural father where N.C.G.S. § 48-28 barred the adoptive father from attacking the validity of the termination order as a means of voiding his adoption of the child, and his motions were made for the improper purpose of escaping his obligations as the child's adoptive father after he and the child's mother were divorced.

Am Jur 2d, Adoption §§ 72, 74.

APPEAL by respondent and intervenor from orders entered 7 October 1987 and 29 June 1988 in MECKLENBURG County District Court by *Judge T. Patrick Matus* and from orders entered 24 April 1990 in MECKLENBURG County District Court by *Judge William G. Jones*. Heard in the Court of Appeals 9 May 1991.

Winifred R. Ervin, Jr., for respondent-appellant.

Tucker, Hicks, Hodge & Cranford, by Edward P. Hausle, for intervenor-appellant.

Jean B. Lawson for petitioner-appellee.

Donald S. Gillespie, Jr., as guardian ad litem.

WYNN, Judge.

This appeal addresses the validity of a 1979 order terminating the parental rights of James Garney ("Mr. Garney") to Jimmy Finnican (formerly Garney, hereinafter referred to as "Jimmy") as a result of an action brought by Roberta Palumbo ("Ms. Palumbo"). Gregory Finnican ("Mr. Finnican"), the intervenor, is the adoptive father of Jimmy.

Ms. Palumbo and Mr. Garney were married on 19 August 1972. Their child Jimmy was born on 5 April 1973. The parties later separated and obtained a divorce in New York on 21 November 1975. The New York court subsequently ordered Mr. Garney to pay $50.00 per week in child support through the Suffolk County Probation Department. Mr. Garney never paid the child support as ordered.

In February 1977, Ms. Palumbo took Jimmy to North Carolina without informing Mr. Garney. From February 1977 until the termination of parental rights proceeding of February 1979, Mr. Garney resided in Suffolk County, New York. However, he moved frequently, worked with different people under different names, and apparently refused to give Ms. Palumbo his address or phone number.

Ms. Palumbo and Mr. Finnican married in Charlotte, North Carolina on 12 February 1977. Thereafter, Mr. Finnican sent his wife to an attorney to terminate Mr. Garney's parental rights, so that he could adopt Jimmy. The same attorney represented Mr. Finnican in securing a decree of adoption.

In December 1983, the couple separated and later obtained a divorce in North Carolina. After problems arose concerning custody and visitation, Mr. Finnican contacted Mr. Garney and introduced Jimmy to his biological father during a June 1986 visit to New York. Mr. Finnican then gave Mr. Garney the name of Mr. Ervin, the attorney who has represented Mr. Garney throughout these proceedings. The record discloses that Mr. Finnican paid for Mr. Garney's attorney's fees for this action, and that Mr. Garney appeared as a witness for Mr. Finnican in his custody case against Ms. Palumbo in which the court awarded custody of Jimmy to Ms. Palumbo. The record further discloses that Mr. Finnican assisted Mr. Garney in moving to Charlotte, North Carolina in July 1989, by locating a home for him a few houses removed from Ms. Palumbo's residence.

Mr. Garney first sought to void the 1979 termination of parental rights by filing a motion to set aside the judgment pursuant to N.C.R. Civ. P. 60(b)(4) and (b)(6) on 13 June 1986; Ms. Palumbo opposed this and subsequent motions. Shortly thereafter, the court appointed Donald S. Gillespie, Jr., as guardian *ad litem* for Jimmy. On 5 May 1987, the court allowed Mr. Finnican to intervene. Both Mr. Finnican and Mr. Garney made motions for summary judgment, which were denied. After hearing the merits of the case, District

Court Judge William G. Jones entered an order on 24 April 1990 denying the motions to set aside the termination of parental rights. On 2 May 1990, *nunc pro tunc* to 24 April 1990, Judge Jones entered an order imposing Rule 11 sanctions against respondent and intervenor, jointly and severally. Mr. Garney and Mr. Finnican appeal from the orders denying their Rule 60(b) and summary judgment motions, appointing a guardian *ad litem* for the minor child Jimmy, and imposing sanctions against them.

I.

In their first assignment of error, Mr. Garney and Mr. Finnican contend that the trial court erred in denying their motions for summary judgment. They assert that the 1979 termination of parental rights is void because the court that entered the order lacked *in personam* jurisdiction over Mr. Garney.

[1] Before addressing the merits of Mr. Garney's and Mr. Finnican's contentions on this issue, we first note that Mr. Finnican, as an adoptive parent, is without standing to challenge the legitimacy of Jimmy's adoption. To allow him to do so would make a complete mockery of the judicial process wherein he petitioned for and obtained the adoption decree. We will address this point later in this opinion concerning the matter of sanctions, but suffice it to say that Mr. Garney is the proper party who may contest the lack of personal jurisdiction. As such, we only will address the denial of the summary judgment motion on the part of Mr. Garney.

Because Mr. Garney seeks to overturn a previous judgment, we must consider whether relief is available under Rule 60(b). A motion for relief pursuant to N.C.R. Civ. P. 60 is addressed to the sound discretion of the trial judge and on appeal our review is limited to determining whether the trial judge abused that discretion. *Greenhill v. Crabtree*, 45 N.C. App. 49, 262 S.E.2d 315, *aff'd*, 301 N.C. 520, 271 S.E.2d 908 (1980). Rule 60, in pertinent part, provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (4) The judgment is void;
>
> . . . .

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time . . . .

N.C.R. Civ. P. 60(b)(4) & (6).

Although section (b) of this rule states that all motions shall be made "within a reasonable time," this requirement is not enforceable with respect to motions made pursuant to subsection (b)(4), "because a void judgment is a legal nullity which may be attacked at any time." *Allred v. Tucci*, 85 N.C. App. 138, 141, 354 S.E.2d 291, 294, *disc. rev. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987). A judgment or order is void if, among other things, the court lacked personal jurisdiction. *See Hayes v. Evergo Telephone Co.*, 100 N.C. App. 474, 480, 397 S.E.2d 325, 329 (1990) ("A judgment entered against a defendant over which the Court does not have in personam jurisdiction is void and subject to being set aside pursuant to G.S. 1A-1, Rule 60(b)(4).").

The North Carolina Supreme Court has ruled that when deciding whether *in personam* jurisdiction exists, the courts of this state should employ a two-step analysis. "First, it should be ascertained whether the statutes of this State allow our courts to entertain the action the plaintiff has brought against the defendant." *Miller v. Kite*, 313 N.C. 474, 476, 329 S.E.2d 663, 665 (1985). If so, then the court must determine whether applying the statute would violate the due process clause of the fourteenth amendment. *Id.* at 476-77, 329 S.E.2d at 665.

In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990), illustrates the analysis that is to be undertaken when personal jurisdiction is at issue. In *Trueman*, petitioner and respondent were married in Wisconsin and resided there until they separated. Petitioner, the mother, took their child to Jackson County, North Carolina, where the Jackson County District Court awarded petitioner custody of the minor child and an absolute divorce. About three years later, petitioner initiated an action to terminate respondent's parental rights on the ground that he failed to make support payments ordered by a Wisconsin court for a year preceding the filing of the petition.

This court held that the statutory authority to exert jurisdiction existed because an action concerning the parent-child relationship is *in rem*. *Id.* at 581, 393 S.E.2d at 570. However, we

overturned the termination of parental rights because the father's only contact with this state was the presence of his child and his support payments sent here by the Wisconsin court. The *Trueman* court concluded that the "other requirement, that the person sued has had enough minimum contacts with the state to satisfy due process standards if required to defend the action here," was not satisfied. *Id. Accord Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985).

[2] We are faced with a jurisdictional issue in the case at bar similar to that resolved in *Trueman*. Although there was a statutory basis for exercising personal jurisdiction under N.C.G.S. § 1-75.3(c) (1983), Mr. Garney had virtually no contact with the State of North Carolina. His only contact with the state, according to the record, was that his child was brought here by his former wife to whom he paid no support. Accordingly, we must hold that respondent did not have sufficient contacts with this state to support the exercise of jurisdiction over his person. As such, we find that the 1979 judgment was void for lack of jurisdiction over the person of Mr. Garney.

We conclude that since the facts regarding Mr. Garney's contacts with North Carolina were not in dispute, Mr. Garney was entitled to relief as a matter of law. The trial judge, therefore, erred in refusing to grant Mr. Garney's motion for summary judgment based on Rule 60(b)(4).

II.

[3] The appellants, Mr. Garney and Mr. Finnican, also assign error to the court's appointment of a guardian *ad litem* to represent the interests of Jimmy. Under N.C.G.S. § 1A-1, Rule 17(b)(3), "a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant . . . so represented." This court, in *In re Barnes*, 97 N.C. App. 325, 327, 388 S.E.2d 237, 238 (1990), determined that "N.C.G.S. § 1A-1, Rule 17(c) mandates that a guardian ad litem must always be appointed for a minor child in a termination proceeding regardless of whether a respondent filed an answer denying material allegations of the petition."

The instant case involved an adoptive father financing a suit by the biological father to overturn a termination of parental rights instigated by the same adoptive father. The trial judge properly

determined that it was both expedient and necessary that Jimmy have present a representative concerned only with his best interests. Appellants' assignment of error on this point is overruled.

III.

Appellants next contend that the trial court committed reversible error in imposing sanctions under N.C.G.S. § 1A, Rule 11. Rule 11 provides,

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C.R. Civ. P. 11. As our Supreme Court stated in *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), a trial court's decision to impose sanctions under Rule 11(a) is reviewable *de novo* as a legal issue. When conducting its review, the appellate court must uphold the trial court's determination if it finds the presence of the following: "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.*

In the case at bar, the trial court, on its own initiative, imposed sanctions against intervenor and respondent pursuant to Rule 11. The court, in its conclusions of law, found that said parties pursued their motions to set aside the termination of parental rights order for improper purposes, to harass Ms. Palumbo and Jimmy, and conducted themselves in a way calculated to harm the juvenile. This court has held on a number of occasions that "to impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the Rule 11 legal or factual certification requirements." *Higgins v. Patton*, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 (1991).

[4] After carefully reviewing the facts of this case, we find that although Mr. Garney may have instigated these proceedings for

an improper purpose and may have behaved reprehensively, his motions had a sufficient basis in both fact and in law to preclude the imposition of sanctions. We, therefore, reverse the trial court on this point.

[5] With respect to Mr. Finnican, however, we uphold the trial court's imposition of sanctions. Under N.C.G.S. § 48-28(a),

> (a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a biological parent or guardian of the person of the child.

N.C.G.S. § 48-28(a) (1984). See *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809, *disc. rev. denied*, 316 N.C. 730, 345 S.E.2d 385 (1986).

Although Mr. Finnican was properly allowed to intervene under N.C.R. Civ. P. 24 because the action involved his putative parental rights and interests, N.C.G.S. § 48-28 barred him, as a matter of law, from attacking the validity of the 1979 termination of parental rights as a means of voiding his adoption of Jimmy. In short, the relief sought by Mr. Finnican in his summary judgment and Rule 60(b) motions was not warranted by existing law. Moreover, as the trial judge correctly determined, he pursued this action for an improper purpose. Mr. Finnican orchestrated Mr. Garney's challenge to the 1979 termination, using Mr. Garney and the courts of this state as a tool in his plan to escape his obligations as Jimmy's adoptive father. Accordingly, we affirm the trial court and overrule Mr. Finnican's assignment of error on this point.

IV.

Because we hold that the 1979 termination of parental rights order was void, we need not address Mr. Garney's or Mr. Finnican's remaining assignments of error.

In summary, the order denying Mr. Garney's motion for summary judgment is reversed; the order imposing sanctions on Mr.

Garney is reversed; the order appointing the guardian ad litem is affirmed; and the order imposing sanctions on Mr. Finnican is affirmed.

Affirmed in part and reversed in part.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA v. MARILYN LOUISE WHITE

No. 9026SC1257

(Filed 1 October 1991)

1. **Narcotics § 4.7 (NCI3d)— trafficking by possession—instruction on felonious possession not required**

The trial court in a prosecution for trafficking in cocaine by possession did not err in refusing to instruct the jury on the lesser included offense of felonious possession of cocaine where the evidence tended to show that more than 28 grams of a white powder containing cocaine were transported in defendant's vehicle, an additional 3.5 grams of a white powder containing cocaine were found in defendant's glove under the front seat, defendant denied that she had knowledge of cocaine in her vehicle, and defendant does not deny that the State presented positive and uncontroverted evidence on each element of trafficking in cocaine by possession.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.5.

2. **Narcotics § 3.3 (NCI3d)— expert testimony—substance "could" contain cocaine**

The trial court did not err in permitting a chemical analyst to state his opinion that white powder found in defendant's glove "could" contain cocaine based on a preliminary color test.

Am Jur 2d, Drugs, Narcotics, and Poisons § 46.

APPEAL by defendant from judgment entered 13 July 1990 by *Judge Shirley L. Fulton* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 23 September 1991.

Lacy H. Thornburg, Attorney General, by Kathryn Jones Cooper, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Sue A. Berry, Assistant Public Defender, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 13 July 1990, which judgment was based upon a jury verdict convicting defendant of two violations of N.C.G.S. § 90-95(h)(3) (1990), trafficking in cocaine by possession and trafficking in cocaine by transportation.

The State's evidence at trial tends to show the following: At approximately 7:30 p.m. on 2 January 1990, Paul Levins (Levins), a Charlotte police officer working in an undercover capacity, met Clara Broadnax (Broadnax) in a shopping center parking lot to purchase two ounces of cocaine from her. Levins waited in the parking lot about five minutes before Broadnax arrived. Broadnax arrived at the parking lot in a pickup truck driven by the defendant. Broadnax exited the truck, approached Levins' car, leaned into the car, and showed Levins two bags of a white, powder substance wrapped in a Kleenex. Levins examined the substance and handed Broadnax $2,200.00. Because the agreed price for the substance was $1,250.00 per ounce, Levins told Broadnax that he had to get the rest of the money out of the trunk area of his car. Broadnax took the $2,200.00, got into the passenger seat of the truck, and waited for Levins. Levins then opened the hatch of his car, a signal for two "Take Down Units" to approach and assist in making the arrests. With blue lights flashing, the two police cars arrived. As they arrived, Levins noticed the defendant attempt to start the truck while it was already running. The defendant then attempted to back out of the parking space, but by that time she was surrounded. As the other officers approached the truck, Levins noticed the defendant put something under her seat. Levins searched under the defendant's seat and found a cellophane package containing a white, powder substance inside a black glove. The officers arrested both defendant and Broadnax.

Broadnax testified that at approximately 7:00 p.m. on 2 January 1990, she was about to leave her house to meet Levins when the defendant arrived. Broadnax told the defendant that she was going to deliver two ounces of cocaine to someone who had called for it. Defendant said she would go with Broadnax. Because Broadnax's

car did not have heat, the defendant agreed to drive her truck. For taking Broadnax to meet Levins, Broadnax agreed to give some of the cocaine to the defendant. While driving to the parking lot, Broadnax took some cocaine out of each of the two separate bags containing cocaine and put it in the wrapper of a cigarette pack. Defendant then put the package inside her navy blue or black glove.

Tony Aldridge, a chemical analyst in the chemistry section of the Charlotte Mecklenburg Crime Laboratory, testified that he examined the three packages of white, powder substance obtained by Levins. In his opinion, one of the two bags sold to Levins contained "24.1 grams of a white powder which contained cocaine," and the other bag sold to Levins contained "23.9 grams of a white powder and that white powder did contain cocaine." He performed only a "simple preliminary color test" on the cellophane package found in the black glove and from that test determined that the package contained 5.3 grams of a white powder which could contain cocaine. He testified, "It does not have to contain cocaine but it could."

Defendant presented evidence. She testified that at approximately 5:30 p.m. on 2 January 1990, she picked up her son at the nursery. She stayed at the nursery for a while to talk to some of the other parents. When her son said that he was hungry, the defendant left the nursery and proceeded to Hardee's. While at Hardee's, the defendant saw Broadnax. Broadnax told the defendant that she was having problems with her car, she needed to go meet a man named Carl, and she would pay the defendant $10.00 to take her to meet him. Defendant agreed and took Broadnax back to Broadnax's house. While there, Broadnax told the defendant that she had to meet Carl to pick up some money. Defendant remained outside in her truck while Broadnax went inside. Broadnax returned from her house with a change purse and a Kleenex box. Defendant and Broadnax then drove to the parking lot. Broadnax did not see Carl when they arrived, and because the defendant and her son had not eaten at Hardee's, the defendant went to a pizza restaurant in the shopping center and ordered a pizza. They got the pizza and began eating it. A few minutes later a car pulled up to them, and Broadnax said, "I think that is them." Defendant drove the truck over to meet the car, and Broadnax got out of the truck to talk with the man. Broadnax returned to the truck and the defendant asked, "So, you ready to go?" Broadnax responded, "No, he got to get some more money out

of his trunk." Defendant had the truck running, shifted in reverse, and ready to go. At that point, the police surrounded and arrested the defendant and Broadnax. Defendant testified that she did not know that Broadnax had cocaine with her when she got into the defendant's truck after taking Broadnax to her house, that to her knowledge, she has never had cocaine in her truck, that she did not know that she was taking Broadnax to transact a sale of cocaine, and that the last time she saw her black glove, it was in the glove compartment. In fact, the defendant introduced into evidence a note written by Broadnax which stated, "To Whom it May Concern: Marilyn White had no knowledge of what was going on. She went into the Pizza Hut to pick up the food that was ordered."

The issues are (I) whether the defendant is entitled to the lesser included offense instruction of felonious possession of cocaine in the truck where the defendant does not deny that the State presented positive and uncontroverted evidence on each element of the crime charged but merely denies any knowledge of the cocaine in her truck; and (II) whether the trial court erred in overruling the defendant's general objection to the prosecutor's question of a chemical analyst asking the witness to give his opinion of the contents of a package upon which contents only a preliminary color test had been conducted.

I

[1] For a conviction of felonious possession of cocaine, the State is required to prove that the defendant knowingly possessed cocaine. N.C.G.S. § 90-95(d)(2) (1990); *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (felonious possession of controlled substance requires knowing possession). "To prove the offense of trafficking in cocaine by possession the State must show: 1) [knowing] possession of cocaine and 2) that the amount possessed was 28 grams or more." *State v. Mebane*, 101 N.C. App. 119, 123, 398 S.E.2d 672, 675 (1990); N.C.G.S. § 90-95(h)(3); *Weldon*, 314 N.C. at 403, 333 S.E.2d at 702. Felonious possession of cocaine is a lesser included offense of trafficking in cocaine by possession. *State v. Siler*, 310 N.C. 731, 733, 314 S.E.2d 547, 549 (1984); *State v. Brown*, 101 N.C. App. 71, 79, 398 S.E.2d 905, 909-10 (1990); *State v. Winslow*, 97 N.C. App. 551, 557, 389 S.E.2d 436, 440 (1990). With regard to lesser included offenses, our Supreme Court has stated:

> A trial court must submit to the jury a lesser included offense when and only when there is evidence from which the jury could find that the defendant committed the lesser included offense. . . . When the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser included offense is not required. . . . Mere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser included offense. . . . Thus, mere denial of the charges by the defendant does not require submission of a lesser included offense.

State v. Maness, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988) (citations omitted).

Relying upon *Siler*, the defendant argues that the trial court erred in denying the defendant's request to instruct the jury on felonious possession of cocaine as a lesser included offense of trafficking in cocaine by possession. The defendant's reliance upon *Siler* is misplaced. Although the defendant in *Siler* denied knowing about 300 grams of cocaine found in the trunk of a car in which he had been a passenger, he admitted that he had knowledge of a smaller amount of cocaine also found in a separate bag inside that car. From this evidence the jury could have determined that the defendant possessed an amount of cocaine less than the amount required for conviction of trafficking in cocaine by possession, and therefore the defendant was entitled to an instruction on the lesser included offense. *Id.* at 733, 314 S.E.2d at 549. Here, however, the defendant does not deny that the State presented positive and uncontroverted evidence on each element of trafficking in cocaine by possession. Accordingly, we do not address the issue of whether the State presented such evidence on each element of the charged crime. *See State v. Thorpe*, 326 N.C. 451, 454-55, 390 S.E.2d 311, 313-14 (1990) (constructive possession); *State v. Davis*, 325 N.C. 693, 697-99, 386 S.E.2d 187, 190-91 (1989) (constructive possession); *State v. Baize*, 71 N.C. App. 521, 528-30, 323 S.E.2d 36, 41-42 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E.2d 34 (1985) (concert of action and constructive possession). Instead, the defendant argues that her denial of any knowledge of the cocaine in her truck is sufficient to require the submission of the lesser included offense to the jury. We disagree. The mere denial of the charges by the defendant, where there is positive evidence on each element of the crime charged and where there is no conflicting evidence

relating to any element, does not require submission of a lesser included offense to the jury. *Maness*, 321 N.C. at 461, 364 S.E.2d at 353.

II

[2] On direct examination, Aldridge was asked if he had an opinion as to the contents of the cellophane package found in the black glove under the defendant's seat. He said that he had formed only a preliminary opinion as to what the package contained. The prosecutor asked him for his preliminary opinion, and the defendant's attorney generally objected. The trial court overruled the general objection and allowed Aldridge to testify that based upon a positive response to the preliminary testing, the package "could" contain cocaine.

"[A] general objection, if overruled, is ordinarily not effective on appeal." *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986). "This rule serves to facilitate proper rulings and to enable opposing counsel to take proper corrective measures to avoid retrial." *State v. Catoe*, 78 N.C. App. 167, 168, 336 S.E.2d 691, 692 (1985), *disc. rev. denied*, 316 N.C. 380, 344 S.E.2d 1 (1986). Under Rule 10(b)(1) of the Rules of Appellate Procedure, however, "to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." *See also State v. Ward*, 301 N.C. 469, 477, 272 S.E.2d 84, 89 (1980); N.C.G.S. § 8C-1, Rule 103(a)(1) (1988); 1 H. Brandis, Brandis on North Carolina Evidence § 27 (3d ed. 1988). Although the defendant generally objected to the evidence, the ground for the objection is readily apparent from the context of the direct examination: The chemical analyst's opinion that the white, powder substance "could" contain cocaine is speculative because a complete chemical analysis had not been performed and therefore should not have been admitted into evidence. Accordingly, we will address the defendant's argument that such an opinion should be inadmissible as speculation because it was based on a preliminary opinion and the identification of the substance had not been completed. We do not address other potential issues regarding the admissibility of the analyst's opinion because those issues have not been raised. *See State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282-83, *disc. rev. denied*, 327 N.C. 639,

399 S.E.2d 127 (1990) (relevant rules for admissibility of expert testimony).

Under N.C.G.S. § 8C-1, Rule 702 (1988), "[t]he test for admissibility [of an expert's opinion] is whether the jury can receive 'appreciable help' from the expert witness." *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985) (citation omitted). "While baseless speculation can never 'assist' the jury under Rule 702," *Cherry v. Harrell*, 84 N.C. App. 598, 605, 353 S.E.2d 433, 438, *disc. rev. denied*, 320 N.C. 167, 358 S.E.2d 49 (1987), an expert's opinion need not be positive to be admissible. *State v. Robinson*, 310 N.C. 530, 537-38, 313 S.E.2d 571, 576-77 (1984) (evidence that "male sex organ could" have penetrated vagina admissible though use of "could" significantly weaker than "probably"); *State v. Ward*, 300 N.C. 150, 153-54, 266 S.E.2d 581, 583-84 (1980) (firearms expert allowed to testify that bullet "could have" been fired from defendant's gun); *State v. Benjamin*, 83 N.C. App. 318, 319-20, 349 S.E.2d 878, 879 (1986) (opinion concerning how victim "could have gotten" gunshot residue on his hands admissible). If the expert has a positive opinion, however, the expert is allowed to express that opinion. *Ward*, 300 N.C. at 153-54, 266 S.E.2d at 584. That an expert's "could" or "might" opinion may have "little probative value goes to the question of its weight and sufficiency, not its admissibility." *Id.* at 154, 266 S.E.2d at 584.

Though not a positive opinion that the substance in the cellophane package contained cocaine, the analyst's opinion that the substance "could" contain cocaine was properly admissible. The opinion was not based upon mere speculation, instead it was based upon a preliminary color test with a positive result. *See State v. McDougall*, 308 N.C. 1, 10, 301 S.E.2d 308, 314, *cert. denied*, 464 U.S. 865, 78 L.Ed.2d 173 (1983) (trial court admitted results of initial screening test of blood showing positive reaction for cocaine). That the analyst's opinion was based upon a positive preliminary test result and not upon a complete analysis goes not to the admissibility of the opinion, but to its weight and sufficiency on an issue. *See Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 201, 392 S.E.2d 657, 659 (1990) (addressing sufficiency of evidence not threshold question of admissibility of 'might or could' opinion evidence).

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

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

WILSON FORD, PLAINTIFF v. NCNB CORPORATION, DEFENDANT

No. 8926SC1288

(Filed 1 October 1991)

1. **Banks § 45 (NCI4th)— misplaced deposit—liability to employee making deposit**

The trial court did not err by denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict in an action to recover damages suffered when defendant lost a deposit made by plaintiff for his employer. The asserted basis for the motions was that the evidence does not indicate that the lost deposit was a proximate cause of plaintiff's employment being terminated, but the loss of his job was not the only damage the evidence shows that plaintiff sustained and evidence was presented indicating that the loss of the deposit proximately caused plaintiff to lose his job.

Am Jur 2d, Banks §§ 428, 430, 431.

2. **Limitation of Actions § 4.2 (NCI3d)— negligence—loss of deposit—amendment—not barred**

An action for damages incurred when defendant lost a deposit made by plaintiff for his employer was not barred by the statute of limitations. Defendant's contention that the original pleading as to breaching a bailment was not notice of the occurrences and transactions upon which the amended negligence claim is based has no merit; the amended pleading does not allude to any new occurrence or transactions, but merely characterizes differently the same occurrences and transactions that were proven at trial.

Am Jur 2d, Limitation of Actions §§ 219-222, 228.

3. **Damages § 22 (NCI4th)— mental and emotional distress—no physical contact**

The trial court did not err by permitting plaintiff to recover damages for the mental and emotional distress caused by de-

fendant's negligence which did not involve any physical contact with plaintiff where plaintiff alleged damages arising from the negligent loss of a deposit made by plaintiff for his employer. The impact rule, devised for circumstances markedly different from those present here, is no reason for denying redress for consequences so naturally and obviously resulting from a defendant's neglect in handling money duly delivered to it.

Am Jur 2d, Damages § 252; Fright, Shock, and Mental Disturbance §§ 15, 25, 55.

APPEAL by defendant from judgment entered 7 July 1989 by *Judge Shirley L. Fulton* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 31 May 1990.

On 19 August 1987 plaintiff brought this action to recover damages which allegedly resulted from defendant bank losing, for about two years, $5,000.15 that he placed in one of defendant's night depositories for his employer, A&P. The only theory of liability initially alleged was the breach of a special bailment in regard to the deposit. The complaint alleged that the bank's failure to promptly credit the deposit to A&P or properly explain its failure to do so caused plaintiff to lose his job and suffer a loss of earnings, emotional anguish, humiliation, scorn and derision. On 17 May 1989, a few weeks before trial, the court permitted plaintiff to file an amendment to the complaint which alleges that defendant negligently failed to have the depository properly searched for the deposit bag that was lodged in it, though it knew or should have known that the bag could be lost in the depository and that its failure to locate the deposit would likely damage plaintiff. Defendant denied all the material allegations of the complaint and amendment and pleaded as a further defense the three-year statute of limitations. Following a trial of the two issues submitted, the jury found that defendant's negligence damaged plaintiff in the amount of $100,000 and judgment was entered for that amount. Plaintiff's evidence pertinent to the questions presented, when viewed in the light most favorable to him, indicates the following:

In February, 1984 when plaintiff was twenty years old, A&P asked him to accept employment as a manager trainee at its Park Road store in Charlotte, and while so employed he was in effect the assistant manager of the store. Plaintiff, then attending Johnson C. Smith University in Charlotte, had been a hard working, effi-

cient, well regarded part-time employee of A&P since he was a junior in high school. One of plaintiff's frequent responsibilities as a manager trainee was to deposit the store's daily receipts in the night depository of NCNB's branch facility on Park Road. The instructed procedure for accomplishing that task was as follows: Count and itemize the currency and checks to be deposited; put the funds and a deposit slip in a specially numbered, lockable bag furnished by the bank and put a duplicate deposit slip in the store safe; lock the bag and take it to the branch depository; unlock the depository door with a key furnished by the bank, drop the bag in the depository, close the door and lock it; unlock and reopen the door and look in the depository to make sure that the bag is not visible and has dropped out of sight into the vault inside the building; re-close and re-lock the depository door. The bank's routine in processing night deposits was as follows: Each morning two bank employees working together opened the vault, logged in each deposit bag that was there, checked its contents against the deposit slip, and left the bag and validated deposit slip for the customer to pick up at its convenience.

On 31 July 1984 the store's receipts for deposit amounted to $5,000.15 and plaintiff followed the instructed procedure in making the deposit. When the two bank employees opened the depository the next morning A&P's bag was not found and the A&P employee who called for it was so informed. A few days later, the bag still not having been found, the bank reported the missing deposit to A&P. Mr. Waters, the Park Road A&P store manager, went to the bank and told Ms. Moss, the branch manager, that plaintiff stated that he deposited the bag and asked the bank to investigate. The bank's investigation consisted only of again looking into the depository, which others had already done to no avail, and reexamining the bank's log as to deposit bags received. The depository was not dismantled and its inner mechanisms were not searched, and neither the Mosler Safe Company, which maintained the night depository, nor Diabold Company, Inc., which installed it, was asked to assist in the investigation. The depository was under the exclusive control of the bank and only the bank had the ability or authority to dismantle or search it. After several conversations between A&P's store manager, Mr. Waters, and various bank employees, the bank's position was that it had not received the deposit and would not credit it to A&P's account. Ford was not told that the deposit was missing and had not been credited to

the store's account until late September, 1984, when he was questioned about mislaying or losing the bag and submitted to a polygraph test at the store's request. After the test indicated that some of his answers were deceptive, A&P terminated plaintiff's employment on 9 October 1984 and so advised the bank a few days later. On 19 June 1986 the lock on defendant's night depository was jammed by another customer's misuse and the bank called Mosler Safe Company to repair it. When Mosler's technician began working on the depository he heard a scraping sound and upon removing the head of the depository found the missing deposit bag. After learning that the "lost" deposit had been found A&P's store manager offered Ford his job back, which he declined.

During the first few months after plaintiff was discharged in trying to obtain employment he truthfully told prospective employers what had happened at A&P and was not hired. After he stopped listing A&P as a former employer he immediately obtained a job at minimum wages and within a few months thereafter was earning more than he did at A&P. Before the deposit bag was lost plaintiff enjoyed a good reputation among all the company employees and on a scale of one to ten the store manager had rated him as a ten. He was outgoing and sociable, helped to support his mother and three younger brothers, and was paying for a new car on the installment plan. After being discharged he became withdrawn and lost both sleep and weight. When his "friends" either avoided him or teased him for refusing to share the "lost" money with them he was embarrassed and depressed and would sit in his room for hours wondering what could have happened to the deposit bag. He felt that his inability to help support his family was a loss of his manhood. His new car was repossessed when he could not make the payments and his good credit rating was ruined.

Ferguson, Stein, Watt, Wallas, Adkins and Gresham, P.A., by Jonathan Wallas, for plaintiff appellee.

J. J. Wade, Jr. and James H. Wade for defendant appellant.

PHILLIPS, Judge.

[1] Defendant appellant poses three questions for us to determine, the first of which is whether the court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. The asserted basis for the motions was that the evidence

does not indicate that the lost deposit was a proximate cause of A&P terminating plaintiff's employment. Since losing his job with A&P was not the only damage that the evidence shows plaintiff sustained as a consequence of the lost deposit the motions were without merit on their face, and were properly denied by the court. Furthermore, evidence was presented indicating that the loss of the deposit proximately caused plaintiff to lose his job. That the bank reported to A&P that $5,000.15 plaintiff said he delivered to the bank was not received, that A&P fired him after subjecting him to a polygraph test concerning the lost deposit, and that A&P offered to rehire him after the deposit was found is evidence from which the inference can be drawn that he was fired because of the lost funds. And as defendant expressly recognized in its brief, there was also testimony by A&P's store manager that he "understood that plaintiff was terminated because the deposit bag was lost." That this evidence may have been erroneously received, as defendant contends, did not eliminate it from the case as defendant mistakenly assumes. The evidence having been received, the court had to take it into account in determining whether the verdict was supported by evidence. *Harrell v. W. B. Lloyd Construction Co.*, 300 N.C. 353, 266 S.E.2d 626 (1980). Nor is it correct, as defendant further argues, that the testimony of A&P's personnel manager establishes without contradiction that plaintiff was fired for not following the store's requirement that the night depositor be accompanied by another employee. For the personnel manager himself contradicted this testimony by admitting that plaintiff would not have been fired if the lost deposit had been found within a few weeks, and plaintiff further contradicted it by testifying that he had not been told of any requirement to be accompanied when making night deposits and that both he and the store manager had made unaccompanied deposits without being reprimanded.

[2] The second question defendant presents is whether the court erred in refusing to submit an issue as to the negligence claim asserted in the amendment to the complaint being barred by G.S. 1-52(16), the three-year statute of limitations for personal injury actions. We treat the question as being whether the action is barred by the three-year statute of limitations, for under the circumstances recorded and argued the question is one of law, not fact. Since plaintiff's claim for negligence accrued, so defendant states, either at "the end of September, 1984," when "the Plaintiff first learned there was some problem with the July 31 deposit" or "about Oc-

tober 9, 1984" when A&P terminated his employment, and the amendment to the complaint was not filed until 17 May 1989, the answer to the question depends upon whether the original pleading alleging a breach of the bailment involving the deposit was notice to defendant of "the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." Rule 15(c), N.C. Rules of Civil Procedure. Under the provisions of that rule if the original pleading was such notice the amendment will be "deemed to have been interposed at the time the claim in the original pleading was interposed," which was within three years of the accrual of the action. If, however, the original pleading was not such notice, the amended pleading came too late and the claim asserted is barred.

Defendant's argument that the original pleading as to breaching the bailment was not notice to it of the occurrences and transactions upon which the amended negligence claim is based has no merit. Defendant's liability as a bailee of the deposit rests upon negligence, 8 C.J.S. *Bailments* Sec. 48 (1988); *Millers Mutual Insurance Association of Illinois, et al. v. Atkinson Motors, Inc.*, 240 N.C. 183, 81 S.E.2d 416 (1954), and in the original pleading it was alleged that defendant breached the bailor-bailee relationship by failing to find and credit the deposit. In the amendment to the complaint it was alleged that defendant's failure to find and credit the deposit was negligence. The amended pleading does not allude to any new occurrence or transaction; it merely characterizes differently the same occurrences and transactions that the original pleading was based upon. Since both pleadings are based on the occurrences and transactions that were proved at trial and which support the verdict and judgment the negligence claim is not barred by the statute of limitations and defendant's arguments to the contrary are overruled.

[3] The final question defendant poses is whether the court erred in permitting plaintiff to recover damages for the mental and emotional distress caused by defendant's negligence which did not involve any physical contact with plaintiff. In arguing that plaintiff is not entitled to such damages, defendant relies upon statements in various cases, including *Williamson v. Bennett*, 251 N.C. 498, 503, 112 S.E.2d 48, 52 (1960), to the effect that "in ordinary negligence cases" recovery may not be had for mental or emotional distress in the absence of "some actual physical impact or genuine physical injury." But our Courts have allowed such damages to be recovered

in many unusual cases not involving physical contact where the emotional and mental stress suffered was an obvious and natural consequence of the particular negligence involved. One such case is *Kimberly v. Howland*, 143 N.C. 398, 55 S.E. 778 (1906), where negligence in blasting caused rocks to strike plaintiff's house, but not the plaintiff. Another such case is *Young v. Western Union Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890), where damages for mental and emotional distress resulting from the negligent late delivery of a telegraph message indicating a spouse's last illness were approved. In *Young* the Court said, "If injury to the feelings be an element to the actual damages in slander, libel, and breach of promise cases, it seems to us it should equally be so considered in cases of this character." *Id.* at 375, 11 S.E. at 1045. The same rule applies in this extraordinary case where defendant bank's negligence in handling money duly and properly delivered to it naturally, if not inevitably, caused plaintiff to be suspected of dishonesty and suffer mental and emotional distress, though no physical contact either occurred or was threatened. For it is a commonly known fact of life that employees who fail to deposit money entrusted to them for that purpose are often suspected of embezzlement; that employees suspected of dishonesty are often shunned and derided by others; that honest persons unjustly suspected of dishonesty are embarrassed, worried, humiliated and frustrated; and that such mental and emotional stress and strain often causes a loss of sleep and weight. The impact rule, devised for circumstances markedly different from those present here, is no reason for denying redress for consequences so naturally and obviously resulting from a defendant's neglect in handling money duly delivered to it, and since the law does not require vain things it does not require medical proof of consequences that are as natural and obvious as those plaintiff suffered in this case.

In a case strikingly similar in its facts to this one, the Mississippi Supreme Court deemed the impact rule inapplicable and allowed the plaintiff to recover damages for emotional distress much like that which the plaintiff in this case suffered. In *First National Bank v. Langley*, 314 So.2d 324 (Miss. 1975), Langley, also an employee of A&P, deposited the day's receipts in the bank's night depository and was suspected of thievery after the bank reported that the deposit had not been received. The only significant difference between the cases is that Langley repeatedly requested the bank to check the depository and the bank, after making super-

ficial checks, incorrectly insisted that the bag could not have gotten hung up in the depository. Four members of the Court dissented from the decision, not because the "impact rule" was not applied, but because they were of the opinion that punitive damages should have been permitted, while the majority ruled otherwise.

No error.

Judges ARNOLD and COZORT concur.

BARBARA MacCLEMENTS, PLAINTIFF v. DALE LAFONE, DEFENDANT

No. 9026SC951

(Filed 1 October 1991)

1. **Physicians, Surgeons, and Allied Professions § 12.3 (NCI3d) — sexual relationship between therapist and patient — professional malpractice**

Plaintiff's evidence was sufficient for the jury in a professional malpractice action against defendant therapist where it tended to show that plaintiff sought treatment at a mental health center for various problems, including male-female relationships; defendant provided therapy for plaintiff for over two months; during an evening therapy session on 10 April 1985 defendant began kissing plaintiff and then had sexual relations with her; defendant later transferred plaintiff's case to another therapist; defendant continued a sexual relationship with plaintiff until the spring of 1986; expert witnesses testified that sexual conduct between a patient and a therapist is unacceptable conduct and falls below the applicable standard of practice; plaintiff suffers from post-traumatic stress disorder as a result of defendant's conduct; and plaintiff will need extensive therapy to enable her again to enter into a therapeutic relationship and then to address the original issues which prompted her initially to seek treatment from defendant.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 83, 275; Seduction § 8.

Civil liability of doctor or psychologist for having sexual relationship with patient. 33 ALR3d 1393.

2. Physicians, Surgeons, and Allied Professions § 12.3 (NCI3d)— sexual relationship between therapist and patient—consent—instructions

The trial court did not err in failing to submit a preclusive issue of consent to the jury in a professional malpractice action based on a sexual relationship between defendant therapist and plaintiff patient.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 366.

3. Rules of Civil Procedure § 15.1 (NCI3d)— amendment of complaint—punitive damages

The trial court did not abuse its discretion in allowing plaintiff to amend her complaint to allege a claim for punitive damages in a professional malpractice action.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 371; Pleading § 323.

4. Damages § 131 (NCI4th); Physicians, Surgeons, and Allied Professions § 21 (NCI3d)— professional malpractice—punitive damages—sufficiency of evidence

Plaintiff's evidence was sufficient for submission of an issue of punitive damages to the jury in a professional malpractice action against defendant therapist where it tended to show that plaintiff sought treatment from defendant for various problems, including male-female relationships; defendant treated plaintiff for over two months; on 10 April 1985 plaintiff called defendant in a panic and arranged a 12:00 noon appointment for that day; defendant called her back following this appointment to arrange another appointment the same day for after office hours; defendant had sexual relations with plaintiff during this later appointment; and defendant terminated his treatment of plaintiff and arranged for her case to be transferred to a female therapist.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 371.

5. Constitutional Law § 354 (NCI4th); Rules of Civil Procedure § 37 (NCI3d)— possible punitive damages—insufficiency to invoke self-incrimination privilege

The trial court's allowance of plaintiff's motion to compel defendant to respond to deposition questions regarding his sexual affairs with plaintiff and other patients did not violate

defendant's right against self-incrimination on the ground that his testimony might subject him to punitive damages where there was no showing of a threat of execution against the person under N.C.G.S. § 1-311.

Am Jur 2d, Depositions and Discovery §§ 38, 39.

6. **Evidence § 19 (NCI3d)— malpractice—sexual relations with patient—evidence of sexual relations with other patients**

In a professional malpractice action based on a sexual relationship between defendant therapist and plaintiff patient which began while defendant was treating plaintiff at a mental health center, testimony that defendant had previously engaged in sexual relations with three of his other patients at the mental health center was properly admitted to show defendant's scheme or intent to take advantage of female patients being treated by him at the mental health center. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 334.

7. **Evidence § 52 (NCI3d)— expert testimony—capacity to consent to sex with therapist**

In a professional malpractice action based on a sexual relationship between defendant therapist and plaintiff patient, the trial court did not err in the admission of expert testimony concerning plaintiff's capacity to consent to the sexual conduct in question where the witness's opinion was based on his interpretation of plaintiff's medical records while defendant was treating her.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 341, 345, 346, 351.

8. **Physicians, Surgeons, and Allied Professions § 15.1 (NCI3d)— professional malpractice—violation of ethical standards**

The trial court in a professional malpractice action against a therapist did not err in admitting testimony of defendant's violation of ethical principles for marriage and family therapists where expert testimony equated the relevant ethical principles with the accepted standard of reasonable care imposed by tort law.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 212, 213.

9. Insurance § 150 (NCI3d); Physicians, Surgeons, and Allied Professions § 15 (NCI3d)— malpractice action—evidence of liability insurance inadmissible

The trial court did not err in excluding evidence of defendant's professional liability insurance policy in a professional malpractice action.

Am Jur 2d, Evidence § 404.

Propriety and prejudicial effect of trial counsel's reference or suggestion in medical malpractice case that defendant is insured. 71 ALR4th 1025.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance. 4 ALR2d 761.

APPEAL by defendant from judgment entered 14 March 1990 by *Judge James U. Downs* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 19 August 1991.

Plaintiff sought counseling in January 1985 at Mecklenburg Mental Health Center (MMHC). MMHC assigned her case to defendant, one of its employees. Plaintiff contends on 10 April 1985 defendant began kissing her during an evening therapy session and then had sexual relations with her. Defendant contends his sexual relationship with plaintiff began on 11 April 1985, after he had terminated the therapist/patient relationship.

Plaintiff filed a professional malpractice action against defendant on 7 April 1988. Following a jury trial plaintiff received a verdict in the amount of $135,000.00. From the resulting judgment, defendant appeals.

Lesesne & Connette, by Edward G. Connette; and Karro, Sellers, Langson & Gorelick, by Seth H. Langson, for plaintiff-appellee.

Elrod & Lawing, P.A., by Frederick K. Sharpless and Elizabeth G. Grimes, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first assigns error to the trial court's denial of his motion for a directed verdict.

> In passing upon a defendant's motion for directed verdict, the plaintiff's "evidence must be taken as true, . . . and [the motion] may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiffs." *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E.2d 897, 902 (1974).

Mazza v. Huffaker, 61 N.C. App. 170, 174, 300 S.E.2d 833, 836, *review denied*, 309 N.C. 192, 305 S.E.2d 734 (1983). If all the essential elements of actionable negligence tend to be supported after the evidence is taken in the light most favorable to the plaintiff, along with all permissible inferences, the motion is properly denied. *Id.*

> Defendant's liability is conditioned on plaintiff's proof
>
> 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. Gen. Stat. § 90-21.12 (1990). Expert testimony is ordinarily required in determining this standard of care. *Id.* at 175, 300 S.E.2d at 837.

Plaintiff presented evidence tending to show the following facts. In January 1985 plaintiff sought treatment at the Mecklenburg Mental Health Center (MMHC) for depression resulting from the loss of a significant relationship and problems in male-female relationships. MMHC assigned her case to defendant, whose job title is variously described in plaintiff's medical records as psychologist, psych. I, and clinician.

Defendant provided therapy for plaintiff until 10 April 1985. During an evening therapy session on that date defendant began kissing plaintiff and then had sexual relations with her. Defendant later transferred plaintiff's case to another therapist. He continued a sexual relationship with her until the spring of 1986.

Plaintiff presented expert testimony which tended to show the following. Patients commonly experience "transference" during the therapeutic process. This is a psychological term describing how patients will attribute to their therapist feelings the patients have had toward significant others in their lives. Feelings of closeness, intimacy, and sexual attraction to the therapist are com-

monly involved. By reacting differently than the patient's significant others have reacted to these feelings, the therapist allows the patient to experience a different style of relationship. Therapeutic change can then occur. A therapeutic relationship is built upon trust and objectivity. Sexual intimacy with a patient is a serious breach of this trust and objectivity. "Courts have uniformly regarded mishandling of transference as malpractice or gross negligence." *Simmons v. United States*, 805 F.2d 1363, 1365 (1986) (ten citations omitted).

Expert testimony also addressed the standards of practice for psychologists or therapists in Charlotte, North Carolina for the relevant time period. These expert witnesses testified that sexual contact between a patient and a therapist, counselor or psychologist was unacceptable conduct and fell below the applicable standards of practice. Testimony clearly shows defendant engaged in a sexual relationship with plaintiff, thereby violating this standard.

Other expert testimony diagnosed plaintiff as suffering from post-traumatic stress disorder as a result of defendant's conduct. Plaintiff would need extensive therapy, first to enable her to enter again into a therapeutic relationship and then to address the original issues which prompted her to seek treatment from defendant initially. Plaintiff has presented evidence of professional malpractice sufficient to withstand defendant's motion for a directed verdict.

Defendant also assigns error to the trial court's denial of his motion for judgment notwithstanding the verdict. The standards employed by the trial court in passing on a motion for directed verdict are also used in passing on a motion for judgment notwithstanding the verdict. *Id.* at 174, 300 S.E.2d at 836-37. For the reasons discussed in the preceding assignment of error, the evidence in the record is sufficient to withstand defendant's motion for judgment notwithstanding the verdict.

[2] Defendant contends the trial court erred by failing to submit a preclusive issue of consent to the jury. While defendant argues exhaustively by analogy and implication the concept of consent as a defense in this negligence-based action, he cites no authority directly on point. We are not persuaded.

"Jury instructions must be considered and reviewed in their entirety; the instructions will not be dissected and examined in fragments. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967)."

Robinson v. Seaboard System R.R., Inc., 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), *review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). If there is no reasonable cause to believe the charge misled the jury or affected the impartiality of the trial, the assignment of error will be overruled. *Id.* Any perceived error regarding plaintiff's consent accrued to defendant's benefit, so defendant is unable to demonstrate that he has been prejudiced as a result. *Id.* at 528, 361 S.E.2d at 919. This assignment of error is overruled.

[3] Defendant argues the trial court erred in granting plaintiff's motion to amend her complaint to add a claim for punitive damages. A motion to amend is addressed to the trial court's sound discretion, and its decision will not be disturbed on appeal without a clear showing of abuse of discretion. *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986). Defendant failed to carry his burden of satisfying the trial court that he would be prejudiced by the amendment. *Id.* The record does not support defendant's contentions of material prejudice. After careful review of the record we find no abuse of discretion by the trial court.

[4] Defendant contends the trial court erred in denying his motions for a directed verdict and for judgment notwithstanding the verdict as to plaintiff's claim for punitive damages. The punitive damages issue is properly submitted to the jury "[i]f there is sufficient evidence from which the jury may reasonably infer that the wrongdoer's . . . acts were aggravated by . . . a wanton and reckless disregard of plaintiff's rights[.]" *Mazza*, 61 N.C. App. at 188, 300 S.E.2d at 844.

Plaintiff's evidence tends to show the following facts. Plaintiff sought treatment from defendant for various problems, including male-female relationships. Defendant treated plaintiff for over two months. On 10 April 1985 plaintiff called defendant in a panic and arranged a 12:00 appointment for that day. Defendant called her back following this appointment to arrange another appointment on 10 April for after office hours. Defendant had sexual relations with plaintiff during this later appointment. He terminated his treatment of her and arranged for her case to be transferred to a female therapist. From the record before us there was sufficient evidence to warrant the submission of the punitive damages issue to the jury. The trial court did not err in denying defendant's motions.

[5] Defendant contends the trial court erred in granting plaintiff's motion to compel defendant's response to deposition questions re-

garding his sexual affairs with plaintiff and other patients. He argues the trial court's action violated his privilege against self-incrimination. Defendant bases his contention upon *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964). The basis for *Allred* was N.C. Gen. Stat. § 1-311 (1953). *Leonard v. Williams*, 100 N.C. App. 512, 515, 397 S.E.2d 321, 323 (1990).

In order for a defendant to invoke his privilege against self-incrimination, "there must be a threat of execution against the person[.]" *Id.* at 516, 397 S.E.2d at 324. Due to an amendment of G.S. § 1-311 (1983) in 1977, execution against a person under this statute is limited

> to cases where either the jury's verdict or the trial court's findings of fact include a finding that the defendant is about to either (1) flee the jurisdiction to avoid paying his creditors, or (2) has concealed or diverted assets in fraud of his creditors, or (3) will do so unless immediately detained.

Id. There being no such finding in the case *sub judice*, defendant has no basis to exercise his privilege against self-incrimination because of the threat of a punitive damages award. *Id.*

[6] Next defendant contends the trial court erred by allowing the admission of testimony concerning three patients with whom defendant had engaged in sexual relations prior to plaintiff. "Evidence of other crimes, wrongs or acts is admissible to show that a defendant had the requisite mental intent or state[.]" *State v. Mills*, 83 N.C. App. 606, 611, 351 S.E.2d 130, 133 (1986) (omitted citations).

> [T]he ultimate test for determining whether such evidence is admissible [under N.C.R. Evid. 404(b)] is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403. *State v. Cotton*, 318 N.C. 663, 665, 351 S.E.2d 277, 278-79 (1987).

State v. Boyd, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988).

The prior incidents of sexual relations occurred between defendant and three patients. Defendant treated each of these patients while employed at MMHC. He began the first relationship with a patient during his first year at MMHC in 1977. Defendant engaged in sexual relations with the first in his office and with the next two patients in their homes. He concluded each relation-

ship before he began the next. Plaintiff was defendant's patient at MMHC. She testified that defendant engaged in sexual relations with her in his office and her home beginning in 1985.

Testimony of these prior relationships with defendant's patients is admissible under N.C.R. Evid. 404(b). It tends to demonstrate defendant's scheme or intent to take advantage of female patients being treated by him at MMHC. The trial court did not abuse its discretion by admitting the testimony under the balancing test of N.C.R. Evid. 403.

[7] Defendant further contends the trial court erred in admitting Dr. Tyson's testimony regarding plaintiff's capacity to consent to the sexual conduct in question. On redirect examination Dr. Tyson was asked if he had an opinion as to plaintiff's capacity to consent. Dr. Tyson was directed to base this opinion upon his "review of the medical records from the Mecklenburg Mental Health Center for the period of January 1985 through April 1985" and his "training and education."

Given that Dr. Tyson's opinion was based on his interpretation of plaintiff's medical records while defendant was treating her, defendant's reliance upon *Cox v. Jefferson-Pilot Fire and Cas. Co.*, 80 N.C. App. 122, 341 S.E.2d 608, *cert. denied*, 317 N.C. 702, 347 S.E.2d 38 (1986), is misplaced. Plaintiff supplied none of the information which Dr. Tyson relied upon in forming his opinion. The trial court did not err in admitting this testimony.

[8] In his final argument defendant contends the trial court erred by allowing testimony and receiving evidence of his violation of ethical principles for marriage and family therapists. Expert testimony equated the relevant ethical principles with the accepted reasonable standard of care imposed by tort law. *Mazza*, 61 N.C. App. at 184, 300 S.E.2d at 842. Defendant's argument is unavailing.

[9] Plaintiff cross-assigns error to the trial court's refusal to admit into evidence defendant's professional liability insurance policy. "The existence of insurance covering a defendant's liability in an action for damages by reason of defendant's negligence is wholly irrelevant to the issues involved. . . . The North Carolina courts have adhered to the rule that evidence or mention of insurance is not permitted." *Maness v. Bullins*, 19 N.C. App. 386, 387-88, 198 S.E.2d 752, 753, *cert. denied*, 284 N.C. 254, 200 S.E.2d 654 (1973) (citation

omitted). The trial court's exclusion of this evidence was not erroneous.

No error.

Chief Judge HEDRICK and Judge PHILLIPS concur.

NATHAN Q. WILLIAMSON AND JEAN M. WILLIAMSON, PETITIONERS/APPELLANTS v. ROBERT L. SAVAGE, JR., TRUSTEE, SOUTHERN NATIONAL BANK OF NORTH CAROLINA, WALLACE W. HOLT AND MYRTLE E. HOLT, RESPONDENTS

No. 9010SC1285

(Filed 1 October 1991)

1. **Mortgages and Deeds of Trust § 26.1 (NCI3d)— foreclosure—notice of hearing—service by publication**

The trustee in a foreclosure exercised due diligence in attempting to locate and personally serve Jean Williamson where the deed of trust granted the trustee a power of sale; Nathan and Jean Williamson were each entitled to a notice of hearing; the trustee attempted unsuccessfully to serve Jean Williamson by delivery via a Wake County Deputy Sheriff; the trustee posted the notice of hearing on the property, posted it at the door of the courthouse, and published it in the newspaper; and, knowing that Jean Williamson was somewhere in Florida and that the Bank did not have her Florida address, attempted to contact Nathan Williamson to locate that address. The trustee's several attempts to contact Nathan Williamson, combined with the trustee's knowledge that the Bank had also attempted unsuccessfully to contact Nathan Williamson on many occasions about the indebtedness, demonstrate the trustee's due diligence. N.C.G.S. § 45-21.16.

Am Jur 2d, Mortgages § 562.

2. **Mortgages and Deeds of Trust § 26 (NCI3d)— foreclosure—notice of sale—no obligation to mail to last known address**

The trustee in a foreclosure had no obligation to mail the notice of sale to Jean Williamson by first-class mail where the property in North Carolina was Jean Williamson's last

known address and neither the trustee nor the bank knew her Florida address. N.C.G.S. § 45-21.17(4).

Am Jur 2d, Mortgages § 562.

APPEAL by petitioners from order entered 17 September 1990 by *Judge George R. Greene* in WAKE County Superior Court. Heard in the Court of Appeals 23 September 1991.

Rosenthal & Putterman, by Charles M. Putterman, for petitioner-appellants.

Holleman and Stam, by Henry C. Fordham, Jr., for respondent-appellees.

GREENE, Judge.

Petitioners appeal the trial court's order entered 17 September 1990 denying their motion to vacate a foreclosure sale.

Nathan and Jean Williamson (Petitioners) executed a second deed of trust (deed of trust) to secure future advances to Petitioners by Southern National Bank (Bank). Nathan Williamson signed the deed of trust in North Carolina on 10 December 1987, and Jean Williamson signed it in Florida on 26 January 1988. Petitioners' property subject to the deed of trust is located at 909 Bryn Mawr Court, Apex, North Carolina. The trustee under the deed of trust is Robert L. Savage, Jr. (Trustee). Nathan Williamson executed two "commercial loan notes," the first on 8 February 1988 in the amount of $20,000.00 and the second on 1 September 1989 in the amount of $4,200.00. Both notes are payable to Bank, and both are secured by the deed of trust. Petitioners admit that they have defaulted under the terms of the deed of trust.

After Petitioners' default, Bank instructed Trustee to begin foreclosure proceedings on the deed of trust. Trustee began the proceedings by executing a notice of hearing pursuant to N.C.G.S. § 45-21.16 (1984). On 25 April 1990, Trustee, via a Wake County Deputy Sheriff, personally served Nathan Williamson at 909 Bryn Mawr Court, Apex. Trustee attempted to serve Jean Williamson in the same manner, however, the deputy sheriff was unable to locate her at the Bryn Mawr property. On the return of service, the deputy sheriff indicated that Jean Williamson had moved to Florida. Nonetheless, Bank and Trustee served Jean Williamson with the notice of hearing by posting it at the door of the Wake

County Courthouse on 17 April 1990, by posting it on the door of the property on 19 April 1990, and by publishing it in the *News and Observer*.

On 30 May 1990, the Clerk of Superior Court for Wake County conducted the hearing and entered an order authorizing Trustee to proceed with the foreclosure under the deed of trust. Nathan Williamson attended this hearing, but Jean Williamson did not. On 11 June 1990, Trustee mailed by first-class mail the notice of sale to Nathan and Jean Williamson at their Bryn Mawr property address and posted the notice of sale at the door of the Wake County Courthouse. Trustee also published the notice of sale in the *Western Wake Herald* on 27 June 1990 and 4 July 1990. On 6 July 1990, Trustee conducted a public sale of the Bryn Mawr property and sold the property to Wallace and Myrtle Holt.

On 23 August 1990, Petitioners filed a motion to vacate the foreclosure sale on the grounds of inadequate notice of the foreclosure hearing and of the foreclosure sale. The motion came on for hearing on 13 September 1990. The evidence produced at the hearing before the trial court tends to show the following: That Trustee and Bank have never known Jean Williamson's Florida address; that Jean Williamson's last known address was the Bryn Mawr property; that Nathan Williamson had Jean Williamson's Florida address; that Bank gave the deed of trust to Nathan Williamson to have it signed by Jean Williamson in Florida; that Trustee knew that Bank had attempted on many occasions to contact Nathan Williamson unsuccessfully about the indebtedness; and that before the 30 May 1990 hearing, Trustee had attempted unsuccessfully on several occasions to contact by telephone Nathan Williamson for Jean Williamson's Florida address, although Trustee had never left a message at Nathan Williamson's place of business concerning Jean Williamson's Florida address. From this evidence, the trial court found that "Trustee exercised due diligence to locate and personally serve Jean M. Williamson with a Notice of Hearing but was not able to serve her," and concluded that Trustee complied with N.C.G.S. § 45-21.16 and with N.C.G.S. § 45-21.17 (Supp. 1990) with regard to Petitioners.

The issues are (I) whether the trustee in a deed of trust exercised "due diligence" in attempting to obtain the address of the grantor in a deed of trust for purposes of complying with N.C.G.S.

§ 45-21.16; and (II) whether the trustee complied with N.C.G.S. § 45-21.17 where he sent the notice of sale to the last known address of the grantor in a deed of trust.

I

Notice of Hearing

[1] North Carolina Gen. Stat. § 45-21.16(a) (1984) requires that "[t]he mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall serve upon each party entitled to notice under this section a notice of hearing." In this case, the deed of trust granted Trustee a power of sale, and Nathan and Jean Williamson were each entitled to a notice of hearing. *See* N.C.G.S. § 45-21.16(b) (1984). The statute provides that "[t]he notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested . . . ." N.C.G.S. § 45-21.16(a). Trustee attempted unsuccessfully to serve Jean Williamson by delivery via a Wake County Deputy Sheriff and did not attempt to serve Jean Williamson "by actual delivery by registered or certified mail" pursuant to N.C.G.S. § 45-21.16(a).

The statute further provides "that in those instances in which service by publication would be authorized [under the Rules of Civil Procedure], service may be made by posting a notice in a conspicuous place and manner upon the property . . . ." *Id.* Rule 4(j1) of the North Carolina Rules of Civil Procedure provides that "[a] party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication." Therefore, if a party cannot with due diligence be served by personal delivery or registered or certified mail, service of the notice of hearing may be made by posting the notice on the property. *See Federal Land Bank of Columbia v. Lackey*, 94 N.C. App. 553, 556-57, 380 S.E.2d 538, 540 (1989), *aff'd per curiam*, 326 N.C. 478, 390 S.E.2d 138 (1990) (constructive notice sufficient to satisfy minimum due process requirements only if "party's name and address are not reasonably ascertainable"). Having tried and been unable to serve Jean Williamson by personal delivery, Trustee posted the notice of hearing on the Bryn Mawr property, posted it at the door of the Wake County Courthouse, and published it in the *News and Observer*. Accordingly, if Trustee used due diligence in his unsuccessful attempt to locate and serve Jean Williamson,

then his subsequent actions complied with the notice requirement of N.C.G.S. § 45-21.16(a).

"Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980) (no due diligence where plaintiff had access to reports containing defendants' addresses and where plaintiff could have contacted defendants' insurance carrier for help in locating defendants). In deciding whether due diligence has been used in attempting to locate a party entitled to notice of hearing, our appellate courts are not bound by a "restrictive mandatory checklist," rather, we decide whether due diligence has been used on a case-by-case approach. *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372, *disc. rev. denied*, 301 N.C. 87 (1980) (due diligence where "plaintiff's counsel contacted directory assistance and defendant's insurer for his address to no avail"); *see also In re Clark*, 76 N.C. App. 83, 87-88, 332 S.E.2d 196, 199-200, *disc. rev. denied*, 314 N.C. 665, 335 S.E.2d 322 (1985) (no due diligence where petitioner in a termination of parental rights case knew respondent's name and his county of residence, but had not checked the public records to determine his location; rather, petitioner relied solely on information supplied by the mother of respondent's child).

In this case, after the deputy sheriff was unable to locate Jean Williamson to serve her, Trustee, knowing that Jean Williamson was somewhere in Florida and that Bank did not have her Florida address, attempted to contact Nathan Williamson to locate Jean Williamson's Florida address. Trustee testified at the hearing on the motion to vacate the foreclosure sale, "I did not call him every hour on the hour or every day. I made several attempts to contact him, but those were unsuccessful." Bank and Trustee argue that Trustee's several attempts to contact Nathan Williamson, who had Jean Williamson's address, combined with Trustee's knowledge that Bank had also attempted unsuccessfully to contact Nathan Williamson on many occasions about the indebtedness demonstrate Trustee's due diligence. We agree. This evidence shows that Jean Williamson's Florida address was not reasonably ascertainable, and Trustee used due diligence in attempting to locate it. Accordingly, the evidence in this record supports the determination that Trustee

exercised due diligence in attempting to locate and personally serve Jean Williamson.

II

Notice of Sale

[2] North Carolina Gen. Stat. § 45-21.17(1)(a) (Supp. 1990) provides that "[i]n addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument," the notice of sale shall "[b]e posted, at the courthouse door in the county in which the property is situated, for at least 15 days immediately preceding the sale." The statute also requires that the notice of sale shall be published "once a week for at least two successive weeks" in a newspaper "qualified for legal advertising" if such a newspaper is published in the county, and if not, then "in a newspaper having a general circulation in the county." N.C.G.S. § 45-21.17(1)(b) (Supp. 1990). Petitioners do not argue that Trustee did not comply with these requirements.

Furthermore, the statute requires that "[t]he notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 *whose address is known to the trustee or mortgagee . . . .*" N.C.G.S. § 45-21.17(4) (Supp. 1990) (emphases added). Petitioners argue that the evidence before the trial court shows that the Bryn Mawr address was not the last known address for Jean Williamson and that Trustee and Bank knew her Florida address, and that therefore Trustee should have mailed the notice of sale to her by first-class mail. We disagree. "It is well settled that when the trial judge sits as factfinder, his findings of fact are binding [on appeal] if they are supported by any competent evidence in the record . . . ." *R. L. Coleman & Co. v. City of Asheville*, 98 N.C. App. 648, 651, 392 S.E.2d 107, 108-09, *disc. rev. denied*, 327 N.C. 432, 395 S.E.2d 689 (1990). In this case, the trial judge sat as factfinder. Because there is competent evidence in the record to support the findings that the Bryn Mawr property was Jean Williamson's last known address and that neither Trustee nor Bank knew her Florida address, the trial court's findings of fact are binding on this appeal. On these facts, Trustee, not knowing Jean Williamson's Florida address, had no obligation to mail the notice of sale to her by first-class mail. Trustee's actions complied with N.C.G.S. § 45-21.17, and accordingly the trial court's order is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. KENNETH EMORY HARGROVE

No. 9018SC846

(Filed 1 October 1991)

1. **Homicide § 28.1 (NCI4th)— manslaughter—self-defense instruction not given—no error**

Defendant was not entitled to a self-defense instruction in a manslaughter prosecution under facts that involved defendant going out to a parked vehicle and returning with a crowbar. There was no evidence on which the jury could have found the defendant's actions necessary to protect himself nor reasonable under the circumstances.

Am Jur 2d, Homicide §§ 480, 519.

2. **Criminal Law § 86.2 (NCI3d)— homicide—impeachment of defendant—prior convictions—admissible**

There was no error in a manslaughter prosecution from the admission of prior larceny convictions to impeach defendant where defendant contended that these convictions were obtained in violation of his right to counsel. Defendant failed to carry his burden to show by a preponderance of the evidence that he had not waived his right to counsel. N.C.G.S. § 15A-980.

Am Jur 2d, Homicide § 540.

3. **Criminal Law § 1188 (NCI4th)— manslaughter—sentencing—prior convictions—findings as to indigency**

There was evidence to support the findings of the trial court concerning prior convictions when sentencing defendant for manslaughter where defendant contended that, when he was previously convicted in 1971 and 1977, the trial court incorrectly found that defendant was not indigent and chose not to retain private counsel. The decision to use the defendant's prior convictions as statutory factors to aggravate his sentence was not in error.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 9.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 ALR2d 1080.

4. Criminal Law § 1114 (NCI4th)— manslaughter—sentencing—lack of remorse

There was sufficient evidence to support the nonstatutory aggravating circumstance of lack of remorse when sentencing defendant for manslaughter where the State introduced evidence that, after the defendant had beaten his father, he visited a local bar, drank a beer and was gone for at least an hour before returning home and that he told an officer four hours after the beating that his father had gotten what he deserved.

Am Jur 2d, Homicide § 554.

APPEAL by defendant from judgment entered 9 March 1990 in GUILFORD County Superior Court by *Judge Melzer A. Morgan, Jr.* Heard in the Court of Appeals 20 March 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sylvia Thibaut, for the State.

Malcolm Ray Hunter, Appellate Defender, by Assistant Teresa A. McHugh, for defendant-appellant.

WYNN, Judge.

From a judgment imposing an eighteen-year sentence following the defendant's conviction of voluntary manslaughter, defendant appeals. For the reasons that follow we find no reversible error and affirm the trial court's decision.

I

At trial, the evidence produced by the State tended to establish that in the early evening of May 3, 1989, the defendant, Kenneth Emory Hargrove, returned to his home where he lived with his father, Martin Hargrove. The defendant asked his father for money; after refusing to give his son money, an altercation ensued between the father and son during which the defendant obtained a crowbar from a truck parked near the home and returned inside where he beat his father with the crowbar causing his death from injuries to his brain due to multiple blunt force trauma.

The defendant testified in conflict to the State's evidence that before the altercation occurred, he thought his father was "going to get his gun" so the defendant picked up the crowbar from a table in the room where his father sat and beat his father in self-defense. The defendant entered a plea of not guilty to the murder charge and was convicted of voluntary manslaughter and sentenced to eighteen years imprisonment. From his conviction and sentence, he appeals.

II

[1] The defendant first assigns error to the trial judge's instruction that if the jury found "the defendant went outside and returned with the crowbar and struck his father with the crowbar, then any fear the defendant had of imminent death or imminent great bodily harm from his father would not be reasonable."

In *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983), the North Carolina Supreme Court set forth the threshold inquiries for determining whether a defendant is entitled to a self-defense instruction. There, the Court held that two questions must be answered in the affirmative:

> (1) is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and
>
> (2) if so was that belief that it was necessary to kill his adversary in order to protect himself reasonable?

Id. at 148, 305 S.E.2d at 553.

In short, a defendant is only "entitled to an instruction on self-defense if there is any evidence in the record that it was necessary, or reasonably appeared to be necessary, to kill in order to protect himself from death or great bodily harm." *State v. Spaulding*, 298 N.C. 149, 156, 257 S.E.2d 391, 395 (1979) (citing *State v. Johnson*, 166 N.C. 392, 81 S.E.2d 450 (1914)).

In the case at hand, to be sure, there was evidence presented by the defendant that his father was a violent man; his father shot and killed his mother and shot his brother some years earlier and that his father had threatened, on more than one occasion, to shoot the defendant. However, under the set of facts that involved the defendant going out to a parked vehicle and returning with a crowbar, there was no evidence on which the jury could

have found the defendant's actions were necessary to protect himself nor were his actions reasonable under the circumstances. Therefore, defendant was not entitled to a self-defense instruction under these facts.

III

The defendant next assigns error to the use of four prior convictions: a 1971 malicious damage to property charge, a 1977 assault with a deadly weapon (inflicting injury) charge, a 1984 miscellaneous larceny charge, and a 1989 concealing merchandise charge.

These convictions arose during two distinct phases of the trial. The 1984 and 1989 convictions were introduced in the case in chief, on cross-examination, to impeach the defendant. The defendant appeared without the benefit of counsel in both convictions because he executed a waiver of counsel. Finally, during the sentencing phase of the trial, his convictions were found to be statutory factors in aggravation and were used to enhance the defendant's sentence.

Because this appeal confronts separate uses of the same convictions, it is necessary to discuss each use individually.

Use of the Convictions in the Case in Chief

[2] On cross-examination of the defendant, the State used defendant's 1984 and 1989 larceny convictions for impeachment purposes. N.C.R. Evid. 602 allows a prior conviction to be introduced for impeachment purposes, if the conviction was punishable by confinement of more than 60 days. The defendant contends that these convictions were obtained in violation of his right to counsel and as such should have been suppressed. Earlier the defendant moved to have the convictions suppressed, and the trial court held that they were admissible because, in both instances, the defendant had executed a waiver of counsel.

N.C. Gen. Stat. § 15A-980 (1988) controls when a defendant has the right to suppress the use of a prior uncounseled conviction obtained in violation of the defendant's right to counsel. It states that:

> A defendant has the right to suppress the use of a prior uncounseled conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or its use will: (1) increase the degree of crime of which the defendant would be guilty; or (2) result in a sentence of im-

> prisonment that otherwise would not be imposed; or (3) result in a lengthened sentence of imprisonment.

Id.

When a defendant makes a motion to suppress the use of a prior conviction, the burden is on the defendant to prove by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail on a motion to suppress, he must prove " 'that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel.' " *State v. Brown*, 87 N.C. App. 13, 22, 359 S.E.2d 265, 270 (1987) (citing *State v. Haislip*, 79 N.C. App. 656, 658, 339 S.E.2d 832, 834 (1986)). The defendant must meet his burden on all three facts.

Furthermore, where the defendant proceeds on a waiver of counsel, N.C. Gen. Stat. § 15A-1242 requires a thorough examination of the waiver. The requirements are set out below:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (1988).

In *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986), this Court held that, "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary . . . ." *Id.* at 89, 345 S.E.2d at 441.

In the case at hand, the trial court found in both the 1984 and 1989 convictions, "The defendant can read. The defendant is competent and literate." The trial court found that the defendant had executed a "knowing and voluntary" waiver of his right to counsel in both of the prior convictions in question. Moreover,

each conviction was accompanied by the aforementioned certification which indicated that the district court judge complied with the mandates of § 15A-1242.

We conclude that the defendant failed to carry his burden, to show by a preponderance of the evidence, as required by § 15A-980, that he show "he had not waived his right to counsel." The trial court properly allowed the 1984 and 1989 convictions to be admitted into evidence.

Use of the Convictions at Sentencing

[3] Regarding the use of the defendant's convictions during the sentencing phase of the trial, the judge found that each conviction was an aggravating factor sufficient to support enhancement of the defendant's sentence. The defendant contends that this finding was in error because, when defendant was convicted in 1971 and 1977, the trial court incorrectly found that the defendant was not indigent and chose not to retain private counsel. N.C. Gen. Stat. § 15A-980 controls these convictions. Again, the defendant had the burden of showing that (1) he was not indigent, (2) he had no counsel and (3) he had not waived his right to counsel.

The defendant introduced evidence that he was not employed at the time of arrest. However, the defendant testified that at the time of conviction and sentencing on March 9, 1972, he was paid about six dollars an hour; worked forty hours a week; and had expenses of $75.00 to $100.00 a week. Additionally, he testified that at the time of the 1977 conviction, he was earning about $217.00 a week "when he worked." The defendant also testified that he could not afford an attorney and never inquired into the cost of private representation.

"Our scope of review on an order for a motion to suppress is 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.' " *Brown*, 87 N.C. App. at 23, 359 S.E.2d at 270. After a careful review of the record, there was evidence to support the findings of the trial court and as such the decision to use the defendant's prior convictions as statutory factors to aggravate his sentence was not in error.

IV

[4] Finally, the defendant assigns error to the trial judge's finding as a nonstatutory factor in aggravation that the defendant lacked remorse.

Our Supreme Court has recognized the propriety of finding as a nonstatutory factor in aggravation the lack of remorse on the part of the defendant. *See State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985). The State has the burden of proving the existence of a nonstatutory aggravating factor by a preponderance of the evidence. The State must also show that it is reasonably related to the purposes of sentencing. N.C. Gen. Stat. § 15A-1340.4(a) (1988); *State v. Turner*, 103 N.C. App. 331, 406 S.E.2d 147 (1991) (citing *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988)). Moreover, regarding this particular nonstatutory factor, in *State v. Parker*, 315 N.C. 249, 257, 337 S.E.2d 497, 502 (1985), the Supreme Court stated:

> Almost always remorse occurs, if at all, sometime after the commission when defendant has had an opportunity to reflect on his criminal deed. If after such time for reflection remorse does not come, and there is evidence of this fact, then lack of remorse properly may be found by the sentencing judge as an aggravating circumstance.

Id.

In the case at hand, the State introduced evidence that after the defendant beat his father, he visited a local bar, drank a beer and was gone for at least an hour before returning home. Even more telling is the fact that at the police station, four hours after beating his father, the defendant told an officer that his father "got what he deserved." We find that this evidence was enough to support the aggravating circumstance of lack of remorse found by the trial court.

V

For the foregoing reasons, we find no error in the trial and sentencing of the defendant.

No error.

Judges ARNOLD and JOHNSON concur.

RICHARD DANIEL SHUFORD, II, BY HIS GUARDIAN AD LITEM, RICHARD DANIEL SHUFORD, AND RICHARD DANIEL SHUFORD, INDIVIDUALLY, PLAINTIFFS v. ARCHIE N. McINTOSH, M.D., ARCHIE N. McINTOSH, M.D., P.A., AND THE McDOWELL HOSPITAL, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. 9024SC1185

(Filed 1 October 1991)

1. **Jury § 7.13 (NCI3d)— civil action—excessive peremptory challenges—plaintiff not prejudiced**

The trial court erred in allowing each defendant in a medical malpractice action two more peremptory challenges than N.C.G.S. § 9-22 authorizes upon finding that defendants had antagonistic defenses, but plaintiff was not prejudiced by such error.

Am Jur 2d, Jury §§ 250, 251, 260-262.

2. **Physicians, Surgeons, and Allied Professions § 15 (NCI3d)— medical malpractice case—exclusion of medical pamphlets**

The trial court in a medical malpractice case did not err in the exclusion of two medical pamphlets where no foundation was laid for establishing the relevancy or reliability of these pamphlets, and the pamphlets appear to be recommendations rather than standards applicable to defendants.

Am Jur 2d, Evidence § 890.

3. **Damages § 53 (NCI4th)— collateral source rule—cross-examination about public benefits**

Defendants' cross-examination of plaintiff's witnesses in a medical malpractice action as to educational and other public benefits and services available to the brain-damaged minor plaintiff did not violate the collateral source rule and was not error where it was in response to testimony offered by plaintiff that such facilities and services were not available in the area.

Am Jur 2d, Damages §§ 570, 571, 583, 584.

Receipt of public relief and gratuity as affecting recovery in personal injury action. 77 ALR3d 366.

APPEAL by plaintiffs from judgment entered 26 January 1990 by *Judge Joseph R. John* in YANCEY County Superior Court. Heard in the Court of Appeals 3 June 1991.

The action of the minor plaintiff, Richard Daniel Shuford, II, is for brain damage and other injuries allegedly caused by the negligence of the defendants during his mother's pregnancy and delivery. His father's action to recover for the child's medical expenses and lost services was voluntarily dismissed before trial. Following a December-January trial of the child's case, interrupted by a thirteen day recess, the jury answered the negligence issue as to each defendant "No" and judgment was entered dismissing the action. In support of his allegations of neglect plaintiff presented evidence tending to show that the medical care defendants furnished him and his mother was deficient in several respects and caused his considerable mental and physical deficiencies. In pertinent part plaintiff's evidence when viewed in its most favorable light to him tends to show the following:

Because of swelling in her ankles during the last few weeks preceding delivery, Dr. McIntosh, his mother's obstetrician, had her take the diuretics Diuril and Lasix in dosages that were known to endanger the health of prenatal children. On the morning of 28 July 1977, though the child's head was not then engaged in the pelvis and was not in position to start through the birth canal, Dr. McIntosh, in an attempt to induce labor, ruptured the mother's amniotic membranes in his office and had her admitted to defendant McDowell County Hospital, which was not qualified to properly handle high risk obstetrical patients such as plaintiff's mother. At 8 o'clock that night, labor not having progressed, Dr. McIntosh administered dosages of the drug Pitocin, which caused the uterus to contract as though in labor for several hours; during that period the fetal heart tones were not monitored and the doctor was not in attendance, as approved medical practice required, though defendants knew that the repeated contractions of the uterus could reduce or cut off the supply of blood and oxygen to the child. After several hours of contractions when his mother did not go into actual labor, Dr. McIntosh administered still another dose of Pitocin with the same effects and result as before. About twenty-four hours after first attempting to induce labor by rupturing the mother's membranes and fifteen hours after first administering the drug Pitocin to her, Dr. McIntosh ascertained by X-ray pelvimetry, as he could and should have ascertained before under-

taking to induce labor, that the child's head was not engaged, the mother's pelvis was too narrow to allow the child to pass through the birth canal, and that instead of expediting labor the prolonged uterine contractions that had occurred had repeatedly pushed the child's head against the mother's bony pelvis to no purpose. After the child was properly delivered by Caesarean section it exhibited signs of serious injury during birth including respiratory distress and insufficient oxygen supply, and two days later the child began to have severe seizures, but the hospital nurses did not notify the doctor of any of those ominous conditions and neither defendant took any steps to determine the extent or cause of the conditions or to transfer the child to a hospital more qualified to treat them.

Pulley, Watson & King, P.A., by W. Paul Pulley and Michael J. O'Foghludha; and Dennis J. Winner, P.A., by Dennis J. Winner, for plaintiff appellant.

Mitchell Blackwell & Mitchell, by W. Harold Mitchell and Keith W. Rigsbee, for defendant appellee McIntosh.

Dameron and Burgin, by Charles E. Burgin, for defendant appellee The McDowell Hospital, Inc.

PHILLIPS, Judge.

[1] In seeking a new trial, plaintiff cites five actions by the court as prejudicially erroneous. The first action complained of, allowing each defendant more peremptory jury challenges than the statutes authorize, was clearly erroneous, but such action has heretofore been held to be harmless error by our Supreme Court.

G.S. 9-19 allows each side in a civil action eight peremptory challenges, and the only authority for exceeding that allowance is the following provision in G.S. 9-20:

> When there are two or more defendants in a civil action, the presiding judge, if it appears that there are antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law, or he may increase the number of challenges to *not exceeding six for each defendant* or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to

> the nature of the interests and number of challenges shall be final. (Emphasis added).

In this case the trial judge, after finding that the defendants had antagonistic interests, allowed each defendant eight peremptory challenges. Dr. McIntosh exercised all eight of the challenges allowed him, the hospital used only five, and plaintiff only seven.

Though defendants argue otherwise, the court had no authority to allow each defendant eight peremptory challenges. The language of G.S. 9-20 is susceptible of no other interpretation. Having found that the interests of the defendants were antagonistic, G.S. 9-20 authorized the trial judge in his discretion to either apportion between them the eight peremptory challenges allotted to the defendants or to increase the peremptory challenges of each defendant up to a maximum of six; it did not authorize the judge to allot either defendant more than six peremptory challenges.

In contending that allowing the defendants more peremptories than the statute allows was prejudicial as a matter of law, plaintiff mainly relies upon the statement in *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 302, 67 S.E.2d 292, 298 (1951), that "a litigant cannot exercise any more peremptory challenges than the number allowed to him by law," but that case did not involve the allowance of more peremptory challenges than then G.S. 9-22 authorized; and the holding in *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975), that an alternate juror being in the jury room after deliberations began in violation of G.S. 9-18 was reversible error *per se*. These decisions cannot be applied to this case which involves allowing more peremptory challenges than the applicable statute authorized, because our Supreme Court has held that such allowances are not reversible error *per se*. In *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, *cert. denied*, 429 U.S. 932, 50 L.Ed.2d 301 (1976), the Court held that allowing the State one more peremptory challenge in a capital case than G.S. 9-21 authorized was not prejudicial error. In *State v. Woods*, 286 N.C. 612, 213 S.E.2d 214 (1975), *modified*, 428 U.S. 903, 49 L.Ed.2d 1208 (1976), the Court ruled to the same effect though two capital crimes were charged and the trial court mistakenly allowed both sides many more peremptories than the statute authorized.

Plaintiff's arguments to the contrary are not without appeal. There is good ground for maintaining, as he argues, that allowing one side in a case more peremptory challenges than the statute

authorizes taints the fair jury trial process that our system of jurisprudence is based upon, and that a violation of the statute was intended by the Legislature to be prejudicial since showing prejudice in such situations is all but impossible and the statute will become a dead letter if not enforced. But the decisions cited require us to hold otherwise.

[2] The other actions of the trial court that plaintiff complains of were either not erroneous or were without prejudicial effect. The refusal to receive into evidence two medical pamphlets—"Standards for Ambulatory Obstetric Care" published by the American College of Obstetricians and Gynecologists, and "Rules and Statutes Applying to the Licensing of Hospitals in North Carolina" published by the North Carolina Department of Human Resources—was not error because no foundation was laid for establishing either the relevancy or reliability of these pamphlets, which on their face appear to be recommendations, rather than standards applicable to either of the defendants. And as plaintiff concedes in his brief, he "was later able to introduce such evidence via other witnesses."

[3] Permitting defendants to cross-examine plaintiff's witnesses as to educational and other public benefits and services available to the child did not violate the collateral source rule and was not error because the cross-examination was in response to testimony offered by plaintiff that such facilities and services were not available in that area. The other cross-examination allowed of plaintiff's medical witness, which plaintiff complains of, was also within reasonable limits and the court's discretion. And the denial of plaintiff's motion for a new trial pursuant to Rule 59, N.C. Rules of Civil Procedure was within the court's discretionary authority and no abuse is indicated.

No error.

Judges ARNOLD and WELLS concur.

UNITED SERVICES AUTOMOBILE ASSOCIATION, PLAINTIFF v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY AND WARDEN MOTORS, INC., D/B/A CLEMMONS TRADERS, DEFENDANTS

No. 9021SC1266

(Filed 1 October 1991)

Insurance § 92.1 (NCI3d)— test drive of vehicle—garage liability insurance—driver's insurance—primary and excess coverage

A dealer's garage liability policy provided primary coverage and the driver's own automobile policy provided excess coverage for an accident that occurred while the driver was test driving a vehicle owned by the dealer. Ambiguous language in the "other insurance" clause of the garage liability policy that its coverage was excess for any person who becomes an insured as "required by law" served only as a limitation to the statutory amount of coverage set out in N.C.G.S. § 20-279.21(b)(2) relating to an owner's policy of liability insurance and did not render coverage under the dealer's policy excess in this instance.

Am Jur 2d, Automobile Insurance §§ 217, 432-434.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like. 93 ALR2d 1047.

APPEAL by defendant from Order entered 2 October 1990 in FORSYTH County Superior Court by *Judge James A. Beaty, Jr.* Heard in the Court of Appeals 6 June 1991.

Nichols, Caffrey, Hill, Evans & Murrelle, by Karl N. Hill, Jr., for plaintiff-appellee.

Petree, Stockton & Robinson, by James H. Kelly, Jr., for defendant-appellant.

WYNN, Judge.

This appeal arises out of an accident involving an automobile owned by Warden Motors, but driven by Sanford E. Isenhour ("Isenhour"). At the time of the accident, plaintiff United Services Automobile Association ("USAA"), insured Isenhour while defendant Universal Underwriters Insurance Company ("UNIVERSAL") provided coverage for Warden Motors. USAA instituted this declaratory

judgment action seeking a declaration that the "Garage Liability Policy" issued by UNIVERSAL provided primary coverage for the accident.

The facts indicate that on 27 January 1988, Isenhour went to defendant Warden Motors for the purpose of purchasing a truck. Isenhour was given permission to test drive a 1981 Ford truck. During the test drive, Isenhour struck the rear end of a stopped Cadillac owned by Rebecca Kaye ("Kaye"), but being operated by Mortimer R. Shapiro ("Shapiro").

As a result of the accident, Shapiro made a personal injury claim against Isenhour, and USAA settled the claim for $2,000. Kaye filed a subsequent lawsuit for the damage to the Cadillac. Following UNIVERSAL's refusal to reimburse USAA for the payment to Shapiro or to pay Kaye's damage claim, this action resulted. After reviewing each of the relevant provisions in the respective policies, the trial court concluded that UNIVERSAL's policy provided primary coverage. From the entry of this declaration, UNIVERSAL appeals.

The sole issue presented by this appeal is whether the trial court erred in concluding the insurance coverage provided by UNIVERSAL was primary, and the USAA policy was secondary. However, before moving into an analysis of the ultimate issue, we must first decide if Isenhour is in fact an "insured" under both policies. Isenhour's USAA policy provides coverage to the following "covered persons":

> "**Covered person**" as used in this Part means:
>
> 1. You or any family member for the ownership, maintenance or use of any auto.

Since the USAA policy was issued to Isenhour personally, he is clearly a "covered person" under the terms of his own USAA policy. Moreover, as indicated by both the language of this policy and the actions of USAA, the applicability of the USAA policy is not affected by the fact that Isenhour was operating a non-owned vehicle at the time of the accident.

The terms of Warden Motors' insurance policy issued by UNIVERSAL also reflect that Isenhour is an insured. The UNIVERSAL policy provides:

Insuring Agreement

WE will pay all sums the INSURED legally must pay as damages (including punitive damages where insurable by law) because of INJURY to which this insurance applies caused by an OCCURRENCE arising out of GARAGE OPERATIONS or AUTO HAZARD.

* * *

"**AUTO HAZARD**" means the ownership, maintenance, or use of any AUTO YOU own or which is in YOUR care, custody or control and:

(1) used for the purpose of GARAGE OPERATIONS or

(2) used principally in GARAGE OPERATIONS with occasional use for other business or non-business purposes or

(3) furnished for the use of any person or organization.

* * *

WHO IS AN INSURED

* * *

With respect to the **AUTO HAZARD**:

1. YOU;

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

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

The language contained in subsections 1. and 2. of "WHO IS AN INSURED" clearly shows that Isenhour was an insured under the UNIVERSAL policy; after all, Isenhour was using the automobile with Warden Motors permission. In addition, N.C. Gen. Stat. § 20-279.21(b)(2) (1989) provides that Isenhour, as a person using the automobile with permission, is covered by the UNIVERSAL policy.

We now turn to the ultimate issue in this case—Which of the two policies is the primary insurance covering Isenhour's accident?

When construing insurance policies, each policy must be examined separately and irrespective of the other in order to determine its effect on the other. *Allstate Insurance Co. v. Shelby Mutual Insurance Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967). Isenhour's USAA insurance provides the following when there is another policy covering a car not owned by Isenhour:

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

(Emphasis added.) This language shows that USAA will not be liable for primary coverage if some other insurance policy covering the non-owned car provides "collectible insurance." By its terms, the coverage provided by the USAA policy is *excess* whenever its insured operates a non-owned automobile and when there is other collectible insurance available.

Warden Motors' UNIVERSAL insurance policy also contains a provision concerning overlapping insurance policies:

> **OTHER INSURANCE**—The insurance afforded by this Coverage Part is primary, except it is excess:
>
> (1) for PRODUCT RELATED DAMAGES and LEGAL DAMAGES;
>
> (2) for any person or organization who becomes an INSURED under this Coverage Part as *required by law*. (Emphasis added.)

UNIVERSAL contends that Isenhour was "required by law" to be an insured under its policy and thus the "Other Insurance" provision contained in its policy renders UNIVERSAL's coverage secondary to USAA's. We disagree.

We recognize that UNIVERSAL is "required by law" to insure Isenhour under N.C. Gen. Stat. § 20-279.21(b)(2) (1989). We also recognize that the UNIVERSAL policy states that an insured includes "[a]ny other person . . . required by law to be an INSURED

while using an AUTO covered by this Coverage Part within the scope of YOUR permission." However, we find that the undefined and ambiguous language "required by law" contained in the UNIVERSAL policy serves only as a limitation to the statutory amount of coverage set out in section 20-279.21(b)(2) relating to an owner's policy of liability insurance. It is well settled that "if there is any doubt concerning the true meaning of a policy clause, the doubt is to be resolved against the insurer, who authored it." *Akzona, Inc. v. American Credit Indem. Co.*, 71 N.C. App. 498, 503, 322 S.E.2d 623, 627 (1984). Having determined the phrase "required by law" to be ambiguous, we find it necessary to read it out of UNIVERSAL's policy. When viewed after deletion of the ambiguous term, the UNIVERSAL policy states that an "insured" includes "[a]ny person USING AN AUTO covered by this Coverage Part within the scope of [Warden Motors'] permission." After removing the ambiguous language, UNIVERSAL's "OTHER INSURANCE" clause clearly provides that UNIVERSAL's coverage is primary in regard to Isenhour.

The terms of the USAA policy also reflect that the UNIVERSAL policy is primary. The USAA policy provides that USAA's coverage is not primary for any vehicle not owned by Isenhour if there exists other "collectible insurance." Thus the existence of the other collectible insurance policy (UNIVERSAL) is the event which prevents the USAA policy from operating at all with reference to Isenhour. *See Allstate Insurance Co. v. Shelby Mutual Insurance Company*, 269 N.C. 341, 152 S.E.2d 436 (1967).

Other authorities in the field of insurance add support to the decision that we reach today:

> It thus has been held that where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any other valid, collectible insurance, *the owner's insurer has the primary liability*. In such case, the liability of the excess insurer does not arise until the limits of the collectible insurance under the primary policy have been exceeded. It should be noted that under this rule, the courts give no application to the other insurance clause in the primary policy, which provides that if the additional insured has other valid and collectible insurance, he shall not be covered by the primary policy.

That is because the insurance under the excess coverage policy is not regarded as other collectible insurance, as it is not available to the insured until the primary policy has been exhausted. Or, to put it another way, a non-ownership clause, with an excess coverage provision, does not constitute other valid and collectible insurance within the meaning of a primary policy with an omnibus clause.

8A Appleman, Insurance Law and Practice § 4909.45 (emphasis added).

For these reasons, we hold that the UNIVERSAL policy provided primary coverage to Isenhour. The decision of the trial court is,

Affirmed.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT, IN THE MATTER OF A FILING DATED JULY 1, 1987 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES—ON REMAND

No. 9010INS1210

(Filed 1 October 1991)

1. Insurance § 79.1 (NCI3d)— rate making—failure to distribute funds

The Insurance Commissioner did not err by failing to distribute funds held in escrow under N.C.G.S. § 58-36-25(b) following a remand to the Commissioner by the Court of Appeals for further findings. The final determination in N.C.G.S. § 58-36-25(b) means all proceedings arising out of a disapproval order in a rate filing, including proceedings on remand.

Am Jur 2d, Insurance §§ 30, 59.

2. Insurance § 79.1 (NCI3d)— rate making—remand for further findings—scope of proceedings

The Insurance Commissioner erred when considering a rate making proceeding on remand for additional findings by receiving evidence beyond what was appropriate to comply with the mandate. While the Commissioner is authorized to receive additional evidence, he may consider only that evidence necessary to explain how *in fact* he resolved the conflicting evidence, what adjustments he made, and which calculations he considered more reliable when he entered the disapproval order.

Am Jur 2d, Insurance §§ 22, 30.

APPEAL by North Carolina Rate Bureau from order entered 2 July 1990 by the Commissioner of Insurance. Heard in the Court of Appeals 27 August 1991.

On 1 July 1987 the North Carolina Rate Bureau filed for rate increases for private passenger automobile and motorcycle insurance. In an order dated 1 February 1988 the Commissioner disapproved in part the filing and ordered into effect overall decreases in the existing rates. The Commissioner's action was based on his adoption of expense trends and underwriting profit and contingency provisions lower than those used in the filing. The Rate Bureau appealed. As provided by G.S. 58-36-25(b), the portion of the premium that was disapproved was placed in escrow. By a decision filed 15 August 1989, this Court vacated the 1 February 1988 order and remanded the matter to the Commissioner to make findings to "show *how* he has resolved the conflicting evidence, what adjustments he found necessary to make, and what calculations he considered more reliable." *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 95 N.C. App. 157, 162, 381 S.E.2d 801, 804 (1989) (emphasis in original). On 19 March 1990, the Commissioner issued an amended notice of supplemental hearing on remand. The notice provided that "[a]dditional evidence may be presented by the Rate Bureau and the Insurance Department concerning what consideration is due to dividends, deviations, underwriting profit and contingencies in the making and use of rates." A public hearing was held beginning 14 May 1990. On 2 July 1990 after considering the new evidence on the issues presented, the Commissioner again ordered the calculation of the rates using underwriting profit and contingency provisions

identical to those contained in the 1 February 1988 order. The Rate Bureau appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Ann W. Spragens; Hunter, Wharton & Lynch, by John V. Hunter III; and E. Daniels Nelson for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by Charles H. Young, Jr., Marvin M. Spivey, Jr. and R. Michael Strickland, for the defendant-appellant.

EAGLES, Judge.

[1] The Rate Bureau first contends that the Commissioner erred by failing to distribute the funds held in escrow under G.S. 58-36-25(b). We disagree.

G.S. 58-36-25(b) provides for the distribution of escrowed funds "upon a final determination by the Court." The Rate Bureau argues that this Court's decision at 95 N.C. App. 157, 381 S.E.2d 801 (1989), which remanded the matter to the Commissioner for further findings, constituted a "final determination" under G.S. 58-36-25(b). The Rate Bureau also contends that the Commissioner's disapproval order entered 1 February 1988 was legally insufficient and that the rates were therefore deemed approved under G.S. 58-36-70(d).

This Court has addressed both of these arguments in another appeal by the Rate Bureau arising from the 1 July 1987 filing. In that appeal the Rate Bureau filed a motion seeking release of the same escrowed funds. The Commissioner denied the motion and the Rate Bureau appealed. This Court dismissed the appeal as interlocutory but said that " 'final determination' in G.S. 58-36-25 means *all* proceedings arising out of a disapproval order in a rate filing, including proceedings on remand." *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 102 N.C. App. 809, 812, 403 S.E.2d 597, 599 (1991). We find the Rate Bureau's arguments unpersuasive for the same reasons as set out in our earlier opinion.

[2] Next, the Rate Bureau contends that the remand order entered 2 July 1990 "constitutes a new order which can have no retroactive effect." The Rate Bureau argues that the new hearing went beyond explaining the original order and that "the Commissioner simply undertook to start over with *new* issues and to put evidence in the record from which he could attempt to fashion some rationale

for arriving at the same underwriting profit provisions he started with in the Original Order." We agree that the Commissioner's order on remand went beyond explaining the original order and must be vacated.

This Court's opinion in *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 95 N.C. App. 157, 162, 381 S.E.2d 801, 804 (1989) (emphasis in original), remanded the matter to the Commissioner to "make findings that clearly show *how* he has resolved the conflicting evidence, what adjustments he found necessary to make, and what calculations he considered more reliable." The opinion also provided: "The Commissioner is authorized to receive additional evidence if deemed necessary to comply with this opinion."

Here, the Commissioner's amended notice of supplemental hearing on remand provided:

> Additional evidence may be presented by the Rate Bureau and the Insurance Department concerning what consideration is due dividends, deviations, underwriting profit and contingencies in the making and use of rates in the filing referred to above, under the rule of application and for the period adopted by the Rate Bureau for the use of such rates in the earlier proceeding in this matter.
>
> II. Specifically, the Commissioner will receive evidence concerning the following issues:
>
> A. How dividends should be considered in making the referenced rates, including methods and amounts as merited;
>
> B. How deviations should be considered in making the referenced rates, including methods and amounts as merited;
>
> C. Whether Generally Accepted Accounting Principles or Statutory Accounting Principles are appropriate for use in determining a reasonable margin for underwriting profit and contingencies in making the referenced rates, including methods of application as merited;
>
> D. What premium to surplus ratios are appropriate for use in determining a reasonable margin for underwriting profit and contingencies in making the referenced

rates, including methods by which the ratios are derived; and

E. To what extent should the unearned premium reserve be treated as policyholders' funds and available for investment, in determining a reasonable margin for underwriting profit and contingencies in making the referenced rates, including methods of application as merited?

F. What is the amount of loss reserves available for investment in determining a reasonable margin for underwriting profit and contingencies in making the referenced rates, including methods of application as merited?

Here the Commissioner received evidence concerning matters beyond what was appropriate to comply with the mandate of this Court. On remand, the Commissioner erroneously reconsidered how the rates should be calculated rather than explaining how he arrived at the conclusions and calculations in his 1 February 1988 disapproval order. Accordingly, we again remand the matter to the Commissioner to make the findings required by this Court's decision in *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 95 N.C. App. 157, 381 S.E.2d 801 (1989). We emphasize that while the Commissioner is authorized to receive additional evidence, he may consider only that evidence which is necessary to explain how *in fact* he resolved the conflicting evidence, what adjustments he made, and which calculations he considered more reliable when he entered the disapproval order on 1 February 1988.

Because we hold that the order entered 2 July 1990 must be vacated and remanded for additional proceedings consistent with this opinion and this Court's opinion reported at 95 N.C. App. 157, 381 S.E.2d 801 (1989), we find it unnecessary to address the Rate Bureau's remaining assignments of error.

Vacated and remanded.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PIEDMONT NATURAL GAS COMPANY, INC. (APPLICANT); PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; AND LACY H. THORNBURG, ATTORNEY GENERAL v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.

No. 9010UC1294

(Filed 1 October 1991)

Gas § 1 (NCI3d)— order amending ratemaking formula—rates lowered—CUCA not aggrieved party

The Carolina Utility Customers Association was not an "aggrieved" party which could appeal an order of the Utilities Commission amending a ratemaking formula providing for an adjustment of natural gas rates to pass cost savings to the utility's customers when the utility purchases gas from non-traditional sources, reducing the utility's rates, and permitting the utility to file for subsequent increases to the extent necessary to offset previous reductions under the order.

Am Jur 2d, Public Utilities § 287.

INTERVENOR-appellant appeals from 13 February 1990 order of the North Carolina Utilities Commission. Heard in the Court of Appeals 28 August 1991.

On 29 October 1985 Docket No. G-9, Sub 257, the Utilities Commission adopted a ratemaking formula which authorized Piedmont Natural Gas Company, Inc. (Piedmont) to adjust its rates to pass gas cost savings on to its customers when Piedmont purchased gas from non-traditional sources. The formula was amended in 1986, 1987, and 1988. On 8 February 1989 the Utilities Commission reconsidered and reapproved the formula in a general rate case brought by Piedmont (Docket No. G-9, Sub 278). The Commission's 8 February 1989 order approving the formula was not appealed.

On 20 April 1989 Piedmont made a filing before the Utilities Commission to amend the formula because of a Stipulation and Agreement (Agreement) entered on 3 April 1989 between the Federal Energy Regulatory Commission and Transcontinental Pipeline Corporation (Transco), Piedmont's supplier. That Agreement provided that Transco's customers, including Piedmont, would discontinue purchasing gas under Transco's CD-2 Rate Schedule. The CD-2 rate schedule had previously been used to determine gas cost sav-

ings. Gas cost savings were computed by subtracting Piedmont's actual cost of gas when purchased from non-traditional sources from the CD-2 rate schedule cost of gas. Because the CD-2 rate was no longer an appropriate measure to determine gas cost savings, Piedmont filed to amend the formula. In the same filing, Piedmont proposed to reduce its rates by $1.0159 per dekatherm, provided, that Piedmont could remove the cost reduction if and when its gas costs later increased.

The Utilities Commission entered an interim order on 3 May 1989 authorizing Piedmont to reduce its rates as requested. The Commission held a hearing on 12 December 1989, at which the intervenor-appellant, Carolina Utility Customers Association, Inc. (CUCA), cross-examined witnesses for Piedmont and the Public Staff. On 13 February 1990 the Commission entered an order amending the formula. The amendment allowed Piedmont to replace more expensive gas suppliers and to provide additional supplies of gas through increased pipeline capacity. It also required Piedmont to reduce its rates by $.25 per dekatherm in addition to the $1.0159 per dekatherm reduction placed into effect by the 3 May 1989 order.

CUCA appeals.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for intervenor-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos, for applicant-appellee.

EAGLES, Judge.

CUCA argues that the Commission's 13 February 1990 order should be reversed *inter alia* because there were insufficient findings of fact and conclusions of law and because the order was issued outside a general rate making proceeding. However, we do not reach the issues CUCA raises because we hold that CUCA is not a party aggrieved by the order currently before us and as such has no standing to appeal from this order.

N.C. Gen. Stat. § 62-90 provides in pertinent part:

> (a) Any party to a proceeding before the Commission may appeal from any final order or decision of the Commission within 30 days after the entry of such final order or decision, . . ., if the party aggrieved by such decision or order shall

> file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decisions or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

In order to have standing to appeal, a party must not only file notice of appeal within 30 days, but must also be aggrieved.

This court recently addressed the meaning of "aggrieved" in *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 102 N.C. App. 809, 403 S.E.2d 597 (1991). There we stated:

> Under the Administrative Procedure Act, a "person aggrieved" is defined as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." G.S. 150B-2(6). Under the Judicial Review Act, the predecessor to the Administrative Procedure Act, the Supreme Court said: "The expression 'person aggrieved' has no technical meaning. What it means depends on the circumstances involved." *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963).

Id. at 812, 403 S.E.2d at 599. "Our Supreme Court has held that 'person aggrieved' means [one] 'adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.' " (Citation omitted.) *In re Wheeler*, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987). Where a party is not aggrieved by an order his appeal will be dismissed. *Compare Gaskins v. Blount*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963).

Here, CUCA has not shown that its interest in person, property, or employment has been substantially adversely affected, directly or indirectly. As Piedmont's brief correctly points out, Piedmont did not increase its rates under the 13 February 1990 order of the Commission. On the contrary, Piedmont *reduced* its rates by a total of $1.2659 per dekatherm.

CUCA contends, however, that they are an aggrieved party because the order would allow Piedmont to increase its rates in the future to the extent necessary to offset previous reductions under this order. We disagree. While under this order Piedmont may file, and in fact has filed to make subsequent increases, those proposed increases are not before us. The subsequent proposed

increases were effected through later filings in separate dockets which are subject to appellate review at an appropriate time. Those orders are not before us in this appeal.

Appeal dismissed.

Judges JOHNSON and PARKER concur.

HERMAN M. BROWN, PLAINTIFF v. L. H. WINDHOM, D/B/A WINDHOM BROTHERS, DEFENDANT

No. 9010DC1234

(Filed 1 October 1991)

Rules of Civil Procedure § 60.1 (NCI3d)— Rule 60 motion—not timely

The trial court did not abuse its discretion in concluding that defendant's motion for relief under N.C.G.S. § 1A-1, Rule 60 was not timely where defendant offered as an explanation for a one year delay in filing the motion that the "confusion associated with the trial court's disposition of defendant's case produced uncertainty on the part of defendant as to his legal rights and ultimately produced the resulting delay." Defendant's explanation, without more, was insufficient to demonstrate that the trial court abused its discretion in concluding that the delay was unreasonable and in denying the motion.

Am Jur 2d, Motions, Rules, and Orders § 8.

APPEAL by defendant from Order and Judgment entered 4 September 1990 by *Judge L. W. Payne* in WAKE County District Court. Heard in the Court of Appeals 22 August 1991.

Mattox & Davis, P.A., by W. Gregory Duke and Fred T. Mattox, for defendant appellant.

No brief filed for plaintiff appellee.

COZORT, Judge.

Defendant appeals from the trial court's denial of defendant's Rule 60 motion to set aside the judgment. We affirm, finding no

error in the trial court's conclusion that it was unreasonable for defendant to delay almost a year before filing the motion.

On 17 November 1987, plaintiff Herman Brown brought an action against defendant L. H. Windhom, d/b/a Windhom Brothers. Plaintiff sought rescission of a contract and alternatively sought relief for breach of contract. Defendant's attorney at that time, Paul White, from Pitt County, timely filed an answer to the complaint. Pursuant to an agreement between plaintiff's counsel and Mr. White, Mr. White spoke on the telephone with plaintiff's counsel each time the matter appeared on the trial docket, to prevent defendant's counsel from making an unnecessary trip to Raleigh. Plaintiff's counsel would attend calendar call and then inform Mr. White as to whether the matter would be heard that day. On 7 March 1989, when the action was called, plaintiff's attorney had his secretary telephone Mr. White's office. Mr. White's secretary stated that Mr. White was "on his way to court." In actuality, Mr. White was in transit to court in Greenville and not to Raleigh. As a result, neither defendant nor Mr. White appeared at court in Raleigh. In the absence of defendant and defense counsel, the court heard testimony from plaintiff. The court then entered judgment in open court for plaintiff for $2,782.00 plus interest. The judgment was filed 10 March 1989. On 8 March 1990, Fred T. Mattox, new counsel for defendant, filed a motion for relief from the judgment. In the motion, Mr. Mattox alleged that Mr. White did not receive notice that the case would be tried on 7 March 1989. Defendant L. H. Windhom also stated by affidavit that he was not notified of the trial date. In an order entered 4 September 1990, the trial court denied defendant's motion, finding that defendant waited almost a year before filing the motion and concluding that "defendant's delay of almost one year in making his said Motion substantially exceeds the time a reasonable person would have needed under the circumstances to present the objections raised by defendant." Defendant appeals.

On appeal defendant first contends that he had a meritorious defense and that his failure to appear was due to excusable neglect. We need not consider these arguments, however, unless defendant can first demonstrate that the trial court erred in concluding that the motion for relief was not made in a reasonable time.

N.C. Gen. Stat. § 1A-1, Rule 60 (1990) allows a court to relieve a party from a final judgment for reason of mistake, inadvertence,

surprise, or excusable neglect. When a motion is made pursuant to subsection (b)(1), it "shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." Generally, a motion for setting aside a judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial court and the standard of appellate review is limited to determining whether the court abused its discretion. *City Fin. Co. v. Boykin*, 86 N.C. App. 446, 448, 358 S.E.2d 83, 84 (1987).

What constitutes a "reasonable time" under the rule is determined by examining the circumstances of the individual case. *Nickels v. Nickels*, 51 N.C. App. 690, 277 S.E.2d 577, *cert. denied*, 303 N.C. 545, 281 S.E.2d 392 (1981). In *Nickels*, the defendant-movant made a motion to set aside a judgment pursuant to Rule 60(b)(4), a section which does not require the motion to be filed within one year, but which nonetheless must be filed within a "reasonable time." The court in *Nickels* concluded that the movant offered no valid explanation for waiting almost twenty-three (23) months after entry of a consent judgment to make his motion. *Id.* at 693, 277 S.E.2d at 579. Although some of the delay was caused by the defendant's hiring of a new attorney, the court found that the time which had elapsed prior to the motion was unreasonable under the circumstances. *Id.*

Similarly, in the present case, defendant offers little explanation for the one-year delay in filing the motion for relief. Defendant's motion filed in the trial court offers no reason for the delay. In his brief filed in this Court, defendant's only explanation is that the "confusion associated with the trial court's disposition of Defendant's case produced uncertainty on the part of Defendant as to his legal rights and ultimately produced the resulting delay." We find that explanation, without more, insufficient to demonstrate that the trial court abused its discretion in concluding that delay was unreasonable and in denying the motion. Finding no abuse of discretion in the trial court's conclusion that the motion was not timely filed, we need not consider defendant's arguments relating to excusable neglect and a meritorious defense. The trial court's order is

Affirmed.

Judges ORR and ARNOLD concur.

CARMEN P. GRAY AND HUSBAND, BILLY GRAY, PLAINTIFFS v. LYNDON F. SMALL AND WIFE, LYNN McQUEEN SMALL, DEFENDANTS

No. 901SC1287

(Filed 1 October 1991)

Negligence § 59.3 (NCI3d)— guest in home—fall on steps—summary judgment for defendants

Summary judgment for defendants was proper in an action arising from plaintiff Carmen Gray's fall on defendants' steps as she was leaving defendants' house after delivering a present. The record shows that plaintiffs were social guests in defendants' home and therefore held the status of licensees; the forecast of evidence raises at most issues as to defendants' ordinary or passive negligence and does not raise an issue of gross negligence.

Am Jur 2d, Premises Liability §§ 159, 396, 402-404.

Liability for injury to guest in home or similar premises. 25 ALR2d 598.

Judge PHILLIPS dissents.

APPEAL by plaintiffs from *Brown (Frank R.), Judge*. Order entered 26 September 1990 in Superior Court, DARE County. Heard in the Court of Appeals 26 August 1991.

This is a civil action wherein plaintiffs seek damages for personal injuries allegedly resulting from defendants' negligence in the maintenance of their home. The evidentiary matter offered in support of and in opposition to the motions for summary judgment disclose that plaintiffs went to defendants' home for the purpose of delivering a gift to one of defendants' children. Plaintiffs ascended a small set of stairs and entered the house through the back door. After a short visit with defendants, plaintiffs exited through the back door and descended the stairs. The female plaintiff stepped on grass that was on the step and fell, injuring her ankle and foot.

Both parties filed motions for summary judgment. From a order granting summary judgment for the defendants, plaintiffs appealed.

Twiford, O'Neal & Vincent, by Russell E. Twiford and Edward A. O'Neal, for plaintiff, appellants.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr., for defendant, appellees.

HEDRICK, Chief Judge.

Plaintiffs' sole argument on appeal is that the trial court erred in granting defendants' motion for summary judgment.

Summary judgment is proper when the pleadings, depositions and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). N.C. R. Civ. P. 56. In determining whether summary judgment is proper, the court must view the evidence in the light most favorable to the non-moving party, giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor. *Freeman v. Sturdivant Dev. Co.*, 25 N.C. App. 56, 212 S.E.2d 190 (1975).

The record shows that plaintiffs were social guests in defendants' home and therefore, held the status of licensees. "The duty of care owed to a licensee by an owner or possessor of land ordinarily is to 'refrain from doing the licensee willful injury and from wantonly and recklessly exposing [her] to danger.'" *DeHaven v. Hoskins*, 95 N.C. App. 397, 400, 382 S.E.2d 856, 858, *cert. denied*, 325 N.C. 705, 388 S.E.2d 452 (1989) (quoting *McCurry v. Wilson*, 90 N.C. App. 642, 369 S.E.2d 389 (1988)). "It follows that, as a general rule, the owner . . . is not liable for injuries to licensees due to the *condition* of the property, or . . . due to *passive negligence or acts of omission.*" *Id.* at 400, 382 S.E.2d 858 (*quoting, Pafford v. J. A. Jones Constr. Co.*, 217 N.C. 730, 9 S.E.2d 408 (1940)) (emphasis in original).

The record in this case affirmatively establishes that plaintiffs were social guests, licensees, in the home of defendants when the female plaintiff slipped and fell as she and her husband exited defendants' premises. Thus, summary judgment for defendants would be improper if the evidentiary matter offered in support of or in opposition to the motions for summary judgment raised genuine issues of material fact with respect to defendants' gross negligence

or willful or wanton conduct causing the injuries of which plaintiffs' complained.

The forecast of evidence in this record raises at most issues as to defendants' ordinary or passive negligence. No issue is raised as to defendants' gross negligence. Thus, summary judgment for defendants was proper.

Affirmed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the rules of law stated by the majority do not apply to plaintiffs' case. Plaintiff does not allege that she was injured by a condition of the premises that existed when she got there, in which event the host's gross negligence or willful and wanton conduct would have to be shown. Her claim is that she was injured because after her arrival on the premises defendants actively increased the hazard to her by negligently causing grass to accumulate on the steps. This basis for imposing liability on a host property owner has been approved in many cases starting with *Jones v. Southern Railway Co.*, 199 N.C. 1, 153 S.E. 637 (1930). *Also see* Prosser and Keeton, The Law of Torts Sec. 60, p. 416 (5th ed. 1984).

In my view plaintiffs' affidavits raise an issue of fact as to defendants' active negligence in increasing the hazard to the femme plaintiff after she got on the property and the summary judgment should be reversed.

JAMES DOUGLAS FLETCHER, PLAINTIFF v. NORMA S. FLETCHER, DEFENDANT

No. 9014DC1282

(Filed 1 October 1991)

Divorce and Separation § 70 (NCI4th)— separation for statutory period—wife's health irrelevant

The trial court properly excluded evidence relating to defendant wife's health and prospects for obtaining medical insurance in an action for divorce pursuant to N.C.G.S. § 50-6.

Am Jur 2d, Divorce and Separation §§ 147, 630.

APPEAL by defendant from judgment entered 15 October 1990 by *Judge Kenneth C. Titus* in DURHAM County District Court. Heard in the Court of Appeals 28 August 1991.

Plaintiff and defendant married on 29 March 1974 and separated on 3 April 1987. The trial court entered a judgment of absolute divorce on 15 October 1990. From this judgment, defendant appeals.

William J. Thomas, II, for plaintiff-appellee.

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

ARNOLD, Judge.

Defendant assigns error to the trial court's exclusion of evidence relating to her health at the divorce hearing. The statutory requirements for divorce pursuant to N.C. Gen. Stat. § 50-6 (1987) are: (1) "the husband and wife have lived separate and apart for one year" and (2) the plaintiff or defendant "has resided in the State for a period of six months." Defendant does not contest the trial court's findings as to these requirements.

Defendant sought to introduce evidence of her health and her prospects for obtaining medical insurance following divorce. Such evidence, however, is not relevant to the trial court's determination to grant or deny a divorce pursuant to G.S. § 50-6. N.C.R. Evid. 401. The trial court properly excluded this evidence.

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD HARDY

No. 903SC1184

(Filed 15 October 1991)

1. **Rape and Allied Offenses § 5 (NCI3d)— intercourse with stepdaughter—constructive force**

The State presented sufficient evidence that defendant's acts of sexual intercourse with his stepdaughter were by force and against her will because the jury could reasonably infer that defendant used his position of power to constructively force the stepdaughter's participation in sexual intercourse where it tended to show that defendant began abusing the stepdaughter when she was only fifteen years old; each episode of abuse occurred while the stepdaughter lived with defendant as an unemancipated minor in the defendant's trailer and subject to his parental authority; in each incident the defendant was either silent or at most said "Shh" prior to removing the stepdaughter's underwear and engaging in sexual intercourse with her; and the stepdaughter never gave her consent and defendant never asked for it.

Am Jur 2d, Rape §§ 4-6, 38, 91.

2. **Rape and Allied Offenses § 5 (NCI3d)— child victim—date of offenses—specificity not required**

The State's evidence was sufficient to support defendant's conviction on two charges of second degree rape of his fifteen-year-old stepdaughter, although the victim was unable to identify a specific date on which each of the offenses occurred, where the indictment alleged that the offenses occurred between July 1989 and 22 October 1989, and the victim testified that defendant's abuse of her did not start until after they moved into a new trailer and that this move occurred "in the middle of July or early August."

Am Jur 2d, Rape § 88.

3. **Criminal Law § 89.3 (NCI3d)— letter admissible for corroboration**

A letter written by an alleged rape and indecent liberties victim to her pastor's wife in which the victim stated that her stepfather was forcing her to have sexual intercourse with

him was properly admitted to corroborate the victim's prior testimony.

Am Jur 2d, Rape §§ 97-99.

4. **Criminal Law § 169.2 (NCI3d)— noncorroborative testimony— objections sustained—absence of prejudice**

Defendant was not prejudiced by noncorroborative testimony where the trial court sustained defendant's objection to the testimony.

Am Jur 2d, Trial § 395.

5. **Criminal Law § 169.2 (NCI3d)— noncorroborative testimony— curative instruction**

Assuming that a portion of a rape and indecent liberties victim's statement to the investigating officer did not corroborate the victim's testimony, the admission of this portion of the statement for corroborative purposes was rendered harmless by the trial court's curative instruction to the jury.

Am Jur 2d, Trial §§ 1478, 1480.

6. **Rape and Allied Offenses § 4 (NCI3d)— post traumatic stress syndrome—admissibility**

Expert testimony that an alleged rape and indecent liberties victim suffered from post traumatic stress syndrome was properly admitted.

Am Jur 2d, Rape § 68.5.

Admissibility, at criminal prosecution of expert testimony on rape trauma syndrome. 42 ALR4th 879.

7. **Rape and Allied Offenses § 4.3 (NCI3d)— victim's school disciplinary records—exclusion as harmless error**

Any error in the trial court's exclusion of evidence of a rape and indecent liberties victim's school disciplinary records, including suspension reports, was harmless where no possibility exists that the outcome of the trial would have been any different had the records been admitted.

Am Jur 2d, Rape § 55.

8. Rape and Allied Offenses § 6 (NCI3d)— parent-child relationship—constructive force—sufficiency of instructions

The trial court in a prosecution of defendant for second degree rape of his stepdaughter sufficiently instructed the jury on constructive force arising from the parent-child relationship and did not err in refusing to give additional instructions requested by defendant.

Am Jur 2d, Rape § 108.

9. Criminal Law § 1092 (NCI4th)— presumptive sentence—no right of appeal

The Fair Sentencing Act does not allow appeal of a presumptive sentence as of right.

Am Jur 2d, Appeal and Error § 867.

APPEAL by defendant from judgments entered 3 March 1990 by *Judge Frank R. Brown* in PITT County Superior Court. Heard in the Court of Appeals 17 September 1991.

Defendant was indicted and convicted of three counts of second degree rape and three counts of taking indecent liberties with a child. The defendant was sentenced to twelve years imprisonment for each second degree rape conviction, two of which run consecutively. He was also sentenced to three concurrent terms of three years imprisonment for the convictions of taking indecent liberties with a child to be served at the expiration of the two twelve year consecutive sentences for the second degree rape conviction.

Defendant's fifteen year old step-daughter testified for the State. Because of her young age and the very nature of the offenses charged, we will refer to defendant's step-daughter as "victim." In the summer of 1989 the victim lived in Colonial Trailer Park with her mother, her sisters and the defendant. During May, June and July the family resided in a trailer (old trailer) on Rawl Road, and in the middle of July or early August moved to another trailer (new trailer) in the same trailer park. One night while the victim was still living in the old trailer she and her sister walked to the store. The defendant approached the victim and said, "I want you." He then asked the victim "would [she] tell" and the victim did not respond. The victim testified, "at that time I didn't pay it no mind because he was kind of high. . . ." The defendant also

walked into the victim's room one night, "but he didn't never do nothing because [the victim's] mother got up and she came in the room . . . ."

The victim also testified that on five or six different occasions after she moved into the new trailer, the defendant would go into her bedroom while "high" from alcohol. He would only be wearing his T-shirt and his underwear. The victim testified that the defendant "used to come back there when my mother was asleep, and he would come in there and he'll want to be getting in — getting on the bed with me." The defendant, without speaking except to say "Shh," would then take off the victim's underwear, "get on top of [the victim]," and "put his penis inside [her]." The victim testified that inside her meant "in [her] vagina." At no time did the victim want the defendant to have intercourse with her. The defendant told the victim "if [she] told [her] mother would throw [her] out and nobody would believe [her]." The victim did not fight the defendant because she was afraid of him and "[she] figured he would hurt [her]." The defendant also told her, "that if he wasn't married to [the victim's] mother he'll be all mines [sic]." In addition, the defendant gave "[the victim] money to keep [her] mouth shut . . . and said if [her] mother asked [her] where did [she] get the money from don't tell her." The victim also testified that while the defendant never threatened her, she was afraid of him "because [she] figure [sic] if [she] told it something would happen to [her]."

The victim further testified that she had seen the defendant fight with her mother and that at times she had feared for her mother's life. The victim never told her mother what the defendant had done to her because "[she] thought maybe something would happen to me."

In October 1989 the victim told Mrs. Bright, one of her teachers, a little bit about what was happening, "but wouldn't really tell her exactly what happened." Mrs. Bright sent the victim to Mrs. Moore, a guidance counselor. During the same summer the victim began attending the Community Christian Church in Winterville. She wrote the pastor's wife a letter telling her that "[m]y stepfather forces my [sic] to have sexual intercourse" with him. She wrote the letter because she thought she needed help. The victim also talked with two workers at the Department of Social Services and an employee at the Farmville Mental Health Center.

Nancy Cleghorn, staff psychologist at the Pitt County Mental Health Center and the Lenoir Mental Health Center, testified for the State. Ms. Cleghorn began seeing the victim on 4 January 1990 "to evaluate her need and provide treatment as appropriate." Ms. Cleghorn testified that the victim suffered from symptoms consistent with a child who had been sexually abused. She stated:

> Symptoms that she reported included fears; easily startled; she had reported some sleep disturbance when she was in the family home; the sleep had improved since living with her maternal aunt, but . . . she's continued to report nightmares involving themes of violence, nightmares of her stepfather killing her mother; decreased concentration was reported and this seemed to go along with the decrease in her academic performance at school; her memories about things that had occurred in the family home; the abuse that she reported to me would intrusively come into her mind even when she tried not to think about it. And there was also when I conducted a mental status exam, I felt as though her mood showed evidence of depression and anxiety.

Ms. Cleghorn also testified concerning "child abuse accommodation syndrome" or delayed reporting.

The defendant testified that the victim "ain't never act [sic] like she was scared of me. I ain't never gave her no reason for her to be scared of me." He also testified that he never told the victim that he wanted to have sex with her and that he never had any sexual contact with the victim. The defendant admitted smoking "reefer" and drinking liquor and beer to get high. From judgment entered on the guilty verdict, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Teresa L. White, for the State.

Robin L. Fornes for defendant-appellant.

EAGLES, Judge.

I

The defendant first argues that the trial court erred by denying defendant's motion to dismiss the charges because of insufficient evidence. We disagree.

> It is well settled that upon 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.

State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citing *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977)).

A

[1] Defendant argues that the State failed to show that the alleged sexual intercourse was by force and against the victim's will. This argument is controlled by *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987). In *Etheridge*, the Supreme Court addressed the proof necessary to support a conviction for second-degree sexual offense. Specifically, the court addressed the requirements of the phrase "[b]y force and against the will of the other person." The language construed is identical to the phrase found in the definition of second-degree rape. *Id.* at 44, 352 S.E.2d at 680; G.S. § 14-27.3. The Court stated:

> The phrase "by force and against the will of the other person" means the same as it did at common law when it was used to describe an element of rape. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981). The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion. *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975). Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. *See State v. Barnes*, 287 N.C. 102, 214 S.E.2d 56, *cert. denied*, 423 U.S. 933, 46 L.Ed.2d 264 (1975) (threat of serious bodily injury sufficient to constitute constructive force). Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

Etheridge at 45, 352 S.E.2d at 680. The *Etheridge* Court then applied the constructive force doctrine to the defendant's acts. In *Etheridge*, the defendant, the minor child's father, had made

illicit sexual advances toward his son beginning when the son was eight years old. *Id.* at 47, 352 S.E.2d at 681. The abuse occurred while the child lived as an unemancipated minor in the defendant's household, subject to the defendant's parental authority and discipline. *Id.* at 47-48, 352 S.E.2d at 681. In the incident charged the defendant instructed his son "[d]o it anyway" when his son initially refused to disrobe. *Id.* at 48, 352 S.E.2d at 681. Finding constructive force to be present the Court stated:

> It is nonetheless reasonable to conclude that these words carried a great deal more menace than is apparent on the surface, ... The child's knowledge of his [parent's] power may alone induce fear sufficient to overcome his will to resist, and the child may acquiesce rather than risk his [parent's] wrath. As one commentator observes, force can be understood in some contexts as the power one need not use. Estrich, *Rape*, 95 Yale L.J. 1087, 1115 (1986).
>
> In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces. Coercion, as stated above, is a form of constructive force.

Etheridge at 48, 352 S.E.2d at 681-682.

Here, constructive force can be reasonably inferred from the circumstances surrounding the parent-child relationship. The defendant, the victim's step-father, began abusing the victim when she was only fifteen years old. Each episode of abuse occurred while the victim lived with the defendant as an unemancipated minor in the defendant's trailer and subject to his parental authority. In each incident the defendant was either silent or at most said "Shh" while climbing on top of his step-daughter and engaging in sexual intercourse with her. She never gave her consent and the defendant never asked for it. When considered with the totality of the circumstances of this case, it is reasonable to conclude that by removing her underwear and physically climbing in on top of the victim, either silently or with a "Shh," the defendant's actions "carried a great deal more menace than is apparent on the surface . . . ." *Etheridge* at 48, 352 S.E.2d at 681. "[W]e hold that the state presented sufficient evidence from which a jury could reasonably infer that the defendant used his position of power to force his [step-daughter] to participat[e] in sexual [intercourse]." *Id.*

B

[2] Defendant next argues that two of the second degree rape charges (90 CRS 1786 and 90 CRS 1787) should have been dismissed "because of a lack of speci[f]icity and proof as to when the charges occurred." This argument is without merit.

In *State v. Wood*, 311 N.C. 739, 319 S.E.2d 247 (1984), the defendant was convicted of first degree rape and two counts of taking indecent liberties with a minor. *Id.* at 740, 319 S.E.2d at 247. On appeal the defendant argued that the evidence was insufficient to convict him of rape because the State failed to prove the specific date of the rape as alleged in the indictment. *Id.* at 742, 319 S.E.2d at 249. The victim had testified that the offense occurred on a weekend sometime prior to Memorial Day and that she was still in school. *Id.* The court rejected the defendant's argument:

> We have stated repeatedly that in the interest 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 evidence. *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983); *State v. King*, 256 N.C. 236, 123 S.E.2d 486 (1962). *See: State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984). 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. *Id.*

Id. at 742, 319 S.E.2d at 249.

State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988), is also instructive. In *Swann*, the defendant sexually assaulted an eleven year old child. *Id.* at 669, 370 S.E.2d at 535. The child was unable to remember the exact date of the assaults. However, he was able to identify a specific event around which the assaults occurred. The child testified that the incidents occurred shortly after his brother was born. *Id.* at 674, 370 S.E.2d at 538. The victim's mother testified that the first incident occurred three to four weeks after the victim's brother's birth and stated the date of that birth. *Id.* at 674-675, 370 S.E.2d at 538. The Court held that the testimony was sufficient to submit the charges to the jury. *Id.* at 675, 370 S.E.2d at 538.

Here, both indictments attacked by the defendant state the date of offense as "[b]etween" July 1989 and 22 October 1989. Lisa was unable to identify a specific date on which each of the offenses occurred. However, Lisa was able to relate the assaults to specific events in her life. Lisa testified, "[w]ell, nothing really started until we moved to the new trailer." She also testified that she moved into the new trailer "in the middle of July [or] early August." This testimony was sufficiently precise to submit the charges to the jury.

C

Defendant also assigns as error the trial court's denial of the defendant's motion to dismiss the charges of taking indecent liberties with a child. However, the defendant has failed to support his assignment with reason, argument or authority. Accordingly, this assignment of error has been abandoned. N.C.R. App. P. 28(c).

II

Defendant next argues the trial court committed reversible error by allowing into evidence out of court statements made by the victim. We find no reversible error here.

A

[3] First, the defendant claims the letter that the victim gave to the pastor's wife of the Community Christian Church in Winterville was inadmissible hearsay and was not corroborative of the victim's prior testimony. Specifically, the defendant objects to that part of the letter which states, "my step-father forces my [sic] to have sexual intercourse with me [sic] but I don't want that. . . ." This contention is without merit.

> One of the most widely used and well-recognized methods of strengthening the credibility of a witness is by the admission of prior consistent statements. *State v. Carter*, 293 N.C. 532, 238 S.E.2d 493 (1977). If previous statements offered in corroboration are generally consistent with the witness's testimony, slight variations between them will not render the statements inadmissible. Such variations only affect the credibility of the evidence which is always for the jury. [Citations omitted.]

State v. Locklear, 320 N.C. 754, 761-762, 360 S.E.2d 682, 686 (1987).

Upon direct examination the victim testified as follows:

Q: What would happen when he would come in your room?

A: Well, he'll get—he'll get on me.

Q: Now, would you have any clothes on or would he have any clothes on?

A: I had my night clothes on.

Q: What would happen to your night clothes?

A: They still be on.

Q: And what would the defendant do?

A: Take off my underwear.

Q: Would he say anything to you?

A: No.

Q: And what would he do to you?

A: Get on top of me.

Q: What would happen then?

A: He put his penis inside me.

Q: Now, . . ., was this with your permission?

A: No.

Q: Something you wanted him to do?

A: No.

The letter corroborates the victim's testimony and was therefore properly admitted into evidence.

B

[4] Defendant also argues that it was prejudicial error for the trial court to deny the defendant's motion to strike the testimony of the victim's aunt, Irene Harris. This contention is also without merit. Ms. Harris testified as follows:

Q: Did Lisa ever express any fear of the defendant to you?

MR. MCGLAUFLIN: Objection, Your Honor.

THE COURT: Overruled.

BY MRS. AYCOCK:

Q: You may answer.

A: Yes, she did.

Q: What did she say about it as far as the fear or as far as her fear of the defendant?

A: She said that she was scared that he would kill her.

MR. MCGLAUFLIN: Objection, Your Honor, move to strike.

THE COURT: Overruled, motion denied.

BY MRS. AYCOCK:

Q: What else did she say about this?

A: And I asked her—

THE COURT: Well, she asked you what else she said about that.

Q: You may answer.

A: I asked her—

THE COURT: All right. Objection sustained.

BY MRS. AYCOCK:

Q: Ms. Harris, have you ever been a witness before?

A: No, I have not.

Q: Did you ask [the victim] why she was afraid of him?

A: Yes, I did.

Q: What did she tell you?

A: She said with him smoking reefer and with the films that she have seen at school—

THE COURT: Well, I am going to sustain the objection. If you are offering this to corroborate the witness, the witness has not testified to any of these things this lady has said, and I am going to sustain the defendant's objection. If you

want to corroborate her, you have to corroborate what the girl said in the courtroom.

" 'A party may not take exception to a ruling of the court in his favor. . . .' " *In re McCraw*, 3 N.C. App. 390, 394, 165 S.E.2d 1, 4 (1969). Here, the defendant's objection was sustained. This assignment of error is overruled.

C

[5] Defendant also objects to the trial court allowing the investigating officer to read into evidence the victim's statement as corroborative evidence. This argument fails as well.

The statement, in pertinent part, reads as follows: "So about a week later he came into my bedroom and was taking off his clothes but I know [sic] idea what happen until I really woke up. So when I finally woke up he had his hand over my mouth." Assuming *arguendo* that this portion of the statement was not corroborative, the trial court gave a curative instruction to the jury which cured any error:

> The Court wants to instruct you that when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with her testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.
>
> If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of [the victim] at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve her testimony at this trial. You may not consider it for any other purpose.

This assignment is overruled.

III

[6] By his next assignment of error, the defendant asks this Court to reconsider the admissibility of testimony on post traumatic stress syndrome. As the defendant concedes, this issue has been resolved. We are bound by *State v. Strickland*, 96 N.C. App. 642, 387 S.E.2d

62, *disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 100 (1990), and *State v. Hall*, 98 N.C. App. 1, 390 S.E.2d 169, *disc. rev. allowed*, 327 N.C. 486, 397 S.E.2d 228 (1990). *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (one panel of the Court of Appeals is bound by a prior decision of another panel of the Court addressing the same issue, although in a different case, unless the prior decision has been overturned by a higher court).

IV

[7] Defendant also argues that the trial court erred by not allowing the defendant to present evidence of the victim's school disciplinary records including suspension reports. "An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed. N.C. Gen. Stat. § 15A-1443." *State v. Smith*, 87 N.C. App. 217, 222, 360 S.E.2d 495, 498 (1987), *disc. review denied*, 321 N.C. 478, 364 S.E.2d 667 (1988). Assuming, *arguendo*, that the evidence was relevant, "the defendant here has not persuaded us that there exists any reasonable possibility that the outcome of the trial would have been any different had the testimony . . . been allowed." *Id.* at 222, 360 S.E.2d at 498. This assignment of error is overruled.

V

[8] Defendant next argues the trial court incorrectly instructed the jury on the offense of second degree rape. We disagree. The trial judge, in part, instructed the jury:

> For you to find the defendant guilty of second-degree rape, the State must prove three things beyond a reasonable doubt.
>
> * * *
>
> Second, that the defendant used or threatened to use force sufficient to overcome any resistance the victim might make. The force necessary to constitute rape need not be actual physical force. Fear or coercion may take the place of physical force. And when you come to consider the force sufficient to overcome any resistance the victim might make, you may consider that sexual activity between a parent and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children coupled with the power inherent in a parent's position of authority creates a unique situation of dominance and control in which explicit threats

> and displays of force are not necessary to effect the abuser's purpose.

In his brief, "[t]he defendant readily admits that this is a correct statement of the law" as found in *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987). However, the defendant requested the following additional instruction:

> However, the totality of the circumstances concerning the relationship between a parent and a child must be considered in determining whether the parent's position of authority was sufficient in and of itself to overcome any resistance made by the child to the sexual activity. Such circumstances would include the age of the child; when sexual activity between the parent and child first began; the nature and extent of discipline and punishment of the child by the parent prior to the sexual activity; the presence or the absence of other parental figures in the household, and any commands uttered toward the child by the parent at the time of the sexual activity which would tend to indicate punishment was imminent if the child did not engage in sexual activity with the parent.

Under the facts and circumstances of this case the instruction given by the trial court adequately presented the law in compliance with *Etheridge*. This assignment of error is overruled.

VI

[9] Finally, the defendant claims the trial court committed reversible error in sentencing the defendant to the presumptive prison terms provided by the Fair Sentencing Act. G.S. § 15A-1444(a1) provides:

> A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his sentence is supported by the evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article. Otherwise, he is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

Simply stated, "[t]he [Fair Sentencing] Act does not allow appeal of a presumptive sentence as of right." *State v. Cain*, 79 N.C. App. 35, 49, 338 S.E.2d 898, 907, *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). Here, the trial judge imposed the presumptive sentence for each of the convictions. Accordingly, this assignment of error is overruled.

No error.

Judges JOHNSON and PARKER concur.

MARILYN BAKER, AMY CHAMBERS, GWENDOLYN CLARK, JOSEPH LAMBRIGHT, CARL LEACH, MARY JORDAN, FRANKIE HARRINGTON, JOHN HUBBARD, ANNIE B. LYNN, LENDELL MEDLIN, REUBEN WATERS, ANGELA WALKER, CURTIS WALKER, PERCY WILLIAMS AND GLENN WRIGHT, PLAINTIFFS v. LEROY RUSHING, CLAUDE STEVEN MOSLEY, THE FRANKLIN HOTEL, INC., INDIVIDUALLY AND AS GENERAL PARTNER OF THE FRANKLIN APARTMENTS OF MONROE, A NORTH CAROLINA GENERAL PARTNERSHIP, RUSHING CONSTRUCTION CO., INC., D/B/A THE FRANKLIN HOTEL, DEFENDANTS

No. 9020DC1351

(Filed 15 October 1991)

1. **Appeal and Error § 119 (NCI4th)— summary judgment—fewer than all defendants—appealable**

Summary judgment for fewer than all defendants was immediately appealable where the trial court made no certification under N.C.G.S. § 1A-1, Rule 54(b) but plaintiffs had made the same claims against several defendants and the resolution of those claims depended upon the determination of common factual issues. Furthermore, plaintiffs have a substantial right to have one jury decide whether one, some, all, or none of the joint defendants caused their injuries.

Am Jur 2d, Appeal and Error § 104.

2. **Landlord and Tenant § 1 (NCI3d)— residential hotel—eviction—summary judgment**

Summary judgment was improperly granted for some defendants in an action arising from the closing of a residential

hotel where the evidence at the summary judgment hearing showed that each plaintiff resided in The Franklin Hotel pursuant to an oral lease; each plaintiff leased his apartment as his sole and permanent residence; some plaintiffs had resided in the building for as long as six years; each apartment contained one or two bedrooms, a kitchen/living room and a separate bath; the payments for the apartments were made weekly and were referred to by each party as "rent"; a hotel license was obtained for the building, but no significant changes in the operation of the premises occurred; and plaintiffs continued to make weekly payments which were described as rent. At a minimum, the evidence presents genuine issues of material fact regarding plaintiffs' status as residential tenants.

Am Jur 2d, Landlord and Tenant § 6.

3. Principal and Agent § 11 (NCI3d)— torts of agent—personal liability

Summary judgment could not be supported for defendant Mosley in an action arising from the closing of a residential hotel where Mosley contended that his status as an agent precluded personal liability for the alleged torts of trespass, trespass to chattels, conversion, unfair or deceptive practices, and unfair debt collection practices. It is well settled that a person is personally liable for all torts committed by him or her, notwithstanding that the action may have been taken as an agent for another or as an officer of a corporation.

Am Jur 2d, Agency § 309.

4. Principal and Agent § 11 (NCI3d)— acts of agent—contract claims—summary judgment improper

Summary judgment was improperly granted for defendant Mosley in his individual capacity on contract claims for breach of the implied covenant of quiet enjoyment and breach of the implied warranty of habitability in an action arising from the closing of a residential hotel where the record before the trial court reveals no evidence on the issue of whether Mosley was acting as an agent on behalf of a disclosed principal or on behalf of an undisclosed principal.

Am Jur 2d, Agency §§ 302, 316.

5. Principal and Agent § 11 (NCI3d) — breach of implied warranty of habitability — personal liability of agent — summary judgment improper

Summary judgment for defendant on the issue of personal liability for breach of the implied warranty of habitability was improper in part because N.C.G.S. § 42-40(3) includes a broad, statutory definition of landlord which makes irrelevant the common law distinction between disclosed and undisclosed principals. There is evidence that defendant Mosley supervised the on-site manager of the building, gave him instructions on the daily operation of the premises, and had authority to order repairs and to put and keep the premises in a fit and habitable condition. At a minimum, a genuine issue of material fact exists as to Mosley's status as a landlord.

Am Jur 2d, Landlord and Tenant §§ 767-769.

6. Partnership § 9 (NCI3d) — merger of corporate powers — continued existence

Summary judgment should not have been granted in favor of a partnership in an action arising from the closing of a residential hotel where the two corporate partners had merged. Although defendant partnership contended that it had dissolved and was no longer subject to suit, the partnership offered no evidence as to when it completed the winding up of its affairs, and there is evidence in the record tending to show that the partnership continued to do business after the merger, or at least was involved in winding up, and therefore had not been terminated.

Am Jur 2d, Partnership §§ 888, 889.

7. Corporations § 207 (NCI4th) — dissolution — amenability to suit

Summary judgment for defendant corporation could not be supported by the dissolution of the corporation in an action arising from the closing of a residential hotel. Dissolution does not terminate the corporation's existence nor its amenability to suit. N.C.G.S. § 55-14-05(b)(5).

Am Jur 2d, Corporations §§ 2882, 2896, 2903.

APPEAL by plaintiffs from order entered 11 October 1990 in UNION County District Court by *Judge Kenneth W. Honeycutt.* Heard in the Court of Appeals 25 September 1991.

Legal Services of Southern Piedmont, Inc., by Vernon J. Cahoon and Theodore O. Fillette, III, for plaintiff-appellants.

Griffin, Caldwell, Helder & Lee, P.A., by W. David Lee, for defendant-appellees.

GREENE, Judge.

Plaintiffs appeal from summary judgment entered for defendants The Franklin Apartments of Monroe, a North Carolina General Partnership (the Partnership), Claude Steven Mosley (Mosley), and The Franklin Hotel, Inc. (Hotel, Inc.).

Plaintiffs' complaint alleges claims against Leroy Rushing, Mosley, Hotel, Inc., the Partnership, and Rushing Construction Co., Inc. d/b/a The Franklin Hotel for breach of the implied warranty of habitability, breach of the covenant of quiet enjoyment, unfair or deceptive trade practices, unfair debt collection practices, trespass, trespass to chattels, and conversion.

The evidence in the light most favorable to plaintiffs reveals that plaintiffs resided at 204 West Franklin Street in Monroe, North Carolina, in a building known as "The Franklin Hotel." Their periods of occupancy commenced on various dates beginning in early 1980 and continuing through October 1988. While living in The Franklin Hotel, plaintiffs made weekly payments which were described as "rent," and none of the plaintiffs had other residences. During plaintiffs' tenancies, numerous defects existed in the premises. These defects included lack of hot water at certain times during the month, defective radiators, leaking ceilings, nonweathertight windows, missing windows, roach and rodent infestation, defective doorlocks, faulty plumbing, and accumulation of trash in the common areas. No repairs to the premises were made even after plaintiffs' repeated requests for same.

The owner of The Franklin Hotel from November 1982 until February 1985 was the Partnership. At the time it purchased the building, the Partnership consisted of two individuals: Mosley and Jacob Curtis Blackwood (Blackwood). Subsequently, Mosley and Blackwood each formed corporations: The Franklin Investments, Inc. (formed by Blackwood in February 1984) and Franklin Rentals, Inc. (formed by Mosley in December 1984). In February 1985, the Partnership conveyed The Franklin Hotel to the two corporations. By 1988, Mosley through purchases of stock had become the sole

shareholder of both Franklin Rentals, Inc. and Franklin Investments, Inc. He was also president and director of both corporations, and was responsible for the hiring and firing of The Franklin Hotel's on-site building managers and for determining rental rates and authorizing repairs. In January 1988, a hotel license was obtained for The Franklin Hotel. Prior to that time, summary ejectment was used to remove tenants from the building. In July 1988, Franklin Investments, Inc. and Franklin Rentals, Inc. merged into Hotel, Inc. On 30 September 1988, The Franklin Hotel was conveyed to defendant Rushing Construction Co., Inc. Mosley continued to manage the building pursuant to an oral agreement with defendant Leroy Rushing (Rushing).

In November 1988, Mosley instructed the on-site building manager to begin informing plaintiffs that the building would be closed at the end of December 1988. On 22 December 1988, a temporary restraining order was issued by Chief District Judge Donald Huffman prohibiting Rushing, his agents, employees or building manager from evicting plaintiffs or interfering with plaintiffs' quiet enjoyment of the premises. Despite personal service of this order on Rushing on 22 December 1988, plaintiffs were evicted from their apartments without judicial process on 23 December 1988 by Rushing and Mosley. Several police officers were also present during the eviction. On this same day, the city's chief building inspector inspected the premises. The building inspector determined that The Franklin Hotel was unsafe and unfit for human habitation, and on 28 December 1988, ordered the building condemned. On 30 December 1988, Hotel, Inc. filed articles of dissolution with the Office of the Secretary of State.

The issues presented are I) whether the summary judgment for fewer than all defendants affects a substantial right and is therefore immediately appealable; and II) whether summary judgment can be sustained on the grounds that (A) plaintiffs were not "residential tenants" as that term is used in Chapter 42 of the General Statutes, (B) Mosley has no individual liability because he was acting as an agent for the corporate owners of The Franklin Hotel, (C) the Partnership has no liability because it has been dissolved, and (D) Hotel, Inc. has no liability because of its dissolution on 30 December 1988.

I

[1] The trial court entered summary judgment in favor of defendants Mosley, the Partnership, and Hotel, Inc. The record reveals, however, that plaintiffs' action is still pending against the remaining defendants, namely Rushing and Rushing Construction Co., Inc. Because the trial court's award of summary judgment is for fewer than all defendants, it is an interlocutory order as it "does not dispose of the case, but leaves it for further action for the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Although there is no right of immediate appeal from interlocutory orders and judgments, *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990), appeal of an interlocutory order is permitted in two situations. *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). First, a separable portion of a multiple claim or multiple party action that has been finally adjudicated may be appealed pursuant to N.C.G.S. § 1A-1, Rule 54(b) (1990) if the trial judge certifies that there is no just reason to delay the appeal. *Davidson*, 93 N.C. App. at 24, 376 S.E.2d at 490. The trial court in this case made no certification, therefore no appeal lies under Rule 54(b).

Second, if an interlocutory order is not appealable under Rule 54(b), it may nevertheless be appealed if it meets the requirements of N.C.G.S. §§ 1-277 (1983) and 7A-27(d) (1989). *Davidson*, 93 N.C. App. at 24, 376 S.E.2d at 491. Under these statutes, interlocutory appeals are most commonly allowed if delaying the appeal will prejudice a substantial right. *Id.* Whether a substantial right will be prejudiced by delaying appeal must be determined on a case by case basis. *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982). However, it is well settled that the right to avoid the possibility of two trials on the same factual issues can be a substantial right and therefore one which may support immediate appeal of an interlocutory order. *See, e.g., J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 9, 362 S.E.2d 812, 817 (1987) (the possibility of inconsistent verdicts on the same factual issues satisfies the substantial right requirement of Sections 1-277 and 7A-27(d)).

In the instant case, plaintiffs have made the same claims against several defendants and the resolution of these claims depends upon

the determination of common factual issues, e.g., the condition of the building in which plaintiffs resided. Furthermore, plaintiffs have a substantial right to have one jury decide whether one, some, all, or none of the joint defendants caused plaintiffs' injuries. *Bernick*, 306 N.C. at 439, 293 S.E.2d at 408-09. Accordingly, the order granting summary judgment as to defendants Mosley, the Partnership, and Hotel, Inc. affects a substantial right and is immediately appealable.

II

The critical question on review of a summary judgment is whether there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983). In making this determination, the appellate courts are to consider only the evidence which was before the trial court. 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2716 (1983). The movant is not permitted to advance new theories or raise new issues in support of the motion on appeal. *Id.* Here, the evidence at summary judgment related to whether plaintiffs were "residential tenants," whether defendant Mosley had any individual liability, and whether the Partnership and Hotel, Inc. were absolved of liability because of their respective dissolutions. Accordingly, our review is limited to the question of whether the summary judgment can be supported by any or all of these grounds.

A

[2] Defendants contend that the building in which plaintiffs resided was a hotel, and that, accordingly, plaintiffs are not "residential tenants" entitled to the protection of Chapter 42, Article 5, "Residential Rental Agreements" (the Act) or Chapter 42, Article 2A, "Ejectment of Residential Tenants." Plaintiffs argue to the contrary.

The Act provides protection to those persons occupying "a dwelling unit . . . normally held out for the use of residential tenants who are using the dwelling as their primary residence." N.C.G.S. § 42-40(2) (1984). The Act expressly excludes from its application "transient occupancy in a hotel, motel, or similar lodging subject to regulation by the Commission for Health Services." N.C.G.S. § 42-39(a) (1984). Article 2A of Chapter 42 prohibits landlord self-help eviction where residential tenancies are involved. *See*

N.C.G.S. § 42-25.6 (1984) (requiring landlord to proceed under the statutory procedures for summary ejectment of a "residential tenant"). Whether the plaintiffs here were residential tenants must be determined by looking at all of the circumstances, and the fact that a building is identified as a "hotel" and those who reside in it as "guests" is not determinative.

The evidence at the summary judgment hearing showed that each plaintiff resided in The Franklin Hotel pursuant to an oral lease, that each plaintiff leased his apartment as his sole and permanent residence, and that some plaintiffs had resided in the building for as long as six years. Each apartment contained either one or two bedrooms, a kitchen/living room and a separate bath. The payments for the apartments were made weekly and were referred to by each party as "rent." The evidence showed that in January 1988, Mosley obtained a hotel license for the building, but that thereafter no significant changes in the operation of the premises occurred. Plaintiffs continued to make payments on a weekly basis as they had prior to January 1988, and these payments continued to be described as "rent."

This evidence could support a finding that plaintiffs were residential tenants who leased the apartments as their primary residences and thus were entitled to assert claims under Article 5 and Article 2A of Chapter 42. At a minimum, the evidence presents genuine issues of material fact regarding plaintiffs' status as residential tenants, and for this reason, summary judgment was improperly granted.

B

[3] Mosley argues that his status as an agent precludes his personal liability for the alleged torts of trespass, trespass to chattels, and conversion, and for the claims based on his alleged tortious conduct, specifically the claims for unfair or deceptive trade practices, N.C.G.S. § 75-1.1 (1988), and unfair debt collection practices, N.C.G.S. § 75-50 *et seq.* (1988 & Supp. 1990). We disagree. It is well settled in North Carolina that a person is personally liable for all torts committed by him, notwithstanding that he may have acted as an agent for another or as an officer for a corporation. *Strang v. Hollowell*, 97 N.C. App. 316, 318, 387 S.E.2d 664, 665 (1990). Therefore, summary judgment cannot be supported on this basis.

[4] Mosley also argues that any wrongful acts committed by him giving rise to plaintiffs' contract claims cannot support a claim against him in his individual capacity. Whether an agent is subject to personal liability for acts done on behalf of his principal depends on the circumstances of the case. An authorized agent who enters into a contract on behalf of a disclosed principal generally is not personally liable to third parties since the contract is with the principal. *Walston v. R. B. Whitley & Co.*, 226 N.C. 537, 540, 39 S.E.2d 375, 377 (1946). However, an agent who makes a contract for an undisclosed principal is personally liable as a party to the contract unless the other party had actual knowledge of the agency and of the principal's identity. *Howell v. Smith*, 261 N.C. 256, 258-59, 134 S.E.2d 381, 383 (1964). The record before the trial court reveals no evidence on the issue of whether Mosley was acting as an agent on behalf of a disclosed principal or on behalf of an undisclosed principal. Therefore, summary judgment was improper on plaintiffs' contract claims for breach of the implied covenant of quiet enjoyment and breach of the implied warranty of habitability. *See Miller v. C. W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 371, 355 S.E.2d 189, 195 (1987) (an action for breach of the implied warranty of habitability is wholly contractual).

[5] Moreover, summary judgment on the implied warranty of habitability claim was improper for an additional reason. The Act empowers tenants to bring an action against their landlord for breach of the implied warranty of habitability. *Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694, *disc. rev. denied*, 321 N.C. 296, 362 S.E.2d 779 (1987). The Act defines a landlord as:

> any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article.

N.C.G.S. § 42-40(3) (1984). This broad, statutory definition of landlord makes irrelevant in determining the liability of an agent the common law distinction between disclosed and undisclosed principals. Thus Mosley, if found to be a "person having the actual or apparent authority of an agent to perform the duties imposed" by the Act, would be subject to individual liability for plaintiffs' claim for breach of the implied warranty of habitability. *See Allen v. Standard Crankshaft & Hydraulic Co.*, 210 F. Supp. 844 (W.D.N.C. 1962), *aff'd*, 323 F.2d 29 (4th Cir. 1963) (where the General Assembly has legislated with respect to the subject matter of a common

law rule, the statute supplants the common law with respect to the particular rule).

On the issue of whether Mosley was "a person with the actual or apparent authority of an agent to perform the duties imposed" by the Act, there is evidence in the record that Mosley supervised the on-site manager of the building, gave him instructions on the daily operation of the premises, and had authority to order repairs and to put and keep the premises in a fit and habitable condition. This evidence could support a finding that Mosley was a landlord as defined by the Act. At a minimum, a genuine issue of material fact exists as to Mosley's status as a landlord and, therefore, summary judgment cannot be supported on this basis.

C

[6] The Partnership asserts that when its two corporate partners merged in July 1988, the Partnership dissolved and, as a result, became nonexistent and no longer subject to suit. Assuming *arguendo* that the merger of the two corporate partners effectively caused a dissolution of the Partnership, *see* N.C.G.S. § 59-59 (1989) (defining dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business"), "dissolution of itself has no effect on existing liabilities of the partnership. If it did, partners could escape their obligations by dissolving." J. Crane & A. Bromberg, Law of Partnership § 79 (1968) (hereinafter Crane); *see also* II A. Bromberg & L. Ribstein, Bromberg and Ribstein on Partnership § 7.14 (1988). North Carolina Gen. Stat. § 59-60 (1989) provides that upon dissolution, "the partnership is not terminated, but continues until the winding up of partnership affairs is completed." In other words, "dissolution designates the point in time when the partners cease to carry on the business together; termination is the point in time when all the partnership affairs are wound up, winding up [meaning] the process of settling partnership affairs after dissolution." Unif. Partnership Act § 29, Official Comment, 6 U.L.A. 364 (1969). A partnership's legal existence continues during the winding up of its affairs, and the partnership and partners can sue and be sued for the enforcement of the partnership's rights and obligations. Crane at § 79; *see also* N.C.G.S. § 59-66(a) (1989) (dissolution does not of itself discharge the existing liability of any partner).

The Partnership offered no evidence, documentary or otherwise, as to when, if ever, it completed the winding up of its affairs. Although the Partnership did offer documentary evidence of the July 1988 merger of the Partnership's two corporate partners, there is evidence in the record tending to show that the Partnership continued to do business after the merger, or at least was involved in winding up, and therefore had not been terminated. For example, the general warranty deed conveying The Franklin Hotel property to Rushing Construction Co., Inc., executed on 30 September 1988, lists as grantor "The Franklin Apartments of Monroe, a North Carolina General Partnership." The deed is signed "The Franklin Apartments of Monroe by The Franklin Hotel, Inc., Partner, by Claude Steven Mosley, President." Accordingly, the evidence cannot support summary judgment on this basis.

D

[7] Hotel, Inc. contends that upon its dissolution on 30 December 1988, the corporation ceased being subject to suit. We disagree. Contrary to defendant's argument, dissolution does not terminate the corporation's existence; a dissolved corporation continues in existence indefinitely. R. Robinson, Robinson on North Carolina Corporation Law § 28.1 (1990). The law in effect when plaintiffs filed their complaint allowed for suits against dissolved corporations based on any liability incurred "prior to such dissolution." N.C.G.S. § 55-114(d) (1982). This is consistent with the current Business Corporation Act. *See* N.C.G.S. § 55-14-05(b)(5) (1990). Thus, under either statute, dissolution does not terminate the corporation's existence nor its amenability to suit. Accordingly, summary judgment cannot be supported on this basis.

For the foregoing reasons, the trial court erred in granting summary judgment for Mosley, the Partnership, and Hotel, Inc.

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. STEPHEN BRIAN JONES

No. 9019SC1180

(Filed 15 October 1991)

1. Criminal Law § 34.7 (NCI3d)— assault—placing gun to head of another—admissible

The trial court did not abuse its discretion in a prosecution for assault and for discharging a weapon into occupied property by admitting evidence that defendant had placed a gun to the head of a fourteen year old boy, who was not the victim of the assault, when questioning the boy regarding stolen cocaine. The evidence was relevant and admissible to show that defendant shot because he believed the victim had stolen cocaine from him; the conduct occurred within the minutes just before the shots were fired and within the same continuous sequence of events when defendant questioned first the boy and then the victim about the stolen drugs; and the prejudicial effect is not undue given the probative nature of the evidence, the fact that defendant admitted the shooting, and the testimony of the victim and another eyewitness.

Am Jur 2d, Evidence §§ 324, 325.

2. Criminal Law §§ 1176, 1120 (NCI4th)— aggravating factors—monetary damage to victim

There are circumstances under which the financial burden imposed upon the victim may be used as a nonstatutory aggravating factor; both *State v. Bryant*, 318 N.C. 632, and *State v. Sowell*, 318 N.C. 640, involved the statutory aggravating factor of great monetary loss.

Am Jur 2d, Assault and Battery § 108; Criminal Law §§ 598-599.

3. Criminal Law § 1120 (NCI4th)— aggravating factors—monetary damage to victim—evidence insufficient

There was insufficient evidence to support the nonstatutory aggravating factor that an injury caused great monetary damage to the victim where the evidence of the victim's medical bills and lack of insurance was placed before the

court solely by the oral representation of the prosecuting attorney.

Am Jur 2d, Assault and Battery § 108; Criminal Law §§ 598-599.

4. **Criminal Law § 1120 (NCI4th)— assault—aggravating factors—monetary damage to victim—improper**

The trial court erred when sentencing defendant for assault with a deadly weapon inflicting serious injury by finding in aggravation that the injury caused great monetary damage to the victim where defendant shot the victim once in the foot, the victim also received injuries to his hand from broken glass panes in the front door which he encountered when he fled, and these injuries resulted in medical expenses totaling about $4700. Medical expenses which represent a financial burden to the victim may not be considered as a nonstatutory factor in aggravation unless they are excessive and go beyond that normally incurred from an assault of this type.

Am Jur 2d, Assault and Battery § 108; Criminal Law §§ 598-599.

5. **Criminal Law § 1119 (NCI4th)— discharging a firearm into an occupied building—aggravating factors—two shots—two year old in house**

The trial court did not err when sentencing defendant for discharging a firearm into an occupied building by finding as a nonstatutory aggravating factor that defendant shot indiscriminately at least two times into the dwelling house and barely missed a two year old child. The crime of discharging a weapon into an occupied building is accomplished when the defendant shoots once into the structure; further acts of shooting are above and beyond that necessary to prove the offense and increase the risk of harm to the people within, thereby increasing defendant's culpability. The vulnerability of the child to the flying bullets was increased due to her youth in that she was less likely to react defensively.

Am Jur 2d, Assault and Battery § 108; Criminal Law §§ 598-599.

APPEAL by defendant from judgment entered 5 June 1990 by *Judge Howard R. Greeson, Jr.* in CABARRUS County Superior Court. Heard in the Court of Appeals 17 September 1991.

Defendant was tried before a jury and convicted of assault with a deadly weapon inflicting serious injury and discharging a firearm into an occupied property. From sentences in excess of the presumptive terms, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas B. Wood, for the State.

William D. Arrowood for defendant-appellant.

JOHNSON, Judge.

The evidence at trial tended to show that the victim, Rico Wallace, was visiting at the Smith home when the defendant came to the door and knocked. At the time, the house contained several adults and young children. Upon admittance to the house, the defendant went directly to a bedroom where he had earlier left his gun for safekeeping. In the room at the time were Tawanda Ann Smith and a fourteen year old boy. Tawanda testified that the defendant put his gun to the boy's head and asked him "Who got my cocaine from off the corner?" Defendant then went into the living room where he questioned Rico as to the whereabouts of the cocaine that defendant said Rico had taken from him. When Rico denied knowledge of the cocaine the defendant went outside and questioned others who were in the yard. Rico followed defendant to the yard. Following further argument defendant pulled his gun and shot Rico in the foot. As Rico fled into the house, defendant shot several more times in his direction, the bullets hitting the glass in the door and several striking a wall in the interior of the house. Several people were in the house at the time and a two year old child was standing in the doorway when the shooting began.

Defendant testified that he had been robbed earlier at gunpoint by Rico and that when he and Rico were in the yard he saw Rico reach into his pocket and pull a gun, causing the defendant to shoot first in self-defense. The victim denied having a gun.

I.

[1] Defendant first contends that the trial court erred in admitting evidence that the defendant placed a gun to the head of the fourteen year old boy when questioning him regarding the stolen cocaine. This evidence was offered by the State during the testimony of Tawanda Smith. The act testified to occurred when defendant entered the bedroom to retrieve his gun and just before he confronted the victim in the living room and then shortly thereafter in the front yard where the shooting took place. The trial judge heard the evidence on *voir dire*, found the evidence admissible to show motive or intent and so instructed the jury. There is no evidence in the transcript that the judge explicitly weighed the probativeness of the evidence against the prejudice to the defendant. Defendant admits that the testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence, G.S. § 8C-1, for the purpose of showing motive. He argues that it should have been excluded because its probative value is outweighed by its prejudicial effect. G.S. § 8C-1, Rule 403.

Rule 403 requires the exclusion of evidence, even though relevant, "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" "Unfair prejudice" in the context of Rule 403 means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." Commentary, G.S. § 8C-1, Rule 403 (1988); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986). While evidence which is probative of the state's case will necessarily have a prejudicial effect on the defendant, the question is one of degree. *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986). We must decide whether the prejudicial effect of the testimony at issue is "undue" or substantially outweighs its probative value so as to require exclusion. *Id.* at 95, 343 S.E.2d at 889.

We find that this evidence was properly admitted. The defendant testified that he drew his gun and shot the victim in self-defense. The evidence in question was relevant and admissible to show that defendant in fact shot because he believed that the victim had stolen cocaine from him. The conduct at issue occurred within the few minutes just before the shots were fired and within the same continuous sequence of events when defendant questioned first the boy and then the victim about the stolen drugs. It therefore is probative of defendant's motive and intent. The prejudicial effect

is not "undue" given the probative nature of the evidence, the fact that the defendant admitted the shooting, the testimony of the victim and another eyewitness. The judge did not abuse his discretion in admitting this evidence. This assignment of error is overruled.

II.

[2] Following the jury verdict of guilty on both charges, the trial court made findings of aggravating and mitigating factors for purposes of sentencing. As to both charges, the court found the statutory mitigating factor that the defendant had no record of prior criminal convictions. As to each charge the court found one non-statutory aggravating factor. For both charges, the court found that the aggravating factor outweighed the mitigating factor and sentenced the defendant to a prison term greater than the presumptive.

Defendant contends that the trial court erred in finding in aggravation of the assault conviction, that the victim's physical injury caused great monetary damage to the victim. He relies upon *State v. Bryant*, 318 N.C. 632, 350 S.E.2d 358 (1986) and *State v. Sowell*, 318 N.C. 640, 350 S.E.2d 363 (1986). In both *Bryant* and *Sowell* the defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. In each case the trial judge found the statutory aggravating factor that the offense involved damage causing great monetary loss, G.S. § 15A-1340.4(a)(1)m. The Supreme Court held in each case that the statutory aggravating factor found in G.S. § 15A-1340.4(a)(1)m, referring to "damage causing great monetary loss," properly encompassed only monetary loss resulting from damage to property, not personal injury. *Bryant*, 318 N.C. at 635, 350 S.E.2d at 360; *Sowell*, 318 N.C. at 641, 350 S.E.2d at 364. But in *dictum*, the *Bryant* Court stated: "none of this discussion should be interpreted as a ruling by this Court that under no circumstances may the financial burden imposed upon the victim by his or her injury ever be considered a non-statutory aggravating factor. We merely hold that consideration of that factor is not statutorily mandated." 318 N.C. at 637, 350 S.E.2d at 361. Thus, there are circumstances under which the financial burden imposed upon the victim by his injury may be used as a non-statutory aggravating factor and neither *Bryant* nor *Sowell* prevents us from considering this issue.

[3] Having decided that this factor may be considered in sentencing, we find that there are still two questions before us: (1) whether the evidence presented by the State is sufficient to support the non-statutory aggravating circumstance and (2) even assuming, *arguendo*, that this factor is sufficiently proved, whether under the facts of this case, the factor is proper as a matter of law. We find that under the facts of this case such a finding is in error.

Under the Fair Sentencing Act a trial judge may consider any non-statutory aggravating or mitigating factor which is proved by a preponderance of the evidence and which is reasonably related to the purposes of sentencing. G.S. § 15A-1340.4(a). The State bears the burden of proof if it wishes to establish the existence of an aggravating factor. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). Where the State presents insufficient evidence to support an aggravating circumstance the defendant is entitled to a new sentencing hearing. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985); *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). In *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984), the trial court found as an aggravating factor that the defendant caused serious mental injury to the victim. The only evidence offered by the State in support of this factor was a statement by the district attorney that he had been told by the victim's husband that she had entered the hospital after testifying at trial, had been heavily sedated and was resting at home. The husband did not testify, nor did the State offer any medical testimony or medical reports to support its contention that the victim suffered a serious mental injury caused by the defendant's actions. Our Supreme Court found this evidence to be insufficient. *Brown*, 312 N.C. at 249-250, 321 S.E.2d at 863.

In the case *sub judice*, evidence concerning the victim's medical bills and his lack of insurance was placed before the court solely by the oral representation of the prosecuting attorney. No bills or records or other evidence was submitted. The victim did not testify nor did the defendant stipulate to the amounts or existence of the medical bills. We hold that the State presented insufficient evidence to support the non-statutory aggravating factor that the injury caused great monetary damage to the victim. Defendant is therefore entitled to a new sentencing hearing. *Ahearn*, 307 N.C. 584, 300 S.E.2d 689.

[4] Normally, at a resentencing hearing, the State would be permitted to present proper evidence in support of an aggravating

factor and the defendant would be permitted to rebut that evidence if he could. *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985) (A resentencing hearing is a *de novo* proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing.). We expect that the State in this case would attempt to present evidence at the resentencing hearing which would properly prove the existence of this factor. We therefore continue our analysis and inquire as to whether, under the facts of the case *sub judice*, this factor can be properly found even assuming that the State meets its burden of proof. We hold that it cannot.

We note first that the defendant was convicted of assault with a deadly weapon inflicting serious injury, a class H felony, punishable by a maximum of ten years imprisonment, presumptive three years. It is assumed that when the legislature prescribed presumptive sentences under the Fair Sentencing Act it took into account the seriousness of the crime. *See State v. Medlin*, 62 N.C. App. 251, 253, 302 S.E.2d 483, 485 (1983). In this case the crime necessarily involves the inflicting of serious bodily injury upon the victim. With serious bodily injury necessarily goes, to a greater or lesser extent, the attendant pain and suffering, lost wages, medical bills and the like.

Our cases have consistently stated that under the Fair Sentencing Act the enhancement of a defendant's sentence must be based upon conduct which goes beyond that normally encompassed by the particular crime for which the defendant is convicted. *See State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983) (second degree murder: to find aggravating factor that offense is particularly heinous, atrocious or cruel, court must consider whether evidence discloses excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense); *accord State v. Higson*, 310 N.C. 418, 312 S.E.2d 437 (1984) (sĕcond degree murder and assault); *Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (manslaughter). Also, any factor used to increase or decrease a presumptive term must relate to the character or conduct of the offender. *State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983) (*citing Ahearn*, 307 N.C. 584, 300 S.E.2d 689).

In the case *sub judice* the defendant shot the victim once in the foot. The victim also received cutting injuries to his hand from broken glass panes in the front door which he encountered

as he fled into the house. These injuries resulted in medical expenses totaling about $4,700. While medical expenses, which represent a financial burden on the victim, may be considered as a non-statutory factor in aggravation, *see Bryant*, 318 N.C. at 637, 350 S.E.2d at 361, we find that they may not be so used unless they are excessive and go beyond that normally incurred from an assault of this type. Therefore, the question before us is whether the medical expenses incurred by the victim in this case are so excessive or beyond that normally associated with an injury resulting from an assault inflicting serious injury that they may be used as a basis for enhancing defendant's sentence beyond the presumptive. We hold that under the facts of this case the medical expenses were not so excessive and the trial court erred in finding as a factor in aggravation that the injury caused great monetary damage to the victim.

III.

[5] Defendant also alleges that the trial court erred when it found in aggravation of the firearm offense that the "defendant shot indiscriminately at least two times into the dwelling home and barely missed 2 yr old Keosha Smith, a very young child of 2 yrs. old."

This aggravating factor would appear to encompass two separate findings: (A) that the defendant shot indiscriminately at least two times into the dwelling house and (B) that the shooting endangered a young child two years of age. We find no error in either finding.

The elements of the offense prohibited by G.S. § 14-34.1 are (1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied. A person violates this statute if he intentionally, without legal excuse or justification, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973). The evidence at trial showed that defendant shot into the house several times within minutes of having stepped out of the house, that the house was occupied at the time by several adults and three young children including a two year old child, that as to the children, defendant actually knew of at least the two year old's presence, and that the two year old child was standing in the open front door when defendant fired his gun toward, and in fact struck, the door of the house.

We note initially the oft-stated rule that non-statutory aggravating factors may be found by the court to the extent that they are (1) related to the purposes of sentencing and (2) proved by a preponderance of the evidence. G.S. § 15A-1340.4(a); *State v. Taylor*, 322 N.C. 280, 286, 367 S.E.2d 664, 668 (1988). One of the primary purposes of sentencing is to "impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability[.]" G.S. § 15A-1340.3.

(A)

As to the fact that defendant shot "at least two times into the house," we find that this may properly be used as a basis for aggravation. The crime of discharging a weapon into an occupied building is accomplished when the defendant shoots once into the structure. Any further acts of shooting are above and beyond that necessary to prove the offense for which defendant is convicted. The trial court may aggravate a sentence on the basis of conduct which is not used to prove an element of the offense for which the defendant is convicted if that conduct is proved by a preponderance of the evidence, increases the defendant's culpability and is related to the purposes of sentencing. G.S. § 15A-1340.4(a); *State v. Abee*, 308 N.C. 379, 302 S.E.2d 230 (1983). Defendant's act of repeatedly shooting into an occupied building increased the risk of the harm to the people within thereby increasing the defendant's culpability. We hold that this fact may therefore be used in aggravation of defendant's sentence on the firearm charge.

(B)

Regarding the finding that the shooting endangered a two year old child, this factor is not the statutory factor specified in G.S. § 15A-1340.4(a)(1)j (age or infirmity of victim) but is an additional non-statutory aggravating factor. Since the purpose of the statute prohibiting discharge of a firearm into a building is the protection of the occupant(s) of a building, *Williams*, 284 N.C. 67, 199 S.E.2d 409, any person located in the target building is a victim of this offense. In *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985), our Supreme Court explained the effect of a victim's age as regards sentence enhancement under the Fair Sentencing Act:

> One of the purposes of sentencing is to impose a punishment commensurate with the offender's culpability. N.C.G.S.

> § 15A-1340.4(a) (1983). Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized. Unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act.

Id. at 525, 335 S.E.2d at 8.

We find that this reasoning applies to the facts in this case. Defendant shot several times into a dwelling in which he knew a young child was located. The child was in fact standing in the doorway when the defendant shot in the direction of the doorway. The vulnerability of the child to the flying bullets was increased due to her youth in that she was less likely to react defensively by fleeing or falling to the floor or by seeking other shelter from the multiple shots that flew around her. This assignment of error is overruled.

Guilt phase: No error.

Remand for resentencing in 90CRS3359 (assault).

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD POINDEXTER

No. 9026SC1117

(Filed 15 October 1991)

1. Searches and Seizures § 12 (NCI3d)— airport encounter with police—defendant not seized—admissibility of evidence found in search

Defendant was not seized within the meaning of the Fourth Amendment during his initial encounter with police at an air-

port because conduct of the police would not have communicated to a reasonable person that such person was not free to decline the officers' requests or otherwise terminate the encounter where the evidence showed that officers approached defendant as he left the airport terminal after he arrived there on a flight from New York; a city narcotics officer identified himself as a police officer, showed defendant his police badge, and asked defendant if he could speak with him for a moment, to which defendant consented; the officer stood to the left of defendant and an SBI agent stood to the right of defendant; defendant then complied with the officer's request to see his airplane ticket; after looking at the ticket, the officer returned it to defendant; upon the officer's request to return to the terminal because of the cold weather, defendant agreed even though he had been informed that he was not in custody; once inside the officer asked defendant for additional identification, questioned him about his residence and asked him why he was leaving the terminal if he had a connecting flight in thirty minutes; the officer again advised defendant that he was not under arrest, informed defendant that he was looking for drugs being smuggled into the airport, again advised defendant that he was not under arrest, told defendant that the officers were just looking for his cooperation, and requested defendant's permission to search his person and handbag; in response to the officer's statement that the search could be conducted where they stood or in a nearby restroom, defendant stated that he would rather go to the restroom; and during the search, the SBI agent discovered a package containing cocaine on defendant's person. The narcotics officer's display of a badge in conjunction with both officers' other conduct during the initial encounter was not a sufficient show of authority to constitute a seizure or to make defendant's consent involuntary.

Am Jur 2d, Searches and Seizures §§ 46-48, 100.

Validity, under Federal Constitution, of consent to search—Supreme Court cases. 36 L. Ed. 2d 1143.

2. Appeal and Error § 150 (NCI4th)— constitutional issue—absence of determination by trial court

The Court of Appeals will not address the issue of whether race was unconstitutionally used as a factor in the drug courier

profile where the trial court made no findings of fact or conclusions of law concerning race and the drug courier profile.

Am Jur 2d, Appeal and Error § 635.

APPEAL by defendant from Judgment entered 6 April 1990 by *Judge Kenneth A. Griffin* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 27 August 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Grady Jessup, for defendant appellant.

COZORT, Judge.

Defendant James Edward Poindexter was arrested at Douglas Municipal Airport in Charlotte, North Carolina, on 17 December 1989, after police officers searched him and discovered cocaine. On 5 February 1990, defendant was charged with two counts of trafficking in drugs, one by felonious possession, and one by felonious transportation of 400 grams or more of cocaine. On 22 February 1990, defendant filed a motion to suppress all physical evidence and statements obtained, alleging an unlawful seizure and search in violation of his constitutional rights. The trial court denied the motion to suppress. Defendant gave notice of appeal and entered a guilty plea to trafficking in drugs by possession of more than 400 grams of cocaine. The State voluntarily dismissed the second count of trafficking by transporting more than 400 grams of cocaine. From a judgment imposing a sentence of thirty-five years in prison and a fine of $250,000.00, defendant appeals. We affirm.

Defendant raises two issues on appeal: (1) whether the trial court erred in denying defendant's motion to suppress physical evidence and statements on the grounds that he was unconstitutionally seized without an arrest warrant, probable cause, or his consent; and (2) whether the trial court erred by failing to determine whether the use of race was an impermissible factor in the drug courier profile.

At the suppression hearing the State presented evidence that on 17 December 1989, defendant deplaned from a New York flight at Douglas International Airport in Charlotte, North Carolina. Charlotte Narcotics Officer Jerry Sennett, State Bureau of Investiga-

tion Agent Tony Ballas, and Charlotte Vice Officer B. B. Wallace were standing near the gate agent observing passengers as they deplaned. Defendant approached the gate agent in the middle of a group of passengers; however, he did not stop to ask for information from the gate agent. Upon stopping for a second and looking at Officer Sennett, defendant's eyes became wide and he had a nervous look. Defendant then immediately turned, quickly walked down the concourse toward the main terminal, went down an escalator, and started out an exit door. Officer Sennett approached the defendant, identified himself as a police officer, presented identification, and asked to speak with the defendant. Officer Sennett asked to see the defendant's ticket and returned it to him after noting that defendant came from New York, purchased his ticket with cash, had a connecting flight to Columbia, South Carolina, and had no checked baggage. Officer Sennett then asked defendant if he would like to step inside out of the cold. The defendant agreed.

Upon request, defendant presented to Officer Sennett his driver's license indicating a Pisgah Forest, North Carolina, address. The defendant began breathing heavily and became visibly nervous. Defendant first told the officer that he lived in New York City and had lived in Columbia, South Carolina, for several months. He explained that he was going to his car in the parking lot to get some belongings before his next flight. Officer Sennett informed the defendant twice that he was not under arrest or in custody. After asking for the defendant's cooperation, Officer Sennett asked the defendant if he would consent to a search of his person and luggage for drugs. In response to Officer Sennett's statement that the search could be conducted where they stood or in a nearby restroom, the defendant stated that he would rather go to the restroom. During the search, Agent Ballas discovered a large object wrapped in gray duct tape in defendant's pants. Defendant was then placed under arrest, advised of his Miranda rights, signed an Adult Waiver of Rights Form, and gave a statement about twenty minutes later. For the purposes of the hearing, it was stipulated that the package contained 425.1 grams of cocaine.

The defendant testified that he was walking out the door from the airport when someone grabbed him by the arm and showed him a badge. The officer told him he was not under arrest, but the officers had him boxed in. He felt like he was arrested and could not leave if he wanted to.

The defendant argues: (1) that he was seized within the meaning of the Fourth Amendment during the initial encounter when the officers approached him, identified themselves as police officers, showed him their badges, requested and took possession of his airline ticket, and requested that he return to the terminal; (2) that the officers did not have a reasonable articulable suspicion based upon the drug courier profile or other facts known to them to justify the seizure; and (3) that race was unconstitutionally used as a factor in the drug courier profile.

[1] We must first determine whether the defendant was seized within the meaning of the Fourth Amendment. In *Florida v. Royer*, 460 U.S. 491, 75 L.Ed.2d 229 (1983), the United States Supreme Court stated:

> [T]he State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.
>
> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.

Id. at 497-98, 75 L.Ed.2d at 236 (citations omitted).

More recently, in *Florida v. Bostick*, --- U.S. ---, 115 L.Ed.2d 389 (1991) [59 U.S.L.W. 4708, 4710 (18 June, 1991)], the United States Supreme Court summarized recent rulings dealing with airport encounters as providing that "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required." (Citations omitted.) In determining

"whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at ---, 115 L.Ed.2d at --- [59 U.S.L.W. at 4711].

In *State v. Thomas*, 81 N.C. App. 200, 343 S.E.2d 588, *cert. denied*, 318 N.C. 287, 347 S.E.2d 469 (1986), we reviewed numerous state and federal cases involving the drug courier profile and Fourth Amendment issues, concluding that:

> The analysis which has emerged from these decisions can be summarized as follows:
>
> "1. Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment;
>
> 2. Brief seizures must be supported by reasonable suspicion; and
>
> 3. Full-scale arrests must be supported by probable cause."

Id. at 205, 343 S.E.2d at 591 (citing *State v. Perkerol*, 77 N.C. App. 292, 298, 335 S.E.2d 60, 64 (1985)).

State v. Grimmett, 54 N.C. App. 494, 284 S.E.2d 144 (1981), *cert. denied and appeal dismissed*, 305 N.C. 304, 290 S.E.2d 706 (1982), provides a good example of our analysis in airport detention cases. In *Grimmett*, officers observed the defendant and his companion in the vicinity of the baggage claim pickup in the Charlotte Airport. Relying upon the drug courier profile, an officer approached the defendant, identified himself as an officer, stated the purpose of his approach, asked if the defendant would speak to him, and asked for some identification. Defendant agreed to speak to the officer and to accompany him back inside the terminal. Once inside, the officer took the defendant to a hallway outside the crowded airport police office. In the hallway, Grimmett opened a suitcase taken by another officer from Grimmett's companion. Grimmett then gave the officers permission to search the suitcase. Upon discovery of a controlled substance, Grimmett was arrested. *Id.* at 496, 284 S.E.2d at 147.

Citing language from *Terry v. Ohio*, 392 U.S. 1, 20 n.16, 20 L.Ed.2d 889, 905 n.16 (1968), that "not all personal intercourse be-

tween policemen and citizens involves 'seizures' of persons," we agreed with the trial court that the defendant had not been seized during the initial encounter. Our analysis continued, however, since the defendant asserted that he had been seized when he was escorted from the public area to the office. Agreeing with the defendant that the officers did not have the requisite reasonable articulable suspicion to justify the further detention, we nevertheless affirmed the denial of defendant's motion to suppress the evidence on the basis that the defendant voluntarily consented to accompany the officers to the hallway.

The case at bar is factually quite similar to *State v. Grimmett.* Our analysis here, however, is limited to determining whether the initial encounter constituted a seizure because the defendant failed to argue that the events after the initial encounter constituted an unlawful seizure.

The trial court found the following facts. Officer Sennett approached the defendant as he exited the terminal, showed his police identification, identified himself as a police officer, and asked defendant if he could speak with him for a moment, to which the defendant consented. Officer Sennett stood to the left of the defendant and Agent Ballas stood to the right of the defendant. Officer Sennett then asked to see the defendant's airplane ticket. The defendant complied with the request. After looking at the ticket, Officer Sennett returned it to the defendant. Upon Officer Sennett's request to return to the terminal because of the cold weather, the defendant agreed, even though he had been informed that he was not in custody. Once inside, Officer Sennett asked the defendant for additional identification, questioned him about his residence, and asked him why he was leaving the terminal if he had a connecting flight in thirty minutes. Officer Sennett again advised the defendant that he was not under arrest, informed him that he was looking for drugs being smuggled into the airport, again advised him he was not under arrest, told him they were just looking for his cooperation, and finally requested permission to search his person and handbag. These findings of fact are supported by the testimony of Officer Sennett. If supported by competent evidence, the underlying findings of fact are conclusive and binding on appeal. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The findings of fact in turn support the trial court's conclusion of law that there was no violation of the defendant's federal or state constitutional rights.

Reviewing all the circumstances surrounding the initial encounter, we find that the police conduct would not have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. The officers approached the defendant, identified themselves, and asked if they could speak to him and see his airline ticket. The defendant consented. The officers then asked the defendant if he would like to step inside for the purpose of questioning since it was a cold day. The defendant agreed even though he had been told he was not in custody. There is no evidence that the officers threatened or coerced the defendant to accompany them inside. The defendant testified that the officers did not show him their weapons during the entire encounter. In fact, the defendant testified that he accompanied the officers into the terminal because the officers showed him their badges. Once outside, the officers twice informed the defendant that he was not under arrest, asked for his cooperation, and then asked for permission to conduct a search.

In *Florida v. Royer*, 460 U.S. at 498, 75 L.Ed.2d at 236, the United States Supreme Court specifically stated that the fact that an officer identifies himself is not sufficient by itself to transform a lawful stop into a seizure requiring some level of particularized suspicion. Here, the trial court found that "Officer Sennett approached the Defendant and since he was dressed in casual clothes, he showed him his police identification, [and] identified himself as a police officer." The officer showed the defendant his badge as a means of identification. We find that the display of the badge in conjunction with the officers' other conduct during the initial encounter was not a sufficient show of authority to constitute a seizure or to make the defendant's consent involuntary. The trial court correctly denied the motion to suppress.

[2] Defendant also assigns as error the trial court's failure to determine whether race was being impermissibly employed as a factor in utilizing the drug courier profile. We will not address this issue since it does not affirmatively appear that " 'such question was raised *and passed upon* in the court below,' " *State v. Dorsett*, 272 N.C. 227, 229, 158 S.E.2d 15, 17 (1967) (quoting *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955)) (emphasis added by the Court in *Dorsett*), as the trial court made no findings of fact or conclusions of law concerning race and the drug courier profile.

The judgment below is

Affirmed.

Judges ORR and LEWIS concur.

PARRISH FUNERAL HOME, INC., PLAINTIFF v. HARRY PITTMAN AND WIFE, JEAN PITTMAN, DEFENDANTS

No. 9011DC1200

(Filed 15 October 1991)

Executors and Administrators § 29 (NCI3d)— funeral expenses— parol agreement by third party to pay—binding

The trial court erred by granting a directed verdict for defendants where defendant Harry Pittman contacted plaintiff to make funeral arrangements for his father; Pittman told plaintiff that the executor of the estate would bring a check to pay for the funeral; the executor came to the funeral home without paying for the funeral; plaintiff indicated that he would not have the funeral unless someone would be responsible for the bill; Pittman indicated that he would pay for the funeral if the estate could not but refused to sign the bill; plaintiff provided the funeral and billed the estate; plaintiff was informed that the estate could not pay the funeral expenses; and defendants refused to pay. Although N.C.G.S. § 28A-19-8 states that the deceased's estate shall be primarily liable for funeral expenses, it does not exclude or prohibit other sources from paying funeral expenses or undertaking the obligation to pay the expenses. A promise to pay a decedent's debts must be in writing when such debts are generally charged to the decedent's estate, but the Statute of Frauds is not available as a defense here because defendants did not specifically plead that defense.

Am Jur 2d, Executors and Administrators §§ 591, 592; Statute of Frauds §§ 214, 592, 594.

APPEAL by plaintiff from judgment entered 10 May 1990 by *Judge O. Henry Willis, Jr.* in JOHNSTON County District Court. Heard in the Court of Appeals 20 August 1991.

This action arises from plaintiff's claim filed 26 July 1989, alleging that defendants failed to pay $4,288.95 for funeral expenses and services plaintiff provided for defendants' deceased relative. Plaintiff alleged that defendants entered into an express contract with plaintiff for such services and are thereby obligated to pay under the contract.

This case was tried before a jury in Johnston County District Court on 9 May 1990. At the close of plaintiff's evidence, defendants moved for a directed verdict on the grounds that the debt was primarily the debt of the decedent's estate and that defendants' promise to pay was a collateral promise that should have been in writing. The trial court granted defendants' motion and entered its order accordingly.

Plaintiff appeals from the judgment of 10 May 1990.

Lucas, Bryant & Denning, P.A., by W. Robert Denning, III, and Robert W. Bryant, Jr., for plaintiff-appellant.

Daughtry, Woodard & Lawrence, by Stephen C. Woodard, Jr., for defendant-appellees.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting a directed verdict in defendants' favor. For the following reasons, we hold that the trial court erred and reverse its judgment of 10 May 1990.

Under N.C. Gen. Stat. § 1A-1, Rule 50, the question presented by a motion for a directed verdict to both the trial and appellate courts is whether the evidence, viewed in the light most favorable to the nonmovant, is sufficient to reach the jury. *Helvy v. Sweat*, 58 N.C. App. 197, 199, 292 S.E.2d 733, 734, *disc. review denied*, 306 N.C. 741, 295 S.E.2d 477 (1982) (citation omitted). The nonmovant is entitled to every reasonable inference which may be drawn from the evidence, and all conflicts must be resolved in his favor. *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 301 S.E.2d 439, *disc. review denied*, 308 N.C. 678, 304 S.E.2d 759 (1983). When the evidence is insufficient to support a verdict in the non-

movant's favor, the directed verdict motion should be granted. *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

The evidence in the present case, viewed in plaintiff's favor, tends to show that plaintiff Elton Parrish (Parrish) is the owner and operator of Parrish Funeral Home, Inc. On 15 March 1989, defendant Harry Pittman (Pittman) contacted Parrish concerning Pittman's father who had died in Florida. Pittman asked Parrish to arrange to have his father's body returned to this state for burial. Pittman also requested that Parrish handle the funeral arrangements through his funeral home. Prior to the funeral, Pittman and his wife selected the casket, vault and clothing for his deceased father. The next day when Pittman was discussing funeral arrangements with Parrish, Pittman told Parrish that the executor of the estate, Lynn Blaha, would bring Parrish a check to pay for the funeral service.

A day later, the Pittmans and Ms. Blaha returned to the funeral home. Ms. Blaha left without paying for the funeral services, and Parrish told the Pittmans that he had "gone as far as [he] could go." He further stated that he would not have the visitation or the funeral unless someone was going to be responsible for the bill. The total bill was $4,288.95. Pittman told Parrish that "the estate certainly ought to be worth it, and if that is not worth it, we will see that you get your money." Pittman also stated that "we will see that you get your money if I have to pay it myself."

Parrish then requested that Pittman sign the bill but Pittman refused. Pittman stated that he hoped Ms. Blaha would sign the document. Parrish provided the remainder of the funeral services and billed the estate for the balance due. Within a month after the funeral, Parrish telephoned Ms. Blaha to collect the debt from the estate. Parrish also telephoned the Clerk of Court in Johnston County and in Norfolk, Virginia to determine if an estate account had been established for the deceased. Parrish testified that he was informed that the estate could not pay the funeral expenses. Parrish then demanded that the Pittmans pay, based upon their representations before the funeral. The Pittmans refused to pay, and Parrish filed this action.

After plaintiff presented the above evidence at trial, defendants moved for a directed verdict on two grounds: that N.C. Gen. Stat. § 28A-19-8 provides that funeral expenses of a decedent shall be considered an obligation of the estate; and that defendants'

promise to pay the funeral services was a promise to pay the debt of another and therefore required to be in writing by the Statute of Frauds under N.C. Gen. Stat. § 22-1. The trial court then granted defendants' motion for directed verdict on these grounds.

Article 19 of Chapter 28A of the General Statutes is entitled, "Claims against the Estate," which is evidence of the Legislature's intent that funeral expenses be paid first from a decedent's estate. Chapter 28A, however, does not specifically limit such expenses to the deceased's estate. We are bound by the rule that "when construing a statutory provision, the words in the statute are to be given their natural or ordinary meaning, unless the context of the provision indicates that they should be interpreted differently." *Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990), *citing*, *Abernathy v. Commissioners*, 169 N.C. 631, 86 S.E. 577 (1915).

Under N.C. Gen. Stat. § 28A-19-8 (1984):

> Funeral expenses of a decedent shall be considered as an obligation of the estate of the decedent and the decedent's estate shall be primarily liable therefor. The provisions of this section shall not affect the application of G.S. 28A-19-6.

Plaintiff maintains that § 28A-19-8 does not exclude an express contract to pay for funeral services and argues that an express contract between plaintiff and defendants exists because defendants agreed to pay for the funeral expenses if the estate did not pay.

There is no case law in this state directly addressing this argument under the above statute. The statute states that the deceased's estate shall be "*primarily*" liable for funeral expenses. However, the statute does not exclude or prohibit other sources from paying funeral expenses or undertaking the obligation to pay the expenses. If there were no funds in an estate from which funeral expenses could be paid, then some other source should be available. Therefore, we hold that § 28A-19-8 does not limit collection of funeral expenses exclusively to the estate.

In *Ray v. Honeycutt*, 119 N.C. 510, 26 S.E. 127 (1896), our Supreme Court stated the well-settled rule that burial expenses are first charged "upon the assets in the hands of the personal representative, and the law will imply a promise to him who, from the necessity of the case, for any reason, incurs the expense of

a proper burial." *Id.* at 512, 26 S.E. at 128 (citations omitted). The Court then ordered the administrator of the estate in *Ray* to reimburse the deceased's widow for debts she had incurred for purchasing burial clothes for her deceased husband, even though there was no contract for such between the widow and the administrator of her husband's estate.

The *Ray* Court further stated that funeral expenses are a necessary expense and "devolves upon the assets of the estate, and the law implies the promise to pay them, or to repay the proper person, who as a matter of affection and duty, has incurred and paid them." *Id.* at 513, 26 S.E. at 128. *Ray*, however, did not state that funeral expenses were an *exclusive* obligation of the estate.

As to the evidence in the case before us, it does not preclude as a matter of law that an express contract existed between plaintiff and defendants whereby defendants unconditionally agreed to pay the funeral expenses. The plaintiff's evidence of record indicates that defendants agreed to take care of the funeral expenses if the estate did not, and that Pittman agreed with plaintiff to "see that you get your money if I have to pay it myself[.]" after plaintiff stated that he could not go forward with the visitation or funeral unless someone was responsible for the bill. Although the evidence also indicates that defendants refused to sign any agreement that they would in fact be responsible for the funeral expenses if the estate did not pay, this evidence does not so negate defendant's alleged agreement to take care of the funeral expenses if the estate did not so as to warrant a directed verdict.

Secondly, defendants argue that this alleged promise to pay was the promise to pay the debt of another, which is void by law unless in writing. Under N.C. Gen. Stat. § 22-1 (1986) (Statute of Frauds):

> No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

The general rule under the above statute is that a promise to answer for the debt of another for which the other remains liable, must be in writing. *Mason v. Wilson*, 84 N.C. 51 (1881). Further, it is well-settled law in this state that a promise by an administrator of an estate to pay the debts of the intestate out of his own resources if the estate could not pay is void under the Statute of Frauds, unless such agreement is in writing. *Smithwick v. Shepherd*, 49 N.C. 196 (1856). We see no difference in the present case that the promise to pay the decedent's debt was made by a relative instead of the administrator of the estate. Therefore, we hold consistent with the above principles of law by which we are bound that a promise to pay a decedent's debts must be in writing when such debts are generally charged to the decedent's estate.

Plaintiff, however, argues that because defendants did not specifically plead the affirmative defense of the Statute of Frauds as required by N.C. Gen. Stat. § 1A-1, Rule 8(c), it should not now be available as a defense to the contract. We agree.

Defendants contend that plaintiff's complaint gave defendants no notice that the Statute of Frauds should have been pled. Plaintiff's complaint alleges, however, that there was an express contract between plaintiff and defendants for payment of the funeral expenses. We find that this is sufficient to put defendants on notice of a contract. With notice of a contract, the question naturally arises as to whether it was an oral contract or written, and whether the Statute of Frauds was applicable. Therefore, defendants had a duty to raise the affirmative defense of Statute of Frauds in its answer to the complaint. Under Rule 8(c):

> In pleading to a preceding pleading, a party shall set forth affirmatively . . . , statute of frauds, ... Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved.

N.C. Gen. Stat. § 1A-1, Rule 8(c) (1990). *See also Smith v. Hudson*, 48 N.C. App. 347, 269 S.E.2d 172 (1980) (where defendants fail to raise the affirmative defense of statute of frauds under Rule 8(c), defendants waive their right to assert the defense at a later time).

For the above reasons, we hold that the trial court erred in granting directed verdict in defendants' favor and remand to the trial court for action consistent with this opinion.

Reversed and remanded for a new trial.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. DONALD CLAY WELLS

No. 903SC1122

(Filed 15 October 1991)

1. **Criminal Law § 1237 (NCI4th)— trafficking in cocaine—substantial assistance—not found**

The trial court did not abuse its discretion when sentencing defendant for trafficking in cocaine by failing to find that defendant's testimony incriminating a co-defendant was substantial assistance within the meaning of N.C.G.S. § 90-95(h)(5) where the judge considered the defendant's offer to testify at the co-defendant's retrial to be substantial assistance and reduced the conviction based on that assistance, but declined to find the testimony at the original trial as a mitigating factor. There is nothing in the record indicating that the judge did not consider the evidence and make a determination as to whether substantial assistance had been given and it was solely within the court's discretion to determine whether there was assistance and whether the sentence should be reduced.

Am Jur 2d, Criminal Law §§ 598, 599; Drugs, Narcotics, and Poisons § 48.

2. **Criminal Law § 1266 (NCI4th)— trafficking in cocaine—mitigating factors—good character—not found**

The trial court did not err when resentencing defendant for trafficking in cocaine by not finding in mitigation that defendant was a person of good character or had a good reputation in the community. The resentencing hearing is *de novo* and the judge is to make a new and fresh determination of factors in mitigation and aggravation. There is nothing in the

record which indicates that defendant presented any evidence of character or reputation at the resentencing hearing.

Am Jur 2d, Criminal Law §§ 598, 599; Drugs, Narcotics, and Poisons § 48.

3. **Criminal Law § 1070 (NCI4th)— trafficking in cocaine—co-defendants—identical sentences**

The trial court did not err or abuse its discretion by giving this defendant and a co-defendant identical sentences for conspiracy to traffic in cocaine and trafficking in cocaine even though defendant contended that the co-defendant was more culpable. The trial court rendered a sentence within the appropriate statutory limits and nothing in the record indicates an abuse of discretion.

Am Jur 2d, Criminal Law §§ 178, 602; Drugs, Narcotics, and Poisons § 48.

4. **Criminal Law § 1237 (NCI4th)— trafficking in cocaine and conspiracy to traffic—mitigating factors—substantial assistance—not applied to all convictions**

The trial court did not err when sentencing defendant for conspiracy to traffic in cocaine and trafficking in cocaine by not applying the mitigating factor of substantial assistance to each conviction.

Am Jur 2d, Criminal Law §§ 598, 599; Drugs, Narcotics, and Poisons § 48.

APPEAL by defendant from *Watts (Thomas S.), Judge*. Judgment entered 4 June 1990 in Superior Court, PITT County. Heard in the Court of Appeals 28 August 1991.

Defendant was charged in proper bills of indictment with trafficking in cocaine by possession of more than 200 but less than 400 grams of cocaine, conspiracy to traffic in cocaine by the sale of more than 200 but less than 400 grams of cocaine, traffic by the sale of more than 200 grams but less than 400 grams of cocaine and trafficking in cocaine by the sale of more than 200 grams but less than 400 grams of cocaine in violation of G.S. 90-95(h). A jury found defendant guilty on all charges. From judgments imposing two consecutive fourteen year terms for the trafficking charges and a concurrent fourteen year term on the conspiracy

charge, and judgment arrested on the remaining conspiracy charge, defendant appealed.

In *State v. Hamad and Wells*, 92 N.C. App. 282, 374 S.E.2d 410 (1988), *affirmed per curiam*, 325 N.C. 544, 385 S.E.2d 144 (1989), this Court ordered a new trial for defendant Hamad and a new sentencing hearing for defendant Wells. At the resentencing hearing on 4 June 1990, Judge Watts, after consideration of the evidence, consolidated Wells' convictions for trafficking in cocaine by possession and conspiracy to traffic in cocaine by possession, and sentenced Wells to 14 years plus a fine of $100,000.00. On the conviction for trafficking in cocaine by sale, Judge Watts found that defendant had rendered substantial assistance to the State pursuant to G.S. 90-95(h)(5) and imposed a sentence of three years to begin at the expiration of the 14 year sentence. From these judgments, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Assistant Appellate Defender Gordon Widenhouse for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first argues the sentencing court erred in failing to find and consider defendant's trial testimony that incriminated the co-defendant as "substantial assistance" within the meaning of G.S. 90-95(h)(5) which provides in pertinent part:

> [T]he sentencing judge **may** reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance. (Emphasis added.)

This Court has held "that whether a trial court finds that a criminal defendant's aid amounts to 'substantial assistance' is *discretionary.*" *State v. Hamad and Wells*, 92 N.C. App. 282, 289, 374 S.E.2d 410, 414 (1988), *affirmed per curiam*, 325 N.C. 544, 385 S.E.2d 144 (1989) (emphasis in original). The reduction of the sentence

is also in the judge's discretion, even if the judge finds substantial assistance was given. *State v. Willis*, 92 N.C. App. 494, 498, 374 S.E.2d 613, 616 (1988), *disc. review denied*, 324 N.C. 341 (1989).

In order to overturn a sentencing decision, the reviewing court must find an "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." *Id. quoting State v. Myers and Garris*, 61 N.C. App. 554, 301 S.E.2d 401 (1983), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984).

Defendant argues that the trial court erred by failing to consider testimony against his co-conspirator given at the previous trial as "substantial assistance." We do not agree. In *State v. Hamad and Wells*, this Court granted a new sentencing hearing for defendant Wells, due to the trial judge's failure to exercise his discretion in determining "substantial assistance." The trial court did not fail to exercise its discretion in determining "substantial assistance" in the present case. At the resentencing hearing, Judge Watts reviewed the evidence and judgments of the previous trial. He heard testimony that defendant offered to testify against the co-defendant at his retrial. Following the evidence presented at resentencing, defendant argued that his offer to testify should be considered "substantial assistance." Judge Watts stated that he had considered the evidence at the original trial and "in his discretion solely and not as a matter of law," the testimony at the original trial did not amount to "substantial assistance" and he did not consider it as such. Defendant was considered to have given "substantial assistance" when he offered to testify against the co-defendant Hamad. From this finding of "substantial assistance," defendant was given a three year sentence for the trafficking in cocaine by sale, a charge which carries a mandatory 14 year sentence.

There is nothing in the record which indicates that the trial judge did not consider the evidence and make a determination as to whether "substantial assistance" had been given by defendant. It was solely within the discretion of the trial court to determine whether there was assistance and whether the sentence should be reduced based on this assistance. After hearing the evidence, the trial judge considered the offer by defendant Wells to testify at defendant Hamad's retrial to be "substantial assistance." He then decided to reduce Wells' conviction based on this assistance.

However, Judge Watts declined to find the testimony at the original trial as a mitigating factor.

After close examination of the record, we conclude the trial judge merely exercised his discretion in not finding the mitigating factor of "substantial assistance" as set out in G.S. 90-95(h)(5). Since there is no showing of abuse of discretion, defendant's argument is meritless.

[2] Defendant next argues the trial court erred in failing to find as a statutory mitigating factor that defendant was a person of good character or had a good reputation in the community, which denied defendant his rights under the Fair Sentencing Act.

At a resentencing hearing the judge makes a new and fresh determination of the presence of aggravating and mitigating circumstances from the evidence. *State v. Mitchell*, 67 N.C. App. 549, 313 S.E.2d 201 (1984). *See State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, *affirmed per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986). Sentencing hearings are *de novo*. At a resentencing hearing the trial court may find aggravating and mitigating factors without consideration of any factors found in the previous sentencing hearing. *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985). At the sentencing hearing the defendant bears the burden of persuasion on mitigating factors. Defendant's position is analogous to that of a person seeking a directed verdict. *State v. Taylor*, 309 N.C. 570, 576-77, 308 S.E.2d 302, 307 (1983). Defendant is asking the court to find that "the evidence so clearly establishes a fact in evidence that no reasonable inferences to the contrary can be drawn." *State v. Torres*, 99 N.C. App. 364, 373, 393 S.E.2d 535, 541 (1990), *quoting State v. Taylor*. Where testimony is not overwhelmingly persuasive on the question of defendant's good character or good reputation in the community, it is not manifestly credible and there is no requirement to find a mitigating factor. *Id.*

There is nothing in the record which indicates that defendant presented any evidence of character or reputation at the resentencing hearing. The resentencing hearing is *de novo* and the judge is to make a new and fresh determination of factors in mitigation and aggravation. The new factors can be made without any consideration of those found at a previous sentencing hearing. Since defendant offered no evidence of character or reputation at the resentencing hearing he did not bear the burden of persuasion with respect to mitigating factors. The trial court did not err in

failing to find the statutory mitigating factor that defendant is a person of good character or has a good reputation in the community. Defendant's argument is without merit.

[3] Defendant next argues that the trial court erred and abused its discretion by giving defendant and co-defendant identical sentences, when the co-defendant was more culpable than defendant. Where a sentence is within statutory limits, the punishment actually imposed by the trial judge is a discretionary matter. *State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976).

In the present case, defendant was given a fourteen year sentence for consolidated convictions of trafficking in cocaine by possession and conspiracy to traffic in cocaine by possession. Defendant was given a consecutive three year sentence for his conviction of trafficking by sale of cocaine. In the present case, the trial court rendered a sentence which falls within the appropriate statutory limits. Nothing in the record indicates that there was an abuse of discretion by the trial court thus, defendant's sentence is proper and will not be disturbed. Defendant's argument is without merit.

[4] Defendant last argues the trial court erred in failing to apply the mitigating factor of "substantial assistance" to each of defendant's convictions.

"[O]ur courts have recognized that the 'substantial assistance' statute is permissive, not mandatory, and that defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance." *State v. Kamtsiklis*, 94 N.C. App. 250, 260, 380 S.E.2d 400, 405 (1989) (citations omitted). G.S. 90-95(h)(5) is a "post conviction form of plea bargaining." *Id.* This statute does not guarantee any defendant that the State will participate in this form of plea bargaining. *Id.* This assignment of error is without merit.

The decision of the trial court is affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

HOUSE OF RAEFORD FARMS, INC., PLAINTIFF-APPELLANT v. CITY OF RAEFORD, DEFENDANT-APPELLEE

No. 9016SC1327

(Filed 15 October 1991)

1. **Rules of Civil Procedure § 15.1 (NCI3d)— revocation of wastewater discharge permit—permittee's action for damages and injunction—amendment to complaint**

The trial court did not abuse its discretion by denying plaintiff's motion to amend the complaint in which it sought damages and injunctive relief for the revocation of a wastewater discharge permit where defendant filed a motion to dismiss the original complaint, plaintiff filed an amended and restated complaint, and defendant renewed its motion to dismiss. Although the trial judge elected not to specify the particular reasons underlying the denial of plaintiff's motion to amend, and was not required to do so, the order of dismissal indicates that the court considered the possibility of undue prejudice to defendant as a factor in its decision. The potential for undue prejudice has been recognized as a valid basis for the court's exercise of discretion in denying a motion to amend.

Am Jur 2d, Pleading §§ 310, 312.

2. **Administrative Law and Procedure § 51 (NCI4th)— revocation of wastewater discharge permit—action for damages and injunctive relief—dismissal for lack of subject matter jurisdiction**

The trial court correctly dismissed plaintiff's complaint for lack of subject matter jurisdiction where plaintiff sought damages and injunctive relief arising from the revocation of its wastewater discharge permit following the administrative hearing, but failed to properly file a petition for writ of certiorari with the superior court which would have allowed the court to exercise its jurisdiction.

Am Jur 2d, Administrative Law § 731.

APPEAL by plaintiff from Order entered 28 September 1990 by *Judge B. Craig Ellis* in HOKE County Superior Court. Heard in the Court of Appeals 18 September 1991.

Jordan, Price, Wall, Gray & Jones, by Henry W. Jones, Jr., Paul T. Flick, and Roseanne P. Carter, for plaintiff appellant.

Everett, Wood, Womble, Finan & Riddle, by W. Harrell Everett, Jr., and Jonathan S. Williams, for defendant appellee.

COZORT, Judge.

The City of Raeford issued an order to revoke plaintiff's wastewater discharge permit and to fine the plaintiff $50,000.00 for alleged violations of the City's effluent discharge standards. Plaintiff sued the City seeking an order enjoining the City from enforcing the order. After amending its complaint once, plaintiff sought a second amendment to add a petition for writ of certiorari to the complaint. The trial court denied the motion for second amendment to the complaint and dismissed the action for lack of subject matter jurisdiction. Plaintiff appeals. We find no abuse of discretion in the trial court's denial of plaintiff's motion to amend and conclude that the action was properly dismissed for lack of subject matter jurisdiction. We thus affirm.

Plaintiff owns and operates a turkey slaughtering and processing business within the city limits of Raeford, North Carolina. In July 1987, plaintiff obtained a permit from defendant in order to discharge wastewater from plaintiff's facility into defendant's sewage system. Twice following the issuance of the initial permit, defendant adopted more stringent standards pertaining to the effluent limits on plaintiff's discharged wastewater. After collecting samples from the plaintiff's wastewater, defendant cited plaintiff for noncompliance with the stricter standards. Defendant issued a Cease and Desist Order on 21 February 1990 directing plaintiff to cease and desist the discharge of sewage which exceeded permit limits. On 1 June 1990, the defendant issued a Notice of Non-Compliance, which set a fine of $50,000.00 and gave the plaintiff 30 days to comply with the permit. Plaintiff was given 15 days to show cause as to why the permit should not be revoked. The City Manager, acting as hearing officer, presided over the Show Cause Hearing, requested by plaintiff, on 10 July 1990. In a decision rendered 25 July 1990, plaintiff was assessed penalties of $50,000.00, charged with $19,072.04 in enforcement costs, and required to post a $100,000.00 performance bond. On 30 July 1990, plaintiff filed a complaint against defendant in Hoke County Superior Court seeking to challenge the hearing officer's findings. The complaint included a claim for damages,

alleged various due process violations, and requested injunctive relief. On 24 August 1990, defendant filed a motion to dismiss alleging, among other things, lack of subject matter jurisdiction.

On 28 August 1990, plaintiff filed an amended and restated complaint which added claims and corrected clerical errors found in the original complaint. A preliminary injunction was granted on 30 August 1990 until the trial court could make a final decision on the merits. On 29 August 1990 and 13 September 1990, defendant renewed its motion to dismiss the action for lack of subject matter jurisdiction. On 20 September 1990, plaintiff filed a second amended complaint which included among other claims a petition for writ of certiorari and two claims pursuant to 42 U.S.C. § 1983 (1988). On 28 September 1990, the trial court denied plaintiff's motion for leave to amend its complaint and dismissed the action in its entirety for lack of subject matter jurisdiction.

[1] On appeal, plaintiff contends that the trial court abused its discretion in denying its motion for leave to amend the complaint. We find no abuse of discretion. Pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure, a party may amend any pleading once without leave of court if amended prior to the time a responsive pleading is served, but with respect to additional amendments, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). This rule reflects the general policy of allowing an action to proceed to a determination on the merits. *Johnson v. Johnson*, 14 N.C. App. 40, 42, 187 S.E.2d 420, 421 (1972). A motion to amend is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of abuse of discretion. *Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 430, 391 S.E.2d 211, 216, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). Furthermore, "[a] ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The trial judge is not required to set forth specific reasons for denial of a motion to amend. *Chicopee*, 98 N.C. App. at 430, 391 S.E.2d at 216. Some reasons which would justify a denial, however, include: (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of

amendment, and (e) repeated failure to cure defects by previous amendments. *Id.*

In the present case, the trial judge elected not to specify the particular reasons underlying the denial of plaintiff's motion to amend, nor was he required to do so. The order of dismissal indicates that the court considered the possibility of undue prejudice to the defendant as a factor in its decision. Our courts have recognized the potential for undue prejudice as a valid basis for the court's exercise of discretion in denying a motion to amend. *Id.* Contrary to plaintiff's assertion, we find no abuse of discretion in this case and uphold the trial court's denial of plaintiff's motion to amend.

[2] Plaintiff additionally challenges on appeal the granting of defendant's motion to dismiss for lack of subject matter jurisdiction. We conclude that plaintiff's first amended complaint was insufficient to meet the requirements necessary for the court to consider it as a petition for a writ of certiorari. Therefore, we uphold the trial court's dismissal of the action.

The most critical aspect of a court's authority to act is the court's jurisdiction over the subject matter in an action. *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Subject matter jurisdiction refers to the court's ability to adjudicate the particular action which is before the court. *Id.* As noted by statute, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (1990). When review of certain administrative proceedings is sought by a party, our courts have noted, " '[i]t is well settled in this jurisdiction that *certiorari* is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law.' " *Davis v. Hiatt*, 326 N.C. 462, 465, 390 S.E.2d 338, 340 (1990) (citing *Russ v. Board of Education*, 232 N.C. 128, 130, 59 S.E.2d 589, 591 (1950)). Since actions taken following an administrative hearing and formal findings made by a municipality are quasi-judicial, and not executive, they are judicially reviewable in the Superior Court Division. *In Re Burris*, 261 N.C. 450, 453, 135 S.E.2d 27, 29-30 (1964). The plaintiff below failed to properly file a petition for writ of certiorari with the superior

court which would have allowed the court to exercise its jurisdiction. Consequently, the trial court's dismissal must be upheld.

To meet the pleading requirements for a petition for a writ of certiorari, a party must demonstrate: (1) no appeal is provided at law, *Davis*, 326 N.C. at 465, 390 S.E.2d at 340; (2) a *prima facie* case of error below; and (3) merit to its petition. *See Taylor v. Johnson*, 171 N.C. 84, 87 S.E. 981 (1916); and N.C. Gen. Stat. § 1-269 (1983). We recognize that "if a petition alleges facts sufficient to establish the right of review on certiorari its validity as a pleading is not impaired by the fact the petitioner does not specifically pray that the court issue a writ of certiorari." *Davis*, 326 N.C. at 465, 390 S.E.2d at 340. In the present case, plaintiff filed a complaint for damages and other relief following the administrative hearing. And, although the plaintiff had amended its complaint one time, the trial court declined to treat the first amended complaint as a petition for a writ of certiorari since the complaint did not allege sufficient facts and did not properly request judicial review of the earlier proceedings. As a result, the trial court was correct in dismissing the action for lack of subject matter jurisdiction. We note, however, that our decision to uphold the dismissal of plaintiff's action does not deny plaintiff the right to file a separate petition for a writ of certiorari.

The trial court's Order of 28 September 1990 is

Affirmed.

Judges ORR and LEWIS concur.

VIVIAN CROSS, EMPLOYEE, PLAINTIFF v. BLUE CROSS/BLUE SHIELD, EMPLOYER; WAUSAU INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 9010IC1187

(Filed 15 October 1991)

Master and Servant § 68 (NCI3d)— workers' compensation—stress symptoms—causal relationship to job not shown

The Industrial Commission did not err in finding that there was no causal relationship between plaintiff's employment in 1987 as a medical review examiner and her stress-

related symptoms and that plaintiff thus did not suffer from a compensable occupational disease, although a portion of a psychiatrist's testimony arguably supported plaintiff's contention, where there was evidence that plaintiff was having difficulty performing her duties, and the psychiatrist further testified that plaintiff told him her sister had died in 1985, her brother had died in 1986, she had undergone an abortion during the summer of 1987, and she had ended a relationship with her boyfriend. Stress caused by the inability properly to perform one's job is not the same as stress caused by the duties of the job itself.

Am Jur 2d, Workmen's Compensation § 301.

Mental disorders as compensable under workmen's compensation acts. 97 ALR3d 161.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission entered 25 May 1990. Heard in the Court of Appeals 20 August 1991.

Taft, Taft & Haigler, by Robin E. Hudson, for plaintiff appellant.

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

COZORT, Judge.

Plaintiff Vivian Lee Cross began working at Blue Cross/Blue Shield in Durham, North Carolina, on 18 May 1987 as a medical review examiner. On 2 September 1987, after numerous absences, plaintiff resigned from her position citing job-related stress as the reason. On 30 September 1987, plaintiff filed for benefits under the Workers' Compensation Act, alleging job-related stress disorder. A Deputy Commissioner for the North Carolina Industrial Commission (Commission) denied plaintiff's claims for benefits, concluding she did not suffer from a compensable occupational disease. The Commission affirmed, adopting the opinion of the Deputy Commissioner. Plaintiff appeals. We affirm.

The sole issue on appeal is whether the Commission erred in denying the plaintiff benefits on the basis that she did not suffer from a compensable occupational disease. Our role in reviewing the Commission's decision is limited to determining whether there is any competent evidence to support the findings of fact, and

whether the findings of fact justify the conclusions of law. *Buchanan v. Mitchell County*, 38 N.C. App. 596, 599, 248 S.E.2d 399, 401, *cert. denied*, 296 N.C. 583, 254 S.E.2d 35 (1979).

Plaintiff contends the Commission failed to properly consider the medical evidence in finding that

> 4. There is no evidence in the record to establish that any of plaintiff's physical or psychological conditions for which she sought treatment were causally related to her employment with defendant.

Plaintiff argues that since "all of the medical evidence indicated that the plaintiff's symptoms . . . were directly precipitated by the conditions of her job," the Commission must have based its decision on a misapprehension of the law. We disagree.

The evidence shows that Ms. Cross was employed at Blue Cross/Blue Shield from 18 May 1987 to 2 September 1987. As a medical review examiner, plaintiff was responsible for receiving telephone requests for authorization of medical procedures and expenses, processing the authorizations, and distributing information on medical claims. Plaintiff began having difficulty performing her duties and received at least three memoranda concerning her unsatisfactory performance. Plaintiff also missed several days of work, often without informing her employer and without offering requested medical verifications for the absences.

During her employment, plaintiff began experiencing muscle spasms, nervousness, high blood pressure and other ailments. Plaintiff's personal physician prescribed a sedative. Ms. Cross testified that, beginning about the end of July, she went to the Duke University Emergency Room three or four times a week. On 19 August 1987, an emergency room physician attending to Ms. Cross recommended that she seek psychiatric treatment if her symptoms did not improve. On 8 September 1987, Ms. Cross went to the North Carolina Memorial Hospital Psychiatric Clinic where Dr. Albert J. Naftel, Jr., a third-year psychiatry resident, examined her.

Plaintiff relies heavily upon Dr. Naftel's deposition testimony to support her claim that her physical and psychological difficulties were related to her employment. Specifically, she points to the following testimony:

Q Now, if you assume that the Industrial Commission finds that her job was as I described it to you, do you have an opinion satisfactory to yourself to a reasonable degree of medical probability as to whether working in that kind of job would increase her risk of psychiatric symptoms above members of the general public?

A I think that when you have someone that is having depressive symptoms, adjustment symptoms, anxiety, somatic complaints, they're going to have difficulty handling any sort of stressor, including work. And that if you can decrease some of the stresses, yes, it will improve.

Q The question was, do you think the job would have increased her risk of—

A I think that stressors, job included, can exacerbate symptoms, okay?

Q Okay.

* * * *

Q The question has more to do with whether the job, her job, would have increased her risk of developing symptoms or having them exacerbated as compared to somebody else in the general population who did not have that kind of job. Would she be at a higher risk of that kind of thing, is the question.

A Anyone with—yeah, I don't know quite how to answer you. Anyone that has these—that is having an adjustment disorder, any stressor will increase the risk for their symptoms becoming worse.

Q Okay.

A You know, one stressor alone may not have caused—or really affected her, but she had numerous stressors over a period of time, and any stressor is going to definitely increase anxiety itself.

Q Does the kind of job that I describe to you sound like the kind of job that would do that?

A It doesn't sound pleasant. I mean, it sounds like the job you described would be stressful for someone that was—it

> sounds like you're saying she was having trouble keeping up with what was going on there, and generally for people that's stressful.

Although this portion of Dr. Naftel's testimony arguably supports plaintiff's contention, the Commission is free to accept or reject all or part of a witness's testimony. *See Blalock v. Roberts Co.*, 12 N.C. App. 499, 504, 183 S.E.2d 827, 830 (1971).

Moreover, the North Carolina Supreme Court has previously concluded in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 105, 301 S.E.2d 359, 372 (1983), that "the Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony. It may consider other factual circumstances in the case."

For example, in *Harvey v. City of Raleigh Police Dept.*, 96 N.C. App. 28, 384 S.E.2d 549, *cert. denied*, 325 N.C. 706, 388 S.E.2d 454 (1989), we affirmed the Commission's decision denying benefits to the widow of a police officer alleging that his employment caused dysthymic disorder (depression) ultimately resulting in his suicide. Despite medical expert testimony to the contrary, the Commission found that the police officer's employment did not significantly contribute to or become a significant factor in the development of his disorder. *Id.* at 31, 384 S.E.2d at 550. We found the Commission's findings were supported by evidence that the deceased was having financial and home environment difficulties, was being sued for his actions as a security officer, and was under investigation for shoplifting. *Id.* at 33-34, 384 S.E.2d at 552. In addition, there was expert medical testimony impeaching the credibility of the medical testimony supporting a causal relationship between the employment and the disorder. *Id.* at 32-33, 384 S.E.2d at 551-52.

Similarly, we find in the case at bar that the Commission could reasonably conclude from all the evidence that the plaintiff did not establish a causal relationship between her employment and stress-related symptoms. In addition to the above-quoted testimony, Dr. Naftel further testified that plaintiff told him that her sister had died in 1985, her brother had died in 1986, that she had undergone an abortion during the summer of 1987, and that she had ended a relationship with her boyfriend.

Furthermore, there was evidence that plaintiff was having difficulties performing her duties. We agree with defendant that

stress caused by the inability to properly perform one's job is not the same as stress caused by the duties of the job itself.

Plaintiff has the burden of proving compensability for an occupational disease. *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, 301 N.C. 401, 274 S.E.2d 226 (1980). The Commission found that there was no evidence to establish a causal relationship between plaintiff's employment and her symptoms. This finding of fact is supported by the evidence and in turn supports the Commission's conclusion of law that plaintiff did not suffer from a compensable occupational disease.

Therefore, the Opinion and Award of the Industrial Commission is

Affirmed.

Judges ORR and LEWIS concur.

DONALD PERNELL, EMPLOYEE-PLAINTIFF v. PIEDMONT CIRCUITS AND CRAWFORD & CO., EMPLOYER-CARRIER/DEFENDANTS

No. 9010IC1316

(Filed 15 October 1991)

1. Master and Servant § 65.1 (NCI3d) — workers' compensation — recurrent hernia

The Industrial Commission correctly found for defendants in a workers' compensation action in which plaintiff sought compensation for a hernia. The finding that it could not be determined whether plaintiff's hernia developed before or after the accident is binding on appeal because plaintiff did not except to this finding; moreover, the frequency of this recurrent problem, its proximity to the last diagnosed hernia, and evidence that plaintiff's other medical conditions may have been equally culpable constitutes sufficient evidence to support the Commission's finding.

Am Jur 2d, Workmen's Compensation §§ 229, 300.

Sufficiency of proof that hernia resulted from accident or incident in suit rather than from pre-existing condition. 2 ALR3d 434.

2. **Master and Servant § 65.1 (NCI3d)— workers' compensation— definition of hernia**

Plaintiff's contention in a workers' compensation action that the Industrial Commission relied on an inappropriate definition of hernia had no merit. Although the findings do not indicate a precise definition of hernia and the Court of Appeals declined to define the term, defendants' definition of hernia as a defect or weakening of an organ wall which allows protrusion of another organ is more plausible and comports with *Moore v. Engineering & Sales Co.*, 214 N.C. 424. The Court also declined to pronounce as a matter of law that a recurring hernia is never of "recent origin."

Am Jur 2d, Workmen's Compensation § 300.

3. **Master and Servant § 65.1 (NCI3d)— workers' compensation— hernia—recurrent**

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff had a recurrent hernia and that he had a hernia prior to the accident in question where the Commission found that plaintiff had had five hernia repairs at the same site in nine years and his medical records refer to his hernia as recurrent.

Am Jur 2d, Workmen's Compensation §§ 229, 300.

Sufficiency of proof that hernia resulted from accident or incident in suit rather than from pre-existing condition. 2 ALR3d 434.

4. **Master and Servant § 93 (NCI3d)— workers' compensation— review of Deputy Commissioner's decision—standard of review**

The decision of the Industrial Commission in a workers' compensation action was affirmed despite plaintiff's contention that the Commission applied a lower standard of review to the Deputy Commissioner's decision than required. The Commission's use of the words "reversible error" refer to the Commission's decision to adopt the deputy's decision, not to indicate that a lower standard of review was utilized.

Am Jur 2d, Workmen's Compensation §§ 630, 631.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award filed 31 August 1990. Heard in the Court of Appeals 17 September 1991.

On 28 December 1989 the Deputy Commissioner filed an Opinion and Award in favor of defendant. Upon plaintiff's appeal, the Full Commission affirmed. Plaintiff appeals.

McCreary & Read, by Daniel F. Read, for plaintiff-appellant.

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

LEWIS, Judge.

Plaintiff-employee was a 46 year old man who had experienced recurrent incisional hernias prior to and during his employment with defendant Piedmont Circuits. The initial hernia was diagnosed and repaired in 1978. This initial hernia site required five subsequent surgical repairs between 1978 and 1987. Plaintiff-employee's previous hernia was diagnosed in October 1987.

On 5 April 1988, plaintiff-employee fell while performing a job related task. Plaintiff-employee felt his hernia site "bust loose" immediately after his fall. Two days later, he felt a "bulge in his stomach." Eight days after the fall, plaintiff-employee went to see a physician who diagnosed a hernia at the same site as plaintiff's five previous hernias. Plaintiff attributes this hernia to his work related fall and, as such, he seeks compensation from the defendants. The Commission's findings of fact indicate that it cannot be determined whether the hernia resulted from his fall on 5 April 1988.

On 28 December 1989, the Deputy Commissioner filed an opinion denying plaintiff-employee's claim. Plaintiff appealed to the Full Commission which affirmed the Deputy Commissioner in an order filed 31 August 1990.

[1] Plaintiff-employee brings forth several assignments of error. First, plaintiff claims that the Industrial Commission erred in finding that plaintiff had a recurrent incisional hernia prior to his work related fall. Plaintiff alleges that the Commission inappropriately defined the term hernia under the North Carolina Workers' Compensation Act N.C.G.S. § 97-2(18) (cum. supp. 1990) which definition was then applied to plaintiff's detriment. Plaintiff contends that the Commission committed reversible error by applying a

lower standard of review to the Deputy Commissioner's decision than required.

This Court's review of an Industrial Commission decision is limited to determining whether there is competent evidence to support the Commission's findings and whether the findings of fact support its conclusions of law. *Inscoe v. DeRose Indus. Inc.*, 292 N.C. 210, 232 S.E.2d 449 (1977). Once determined, these facts are conclusive and will not be set aside unless there is a "complete lack of competent evidence to support them." *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981) (*quoting Anderson v. Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965)).

To establish a prima facie case for compensation under the Workers' Compensation Act (Act), plaintiff must prove: 1) an injury resulting in hernia or rupture, 2) which appeared suddenly, 3) immediately following a work related accident, and 4) did not exist prior to the accident. N.C.G.S. § 97-2(18) (cum. supp. 1990). Plaintiff must definitively prove each element to the "satisfaction of the Commission." *Id.* The Commission dismissed plaintiff-employee's claim because he failed to carry his burden as to the fourth element of the prima facie case. The Commission found that it could not be determined whether or not plaintiff's hernia developed before or after the accident. Plaintiff did not except to this finding; therefore, it is binding on appeal. *Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 361 S.E.2d 575 (1987).

The Commission's finding that it cannot be determined whether or not plaintiff's hernia occurred prior to the accident is also a conclusive fact because it is supported by competent evidence. Though there was evidence indicating that prior hernias had been repaired, the frequency of this recurrent problem, its proximity to the last diagnosed hernia, and evidence that plaintiff's other medical conditions may have been equally culpable constitutes sufficient evidence to support the Commission's finding that the hernia existed before the plaintiff's work related accident. This Court agrees that plaintiff failed to carry his burden as to the fourth statutory requirement; therefore, the Commission's finding for the defendants is affirmed.

[2] Plaintiff alleges that the Commission applied an incorrect definition of "hernia." As a question of law, this Court may review the definition applied. The medical condition known as "hernia" is not specifically defined in either the Act or in the case law.

This Court declines to define the term hernia, but, the legislature's use of the term hernia in conjunction with the word rupture in the statute, "hernia or rupture," seems to indicate that something less than full extension through the organ wall is contemplated. N.C.G.S. § 97-2(18) (cum. supp. 1990). In *Moore v. Engineering & Sales Co.*, 214 N.C. 424, 199 S.E. 605 (1938), the Court indicated that a hernia begins with the abdominal wall weakening and ends with protrusion.

The Commission's findings do not indicate a precise definition of hernia. Plaintiff insists that the definition of hernia is limited to a protrusion of an organ or tissue through an abnormal opening. Plaintiff's definition would make the statute redundant where it states "hernia and rupture." Protrusion logically follows once a hole is created by rupture. Defendants' definition of hernia as a defect in or a weakening of an organ wall which allows protrusion of another organ is more plausible and comports with *Moore*. As both parties' definitions are cognizable under the statute, plaintiff's contention that the Commission relied upon an inappropriate definition of a hernia has no merit.

The defendants urge us to pronounce as a matter of law that a recurring hernia is never of "recent origin." This would prevent plaintiffs with prior hernias from ever meeting their burden as to the fourth statutory element. Because this would unduly extend the statute, we decline to do so.

[3] Plaintiff alleges that the Commission erred in finding that he had a recurrent hernia and that he had a hernia prior to the accident in question. As a question of fact, this Court's review is limited to determining whether there is any competent evidence to support the finding. Here, there is just such competent evidence. According to the Industrial Commission's findings, plaintiff has had five hernia repairs at the same site in nine years. Hence, plaintiff's contention that he does not have a "recurrent" hernia flies in the face of the popular definition of "recurrent." Plaintiff's medical records also refer to his hernia as "recurrent." The frequency of hernia recurrence creates a firm basis to infer that the hernia existed prior to the accident. As the Commission is the sole judge of the weight of the evidence, *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965), this Court accepts the Commission's decision on the question of whether plaintiff's hernia predated the accident. Because plaintiff was unable to definitively prove

to the satisfaction of the Commission that the hernia did not exist prior to the accident, plaintiff has not carried his burden and dismissal of his claim is appropriate.

[4] Last, plaintiff alleges that the Commission committed reversible error by applying a lower standard of review to the Deputy Commissioner's decision than required. Upon appeal, the Full Commission is required to "review the award." N.C.G.S. § 97-85 (1985). Neither the plaintiff nor the statute states the standard of review. Plaintiff alleges that the Commission's use of the words "reversible error" indicates that the Commission used a lower standard of review even though the Commission's plenary powers would permit the application of a higher standard which encompasses the power to "adopt, modify, or reject" the deputy's findings. *Hobgood v. Anchor Motor Freight*, 68 N.C. App. 783, 785, 316 S.E.2d 86, 87 (1984). Plaintiff argues that the Commission did not use its full powers. We disagree. It appears that the Full Commission reviewed all of the evidence as its opinion indicates that the deputy's decision is "supported by strong implication of the evidence. . . ." Without a review of all of the evidence, this statement could not have been made. Hence, the Commission's use of the words "reversible error" refers to the Commission's decision to adopt the deputy's decision, not to indicate that a lower standard of review was utilized. The Commission's decision is affirmed.

Affirmed.

Judges COZORT and ORR concur.

JACK WALDROP, PLAINTIFF-APPELLEE v. GEORGE D. YOUNG, DEFENDANT-APPELLANT

No. 9028SC1356

(Filed 15 October 1991)

Rules of Civil Procedure § 60.2 (NCI3d)— motion for relief from judgment—evidence not newly discovered—due diligence not shown

The trial court did not err in the denial of defendant's Rule 60(b)(2) motion for relief from judgment on the ground

of newly discovered evidence where (1) the testimony of a new witness, defendant's former employee, would be merely corroborative or cumulative of the evidence presented by defendant at the trial and is thus not newly discovered evidence within the meaning of the Rule and (2) defendant did not meet his burden of showing that he exercised due diligence in trying to locate the witness before trial in that the evidence shows that, although the witness had moved, she received her W-2 form mailed by defendant to her last known address, but defendant did not attempt to subpoena the witness or try to contact her by mail.

Am Jur 2d, Judgments § 820.

APPEAL by defendant from order dated 19 September 1990 in BUNCOMBE County Superior Court by *Judge C. Walter Allen* denying defendant's motion for relief from judgment. Heard in the Court of Appeals 26 September 1991.

On 1 August 1988, plaintiff and defendant entered into a written one-year term lease agreement. Pursuant to the agreement, defendant became lessee of a business location owned by plaintiff. Defendant operated under the lease for almost two months at which time he vacated the premises and ceased paying rent.

On 14 December 1988, plaintiff instituted this action for recovery of unpaid rent and for further relief not pertinent to this appeal. Plaintiff contended that defendant breached the lease by vacating the premises without cause and by failing to pay rent. Defendant contended he left the leased premises because of a leaky roof which rendered the premises unusable and which plaintiff refused to repair after defendant's repeated requests.

Following trial without a jury on 26 September 1989 by the Honorable J. Marlene Hyatt, judgment was entered in favor of plaintiff for unpaid rent in the amount of $8,050.00, plus interest.

On 9 March 1990, defendant filed a motion for relief from judgment pursuant to Rule 60(b)(2) of the North Carolina Rules of Civil Procedure. Defendant alleged that at the time the original action was heard, he was aware of a potential witness—a former employee who had worked at the leased premises. However, after repeated attempts, defendant was unable to locate the witness because she had moved from the last address known to him. Subse-

quent to the time judgment was entered, defendant located the witness. Defendant then filed the motion alleging he had newly discovered evidence constituting grounds for a new trial. The motion was supported by an affidavit of the witness concerning what her testimony would be should a new trial be ordered. A hearing was held, and by order entered 19 September 1990, Judge Allen denied defendant's motion. Defendant appeals.

Dennis J. Winner, P.A., by Dennis J. Winner, for plaintiff-appellee.

Swain, Stevenson & Moore, P.A., by Joel B. Stevenson, for defendant-appellant.

WELLS, Judge.

Defendant assigns as error the trial court's denial of his Rule 60(b)(2) motion for relief from judgment based on the grounds of newly discovered evidence. Defendant contends that his former employee's testimony constitutes newly discovered evidence because the witness could not, with due diligence, have been located prior to trial. N.C. Gen. Stat. § 1A, Rule 60(b)(2) provides:

> *Relief from judgment or order.*
>
> * * *
>
> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

Plaintiff contends that the testimony of defendant's potential witness, which is the basis of the motion, is not "newly discovered evidence" within the meaning of Rule 60(b)(2). We agree. Proffered evidence which is merely cumulative or corroborative is not "newly discovered evidence" within the meaning of Rule 60(b)(2). *Cole v. Cole*, 90 N.C. App. 724, 370 S.E.2d 272 (1988), *disc. review denied*, 323 N.C. 475 (1988). In this case, the proffered testimony was merely

corroborative of the evidence presented by defendant during the trial. At trial, defendant testified about the leaks in the roof and his repeated requests to the landlord to repair them. The affidavit submitted in support of defendant's motion shows that the new witness would also testify about the existence of the leaks and defendant's requests for repairs. Thus, the testimony of the new witness would be merely corroborative or cumulative and as such is not newly discovered evidence within the meaning of the Rule. *Cole, supra.*

Furthermore, to constitute "newly discovered evidence" within the meaning of Rule 60(b)(2), the evidence must be such that it could not have been obtained in time for the original proceeding through the exercise of due diligence. *Harris v. Medical Center,* 38 N.C. App. 716, 248 S.E.2d 768 (1978), (*citing* 7 Moore's Federal Practice § 60.23[4] at 273). The record in this case shows that prior to trial, on several occasions defendant went to the trailer park where the witness lived at the time she was employed by defendant. Upon discovering that the witness had moved, defendant inquired of the park manager and the witness's next-door neighbor as to her whereabouts. Defendant did not try to subpoena the witness. There is no evidence that defendant tried to contact the witness by mail. Yet the record does indicate that the witness received her W-2 form from defendant, mailed to her last known address. Thus, we conclude that the trial court correctly ruled that defendant did not meet his burden of showing that he exercised due diligence in trying to locate the witness prior to trial.

For the foregoing reasons we hold that the proffered witness's testimony was not newly discovered evidence within the meaning of Rule 60(b)(2). We have examined defendant's other argument with respect to the validity of the trial court's ruling and find it to be without merit. Accordingly, we affirm the trial court's denial of defendant's motion for relief from judgment and new trial.

Affirmed.

Judges PARKER and WYNN concur.

STATE OF NORTH CAROLINA v. MOSES DRAKEFORD

No. 9010SC1168

(Filed 15 October 1991)

1. **Criminal Law § 61 (NCI4th)— conspiracy—Maryland resident—jurisdiction of North Carolina court**

The trial court had jurisdiction to try defendant for conspiracy to traffic in cocaine by transportation where the evidence tended to show that an undercover officer arranged to purchase over four hundred grams of cocaine from a Wake County dealer; the dealer made telephone calls from Wake County to defendant at his home in Maryland and told him that he wanted to obtain a quantity of cocaine; the dealer met defendant at his home in Maryland and the two of them went to New York, where defendant arranged a purchase of cocaine; the dealer agreed to split the profit with defendant upon sale of the cocaine; and the dealer returned to North Carolina and sold the cocaine to the undercover officer. The dealer committed numerous overt acts in furtherance of a common design in North Carolina, and each time acts in furtherance of the common design occurred, the conspiracy was continued and renewed as to all members of the conspiracy.

Am Jur 2d, Conspiracy § 21.

Jurisdiction to prosecute conspirator who was not in state at time of substantive criminal act, for offense committed pursuant to conspiracy. 5 ALR3d 887.

2. **Criminal Law § 60 (NCI4th)— jurisdiction of conspiracy—instruction on burden of proof not required**

The trial court did not err in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that North Carolina had jurisdiction over the offense of trafficking in cocaine where the State proved beyond a reasonable doubt that the conspiracy occurred within the boundaries of North Carolina pursuant to telephone calls between Wake County, North Carolina and defendant's home in Maryland.

Am Jur 2d, Conspiracy §§ 21, 39.

APPEAL by defendant from *Battle (F. Gordon), Judge*. Judgment entered 18 April 1990 in Superior Court, WAKE County. Heard in the Court of Appeals 16 September 1991.

Defendant was charged in proper bills of indictment with conspiracy to traffic in cocaine by transporting 400 or more grams of cocaine in violation of G.S. 90-98 and 90-95(h).

The evidence at trial tends to show the following: Richard Johnson, an undercover police officer, met with David Simpkins, an alleged cocaine dealer from Wake County, to negotiate the purchase of more than 400 grams of cocaine. After meeting with Johnson, Simpkins called defendant Moses Drakeford at his home in Maryland. Simpkins testified that he told Drakeford he wanted "a quantity" of cocaine. Simpkins testified that defendant told him "to come up to Maryland, and they would see what they could do." Simpkins left Wake County to meet defendant in Maryland. Upon arriving in Maryland, Simpkins phoned defendant to find out where he lived. Defendant met Simpkins and they proceeded to defendant's home. After making some phone calls, defendant and Simpkins left for New York. When the two arrived in New York, defendant went into a store, then came out and asked Simpkins for the money. Defendant took the money, went back into the store, and came out again. Defendant told Simpkins to walk across the street and pick up the package of cocaine. After receiving the cocaine, the men departed New York for Maryland. On the return trip, Simpkins told defendant that "if we sold it, I would split the profit with him." When the men arrived at defendant's home in Maryland, Simpkins left immediately for North Carolina. Upon arrival in North Carolina, Simpkins sold the cocaine to undercover agent Johnson and was arrested.

Approximately two years later, defendant was charged with conspiracy to traffic in cocaine by transporting more than 400 grams. The jury found defendant guilty of the charge. From a judgment imposing a prison sentence of thirty-five years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. David Steinbock, for the State.

George E. Kelly, III, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred in denying his motion to dismiss since the trial court lacked jurisdiction to try him for conspiracy. Defendant argues that the evidence at trial did not show defendant agreed, or had knowledge or intent that cocaine be transported into North Carolina.

"Our courts have jurisdiction of a prosecution for criminal conspiracy, if any one of the conspirators commits within the State an overt act in furtherance of a common design, even though the unlawful conspiracy was entered into outside the State. The rationale of this principle of law is that the conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design." *State v. Goldberg*, 261 N.C. 181, 203, 134 S.E.2d 334, 349 (1964).

While there is no direct evidence that defendant Drakeford expressly agreed to commit the crime of trafficking cocaine, there is sufficient circumstantial evidence in the form of a pin register showing the telephone calls to defendant by Simpkins while he was in Wake County; testimony by Simpkins to create a reasonable inference that Drakeford knew of Simpkins' desire to obtain cocaine and testimony there was an implied understanding that if Simpkins drove to Maryland, defendant would procure the cocaine for resale in North Carolina.

In the present case, the evidence is plenary to establish that a conspiracy existed between defendant and Simpkins. Simpkins committed numerous overt acts in furtherance of a common design in the State of North Carolina. Each time acts in furtherance of the common design occurred, the conspiracy was continued and renewed as to all members of the conspiracy. Thus, defendant's contention concerning lack of jurisdiction is meritless.

[2] Defendant next contends the trial court erred in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that North Carolina had jurisdiction over the offense. Defendant argues that because jurisdiction was in issue and the trial court refused to instruct on the State's burden of proof on this issue that the trial court committed reversible error. We disagree.

Defendant relies on *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977). This case held that when jurisdiction is challenged, the State must prove beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Defendant argues the evidence is insufficient to carry the case to the jury on the question of jurisdiction. We reject this argument.

In *Batdorf*, the Supreme Court placed the burden upon the State of proving beyond a reasonable doubt that the crime with which the accused is charged occurred in North Carolina. *Id.* at 494, 238 S.E.2d at 502. We find the facts in *Batdorf* distinguishable. In *Batdorf*, the only evidence presented by the State that a murder occurred in North Carolina was that a body was found in the State. The defendant challenged the State's evidence and testified that the murder occurred in some State other than North Carolina. The court held that the State had not met its burden of proof to show the crime occurred within the State. In the present case, the State presented sufficient evidence to show that a conspiracy occurred within the territorial limits of this State's jurisdiction. *Cf. State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856 (1982), *cert. denied*, 457 U.S. 1138.

In the present case, the principal concern is where the offense occurred not where the defendant's acts occurred. The State has made a *prima facie* case of jurisdiction based on evidence sufficient for the jury to infer that defendant conspired with Simpkins to procure drugs by telephone calls between Maryland and North Carolina. It is clear from the testimony and pin register evidence that the actual conspiracy occurred in the State of North Carolina. There is plenary evidence to show North Carolina has jurisdiction to try this case. By the evidence presented, the State proved beyond a reasonable doubt that the crime occurred within its boundaries. Had the evidence been challenged as in *Batdorf*, and the State had not proven beyond a reasonable doubt that the crime occurred within its boundaries, then a special instruction as to jurisdiction would be warranted. However, this is not the case. The evidence makes a *prima facie* showing of jurisdiction sufficient to carry to the jury without need of a special jury instruction. Defendant's argument is meritless.

Defendant had a fair trial free from prejudicial error.

No error.

Judges ARNOLD and PHILLIPS concur.

LEWIS WALTZ, INDIVIDUALLY, AND AS GUARDIAN AD LITEM FOR JASON WALTZ, A MINOR, PLAINTIFFS v. THE WAKE COUNTY BOARD OF EDUCATION AND WAKE COUNTY PUBLIC SCHOOL SYSTEM, DEFENDANTS

No. 9010SC1348

(Filed 15 October 1991)

Schools § 11 (NCI3d)— child injured on school playground—school board not liable

A school board did not breach its duty of care to an eight-year-old student who tripped over a tree root near school playground equipment and broke his arm where the board took reasonable steps to protect its students by placing sand underneath and around the playground equipment.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 558, 560, 564.

Tort liability of public schools and institutions of higher learning for injuries due to condition of grounds, walks, and playgrounds. 37 ALR3d 738.

APPEAL by defendants from order entered 5 July 1990 by *George R. Greene* in WAKE County Superior Court. Heard in the Court of Appeals 25 September 1991.

Plaintiffs filed suit on 7 August 1989 seeking to recover for injuries sustained by the minor plaintiff, Jason Waltz, and for medical expenses incurred on his behalf by his father and guardian ad litem, Lewis Waltz. Defendants made a motion for summary judgment which was granted 5 July 1990.

On 13 February 1987 Jason Waltz, an eight year old student in Nancy Thorne's second grade class at E.C. Brooks Elementary School, was injured while playing on the school playground. Ms. Thorne's class had just completed a Valentine's Day party and Ms. Thorne allowed the class to go onto the playground with Mrs. Sharon Moore, a grade parent. Other grade parents helped Ms.

Thorne clean up the classroom. Once on the playground, Jason went over to a climbing apparatus, "monkey bars," to play. Mrs. Moore called him to join the other children who were away from the monkey bars. Jason stepped down from the monkey bars, turned and started to run to join the other children. Jason tripped over a tree root connected to the trunk of a tree located near the monkey bars. He fell fracturing his right elbow. Earlier, school officials had placed sand around the tree root. However, the top of the tree root was exposed. Apparently, no one saw Jason fall.

A few moments later Ms. Thorne walked outside to join her class on the playground. When she was about halfway to the playground Jason walked up to her along with another child. Jason told her that he had tripped and hurt his arm. Ms. Thorne immediately took Jason to the health room and called his mother.

Plaintiff does not dispute that Jason had played on the monkey bars during recess and at other times while he was a student at E.C. Brooks Elementary. Nor do plaintiffs dispute that sand had been placed underneath and around the monkey bars to provide a cushioned surface.

Plaintiffs brought suit and defendants moved for summary judgment on 22 June 1990. The motion was granted 5 July 1990. Plaintiff appeals.

Bingham & Tuttle, by Richard S. Bingham, for plaintiff-appellant.

Robert E. Smith for defendant-appellees.

EAGLES, Judge.

Plaintiff-appellant contends the trial court erred in granting summary judgment for the defendants. We disagree.

Summary judgment is a drastic remedy to be granted only with caution, especially in cases alleging negligence. *Dumouchelle v. Duke Univ.*, 69 N.C. App. 471, 473, 317 S.E.2d 100, 102 (1984). Nevertheless, summary judgment is appropriate where a party cannot prove the existence of an essential element of their claim. *Little v. National Servs. Indus., Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 511 (1986).

Here plaintiff asserted a claim based in negligence against the defendants. " 'To recover damages for actionable negligence,

plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach.' " *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 217, 152 S.E.2d 336, 341 (1967) (citing *Petty v. Print Works*, 243 N.C. 292, 90 S.E.2d 717 (1956)). Plaintiffs have failed to show that the defendants have breached their legal duty.

A student attending school is an invitee while on the property of that school. *Clary v. Alexander County Bd. of Educ.*, 19 N.C. App. 637, 638-639, 199 S.E.2d 738, 739 (1973), *aff'd*, 285 N.C. 188, 203 S.E.2d 820 (1974), *opinion withdrawn and rev'd on other grounds*, 286 N.C. 525, 212 S.E.2d 160 (1975).

> A landlord owes a duty to an invitee to use reasonable care to keep the premises safe and to warn of hidden dangers, but he is not an insurer of the invitee's safety. (Citations omitted.) . . .
>
> These rules apply to a public school or board of education just as they apply to any other landlord, if the board of education has waived the defense of sovereign immunity (as defendant has done in the present case) by purchasing a liability insurance policy. . . .

Clary at 639, 199 S.E.2d at 739-740.

Here, the plaintiff has failed to show that the defendant has breached its duty of reasonable care. "[R]ecovery has generally not been permitted for injuries suffered by children on school grounds as a result of common, permanent, or natural conditions existing thereon." 68 Am. Jur. 2d *Schools* § 325 (1973). We do not go so far as to say that a school may never be liable for injury resulting from a natural condition. However, school officials simply cannot be expected to protect children from *every* natural condition they may encounter on a school yard or a playground. Falls and mishaps, though unfortunate, are a part of every schoolchild's life and are something that neither teachers nor parents can reasonably be expected to guarantee to prevent. Here, the school took reasonable steps to protect its students by placing sand underneath and around playground equipment. This did not serve to aggravate the natural condition of the roots. If anything, it served to mitigate it by cushioning the fall of students. We hold, as a matter of law, that the school has not breached its duty of reasonable care.

Affirmed.

Chief Judge HEDRICK and Judge GREENE concur.

MALCOLM M. LOWDER, ET AL.	)	
	)	ORDER
v.	)	AND
	)	JUDGMENT
ALL STAR MILLS, INC., ET AL.	)	

No. 9020SC897

(Filed 27 September 1991)

UPON motion for sanctions by Malcolm M. Lowder et al, appellees, under North Carolina Appellate Rule 34, this Court issued an order on the 18th day of July 1991 directing W. Horace Lowder, appellant, to appear on 26 August 1991 and show cause why he should not be sanctioned. A sanctions hearing was scheduled and the parties were allowed oral argument and briefs, if desired. Both appellant and appellees appeared, submitted briefs, made oral arguments and filed affidavits.

This Court considered the voluminous previous appeals filed in this Court for which appellant stated he and his adherents had expended more than $800,000.00 since 1977 in attorneys' fees. He also indicated that the value of the family corporations involved in these proceedings in which W. Horace Lowder has a substantial interest was some $20,000,000 when this litigation began.

Following the hearing in the Court of Appeals pursuant to Rule 34(d), and considering the entire record in this appeal and previous appeals, the Court finds:

1) that here W. Horace Lowder has appealed on behalf of the corporate defendants despite this Court's repeated rulings that he has no standing to make motions or appeal on behalf of the corporate defendants now in receivership. *Lowder v. All Star Mills*, 301 N.C. 561, 273 S.E.2d 247 (1981), *appeal after remand*, 60 N.C. App. 275, 300 S.E.2d 230 (1983), *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E.2d 193 (1983), *reh'g denied*, 310 N.C. 749, 319 S.E.2d 266 (1984); *Lowder v. All Star Mills*, 100 N.C. App. 322, 396 S.E.2d 95 (1990), *disc.*

rev. denied, 327 N.C. 636, 398 S.E.2d 869 (1990); *Lowder v. All Star Mills*, 91 N.C. App. 621, 372 S.E.2d 739 (1988), *disc. rev. denied*, 324 N.C. 113, 377 S.E.2d 234 (1989); *Lowder v. All Star Mills*, 100 N.C. App. 318, 396 S.E.2d 92 (1990), *disc. rev. denied*, 327 N.C. 636, 398 S.E.2d 870 (1990).

2) that in this appeal W. Horace Lowder argues that the trial court lacks jurisdiction and exceeds its authority by entering any order whatsoever, in spite of this Court's previous clear rejection of this argument. *Lowder v. All Star Mills*, 100 N.C. App. 322, 396 S.E.2d 95 (1990), *disc. rev. denied*, 327 N.C. 636, 398 S.E.2d 869 (1990); *Lowder v. All Star Mills*, 91 N.C. App. 621, 372 S.E.2d 739 (1988), *disc. rev. denied*, 324 N.C. 113, 377 S.E.2d 234 (1989); *Lowder v. All Star Mills*, 301 N.C. 561, 273 S.E.2d 247 (1981), *appeal after remand*, 60 N.C. App. 275, 300 S.E.2d 230 (1983), *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E.2d 193 (1983), *reh'g denied*, 310 N.C. 749, 319 S.E.2d 266 (1984); *Lowder v. All Star Mills*, 100 N.C. App. 318, 396 S.E.2d 92 (1990), *disc. rev. denied*, 327 N.C. 636, 398 S.E.2d 870 (1990).

3) that this appeal is the latest of a series of vexatious appeals, *see Lowder v. Doby*, 68 N.C. App. 491, 315 S.E.2d 517 (1984), *disc. rev. denied*, 311 N.C. 759, 321 S.E.2d 138 (1984), based on a variety of arguments repeatedly rejected by the appellate courts of this state since the ruling by the Supreme Court in *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981), *appeal after remand*, 60 N.C. App. 275, 300 S.E.2d 230 (1983), *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E.2d 193 (1983), *reh'g denied*, 310 N.C. 749, 319 S.E.2d 266 (1984). *Lowder v. Lowder*, 68 N.C. App. 505, 315 S.E.2d 520 (1984), *disc. rev. denied*, 311 N.C. 759, 321 S.E.2d 138 (1984); *Lowder v. Rogers*, 68 N.C. App. 507, 315 S.E.2d 519 (1984), *disc. rev. denied*, 312 N.C. 83, 321 S.E.2d 896 (1984); *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 315 S.E.2d 514 (1984), *disc. rev. denied*, 311 N.C. 755, 321 S.E.2d 134 (1984); *Lowder v. Doby*, 79 N.C. App. 501, 340 S.E.2d 487 (1986), *disc. rev. denied*, 316 N.C. 732, 345 S.E.2d 388 (1986); *Lowder v. All Star Mills, Inc.*, 85 N.C. App. 329, 354 S.E.2d 765 (1987), *cert. denied*, 320 N.C. 169, 357 S.E.2d 926 (1987); *Lowder v. All Star Mills, Inc.*, 91 N.C. App. 621, 372 S.E.2d 739 (1988), *disc. rev. denied*, 324 N.C. 113, 377 S.E.2d 234 (1989); *Lowder v. All Star Mills, Inc.*, 100 N.C. App. 318, 396 S.E.2d 92 (1990),

disc. rev. denied, 327 N.C. 636, 398 S.E.2d 870 (1990); *Lowder v. All Star Mills, Inc.*, 100 N.C. App. 322, 396 S.E.2d 95 (1990), *disc. rev. denied*, 327 N.C. 636, 398 S.E.2d 869 (1990).

4) that this Court in *Lowder v. All Star Mills, Inc.*, 100 N.C. App. 322, 396 S.E.2d 95 (1990), *disc. rev. denied*, 327 N.C. 636, 398 S.E.2d 869 (1990), determined that W. Horace Lowder's appeal was "patently frivolous" and remanded "the cause to the trial court for hearing, pursuant to Rule 34(c) of the North Carolina Rules of Appellate Procedure, to determine whether sanctions provided by Rule 34(b)(2) or (b)(3) should be imposed."

5) that the brief filed in this appeal by the appellant, W. Horace Lowder, was 75 pages long, exclusive of index, appendix and attachments.

6) that despite this Court's notice to the parties that the hearing would be limited to sanctions, W. Horace Lowder argued again the matter of jurisdiction in his brief, orally and in the affidavit as to attorneys' fees.

Based on the findings, we conclude:

1. That this appeal was frivolous in that

   a. the appeal was neither grounded in fact nor warranted by existing law nor was it a good faith argument for the extension, modification or reversal of existing law; and

   b. this appeal has been filed with no purpose other than to delay compliance with orders of the trial court and incur needless expense.

2. That the appellant's brief of 75 pages filed in this appeal is a gross violation of Rule 28(j) of the North Carolina Rules of Appellate Procedure. See also N.C. App. R. 25.

3. That this frivolous appeal merits sanctions.

IT IS, HEREBY, ORDERED, ADJUDGED AND DECREED that after a hearing in compliance with Rule 34 of the North Carolina Rules of Appellate Procedure, the following sanctions are imposed:

1) that W. Horace Lowder shall pay to the Clerk of the Court of Appeals double costs. In addition to the $688.00 he has already paid, he shall pay $688.00 to the Clerk within ten days of this order.

2) that W. Horace Lowder shall pay to the Clerk of Superior Court of Stanly County for the use and benefit of the law firm of Moore & Van Allen attorneys' fees in the amount of $2,500.00.

3) that W. Horace Lowder shall within 30 days of the certifying of this Order and Judgment by the Clerk of the Court of Appeals pay in cash, or as may be satisfactory to the Clerk of Superior Court of Stanly County, a fine in the amount of $100,000.00 to the Clerk of Superior Court of Stanly County, North Carolina.

Nothing in this Order and Judgment is intended to diminish, replace or interfere with the exercise of contempt powers by the Superior Court of Stanly County to compel compliance with any or all previous orders of the Superior Court in this matter.

This Order and Judgment shall be recorded in the office of the Clerk of Superior Court, Stanly County, North Carolina and shall be enforced by the contempt powers of the Superior Court of Stanly County.

This the 27th day of September, 1991.

LEWIS, J.
For the Court

Judges EAGLES and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 OCTOBER 1991

DOST v. DOST No. 9030DC1307	Cherokee (88CVD247)	Affirmed in part; vacated & remanded in part
IN RE HATFIELD No. 9018SC1105	Guilford (90CRS20398)	Reversed
IN RE OAKES No. 9012DC1097	Cumberland (90-J-70) (90-J-69)	Affirmed
PRICE v. WENDY'S INTERNATIONAL, INC. No. 9011SC1219	Johnston (89CVS1626)	Affirmed
READ v. ROOKER No. 909SC1207	Warren (89CVS260)	Affirmed
STATE v. BROWN No. 903SC1055	Pitt (89CRS27175)	Reversed
STATE v. CLYNE No. 9026SC1164	Mecklenburg (90CRS1136)	No Error
STATE v. FOSTER No. 9026SC1026	Mecklenburg (89CRS69814)	Affirmed
STATE v. GOODMAN No. 9026SC726	Mecklenburg (87CRS010770)	No Error
STATE v. McLEOD No. 908SC1025	Wayne (89CRS12904) (90CRS2528)	No Error
STATE v. WHITE No. 9026SC1127	Mecklenburg (90CRS9974)	No Error
STATE v. WRIGHT No. 9015SC1147	Alamance (89CRS29473)	No Error
STEPHENS v. TOWN OF LONG BEACH No. 9013SC941	Brunswick (89CVS1079)	Affirmed

FILED 15 OCTOBER 1991

BARR v. FRENCH BROAD ACQUISITIONS No. 9023DC1301	Ashe (89CVD127)	Reversed & Remanded

BARTON v. BARTON No. 9017DC1273	Rockingham (89CVD366)	Affirmed
BROGDON v. BROWN No. 9121DC614	Forsyth (90CVD6841)	Reversed & Remanded
C B S & C, INC. v. NEAL No. 9121SC591	Forsyth (90CVS2538)	Affirmed
DAVIS v. CITY OF CHARLOTTE No. 9010IC1295	Ind. Comm. (865291)	Affirmed
GRAIN DEALERS MUTUAL INS. CO. v. LONG No. 9018SC1330	Guilford (89CVS5501)	Affirmed
HERNANDEZ v. HERNANDEZ No. 907DC1238	Wilson (88CVD937)	Reversed as to the increase in child support. Affirmed as to the medical expenses.
HUNT v. HUNT No. 9119DC4	Randolph (90CVD1115)	Reversed & Remanded
LERCH v. CAPE FEAR VALLEY MEDICAL CENTER No. 9010IC1229	Ind. Comm. (650494)	Vacated & Remanded
MARSH v. TROTMAN No. 9020SC1311	Moore (87CVS511)	No Error
MOLONEY v. LONG GARDENING No. 9110IC548	Ind. Comm. (868308)	Affirmed
OWENBY v. BROOKSHIRE No. 9026SC1181	Mecklenburg (87CVS14002)	Affirmed
SAWYER v. BARBER AND TENNYSON, INC. No. 9010DC1323	Wake (89CVD3889)	Reversed & Remanded
STATE v. BREWER No. 9026SC1029	Mecklenburg (89CRS83762)	Reversed, vacated & remanded
STATE v. BROADIE No. 9118SC616	Guilford (90CRS14498)	No Error
STATE v. CROWE No. 9029SC1339	Transylvania (90CR1474)	No Error

STATE v. HODGES No. 9117SC518	Surry (89CRS4152) (89CRS4388) (89CRS4389) (89CRS4390) (89CRS4391) (89CRS4392) (89CRS4393) (89CRS4394) (89CRS4395)	89CRS4393: Conviction is arrested. 89CRS4391: Remanded for resentencing. All other cases: Judgments are affirmed.
STATE v. HORTON No. 901SC1144	Dare (89CRS9389) (89CRS9395)	No Error
STATE v. LOCKLEAR No. 9016SC1103	Robeson (88CRS13758)	No Error
STATE v. MACLIN No. 9118SC557	Guilford (89CRS53595)	Affirmed
STATE v. ROBERTS No. 9026SC1008	Mecklenburg (89CRS49931) (89CRS49932) (89CRS49933) (89CRS64260)	Remanded for resentencing
STATE v. TYLER No. 9126SC538	Mecklenburg (90CRS73990)	No Error
STATE v. WILLIAMS No. 9118SC497	Guilford (89CRS56560)	No Error
STATE v. YOUNCE No. 9125SC546	Caldwell (89CRS9769)	Affirmed
STEPP v. SUMMEY OUTDOOR ADVERTISING No. 9129SC480	Henderson (88CRS1141) (89CVS104)	Dismissed

WEST AMERICAN INSURANCE CO., PLAINTIFF v. TUFCO FLOORING EAST, INC., TUFCO FLOORING SALES & SERVICE, INC., AND PERDUE FARMS, INC., DEFENDANTS

No. 9018SC1052

(Filed 5 November 1991)

1. **Insurance § 149 (NCI3d) — commercial general liability policy — pollution exclusion — floor resurfacing — chicken contaminated by fumes**

The trial court did not err by ruling that a pollution exclusion clause in a commercial general liability policy did not exclude coverage for chicken products contaminated by fumes or vapors from floor resurfacing work. The products completed operations hazard coverage of the policy, which includes all property damage occurring away from premises the insured owns or rents and arising out of the insured's work so long as the work is completed before the property damage occurs, applies to defendant Perdue's claim against defendant Tufco. The work was done away from any premises rented or owned by Tufco, it is undisputed that the property damage suffered by Perdue arose from Tufco's work, and the damage to the chicken was not discovered until after Tufco completed its work. The date of discovery rationale of *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1324, is expressly adopted as the rule in North Carolina and, for insurance purposes, property damage occurs when it is first manifested or discovered.

Am Jur 2d, Insurance §§ 717, 719.

2. **Insurance § 149 (NCI3d) — commercial general liability policy — pollution exclusion clause — overriding completed operations coverage**

Completed operations insurance coverage purchased by defendant Tufco from plaintiff West American overrode the pollution exclusion clause in the policy where the override was reflected in the pollution exclusion clause itself and in a flyer sent with the policy, the insurance industry association which drafted the exclusionary clause has explained in annotations to the clause that it is overridden by completed operations coverage, and the International Risk Management Institute describes an exception for pollution liability falling within the products-completed operations hazard. Moreover,

the policy in this case is ambiguous and must be construed against the drafter/insurer. A reasonable person in the position of Tufco would have understood this claim to be covered.

Am Jur 2d, Insurance §§ 284, 286, 717, 719.

3. **Insurance § 149 (NCI3d)— commercial general liability insurance—pollution exclusion clause—food contaminated by flooring vapors**

The trial court correctly ruled that a pollution exclusion clause to a commercial general liability policy did not apply to a claim for chicken contaminated by vapors from a flooring compound where the flooring material was not a pollutant under the exclusion clause. It was not an irritant or a contaminant when it was brought into the plant.

Am Jur 2d, Insurance §§ 717, 719.

4. **Insurance § 149 (NCI3d)— commercial general liability insurance—pollution exclusion clause—coverage not denied**

A pollution exclusion clause in a commercial general liability insurance policy did not exclude coverage to Tufco for Perdue's claims where Tufco installed a coating over existing floors in a Perdue facility and chicken stored in the facility was contaminated by vapors from the flooring compound. Both the historical purpose underlying the pollution exclusion and the operative policy terms indicate that a discharge into the environment is necessary for the clause to be applicable. The policy contains a pollution exclusion, not an exclusion for all damages that may result due to Tufco's use of chemicals in the installation of industrial flooring.

Am Jur 2d, Insurance §§ 717, 719.

APPEAL by plaintiff from judgment entered 28 July 1990 in GUILFORD County Superior Court by *Judge W. Steve Allen.* Heard in the Court of Appeals 16 April 1991.

William L. Stocks and Douglas E. Wright for plaintiff-appellant.

Tuggle, Duggins & Meschan, by Robert C. Cone, for defendant-appellee, Tufco.

Brooks, Pierce, McLendon, Humphrey & Leonard, by George W. House and James A. Wilson, for defendant-appellee, Perdue Farms.

WYNN, Judge.

Plaintiff, West American Insurance Co. ("West American"), seeks to overturn the summary judgment granted to defendants, Tufco Flooring East, Inc., Tufco Flooring Sales & Service, Inc. ("Tufco"), and Perdue Farms, Inc. ("Perdue"). We affirm the decision of the trial judge to grant the summary judgment in favor of the defendants Tufco and Perdue.

The facts in this case are undisputed. Tufco is in the floor resurfacing business which includes installation of a coating over existing floors. The coating used consists of a six-layer system using several chemicals, three of which contain a chemical compound known as styrene. From 25 March through 27 March 1989, employees and agents of Tufco performed floor resurfacing work in certain areas of the Perdue chicken processing facility in Accomac, Virginia. While the work was being done, chicken products were being stored by Perdue in a location known as the "twenty-eight degree cooler" which was adjacent to one of the areas being resurfaced.

On 28 March 1989, the day after Tufco completed its work, Perdue shipped the chicken which had been in the twenty-eight degree cooler to various customers. On 29 March 1989, these customers notified Perdue that there was a problem with the smell and taste of the chicken. Subsequent chemical testing revealed that the chicken contained styrene and was unfit for human consumption. After disposing of approximately $500,000 in chicken parts, Perdue asserted a claim against Tufco. Perdue alleged that the chicken was damaged while in the twenty-eight degree cooler as a result of coming into contact with styrene vapors or fumes released from the chemicals used by Tufco during the resurfacing work.

In March of 1989, Tufco had in force a commercial liability policy through West American which contained a "pollution exclusion" clause. Based upon that exclusion, West American took the position that no insurance coverage was provided for any claims by Perdue against Tufco resulting from the infiltration of chicken by styrene fumes which were released by the products Tufco used in its operations.

Subsequently, West American filed a declaratory judgment action seeking a declaration that Tufco's insurance policy provided no liability coverage for Perdue's claim against Tufco. Both Perdue and Tufco filed counterclaims asking for a declaratory judgment in their favor. Perdue also had a cross-claim against Tufco for damages alleging that Tufco was negligent, but that action has been severed from the claims for declaratory relief. Based upon information produced at discovery, all parties filed motions for summary judgment.

Following a hearing, the trial judge entered judgment denying West American's motion for summary judgment and granting summary judgment to Tufco and Perdue. The judge found that the pollution exclusion in the policy did not exclude coverage for the claims of Perdue against Tufco and that Tufco had liability coverage under the West American policy. Further, pursuant to N.C.R. Civ. P. 54, the trial judge entered final judgment as to all parties and all claims for declaratory relief concerning insurance coverage. From that judgment, West American has appealed.

DISCUSSION

The central controversy in this case is whether the trial court erred in ruling that the "pollution exclusion" clause in the West American policy covers Perdue's claims against Tufco. The "pollution exclusion" clause in controversy is contained in section I.2.f. of the commercial general liability (CGL) insurance policy that Tufco purchased from West American. When Perdue asserted its claim in March 1989, Tufco had in force this CGL insurance policy through West American. The West American policy contained the following exclusion pertaining to pollutants:

> 2. Exclusions
>
> This insurance does not apply to:
>
> . . . .
>
> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants:
>
> (a) At or from premises you own, rent or occupy;
>
> (b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Based upon this "pollution exclusion" clause, West American takes the position that no insurance coverage is provided for any claims by Perdue against Tufco resulting from the infiltration of chicken products in the twenty-eight degree cooler by styrene fumes or vapors which were released by the products that Tufco used in resurfacing the floor at the Perdue plant from 25 March through 27 March 1989. We disagree. The trial court's ruling that the "pollution exclusion" clause does not apply to the claim at issue is supported by four independent grounds: (1) the "pollution exclusion" clause is expressly inapplicable to and overridden by the "completed operations" coverage in the policy, which applies to the claim at issue; (2) the West American insurance policy applied to this claim is ambiguous, and that ambiguity must be construed against the drafter/insurer; (3) as brought onto the site, the flooring material, styrene monomer resin, was not a "pollutant" under the "pollution exclusion" clause; and (4) the "pollution exclusion" clause applies only to discharges into the environment, and none occurred here.

I.

[1] The trial court did not err in ruling that the "pollution exclusion" clause in the West American policy does not exclude coverage for the claims of Perdue against Tufco. The "pollution exclusion" clause is expressly inapplicable to and overridden by the "completed operations" coverage in the policy, which applies to the claim at issue.

Section V.11.a. of the West American policy defines the "products-completed operations hazard." This completed operations coverage is a common form of additional coverage available to purchasers of liability insurance, and it was purchased by Tufco in this case. As pertinent here, the scope of the completed operations coverage includes all property damage occurring away from premises the insured owns or rents and arising out of the insured's work, so long as the work is completed before the property damage has occurred.

The "products-completed operations hazard" applies to Perdue's claim against Tufco. The work was done by Tufco at Perdue's plant in Accomac, Virginia, away from any premises rented or owned by Tufco. Also, it is undisputed that the property damage suffered by Perdue arose out of Tufco's work. Nevertheless, West American claims that the "products-completed operations hazard" does not extend coverage to Tufco for Perdue's claims because the property damage in question "occurred," for insurance purposes, before the completion of Tufco's work. This argument has no merit. The damage to the chicken was not discovered until 29 March 1989—two days after Tufco completed its work—when customers notified Perdue that there was a problem with the smell and taste of the chicken. Despite the fact that neither this Court nor the North Carolina Supreme Court has had occasion to rule on the issue, the "general" rule is that, for insurance purposes, property damage "occurs" when it is manifested or discovered. *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986). This rule is also the majority rule in the United States. *See Community Fed. Sav. & Loan Ass'n v. Hartford Steam Boiler Inspection & Ins. Co.*, 580 F. Supp. 1170 (E.D. Mo. 1984); *Aetna Casualty & Surety Co. v. PPG Industries, Inc.*, 554 F. Supp. 290, 294 (D. Ariz. 1983) (property damage occurred when defective insulation was discovered); *Travelers Ins. Co. v. C.J. Gayfer's & Co.*, 366 So.2d 1199, 1202 (Fla. App. 1979) (property damage occurs

when "negligence manifests itself in property damage"). The *Mraz* "date of discovery" rule also has been specifically adopted by the U.S. District Court for the Eastern District of North Carolina, applying North Carolina law. *See Peerless Ins. Co. v. Strother*, 765 F. Supp. 866, 870 (E.D.N.C. 1990) (applying "the 'discovery' trigger of coverage theory" in hazardous waste coverage case).

The Fourth Circuit's decision in *Mraz* is highly relevant to the instant case. At issue was a determination of insurance coverage for the costs of cleaning up buried hazardous waste. The Fourth Circuit held that the "occurrence" is judged by "*the time at which the leakage and damage are first discovered.*" 804 F.2d at 1328 (emphasis added). West American argues that *Mraz* is limited to the unique facts of hazardous waste cases. This interpretation of the case is unduly restrictive. The *Mraz* definition of "occurrence" as a provision in a liability insurance policy is not meant to be confined in application strictly to hazardous waste cases. The following excerpt from *Mraz* is indicative of this point:

> There are situations . . . in which the existence or scope of damage remains concealed or uncertain for a period of time even though [the] damage is occurring. The leakage of hazardous wastes as in this case is a clear *example*. Determining exactly when damage begins can be difficult, if not impossible. In such cases we believe that the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves.

Id. (emphasis added). The court merely used the "example" of a hazardous waste case to illustrate the "date of discovery" rule because *Mraz* involved hazardous waste. It never once stated that the "date of discovery" rule should be applied to determine insurance coverage liability *only* in a hazardous waste case.

We therefore find that the *Mraz* date of discovery "trigger" of CGL coverage was applied correctly in this case. The trial court correctly determined that the damage suffered by Perdue "occurred" on 29 March 1989—the date that customers notified Perdue that there was a problem with the smell and taste of the chicken. Furthermore, we now expressly adopt the *Mraz* "date of discovery" rationale as the rule in North Carolina, and we hold that for insurance purposes property damage "occurs" when it is first manifested or discovered.

The elements of the completed operations coverage are thus present in this case. The damage occurred away from Tufco's (the insured's) premises and arose out of its work for Perdue, and Tufco's work was completed on 27 March 1989—two days before the damage "occurred" on 29 March 1989.

[2] Having determined that, we now must decide if the completed operations coverage overrides the pollution exclusion clause relied on by West American. We hold that the completed operations coverage purchased by Tufco from West American does indeed override the pollution exclusion clause in the CGL policy. This "override" is reflected in four different documents presented to the trial court and included in the record on appeal.

First, the pollution exclusion clause applies only to claims arising from work in progress, not completed operations. Specifically, it excludes claims "arising out of the . . . discharge, dispersal, release or escape of pollutants . . . at or from any site or location on which you [the insured] . . . are performing operations."

Second, in a flyer sent to Tufco with the policy, West American itself expressed its intention not to subject the completed operations coverage to the pollution exclusion clause. Specifically, section II of the flyer, entitled "Broadening of Coverage," states with regard to "pollution liability coverage" that the policy provides "[c]overage with respect to . . . [n]on-sudden or gradual emissions of pollutants . . . *[d]ue to the products-completed operations hazard* . . . ." (emphasis added).

Third, as reflected in a document submitted to the trial court and made part of the record on appeal, the insurance industry association that drafted the pollution exclusion clause at issue, namely the Insurance Services Office ("ISO") of America, has explained in annotations to the pollution exclusion clause that it is overridden by completed operations coverage. The annotations compare a prior version of the general liability policy with the version issued by West American to Tufco. The annotations point out that, whereas the prior pollution exclusion clause contained "[n]o products-completed operations hazard," the current version results in "coverage [that] embraces products-completed operations exposure from both sudden and gradual emissions."

Fourth, in another document submitted to the trial court and made part of the record on appeal, the International Risk Manage-

ment Institute, which researches and analyzes commercial liability provisions for the insurance industry and others, describes the interrelationship of the pollution exclusion clause and the completed operations coverage as follows:

> An exception for pollution liability falling within the products-completed operations hazard is inferred by the exclusion, and ISO has stated that the exception is intended. This exception does have important coverage consequences. *If a pollution release causing bodily injury or property damage results from the insured's product or completed operation, the insured's liability to injured parties is covered.*

Gibson & McLendon, *Commercial Liability Insurance*, Volume I, Section V, V.E.1 (1985) (emphasis added).

II.

The second reason that the trial court did not err in ruling that the "pollution exclusion" clause does not exclude coverage is because the West American CGL policy applied to this claim is ambiguous. Under North Carolina law, that ambiguity must be construed against the drafter/insurer, West American.

Ambiguities in insurance policies are to be strictly construed against the drafter, the insurance company, and in favor of the insured and coverage since the insurance company prepared the policy and chose the language. *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978); *Southeast Airmotive Corp. v. United States Fire Ins. Co.*, 78 N.C. App. 418, 420, 337 S.E.2d 167, 169 (1985), *disc. review denied*, 316 N.C. 196, 341 S.E.2d 583 (1986). An ambiguity arises in an insurance policy when the language used in the policy is susceptible to different and conflicting interpretations. In this case, the policy must be given the interpretation most favorable to the insured. *W & J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 316, 374 S.E.2d 430, 433 (1988), *disc. review denied*, 324 N.C. 342, 378 S.E.2d 809 (1989). This rule is particularly appropriate when considering exclusions from coverage, which are not favored by the courts and are to be strictly construed against the insurer. *Id.* at 317, 374 S.E.2d at 433. "When the coverage provisions of a policy include a particular activity, but that activity is later excluded, the policy is ambiguous, and the apparent conflict between coverage and exclusion must be resolved in favor of the insured." *Southeast Airmotive Corp.*, 78 N.C. App. at 420, 337

S.E.2d at 169. Conversely, "policy provisions which extend coverage are construed liberally in favor of coverage." *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). Applying these well-settled principles governing the construction of insurance policies, any ambiguity in the interrelationship between the completed operations coverage and the pollution exclusion clause must be resolved in favor of Tufco.

Furthermore, when an ambiguity exists, an insurance policy should be construed as a reasonable person in the position of the insured would have understood it to mean. *Grant*, 295 N.C. at 43, 243 S.E.2d at 897; *W & J Rives, Inc.*, 92 N.C. App. at 316, 374 S.E.2d at 433. A reasonable person in the position of Tufco would have understood claims such as Perdue's to be covered. Tufco is in the business of installing industrial flooring, and Tufco purchased a commercial liability policy to protect it from liabilities arising from the very type of activity at issue here. This work was no secret. As early as February 1988, West American was aware of the type of business activity in which Tufco was engaged. Yet, in West American's answer to an interrogatory from Perdue, West American does not deny that it never told Tufco of its interpretation that the CGL policy did not cover damages arising from Tufco's regular business activities. West American's interpretation of the CGL policy purchased by Tufco is erroneous. To allow West American to deny coverage for claims arising out of Tufco's central business activity would render the policy virtually useless to Tufco. If this Court accepted West American's interpretation of the CGL policy, we would be allowing an insurance company to accept premiums for a commercial liability policy and then to hide behind ambiguities in the policy and deny coverage for good faith claims that arise during the course of the insured's normal business activity. Such an interpretation would constitute the height of unfairness. *See Bentz v. Mutual Fire, Marine & Inland Ins. Co.*, 83 Md. App. 524, 575 A.2d 795 (1990) (where the insured's "sole business" was pesticide application and insurer was aware of the nature of the business, the court agreed that the parties intended the insurance policy to cover the insured's "normal operations").

III.

[3] The third reason the trial court's ruling is correct is because as brought onto the site, the flooring material, styrene monomer resin, was not a "pollutant" under the "pollution exclusion" clause.

West American argues that the pollution exclusion clause is applicable because the styrene vapors emanating from the flooring material (styrene monomer resin) used by Tufco constituted a "pollutant" which Tufco brought on or to the site. We disagree. Tufco did not bring the *vapors* or *fumes* which invaded the chicken to the Perdue plant. Rather, Tufco brought an unadulterated, pure raw material, styrene monomer resin, in one-gallon metal cans with screw-on caps. When this raw material was brought onto the site, it was neither an "irritant or contaminant." It was a raw material used by Tufco in its normal business activity of resurfacing floors. Yet, to be a "pollutant" under the exclusion, a substance brought onto the site must be precisely that, an "irritant or contaminant."

Paragraph (d)(i) of the "pollution exclusion" clause is the operative provision which West American argues denies coverage to Tufco for Perdue's claims. However, paragraph (d)(i) must be read in conjunction with the paragraphs surrounding it, specifically (b), (c), and (d)(ii). All of these paragraphs refer to the management and/or treatment of an unwanted waste material. Similarly, paragraph (d)(i) relates to the use of some form of unwanted or waste material upon the site. It was not meant to refer to any raw material brought upon the premises by the insured for the purpose of normal business activity which accidentally resulted in property damage or bodily injury.

The Oxford English Dictionary (2d Edition, 1989) defines "pollutant" as "a polluting agent or medium." It also defines "pollute" as "2. a. [t]o make physically impure, foul, or filthy; to dirty, stain, taint, befoul. *spec.* To contaminate (the environment, atmosphere, etc.) with harmful or objectionable substances." This common understanding of the word "pollute" indicates that it is something creating impurity, something objectionable and unwanted. The flooring material (styrene monomer resin) brought upon the premises by Tufco was wanted. It was not impure. When Tufco purchased its CGL insurance, it understood "pollutant" in the same way that the Oxford English Dictionary defines "pollutant," as an unwanted impurity, not as the raw materials which Tufco purchased to do its job.

In *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 632 P.2d 1377 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982), the insurance company contended that paint which damaged passing cars as a result of paint overspray during bridge repairs

was a "pollutant." The Oregon Court of Appeals disagreed and stated:

> The specifics mentioned in the policy exclusion are generally considered to be irritants, contaminants or pollutants, whereas "paint" in common understanding is not generally so thought of.
>
> . . . .
>
> While it may be technically true that paint could fall within these classes, we do not believe that that meaning is so clear as to cause a reasonable person in the position of the insured to believe that paint was one of the substances referred to in [the pollution] exclusion . . . .

Id. at 894, 632 P.2d at 1379. Similarly, the styrene monomer resin at issue here was not an irritant or contaminant when brought into the Perdue plant by Tufco. Thus, as with paint unintentionally sprayed on passing cars in *A-1 Sandblasting*, the styrene monomer resin is not a "pollutant" under the "pollution exclusion" clause in the CGL policy purchased by Tufco from West American.

IV.

[4] The last reason the pollution exclusion does not deny coverage to Tufco for Perdue's claims is because the pollution exclusion applies only to discharges into the environment. Both the historical purpose underlying the pollution exclusion and operative policy terms indicate that a discharge into the environment is necessary for the clause to be applicable.

The historical purpose of the pollution exclusion limits the scope of the exclusion to environmental damage. When the pollution exclusion was first instituted in the early 1970's, it applied, by its own terms, only to discharges of pollutants "into or upon land, the atmosphere or any water course or body of water . . . ." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693-94, 340 S.E.2d 374, 379, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). *See Grinnell Mutual Reinsurance Co. v. Wasmuth*, 432 N.W.2d 495, 498 (Minn. Ct. App. 1988); *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of N.Y.*, 218 N.J. Super. 516, 521, 528 A.2d 76, 79 (1987). In *Waste Management*, the North Carolina Supreme Court recognized that, from the insurer's perspective, the practical reason for the pollution exclusion is to avoid "the yawning extent of potential liability arising from

the gradual or repeated discharge of hazardous substances *into the environment.*" 315 N.C. at 698, 340 S.E.2d at 381 (emphasis added). Indeed, insurance companies' attempts to expand the scope of the pollution exclusion so that it denies coverage for *non-environmental damage* have been rejected by the courts in other states. *See Grinnell*, (damages caused by insulation inside home not excluded by pollution); *A-1 Sandblasting*, (pollution exclusion did not exclude coverage for damage to passing cars resulting from overspray by bridge painters); *Pepper Industries, Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977) (damages caused by gasoline discharged into city sewer system are not excluded by pollution exclusion clause).

In 1985, the insurance industry amended the pollution exclusion clause in the standard commercial liability policy in order to clarify certain issues that had arisen regarding the interpretation of the provision. This new pollution exclusion clause is the one present in the policy before this Court. This new pollution exclusion clause is explained in a document made part of the record on appeal. This document is entitled International Risk Management Institute, Inc., Commercial Liability Insurance, Volume I, Section V, Annotated CGL Policy (1985) ("the I.R.M. Annotated CGL Policy"). According to the I.R.M. Annotated CGL Policy at V.E. 1-2, the amendment to the pollution exclusion was intended by the insurance industry to exclude governmental cleanup costs from coverage. Even though the new pollution exclusion does omit language requiring the discharge to be "into or upon land, the atmosphere or any water course or body of water," the I.R.M. Annotated CGL Policy gives no indication that the change in the language was meant to expand the scope of the clause to non-environmental damage. Accordingly, this Court agrees with the defendants and refuses to change the historical limitation that the pollution exclusion clause does not apply to non-environmental damage.

The operative policy terms of the pollution exclusion clause imply that there must be a discharge into the environment before coverage can be properly denied. The operative terms in the version of the pollution exclusion clause at issue in this case are "discharge," "dispersal," "release," and "escape." While they are not defined in the policy, the terms "discharge" and "release" are terms of art in environmental law and include "escape" by definition and "dispersal" by concept.

"Discharge" is defined in the federal regulations interpreting the Resource, Conservation and Recovery Act ("RCRA"), section 1004(3) as the "accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of hazardous waste into or on any land or water." 40 C.F.R. § 260.10 (1990). "Release" is defined in § 101(22) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, *escaping*, leaching, dumping, or disposing *into the environment* . . . ." 42 U.S.C. § 9601(22) (1988) (emphasis added).

Because the operative policy terms "discharge," "dispersal," "release," and "escape" are environmental terms of art, the omission of the language "into or upon land, the atmosphere or any water course or body of water" in the new pollution exclusion clause is insignificant. The omission of the phrase only removes a redundancy in the language of the exclusion that was present in the earlier pollution exclusion clause. Consequently, we find that any "discharge, dispersal, release, or escape" of a pollutant must be into the environment in order to trigger the pollution exclusion clause and deny coverage to the insured. We also agree with the defendants that the discharge at issue here, confined to a cooler within a chicken processing plant, does not qualify.

In *Grinnell*, the Court of Appeals of Minnesota addressed the question of whether discharges not into the environment fell within the original version of the pollution exclusion clause. The court stated that:

> Considering the nature and purpose of the pollution exclusion . . . [t]he ordinary reader of the exclusion would reasonably conclude that it would not limit coverage for respondents' unexpected damage due to installation of building materials in a home, but would exclude pervasive environmental pollution problems such as hazardous waste dumping. The policy contains a pollution exclusion, not a delayed-action injury exclusion or *an exclusion for all vapor cases* . . . [The insured] purchased insurance to protect himself from damage resulting from the installation of insulation. Under the broad coverage afforded, he would reasonably expect coverage.

Grinnell, 432 N.W.2d at 499 (emphasis added).

Likewise in the case at bar, Tufco purchased CGL insurance to protect itself from claims that might arise as a result of its

installation of industrial flooring. The policy contains a *pollution* exclusion, not an exclusion for all damages that may result due to Tufco's use of chemicals in the installation of industrial flooring. In light of the language of the West American policy and Tufco's reasonable belief that damages accidentally arising from its normal business activities would not be excluded, we agree that the pollution exclusion clause in the West American policy applies only to discharges into the environment and not to the non-environmental damage that led to Perdue's claim against Tufco.

CONCLUSION

Based upon the foregoing reasoning, we agree that the trial court properly granted the summary judgment of declaratory relief to the defendants Tufco and Perdue and properly denied the same to the plaintiff West American. The pollution exclusion clause contained in the CGL policy purchased by Tufco from West American does not deny coverage to Tufco for Perdue's claims in this case. Accordingly, the decision of the trial court is,

Affirmed.

Judges ARNOLD and JOHNSON concur.

WILLIAM N. DOYLE, PETITIONER-APPELLANT v. SOUTHEASTERN GLASS LAMINATES, INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES

No. 9019SC1318

(Filed 5 November 1991)

1. **Master and Servant § 108 (NCI3d)— unemployment compensation—rebuttable presumption**

Under the Unemployment Compensation Act, a claimant is presumed to be entitled to benefits, but this presumption is rebuttable with the burden on the employer to establish circumstances disqualifying the claimant.

Am Jur 2d, Unemployment Compensation § 52.

2. Master and Servant § 108.1 (NCI3d)— unemployment benefits—substantial fault—absences

The trial court did not err in affirming the Employment Security Commission's decision to disqualify petitioner from receiving benefits where petitioner was discharged for excessive absenteeism; petitioner had numerous incidents of tardiness; although most of petitioner's day-long absences were approved by his supervisor, they were not necessarily "excused" absences as defined in the employee handbook; petitioner received three written warnings in a five month period for excessive tardiness and absenteeism; and petitioner testified that he knew after his third warning and suspension that he could be let go for more tardiness or absences. N.C.G.S. § 96-14(2A).

Am Jur 2d, Unemployment Compensation § 58.

Discharge for absenteeism or tardiness as affecting right to unemployment compensation. 58 ALR3d 674.

3. Master and Servant § 108.1 (NCI3d)— unemployment compensation—excessive absenteeism—findings—supported by evidence

There was evidence in an unemployment compensation proceeding to support the Employment Security Commission's findings concerning the posting of additional absences during a lay-off period and petitioner's knowledge that his absences were unexcused or violations of company policy.

Am Jur 2d, Unemployment Compensation § 58.

Discharge for absenteeism or tardiness as affecting right to unemployment compensation. 58 ALR3d 674.

4. Master and Servant § 100 (NCI3d)—unemployment compensation—attorney fees

The trial court did not err by failing to award attorney fees to a petitioner who was granted unemployment benefits by an appeals referee but denied benefits on appeal to the full Commission. N.C.G.S. § 96-17(b1) directly addresses the issue of attorney fees and states that "in any court proceeding under this Chapter each party shall bear its own costs and legal fees." Because neither the Commission nor the employer acted without substantial justification under N.C.G.S. § 6-19.1,

the Legislature's intent concerning which statute would control under these circumstances need not be addressed.

Am Jur 2d, Unemployment Compensation § 10.

Judge COZORT dissenting.

APPEAL by petitioner from judgment entered 18 September 1990 by *Judge Samuel A. Wilson* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 17 September 1991.

In December 1989, petitioner filed a claim for unemployment insurance benefits which was granted on 23 January 1990. The employer, Southeastern Glass Laminates, Inc., appealed. An Appeals Referee issued its decision in favor of petitioner on 23 February 1990. On 5 March 1990, the employer appealed this decision to respondent Employment Security Commission. On 20 April 1990, the Commission reversed the decision of the Appeals Referee and found that petitioner was disqualified from receiving benefits for nine weeks.

Petitioner appealed the Commission's administrative decision to Mecklenburg County Superior Court. On 18 September 1990, the trial court entered its judgment in respondent's favor. Petitioner appeals from this judgment.

Legal Services of Southern Piedmont, Inc., by Kenneth L. Schorr, for petitioner-appellant.

Employment Security Commission, by Chief Counsel T.S. Whitaker, and Staff Attorney John B. DeLuca, for respondent-appellee.

ORR, Judge.

Petitioner argues six errors on appeal. For the following reasons, we hold that the trial court did not err and affirm its judgment of 18 September 1990.

It is well-settled law in this state that in an appeal from a decision of the Employment Security Commission, the reviewing court must determine if there was evidence before the Commission to support its findings of fact and determine whether the facts found support the Commission's conclusions of law and resulting decision. *In re Miller v. Guilford County Schools*, 62 N.C. App. 729, 731, 303 S.E.2d 411, 412-13, *disc. review denied*, 309 N.C.

321, 307 S.E.2d 165 (1983) (citation omitted). The question presented for the reviewing court is "whether the facts found are sufficient to support the judgment, *i.e.*, whether the court correctly applied the law to the facts found." *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982) (citation omitted).

[1] Under the Unemployment Compensation Act, a claimant is presumed to be entitled to benefits. This presumption is rebuttable with the burden on the employer to establish circumstances disqualifying the claimant. *Id.* Based upon the evidence in the present case, we hold that the employer met its burden to establish those circumstances to disqualify petitioner.

In the case *sub judice*, the Commission made the following findings of fact.

> 1. At the time the Claims Adjudicator issued a determination in this matter, the claimant had filed continued claims for unemployment insurance benefits for the period December 31, 1989, through January 13, 1990. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with N.C. Gen. Stat. § 96-15(a).
>
> 2. The claimant last worked for Southeastern Glass Laminates, Inc., on December 19, 1989. The claimant was employed as a quality control inspector.
>
> 3. The claimant was discharged from this job because of what the employer considered excessive absenteeism after prior warnings. The employer's policy is to issue written warnings. Three written warnings within a six (6) month period leads to suspension, and any violations after suspension lead to discharge. The management of the company reserves the right, however, to discharge for "excessive absenteeism."
>
> 4. The claimant had received warnings concerning either lateness or absences on July 15, 1989 (for absenteeism), December 2, 1989 (excessive tardiness), and December 9, 1989 (excessive absenteeism). He was suspended effective December 20, 21, and 22, 1989. The claimant had also received warnings earlier in 1989.

5. The company was on a lay-off from December 19, 1989, through January 2, 1990. Between the claimant's last day of work and the time he returned after lay-off, the personnel department posted further infractions to his record for absences. The claimant was discharged for excessive absenteeism upon review of his overall attendance record.

6. The employer's policy provides that any unexcused absence will be considered excessive. The employer grants leave for military duty, injuries and personal leave.

7. The claimant understood that any infraction following a suspension would lead to discharge as he received a company handbook of rules in 1986.

8. On each of the claimant's absences, he either had a medical reason with documentation for being out or had requested and received permission from his supervisor to be out.

Based upon the above findings, the Commission concluded that under N.C. Gen. Stat. § 96-14(2A), "the claimant was discharged for substantial fault connected with the work."

[2] Petitioner first argues that the trial court erred in affirming the Commission's findings and conclusions because as a matter of law, petitioner cannot be at "substantial fault" under the above statute for missing work, so long as his absences were approved by his supervisor. We disagree.

Under § 96-14(2A):

For a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violated reasonable requirements of the job but shall not include (1) minor infractions 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.

N.C. Gen. Stat. § 96-14(2A) (1990).

In *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 591, 406 S.E.2d 609, 612 (1991), this Court held that a claimant's consistent unexcused absences and tardiness may rise to the level of substantial fault under § 96-14(2A). The case at bar is similar. Petitioner had numerous incidents of tardiness documented in the record. Although most of petitioner's day-long absences were approved by his supervisor, they were not necessarily "excused" absences as defined in the employee handbook.

Moreover, under the statute, the Commission may find substantial fault for "minor infractions" if the employee has repeated infractions and the employee receives a warning. Here, petitioner received three written warnings in a five month period for excessive tardiness and absenteeism. Petitioner testified that after his third warning and suspension in December that he knew that he could be "let go" for more tardiness or absences. We find that this is enough to meet the statutory requirements under N.C. Gen. Stat. § 96-14(2A).

We, therefore, hold that the trial court did not err in affirming the Commission's decision to disqualify petitioner from receiving unemployment benefits for nine weeks.

[3] Petitioner next argues that the evidence of record does not support findings of fact 5, 6, and 7. We have reviewed the evidence and find that it supports these findings. There is substantial evidence in the record to support finding number 5. There is no dispute that the company was on a lay-off from 19 December 1989 through 2 January 1990. Petitioner testified that he was either absent or tardy on the additional posted dates for December 1989. Ms. Terry Hannon, Personnel Assistant, testified from written records that additional unexcused absences or tardiness had been posted to petitioner's employment record in December 1989 and that he was discharged after reviewing his overall attendance record.

Petitioner challenges findings 6 and 7 to the extent that they state that he knew that his absences were unexcused or violations of company policy. Petitioner testified that he believed that his absences were excused if approved by his supervisor. He further

testified that he was told they were unexcused when he was terminated.

However, petitioner acknowledged that he received an employee handbook and was aware that further infractions of work rules, including his tardiness and absences, could lead to his discharge. Further, petitioner knew, through his written warnings, that he was close to being terminated for excessive absences or tardiness and testified to this. Therefore, we hold that the evidence supports findings of fact 6 and 7.

[4] The remaining issue we must address is whether the trial court erred in failing to award attorneys' fees to petitioner. We hold that the trial court did not err.

Petitioner argues that N.C. Gen. Stat. § 6-19.1 permits recovery of attorneys' fees in this action because "the agency acted without substantial justification in pressing its claim against the party; and . . . there are no special circumstances that would make the award of attorney's fees unjust." N.C. Gen. Stat. § 6-19.1 (1986). We disagree with this contention.

First, we find no evidence in the record before us that "the agency acted without substantial justification in pressing its claim against [petitioner]." The employer had every right to appeal the appeals referee's decision to the Full Commission and the Commission acted on that appeal. Petitioner alleged several procedural violations during this appeal. We have reviewed the record and find that these violations, if any, do not rise to the level of acting "without substantial justification" required by the statute.

Second, N.C. Gen. Stat. § 96-17(b1) directly addresses the issue of attorneys' fees and states that "in any court proceeding under this Chapter each party shall bear its own costs and legal fees." This statute is specific to actions under Chapter 96 and therefore controls the issue in the present case. It is well-settled law that when one statute speaks directly to a particular situation, that statute will control other general statutes regarding that particular situation, absent clear legislative intent to the contrary. *Whittington v. N.C. Department of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990), *citing, Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966). Because we find that neither the Commission nor the employer acted "without substantial justification" under § 6-19.1, we need not address the Legislature's

intent concerning which of the statutes would control under those circumstances. Therefore, we hold that § 96-17(b1) is specific to the case before us, and petitioner is responsible for his own legal fees and costs.

We have considered petitioner's remaining assignments of error concerning notice of appeal, new evidence allegedly considered by the Commission and additional affidavits and find them without merit.

For the above reasons, we affirm the trial court's judgment.

Affirmed.

Judge LEWIS concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I disagree with the conclusion that petitioner was discharged for substantial fault and was thus subject to disqualification of benefits for nine weeks. I base my opinion on a review of the record below which shows, without dispute, that petitioner committed no attendance infractions after his suspension, and he could not have been properly discharged for absenteeism.

The record does not contain a complete copy of the employment handbook, making effective appellate review difficult. We must rely on the Commission's findings as to the employer's policy. The Commission found, without exception from any party, that the employer's policy provides for written warnings, suspension, and "any violations *after* suspension lead to discharge." (Emphasis added.) This three-step process apparently did not apply to certain egregious infractions, known as "group one work rules," which could result in immediate discharge. Excessive absenteeism, the reason given for petitioner's discharge, is not listed in the "group one work rules." Excessive absenteeism is listed in the "group two work rules," which appear, from my reading of the woefully inadequate record, to be the less serious violations subject to the three-step disciplinary process: written warning, suspension, and discharge for violations occurring after suspension.

As the record plainly shows, petitioner received warnings prior to 19 December 1989. He was suspended on 19 December 1989. The company was on lay-off, through no fault of the petitioner, from 20 December 1989 through 2 January 1990. On 2 January 1990 the employer discharged petitioner, apparently for absences which occurred before 19 December 1989, but which the employer allegedly failed to "post" until some point during the lay-off. That purported discharge did not comply with the employer's own policy which provides that discharge must be for infractions which occur *after* suspension. Such would, of course, be impossible here because the company was on lay-off while petitioner was suspended.

There is no doubt that petitioner had numerous absences and that they may have been sufficient to justify discharge. But the employer must follow its own rules in making that determination, and discharge in violation of its own rules should not be the basis of disqualifying petitioner from benefits.

I vote to reverse the lower court's judgment affirming the Commission, and I respectfully dissent.

STATE OF NORTH CAROLINA v. JOSEPH KEITH REID

No. 9025SC1121

(Filed 5 November 1991)

1. Criminal Law § 427 (NCI4th)— breaking and entering— comment on failure to testify—no error

There was no error in a prosecution for felonious breaking and entering where the prosecutor referred in his closing argument to defendant's failure to testify. The State's comments in this case do not rise to the level of extended comments prohibited by the law of this state and, furthermore, defendant has failed to establish that the statement was so prejudicial that without it there was a reasonable possibility that the outcome of the trial would have been different.

Am Jur 2d, Trial § 507.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

2. Searches and Seizures § 9 (NCI3d)— breaking and entering— traffic stop—motion to suppress denied

The trial court did not err in a prosecution for felonious breaking and entering by denying defendant's motion to suppress evidence seized as a result of a traffic stop where officers had checked a Revco store and noticed that the lights were on, although it was locked and no one was in the parking lot; they subsequently received a radio call of an alarm at Revco; they noticed defendant's car parked facing south along the highway as they responded to the call; they found that no lights were on at the Revco and that the meter box was missing; they immediately returned to the area where defendant's car had been parked to obtain its license number; the car was gone, but within two minutes they observed the car moving north without its headlights and accelerating at a high rate of speed; the officers immediately gave chase with their siren and blue light engaged; and defendant's car traveled at 70 to 90 miles per hour and did not immediately stop for officers. It was not necessary for the officers to have a reasonable suspicion that defendant committed the break-in at Revco; only that the police have a reasonable suspicion of some illegal conduct.

Am Jur 2d, Searches and Seizures §§ 45, 96.

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

3. Constitutional Law § 295 (NCI4th); District Attorneys § 4 (NCI4th)— breaking and entering—defense attorney joining district attorney's office—prosecution not barred

The trial court did not err by denying defendant's motion to dismiss and bar a prosecution for felonious breaking and entering where defendant's first attorney joined the District Attorney's office and the District Attorney requested and received assistance in prosecuting the case from the Special Prosecutions Section of the Attorney General's office. Neither the assistant district attorney who first handled the case nor

the assistant attorney general would be prohibited from prosecuting the case under the North Carolina Rules of Professional Conduct, Rule 9.1(C), and, to avoid any potential conflict, the assistant attorney general was assigned to prosecute the case independently of the district attorney's office. The information the assistant district attorney and the assistant attorney general received from defendant's former counsel was not confidential information and was a matter of public record. The trial court made appropriate findings of fact which are supported by competent evidence.

Am Jur 2d, Prosecuting Attorneys §§ 31, 32.

Disqualification of prosecuting attorney on account of relationship with accused. 31 ALR3d 953.

4. Evidence and Witnesses § 222 (NCI4th)— breaking and entering—flight—sufficiency of evidence

The trial court did not err in a felonious larceny prosecution by instructing the jury on defendant's flight from the scene of the crime, a Revco, where officers first spotted defendant's car parked in the opposite direction of the Revco; they discovered that the vehicle was gone when they returned to obtain the license number; they next saw it moving in a northerly direction without its lights; and defendant attempted to flee from the officers at a high rate of speed.

Am Jur 2d, Evidence §§ 280, 281.

5. Evidence and Witnesses § 312 (NCI4th)— breaking and entering—other crimes—admissible for modus operandi

The trial court did not err in a prosecution for felonious breaking and entering by admitting evidence of other crimes for the purpose of showing modus operandi in the present case where the crime being tried and the other crimes met the similarity and temporal proximity prongs of the admissibility test. Moreover, the probative value of the evidence was not outweighed by its prejudicial effect. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 321, 326.

APPEAL by defendant from judgment entered 29 March 1990 by *Judge Hollis M. Owens, Jr.*, in CALDWELL County Superior Court. Heard in the Court of Appeals 27 August 1991.

On 13 June 1988, defendant was indicted for felonious breaking and entering in violation of N.C. Gen. Stat. § 14-54. He was tried before a jury, convicted on 29 March 1990, and sentenced to ten years active imprisonment. From the judgment and conviction of 29 March 1990, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John H. Watters, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

ORR, Judge.

Defendant argues five errors on appeal. For the following reasons, we hold that the trial court did not err and affirm the judgment of 29 March 1990.

This case arises from defendant's alleged breaking and entering of the Revco Drug Store in Pinewood Shopping Center in Granite Falls. The evidence at trial tends to show that on 1 February 1988, Charlotte McCorcle, pharmacist assistant manager at Revco, was called to the store by an activated alarm. Upon entering the store with a sheriff's deputy, she noticed that drugs on the shelves were in disarray, there were muddy shoe prints and fingerprints on the floor and the shelves, and the meter box at the back of the store had been pulled off the wall and was missing. There was also a hole in the back wall which had not been there when Ms. McCorcle had closed and locked the store the night before.

The activated alarm also notified patrol officers Sergeant Paul Brittain and Officer Sandra Brown of a possible break-in at Revco. The officers received the call at 2:25 a.m. on 1 February 1988, and proceeded north on Highway 321 toward Pinewood Shopping Center. As they approached the shopping center, the only automobile they observed was a parked Ford headed in the opposite direction. This automobile was located approximately 100 yards from the shopping center through the woods. As the officers approached the parking lot of the shopping center, they observed no other cars or persons. They noticed that the lights were out at Revco. They drove to the back of the building and noticed that the meter box was missing from the back of Revco. They drove to where the Ford had been parked to try to obtain its license number and discovered that the car was gone. Less than two minutes later

they saw the car on Highway 321, traveling in a northerly direction. Officer Brown observed a person later identified as defendant driving the car.

Officer Brown testified that the vehicle was traveling at an accelerated speed without its headlights on. Sergeant Brittain activated his siren and blue lights and chased defendant's car, reaching speeds between 70 and 90 miles per hour. Defendant did not stop immediately but did finally pull over and slowly moved down the right side of the road. The only occupant of the car was defendant. Both passenger and driver windows were rolled down on a cold, wet night.

Defendant told Sergeant Brittain that he had run out of gas, although he gave no explanation for the car starting after the officers first observed him. Sergeant Brittain also observed cloth gloves on the back floorboard of the car. Defendant voluntarily returned to Revco with the officers.

When defendant returned to Revco, another officer (Officer Seagle) observed white foam pellet insulation (which was consistent with the insulation in the hole in Revco's back wall) in defendant's hair. Additional evidence collected at the scene of the crime included, *inter alia*, footwear impressions containing foam bead insulation which matched defendant's footwear, foam bead insulation from defendant's clothes which matched the insulation at Revco, foam bead insulation from the floorboard of defendant's car and brown cotton gloves found in the car, and fibers taken from the point of entry which matched the fibers in the toboggan defendant was wearing that night. The officers located a sledgehammer by the side of the road where defendant had slowed down before he stopped his car. The sledgehammer was dry, although it was a cold, wet night.

At trial, Officer Keith Powers of the Winston-Salem Police Department testified to a separate incident that occurred on 3 January 1989 when he responded to an activated alarm call at Pleasant's Hardware in Winston-Salem at approximately 3:49 a.m. When he checked the store for signs of a break-in, he noted a hole knocked in the back of the building and then discovered defendant inside the building. The evidence indicated that this hole was consistent in size and shape to the hole in the back of Revco found during the break-in of February 1988.

I.

[1] Defendant first argues that the trial court erred in allowing the prosecutor for the State to make an inappropriate remark during closing argument concerning defendant's failure to testify in his defense. We disagree.

During his closing argument, the prosecutor discussed the intent element of larceny, and the following exchange occurred.

> [THE STATE]: And the final element of the crime of felonious breaking or entering is that the breaking or entering was done with the intent to commit larceny. Now ladies and gentlemen, intent, as Judge Owens is going to tell you in a little while, is a process of the mind. It's right up here. It's not susceptible to direct proof. What must come from circumstantial evidence and things that can be inferred.
>
> Now the defendant hasn't taken the stand in this case—
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> MR. BURKHEIMER: Objection to his remarks about that, Your Honor.
>
> THE COURT: Overruled.
>
> MR. BURKHEIMER: Exception.
>
> [THE STATE]: The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him. But ladies and gentlemen, we have to look at the other evidence to look at intent in this case. What do we have? Well, we've got a hole in the back wall. Why would anybody do that? Just for the heck of it? Is this vandalism? The State contends that it's not. We've got an entry into the building. Just wanted to go in there, do something, take a look around? State contends that's preposterous. But the most damning of all evidence is that set of shoe tracks going right to the drug counter.
>
> . . . .

The State contends that it may argue the applicable law and all reasonable inferences, and that its argument to the jury was not an "extended reference" to defendant's failure to take the witness stand in his own defense which would require a new trial. Defendant maintains that the State's comments were grossly improper and unconstitutional because it drew the jury's attention to his choice not to testify.

It is well-settled law that in a criminal prosecution, a defendant has the right not to testify and that such failure to testify shall not create a presumption of guilt against him. N.C. Const. art. I § 23; N.C. Gen. Stat. § 8-54 (1986). Further, the general rule is that counsel may not make an improper comment on defendant's failure to testify. *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975) (citations omitted). The purpose of this rule is that "extended reference" by counsel or the court "would nullify the policy that the failure to testify should not create a presumption against the defendant." *State v. Styles*, 93 N.C. App. 596, 610, 379 S.E.2d 255, 264 (1989), *quoting*, *State v. Randolph*, 312 N.C. 198, 206, 321 S.E.2d 864, 869 (1984). However, it is not reversible error if the State makes a "veiled reference" to a defendant's failure to testify which is "so brief and indirect as to make improbable any contention that the jury inferred guilt from the failure of the defendant to testify." *Id.*

Moreover, in *State v. Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988), our Supreme Court stated,

> [t]he reason for the rule is that *extended comment* from the court or from counsel for the state or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. . . . .
>
> While the mere statement by defendants' counsel that the law says no man has to take the witness stand *would seem unobjectionable*, it is obvious that further comment or explanation might have been violative of the rule established by the decisions of this Court.

Id. at 763, 370 S.E.2d at 405, *quoting*, *State v. Bovender*, 233 N.C. 683, 689-90, 65 S.E.2d 323, 329-30 (1951).

Applying the above principles to the State's comments in the case *sub judice*, we hold that the comments do not rise to the level of "extended comments" prohibited by the law of this state. The thrust of that portion of the State's argument to the jury was to explain to the jury what evidence it could use to determine defendant's intent to commit larceny. The State made reference to defendant's failure to testify, his right to do so, the jury's duty

not to hold that against defendant, and then the evidence that may be considered to determine defendant's intent.

We note additionally that pursuant to the North Carolina Pattern Jury Instructions, the trial court either in its discretion or upon request can instruct the jury that the defendant has not testified; that the law of North Carolina gives him that privilege and assures the defendant that his decision not to testify creates no presumption against him; and therefore his silence is not to influence their decision. N.C.P.I.—Crim., 101.30. The comments made by the prosecutor essentially track these instructions.

The statement in the present case was not comparable to those statements made in other cases in which our courts have held them to be improper statements. *See, e.g., State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975), *vacated in part*, 429 U.S. 912, 50 L.Ed.2d 278, 97 S.Ct. 301 (1976); *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975); *State v. Ferrell*, 75 N.C. App. 156, 330 S.E.2d 225, *disc. review denied and appeal dismissed*, 314 N.C. 333, 333 S.E.2d 492 (1985); *State v. Oates*, 65 N.C. App. 112, 308 S.E.2d 507 (1983), *disc. review denied*, 315 S.E.2d 708 (1984); *State v. Waddell*, 11 N.C. App. 577, 181 S.E.2d 737 (1971).

Further, even if the statement in the instant case had been an improper statement, defendant has failed to establish that the error was so prejudicial that without it there was a reasonable possibility that the outcome of the trial would have been different. N.C. Gen. Stat. § 15A-1443(a) (1988). *State v. Banks*, 322 N.C. 753, 764, 370 S.E.2d 398, 406 (1988). We cannot find that had the reference not been made by the State in its closing argument concerning defendant's failure to testify, the evidence against defendant would have been minimized to such an extent that the jury probably would have found him not guilty.

For the foregoing reasons, we find no error in the State's closing argument to the jury, though we sound a cautionary note that such comments will be found acceptable in only the most narrow factual circumstances.

II.

[2] Defendant next argues that the trial court erred in denying his motion to suppress certain evidence because it was obtained as a result of an unconstitutional stop. We find no error.

Defendant maintains that Sergeant Brittain and Officer Brown did not have reasonable, articulable suspicion to stop defendant's car on 1 February 1988, and therefore, all evidence obtained from defendant was erroneously admitted at trial. The State argues that the facts of this case created such suspicion and the stop was therefore legal and the evidence admissible.

It is well-settled law that a police officer may make a brief investigative stop of a vehicle if justified by specific, articulable facts giving rise to a reasonable suspicion of illegal activity. *Alabama v. White*, 110 L.Ed.2d 301, 110 S.Ct. 2412, 58 U.S.L.W. 4747 (1990); *United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975); *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968).

In *Alabama v. White*, 110 L.Ed.2d 301, 110 S.Ct. 2412, 58 U.S.L.W. 4747 (1990), the United States Supreme Court discussed the applicable standard for reasonable suspicion for a vehicular stop.

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. . . . . Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," [citation], that must be taken into account when evaluating whether there is reasonable suspicion.

Id., 110 L.Ed.2d at 309, 110 S.Ct. at 2416.

In *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990), this Court stated that although a police officer may not make *Terry* stops "merely on the pretext of a minor traffic violation," the police officer may make those stops if it is what a reasonable officer *would* do under the same or similar circumstances. *Id.* at 427, 393 S.E.2d at 548.

Applying the above principles to the facts in the case *sub judice*, we hold that the police officers had reasonable, articulable suspicion to stop defendant's car. The officers had checked the Revco store at approximately 1:00 a.m. and noticed that the lights

were on, although it was locked and no one was in the parking lot. After they received the radio call of the alarm at Revco, they noticed defendant's car parked on Highway 321 with the front of the car headed in a southerly direction. When the officers checked Revco, there were no lights on, and they noticed the meter box missing. They immediately returned to the area where defendant's car had been parked to obtain its license number and the car was gone. Within two minutes, they observed the car moving north on Highway 321 without its headlights burning, accelerating at a high rate of speed. The officers immediately began chasing defendant with their patrol car's siren and blue light engaged. Defendant's car travelled at a speed of 70 to 90 miles per hour. Defendant did not immediately stop for the officers. These are specific and articulable facts which, under the circumstances, give rise to a reasonable suspicion of illegal conduct. Further, it is reasonable that any officer would have stopped defendant under the same or similar circumstances.

Under the above law, it is not necessary, as defendant argues, for the officers to have reasonable suspicion that defendant committed the break-in at Revco. It is only necessary that the police have a reasonable suspicion of some illegal conduct. The totality of the circumstances in this case presented the officers with reasonable suspicion that defendant had participated in or was participating in some illegal activity. Therefore, we hold that the trial court did not err in denying defendant's motion to suppress the evidence because the stop was a legal and constitutionally sound stop.

III.

[3] Defendant's third assignment of error is whether the trial court erred in denying his motions to dismiss based upon defendant's first attorney's dual representation in this case. We find no error.

The record in the present case indicates that attorney Jason Parker was defendant's attorney from February 1988 until 9 August 1988, at which time Parker joined the District Attorney's office as an Assistant District Attorney. During the time he was defendant's attorney, Parker filed a request for voluntary discovery and waived arraignment on behalf of defendant. Parker also held some conferences with defendant and the prosecutor handling the case.

After Parker became an Assistant District Attorney, the Assistant District Attorney who had been handling the case, Gary Dellinger, calendared the case for several dates, appeared in court and called the case for trial. On 24 October 1988, another attorney was appointed to represent defendant. On 21 December 1988, the District Attorney requested assistance in prosecuting this case from the Special Prosecutions Section of the Attorney General's office due to a potential conflict of interest. Assistant Attorney General John Watters was assigned to prosecute the case.

On 23 January 1989, defendant filed a motion to bar prosecution because of dual representation by Parker and the State and argued that the State's further prosecution violated his State and Federal Constitutional rights. Defendant also filed a motion for speedy trial relief. On 10 February, the trial court denied the motion to bar prosecution and denied defendant's speedy trial motion. During the hearing on the speedy trial motion, Parker testified about his conversations and telephone calls with defendant and Dellinger testified about his actions in the case. None of the testimony concerned any confidential information obtained by either Parker or Dellinger.

On 25 September 1989, the trial court heard defendant's motion to dismiss (filed 15 August 1989) on the grounds that Watters' actions in subpoenaing Parker to testify at the 10 February hearing violated defendant's State and Federal Constitutional rights. The trial court summarily denied this motion and entered its order accordingly.

North Carolina case law has addressed the issue that is now before us: whether a private attorney whose successive government employment as a district attorney creates a *per se* disqualification of all the other government attorneys on his staff from prosecuting or appearing at *any* time against his former client. *See State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991). Based on the reasoning in *Camacho* and the following analysis of the North Carolina Rules of Professional Conduct, we hold that there is no *per se* disqualification rule in North Carolina.

Under the North Carolina Rules of Professional Conduct, Rule 9.1(C):

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

The Comment to this rule states, "[p]aragraph (C) does not disqualify other lawyers in the agency with which the lawyer in question has become associated." Comment, N.C.R. Prof. Conduct, Rule 9.1. Therefore, under Rule 9.1(C) and the Comment to the Rule, Parker would have been disqualified from prosecuting defendant, but neither Dellinger nor Watters would be prohibited from prosecuting defendant's case for the State. Dellinger was clearly an "other lawyer in the agency" with whom Parker had become associated.

Further, to avoid any potential conflict at all, Watters was assigned to prosecute the case independently of the Caldwell County District Attorney's office. The information Dellinger and Watters received from Parker concerning the case was not confidential information and was a matter of public record. The trial court made appropriate findings of fact concerning this information in its order of 18 January 1990, and these findings are supported by competent evidence.

Defendant relies on *United States v. Schell*, 775 F.2d 559 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098, 89 L.Ed.2d 898, 106 S.Ct. 1498 (1986), for the proposition that it is fundamentally unfair and unconstitutional for an attorney to represent a client and then "switch sides" and participate in the client's prosecution for the same offense. The *Schell* Court held such, basing its holding on "[t]he confidentiality of the attorney-client relationship is severely compromised, if not destroyed, when, after representing a client, a lawyer joins in the criminal prosecution of that client *with respect to the identical matter about which the attorney originally counseled the client.*" *Id.* at 565 (emphasis in the original). There are, however, at least two fundamental differences in *Schell* and the present case.

First, the attorney in *Schell* who had "switched sides" made an appearance for the United States Attorney's Office in the grand jury proceedings against his former clients in virtually the same matter for which he had been retained earlier to represent them. In our case, Parker made no appearance on behalf of the District Attorney's Office in any of the proceedings against defendant. He did testify at a motion hearing concerning his contacts with defendant and his involvement in the case, but none of that contained confidential information, and he was not appearing as an Assistant District Attorney to assist in prosecuting the case, but a critical witness in the hearing.

Second, it is unclear in *Schell* as to whether the Court based its decision on any rule of professional conduct. The Court cited none in its discussion of this issue. In the present case, the Comment to Rule 9.1(C) of the North Carolina Rules of Professional Conduct specifically states that other lawyers in the District Attorney's Office would not be disqualified from prosecuting defendant, although Parker had served for a period of time as defendant's counsel in the same matter. We again note that the prosecution by Dellinger for the District Attorney's office was limited and counsel from the Attorney General's office quickly obtained.

Finally, we find support for our holding on this issue from many other states. The majority of states who have addressed this issue have refused to adopt a *per se* disqualification rule under similar circumstances. *See State v. McKibben*, 239 Kan. 574, 722 P.2d 518 (1986), and the cases cited therein. In those cases holding that there is not a *per se* disqualification rule, the courts analyze the circumstances of the particular case and determined if any confidences had been breached which would prejudice the defendant. 722 P.2d at 525.

The American Bar Association committee on professional ethics also lends its support to our holding. In Formal Opinion 342, 62 A.B.A.J. 517 (1976), the committee ruled "that it is not necessary to disqualify the entire governmental office [under these circumstances]. The individual lawyer should be screened from having direct or indirect participation in the matter and communication with colleagues concerning the prosecution . . . ." 722 P.2d at 525.

Therefore, for the above reasons, we hold that the trial court did not err in denying defendant's motion to dismiss and bar prosecution because of alleged dual representation.

IV.

Defendant's remaining assignments of error concern whether the trial court erred in admitting evidence of another break-in to show *modus operandi*, and whether it erred in instructing the jury on defendant's flight from the scene of the crime.

A.

[4] Defendant contends that the trial court erred in instructing the jury on defendant's flight from the scene of the crime because there was no evidence of flight. We disagree.

The trial court gave the following charge on flight.

> Now members of the jury, the State contends that the defendant fled. The evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient by itself to establish the defendant's guilt.

It has long been held that the trial court may not instruct the jury on a defendant's flight unless "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged. . . ." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). *Accord, State v. Levan*, 326 N.C. 155, 388 S.E.2d 429 (1990); *State v. Moxley*, 78 N.C. App. 551, 338 S.E.2d 122 (1985), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 904 (1986). In determining whether or not a defendant fled from the scene of the crime, the relevant inquiry is whether the defendant fled and took some precautions to avoid apprehension. *Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990).

In the case *sub judice*, there is ample evidence of defendant's flight. Sergeant Brittain and Officer Brown first spotted defendant's car parked in the opposite direction of the Revco. After determining that the meter box was missing from the back of Revco, they returned to obtain the license number from defendant's vehicle and discovered that the vehicle was gone. They next saw it moving in a northerly direction without its lights burning. As they began to chase defendant, defendant did not stop his car and attempted to flee from the officers at a high rate of speed. This is more than "some evidence" that defendant fled the scene of the crime

and took steps to avoid apprehension. We find no error in the trial court's instruction on flight.

B.

[5] Finally, defendant contends that he is entitled to a new trial because the trial court erred in admitting evidence of other crimes for the purpose of showing *modus operandi* in the present case. We find no error.

Defendant argues that Officer Powers' testimony concerning defendant's alleged break-in of Pleasant's Hardware on 3 January 1989, was not admissible under Rule 404(b) of the North Carolina Rules of Evidence. He further argues that *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), excludes evidence of his subsequent crime to show *modus operandi* in the present crime.

Under N.C. Gen. Stat. § 8C-1, Rule 404(b), evidence of other crimes may be admitted so long as it is relevant to any fact or issue other than the defendant's character. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912, 108 S.Ct. 1598 (1988). Rule 404(b) is now considered a general rule of inclusion of relevant evidence of other crimes if it meets the test for admissibility. *Id.* at 206, 362 S.E.2d at 247. The test for whether such evidence is admissible is whether the incidents or crimes are sufficiently similar and not too remote in time as to be more probative than prejudicial under Rule 403. *Id.; State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988).

Usually, remoteness in time of another offense goes to the weight of the evidence and not to its admissibility to show *modus operandi. State v. Schultz*, 88 N.C. App. 197, 362 S.E.2d 853 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988). Remoteness in time is less important on the issue of *modus operandi* when evidence of the other crime is admitted because it is so similar to the *modus operandi* of the crime being tried; such similarities permit a reasonable inference that the same person committed both crimes. *Id.* at 203, 362 S.E.2d at 857.

Applying these general principles to the present case, we hold that the trial court did not err. First, the two crimes meet the first prong of the test regarding similarity. The evidence establishes that each crime was committed in the early morning hours, a retail store was the object of the break-in, each establishment was entered through an almost identical hole in the back wall, and the same

tool was used to create the hole in the wall: a sledgehammer. In the Winston-Salem case, the sledgehammer was discovered at the hardware store; in the present case, the sledgehammer was discovered along the side of the road where defendant had slowed down to stop for the officers in pursuit.

Second, the two crimes were within the temporal proximity prong of the test. The lapse of approximately 11 months between the two alleged crimes was not so remote in time as to render the evidence inadmissible. When the purpose for which the evidence is being admitted is the *modus operandi* of the crime, remoteness in time usually goes to the weight of the evidence, not its admissibility. *Id.* It is reasonable to conclude that a defendant who has established a particular *modus operandi* will continue that same pattern whether or not there has been a long lapse of time between the crimes. *State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986). "It is this latter theory which sustains the evidence's admiss[ibility]." *Id.* We have reviewed the cases cited by defendant on the issue of remoteness in time and find that they are not applicable to show defendant's *modus operandi*. All of the cases cited by defendant concerned other issues such as intent, identity or common plan or scheme.

Moreover, we find that the probative value of the admitted evidence was not outweighed by its prejudicial effect to defendant. Therefore, for the above reasons, we hold that defendant received a fair trial free from prejudicial error.

No error.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. JOHN PAUL JEWELL

No. 9021SC788

(Filed 5 November 1991)

1. **Criminal Law § 301 (NCI4th)— accessory after fact of murder—aiding and abetting murder—joinable offenses**

The offenses of accessory after the fact of a murder and aiding and abetting in the murder are joinable offenses for purposes of indictment and trial even though a defendant may not be convicted of both. N.C.G.S. § 15A-926(a).

Am Jur 2d, Indictments and Informations §§ 155, 157, 209, 213, 221.

2. **Criminal Law § 1189 (NCI4th)— accessory to murder—aiding and abetting as aggravating circumstance**

The trial court could properly aggravate defendant's sentence for accessory after the fact of murder by finding that defendant aided and abetted the murder where defendant was indicted on charges of first degree murder and accessory after the fact of murder but the murder charge was dismissed pursuant to a plea bargain in which defendant pled guilty to accessory after the fact, since N.C.G.S. § 15A-1340.4(a)(1)o does not prohibit a trial court from using as an aggravating circumstance evidence that defendant committed an act for which he was not convicted.

Am Jur 2d, Criminal Law §§ 527, 599; Homicide §§ 552, 554.

3. **Criminal Law § 1226 (NCI4th)— mitigating circumstance—drug and alcohol use—condition reducing culpability—finding not required**

The trial court did not err in failing to find as a statutory mitigating circumstance for accessory after the fact of murder that defendant's mental or physical condition significantly reduced his culpability for the offense where defendant's evidence showed that he had been consuming alcohol and drugs before the crime, but it also showed that he had a complete understanding of a plan to go out and "revenge" an alleged rape during which the murder occurred, defendant drove a car forty miles after the victim was shot, and when defendant felt his

life was endangered by the perpetrator, he had the capacity to reason and to dispose of the gun used in the killing.

Am Jur 2d, Criminal Law §§ 527, 599; Homicide §§ 552, 554.

Judge WYNN concurs in part and dissents in part.

APPEAL by defendant from judgment entered 5 December 1989 by *Judge Howard R. Greeson, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 19 March 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Bruce McKinney, for the State.

David F. Tamer for defendant-appellant.

JOHNSON, Judge.

Defendant was indicted for first degree murder, first degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury and accessory after the fact of a felony (murder). Pursuant to a plea arrangement, defendant pled guilty to attempted first degree burglary, for which he received the presumptive sentence, and accessory after the fact of murder. The trial court found as a non-statutory aggravating factor to the accessory charge that the defendant had aided and abetted the murder and sentenced defendant to the maximum allowable term for that offense.

The evidence as gleaned from the transcript of the sentencing hearing and from defendant's written statement to police shows that on the evening of 29 November 1981, defendant and two companions went to the residence of Joe Anderson. Anderson and his girlfriend, Regina Dedmon, were lying on the couch apparently passed out from intoxication. Anderson and Dedmon were awakened, and the group began drinking. In addition to consuming alcohol, defendant stated that he consumed LSD, marijuana, and possibly a quaalude, that day.

At some point, Anderson informed the group that Dedmon had been raped the previous day by two black men. Anderson then informed defendant that he wanted to go out and revenge the rape of Dedmon, and dared defendant to accompany him. Defendant replied, "Let's go goddamnit!"

Thereafter, defendant, Anderson, Dedmon and the other two men drove to East Winston-Salem in search of the alleged rapists.

Defendant carried a bat while Anderson carried a shotgun. Dedmon pointed to a house where she claimed the alleged rape occurred. With the exception of defendant, who chose to guard the front, the group went to the back door of the house where they attempted to pry the door open. An elderly woman opened the door.

After realizing that they had the wrong house, the group got back into the car and drove for about ten minutes at which time they encountered Donald Burns, who Dedmon said resembled one of her attackers. All five exited the car; Anderson and Dedmon advanced towards Burns and Dedmon began assaulting Burns. When Burns attempted to flee, Anderson shot him at point-blank range severely wounding him.

The group continued on their way until they encountered another black male, William Wright. Anderson, for no apparent reason, shot Wright in the chest fatally wounding him.

The five then returned to Anderson's residence. Shortly thereafter, Anderson, Dedmon, defendant, and an unidentified woman went to Yadkinville Park, approximately twenty miles from Winston-Salem. While at the park, Dedmon assaulted the unidentified woman with a knife. Anderson then asked defendant for a weapon, but the defendant refused to give him one. Defendant, Anderson, and Dedmon left the park, leaving the unidentified woman for dead.

Sometime later that evening, defendant and Anderson went riding, and defendant disposed of the shotgun used to shoot Burns and Wright by throwing it into the woods. The defendant subsequently left North Carolina, established residence in Florida, and was arrested there on 26 June 1989.

I.

By his first Assignment of Error, defendant contends that the trial court improperly aggravated his sentence on the accessory charge by finding that he aided and abetted the murder of William Wayne Wright. He argues that accessory after the fact and aiding and abetting are joinable offenses and therefore the latter cannot be used to aggravate a sentence for the former. We agree that the offenses are joinable but we disagree with defendant's ultimate conclusion.

[1] We approach this problem in two steps. First, we consider defendant's argument that the two offenses are joinable under G.S.

§ 15A-926(a). Then, we consider defendant's conclusion that because these are joinable offenses, the finding that defendant aided and abetted the murder cannot be used to aggravate his sentence on the accessory charge.

First, we note that in the context of joinder, the term "offense" means "indictment," even though the term is often used more generally to refer to the act or acts done by defendant which constitute a crime. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L.Ed.2d 281 (1977); *State v. Jones*, 47 N.C. App. 554, 558, 268 S.E.2d 6, 9 (1980). Joinable offenses are defined in G.S. § 15A-926(a), which 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.

The acts of defendant which gave rise to the indictments on charges of first degree murder and accessory after the fact of murder arose from a "series of acts or transactions connected together or constituting parts of a single scheme or plan." The offenses for which defendant was indicted thus fit the definition of joinable offenses under the statute.

The State argues nevertheless that accessory after the fact and aiding and abetting are not joinable because they are two separate and distinct offenses and are mutually exclusive.

We agree that the two offenses are mutually exclusive but find that this is not determinative. We note first that an aider and abettor is treated as a principal. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981); *State v. Spears*, 268 N.C. 303, 150 S.E.2d 499 (1966); *State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982). Thus, in the context of mutually exclusive offenses, being an aider and abettor to a crime is equivalent to being the principal to a crime. Being the principal to a crime and being an accessory after the fact to that crime are two separate and distinct offenses. *State v. McIntosh*, 260 N.C. 749, 133 S.E.2d 652 (1963), *cert. denied*, 377 U.S. 939, 12 L.Ed.2d 302 (1964) (robbery and accessory after the fact of armed robbery are two distinct substantive crimes; a participant in a felony may not also be an accessory after the fact). However, where the offenses for which defendant is indicted and

tried arise out of the same act or transactions, it is not a bar to joinder that they are mutually exclusive. *State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990); *State v. Upright*, 72 N.C. App. 94, 323 S.E.2d 479 (1984), *cert. denied*, 313 N.C. 610, 332 S.E.2d 82 (1985) (second degree murder and accessory after the fact: where defendant is charged in separate bills of indictment with mutually exclusive offenses growing out of the same transactions or occurrences, the State may proceed to trial on either indictment without dismissing the other); *contra State v. Cox*, 37 N.C. App. 356, 246 S.E.2d 152, *review denied*, 295 N.C. 649, 248 S.E.2d 253 (1978), *cert. denied*, 440 U.S. 930, 59 L.Ed.2d 487 (1979) (stating in *dictum* that armed robbery and accessory after the fact to armed robbery are mutually exclusive offenses and are not joinable for trial). The fact that aiding and abetting and accessory after the fact are mutually exclusive offenses means only that defendant cannot be convicted of both. *Speckman*, 326 N.C. 576, 391 S.E.2d 165 (embezzlement and false pretenses are mutually exclusive offenses; defendant can be indicted and tried on both but cannot be convicted of both when they are based upon a single transaction).

We thus conclude that the offenses of accessory after the fact of a felony and being an aider and abettor to that felony are joinable offenses for purposes of indictment and trial, even though a defendant cannot be convicted of both.

[2] We now consider the second part of defendant's argument; namely, that a finding that defendant aided and abetted the murder, a joinable offense, cannot be used to aggravate his sentence on the accessory charge. We emphasize for purposes of clarity that in the case *sub judice* defendant was *indicted* on charges of first degree murder and accessory after the fact of murder but that the first degree murder charge was *dismissed* pursuant to a plea bargain in which defendant *pled guilty* to accessory after the fact. Thus defendant's argument that a joinable offense cannot be used in aggravation is relevant only if the rules regarding aggravation apply to a joinable offense for which defendant was indicted but which was later dismissed pursuant to a plea bargain agreement.

Defendant argues that under G.S. § 15A-1340.4(a)(1)o the fact that defendant committed a joinable offense cannot be used as an aggravating factor. He cites as authority *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985) and *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984). He further directs us to *State*

v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985), for the proposition that it is error to aggravate a sentence upon finding that the defendant committed an act which constitutes an offense for which he was neither indicted nor tried. We find that *Lattimore* and the cases flowing from it supply the proper resolution for this case and that *McGuire* is not supported by the weight of authority. Hence we decline to follow *McGuire*.

General Statutes § 15A-1340.4(a)(1)o requires a sentencing judge to consider in aggravation evidence that "the defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement" but prohibits such consideration if the prior conviction(s) includes "any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." The *Lattimore* Court construed G.S. § 15A-1340.4(a)(1)o to encompass as well a prohibition against aggravating a sentence with a finding that the defendant *committed* a joined offense. In *Lattimore* the defendant pled guilty to attempted armed robbery and second degree murder. The trial judge enhanced the sentence on the robbery conviction by finding the non-statutory aggravating factor that the victim of the armed robbery was killed. He enhanced the sentence on the murder conviction by finding as an aggravating factor that the murder was committed during the course of the attempted armed robbery. The Court found error as to both enhancements and stated:

> G.S. § 15A-1340.4(a)(1)(o) specifically prohibits, as an aggravating factor, the use of convictions for offenses "joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." To permit the trial judge to find as a non-statutory aggravating factor that the defendant *committed* the joinable offense would virtually eviscerate the purpose and policy of the statutory prohibition (original emphasis).

Lattimore, 310 N.C. at 299, 311 S.E.2d at 879. It is important to note, and defendant fails to acknowledge, that the Court in *Lattimore* was referring to joinable offenses *for which the defendant had been convicted. Accord Westmoreland*, 314 N.C. at 449, 334 S.E.2d at 227-28 (applying the *Lattimore* rule that a sentence may not be enhanced by finding in aggravation that the defendant *committed* a joined offense for which he was convicted and further, explicitly holding that a conviction for an offense covered by the

Fair Sentencing Act may not be aggravated by *contemporaneous* convictions of offenses joined with such offense). *See also State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985) (trial court erred in aggravating sentence for robbery by finding that defendant threw acid before fleeing when defendant was also convicted of malicious throwing of acid, a joined offense); *State v. Winnex*, 66 N.C. App. 280, 311 S.E.2d 594 (1984) (error to aggravate sentences by finding that defendant engaged in a "pattern of violent conduct" when trial court must have based this factor on defendant's convictions of joined offenses).

Defendant argues that *McGuire*, 78 N.C. App. 285, 337 S.E.2d 620, requires that we find error in the case before us. In *McGuire* the defendant pled guilty to two counts of attempted first degree sexual offense. The trial court found as a non-statutory aggravating factor that "prior to this offense [defendant] committed an act in February for which [he] could have been charged and was not charged." 78 N.C. App. at 288, 337 S.E.2d at 622. The trial court used this finding to enhance defendant's sentence and this Court found error, holding that a defendant's sentence may not be aggravated on the basis of evidence of a joinable offense with which defendant has not been charged. *Id.* at 292, 337 S.E.2d at 625. The *McGuire* decision was based in part on *State v. Puckett*, 66 N.C. App. 600, 312 S.E.2d 207 (1984). In *Puckett* this Court held that it was error to aggravate an assault conviction by finding that the offense was committed by "lying in wait," where "lying in wait" is an element of the separate but joinable offense of maliciously assaulting in a secret manner, G.S. § 14-31, an offense with which defendant was not charged, much less convicted. The *Puckett* and *McGuire* decisions stand for the proposition that a sentence may not be aggravated by the use of evidence of an *element of a joinable offense* with which defendant has not been charged (*Puckett*) or by evidence of a *joinable offense* with which defendant has not been charged (*McGuire*). Both *Puckett* and *McGuire* reach far beyond the holding in *Lattimore*. *See also State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985), *rev'd on other grounds*, 320 N.C. 297, 357 S.E.2d 622 (1987) (following *Puckett* without discussion). The *McGuire* and *Puckett* Courts failed to recognize that G.S. § 15A-1340.4(a)(1)o as interpreted by *Lattimore* and later cases only prohibits a sentencing judge from aggravating a sentence on the basis that defendant committed an act—*when that act constitutes a joinable offense for which he has also been convicted.*

Lattimore does not prohibit a trial court from using as an aggravating circumstance evidence that defendant committed an act for which he was *not convicted.*

Our analysis is supported by the weight of authority. In *State v. Abee*, 308 N.C. 379, 302 S.E.2d 230 (1983), the defendant was indicted on two counts of first degree sexual offense and one count of kidnapping. He pled guilty to one count of second degree sexual offense and all other charges were dismissed. The trial court aggravated his sentence on the finding that there were repeated acts of fellatio and inserting of his finger into the victim's rectum. The Supreme Court found no error and held that since it was only necessary to prove one act of fellatio to prove the offense, the other acts were properly considered as aggravating circumstances. In *State v. Green*, 62 N.C. App. 1, 301 S.E.2d 920, *modified and aff'd*, 309 N.C. 623, 308 S.E.2d 326 (1983), defendant was tried for second degree murder and convicted of manslaughter. The trial court found in aggravation that he had concealed the murder weapon. This Court found no error even though the concealment was evidence that he committed a separate criminal offense of carrying a concealed weapon. In *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986), defendant was convicted of solicitation to commit common law robbery and acquitted of one count of solicitation and one count of conspiracy. The trial court dismissed charges of murder, burglary, breaking and entering and armed robbery. Defendant's sentence on the soliciting conviction was enhanced by the finding that "defendant set a course of criminal conduct in motion by his own actions which ultimately resulted in [several crimes.]" The Supreme Court found no error and in its discussion noted that

> *Lattimore* is inapposite because that case involved the aggravation of the defendant's sentence based on a joinable offense for which the defendant had been *convicted.* Here the court properly considered evidence in support of an aggravating circumstance which supported crimes of which defendant was charged and tried but which were dismissed. (Original emphasis.)

Id. at 177, 345 S.E.2d at 373 (citing *Abee*). In *State v. Hayes*, 323 N.C. 306, 372 S.E.2d 704 (1988), defendant was convicted of breaking or entering and larceny and several other crimes. The evidence at trial showed that defendant and his companions engaged in drinking and fighting and that they armed themselves during the course of the evening in which they committed several

offenses for which they were convicted. The Court found no error in the trial court's finding the non-statutory aggravating factor that the defendant "engaged in a pattern of conduct causing serious danger to society." The Court went on to state:

> Under the rules set forth in *Westmoreland* and *Lattimore*, a conviction for which defendant is being sentenced may not be aggravated by defendant's acts which form the gravamen of *contemporaneous convictions of joined offenses*. However, evidence of acts unrelated to the *joined convictions* may properly be considered. (Emphasis added.)

Id. at 315, 372 S.E.2d at 709. *See also State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

These cases reaffirm and explain the *Lattimore* and *Westmoreland* rule that the prohibition against using a prior or contemporaneous conviction of a joined offense also prohibits a trial court from using the fact that defendant committed the joined offense which resulted in a conviction. These cases, however, clearly do not prohibit the trial court from using in aggravation evidence showing that the defendant committed a related bad act where the act did not result in an indictment. Nor do they prohibit the use of a joined offense which was dismissed and did not result in a conviction. *See also State v. Josey*, 328 N.C. 697, 403 S.E.2d 479 (1991) (proper to aggravate sentence on plea to possession of stolen property by finding that defendant seriously injured the victim by her conduct of either aiding and abetting or acting in concert with another in robbery and assault upon the victim).

On the basis of the above authority we find that the trial judge in the case *sub judice* did not err in finding as an aggravating circumstance that defendant aided and abetted the murder of William Wright.

Finally, we are cognizant of the difficulty posed by the fact that defendant could not have been *convicted* of being an aider and abettor to a murder and of being an accessory after the fact to that murder. We find that this difficulty is more apparent than real. "The mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude the sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors." *State v. Melton*, 307 N.C. 370, 377, 298 S.E.2d 673, 678 (1983).

While the trial judge is prohibited from considering factors in aggravation which constitute essential elements of the admitted offense, he is required to consider all circumstances which are transactionally related to the admitted offense and which are related to the purposes of sentencing. *Id.* These circumstances can include facts concerning a dismissed charge as well as the admitted offense. *Id.* Any circumstance used to aggravate a sentence must be proved by a preponderance of the evidence. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988).

We find from our review of the record that the trial court's finding in aggravation is proved by a preponderance of the evidence. It is equally clear that this finding is related to the purposes of sentencing. G.S. § 15A-1340.3 ("The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability[.]"). The fact that defendant cannot be convicted of both offenses does not mean that when he pleads guilty to the accessory charge, his sentence cannot be enhanced by evidence, properly proved, that he aided and abetted the commission of the principal offense.

In summary, we hold that when a defendant pleads guilty to being an accessory after the fact of a crime, should the trial court find by a preponderance of the evidence that the defendant aided and abetted in the commission of that crime, it may use this factor in aggravation of defendant's sentence on the accessory charge.

II.

[3] Defendant next contends that the trial court erred in failing to find as a statutory mitigating factor that the defendant was suffering from a mental or physical condition that was insufficient to constitute a defense, but which significantly reduced his culpability for the offense. G.S. § 15A-1340.4(a)(2)d. We disagree.

Defendant has the burden of proving by a preponderance of the evidence that a mitigating factor exists. *Canty*, 321 N.C. 520, 364 S.E.2d 410. If the court finds that defendant's evidence is uncontroverted, substantial, and manifestly credible, then it must find the mitigating factor. *State v. Holden*, 321 N.C. 689, 365 S.E.2d 626 (1988). Evidence that a mental or physical condition exists, without more, does not mandate consideration as a mitigating fac-

tor. *State v. Grier*, 70 N.C. App. 40, 318 S.E.2d 889, *cert. denied*, 318 N.C. 698, 350 S.E.2d 860 (1986).

Although intoxication is not expressly enumerated as a mitigating factor under subdivision (a)(2), it may be considered in mitigation under paragraph (a)(2)d. *State v. Barranco*, 73 N.C. App. 502, 326 S.E.2d 903, *cert. denied*, 314 N.C. 118, 332 S.E.2d 484 (1985). This Court has found that a mitigating factor exists when there is a material impairment of mental or physical faculties, or both, induced by excessive consumption of alcohol. *Id.* at 511, 326 S.E.2d at 909. However, mere existence of alcohol, without more, does not mandate its consideration as a mitigating factor. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

While drug use is also not an enumerated mitigating factor, the Supreme Court has found that drug use can be considered in mitigation of an offense. *State v. Barts*, 321 N.C. 170, 362 S.E.2d 235 (1987).

Defendant argues that at the time he participated in the events in question he was strongly under the influence of alcohol and drugs. However, when he talked to Officers Spoon and Blevins in June 1989, he was able to recall, in great detail, the chain of events as they occurred on that night eight years before. His statement is evidence that he cooperated with Anderson and the other parties involved in the events at issue. When Anderson told him that he planned to go out and "revenge" the alleged rape of Dedmon, defendant responded, "Let's go goddamnit." Defendant also states that he carried a baseball bat. Defendant was competent enough to cooperate with the others involved and to manifest a willingness to partake in the planned revenge.

Further, after the shootings occurred, defendant drove Anderson's car a total of forty miles to and from Yadkinville, N.C., and when he felt that his life was endangered by an irate Anderson, defendant had the capacity to reason and to dispose of the gun.

Based on the evidence before the court, defendant merely established that he had been consuming alcohol and drugs. Defendant's evidence shows that he had a complete understanding of the plan to go out and "revenge" the alleged rape. We find that defendant's evidence was neither uncontroverted, substantial, nor manifestly credible. Defendant fails to establish by a preponderance

of the evidence that his alcohol and drug consumption constituted a material impairment to his mental or physical faculties.

Accordingly, we hold that the trial judge did not err in failing to find the statutory mitigating factor that the defendant was suffering from a mental or physical condition which significantly reduced his culpability for the offense.

No error.

Judge ARNOLD concurs.

Judge WYNN concurs in part and dissents in part.

Judge WYNN dissenting and concurring in part.

The defendant in this case contends that accessory after the fact of murder and aiding and abetting murder are joinable offenses and that, as such, one cannot be used to aggravate the sentence of another. For the reasons which follow, I would hold, contrary to the majority, that the defendant is entitled to a new sentencing hearing.

From the outset, it is noted that the offense of aiding and abetting is treated as the principal offense. See, e.g., *State v. Polk*, 309 N.C. 559, 308 S.E.2d 296 (1983); *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982); *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977); *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968); *State v. Childress*, 267 N.C. 85, 147 S.E.2d 595 (1966). In light of this statement, it is also instructive to note the holding of the North Carolina Supreme Court in *State v. McIntosh*, 260 N.C. 749, 133 S.E.2d 652 (1963), *cert. denied*, 377 U.S. 939, 12 L.Ed.2d 302 (1964), wherein the Court stated that accessory after the fact to a felony is a separate and distinct crime from the principal felonious act. Most significantly, the Court stated that:

> A participant in a felony may no more be an accessory after the fact that one who commits larceny may be guilty of receiving the goods which he himself had stolen. The crime of accessory after the fact has its beginning after the principal offense has been committed. How may an accessory after the fact render assistance to the principal felon if he himself is the principal felon?

Id. at 753, 133 S.E.2d at 655.

It stands to reason that since a principal felon cannot be an accessory after the fact to himself, he also cannot aggravate his own crime by being an accessory after the fact to himself. It follows that since an aider and abettor to a felony is treated the same as the principal that committed the felony offense, he too cannot be an accessory after the fact to that same offense.

It was improper to aggravate defendant's conviction as an accessory after the fact by finding as a factor in aggravation that he was also an aider and abettor to that offense. Defendant should be given a new sentencing hearing on this issue.

STATE OF NORTH CAROLINA v. THOMAS LEE BILLINGS

No. 9014SC1226

(Filed 5 November 1991)

1. **Evidence and Witnesses § 655 (NCI4th) — motion to suppress in-court and out-of-court identifications — denied — evidence supporting findings sufficient**

The evidence was sufficient to support findings of fact made by the trial court in an assault and robbery prosecution in denying defendant's motion to suppress identifications of defendant made both in and out of court. The victim did not see her assailant's face, but knew that he was male and of African American descent; the victim heard the car stall three times after he took her keys and attempted to drive away; within three minutes, a witness saw a car stopped in the street; the position of the stopped car forced other cars to cross into the oncoming lane to pass by; as the witness drove around the stopped car, she saw an African American man; on voir dire, an officer testified that a flier showing the victim's car led him to the witness; the witness worked with an artist to produce a sketch; she was shown a photographic array containing a photograph of defendant taken several years earlier; the witness identified the photograph of defendant as close; and she identified defendant in a subsequent array containing a current photograph of defendant.

Am Jur 2d, Evidence § 372.

2. Evidence and Witnesses § 443 (NCI4th)— assault and robbery— out of court identification—photographic array—not unduly suggestive

An out of court identification of defendant was not obtained by impermissibly suggestive procedures, although defendant contended that the first array fixed defendant's photograph in the witness's mind, where the witness first viewed an older photograph of defendant and thought it closely resembled the man she saw near the scene of the crime; the witness could make a positive identification only upon seeing a recent photograph; and she explained on cross-examination that she did not know she had seen two photographs of the same person and that her in-court identification was based on what she saw on the day of the crime.

Am Jur 2d, Evidence §§ 371, 371.8.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures. 39 ALR3d 1000.

3. Evidence and Witnesses § 1730 (NCI4th)— assault and robbery—reenactment—videotape admissible

The trial court did not err in a prosecution for assault and robbery by admitting a videotape showing a reenactment of a witness's sighting of defendant shortly after the crime. The basic principles governing the admissibility of photographs apply to motion pictures; videotape recordings may be admitted into evidence where they are relevant and have been properly authenticated. These videotapes did not have the capacity to evoke a strong emotional reaction from a jury, did not present the jury with such a powerful visual image that they completely usurped the witness, and did not depict any conduct, incriminating or otherwise, of defendant.

Am Jur 2d, Evidence §§ 795, 833.

Admissibility of evidence of accused's re-enactment of crime. 100 ALR2d 1257.

4. Criminal Law § 425 (NCI4th)— assault and robbery—closing arguments— comment on defendant's failure to call witness— erroneous statement of evidence—no error

There was no error in a prosecution for assault and robbery from the prosecutor's closing argument that defendant

had elected not to call certain witnesses, including a person with whom defendant was seen on the day of the crime, but whom the prosecutor claimed was not identified until defense counsel's closing argument. That witness had, in fact, been identified by another defense witness who testified. The remarks here were directed to the failure of the defendant to produce exculpatory evidence rather than to his failure to testify on his own behalf, the prosecutor's error of fact was minor and not prejudicial, and the court carefully instructed the jurors that they were to decide the facts from all the evidence and apply the law to the facts as they alone found them.

Am Jur 2d, Trial §§ 590, 592.

Adverse presumption or reference based on party's failure to produce or examine friend—modern cases. 79 ALR4th 779.

APPEAL by defendant from judgment entered 26 May 1990 by *Judge A. M. Brannon* in DURHAM County Superior Court. Heard in the Court of Appeals 18 September 1991.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General W. Dale Talbert, for the State.

Dean A. Shangler for defendant-appellant.

PARKER, Judge.

Defendant was tried before a jury for attempted first degree rape, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, felonious breaking and entering, felonious larceny and possession of stolen goods. The jurors convicted defendant of robbery with a dangerous weapon, felonious breaking and entering, assault with a deadly weapon inflicting serious injury, felonious larceny of a motor vehicle, and felonious possession of a motor vehicle. Finding aggravating and mitigating factors, the trial court sentenced him to consecutive terms totalling seventy years of imprisonment and arrested judgment as to defendant's conviction of felonious possession of a motor vehicle.

[1] Defendant's three contentions on appeal relate solely to the guilt phase of his trial. Defendant brings forward forty-four assignments of error but in his brief mentions and presents arguments in support of only twenty-five of these. The other nine-

teen are, therefore, deemed abandoned. *See* N.C.R. App. P. 28(b)(5). Defendant first contends the court erred in denying his motion to suppress a witness' out of court and in court identifications of him in that (i) there was insufficient evidence to support fourteen of the trial court's findings of fact in the written order denying the motion to suppress or (ii) procedures used in the out of court identification were impermissibly suggestive and tainted the in court identification. We find these contentions to be without merit.

State's evidence tended to show that the victim vividly recalled what happened to her on 16 June 1989, when she returned home shortly before noon and was stabbed and robbed in her house on the corner of Markham and Washington Streets in Durham, North Carolina. She did not see her assailant's face because at first he remained behind her and later covered her head with a pillow case from her bed. From seeing his arm and hearing his voice, she knew that he was male and of African American descent; but she could not positively identify defendant's voice as that of her assailant. After her assailant took her car keys and attempted to drive away in her car, the victim heard the car stall three times.

Within minutes of the assault and robbery, Dorothea Jean Davis drove her 1978 Pontiac Bonneville automobile from Green Street onto Washington Street. At trial she testified that her friend Joyce Whitted was sitting in the front passenger seat of the Bonneville and the windows were down, but Davis could not recall if the radio was playing. When Davis turned onto Washington Street, she saw a car stopped in the street. Other cars were driving around the stopped car. The position of the stopped car forced other cars to cross into the oncoming traffic lane to pass by. As Davis drove her car around the stopped car, she could see into the driver's side. She saw an African American man. Defense counsel objected to Davis' identifying defendant as the driver she saw, and a lengthy *voir dire* ensued.

On *voir dire*, Officer Eric Hester of the Durham Police Department testified that on the Friday following the date of the crime he and other officers conducted a door to door investigation in the Washington Street area, using fliers showing the victim's car. Hester approached two men in the 500 block of Green Street, and one of them led him to Davis. Davis then told Hester she had seen a "Crime Stoppers" bulletin on television which included a photograph of a car that she recognized. She stated further that

on first seeing the actual stopped car she became angry; and as she drove by it, she looked at the driver and said, "If you don't know how to drive a stick, get out of the street." In a statement signed on Friday, 23 June 1989, she said the driver was an African American man with a baby face and short cropped hair that looked like it was messed up in the front.

The same afternoon, Davis worked with technician Allison Hudgins on a composite sketch of the driver. Since Davis and Hester were unsatisfied with this sketch, Hester called in a free lance artist. The artist's sketch was published the following Monday, 26 June, and the next day, Hester received additional information about the crime. Hester testified further that he went to Davis' residence and asked her to look at an array of photographs. He showed Davis photographs of six men; one photograph had been taken of defendant several years earlier. Upon seeing defendant's photograph, Davis stated, "It looks real close. The hair is right. It looks messed up. The complexion is right, but he is just not full enough in the lower facial area, mainly the chin area."

On 28 June, Hester showed Davis another photographic array at the police station. Again, there were six photographs, including one photograph of defendant made only a day or two before the second viewing. Defendant was the only subject whose photograph was in both arrays. Davis picked out the photograph of defendant. Hester testified that only after Davis picked out defendant's photograph from the second array did he tell Davis the two arrays had included different photographs of the same person.

On *voir dire*, Davis' testimony on direct examination essentially corroborated Hester's account of the circumstances surrounding her viewing of the arrays. On cross-examination, using the court reporter for purposes of illustration, Davis demonstrated how she had turned and spoken to the defendant. In addition, with respect to the second viewing, the following colloquy took place:

> Q. Now, after you picked that picture out, did you say anything to Detective Hester?
>
> A. I told him that I felt sure about that picture.
>
> Q. Did you go on to say to him that you were concerned about anything?
>
> A. Not that I can recall. No.

Q. Did you think of the first line-up at all while you were looking at the second line-up?

A. Yes.

Q. You had been thinking about both of them, weren't you?

A. In a way, yes, because at the first line-up I felt like I was looking at one picture and he was similar to the guy, but, you know, it wasn't him, and then on the second pictures I felt sure about this, but I did not know then that it was the same person, but I had felt concern about it.

Q. Did it help you [to] see the picture two times to be sure?

A. No, because I didn't know that the picture . . . . [I]n other words, [at] the first line-up I didn't feel certain about it. [At] the second one I did.

Q. I'm not clear why Detective Hester thought you were concerned?

A. I guess it was because I told him that in the first line-up I felt that this could be the guy, but I could not make a positive identification of the guy.

Q. Were you worried that you were picking the wrong person, is that what you mean?

A. No.

Q. Now, you testified in here during this examination that the person that you saw driving the car was my client, is that correct?

A. That's correct.

Q. Isn't it true that you're saying it's him in here, because you have seen the pictures and all?

A. No. Well, I have seen the pictures, but that's the guy I seen [sic].

Q. [S]eeing the pictures helped you make that clear in your mind?

A. Possibly.

Defendant presented no evidence at the *voir dire*. At the close of the hearing, the trial court denied defendant's motion to suppress the out of court and in court identifications. Signed 19 October

1989, the order denying the motion to suppress includes forty-one numbered findings of fact.

We have carefully reviewed each of defendant's arguments with respect to whether the evidence at the hearing was insufficient to support the fourteen challenged findings. We are satisfied that with respect to every significant challenge, the record shows there was sufficient evidence to support the finding. Defendant concedes that only if the evidence was insufficient did the trial court err as to its conclusion of law that the motion to suppress should be denied. *See* 1 H. Brandis, *Brandis on North Carolina Evidence* § 19a (3d ed. 1988) (finding of fact supported by competent evidence is ordinarily conclusive but whether the findings support the conclusion denying motion to suppress is a question of law). We, therefore, conclude that with respect to the issue of sufficiency of the evidence, the trial court did not err in denying defendant's motion to suppress.

[2] "Due process forbids an out-of-court confrontation which is so unnecessarily 'suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 1253 (1968)). As *Leggett* reiterated,

> "The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Henderson*, 285 N.C. 1, 9, 203 S.E.2d 10, 16 (1974), *death penalty vacated*, 428 U.S. 902, 49 L.Ed.2d 1205, 96 S.Ct. 3202 (1976). In evaluating such claims of denial of due process, this Court employs a two-step process. First, we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need inquire no further. If it is answered affirmatively, the second inquiry we must make is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification. *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978).

Leggett, 305 N.C. at 220, 287 S.E.2d at 837.

Defendant argues that the procedure of showing Davis the two arrays was impermissibly suggestive because viewing defendant's photograph in the first array fixed it in Davis' mind. We disagree.

In *Leggett*, the defendant was the only person whose photograph was in both arrays shown to the victim. The Court stated, "[T]hat a defendant's photograph is the only one common to two groups of photographs shown a victim is not sufficient, standing alone, to support a determination that pretrial photographic identification was conducted in an impermissibly suggestive manner. The totality of the procedures employed . . . here clearly indicates that the procedures were not impermissibly suggestive." *Id.* at 222, 287 S.E.2d at 838. The Court went on to hold the trial court had not erred in admitting "testimony and other evidence, through the victim and the officer conducting the procedures, concerning these photographic identifications of the defendant by the victim." *Id.*

On the issue of impermissibly suggestive identification techniques, the case under review differs on its facts from *Leggett* in only one respect. In *Leggett*, the victim positively identified the defendant's photograph in both arrays. We are not convinced that this factual difference works to the advantage of defendant Billings, but assuming it does so, the evidence on *voir dire* showed that Davis first viewed an older photograph of defendant and thought it closely resembled the man she saw near the scene of the crime. However, only upon seeing a recent photograph could she make a positive identification. Her inability to make a positive identification from the older photograph was coupled with her explanation on cross-examination that she did not know she had seen two photographs of the same person and that although she had viewed the two arrays, her in court identification was based on what she saw on the day of the crime. As in *Leggett*, all the photographs were of African American males and no suggestion was made to Davis that she pick any of the photographs. In addition, all the subjects were similar in age and physical stature, and the photographs were otherwise marked only by numbers written on the reverse side. Under all the circumstances, we conclude that the totality of the procedures employed shows they were not impermissibly suggestive. Having concluded that the procedures used in obtaining Davis' out-of-court identification were not impermissibly suggestive, we need not consider whether the procedures gave rise to a substantial likelihood of irreparable misidentification. We

hold that because the procedures were not impermissibly suggestive, the trial court did not err in denying the motion to suppress Davis' identifications of defendant.

[3] Defendant's second contention is that the court erred in admitting videotape recordings to illustrate Davis' testimony. We find this contention to be without merit.

During the lengthy *voir dire* described above, defendant also objected to the admission of videotapes to illustrate Davis' testimony. The evidence of witnesses Hester and Davis established that Davis assisted police officers in preparing two videotapes purporting to re-enact her conduct on Washington Street on the day of the crime. The actual car belonging to the victim was used; from her memory Davis instructed the officers where it should be sited on Washington Street. In one tape, the camera operator stood on the corner of Green and Washington Streets and filmed Davis making a right turn from Green Street onto Washington Street and driving her 1978 Pontiac Bonneville around the stopped car on Washington Street. In the other tape, the camera operator sat in the back seat of the car as Davis drove the same route. The car windows were rolled down, but the radio was not playing. Detective Hester sat in the front seat to simulate the presence of Davis' friend, Joyce Whitted, but no one talked to simulate conversation between Davis and Whitted.

On cross-examination during the *voir dire*, Davis stated that to the extent the videotape indicated she came to a complete stop beside the victim's car, it was not entirely accurate. Nevertheless, all her testimony made clear that she drove very slowly and turned and spoke directly to the defendant, thus viewing his face.

Immediately after argument on the issue of admissibility of Davis' identifications of defendant, the following colloquy took place:

> MR. SHANGLER: Judge, one more matter as to the video tape. I would like to raise the issue of whether or not that itself would be admissible at this trial even though it illustrates the evidence, because I feel that the prejudicial value outweighs the probative value.
>
> COURT: 403 argument, right?
>
> MR. SHANGLER: Yes, sir, and the basis is her testimony as to what really it lacked in terms of presenting it and the

fact, as your Honor knows, she speaks quite well from the stand and can get across what her testimony is.

The North Carolina Supreme Court has held that the basic principles governing the admissibility of photographs apply also to motion pictures. Videotape recordings may be admitted into evidence where they are relevant and have been properly authenticated. *See State v. Strickland*, 276 N.C. 253, 258, 173 S.E.2d 129, 132 (1970). Such evidence may be admitted to illustrate the testimony of a witness or as substantive evidence. N.C.G.S. § 8-97 (1986). Where a videotape depicts conduct of a defendant in a criminal case, its potential impact requires the trial judge to inquire "carefully into its authenticity, relevancy, and competency, and—if he finds it to be competent—to give the jury proper limiting instructions at the time it is introduced." *State v. Strickland*, 276 N.C. at 262, 173 S.E.2d at 135. Under such circumstances, the trial judge should grant a request from the defense to preview the tape. Moreover, if a videotape contains incriminating statements by the defendant, upon his objection, the judge must conduct a *voir dire* to determine the admissibility of any in-custody statements or admissions in the tape. *See id.*

As shown above, defendant's argument at *voir dire* was merely that probative value of the tapes was outweighed by their prejudicial value. Before this Court, defendant also argues that the videotape re-enactments of Davis' actions were not substantially similar to the actual events they purported to depict.

According to the Rules of Evidence, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1988). In this context, unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional basis. N.C.G.S. § 8C-1, Rule 403 commentary (1988); *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986). More importantly, whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, whose ruling may be reversed for abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *State*

v. Mason, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986); *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988).

From viewing the videotapes, we are not persuaded that they have the capacity to evoke a strong emotional reaction from a jury. Further, we are not persuaded by defendant's argument that the tapes in and of themselves presented the jury with such a powerful visual image that they completely usurped Davis' role as eyewitness. Defendant does not show how the court's decision to admit the tapes was so arbitrary that it could not have been the result of a reasoned decision. Moreover, our viewing of the tapes does not convince us the trial court's decision could not have been the result of a reasoned decision. As shown above, the tapes did not depict any conduct, incriminating or otherwise, of the defendant. For all these reasons, we hold the trial court did not err in denying defendant's motion to exclude the tapes.

[4] Finally defendant contends the court erred in overruling his objection to the prosecutor's closing argument in that it included an error of fact and constituted improper comment on the defendant's failure to testify. Again, we disagree.

The challenged argument is as follows:

> And so, quite frankly, [defendant] knows where he was. He knows who was with him during the course of that day what he did and if anyone was, and what anyone else did during the course of that day, and he has elected to give you some information, including, I would contend to you, giving you other information.
>
> . . . .
>
> He knows what happened that day and what has he presented to you about that day. You know, it's amazing, and you remember [State's witness] Mrs. Moore's testimony when she was on the witness stand. She saw him that day earlier in the afternoon, sometime after lunch with a young black male and she didn't know what his name was and then she saw him later that evening with the same person in the Volkswagen and she didn't know what his name was. Earlier they came up in a black vehicle, I believe she said, and she didn't know what his name was.
>
> Nowhere during the course of this investigation do we know what his name was, or who that person was or anything

about that person until finally arguments this morning after all the evidence is in and we are talking to you about what has been presented and then it comes out in final arguments this morning to you through counsel who this person was. So obviously, somebody, *not* Mrs. Moore, but somebody knew who this person was, because that came out to you this morning in final arguments and that person's name evidently was Joe Perry. Mrs. Moore never said Joe Perry. She just said a young black male. I've seen him over there before. I didn't know who he was. I didn't know his name.

This morning for the first time after all the evidence, hey, Joe Perry.

DEFENSE COUNSEL: OBJECTION

COURT: LET ME GET YOU TO COME HERE FOR A SECOND.

(BENCH CONFERENCE)

COURT: OBJECTION OVERRULED.

The prosecutor continued, without any further objection, by noting which witnesses had testified for the defense and that defendant had elected not to call certain witnesses, including Perry. However, the record shows defense witness Tim Anderson in fact testified that on the day of the alleged crime, defendant came to Anderson's house in the company of Joe Perry, also known as Joe Bird. Thus the prosecutor's argument that the jury never heard Perry's name until closing arguments constitutes an error of fact.

According to the North Carolina Supreme Court

> It is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction. In the discharge of that duty, he should not be so restricted as to discourage a vigorous presentation of the State's case to the jury.
>
> We have held in numerous cases that argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases. Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. Language

> may be used *consistent with the facts in evidence* to present each side of the case.
>
> . . . .
>
> . . . The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law . . . . If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu.*

State v. Monk, 286 N.C. 509, 515-16, 212 S.E.2d 125, 130-31 (1975) (citations omitted, emphasis in original). Nevertheless, minor transgressions are cured by the mere sustaining of an opponent's objection. *Id.* at 516, 212 S.E.2d at 131.

Defendant also argues that "what is more serious is that the intended inference of this part of the prosecutor's argument is that the defendant, who knows what he did or didn't do on June 16, 1989, did not testify from the stand that he was with Joe Perry." We do not find this argument persuasive.

A prosecutor's argument which suggests in unmistakable terms that a defendant has failed to testify

> violates the rule that counsel may not comment upon the failure of a defendant in a criminal prosecution to testify. This is forbidden by [N.C.G.S. §] 8-54 (1969). *See State v. Roberts*, 243 N.C. 619, 91 S.E.2d 589 (1956); *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952); *State v. Farrell*, 223 N.C. 804, 28 S.E.2d 560 (1944).

State v. Monk, 286 N.C. at 516, 212 S.E.2d at 131. Nevertheless, improper comment on a defendant's failure to testify is curable by the court's immediately instructing that (i) the argument is improper and (ii) the jury is to disregard it. However, improper comment is not cured by subsequent inclusion in the general charge of an instruction on a defendant's right to choose whether to testify. *Id.* at 516-17, 212 S.E.2d at 131-32; 1 H. Brandis, *Brandis on North Carolina Evidence* § 56 (3d ed. 1988). We, therefore, explicitly reject State's argument that as a matter of law, a general instruction on the defendant's right to choose whether to testify effects such a cure.

Notwithstanding the prohibition against commenting on a defendant's failure to testify, latitude to present the State's case

vigorously comprehends the prosecutor's right to argue to the jury "a 'defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State.' " *State v. Mason*, 315 N.C. at 732, 340 S.E.2d at 436 (quoting *State v. Jordan*, 305 N.C. 274, 280, 287 S.E.2d 827, 831 (1982)). *See also* 1 H. Brandis, *supra*, at 264 ("statute does not forbid comment by the prosecutor on the defendant's failure to prove specified facts, or to contradict the testimony of State witnesses, or to call or examine certain witnesses"). Since such remarks do not constitute error, they do not require cure by the trial court.

Applying the principles set out above, we conclude that the prosecutor's remarks, being directed to the failure of the defendant to produce exculpatory evidence, rather than to his failure to testify in his own behalf, were not improper. The court, therefore, did not err in overruling defendant's objection if premised on such impropriety. We also conclude the prosecutor's error of fact was minor and not prejudicial. The court in its charge carefully instructed the jurors that they were to decide from all the evidence what the facts actually were and apply the law to the facts as they, and they alone, found them to be. Under these circumstances we are unable to find the court abused its discretionary power to control arguments to the jury. We, therefore, hold that the trial court did not err in overruling defendant's objection if premised on the prosecutor's error of fact.

No error.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. McCLARY HALL, JR., RONALD SHOATS, AND TIMOTHY TYRONE SESSOMS

No. 906SC1338

(Filed 5 November 1991)

1. Jury § 7.14 (NCI3d)— trafficking in cocaine—jury selection—peremptory challenges—racial discrimination

The convictions of defendant Sessoms for trafficking in cocaine were remanded for a determination of whether the

prosecutor's explanation for his peremptory challenge of a juror was race-neutral where defendant Sessoms and the juror are black; the prosecutor asked the clerk, after the juror was seated, "if there was a white male out there"; the prosecutor briefly questioned the black juror and then peremptorily challenged her; a white male was called and later became the jury foreperson; and the prosecutor offered an explanatory statement. Although the State contended that the prosecutor adequately explained the meaning of his question and that such a statement may refute an inference of discrimination, the statement in this case came during the trial court's hearing on a *Batson* motion and not during the voir dire examination. The trial court should have considered the statement for whether the prosecutor adequately rebutted the prima facie showing, not for whether defendant made a prima facie showing.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

2. Jury § 7.9 (NCI3d)— trafficking in cocaine—jury selection—challenge for cause denied—no error

The trial court did not err in a prosecution for cocaine trafficking by denying defendants' challenges for cause of a prospective juror who stated during jury selection that he would hold it against the defendants if his chickens died during the trial and that he held a preconceived opinion as to the defendants' guilt, and who approached defense counsel after jury selection and stated that he did not want to be on the jury and that he would hold them responsible for the deaths of his chickens. The record reveals that the juror stated that he could presume the defendants to be innocent until proven guilty beyond a reasonable doubt despite his preconceived opinions and that he would decide the case based on the evidence and the law as instructed by the trial court.

Am Jur 2d, Jury §§ 265, 267, 269.

3. Jury § 6 (NCI3d)— cocaine trafficking—jury selection—remarks of court to defense counsel—no prejudice

There was no prejudice in a cocaine trafficking prosecution where the court told defense counsel in a bench conference during jury selection "that I thought that the three of you

asked asinine questions and that you repeated them until I felt the jurors were sick of them." After jury selection had been completed, the trial court asked the jury whether any of them had overheard any statement made by the trial court to defense counsel during bench conferences, and no juror indicated that he or she had heard any such statement.

Am Jur 2d, Trial §§ 303, 304.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal. 62 ALR2d 166.

4. Conspiracy § 21 (NCI4th)— cocaine trafficking—mutually exclusive conspiracies—judgment vacated on offense with lesser punishment—error

Convictions for conspiracy to traffic in cocaine were vacated where the court submitted mutually exclusive conspiracies to the jury without the required instruction that it could convict defendant of only one of the conspiracies, the jury returned guilty verdicts on both, and the court arrested judgment for the offense providing the lesser punishment. The court should have vacated the judgment for the offense providing the more serious punishment, and the case was remanded with instructions for the court to enter judgments and sentences accordingly.

Am Jur 2d, Conspiracy §§ 27, 33.

Judge EAGLES concurs in the result only.

APPEAL by defendants from judgments entered 12 July 1990 in HERTFORD County Superior Court by *Judge Orlando Hudson.* Heard in the Court of Appeals 25 September 1991.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Cheshire, Parker, Hughes & Manning, by Joseph Blount Cheshire, V and Richard Noel Gusler, for defendant-appellant McClary Hall, Jr.

Kevin M. Leahy for defendant-appellant Ronald Shoats.

Malcolm Ray Hunter, Jr., Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for defendant-appellant Timothy Tyrone Sessoms.

GREENE, Judge.

McClary Hall, Jr. (Hall) appeals from two judgments entered 12 July 1990, which judgments were based upon jury verdicts convicting Hall of two violations of N.C.G.S. § 90-95(h) (1990), conspiracy to traffick in cocaine from 10 April 1989 through 15 April 1989 and conspiracy to traffick in cocaine from 23 April 1989 through 31 May 1989. Ronald Shoats (Shoats) appeals from two judgments entered on 12 July 1990, which judgments were based upon jury verdicts convicting Shoats of two violations of N.C.G.S. § 90-95(h), conspiracy to traffick in cocaine from 10 April 1989 through 15 April 1989 and conspiracy to traffick in cocaine from 23 April 1989 through 31 May 1989. Timothy Tyrone Sessoms (Sessoms) appeals from a judgment entered 12 July 1990, which judgment was based upon a jury verdict convicting Sessoms of one violation of N.C.G.S. § 90-95(h), conspiracy to traffick in cocaine from 10 April 1989 through 15 April 1989.

Hall and Shoats were charged with and tried on three counts of conspiracy to traffick in cocaine. The first alleged conspiracy covered the period of 10 April 1989 through 15 April 1989, the second covered the period of 23 April 1989 through 31 May 1989, and the third covered the period of 10 April 1989 through 31 May 1989. Sessoms was charged with and tried on two counts of conspiracy to traffick in cocaine, the first alleged conspiracy covering the period of 10 April 1989 through 15 April 1989, and the second alleged conspiracy covering the period of 10 April 1989 through 31 May 1989.

Towards the end of the jury selection, the clerk called Beverly Askew (Askew), a black woman, to be seated in the jury box for examination. After Askew was seated, the prosecutor asked a question of the clerk, and then the trial court sent the jurors out of the courtroom to hear motions. Defendants made a *Batson v. Kentucky* motion, citing as support the question asked of the clerk by the prosecutor whether "there was a white male out there" in the jury panel? Defendants argued that the prosecutor's question demonstrated "his purpose and intent to try to place individuals of the Caucasian persuasion on the jury." After stipulating to the content of his question, the prosecutor explained:

> And as far as—my impression—my impression when I came up there, it was my impression there was a black juror

and a white—and a white juror left in the jury panel and there was not a black female or a female at all left.

I was trying to determine who—who was left. I had three left and two were—two were men and one was a woman, and I had—and apparently there were two women and one men—one man. And I had it backwards, and that's what I was trying to determine who was left as best I could.

After the trial court denied the defendants' *Batson* motion, the defendants made a motion for a mistrial on the ground that the trial court had counsel for the defendants "up to the bench at least on three occasions talking about the voir dire asking us to hurry up. The last such time was yesterday afternoon." Defendants argued that the jury panel probably heard the trial court's comments because Hall, who had been sitting about two feet from the jury box, had overheard them. The trial judge responded, "I make no bones about I told you all that I thought that the three of you asked asinine questions and that you repeated them until I felt the jurors were sick of them and that I informed you of that, not necessarily in those—in those terms." After jury selection had been completed, the trial judge asked, "Has any juror, including the alternates, heard any statement by the Court to any of the lawyers involved in this case at the bench conference? That means that when these lawyers approached the bench and we were having a conversation, did any juror hear the substance of anything that was said? If so, you just please raise your hand?" There being no response from any juror, the trial court found that the jurors had not heard anything that was said to counsel at the bench and denied the defendants' motion for a mistrial.

After the trial court denied the defendants' motion for a mistrial, the prosecutor asked Askew a few questions and then excused her using his last peremptory challenge. Defendants made another *Batson* motion, and the trial court brought Askew back into the courtroom to determine her race. Askew testified that she was black. The State concedes that the defendants are black. Defendants argued that they had made out a prima facie case of discrimination. The trial court, however, disagreed and determined "that none of the defendants have made out a prima facie case that the District Attorney in this case as to . . . [Askew, a black woman] has used his peremptory challenge in a racially discriminatory

fashion." The trial court then excused Askew, and the clerk called another juror, Cliff Phelps (Phelps).

During the voir dire examination of Phelps, the prosecutor asked Phelps whether, if selected for the jury, he would make his decisions based upon the testimony and the law as the trial judge explained it, and Phelps said that he would. Phelps also said that he understood the defendants to be presumed innocent and that he would give the defendants a fair and impartial trial. During the defendants' examination of Phelps, however, Phelps, a chicken farmer, stated that he would hold it against the defendants if his chickens were to die during the trial and stated that he "kind of" considered the defendants to be guilty. The defendants challenged Phelps for cause, and the trial court denied their motions.

After jury selection concluded, counsel for Shoats and Sessoms went out for lunch. Seated at a table across from counsel were various public officials, including Ms. Johnson, the Hertford County Clerk of Superior Court. Phelps was also at the restaurant. During their meal, Phelps approached the defense counsel. According to Ms. Johnson,

> [w]e were just sitting at the table, and Mr. Phelps, he was coming from around from the corner. The restaurant has different sections. And he approached the table, he said something to the effect, I told y'all I didn't really want to serve as a juror and that if something happened to the chickens—no, he did say something about the shifts, something about who was going to take the shift. He said, because if something happens to my chickens, I'm going to hold y'all responsible for them.

Ms. Johnson did not have an opinion as to whether Phelps appeared to be joking or serious when he spoke to counsel. The trial judge then asked Phelps whether he had said "that if something happened to your chickens you would hold them responsible?" Phelps said that he may have said it, but that he said it "in a joking type manner." Furthermore, when asked by the trial judge whether he could still be a fair and impartial juror, Phelps indicated that he could. The defendants again challenged Phelps for cause. The trial court denied the challenge finding that Phelps made the statement concerning his chickens, that he made it in a joking manner, that Phelps violated the trial court's order by talking with the

attorneys, and that despite his comments, Phelps "can be a fair and impartial juror . . . ."

The State's evidence tends to show the following: On or about 10 April 1989, Hall, Shoats, and Sessoms entered into an agreement to purchase a large amount of cocaine in Florida and to have another person procure and deliver it to them. The person was to travel to Florida by airplane, and return from Florida by train. On or about 13 April 1989, the defendants and another person went to Florida to purchase the cocaine. On or about 15 April 1989, the defendants and the other person returned from Florida without the cocaine because Hall had not brought enough money with him to pay for it. On or about 23 April 1989, Hall and Shoats entered into an agreement to return to Florida to purchase a large amount of cocaine. On or about 25 April 1989, Hall, Shoats, and another person traveled by airplane to Florida, and Hall and Shoats purchased nine two-pound packages containing cocaine. Later that day, the person solicited to return by train with the cocaine was arrested at the train station with the cocaine.

The defendants presented no evidence at trial. The jury returned guilty verdicts against the three defendants on each of the alleged conspiracies. The trial court arrested judgment, however, for the charges of conspiracy to traffick in cocaine from 10 April 1989 through 31 May 1989 with regard to all the defendants. The trial court imposed on both Hall and Shoats two consecutive, forty-year sentences for their two conspiracy convictions. The trial court imposed on Sessoms one forty-year sentence for his one conspiracy conviction.

The issues are (I) whether a defendant established a prima facie showing of purposeful discrimination in the selection of a jury where the prosecutor asks the clerk whether there was a white man in the venire and then peremptorily challenges a black prospective juror; (II) whether the trial court erred in denying challenges for cause of a prospective juror who had made comments to defense counsel about his potential jury service and who had held a preconceived opinion about the defendants' guilt; (III) whether the trial court's comments to defense counsel during a bench conference prejudiced the defendants where the record shows that the jury did not hear the comments; and (IV) whether the defendants may be punished for two separate conspiracies where the

defendants are convicted of one continuing conspiracy and the two separate conspiracies thereby producing separate convictions for mutually exclusive offenses.

I

[1] Sessoms argues that the trial court erred in concluding that he failed to make out a prima facie case of discrimination under the equal protection clause of the Fourteenth Amendment to the United States Constitution in the jury selection. Article I, section 26 of the Constitution of North Carolina and the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibit the State from "peremptorily challenging prospective jurors solely on the basis of race." *State v. Smith*, 328 N.C. 99, 119, 400 S.E.2d 712, 723 (1991). In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986), the United States Supreme Court "outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause." *Hernandez v. New York*, 500 U.S. ---, ---, 114 L.Ed.2d 395, 405 (1991).

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. . . . Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. . . . Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Id. (citations omitted).

The three-part test for determining whether a defendant has made the initial prima facie showing of purposeful discrimination is stated as follows:

> [T]he defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the

prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96, 90 L.Ed.2d at 87-88 (citations omitted). The State concedes that Sessoms is black, the voir dire of Askew established that she is black, and the prosecutor peremptorily challenged Askew. Therefore, the issue to be decided is whether the prosecutor's peremptory challenge of Askew raises an inference of purposeful discrimination in light of the relevant circumstances surrounding the challenge. *Smith*, 328 N.C. at 120, 400 S.E.2d at 724. If Sessoms raised such an inference, then he established a prima facie case of purposeful discrimination.

Sessoms argues that a "relevant circumstance" which supports an inference of purposeful discrimination is the prosecutor's question of the clerk. "[Q]uestions and statements made by the prosecutor *during voir dire examination* and in exercising his peremptories which may either lend support to or refute an inference of discrimination" are "other relevant circumstances" under *Batson*. *State v. Robbins*, 319 N.C. 465, 489, 356 S.E.2d 279, 293, *cert. denied*, 484 U.S. 918, 98 L.Ed.2d 226 (1987) (emphases added); *Smith*, 328 N.C. at 121, 400 S.E.2d at 724. After Askew was seated for examination, the prosecutor "asked the Clerk if there was a white male out there?" The prosecutor briefly questioned Askew and then peremptorily challenged her. Askew was excused and Phelps, apparently a white man, was called for examination and later became the jury foreperson. Standing alone, the prosecutor's peremptory challenge of Askew would not amount to a prima facie showing of purposeful discrimination. *Robbins*, 319 N.C. at 494-95, 356 S.E.2d at 296-97 (more required for prima facie case than merely showing defendant of cognizable racial group, members of defendant's race challenged, and no members of defendant's race served on jury). The prosecutor's question of the clerk prior to his examination of Askew, however, is a relevant circumstance which, when combined with the prosecutor's subsequent peremptory challenge of Askew, a black woman, raises an *inference* of purposeful discrimination on the prosecutor's part thereby establishing a prima facie showing.

The State argues, however, that the prosecutor adequately explained to the trial court the meaning of his question of the clerk, and because such a statement may refute an inference of discrimination, Sessoms failed to establish a prima facie showing

of purposeful discrimination. We disagree. Although a prosecutor's statements made *during* voir dire examination may refute an inference of discrimination, the prosecutor's explanatory statement in this case did not come during the voir dire examination; instead, it came during the trial court's hearing on the *Batson* motion. The prosecutor's statement may have adequately explained the meaning of his question, but the trial court should have considered the statement, not for whether the defendant made a prima facie showing, but for whether the prosecutor adequately rebutted the prima facie showing. The prosecutor's statement was in reality his race-neutral explanation for his alleged discrimination and should have been considered as such. To hold otherwise would essentially eliminate the second step of the *Batson* three-step process for evaluating claims of equal protection violations and also eliminate the defendant's opportunity to demonstrate that the prosecutor's explanation was a mere pretext.

The trial court's error in concluding that the defendant had failed to make out a prima facie case of discrimination, however, does not require a new trial. *See State v. Green*, 324 N.C. 238, 241, 376 S.E.2d 727, 728 (1989) (where trial court erred in conducting *Batson* hearing, case remanded for new *Batson* hearing); *cf. State v. Booker*, 306 N.C. 302, 313, 293 S.E.2d 78, 84 (1982) (where prejudicial error occurs on issue not fully resolved by trial court, appellate court may remand to trial court for appropriate proceedings to determine issue without new trial). Because we find no other error in Sessoms' trial, this case is remanded to the Superior Court of Hertford County where a judge presiding over a criminal session will determine whether the prosecutor's explanation for his peremptory challenge of Askew was race-neutral. If the trial court finds that the prosecutor's explanation was not race-neutral, Sessoms is entitled to a new trial. If the trial court finds that the prosecutor's explanation for his peremptory challenge was race-neutral, Sessoms shall be given an opportunity to demonstrate that the explanation was a mere pretext. If Sessoms meets his ultimate burden of proving purposeful discrimination, he is entitled to a new trial. If not, the trial court will order commitment to issue in accordance with the judgment appealed from and entered on 12 July 1990.

II

[2] All of the defendants argue they are entitled to a new trial because the trial court erred in denying their challenges for cause

of prospective juror Phelps. During jury selection, Phelps stated that he would hold it against the defendants if his chickens were to die during the trial and that he held a preconceived opinion as to the defendants' guilt. Furthermore, after jury selection had concluded, Phelps approached defense counsel and told them that he did not want to be on the jury and that he would hold them responsible for the deaths of his chickens.

"Challenges for cause in jury selection are matters in the discretion of the court and are not reviewable on appeal except for abuse of discretion." *State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987). Furthermore, according to our Supreme Court,

> [t]he trial court is not required to remove from the panel every potential juror who has any preconceived opinions as to the potential guilt or innocence of a defendant. . . . If the prospective juror, in the trial court's opinion, credibly maintains that he will be able to 'lay aside his impression or opinion and render a verdict based on the evidence presented in court,' . . . then it is not error for the court to deny defendant's motion to remove said juror for cause.

State v. Cummings, 326 N.C. 298, 308, 389 S.E.2d 66, 71 (1990) (citations omitted). In this case, the trial court concluded that Phelps could be a fair and impartial juror. The record reveals that Phelps stated that he could presume the defendants to be innocent until proven guilty beyond a reasonable doubt despite his preconceived opinions and that he would decide the case based on the evidence and the law as instructed by the trial court. Accordingly, the trial court did not abuse its discretion in refusing to excuse Phelps for cause.

III

[3] Hall and Sessoms argue that the trial court made prejudicial comments to defense counsel in front of the jury during jury selection thereby entitling them to a new trial. We disagree.

Regardless of whether the trial court erred by telling defense counsel during a bench conference "that I thought that the three of you asked asinine questions and that you repeated them until I felt the jurors were sick of them," Hall and Sessoms have not met their burden of showing how the trial court's comments prejudiced them. *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984) (trial court's remarks not grounds for new trial if remarks

could not have prejudiced defendant); *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361, *disc. rev. denied*, 327 N.C. 143, 394 S.E.2d 183 (1990) (defendant bears burden of showing prejudice). After jury selection had been completed, the trial court asked the jury whether any of them had overheard any statement made by the trial court to defense counsel during bench conferences, and no juror indicated that he or she had heard any such statement. Accordingly, because the jury did not hear the trial court's statement to defense counsel, Hall and Sessoms could not have been prejudiced by it.

IV

[4] Hall and Shoats argue that the trial court erred in submitting to the jury three separate conspiracy charges covering the period of 10 April 1989 through 31 May 1989 (Conspiracy I), and the periods of 10 April 1989 through 15 April 1989 and 23 April 1989 through 31 May 1989 (Conspiracies II), and in arresting judgment in Conspiracy I.

Where several offenses charged allegedly arise from the same transaction, and the offenses are mutually exclusive, a defendant may not be convicted of more than one of the mutually exclusive offenses. *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 167 (1990). In this case, a determination that the defendants entered into one agreement to commit a series of unlawful acts over a period of time is inconsistent with a determination that multiple agreements to commit the same series of acts over the same period of time were made. On the facts presented here, either one agreement was made or two agreements were made. Both views cannot exist at the same time. Therefore, the offenses of Conspiracies I and II are mutually exclusive offenses. Accordingly, the defendants cannot be convicted of both Conspiracy I and Conspiracies II. At trial, the prosecutor was apparently aware of this. He stated to the trial court,

> [i]f they are convicted of all three, it would be my position, now—and it will be my position if they are convicted of all three that they can be sentenced as—I would have no objection and would not ask for the Court but to sentence them on one and to arrest the judgment in the other two.

Although a defendant may not be convicted of mutually exclusive offenses arising from the same transaction, the State may

charge a defendant with both such offenses. *Id.* Such "offenses may be joined for trial when they are alleged to arise from the same act or transaction." *Id.* Furthermore, where, as here, there is substantial evidence tending to support Conspiracies I and II, the State is not required to elect between the mutually exclusive offenses. *Id.* at 579, 391 S.E.2d at 167.

> Indeed, if the evidence at trial conflicts, and some of it tends to show . . . [Conspiracy I] but other evidence tends to show that the same transaction amounted to . . . [Conspiracies II], the trial court should submit both charges for the jury's consideration. In doing so, however, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both.

Id. Here, the trial court did not give the required instruction, and the jury convicted the defendants of the mutually exclusive offenses.

Where the trial court fails to instruct the jury that it may convict the defendant of only one of the mutually exclusive offenses, the jury returns guilty verdicts on the mutually exclusive offenses, and the trial court consolidates the offenses for a single judgment, the defendant is entitled to a new trial. *Id.* at 580, 391 S.E.2d at 167-68. A defendant is not prejudiced, however, where the trial court fails to give the required instruction, the jury returns guilty verdicts on the mutually exclusive offenses, and the trial court vacates the judgment for the mutually exclusive offense providing the more serious punishment. *Cf. United States v. Daigle*, 149 F. Supp. 409, 414-15 (D.D.C.), *aff'd per curiam*, 248 F.2d 608 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 913, 2 L.Ed.2d 274 (1958) (where jury convicts defendant of mutually exclusive offenses, no prejudicial error if trial court vacates guilty verdict for mutually exclusive offense providing greater punishment). In this case, the mutually exclusive offenses providing the more serious punishment are Conspiracies II, and the trial court should have vacated the judgment for them. To the contrary, the trial court arrested judgment for Conspiracy I and entered judgments and two consecutive sentences for Conspiracies II. Accordingly, we vacate Hall's and Shoats' convictions for the 10 April 1989 through 15 April 1989 and the 23 April 1989 through 31 May 1989 conspiracies and remand with instructions to the trial court to enter judgments and sentences for the 10 April 1989 through 31 May 1989 conspiracy.

In summary,

Case No. 90-CRS-407 (Sessoms)—Remanded for *Batson* hearing; otherwise, no error.

Case Nos. 90-CRS-73 (Hall), 90-CRS-76 (Hall), 90-CRS-403 (Shoats), and 90-CRS-404 (Shoats)—Judgments vacated.

Case Nos. 90-CRS-1860 (Shoats) and 90-CRS-1864 (Hall)—Remanded for entry of judgments and sentences; otherwise, no error.

Chief Judge HEDRICK concurs.

Judge EAGLES concurs in the result only.

STATE OF NORTH CAROLINA v. CHARLES WILSON JEUNE

No. 9027SC1329

(Filed 5 November 1991)

1. **Criminal Law § 318 (NCI4th)— rape and kidnapping—joinder of defendants denied—no prejudice**

Although a defendant in a prosecution for rape and kidnapping contended that he was denied a fair trial because his brother was acquitted in a separate trial, defendant failed to include anything in the record from which it could be determined that the court abused its discretion by denying defendant's motion to consolidate.

Am Jur 2d, Trial § 1806.

2. **Criminal Law § 483 (NCI4th)— bailiff as witness—new trial**

A defendant in a prosecution for rape and kidnapping was granted a new trial where a State's witness served as bailiff during a portion of the trial. Although this case is factually similar to *State v. Macon*, 276 N.C. 466, to the extent that *Macon* may be construed as requiring a showing of actual prejudice, that requirement has been implicitly overruled by *State v. Mettrick*, 305 N.C. 383, and *State v. Wilson*, 314 N.C. 653. The deputy who testified here was a bailiff and

therefore an officer in charge of the jury; accordingly, prejudice to the defendant is conclusively presumed.

Am Jur 2d, Trial § 942.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 ALR3d 1012.

Judge GREENE dissenting.

DEFENDANT appeals from judgments entered 13 August 1990 by *Judge John M. Gardner* in LINCOLN County Superior Court. Heard in the Court of Appeals 25 September 1991.

Defendant was indicted and convicted of first-degree rape and first-degree kidnapping. He was sentenced to life imprisonment for the rape conviction. The first degree kidnapping charge was arrested and the defendant was sentenced to thirty years imprisonment for second degree kidnapping.

Briefly stated, the State's evidence tended to show that on 13 January 1990 Mrs. Linda Ward and her husband, Mr. Jim Ward, drove from their home in Lincoln County to a boxing match, a "Tuff Man Contest," in Hickory. Before leaving to go to the contest Mrs. Ward consumed "a couple of mixed drinks." She also consumed "a couple of beers" at the contest. During the drive home, Mr. and Mrs. Ward got into an argument. Approximately one mile from their home Mr. Ward stopped the car, got out, opened the hood, disabled the vehicle, and began walking home. Mrs. Ward was unable to start the car and let it roll off to the side of the road. She then began walking home. A few minutes later a four door burgundy Nova automobile passed by her and turned around. The defendant was seated in the passenger seat and his brother, Frederick Jeune, was driving. The defendant offered Mrs. Ward a ride which she accepted. The two men then drove Mrs. Ward past her turnoff and to a field out in the country where they undressed her and raped her. Frederick Jeune then forced her to perform fellatio on him. Mrs. Ward then dressed and the defendant drove her to a convenience store and let her out. Mrs. Ward ran into the store and told the clerk "[p]lease call the police. I've just been raped." Mrs. Ward later identified the defendant, his brother, and the car.

The defendant and Frederick Jeune testified for the defense. Both men admitted having sexual relations with Mrs. Ward, but contended that the conduct was consensual.

The defendant testified that when he saw Mrs. Ward standing on the roadside, he asked Mrs. Ward if she wanted a ride home. She answered "yes" and got into the back seat of the car. A few minutes later Mrs. Ward asked the defendant to get into the back seat with her. He did. The two began hugging and kissing and Mrs. Ward began disrobing. The defendant asked his brother to pull the car over, which he did. The defendant then had sexual intercourse with Mrs. Ward. Afterwards, the defendant saw Frederick Jeune get into the back seat with Mrs. Ward.

Frederick Jeune testified that after the defendant got out of the back seat, Mrs. Ward asked him if he wanted oral sex. He said yes and Mrs. Ward performed fellatio upon him. The two then engaged in sexual intercourse.

Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Clarence J. DelForge, III, for the State.

Brenda S. McLain for defendant-appellant.

EAGLES, Judge.

I

[1] In his first assignment of error the defendant argues that the trial court committed prejudicial error by failing to grant his motion to join his trial with the trial of his brother, Frederick Jeune. We find no prejudicial error.

> It is a well settled rule of law in this jurisdiction that the decision whether to try the defendants separately or jointly is ordinarily within the sound discretion of the trial judge and, absent an abuse of that discretion, will not be overturned on appeal. *State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976); *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976); *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968).

State v. Boykin, 307 N.C. 87, 90, 296 S.E.2d 258, 260 (1982).

Here, the defendant contends that he was denied a fair trial because his brother was acquitted of the charges of raping and

kidnapping Mrs. Ward in a separate trial. However, the defendant has failed to include anything in the record from which we could determine that the trial court abused its discretion by denying the defendant's motion to consolidate the two trials. This assignment is overruled.

II

[2] The defendant next argues that his rights under the Sixth and Fourteenth Amendments have been violated. Specifically, the defendant claims the trial court erred by failing to grant a mistrial on its own motion when a State's witness served as bailiff during a portion of the trial. We agree.

Initially, we note that the State argues that defendant's appeal on this issue should be dismissed because the defendant failed to properly preserve the question for appellate review. Assuming, *arguendo*, that the defendant failed to properly preserve this issue,

> [t]his Court may, . . . pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction. Rule 2 of the Rules of Appellate Procedure; *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963).

State v. Elam, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981). *See also State v. O'Neal*, 77 N.C. App. 600, 604, 335 S.E.2d 920, 923 (1985). In our discretion, we choose to address defendant's constitutional claims.

Deputy David Carpenter, an investigating officer, testified concerning the condition of the car in which the defendant and Mrs. Ward had intercourse. He testified that there were scuff marks on the "driver's side, rear passenger door window[,]" and that they "could be made by [a] small narrow [shoe] heel" like the one Mrs. Ward was wearing. He also testified that the back seat was displaced and that he found an earring underneath the back seat of the car. Mrs. Ward testified and identified the earring: "That's my earring I had on that night."

During the trial, Deputy Carpenter also acted as bailiff. After defense counsel brought this to the attention of the trial judge, the judge asked Deputy Carpenter what he had done. Deputy Carpenter told the judge that he had "held the gate open" for the jury; "opened the jury room door"; and "told them to take their seats and sit down." Deputy Carpenter also said that he

had acted as bailiff because he "was instructed by the sheriff to assist in the courtroom."

Though during trial defendant did not move for a mistrial, defendant argues that Deputy Carpenter's actions conveyed an appearance of impropriety which standing alone so affronts the traditional notions of due process and a fair trial that the defendant should be entitled to a new trial. Defendant relies on *State v. Mettrick*, 305 N.C. 383, 289 S.E.2d 354 (1982) and *State v. Wilson*, 314 N.C. 653, 336 S.E.2d 76 (1985). The State, however, argues the defendant is not entitled to a new trial and relies on the earlier Supreme Court decision in *State v. Macon*, 276 N.C. 466, 173 S.E.2d 286 (1970). After careful examination of these competing precedents, we agree with the defendant.

In *Macon*, two State witnesses, both Deputy Sheriffs, served as courtroom bailiffs over the defendant's objection. *Macon*, 276 N.C. at 470, 173 S.E.2d at 288. The Supreme Court stated, "a State's witness is disqualified to act as *custodian* or *officer in charge* of the jury in a criminal case. . . . Under such circumstances prejudice is conclusively presumed." *Id.* at 473, 173 S.E.2d at 290. However, after applying the facts of the case to the then existing case law, the Supreme Court held:

> The exposure of the jury to these bailiffs was brief, incidental, and without legal significance. Hence, defendant not only fails to show *actual prejudice*—he fails to show circumstances affording any reasonable ground upon which to attack the fairness of the trial or the integrity of the verdict. The only service of the bailiffs to the jurors was in "opening the door to send them out or call them in as occasion required." We hold on the facts in this record that defendant received a fair trial in a fair tribunal in keeping with basic requirements of Due Process. There is nothing to support the contention that his constitutional rights under the Sixth and Fourteenth Amendments have been violated.

Id.

Were *Macon* our only precedent our decision would be different, but twelve years later in *State v. Mettrick*, 305 N.C. 383, 289 S.E.2d 354 (1982), the Supreme Court again addressed the issue. In *Mettrick*, the Ashe County trial court ordered that a special venire of jurors be brought from another county. *Id.* at 384, 289

S.E.2d at 355. The Ashe County sheriff and one of his deputies transported the prospective jurors in two activity buses to Ashe County. After the jury was selected, the sheriff and his deputy continued to transport the jurors daily between counties. *Id.* Both officers were State's witnesses.

The Supreme Court stated:

> We have previously held that, where a witness for the State acts as a *custodian* or *officer in charge* of the jury in a criminal case, prejudice is conclusively presumed. *State v. Macon*, 276 N.C. 466, 473, 173 S.E.2d 286, 290 (1970); *Compare Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed. 2d 424, 85 S.Ct. 546 (1965). In such cases the appearance of a fair trial before an impartial jury is as important as the fact of such a trial. The integrity of our system of trial by jury is at stake. No matter how circumspect officers who are to be witnesses for the State may be when they act as custodians or officers in charge of the jury in a criminal case, cynical minds often will leap to the conclusion that the jury has been prejudiced or tampered with in some way. If allowed to go unabated, such suspicion would seriously erode confidence in our jury system. For this reason we have adopted the rule that prejudice is conclusively presumed in such cases.

Id. at 385, 289 S.E.2d at 356.

After examining the "factual indicia of custody and control" the Supreme Court determined that the sheriff and his deputy "acted as custodians or officers in charge of the jury. . . ." *Id.* at 386, 289 S.E.2d at 356. This raised a conclusive presumption of prejudice despite the fact that the evidence presented no hint of malice or misconduct by the officers. *Id.* The Court ordered a new trial.

The issue was most recently revisited in Justice Meyer's opinion for a unanimous court in *State v. Wilson*, 314 N.C. 653, 336 S.E.2d 76 (1985). There, "[t]he prosecuting attorney's wife was a courtroom officer and was the bailiff in charge of the jury." *Id.* at 655, 336 S.E.2d at 76. During a break in jury deliberations, she engaged in friendly conversation with the jury after two of the jurors told her they had seen her riding to and from work with her husband. *Id.* at 655, 336 S.E.2d at 76-77. The bailiff told the court that she did not attempt to influence the jury at any

time. *Id.* at 655, 336 S.E.2d at 77. Ordering a new trial Justice Meyer restated this bright line rule:

> This Court has held that where the custodian or officer in charge of the jury in a criminal case is a witness for the State, prejudice to the defendant is conclusively presumed and he is entitled to a new trial. (Citations omitted.)
>
> * * *
>
> The State contends that this situation differs from that in *Mettrick*, because in *Mettrick* the close association between the law enforcement officers and the jurors gave them an opportunity to bolster their personal credibility *as witnesses* and thus directly influence the case, whereas here the bailiff was not a witness in the case. This argument, however, overlooks the underlying rationale of the *Mettrick* decision. There, we said the appearance of a fair trial before an impartial jury is as important as the fact that a defendant actually receives such a trial. *State v. Mettrick*, 305 N.C. at 385, 289 S.E.2d at 356. We find this reasoning to be equally applicable here. Our jury system depends on the public's confidence in its integrity. We must zealously guard against any actions or situations which would raise the slightest suspicion that the jury in a criminal case had been influenced or tampered with so as to be favorable to either the State or the defendant. Any lesser degree of vigilance would foster suspicion and distrust and risk erosion of the public's confidence in the integrity of our jury system. . . . We wish to emphasize that there is absolutely nothing in the record to remotely suggest that the bailiff actually attempted to influence the jury in any manner. However, whether any tampering or attempted tampering took place is irrelevant. It is the *appearance* of the *opportunity* for such influence that is determinative.

Wilson, 314 N.C. at 655-656, 336 S.E.2d at 77.

We acknowledge that *Macon* is factually similar to the instant case. There, as here, "[t]he only service of the bailiffs to the jurors was in 'opening the door to send them out or call them in as occasion required.' " *Macon*, 276 N.C. at 473, 173 S.E.2d at 290. Even so, we do not believe that *Macon* controls here.

In oral argument there were contentions that *Macon* requires a showing of actual prejudice in order to warrant a new trial.

We note, however, *Macon* did not express such a requirement. In *Macon* the court stated:

> Hence, defendant not only fails to show *actual prejudice*—he fails to show circumstances affording any reasonable ground upon which to attack the fairness of the trial or the integrity of the verdict.

Macon, 276 N.C. at 473, 173 S.E.2d at 290. Nonetheless, to the extent that *Macon* may be construed as requiring a showing of actual prejudice, we believe that that requirement has been implicitly overruled by *Mettrick* and *Wilson*.

In oral argument contentions were also made that *Wilson* requires that a custodian or officer in charge of the jury be a *crucial* witness to raise a conclusive presumption of prejudice to the defendant. We disagree. In *Wilson* our Supreme Court stated:

> We hold that an immediate family member of either a prosecutor trying the case, a defendant, a defendant's counsel defending the case, or a crucial witness for either the prosecution or the defense is prohibited from serving as custodian or officer in charge of the jury in a criminal case.

Wilson, 314 N.C. at 656, 336 S.E.2d at 77. This holding addressed the issue of when, if ever, an immediate family member of a person involved in a criminal trial could serve as a custodian or officer in charge of the jury. The court held that an immediate family member of (1) a prosecutor trying the case, (2) a defendant, (3) a defendant's counsel defending the case, or (4) a crucial witness for the prosecution or the defense was prohibited from serving as custodian or officer in charge of the jury in a criminal case.

The rule governing witnesses serving as bailiffs was clearly stated in *Wilson*.

> [W]here the custodian or officer in charge of the jury in a criminal case is a witness for the State, prejudice to the defendant is conclusively presumed and he is entitled to a new trial. *State v. Mettrick*, 305 N.C. 383, 289 S.E.2d 354 (1982); *State v. Macon*, 276 N.C. 466, 173 S.E.2d 286 (1970). *See also Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed. 2d 424 (1965).

Wilson, 314 N.C. at 655, 336 S.E.2d at 77.

The issue here, then, is whether Deputy Carpenter was a custodian or an officer in charge of the jury. It is clear and the State concedes that "the *Wilson* Court described the courtroom bailiff as being [an] officer in charge of the jury. . . ." Deputy Carpenter was a bailiff and therefore an officer in charge of the jury. Accordingly, prejudice to the defendant is conclusively presumed.

The State argues, however, that *Macon* controls here because it is factually similar to the instant case. This argument overlooks the recent extension made by the *Wilson* Court. If followed, the State's argument would require us to reach an incongruous result. Under *Wilson* an immediate family member of a person involved in a criminal trial is prohibited from serving as a courtroom bailiff, even though that person is not a witness and does not testify. *Wilson*, 314 N.C. at 656, 336 S.E.2d at 77. However, under the State's argument a person would be allowed to serve as courtroom bailiff despite the fact that he is also a witness and actually testifies. *Macon*, 276 N.C. at 473, 173 S.E.2d at 290. In short, the State's construction of our case law erroneously holds that an appearance of impropriety is not created by a witness serving as a bailiff, while an appearance of impropriety is created by a family member serving as a bailiff. This is at best inconsistent. The State's argument would promote the very appearance of impropriety that our decisions have been trying to eliminate. We reject this construction of our case law and relying on *Wilson* and *Mettrick*, we remand for a new trial.

III

We do not reach the defendant's remaining assignments of error.

New trial.

Chief Judge HEDRICK concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that our Supreme Court has adopted a *per se* rule that whenever a person serves as a bailiff in a criminal trial and testifies for the state in that trial "prejudice to the defendant is conclusively presumed."

As the majority has stated, our Supreme Court has enunciated a "bright line" rule which applies to this case.

> [W]here the custodian or officer in charge of the jury in a criminal case is a witness for the State, prejudice to the defendant is conclusively presumed and he is entitled to a new trial.

State v. Wilson, 314 N.C. 653, 655, 336 S.E.2d 76, 77 (1985); *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982); *State v. Macon*, 276 N.C. 466, 473, 173 S.E.2d 286, 290 (1970). In *Macon*, our Supreme Court concluded that because the bailiffs in the defendant's trial did not act as custodians or officers in charge of the jury, the "defendant received a fair trial in a fair tribunal in keeping with basic requirements of Due Process." *Id.* at 473, 173 S.E.2d at 290. The Court determined that the bailiffs did not act as custodians or officers in charge of the jury because they "were not in the presence of the jurors outside the courtroom, had no communication at any time with them, and had no custodial authority over them." *Id.* Instead, the bailiffs only opened the door to send the jury out and called them back when required. *Id.*

In *Mettrick*, our Supreme Court refined the analysis employed by the Court in *Macon* stating that our courts should look to "factual indicia of custody and control," that is, "we must look to the relationship existing in fact between the witness for the State and the jurors in any given case in order to determine whether the witness has acted as a custodian or officer in charge of the jury so as to raise the conclusive presumption of prejudice." *Mettrick*, 305 N.C. at 386, 289 S.E.2d at 356. In *Mettrick*, the Court concluded that the sheriff and his deputy had acted as custodians or officers in charge of the jury because they had been alone with the jurors for hours as they drove the jurors in a bus through the mountains, they had custody over the jurors during "protracted periods of time with no one else present," and "the jurors' safety and comfort were in the officers' hands during these periods of travel." *Id.*

In *Wilson*, our Supreme Court, citing *Macon* and *Mettrick* for the "bright line" rule, expanded the scope of *Macon* and *Mettrick* by holding that the "bright line" rule also applies where the *custodian or officer in charge of the jury* is an immediate family member of the prosecuting attorney, the defendant, the defendant's counsel, or a crucial witness. *Wilson*, 314 N.C. at 655-56, 336 S.E.2d at 77. Under *Wilson*, if a bailiff is both the custodian or officer in charge of the jury *and* an immediate family member of one of

these trial participants, prejudice to the defendant is conclusively presumed, even though the bailiff does not testify for the state. In *Wilson*, the Court concluded that the bailiff, who was the prosecutor's wife, was also the officer in charge of the jury. *Id.* at 655, 336 S.E.2d at 76-77. She spoke to a juror during a break in the jury's deliberations. During that conversation, the juror told the bailiff that she had seen the bailiff driving home with the prosecutor after work. Another juror told the bailiff that she too had seen the bailiff and the prosecutor driving to work together. The bailiff then had a friendly conversation with those jurors about the fact that they were " 'nearly neighbors and didn't even know it.' " *Id.* at 655, 336 S.E.2d at 77. Contrary to the majority's assertion, the Court did not abandon the "factual indicia" analysis of *Mettrick* and assume that every bailiff is necessarily an officer in charge of the jury. Although implicitly done, the *Wilson* Court analyzed the bailiff's relationship with the juror consistent with the "factual indicia" analysis of *Mettrick* in reaching the conclusion that the bailiff was also an officer in charge of the jury. Because *Macon* and *Mettrick* have not been overruled, explicitly or implicitly, our courts must still use the "factual indicia" analysis to determine whether a bailiff has acted as a custodian or officer in charge of the jury.

As the majority acknowledges, the facts of *Macon* are virtually identical to the facts of this case. The record in this case shows that on one occasion during one day of a three-day trial, the bailiff "held the gate open" for the jury, "opened the jury room door," and "told them to take their seats and sit down." The bailiff had no other communication with any of the jurors. The relationship between the bailiff and the jurors does not compel a conclusion that the bailiff was the custodian or officer in charge of the jury. As in *Macon*, "[t]he exposure of the jury to . . . [the bailiff] was brief, incidental, and without legal significance." *Id.* at 473, 173 S.E.2d at 290.

Contrary to the majority's position, there is nothing inconsistent about the holdings in *Macon*, *Mettrick*, and *Wilson*. Because "the appearance of a fair trial before an impartial jury is as important as the fact that a defendant actually receives such a trial," our Supreme Court's primary goal in deciding *Macon*, *Mettrick*, and *Wilson* has been to maintain and promote public confidence in the integrity of our jury system by guarding "against any actions or situations which would raise the slightest suspicion that the

jury in a criminal case had been influenced or tampered with so as to be favorable to either the State or the defendant." *Wilson*, 314 N.C. at 656, 336 S.E.2d at 77; *Mettrick*, 305 N.C. at 385, 289 S.E.2d at 356. Therefore, the defendant in a criminal trial is conclusively presumed to have suffered prejudice where (1) an immediate family member of either the prosecuting attorney, the defendant, the defendant's counsel, or a crucial witness serves as the custodian or officer in charge of the jury, *Wilson*, 314 N.C. at 656, 336 S.E.2d at 77, and where (2) "a witness for the State acts as a *custodian* or *officer in charge* of the jury . . . ." *Mettrick*, 305 N.C. at 385, 289 S.E.2d at 356. This is so because of the appearance that the jury has been influenced or tampered with in some way by the immediate family member/witness-custodian/officer in charge of the jury who, by definition, closely associates with the jury before or during the trial. *Gonzales v. Beto*, 405 U.S. 1052, 1056, 31 L.Ed.2d 787, 789 (1972); *Turner v. Louisiana*, 379 U.S. 466, 473, 13 L.Ed.2d 424, 429 (1965); *Wilson*, 314 N.C. at 656, 336 S.E.2d at 77; *Mettrick*, 305 N.C. at 385-86, 289 S.E.2d 356; *Macon*, 276 N.C. at 473, 173 S.E.2d at 290; Annotation, *Propriety And Prejudicial Effect, In Criminal Case, Of Placing Jury In Charge Of Officer Who Is A Witness In The Case*, 38 A.L.R.3d 1012, 1015 (1971) (general rule that mere supervision of jury by witness-bailiff without more is not improper). If, however, the bailiff is not the custodian or officer in charge of the jury, which essentially means that the bailiff does not closely associate with the jury before or during the trial, then the conclusive presumption of prejudice does not apply when the bailiff happens to be an immediate family member of a participant in the trial or testifies for the state.

Accordingly, I would not grant the defendant a new trial on the grounds asserted by the majority. Furthermore, because the defendant's remaining assignments of error are without merit, I find no error in the defendant's trial.

I dissent.

DONNA R. POWERS v. CHARLES N. PARISHER

No. 9026SC1306

(Filed 5 November 1991)

1. **Process § 9.1 (NCI3d); Divorce and Separation § 451 (NCI4th)— child support—New Mexico defendant—personal jurisdiction**

The trial court did not err in a child support action by finding personal jurisdiction over defendant, a New Mexico resident, where defendant obligated himself to pay child support under a non-judicial separation agreement in 1981; the parties increased the monthly payment in 1983; and plaintiff's action was brought pursuant to N.C.G.S. § 50-13.4(a) and sought an original award of child support. Plaintiff's action met the statutory requirements of N.C.G.S. § 1-75.4(12) in that the action was brought under Chapter 50 and plaintiff's action arises out of the marital relationship within this State, even though plaintiff moved for a time to Florida, and constitutional due process requirements are satisfied by the extent and quality of defendant's contacts with North Carolina and the significant connection between those contacts and plaintiff's present action.

Am Jur 2d, Divorce and Separation § 243; Process §§ 173, 175, 178.

2. **Divorce and Separation § 451 (NCI4th)— child support—jurisdiction—findings—supported by the evidence**

The trial court properly concluded under the facts that defendant had sufficient purposeful contacts with North Carolina to satisfy due process requirements where it could reasonably be inferred that the parties' separation agreement as amended is a North Carolina contract governed by North Carolina law. The actual birthplaces of the children and the precise frequency of defendant's visits to North Carolina are inconsequential factors in light of the undisputed evidence of defendant's substantial, long-term contacts with North Carolina and, though not essential, defendant's purchase of property in North Carolina.

Am Jur 2d, Divorce and Separation § 243.

3. Divorce and Separation § 458 (NCI4th)— original action for child support—pending divorce action—no abatement

There was no abatement of plaintiff's action for child support, even though there had been a prior divorce, where the divorce complaint did not ask the court to review the question of child support and the divorce judgment did not even allude to the parties' separation agreement. Defendant's divorce complaint contained allegations of the names and ages of the children, as required by N.C.G.S. § 50-8, and mentioned a separation agreement, but did not place the question of child support in issue and did not meet the tests of a plea in abatement. N.C.G.S. § 50-13.5(f).

Am Jur 2d, Divorce and Separation §§ 1092, 1093.

4. Discovery and Depositions § 45 (NCI4th)— child support—requests for documents concerning financial status—protective order denied

The trial court erred in a child support action by granting plaintiff's motion to compel document production and denying defendant's motion for a protective order where the scope of plaintiff's discovery request was not reasonable when viewed from the proper perspective of determining defendant's current ability to pay the support reasonably needed by the children.

Am Jur 2d, Depositions and Discovery §§ 344, 345; Divorce and Separation § 344.

APPEAL by defendant from order entered 12 September 1990 by *Judge Marilyn R. Bissell* in MECKLENBURG County District Court. Heard in the Court of Appeals 18 September 1991.

Hicks, Hodge and Cranford, P.A., by Christy T. Mann and Terri L. Young, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for defendant-appellant.

PARKER, Judge.

Plaintiff is a resident of North Carolina and the former wife of defendant, who currently resides in New Mexico. Plaintiff instituted this action on 5 December 1989 in Mecklenburg County

District Court to obtain a judicial order for the support of the two minor children of the parties' marriage. The Parisher family lived in North Carolina from 1967 until the parties' divorce in this State in 1982.

Defendant left North Carolina in 1983. He was served with the complaint and summons in this action at a temporary business address in Salt Lake City, Utah. In response to plaintiff's complaint, defendant moved to dismiss pursuant to Rules 12(b)(1), (2), (4), (5) and (6) of the North Carolina Rules of Civil Procedure for lack of subject matter and personal jurisdiction, insufficiency of process and service of process and failure to state a claim upon which relief can be granted. The court denied defendant's motion to dismiss. Defendant also moved for a protective order under Rule 26(c) against plaintiff's request for production of financial documents; the trial court denied defendant's motion and granted plaintiff's motion to compel defendant to produce the requested documents. Defendant appeals from the trial court's adverse rulings. On 4 September 1991 defendant also filed a motion to amend the record on appeal, which this Court denied.

[1] Defendant first contends the trial court erred in finding personal jurisdiction over defendant, a New Mexico resident. We disagree. Under a non-judicial separation agreement dated 5 June 1981, defendant obligated himself to pay child support. On 2 February 1983 the parties modified the support portion of their agreement by increasing the monthly payment to $300.00 per child. Thus, although plaintiff's complaint prayed for "an increase in child support based upon a substantial change in circumstances," plaintiff's action was in fact brought pursuant to N.C.G.S. § 50-13.4(a), which provides that "[a]ny parent . . . having custody of a minor child . . . may institute an action for the support of such child." Defendant concedes that plaintiff is asking "the Court to enter an original award of child support." A court must have personal jurisdiction over the defendant in an action for child support. *Johnson v. Johnson*, 14 N.C. App. 378, 188 S.E.2d 711 (1972); N.C.G.S. § 50-13.5(c)(1).

In support of his argument that the trial court lacked *in personam* jurisdiction, defendant contends that (i) no statutory basis for long-arm jurisdiction exists in this case under N.C.G.S. § 1-75.4 and (ii) in any event, the court's exercise of personal jurisdiction offends the constitutional requirement of minimum contacts with this State. Defendant correctly states the two-step analysis "to

determine whether personal jurisdiction may be exercised over a foreign defendant." *Tompkins v. Tompkins*, 98 N.C. App. 299, 301, 390 S.E.2d 766, 767 (1990). Contrary to defendant's arguments, however, the trial court properly found that it had personal jurisdiction in this case.

The applicable statutory ground for personal jurisdiction is subsection 12 of our long-arm statute:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person . . . under any of the following circumstances:
>
> . . . .
>
> (12) Marital Relationship.—In any action under Chapter 50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State.

N.C.G.S. § 1-75.4(12) (1983). We hold that plaintiff's action meets the dual requirements of subsection 12.

First, plaintiff's action is brought "under Chapter 50." As already mentioned, plaintiff seeks an initial judicial determination of child support, N.C.G.S. § 50-13.4(a), and not a court-ordered modification of the parties' amended separation agreement. The existence of a valid separation agreement relating to child support or custody "does not prevent one of the parties" "from instituting an action for a judicial determination of those same matters." *Winborne v. Winborne*, 41 N.C. App. 756, 760, 255 S.E.2d 640, 643, *disc. rev. denied*, 298 N.C. 305, 259 S.E.2d 918 (1979). Further, N.C.G.S. § 50-13.4 is available to this plaintiff, as defendant's prior action for absolute divorce "was filed on or after 1 October 1981." *Cf. Schofield v. Schofield*, 78 N.C. App. 657, 659, 338 S.E.2d 132, 134 (1986).

Second, plaintiff's action "arises out of the marital relationship within this State." Plaintiff states, and the trial court found, that the parties' marriage took place in North Carolina in 1967. Defendant did not assign error to that finding. Nor did defendant contest the finding that the family resided in North Carolina from 1967 up through the date of absolute divorce, 19 July 1982. Both children were born during the 1970s and presently reside in Mecklenburg

County with their mother. For the period 1988-89, the mother and the parties' children lived in Florida. On the ground that plaintiff moved for a time to Florida, defendant contends that the marital relationship within this State "is *not* the source of this action." We do not agree with defendant's interpretation of the legal significance of plaintiff's temporary move to Florida. The record shows that the family spent at least fifteen years domiciled in North Carolina; and, since the divorce in 1982, plaintiff and her children have also resided almost continuously in this State. On these facts the trial court properly concluded that the statutory requirements for personal jurisdiction over defendant were satisfied.

In addition to the statutory basis for the assertion of *in personam* jurisdiction, the trial court's exercise of jurisdiction must also satisfy constitutional due process requirements, *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985), in order that the maintenance of the action not offend "traditional notions of fair play and substantial justice." *International Shoe v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945). Defendant argues that the trial court was incorrect in its conclusion of law that "defendant has sufficient minimum purposeful contacts with the State of North Carolina to establish in personam jurisdiction." This argument is also without merit, given the evidence in the record of defendant's extensive contacts with this State.

In assessing the particular facts of each case, courts consider factors such as:

> (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience.

Fraser v. Littlejohn, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989) (citing *Marion v. Long*, 72 N.C. App. 585, 325 S.E.2d 300, *disc. rev. denied and appeal dismissed*, 313 N.C. 604, 330 S.E.2d 612 (1985)). In appropriate cases the court will look for "some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the forum state's laws." *Buck v. Heavner*, 93 N.C. App. 142, 145, 377 S.E.2d 75, 77-78 (1989) (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 1298 (1958)).

In this case we need not go beyond an examination of the extent and quality of defendant's contacts with North Carolina and the significant connection between those contacts and plaintiff's present action. Defendant having failed to assign error to the finding that the parties and their two children resided in North Carolina from 1967 through 1982, a period co-extensive with defendant's marriage to plaintiff, defendant is bound by this finding on appeal. N.C.R. App. P. 10(a); *Williams v. Williams*, 97 N.C. App. 118, 387 S.E.2d 217 (1990).

Thus, "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court [in North Carolina]." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L.Ed.2d 490, 501 (1980). This case is quite unlike the cases in which a plaintiff's unilateral acts in this State are the sole basis for the court's assertion of personal jurisdiction over a non-resident defendant. The factual differences between this case and *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985), are striking. In *Miller* our Supreme Court held that a State court could not constitutionally exercise personal jurisdiction over defendant father in a 1982 child support action where: the parties married in Illinois; their child was born in Illinois; mother and child moved to North Carolina some time after a 1972 divorce; defendant had never lived in North Carolina and never purchased property in the State; and defendant merely mailed support payments to this State and visited his child in North Carolina approximately six times during a nine-year period.

[2] Given our conclusion that the trial court had personal jurisdiction over defendant, we examine only briefly defendant's specific assignments of error to the trial court's factual findings that (i) two children were born of the marriage in North Carolina; (ii) the parties entered into separation agreements in North Carolina; and (iii) "defendant regularly visits the State of North Carolina to see his family as well as visit with the minor children." Defendant argues that there is no evidence in the record to support these findings. We disagree.

Defendant's verified divorce complaint, an exhibit in the record on appeal, gives the names and birth dates of the two children born of the marriage with plaintiff and references "a Separation Agreement dated June 5, 1981." An affidavit filed by defendant in Mecklenburg County District Court on 9 April 1990 repeats

the names and birth dates of the two children, 1974 and 1977 respectively, and avers defendant's consistent and faithful compliance with monthly support payments for the children as "set forth in our agreement of February 2, 1983." Hence defendant's own evidence is consistent with the more detailed references to the separation agreements in plaintiff's complaint in this action. Moreover, considering (i) the record evidence that the parties resided in North Carolina at the time of their divorce, (ii) the lack of any evidence in the record that the parties executed their separation agreement and its amendment outside North Carolina and (iii) the absence of any reason they would have done so, we can reasonably infer that the parties' separation agreement as amended is a North Carolina contract governed by North Carolina law.

The actual birthplaces of the children and the precise frequency of defendant's visits to North Carolina are inconsequential factors, in light of the undisputed evidence of defendant's substantial, long-term contacts with North Carolina. We also note that plaintiff showed defendant purchased property in Mecklenburg County in 1983, although that fact is not essential to our holding. Under all these facts, the trial court properly concluded that defendant had sufficient purposeful contacts with North Carolina to satisfy due process requirements.

[3] In his second assignment of error, defendant presents his theory that the divorce action he filed in Mecklenburg County in 1982 is still pending and that plaintiff, therefore, cannot bring a second action in the same cause. Defendant consequently assigns error to the trial court's conclusions that "[t]here is no child custody or child support action pending in any other cause" and that the issue of support "was not raised in the 1982 divorce action." Defendant argues that his prior divorce action placed the question of child support at issue with the results that (i) the original divorce court retains jurisdiction over that question and (ii) the present independent action by his wife should, therefore, have been dismissed under a theory of abatement. We disagree.

> "The 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 this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?"

Clark v. Craven Regional Med. Authority, 326 N.C. 15, 21, 387 S.E.2d 168, 172 (1990) (citations omitted). As discussed hereafter, defendant's assertion that his 1982 divorce complaint placed the question of child support at issue is in conflict with existing case law construing the relevant statute, N.C.G.S. § 50-13.5(f). Defendant has not shown the identity of subject matter, issues involved and relief requested under the standard tests applied to a plea in abatement.

N.C.G.S. § 50-13.5(f), enacted in 1967, is the venue provision for a child support action. It includes the following language:

> If an action for . . . divorce . . . has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action.

N.C.G.S. § 50-13.5(f) (1987).

The seminal case interpreting this statutory provision is *In re Holt*, 1 N.C. App. 108, 160 S.E.2d 90 (1968). *Holt* held that N.C.G.S. § 50-13.5(f) modified the prior rule that a court trying a divorce action ordinarily obtained and retained "exclusive jurisdiction of custody and support of children . . . where no custody or support questions [were] raised prior to, or determined in, the final judgment in the divorce action." *Id.* at 110-111, 160 S.E.2d at 92 (italics omitted); *see also Johnson v. Johnson*, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

In *Holt* the husband's complaint for divorce contained no prayer for custody or child support. Similarly, defendant's 1982 action for divorce in this case contained only the prayer "that the marriage of the parties be dissolved and that he be granted an absolute divorce." In *Holt*, as in this case, the wife filed no answer or crossclaim, so that no responsive pleading raised any additional issues. Finally, the final judgment of divorce in *Holt* made no mention of custody or child support, exactly like the present defendant's divorce judgment. On these facts the *Holt* Court held that the support and custody issues had "not been brought to issue or determined," thus permitting the former wife to file an independent proceeding for child support.

Despite the clarity of the holding in *Holt*, defendant argues that the following paragraph in his complaint for divorce brought child support to issue:

> There were two children born of the marriage between Plaintiff and Defendant, namely, Brandon Chas Parisher, born February 2, 1974 and Courtney Anne Parisher, born February 13, 1977. The children are in the custody of Defendant and Plaintiff is providing for their support under the provisions of a Separation Agreement dated June 5, 1981.

Allegations of the names and ages of any children of a party seeking divorce in North Carolina are required by N.C.G.S. § 50-8, in order that the court may protect the interests of such children if the parties have failed to do so. *Jones v. Jones*, 20 N.C. App. 607, 202 S.E.2d 279, *cert. denied*, 285 N.C. 234, 204 S.E.2d 23 (1974). Followed to its logical conclusion, defendant's argument—based as it is on a simple mandatory averment concerning children—would mean that every divorce complaint would place the question of child support at issue where the parties had minor children.

Such a conclusion is inconsistent with our case law. In *Wilson v. Wilson*, 11 N.C. App. 397, 181 S.E.2d 190 (1971), this Court held that child support had not been brought to issue or determined under the following facts. The divorce complaint and answer raised "certain issues," *id.* at 399, 181 S.E.2d at 191; but the divorce judgment expressly stated that " 'the parties have disposed of all matters at issue by a separation agreement and the sole matter that remains to be determined in this action is [their] divorce,' " *id.* at 398, 181 S.E.2d at 191. In the present case, the judgment of divorce contained findings only of then-plaintiff's residency in North Carolina, his marriage to Donna Parisher (now Powers) and a continuous separation of the parties for more than one year. The sole relief in the decree was dissolution of the parties' marriage, just as in *Wilson* and *Holt*; and, as in both those cases, that was the only relief sought by defendant in his prior divorce action.

Further, in defendant's divorce decree, there is not even any mention, let alone an incorporation of, the parties' separation agreement, unlike the decree in *Wilson*, which recited:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the bonds of matrimony . . . are hereby dissolved . . . [and]

> that the plaintiff shall have the custody of the minor children in accordance with the amended separation agreement heretofore mentioned . . . ."

Id. Despite this express allusion to the parties' separation agreement, the *Wilson* Court held that the prior divorce action did not place the question of child support at issue. The reasoning in *Wilson* applies in the present case.

> The judgment is completely silent as to support of the children and does not even refer to any such provision in the separation agreement. . . . The judgment refers to a separation agreement and an amended separation agreement, but contains nothing by which any separation agreement could be identified as to date or content. Certainly, the separation agreements referred to are not incorporated in the divorce judgment.

Id. at 399, 181 S.E.2d at 191. Based on these observations in *Wilson* we also hold that defendant's mere mentioning of "a Separation Agreement dated June 5, 1981" in his divorce complaint was insufficient to raise the issue of child support. As defendant's divorce complaint did not ask the divorce court to review the question of child support and as the divorce judgment did not even allude to the parties' separation agreement, we overrule defendant's second assignment of error.

[4] Finally, defendant assigns error to the trial court's refusal to issue a protective order against plaintiff's extensive requests for documents concerning defendant's financial status. The general rule is "that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480, *disc. rev. denied*, 293 N.C. 589, 239 S.E.2d 264 (1977). We hold that it was an abuse of discretion not to have granted defendant some relief under Rule 26(c) of the North Carolina Rules of Civil Procedure in this case, on the ground that plaintiff's requests for discovery under Rule 34 far exceed the scope of financial documents relevant to plaintiff's action and are, therefore, unduly burdensome. Absent relevance, plaintiff cannot possibly establish the necessity for many of the documents sought in this case. *See Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 273, 312 S.E.2d 905, 907 (1984) (litigants not permitted to engage "in mere fishing expeditions").

Plaintiff requests copies of all these materials for each of the past five years and the current year to date, where applicable: defendant's federal and State income tax returns; financial statements; "[a]n itemization and all written proof" of income; an itemization of all money received "from any and all sources," other than income; documents showing ownership of any realty or personalty; "[a]ll written documents illustrative of all tangible [sic] assets" including "stocks, bonds, mutual funds, account statements from brokerage firms, certificates of deposit, and the like"; "[a]ll your checking account records," including "monthly account statements, the checkstub book and all cancelled checks"; "[a]ll savings account records," including "all deposit slips, passbooks, withdrawal slips, and any other documents related to maintenance of the savings account"; and evidence of debt. Plaintiff's position that all such documents are "necessary" is untenable.

Plaintiff's position is untenable because the relevant inquiries in an action under N.C.G.S. § 50-13.4(a) are "the reasonable needs of the child" and the parties' present, relative financial abilities to contribute to those needs. N.C.G.S. § 50-13.4(c).

> When a motion is made to modify the child support provisions of a separation agreement which has not previously been incorporated into an order or judgment of the court, the court is called upon, for the first time, to exercise its authority to see that the reasonable needs of the child are provided for commensurate with the abilities of those responsible for the child's support. . . . [T]he moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing.

Boyd v. Boyd, 81 N.C. App. 71, 76, 343 S.E.2d 581, 584-85 (1986) (hence evidence of change of circumstances "is not an absolute requirement to justify an increase" in support).

Ordinarily the ability of the supporting spouse to pay child support is determined by the amount that parent is earning at the time of the court's award. *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985); 3 R. Lee, *North Carolina Family Law* § 229, at 121 (4th ed. 1981). While the trial court's thinking in approving plaintiff's discovery requests is not apparent from the record, the court found that plaintiff's request for production was "reasonable . . . in scope." The scope of plaintiff's discovery request is, however, not reasonable, when viewed from the proper perspective of deter-

mining defendant's current ability to pay the support reasonably needed by the children.

For the foregoing reasons, we affirm the trial court's assertion of personal jurisdiction over defendant and its determination that the theory of abatement was not applicable to these facts. We reverse, however, the trial court's orders granting plaintiff's discovery motion to compel document production and denying defendant's motion for a protective order under Rule 26(c) and remand for reconsideration, consistent with this Court's opinion, of defendant's motion to limit the scope of discovery.

Affirmed in part; reversed and remanded in part.

Judges JOHNSON and EAGLES concur.

IRENE H. CHURCH, EMPLOYEE-PLAINTIFF v. BAXTER TRAVENOL LABORATORIES, INC., EMPLOYER-DEFENDANT, AND AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER-DEFENDANT

No. 9010IC1268

(Filed 5 November 1991)

1. **Master and Servant § 55.3 (NCI3d) — workers' compensation — shoulder injury — new conditions of employment**

The Industrial Commission correctly concluded that plaintiff suffered an injury by accident where plaintiff was injured while lifting bags of intravenous solution five working days after being transferred to that position after working about five years as an accounting clerk, which did not involve lifting. Plaintiff was not yet proficient in her new department and was not performing her usual work routine at the time of the injury.

Am Jur 2d, Workmen's Compensation §§ 227, 228.

2. **Master and Servant § 68.4 (NCI3d) — workers' compensation — shoulder injury — thoracic outlet syndrome**

The Industrial Commission did not err by striking the deputy commissioner's finding that plaintiff's incapacity to earn wages after 11 November 1988 was due to Thoracic Outlet

Syndrome, a congenital disease, and that plaintiff did not suffer a compensable occupational disease, where the record viewed as a whole supports the Commission's conclusion that the parties did not try the TOS issue by consent.

Am Jur 2d, Workmen's Compensation §§ 296-298.

3. **Master and Servant § 69 (NCI3d)— workers' compensation— disability payments—75% credit to employer**

The Industrial Commission did not err in a workers' compensation action by reducing a 100% credit to defendant-employer for disability payments to 75% and awarding the remaining 25% to plaintiff as attorney's fees based on the full workers' compensation award. Access to competent legal counsel is a virtual necessity in contested workers' compensation cases today and this award complies with the requirements of *Foster v. Western-Electric Co.*, 320 N.C. 113, and is authorized by N.C.G.S. § 97-42, since all credit given in these circumstances is subject to the approval of the Industrial Commission.

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

Judge PARKER dissenting.

APPEAL by defendants from Opinion and Award filed 26 July 1990 by Commissioner J. Randolph Ward. Heard in the Court of Appeals 27 August 1991.

Cox, Gage and Sasser, by Robert H. Gage, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendant-appellants.

EAGLES, Judge.

Defendants appeal from a worker's compensation award given by the full Industrial Commission (Commission) which modified an earlier deputy commissioner's award. The evidence presented to the Commission is summarized below.

I

Plaintiff worked roughly five years as an accounting clerk for the defendant-employer prior to the time of the painful incident giving rise to this appeal. The position of accounting clerk involved

no lifting. Because of cutbacks, plaintiff was transferred to a production line job in defendant's filling department in early January 1988. Plaintiff's new duties included overwrapping and sealing bags of intravenous solutions, and then moving the bags to trays stacked in levels on a truck. Plaintiff's transfer to this position took place only five working days before her on-the-job injury. Plaintiff told her supervisor of the difficulties that she was having prior to her injury, however, the supervisor responded that she had no authority to modify plaintiff's job tasks.

The solution bags at the plant ranged in size from one-half to five liters. Plaintiff testified that the heavier bags were difficult to handle, since the liquid inside the "floppy" bags "jarred" her arms as she moved them. In each hand, plaintiff was expected to lift fluid bags totaling over ten pounds.

On 15 January 1988, plaintiff was trying to hoist filled bags to the top tray, above the level of her head. She experienced a sudden, unfamiliar pain, as though "someone had jerked" her right shoulder "out of socket." According to plaintiff's medical expert, "the best conclusion would be that [plaintiff] actually tore the rotator cuff at the moment she experienced that pain." Plaintiff had surgery twice and was out of work until 1 July 1988. In July, plaintiff returned to work and remained in the defendant's employ until 11 November 1988. This action was filed with the Commission on 1 November 1988.

On appeal to this Court, defendants assign error to the Commission's (i) finding and conclusion of law that plaintiff had suffered an "injury by accident" within the meaning of G.S. 97-2(6); (ii) determination that the issue of the compensability of plaintiff's TOS disability had not been tried by consent; (iii) decision to give defendants less than full credit for payments previously made to plaintiff under defendants' short term disability plan and then use this "withheld" money to pay plaintiff's attorney's fees. We will treat each of these contentions separately.

II

[1] Defendants first contend that plaintiff's injury was not compensable since for an injury to be characterized as one caused by "accident" and thereby compensable, the injury must involve more than the carrying on of the usual or routine duties of the employee. *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 116,

292 S.E.2d 763, 766 (1982). Defendants assert that plaintiff's injury was not the result of an accident since her injury occurred during her normal work routine. We disagree.

This Court has held that physical exertion may be "the precipitating cause" of an accidental injury required for compensability under G.S. 97-2(6). *See Hollar v. Montclair Furniture Co., Inc.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980). The facts in the present case closely resemble the facts in *Gunter v. Dayco Corp.*, 317 N.C. 670, 346 S.E.2d 395 (1986). *Gunter* involved physical exertion not required in an injured employee's previous desk job. Our Supreme Court asserted that:

> New conditions of employment to which an employee is introduced and expected to perform regularly do not become a part of an employee's work routine until they have in fact become routine. . . . New conditions of employment cannot become an employee's "regular course of procedure" or "established sequence of operations" until the employee has gained proficiency performing in the new employment and become accustomed to the conditions it entails.

Id. at 675, 346 S.E.2d at 398. Under this reasoning, we find that plaintiff, who had been employed by defendant for five years in an office job before her work-related injury and who testified that she was not yet proficient in defendant's filling department, was not performing her usual work routine at the time of accidental injury on her fifth day on the production line. The Commission's conclusion that the plaintiff suffered an injury by accident is accordingly upheld.

III

[2] The defendants' next argument is that the Commission erred in striking the deputy commissioner's finding that plaintiff's incapacity to earn wages after 11 November 1988 was due to Thoracic Outlet Syndrome (TOS), a congenital disease, and his related conclusion that plaintiff did not suffer a compensable occupational disease as defined by G.S. 97-52 and G.S. 97-53(13). In our belief, the evidence presented adequately supports the Commission's actions on this matter.

Subsequent to her injury in January 1988, plaintiff did some "light duty" work for defendant-employer. Finally, on 1 July 1988, after two operations, and in response to her doctor's suggestions,

plaintiff returned to her position on the production line. The plaintiff later discontinued her employment with the defendant on 11 November 1988 due to great pain in her shoulders.

In his deposition, Dr. Spencer (plaintiff's doctor) stated that in his opinion, plaintiff had torn her rotator cuff at the time of her January 1988 accident. According to Dr. Spencer, on 30 June 1988, plaintiff had "an excellent motion" and he urged her to return to work. Later, another doctor diagnosed plaintiff as having TOS. Plaintiff put on no other medical witnesses, nor did plaintiff present any detailed documentary evidence from the physician who diagnosed her TOS. The defendants themselves did not put on any evidence concerning TOS and the record discloses that in fact defendant's attorney twice objected to a line of questioning concerning TOS.

In her original filing dated 1 November 1988, plaintiff sought twenty weeks compensation *only* for temporary total disability following her previously discussed January injury. Plaintiff recovered from her January accident and returned to work in July, 1988. We recognize that plaintiff's evidence did probe the possible relationship between her initial injury and her battle with TOS after returning to work, however, the record viewed as a whole supports the Commission's conclusion that the parties did not try the TOS issue by consent.

IV

[3] Defendants' final contention is that the Commission had no authority to reduce the 100% credit for disability payments to 75%, and to award the remaining 25% to plaintiff as attorney's fees. The thrust of defendants' contention is that plaintiff's case is controlled by *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987). *Foster* concerned a situation in which an injured employee was awarded $7,598.16 from her employer's private insurer. Later the Industrial Commission entered a worker's compensation award in the amount of $6,741.96 and denied the employer *any* credit for the prior payment of $7,598.16. In reversing the Commission's conclusion our Supreme Court stated:

> [P]olicy considerations dictate that an employer such as defendant in this case, who has paid an employee's wage-replacement benefits at the time of that employee's greatest need, should not be penalized by being denied full credit for the amount

> paid as against the amount which was subsequently determined to be due the employee under workers' compensation.

Id. at 117, 357 S.E.2d at 673. We recognize *Foster*'s mandate, however, when *Foster* is read in view of G.S. 97-42 and policy considerations, the decision of the Commission must stand.

G.S. 97-42 dictates that any payments made by an employer to the injured employee during the period of her disability which 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 workers' compensation. *Foster* recognized that the Commission must not make a complete denial of the credit to the employer; however, that is not the situation here. In the instant case, the Commission decided to award a credit to the defendant-employer, albeit not a full 100% credit.

The Commission's justification for not awarding the full credit was more than adequate. Baxter Travenol's private insurer paid the plaintiff only $2,797.44; the Commission later awarded $3,769.79 to plaintiff. The difference between these awards was less than $1,000—a very small amount for any plaintiff to contest. In order to award attorney's fees of any significance, the Commission correctly calculated the fees on the basis of the total award instead of the $1,000 difference. As the Commission recognized, in contested workers' compensation cases today, access to competent legal counsel is a virtual necessity. If attorney's fees were allowed to be calculated from only the difference between the workers' compensation award and the private insurer's payment, then almost no attorney could afford to take a contested case where voluntary payments had already been made. Leaving injured employees without the representation they need to obtain the complete and total amount of their workers' compensation award would defeat the purposes of the Act. In fact, employers would be encouraged to contest liability and meanwhile make voluntary payments less than that required by the Workers' Compensation Act.

The Commission's award in its discretion of a 75% credit to defendant for payments made through its private insurer and the award of the remaining 25% to plaintiff to fund attorney's fees based upon the full workers' compensation award is well within the Commission's discretionary authority. The Commission's action compensated plaintiff's counsel for his essential legal services, and the award was within the Commission's authority to approve fee

payments pursuant to G.S. 97-90(c). The Commission's award allowed the defendant credit for payments that they had already made through their private insurer less only the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award. This award complies with the requirements of *Foster* and is authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. G.S. 97-42. The explicit language of G.S. 97-42 and the need to preserve the efficacy of the Workers' Compensation Act mandates our decision here affirming the award of the Industrial Commission.

Affirmed.

Judge JOHNSON concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

I respectfully dissent from that portion of the majority opinion affirming the reduction in the credit and the increased attorney's fee. The majority purports to recognize the mandate in *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), but then superimposes a different interpretation upon the language of N.C.G.S. § 97-42. Nothing in the Court's application of N.C.G.S. § 97-42 in *Foster* suggests that the Commission has any discretion to reduce the amount of an employer's credit. To the contrary, the Court specifically stated:

> [P]olicy considerations dictate that an employer such as defendant . . . should not be penalized by being denied *full* credit for the amount paid as against the amount which was subsequently determined to be due the employee under workers' compensation.

Id. at 117, 357 S.E.2d at 673 (emphasis added). Read in light of this language in *Foster*, the words in N.C.G.S. § 97-42 "subject to the approval of the Industrial Commission" do not import discretion to allow or disallow a credit in whole or in part, but rather authorize review by the Commission to assure that (i) the payment by the employer qualifies as a matter of law for a credit and

(ii) the amount deducted as a credit has in fact been paid to the employee by the employer.

In the present case the effect of the Commission's action was to award plaintiff a duplicative payment of twenty-five percent of the benefits received under the employer's sickness and disability plan in order to provide a pool of funds from which to pay plaintiff's legal fee. Discussing the policy considerations in *Foster* the Court stated:

> Finally, the Act disfavors duplicative payments for the same disability. We recognize also that allowing double recovery reduces the incentive to adopt private disability plans providing for immediate payment of benefits.

320 N.C. at 117, 357 S.E.2d at 673 (citation omitted).

Moreover, by allowing this duplicative payment to provide plaintiff's legal fee, the Commission indirectly taxed defendant employer with an attorney's fee award and thereby exceeded its statutory authority. The Commission specifically declined to assess plaintiff's legal fee as part of the costs under N.C.G.S. § 97-88 stating, "[W]e do not find here the lack of merit in the defendants' position that traditionally motivates the Commission to make a fee award under that section." *See Bowman v. Chair Co.*, 271 N.C. 702, 159 S.E.2d 378 (1967) (Absent specific statutory authority, the Commission has no power to award attorney's fee.).

The countervailing policy arguments espoused by the Commission may be worthy of consideration; however, certain statements made by the Commission to support its decision are not supported by any evidence in the record. For example the Commission stated:

> [W]e would note that employers create these plans out of motives other than covering possible compensation liability. Indeed, the credit is available only in instances the employer has paid other benefits believing compensation is not due. In most cases, the plans pay greater benefits than the Act requires for some period of time. As a matter of practical fact, many if not most employers recover money for their sickness and accident plans from their compensation carrier when the credit is allowed, and thus benefit financially from the success of plaintiff's counsel, at least in the short run.

To the extent these comments are intended to be findings of fact, the record is devoid of any evidence upon which to find them.

For the foregoing reasons, I vote to reverse the portion of the opinion and award reducing the credit in order to augment the attorney's fee award.

DELLA D. BAXLEY, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE CO., DEFENDANT

No. 9016SC885

(Filed 5 November 1991)

1. **Trial § 6.1 (NCI3d)— stipulation—medical expenses included in verdict—binding effect**

The parties could properly stipulate that the jury included $10,000 of plaintiff's medical expenses in its verdict for $100,000, and plaintiff is bound by that stipulation.

Am Jur 2d, Stipulations § 8.

2. **Insurance § 110.1 (NCI3d)— judgment against underinsured motorist—prejudgment interest—liability of underinsured motorist insurer**

Where plaintiff was awarded prejudgment interest in an action against an underinsured motorist, plaintiff's underinsured motorist insurer was liable for the prejudgment interest, up to its policy limits, on the amount of underinsured motorist coverage it paid to plaintiff pursuant to the judgment, since plaintiff's claim was grounded in tort rather than contract and constituted an "other action" within the meaning of N.C.G.S. § 24-5 (1985), and coverage was provided for damages which plaintiff is legally entitled to recover from the underinsured motorist.

Am Jur 2d, Automobile Insurance § 428.

APPEAL by plaintiff and defendant from a judgment entered 8 June 1990 by *Judge Coy F. Brewer* in ROBESON County Superior Court. Heard in the Court of Appeals 20 February 1991.

H. Mitchell Baker, III and Brent D. Kiziah for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley, Sherry C. McConnell and Peter A. Kolbe, for defendant-appellant.

LEWIS, Judge.

There are two primary questions presented to this Court on appeal in this declaratory judgment action: 1) was the defendant insurance company entitled to a credit for medical payments of $10,000.00 made to the plaintiff against the final jury verdict of $100,000.00, and 2) was the defendant obligated to pay any portion of the interest awarded to the plaintiff because the obligation falls on the primary carrier?

On 17 January 1987, Anita Brown, who was driving her car, hit a car in which the plaintiff, Della Baxley, was a passenger. Plaintiff Baxley suffered bodily injuries and incurred medical bills which have been stipulated to be in excess of $10,000.00. Allstate Insurance Company [Allstate] provided liability coverage for Brown in the amount of $25,000.00 per single person injury. Plaintiff Baxley had an insurance policy with the defendant Nationwide Mutual Insurance Company [Nationwide], providing limits of medical payment coverage of $10,000.00 and underinsured motorist coverage of up to $100,000.00.

On 22 August 1987, plaintiff Baxley filed a tort action against Brown for the personal injuries she suffered in the automobile accident. On 11 September 1987, the plaintiff received the maximum medical payment of $10,000.00 from defendant Nationwide. Allstate paid the plaintiff $25,000.00, the policy limit under Brown's policy. The defendant Nationwide also paid the plaintiff $25,000.00 which was deposited on 12 February 1988.

On 15 August 1988, an order was entered by a trial judge whereby Allstate and its attorney were released from any further obligation to Brown or to participate in the lawsuit between plaintiff Baxley and Brown.

The defendant Nationwide retained counsel for Brown and assumed primary responsibility for her defense. At the jury trial between Baxley and Brown, the plaintiff Baxley put on evidence that she had incurred at least $10,000.00 in medical expenses. In the jury instructions of that trial, the court asked the jury to consider compensatory damages, including medical expenses, when deciding the verdict. The jury rendered the following verdict which was reflected in the judgment filed 14 September 1988:

> What amount is the plaintiff, Della D. Baxley, entitled to recover of the defendant, [Brown]?

Answer: $100,000.00

BASED UPON THE FINDING OF FACT MADE BY THE JURY, IT IS THEREFORE ORDERED ADJUDGED AND DECREED that judgment be and is hereby entered against the defendant [Brown] in the amount of $100,000. Defendant [Brown] is further taxed with the costs of this action to include prejudgment interest from the date of filing on August 20, 1987, until paid. Defendant [Brown] is not required to pay interest on $25,000 which was delivered to plaintiff and endorsed on February 12, 1988.

On 13 December 1988, pursuant to this judgment, Nationwide paid the plaintiff an additional $65,000.00. Following the trial, the $25,000.00 that was paid by Allstate to the Clerk of Court was paid to the defendant in this case, Nationwide. The plaintiff filed this declaratory judgment action against the defendant Nationwide seeking a determination as to whether the defendant was entitled to a credit of $10,000.00 paid under its medical payments coverage against the final verdict of $100,000.00. The plaintiff also asked the court to determine whether the defendant Nationwide or the primary carrier, Allstate, was liable to the plaintiff for the court costs including prejudgment interest in the original action.

On 8 June 1990, the trial judge entered the following order:

1. That there was a contract obligation between Plaintiff and Defendant Nationwide Mutual Insurance Company regarding medical payment coverage and that, since there was not [sic] special jury verdict at the trial level regarding compensation for medical expenses incurred by the Plaintiff, Defendant Nationwide Mutual Insurance Company is not entitled to a credit for the medical payment made to Plaintiff under its underinsured motorist coverage. Therefore, Defendant Nationwide Mutual Insurance Company is obligated to pay an additional $10,000 to Plaintiff.

2. Defendant Nationwide Mutual Insurance Company as the underinsured motorist carrier, is not obligated to pay any portion of the interest awarded to Plaintiff Della D. Baxley against Anita Brown . . . because the obligation fails [sic] on the primary carrier, Allstate Insurance Company, and the original defendant, Anita Brown.

The plaintiff and defendant appeal from the order. The defendant appeals the trial court's holding that the defendant Nationwide

is not entitled to a credit for medical payment of $10,000.00 made to the plaintiff against the $100,000.00 verdict. The plaintiff appeals the trial court's finding that the defendant Nationwide is not obligated to pay any portion of the interest awarded to the plaintiff because the obligation falls on the primary carrier, Allstate. In the record on appeal, both parties stipulated:

> For purposes of appeal, the parties enter into the additional stipulation that the jury in the Tort Action found that the *$10,000 medical expenses incurred by Plaintiff Baxley* and paid by Nationwide were reasonable, proximately caused by Anita Brown, and *were specifically included on a dollar for dollar basis in the Judgment of $100,000.00 in the Tort Action.*

(Emphasis added).

I. Defendant's Appeal

[1] We must initially address the effect of the stipulation on the defendant's appeal. Generally, parties may stipulate as to matters which involve individual rights and obligations of the parties but may not stipulate as to what the law is. 83 C.J.S. *Stipulations* § 10 (1953). When parties stipulate as to a fact at trial and the stipulation is correctly certified, the parties are bound by their stipulation. *Starbuck v. Town of Havelock*, 255 N.C. 198, 199, 120 S.E.2d 440, 442 (1961). "It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact." *Moore v. Humphrey*, 247 N.C. 423, 430, 101 S.E.2d 460, 467 (1958) (citation omitted). As such stipulations are binding at the trial level, they are also binding at the appellate level. Here, the parties specifically stipulated that the jury included $10,000.00 of the plaintiff's medical expenses in the jury verdict for $100,000.00. We hold that the parties may stipulate to such a fact and therefore that the plaintiff is bound by that stipulation.

II. Plaintiff's Appeal

[2] The second question presented to this Court is whether the trial court erred in finding that the defendant Nationwide is not obligated to pay any portion of the interest awarded to the plaintiff because the obligation falls on the primary carrier, Allstate.

In the final judgment in the suit between Baxley and Brown, the trial judge taxed the costs of the action to Brown and specifical-

ly stated that the costs included prejudgment interest from the date of filing, on 20 August 1987, until paid. The judge further stated that Brown was not required to pay interest on the $25,000.00 which was delivered to the plaintiff and endorsed on 12 February 1988. The plaintiff Baxley then brought a declaratory judgment action to have the defendant in this case, Nationwide, pay the interest on the money owed to the plaintiff. The appeal is from that judgment involving plaintiff Baxley and defendant Nationwide. The interest at issue is that on the $65,000.00 already paid to plaintiff Baxley.

In the Nationwide policy, the uninsured motorist coverage (Part D), which includes the underinsurance coverage, states in pertinent part:

> We will pay *damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle* because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> 2. Property damage caused by an accident.

(Emphasis added). There is no specific mention of "interest" in the uninsured motorist provision.

The defendant Nationwide argues that because there is no mention of the defendant's obligation to pay costs or interest in that provision of the contract, and because the defendant Nationwide was not a defendant in the underlying tort action, Nationwide is not obligated to pay interest. We disagree.

In *Ensley v. Nationwide Mutual Ins. Co.*, 80 N.C. App. 512, 342 S.E.2d 567 (1986), *cert. denied*, 318 N.C. 414, 349 S.E.2d 594 (1986), this Court addressed whether a plaintiff's uninsured motorist coverage included the payment of interest on a judgment for the plaintiff. The court in that case looked to N.C.G.S. § 24-5 which at that time stated:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims to cover liability insurance.

N.C.G.S. § 24-5 (Supp. 1981) (rewritten effective 1 October 1985, Session Laws 1985, ch. 214). The *Ensley* court held that "G.S. 20-279.21(b)(3) requires that every motor vehicle liability insurance policy issued in North Carolina provide coverage 'for protection of persons insured thereunder who are *legally entitled to recover damages* from owners or operators of uninsured motor vehicles. . . .' " *Id.* at 514-15, 342 S.E.2d at 569. Citing *Brown v. Lumbermens Mutual Casualty Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974), the court stated that, although the uninsured motorist endorsement is conditional and derivative, because the plaintiff must first show he is legally entitled to recover damages, despite the contractual relationship, the insured action is "actually one for the tort allegedly committed by the uninsured motorist." *Ensley*, 80 N.C. App. at 515, 342 S.E.2d at 569 (citation omitted). The court held that uninsured motorist coverage was a type of liability coverage and that the plaintiff's action met the requirement of an action "other than contract" for an award for pre-judgment interest under N.C.G.S. § 24-5.

The current versions of N.C.G.S. § 24-5 provides:

> (a) Contracts.—In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. Interest on an award in a contract action shall be at the contract rate, if the parties have so provided in the contract; otherwise, it shall be at the legal rate.
>
> (b) Other actions.—In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C.G.S. § 24-5. Here, as in *Ensley*, coverage is provided for *damages which the plaintiff is legally entitled to recover* from the owner or operator of the uninsured motor vehicle, and the plaintiff's claim is based in tort, despite the fact that recovery is derivative and conditional. The defendant assumed up to its policy limits the liability of the uninsured motorist for damages which the plaintiff is legally entitled to recover from the uninsured motorist. *Ensley*,

80 N.C. App. at 515, 342 S.E.2d 569. Therefore, the action falls under N.C.G.S. § 24-5(b), (i.e. is an "other action"), and the plaintiff is entitled to recover, up to the policy limits, interest from the defendant Nationwide. We remand this case for the trial court to apply N.C.G.S. § 24-5(b) to the $65,000.00 paid by the defendant on 13 December 1988.

Defendant's Appeal—reversed and remanded.

Plaintiff's Appeal—reversed and remanded.

Chief Judge HEDRICK and Judge COZORT concur.

ELIZABETH WILLIAMS, PLAINTIFF-APPELLANT v. NEW HANOVER COUNTY BOARD OF EDUCATION, JEREMIAH PATRICK, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, CARL UNSICKER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, RACHEL FREEMAN, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, AND ANN KING, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, DEFENDANTS-APPELLEES v. NORTH CAROLINA STATE BOARD OF EDUCATION, DEFENDANT-INTERVENOR-APPELLEE

No. 915SC9

(Filed 5 November 1991)

1. **Rules of Civil Procedure § 12.1 (NCI3d)— Rule 12(b)(6) motions—properly Rule 12(b)(1) motions—treated as 12(b)(1) motions**

Defendants' motions for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) were treated as 12(b)(1) motions on appeal where the argument focused on the trial court's jurisdiction to hear the appeal from the Board of Education and the parties conceded at oral argument that the proper motions would have been under Rule 12(b)(1).

Am Jur 2d, Motions, Rules, and Orders § 4.

2. **Schools § 13 (NCI3d)— career ladder—promotion denied—appeal to superior court**

A teacher who is denied a promotion under the career ladder program may appeal to the local board of education

and then to superior court. N.C.G.S. § 115C-305 is construed consistently with N.C.G.S. § 115C-45(c) to require a party to exhaust his or her administrative remedies before seeking redress in the courts; therefore, a teacher may not seek judicial review in superior court without first appealing the school personnel action to the local board of education, and an appeal to the local board of education does not preclude an appeal to superior court. Furthermore, the local board's review of a decision by a three-member panel of trained evaluators as provided in N.C.G.S. § 115C-363.3(c) constitutes the final administrative action required before a party participating in the career ladder program may appeal to superior court.

Am Jur 2d, Administrative Law §§ 595, 597-599; Schools §§ 149, 151, 156.

APPEAL by plaintiff from order entered 1 October 1990 in NEW HANOVER County Superior Court by *Judge Napoleon B. Barefoot.* Heard in the Court of Appeals 15 October 1991.

Ferguson, Stein, Watt, Wallas, Adkins and Gresham, P.A., by John W. Gresham and Thomas M. Stern, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr., and Hogue, Hill, Jones, Nash & Lynch, by William L. Hill, II, for defendant-appellees.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

GREENE, Judge.

Plaintiff appeals from an order entered 1 October 1990 granting the defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motions to dismiss the plaintiff's complaint.

In 1985, based on the asserted desire "to attract and retain the best people in teaching and in school administration" and on the policy of providing adequate base salaries for and encouraging differentiation of all teachers, our General Assembly established a "career development pilot program" which is intended to "act as a means of developing a career ladder plan that could be implemented on a statewide basis in the future." N.C.G.S. § 115C-363 (1987). Essentially, the career ladder plan is an experimental, merit pay promotion system implemented in 16 local school administrative

units. N.C.G.S. § 115C-363.1 (1987). The New Hanover County School System was selected as one of the 16 local school administrative units to implement the experimental program.

In general, teachers participating in the program are observed and evaluated pursuant to established criteria, and those who receive the required minimum evaluation ratings are recommended for promotion to a higher pay level. N.C.G.S. § 115C-363.3 (Supp. 1990). The program has three promotional levels: Career Status I, Career Status II, and Career Status III. During the 1985-86 school year, the plaintiff, a New Hanover County public school teacher, applied for and received a promotion to Career Status I. At the beginning of the 1986-87 school year, the plaintiff applied for a promotion to Career Status II. In April, 1987, because the plaintiff had not received the required minimum evaluation ratings for Career Status II on her evaluation, which evaluation her principal had prepared, the plaintiff's principal denied the plaintiff's application for promotion. The plaintiff appealed the principal's decision to a three-member appeals panel which voted two-to-one to uphold the principal's decision. The plaintiff then appealed the panel's decision to the New Hanover County Board of Education [Board] which voted four-to-two to uphold the principal's decision.

On 2 September 1988, the plaintiff filed in the New Hanover Superior Court a petition for judicial review of the Board's decision seeking injunctive relief and a complaint seeking monetary damages. The defendants named in her complaint were the Board and four members of the Board. On 2 November 1988, the defendants moved to dismiss the complaint for, among other reasons, the plaintiff's failure to state a claim upon which relief could be granted. In March, 1989, the trial court granted the North Carolina State Board of Education's [defendant-intervenor] motion to intervene as a defendant. On 27 April 1989, the defendant-intervenor moved to dismiss the complaint for failure to state a claim upon which relief could be granted. On 1 October 1990, the trial court granted the defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motions and dismissed "this action."

We note that the plaintiff does not argue on this appeal that the trial court erred in dismissing her complaint for monetary relief. Instead, the plaintiff only argues that the trial court erred in dismissing her petition for judicial review of the Board's decision. Furthermore, we note that the plaintiff has not brought forth an

argument concerning the trial court's order as it relates to the defendant-intervenor, but only as it relates to the Board and the four Board members. Accordingly, we do not disturb the trial court's order with regard to the dismissal of the cause of action set forth in the plaintiff's complaint or with regard to the dismissal of all matters relating to the defendant-intervenor. N.C.R. App. P. 28(b)(5).

The issue is whether a teacher who is denied a promotion under the career ladder program may, after appealing to the local board of education, appeal to superior court.

[1] The record reflects that at the hearing on the defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motions, the defendants argued that the plaintiff did not have the right to appeal the Board's decision to the trial court and that therefore the plaintiff's petition should be dismissed. The trial court apparently agreed as it dismissed the appeal. The argument that the plaintiff did not have the right to appeal to the trial court focuses on the trial court's jurisdiction to hear the appeal, not on whether the petition itself states a claim upon which relief can be granted. As the parties conceded at oral argument, the proper motions to challenge the trial court's jurisdiction to hear the plaintiff's appeal would have been N.C.G.S. § 1A-1, Rule 12(b)(1) motions, not N.C.G.S. § 1A-1, Rule 12(b)(6) motions. However, because "[a] motion is properly treated according to its substance rather than its label," *Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981), *disc. rev. denied*, 304 N.C. 726, 288 S.E.2d 380 (1982), and because the defendants' motions, in addition to challenging the legal sufficiency of the plaintiff's complaint, challenged the trial court's jurisdiction to hear the plaintiff's petition for judicial review, we treat the defendants' motions with regard to the plaintiff's petition as the trial court and the parties treated them, that is, as N.C.G.S. § 1A-1, Rule 12(b)(1) motions.

[2] At issue in this case is the meaning of N.C.G.S. § 115C-305 (1987) which provides that "[a]ppeals to the local board of education *or* to the superior court shall lie from the decisions of all school personnel, including decisions affecting character or the right to teach, as provided in G.S. 115C-45(c)." [Emphasis added.] The plaintiff argues that N.C.G.S. § 115C-305 gives her the right to appeal the Board's decision to the superior court. The defendants argue that the statute's use of the word "or" instead of "and" allows

a party to appeal decisions of school personnel to *either* the local board of education *or* to the superior court, but not both. It follows, the defendants contend, that because N.C.G.S. § 115C-363.3(c) (Supp. 1990) requires that a teacher appeal the principal's denial of Career Status II to the board of education, the plaintiff is not entitled to judicial review in the superior court. Alternatively, the defendants argue that regardless of how N.C.G.S. § 115C-305 is construed, the plaintiff is not entitled to appeal the Board's decision to superior court because N.C.G.S. § 115C-363.3(c) specifically provides that the Board's action regarding Career Status II is "final."

Because N.C.G.S. § 115C-45(c) (1987) and N.C.G.S. § 115C-305 both deal with appellate review of decisions of all school personnel to the local board of education and to the superior court, we construe these statutes *in pari materia* and reconcile them so that each may be given effect. *Great Southern Media, Inc. v. McDowell County*, 304 N.C. 427, 430-31, 284 S.E.2d 457, 461 (1981). The pertinent provisions of N.C.G.S. § 115C-45(c) provide:

> An appeal shall lie from the decision of all school personnel to the appropriate local board of education. . . .
>
> . . . .
>
> An appeal shall lie from the decision of a local board of education to the superior court of the State in any action of a local board of education affecting *one's character or right to teach*. [Emphases added.]

Our Supreme Court has construed this statute as requiring, prior to seeking review in the superior court, that a teacher first appeal the school personnel action to the local board of education. *Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979) (decided under former N.C.G.S. § 115-34 which statute is not materially different from current N.C.G.S. § 115C-45(c)). This construction of N.C.G.S. § 115C-45(c) prohibits "untimely [judicial] intervention in the administrative process" by requiring as a prerequisite for superior court appellate jurisdiction that a party exhaust his administrative remedies. *Id.* We construe N.C.G.S. § 115C-305 consistent with N.C.G.S. § 115C-45(c) to require a party to exhaust his administrative remedies before seeking redress in the courts. Therefore, a teacher may not seek judicial review in superior court without first appealing the school personnel action to the local board of education. Likewise, an appeal to the local board of educa-

tion does not preclude an appeal to the superior court. *See Warren v. Buncombe County Bd. of Educ.*, 80 N.C. App. 656, 657-58, 343 S.E.2d 225, 226 (1986) (held that N.C.G.S. § 115C-305 authorized principal-teacher to appeal resignation dispute from local board of education to superior court). To construe N.C.G.S. § 115C-305 otherwise would render void N.C.G.S. § 115C-45(c)'s requirement that appeals from school personnel action first be taken to the local board of education. Therefore, to accomplish the legislative purpose behind N.C.G.S. § 115C-45(c) and N.C.G.S. § 115C-305, the "or" in N.C.G.S. § 115C-305 must be read conjunctively as an "and." *Sale v. Johnson*, 258 N.C. 749, 755-57, 129 S.E.2d 465, 469-70 (1963) ("or" may mean "and" when so intended by legislature). This construction will preserve the long-recognized policy of judicial restraint in the context of judicial review of school personnel decisions while giving effect to both N.C.G.S. § 115C-45(c) and N.C.G.S. § 115C-305.

Furthermore, contrary to the defendants' alternative argument, N.C.G.S. § 115C-363.3(c) does not eliminate the plaintiff's right to appellate review in the superior court. The pertinent part of N.C.G.S. § 115C-363.3(c) provides:

> An employee not recommended for Career Status II may request a review by a three-member appeals panel chosen from a roster of trained evaluators. . . . The panel shall report its findings to the employing local board of education and the local board shall take *final action* on the matter. [Emphases added.]

Consistent with our interpretation of N.C.G.S. § 115C-305, the local board's review of the three-member appeals panel's decision as provided in N.C.G.S. § 115C-363.3(c) constitutes the final *administrative* action required before a party participating in the career ladder program may appeal to superior court pursuant to N.C.G.S. § 115C-305. *Cf.* N.C.G.S. § 150B-36 (Supp. 1990) ("final decision").

We agree with the parties that the principal's decision to deny the plaintiff's application for promotion based upon his evaluation of the plaintiff was a decision by a person properly classified as a member of "school personnel" as that term is used in N.C.G.S. § 115C-305. *Cf. Murphy v. McIntyre*, 69 N.C. App. 323, 328, 317 S.E.2d 397, 400 (1984) (principal's evaluation of plaintiff-teacher's aide was decision by member of "school personnel" not by county board of education in case decided under former N.C.G.S. § 115-34

which statute is not materially different from current N.C.G.S. § 115C-45(c)). Accordingly, the plaintiff has the right to appeal the Board's decision to the superior court pursuant to N.C.G.S. § 115C-305, and the trial court's order is

Affirmed in part, reversed in part, and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. STEPHEN ANDRE HEMPHILL

No. 9029SC791

(Filed 5 November 1991)

Homicide § 21.7 (NCI3d)— shaken baby syndrome—second degree murder—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss the charge of second degree murder of his four-month-old daughter where there was evidence that defendant shook the baby and expert testimony that the cause of death was shaken baby syndrome, which typically results from an infant's head being held and shaken so violently that the brain is shaken inside the skull causing bruising and tearing of blood vessels on the surface of and inside the brain.

Am Jur 2d, Homicide §§ 85, 398, 434.5.

Judge GREENE dissenting.

APPEAL by defendant from *Owens (Hollis M., Jr.), Judge*. Judgment entered 17 January 1990 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 23 September 1991.

Defendant was charged with second degree murder for the death of defendant's four month old daughter, Kala Marie Hemphill. Evidence presented by the State tends to show the following: At approximately 3:50 on the afternoon of 20 April 1989 defendant brought his daughter to be examined by her pediatrician, Dr. Ora Wells. The examination revealed that the baby was dead, and Dr. Wells stated that in his opinion the child had been dead for three to four hours. Dr. William Dunn, a medical examiner in Henderson

County, performed an autopsy on the body of Kala Hemphill on 21 April 1989. His examination revealed swelling of the infant's brain, bleeding into the skull around the brain substance, bruises on the brain and hemorrhage in the lungs. The bruises were on the frontal parts of the brain and on the back of the brain. Dunn stated that the bleeding in the lungs was caused by the injury to the brain.

Dr. Dunn testified that he considered such injuries to be severe, and that he believed the cause of death was "Shaken Baby Syndrome," which is an injury resulting from the brain being shaken inside of the skull in such a violent or vigorous manner that it tears blood vessels inside the brain and on the surface of the brain, between the brain and its coverings. Dr. Dunn testified that the injury typically occurs when an infant's head is shaken violently while being held so that the skull itself is maintained within the person's grasp and the brain is shaken inside the head. He stated that vigorous shaking would be required to produce the sort of injury he observed in his autopsy of the victim.

Dr. Dunn indicated that one of the results of the increased intercranial pressure resulting from the swelling of the brain was typically vomiting, and that he had found evidence that this child had breathed some aspirated gastric material down into her lungs. He testified that the victim was alive when the aspiration occurred, although he could not tell if the baby had aspirated prior or subsequent to being shaken, but that the conditions he observed about the child's brain and lungs was consistent with an intentional violent repeated shaking, and that the child had died as a result of "Shaken Baby Syndrome."

Tim Shook, a special agent with the North Carolina State Bureau of Investigation, testified that he took a statement from defendant at 3:16 p.m. on 21 April 1989. Defendant stated that he had fed Kala at about 2:00 p.m. on the date of her death, and that she seemed fine. He further stated that when he checked on her about 3:20 p.m., that she had vomited and was not breathing. He then took the child to Transylvania Community Hospital where she was pronounced dead.

Agent Shook further testified that he took another statement from defendant at 5:16 p.m. on 21 April 1989, after informing defendant that the cause of death was "Shaken Baby Syndrome." In this second statement, defendant recalled that he had shaken

the child about four times around 11:30 a.m. on 20 April 1989 because she was throwing up and he thought she was choking. Shook testified that defendant had not mentioned shaking the child in his first statement.

Defendant testified at trial that he had shaken the child because she was choking, and that "I might have shook her too hard and I might have shook her too much but I shook her, but after I shook her, she was all right." Defendant also testified that he did not intentionally injure his daughter and denied shaking her by her head. Defendant also offered character testimony that he was kind and gentle to children.

Defendant was found guilty of second degree murder and appealed from a judgment imposing a sentence of thirty-five years.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Horton and Horton, by Shelby E. Horton, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant's one assignment of error is that the trial court erred in denying his motion to dismiss the charge of second degree murder. He argues that the evidence is insufficient to support a finding of the element of malice.

In *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978), our Supreme Court defined malice as follows:

> [I]t comprehends not only particular animosity 'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person.'
>
> This Court has said that '[m]alice does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.' In such a situation 'the law regards the circumstances of the act as so

> harmful that the law punishes the act as though malice did in fact exist.'

295 N.C. at 578-579, 247 S.E.2d at 916 (citations omitted).

We hold the evidence in the present case is sufficient to support a finding by the jury that defendant acted with malice as defined by *Wilkerson*. The evidence that defendant shook the baby as well as the expert testimony that the cause of death was "Shaken Baby Syndrome," which typically results from an infant's head being held and shaken so violently that the brain is shaken inside the skull causing bruising and tearing of blood vessels on the surface of and inside the brain, is sufficient to show that defendant acted with "recklessness of consequences, . . . though there may be no intention to injure a particular person."

We hold the trial court properly denied defendant's motion to dismiss the charge of second degree murder, and that defendant had a fair trial free from prejudicial error.

No error.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that the evidence is sufficient to support a finding that the defendant acted with "recklessness of consequences" and therefore with malice.

"When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Whether evidence presented constitutes substantial evidence is a question of law for the court." *Id.* On a motion to dismiss,

> 'the evidence for the State is taken to be true, conflicts and discrepancies therein are resolved in the State's favor and it is entitled to every reasonable inference which may be drawn from the evidence.'. . . 'All of the evidence actually admitted,

whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion.'

State v. Mize, 315 N.C. 285, 290, 337 S.E.2d 562, 565 (1985) (citations omitted).

The evidence on the malice element of the second degree murder charge tends to show that the baby's death was caused by "Shaken Baby Syndrome," the "intentional violent repeated shaking" of the baby. As part of its case, the State introduced the defendant's two statements that he made to the police on 21 April 1989. In his second statement, the defendant stated that at approximately 11:30 a.m. on 20 April 1989, the baby was throwing up, and because he was scared and thought she was choking, he shook the baby hard about four times to try to clear her airway. This evidence is uncontradicted and must be taken as true. *Mize*, 315 N.C. at 290, 337 S.E.2d at 565. Indeed, the State's expert testimony tends to show that the baby died from intentional violent repeated shaking. Accordingly, the issue becomes whether the evidence, viewed in the light most favorable to the State, is sufficient to support a finding that the defendant acted with "recklessness of consequences" and therefore malice.

According to our Supreme Court,

> any act evidencing 'wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person' is sufficient to supply the malice necessary for second degree murder.
>
> . . . .
>
> An act that indicates a total disregard for human life is sufficient to supply the malice necessary to support the crime of second degree murder.

State v. Wilkerson, 295 N.C. 559, 581, 247 S.E.2d 905, 917-18 (1978) (citation omitted). The evidence from the defendant's statement does not show wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief, or total disregard for human life. To the contrary, the evidence tends to show a person who, fearing for the welfare of his child, made a very poor decision about how to handle his child's apparent choking. Furthermore, the uncon-

tradicted evidence shows that once the defendant realized that his child had stopped breathing, he took her to the hospital, and after learning that she was dead, "he was beside himself with grief" and requested that an autopsy be performed on her. His conduct may rise to the level of culpable negligence for a conviction of involuntary manslaughter, but it does not amount to second degree murder. *See Wilkerson*, 295 N.C. at 579-80, 247 S.E.2d at 916-17; *see also State v. Evans*, 74 N.C. App. 31, 327 S.E.2d 638 (1985), *aff'd per curiam*, 317 N.C. 326, 345 S.E.2d 193 (1986) (defendant charged with and convicted of involuntary manslaughter for death by violent shaking of two-year-old child); *State v. Lane*, 39 N.C. App. 33, 249 S.E.2d 449 (1978) (defendant charged with second degree murder, defendant's motion to dismiss allowed as to second degree murder, and defendant convicted of involuntary manslaughter for death by violent shaking of his seven-month-old baby); *State v. Ojeda*, 810 P.2d 1148 (Idaho Ct. App. 1991) (defendant charged with and convicted of involuntary manslaughter for death by violent shaking of three-month-old baby); *Commonwealth v. Earnest*, 563 A.2d 158 (Pa. Super. Ct. 1989) (defendant convicted of involuntary manslaughter for death by striking and shaking fifteen-month-old child). *Cf. State v. Crawford*, 329 N.C. 466, 406 S.E.2d 579 (1991) (defendant convicted of first degree murder for death by torture of six-year-old child); *State v. Huggins*, 71 N.C. App. 63, 67, 321 S.E.2d 584, 587 (1984), *disc. rev. denied*, 313 N.C. 333, 327 S.E.2d 895 (1985) (charged with first degree murder, defendant was tried on and convicted of second degree murder for death by intentionally striking a two and one-half year old child in the abdomen "as hard as one would hit an adult"); *State v. Mapp*, 45 N.C. App. 574, 264 S.E.2d 348 (1980) (defendant charged with and convicted of second degree murder for death of five-year-old child, the victim of "battered child syndrome"); *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667, *cert. denied*, 281 N.C. 316, 188 S.E.2d 900 (1972) (defendant charged with first degree murder and convicted of second degree murder for death by severe blow to abdomen of three-year-old child, the victim of horrible abuse for period of time prior to death). Because there was no substantial evidence tending to support a determination of malice, the trial court should have allowed the defendant's motion to dismiss the charge of second degree murder. Accordingly, I would grant the defendant a new trial.

I dissent.

STATE OF NORTH CAROLINA v. STERLING MAYE

No. 9114SC102

(Filed 5 November 1991)

1. **Constitutional Law § 184 (NCI4th) — cocaine — prayer for judgment continued — no double jeopardy**

An assignment of error contending that defendant's sentencing for trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, and felonious possession of cocaine violated the prohibition against double jeopardy was not reached where the trial court unconditionally continued prayer for judgment on the three possession convictions. Since there has been no final judgment on those charges, the appellate court did not have the authority to reach that assignment of error.

Am Jur 2d, Criminal Law §§ 262, 279.

2. **Evidence and Witnesses § 377 (NCI4th) — cocaine — subsequent offense — admissible — common plan or scheme**

The trial court did not err in a cocaine prosecution by admitting evidence of a subsequent offense as showing a common plan or scheme where the trial court compared the evidence on voir dire with the evidence in the current trial and concluded that the two acts were very similar, particularly defendant's packaging and transportation of the drugs. There was also no error in the trial court's application of the balancing test of N.C.G.S. § 8C-1, Rule 403. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 326, 329.

Judge WYNN concurring.

APPEAL by defendant from judgment entered 17 August 1990 in DURHAM County Superior Court by *Judge J. B. Allen, Jr.* Heard in the Court of Appeals 10 October 1991.

Defendant was indicted for trafficking in cocaine by transportation, trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, and felonious possession of cocaine. All of the charges arose out of a single drug-related incident which occurred on 18 July 1989. The charges were called for trial on 14 August 1990. Defendant Maye and co-defendant Fearington were

tried together. On 17 August 1990, as to defendant Maye, the jury returned a verdict of guilty to all charges.

The State's evidence tended to show that undercover narcotics officers were conducting a surveillance operation involving a Durham residence and two vehicles. On 18 July 1989 while "doing a drive-by" of the residence in an unmarked car, three officers observed a four-door Mercedes approaching them which crossed over the center line and forced the officers to swerve toward the shoulder of the highway to avoid being hit. The Mercedes was one of two vehicles specifically targeted for surveillance. The car was registered to defendant's brother but the State produced evidence that defendant had referred to the car as belonging to him on several occasions. Defendant was driving the vehicle and co-defendant Mark Fearington was riding in the front passenger seat. The officers pursued the Mercedes and observed it turn into the driveway of the residence they had under surveillance. As the officers pulled in behind the Mercedes, they observed the defendant get out of the car "faster than normal," move to the back of the vehicle, step back and squat down. At that time the officers put the blue light on the dash, jumped out of the car and announced themselves as police officers.

An officer heard a "metallic type of sound" when the defendant squatted down, so he had defendant raise his hands and move toward the wall of the house. The officers discovered that the metallic sound was made by a pager being thrown. From where the officers were standing, they could see an opened and unzipped pouch on the front passenger seat of the Mercedes. From their position, they could also see "clear baggies, plastic baggies with a white powder substance" inside the pouch. An officer removed the pouch from the car and discovered $18.00 in quarters, "a large amount of little baggies with twist ties with a white powder substance," a small amount of marijuana, and some house keys. The bag contained 174 little white plastic bags in the pouch. The cocaine in the bag was determined to weigh approximately 49.8 grams.

After the pouch was found, the officers questioned both defendants. Both defendants denied having anything to do with the pouch. The officers placed co-defendant Fearington under arrest but did not arrest defendant Maye. A warrant was issued the next day for defendant Maye and he was arrested at his home pursuant to that warrant.

Defendant's evidence primarily consisted of denials that the cocaine found in the Mercedes Benz on 18 July 1989 belonged to him.

The trial court sentenced defendant to a term of 15 years upon the conviction of trafficking in cocaine by transportation. As to the remaining three convictions of trafficking by possession, possession with intent to sell or deliver, and felonious possession, the court continued prayer for judgment for a term of five years.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jacob L. Safron, for the State.

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

WELLS, Judge.

[1] Defendant brings forward four assignments of error for our review. First, defendant contends the trial court erred in "entering judgment and sentencing him" for convictions of trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, and felonious possession of cocaine. Defendant argues his conviction and "sentencing" for all three possession offenses violated the prohibition against double jeopardy contained in the Fifth Amendment to the U.S. Constitution and Article I, § 19 of the N. C. Constitution. In *State v. Mebane*, 101 N.C. App. 119, 398 S.E.2d 672 (1990), the Court held the legislature did not intend cumulative punishments be imposed for trafficking in cocaine by possession and for possession with intent to sell and deliver when the charges are based on possession of the same cocaine at the same time. Additionally, the Court held that double jeopardy bars punishment for both possession with the intent to sell or deliver and felonious possession of the same cocaine at the same time. However, we are unable to address this assignment of error under the circumstances in this case.

The trial court unconditionally continued prayer for judgment for a term of five years on the three possession convictions at issue here. A defendant who has entered a plea of not guilty to a criminal charge and who is then found guilty, has a right to appeal when final judgment has been entered. N.C. Gen. Stat. § 15A-1444 (1988). G.S. § 15A-101 which defines "entry of judgment" provides that a "[p]rayer for judgment continued . . . without more, does not constitute entry of judgment." *See State v. Southern*,

71 N.C. App. 563, 322 S.E.2d 617 (1984), *aff'd*, 314 N.C. 110, 331 S.E.2d 688 (1985) (when a prayer for judgment is continued, no judgment is entered and no appeal is possible). *Accord, State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Since there has been no final judgment entered with respect to these charges, we do not have the authority to reach this assignment of error. However, we note that if the State should move the trial court to impose sentence as to these three convictions and the court should do so, the defendant may then appeal and may raise the objections asserted in this appeal. *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962).

[2] As his next assignment, defendant contends the trial court erred in allowing the State to admit evidence about his involvement in a separate and unrelated drug offense. Defendant alleges this evidence should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) of the N.C. Rules of Evidence (1988).

The State's witness was an officer with the Durham Police Department. After a bench conference, the witness testified on *voir dire* that he had known defendant both in junior high and high school. He also testified that he knew the defendant professionally because he had arrested the defendant for possession with intent to sell and deliver cocaine on 14 August 1989, about five weeks subsequent to the drug offenses for which the defendant was then standing trial. Pursuant to a traffic stop and arrest, the officer found a clear plastic sandwich bag concealed in defendant's underwear. The bag contained 22 individually tied packets of cocaine weighing a total of 5.8 grams.

Following the officer's testimony on *voir dire*, the trial court allowed arguments by counsel regarding the admissibility of the officer's testimony. After comparing the evidence on *voir dire* with the evidence in the current trial, the trial court concluded that defendant's acts on 18 July 1989 and 24 August 1989 were very similar. Particularly similar were defendant's packaging of the cocaine and the transportation of the drugs. The trial court ruled the evidence admissible under Rule 404(b) to show a common plan or scheme. The court found as a fact that the acts between the two crimes were so related that the facts about the 24 August 1989 offense were admissible to prove the charges being tried. In compliance with Rule 403, the trial court also found that the probative value substantially outweighed any danger of unfair prej-

udice. Thus, the officer was permitted to testify about the foregoing facts in front of the jury.

Defendant argues that the similarities between the two offenses were not sufficient to show a common plan or scheme. Additionally, defendant alleges the strong prejudice of the testimony outweighed any probative value. Relying on *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), defendant contends Rule 404(b) is a general rule of exclusion instead of inclusion.

Rule 404(b) of the North Carolina Rules of Evidence provides:

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1988).

The purposes for which evidence of other crimes, wrongs, or acts may be admissible are not limited to those specifically set forth in Rule 404(b) or in *McClain*. *State v. Weaver*, 318 N.C. 400, 348 S.E.2d 791 (1988). "[E]vidence that defendant committed similar offenses 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." *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986) (Citations omitted). In *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), the Court held ". . . evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." (Emphasis in original). (Citations omitted). Moreover, the Court stated that recent cases in North Carolina show a ". . . clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.*

Applying the above law to the facts in this case, we find the evidence relating to the defendant's involvement in the 24 August 1989 offense was properly admitted under Rule 404(b). Fur-

thermore, we find no merit to defendant's contention that the trial court erred in applying the balancing test under Rule 403.

Defendant does not address the second assignment in his brief, and it is therefore deemed abandoned. N.C.R. App. P., Rule 28.

We have carefully reviewed defendant's final assignment of error and find it to be without merit.

No error.

Judge PARKER concurred.

Judge WYNN filed a separate concurring opinion.

Judge WYNN concurring by separate opinion.

I write separately to emphasize, as pointed out by the majority, that the circumstances of this case do not allow us to address the issue of double jeopardy. Here, the trial judge entered judgment on the conviction of trafficking in cocaine by transportation and ordered prayer for judgment on the remaining convictions. As such, we do not have before us the double jeopardy or cumulative punishments concerns addressed in *State v. Mebane*, 101 N.C. App. 119, 398 S.E.2d 672 (1990). Thus, for example, we do not address the propriety of deciding on appeal the instance in which judgment is entered on the conviction of possession with intent to sell and deliver and prayer for judgment is ordered on the conviction of felonious possession.

STATE OF NORTH CAROLINA v. SHONIE LOU PAVONE

No. 903SC1359

(Filed 5 November 1991)

1. Criminal Law § 150 (NCI4th)— sentencing—consideration of failure to accept a plea bargain—new hearing

Defendant is entitled to a new sentencing hearing where it can reasonably be inferred from remarks by the trial judge that he improperly considered defendant's failure to accept

a plea bargain and the exercise of her right to a jury trial when he imposed sentence.

Am Jur 2d, Criminal Law §§ 535, 599.

2. **Narcotics § 5 (NCI3d)— improper sentence for marijuana offenses**

The trial court acted under a misapprehension of the law when it sentenced defendant to a presumptive term of three years for each offense of sale and delivery of marijuana and possession of marijuana with intent to sell and deliver since those offenses are Class I felonies, N.C.G.S. § 90-95(b)(2), and the presumptive term for a Class I felony is two years. N.C.G.S. § 15A-1340.4(f)(7).

Am Jur 2d, Drugs, Narcotics, and Poisons § 48.

3. **Narcotics § 4.7 (NCI3d)— possession with intent to sell— instruction on lesser offenses not required**

The trial court in a prosecution for possession of cocaine and of marijuana with intent to sell and deliver did not err in failing to submit to the jury the lesser included offense of simple possession where defendant merely denied that she was present at the premises where the transactions occurred, and there was evidence as to every element of the offenses charged which negated that denial.

Am Jur 2d, Drugs, Narcotics, and Poisons § 40; Trial § 1430.

4. **Criminal Law § 884 (NCI4th)— assignment of error to charge— necessity for objection**

Defendant could not assign error to the instructions as given where she failed to object thereto before the jury retired to consider its verdict. Appellate Rule 10(b)(2).

Am Jur 2d, Trial §§ 1459, 1461.

ON certiorari to review the judgment and commitment entered 15 September 1989 in CARTERET County Superior Court by *Judge Herbert O. Phillips, III.* Heard in the Court of Appeals 26 September 1991.

Defendant was indicted for sale and delivery of cocaine, possession with intent to sell and deliver cocaine, sale and delivery of

marijuana, and possession with intent to sell or deliver marijuana. The jury returned a verdict of guilty to all charges.

The State's evidence tended to show that an undercover officer worked in Carteret County from July through November 1987. The officer's objective was to purchase illegal drugs from local drug dealers. An informant arranged for the officer to purchase an eighth of an ounce of cocaine from defendant at the informant's house on 31 July 1987. The officer gave defendant $300.00. Defendant left the house and returned approximately 40-45 minutes later with the cocaine. The undercover officer took the cocaine from defendant. Afterwards, the officer made detailed notes about the transaction, including a physical description of the female who had sold the cocaine to her. The notes were admitted as corroborative evidence at trial. The package containing 3.17 grams of cocaine was also admitted into evidence.

On 4 September 1987, the informant arranged for the officer to purchase marijuana from defendant. The informant and the officer drove to a house occupied by defendant and her boyfriend. The officer testified that the house was located at 2406 Fisher Street. After the officer and the informant entered the house, defendant went to another part of the room and retrieved a package of marijuana. The officer took the marijuana from defendant. The officer gave $50.00 to defendant who then gave the money to her boyfriend. Defendant's boyfriend went to another part of the house and returned with $15.00 which he gave to the officer. Afterwards, the officer made notes about the transaction which were admitted as corroborative evidence during the trial. The package, containing 5.1 grams of marijuana, was also admitted into evidence.

The defense emphasized mistaken identification. Defendant denied ever having met the officer. Defendant admitted having only a casual acquaintance with the informant. Defendant specifically denied selling, delivering or transferring any cocaine on 31 July 1987. Defendant also specifically denied selling, transferring or delivering any marijuana to the officer on 4 September 1987. Defendant argued that her physical appearance did not match the officer's description of the person who had sold the controlled substances. Furthermore, defendant produced evidence to show that she did not live at 2406 Fisher Street on 4 September 1987, but, at that time, defendant was living at 1807 Bridges Street, about four blocks away from Fisher Street.

On 15 September 1989, Judge Phillips sentenced defendant to a three-year term of imprisonment for each of the cocaine charges, and ordered that the terms were to run concurrently. He sentenced defendant to a three-year term for each of the marijuana offenses to run consecutively with the sentence imposed for the cocaine charges. He ordered that the three-year term imposed for the conviction of possession of marijuana with intent to sell and deliver be suspended on the condition of one year supervised probation. On 23 July 1990, this Court allowed defendant's petition for certiorari.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

WELLS, Judge.

Defendant brings forward eight assignments of error for our review. She does not address her first, fourth and sixth assignments in her brief, and they are therefore deemed abandoned. N.C.R. App. P., Rule 28. In her remaining assignments, defendant contends that the trial court erred in (1) relying on an improper and unconstitutional factor when imposing her sentence; (2) acting under a misapprehension of law when sentencing her; (3) failing to instruct the jury on the lesser-included offense of simple possession; (4) instructing the jury peremptorily on an element of the offense; and (5) admitting certain corroborative evidence. We address each issue respectively.

[1] Defendant first contends that the trial court improperly considered both her refusal to agree to a plea arrangement and the exercise of her right to a jury trial in determining the severity of her punishment (active sentence). We agree. "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. Our courts have long adhered to the principle forbidding a trial court from improperly considering the defendant's exercise of this constitutional right as an influential factor in determining the appropriate sentence. *See State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977). This rule was recently upheld by our Supreme Court in *State v. Cannon*:

> Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part

> because defendant did not agree to a plea offer by the state and insisted on trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

326 N.C. 37, 387 S.E.2d 450 (1990), *rev'g*, 92 N.C. App. 246, 374 S.E.2d 604 (1988).

The record reflects that in imposing punishment, the trial court stated:

> The jury has found you guilty in a trial. I understand that there were negotiations with a view toward reaching an agreement with respect to your verdict and sentencing before the trial that were not productive, and I understand and appreciate that, but you must understand that having moved through the jury process and having been convicted, it is a matter in which you are in a different posture.
>
> . . .
>
> The substance of the judgment, Ms. Pavone, is that you would serve a six years [sic] active sentence. I think that is appropriate. You tried the case out; this is the result.

We find that it can be reasonably inferred from the above language that the trial court improperly considered defendant's failure to accept a plea and the exercise of her constitutional right to a jury trial when the trial court imposed her sentence. Accordingly, we hold that defendant is entitled to a new sentencing hearing on all charges.

[2] Defendant next contends that she was incorrectly sentenced for both marijuana charges because the trial court was acting under a misapprehension of law when it sentenced her. We agree. Although we have granted a resentencing hearing as to these charges, we address this issue to alleviate the risk of this error recurring during the resentencing hearing.

The record indicates the trial court perceived the marijuana offenses to be Class H felonies. Class H felonies carry a presumptive sentence of three years. N.C. Gen. Stat. § 15A-1340.4(f)(6) (1988). Thus, the trial court imposed a presumptive sentence of three years for each marijuana offense.

Marijuana is classified as a Schedule VI controlled substance. N.C. Gen. Stat. § 90-94 (1990). The offenses of sale and delivery

of marijuana and possession with intent to sell and deliver marijuana are Class I felonies. G.S. § 90-95(b)(2). The presumptive term for a Class I felony is two years. G.S. § 15A-1340.4(f)(7). Thus, we agree that the trial court acted under a misapprehension of law when it sentenced defendant to a presumptive term of three years for each marijuana offense.

[3] As her third assignment of error, defendant contends she is entitled to a new trial for both charges of possession with intent to sell and deliver because the trial court erroneously failed to submit the lesser-included offense of simple possession to the jury. Simple possession of a controlled substance is a lesser-included offense of possession with intent to sell and deliver a controlled substance. *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982).

Defendant alleges she was entitled to have the simple possession instruction submitted because there was conflicting evidence regarding the element of intent. The State's evidence of defendant's intent to sell and deliver consisted of the undercover officer's detailed testimony about the sales which occurred between her and defendant on 31 July and 4 September. Defendant contends her testimony that she did not sell, deliver or transfer any cocaine or marijuana on the dates in question contradicts the State's evidence of intent thereby creating a conflict in the evidence relating to this element.

The determinative factor in the test of whether a lesser-included offense instruction should be submitted to the jury is what the evidence tends to prove. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). "If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense. . . . and there is no evidence to negate these elements *other than defendant's denial that he committed the offense*, the trial court should properly exclude from jury consideration the possibility of conviction [of a lesser-included offense]." *Id.* (Emphasis added). Defendant's denial that she was present at the premises where these transactions occurred necessarily includes the denial that she possessed the contraband sold and delivered on these occasions. Where defendant only denies an *element* of the offense as opposed to the complete offense, reliance upon *Strickland* would be misplaced. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985). (Emphasis added). However, when a defendant denies having committed a complete offense and there is evidence as to every element of

the offense which negates that denial, application of *Strickland* is proper. *Id.* Defendant's testimony constituted a complete denial of these charges, and the record indicates there was evidence as to every element of the offense which negated that denial. Thus, we hold that the trial court did not err in failing to submit the lesser-included offense to the jury.

[4] As her fourth assignment of error, defendant contends she is entitled to a new trial in both sale and delivery cases because the trial court erroneously peremptorily instructed the jury about the sale and delivery element of the charged offenses. "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . ." N.C.R. App. P., Rule 10(b)(2). This requirement is mandatory and not merely directory. *State v. Fennel*, 307 N.C. 258, 297 S.E.2d 393 (1982). *Accord, State v. Ayers*, 92 N.C. App. 364, 374 S.E.2d 428 (1988). The record reveals that after the alternate juror was released, the court asked counsel for the State and counsel for defendant if they had any objections to the jury instructions as given. Neither attorney objected. Accordingly, this issue was not properly preserved by defendant for review.

After reviewing the record, we conclude that defendant's final assignment of error has not been properly preserved for our review and we therefore do not consider this assignment.

No error in the trial.

Remanded for resentencing as to all charges.

Judges PARKER and WYNN concur.

STATE OF NORTH CAROLINA v. MICHAEL EDWARD STONE AKA ROY EUGENE TEDDER

No. 905SC1296

(Filed 5 November 1991)

1. Homicide § 28.1 (NCI3d) — self-defense — instruction not required

The trial court did not err in failing to instruct the jury on self-defense in a second degree murder prosecution where

all the evidence tended to show that defendant voluntarily joined the original fight in a bar and continued to fight outside the bar; defendant introduced a knife into the fight and was heard by several witnesses to say he had stabbed the victim in the heart; defendant prevented the victim from reentering the bar during the fight and hit the victim with a barstool as he lay bleeding on the floor; and there was thus no evidence that defendant was not at fault or that he reasonably believed it to be necessary to kill the victim in order to protect himself from death or great bodily harm.

Am Jur 2d, Homicide §§ 519, 520.

Duty of trial court to instruct on self-defense, in absence of request by accused. 56 ALR2d 1170.

2. Criminal Law § 1182 (NCI4th)— aggravating factor—prior convictions—fingerprint record—identity of defendant—certified records of convictions

An FBI fingerprint record bearing the name Roy Eugene Tedder was properly admitted during the sentencing phase of this second degree murder trial for the purpose of showing that defendant's true identity was not the name he was using but was Roy Eugene Tedder even though it did not meet the criteria of N.C.G.S. § 15A-1340.4(e) for proving prior convictions. Furthermore, the evidence supported the trial court's finding of prior convictions as an aggravating factor where the State established defendant's true identity as Roy Eugene Tedder by expert testimony that defendant's fingerprints matched fingerprints on the record for Roy Eugene Tedder and an officer's testimony that defendant's parents had informed her that defendant's true identity was Roy Eugene Tedder, and the State introduced several certified court records from Delaware showing convictions of Roy Eugene Tedder for crimes punishable by more than sixty days.

Am Jur 2d, Evidence § 333; Habitual Criminals and Subsequent Offenders §§ 25-27.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 ALR2d 870.

APPEAL by defendant from judgment entered 26 June 1990 in NEW HANOVER County Superior Court by *Judge James R. Strickland.* Heard in the Court of Appeals 24 September 1991.

Defendant was indicted for second-degree murder in violation of N.C. Gen. Stat. § 14-17 for the murder of William (Bill) Ernst. The State's evidence at trial tended to show the following facts and circumstances. On the evening of 4 August 1989, defendant, the victim, Bill Ernst, and three other men, Ahern, Caison and Dildy, entered the Cargo Bay Restaurant and Bar in Wilmington, North Carolina. Once inside, the men began playing pool and drinking beer. Around midnight, Ahern and Caison began to argue over a pool game and then began to fight. The victim was seen trying to break up this fight. He was hit by one of the men and began to fight back. At this point, defendant and Dildy joined in the original fight. The bar owner, Surinder Grewal, told them to carry the fight outside or he would call the police.

The fight continued outside of the bar in the parking lot. The victim, defendant and Caison were seen fighting together against a fence. While fighting against the fence, Caison was cut in the back with a knife. Caison testified that at the time he was cut, he heard the victim say, "Mike (Stone), don't do that. Don't do it." Grewal stated he later observed the defendant and Dildy fighting with the victim in front of the door to the bar. The victim was trying to get back in the bar but defendant prevented him by pushing him into the door or pushing the door shut.

The victim reentered the bar holding his stomach with one hand and holding a bloodied knife in the other. He collapsed on the floor of the bar. The victim was hit with a belt and a pool cue while lying on the floor. Barbara Grewal, the bar owner's wife, testified defendant hit the victim with a barstool while the victim was still on the floor. She asked the victim if she could help and he stated he thought he was going to die. Several witnesses testified they heard defendant say he had stabbed the victim in the heart. Barbara Grewal testified she heard defendant tell the other men to hurry up and leave because he had "stabbed Bill (the victim) in the heart." Defendant, Ahern, Dildy and Caison were later detained by the police as they attempted to leave the scene in a car.

Dr. Charles L. Garrett, a pathologist for the State of North Carolina, testified the victim died due to a massive hemorrhage caused by a stab wound to the heart. There was testimony that

both the victim and defendant had knives on the night of 4 August. One knife was found at the crime scene, opened and bloodied. Another knife was found on the victim upon his arrival to the emergency room of New Hanover Memorial Hospital. This knife was closed and clean. The victim died at the hospital that night.

Defendant did not present any evidence. The jury returned a verdict of guilty of second-degree murder, and the trial court sentenced defendant to 35 years' imprisonment, a sentence in excess of the presumptive sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the State.

Yow, Culbreth & Fox, by Stephen E. Culbreth; and Nora Henry Hargrove; for defendant-appellant.

WELLS, Judge.

Defendant brings forth nine assignments of error for our review. He does not address his first, second, third, fifth and seventh assignments of error in his brief, and they are therefore deemed abandoned. N.C.R. App. P., Rule 28. Defendant moved to have the record on appeal amended pursuant to N.C.R. App. P., Rule 9(b)(5) to include a tenth assignment of error. This motion was denied by a prior panel and we are bound by that decision not to consider this assignment of error. In his remaining assignments, defendant contends the trial court erred in not instructing the jury on self-defense, admitting unauthenticated documents as evidence during the sentencing phase of the trial, and finding an aggravating factor of prior convictions which was not supported by the evidence. We find no error.

[1] Defendant first assigns error to the trial court's failure to instruct the jury on the theory of self-defense. He contends the evidence offered at trial is sufficient to support an instruction on self-defense. To be entitled to an instruction on self-defense, defendant must present evidence tending to show: (1) he was free from fault in the matter, and (2) it was necessary, or reasonably appeared to be necessary, to kill in order to protect himself from death or great bodily harm. *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979). A person is entitled under the law of self-defense to harm another only if he is "without fault in provoking, or engaging in, or continuing a difficulty with another." *State v. Hunter*, 315

N.C. 371, 338 S.E.2d 99 (1986). The right of a person to kill another in self-defense arises when the killing is or reasonably appears to be necessary in order to save himself from death or great bodily harm. *State v. Deck*, 285 N.C. 209, 203 S.E.2d 830 (1984).

If, however, there is no evidence from which the jury reasonably could find that defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, defendant is not entitled to have the jury instructed on self-defense. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982). It is for the court to determine in the first instance as a matter of law whether there is any evidence upon which defendant reasonably believed it to be necessary to kill his adversary in order to protect himself from death or great bodily harm. *State v. Johnson*, 166 N.C. 392, 81 S.E. 941 (1914). If there is no evidence upon which the defendant in fact could form such a reasonable belief, then there is no evidence of self-defense and the issue should not be submitted to or considered by the jury. *State v. Spaulding*, *supra*.

The evidence presented by defendant concerning the events of 4 August 1989 neither established he entered the fight without fault nor showed he reasonably believed it was necessary to kill the victim. Defendant voluntarily joined the original fight in the bar and continued the fight outside the bar. Mr. Grewal's testimony indicated defendant prevented the victim from reentering the bar during the fight and that defendant hit the victim with a barstool as he lay bleeding on the floor.

Defendant was heard by several witnesses to say he stabbed the victim in the heart. Defendant did not testify and presented absolutely no evidence, either circumstantial or direct, which would establish the necessity of his killing the victim. Rather, defendant relied on permissible inferences from testimony elicited on cross-examination of the State's witnesses. *State v. Spaulding*, *supra*, and its progeny of cases require a defendant to either present evidence showing he was free from fault in the matter or that it appeared necessary to use deadly force. The evidence in this case established that defendant, at some point, introduced a knife into the fight and stabbed the victim. We conclude that the trial court's decision not to give an instruction on self-defense was proper in light of the evidence presented at trial. We therefore overrule this assignment of error.

[2] The trial court sentenced defendant in excess of the presumptive sentence based upon a finding of an aggravating factor of prior convictions. Defendant assigns as error the trial court's allowing the introduction of an F.B.I. fingerprint record bearing the name of Roy Eugene Tedder during the sentencing phase of the trial. He contends this document introduced by the State was unauthenticated and unduly relied upon by the trial court to find an aggravating factor of prior convictions. Defendant further contends this record does not comply with the requirements of N.C. Gen. Stat. § 15A-1340.4(e) on proving a prior conviction. The State contends the F.B.I. fingerprint record was used solely for the purpose of establishing the identity of defendant with that of Roy Eugene Tedder. We agree.

The State introduced this document through the testimony of an expert witness concerning defendant's fingerprints. This witness testified that the fingerprints taken of defendant on the night of 4 August matched the fingerprints on the F.B.I. card. Further, the State presented evidence by a Wilmington police officer who was familiar with defendant's family. This witness testified she had spoken with defendant's parents and they informed her that defendant's true identity was Roy Eugene Tedder.

The trial court, having not relied on this document to support an aggravating factor, did not admit evidence which fails the criteria of N.C. Gen. Stat. § 15A-1340.4(e). Therefore, defendant's reliance on this argument is misplaced. Trial judges in North Carolina are allowed wide latitude in conducting sentencing hearings and are encouraged to seek all relevant information which may be of assistance in determining an appropriate sentence. *State v. Midyette*, 87 N.C. App. 199, 360 S.E.2d 507 (1987). The formal rules of evidence do not apply. N.C. Gen. Stat. § 15A-1334(b).

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. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981). The trial court's reliance on the F.B.I. fingerprint record to establish the identity of defendant was not prejudicial to him. This assignment of error is also overruled.

In defendant's final assignment of error he contends the trial court erred in finding an aggravating factor of prior convictions

which was not supported by the evidence. N.C. Gen. Stat. § 15A-1340.4(e) states:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court and shall be prima facie evidence of the facts set out therein. . . .

The language of N.C. Gen. Stat. § 15A-1340.4(e) is permissive rather than mandatory respecting methods of proof. It provides that prior convictions "may" be proved by stipulation or by original certified copy of the court record, not that they must be. The statute does not preclude other methods of proof. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

Having established the identity of defendant as Roy Eugene Tedder, the State introduced several certified court records from the State of Delaware bearing the name of Roy Eugene Tedder. These records showed convictions in excess of 60 days as required by N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) to support the finding of this aggravating factor. This is a statutorily approved method of proving a prior conviction; therefore, defendant's final assignment of error is overruled.

For the reasons stated we find

No error.

Judges PARKER and WYNN concur.

STATE OF NORTH CAROLINA v. ALICE RAMONA GORDON, DEFENDANT

No. 9028SC1360

(Filed 5 November 1991)

1. **Criminal Law § 853 (NCI4th)— assault—self-defense—pattern instruction not given—no objection**

There was no error in an assault prosecution where the court rejected defendant's requested instruction on self-defense, indicated that the pattern instructions would be given, instructed the jury on self-defense but not with the pattern instructions, and defense counsel did not object to the instruction when given the opportunity to do so outside the presence of the jury. Defendant's reliance on *State v. Ross*, 322 N.C. 261, is misplaced because *Ross* concerned the failure of the trial judge to give any instruction, while the court here gave a self-defense instruction. Additionally, it is clear that no plain error exists with respect to the instruction given.

Am Jur 2d, Assault and Battery §§ 69, 107.

2. **Evidence and Witnesses § 394 (NCI4th)— assault—other crimes—inadmissible—no prejudicial error**

There was no prejudicial error in an assault prosecution from the admission of evidence of other crimes concerning defendant and her relatives where defendant did not preserve for appeal issues involving evidence about her uncle and her boyfriend, and there was no prejudice from evidence that defendant had a propensity to break the law, even though the State advanced no argument as to any permissible purpose for introducing the evidence, where the evidence in the case clearly showed that defendant shot the victim and there was substantial evidence that the victim was walking towards her home when defendant shot her, negating defendant's self-defense claim.

Am Jur 2d, Evidence § 320.

3. **Criminal Law § 1184 (NCI4th)— assault—aggravating factors—prior convictions—prosecutor's unsworn statements**

A sentence five years beyond the presumptive term for assault with a deadly weapon inflicting serious injury was remanded for resentencing where the trial judge based his

finding of the aggravating factor of prior convictions solely on the prosecutor's unsworn statements. Defendant's failure to object at trial does not bar her from appealing this issue since the evidence was insufficient as a matter of law. N.C.G.S. § 15A-1340.4(a)(1)o.

Am Jur 2d, Evidence § 333; Habitual Criminals and Subsequent Offenders §§ 26, 27.

APPEAL from judgment and sentence entered 14 May 1990 in BUNCOMBE County Superior Court by *Judge Robert Burroughs.* Heard in the Court of Appeals 26 September 1991.

Lacy H. Thornburg, Attorney General, by P. Bly Hall, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

WYNN, Judge.

The State's evidence tended to show that defendant and the victim, Suzanne Jackson, argued about defendant's boyfriend on 10 September 1989. The next evening, defendant was sitting in or on a friend's car in her apartment complex parking lot about thirty feet from Jackson's front door when Jackson came outside. Defendant yelled remarks to her but did not approach her. Thereafter, Jackson walked towards defendant and said "if you want to fight, we'll fight." In response, defendant jumped out of the car, ran across the street, and apparently obtained a gun from the hand of her uncle who was standing outside at the time of the incident. In the meantime, Jackson's husband urged her to go inside, and, while the couple walked toward their front door, defendant followed them and shot Jackson in the arm.

Defendant presented evidence at trial which formed the basis for her contention that she acted in self-defense. Contrary to Jackson's testimony that she did not have anything in her hand, four of defendant's witnesses testified that the victim had something in her hand that looked like a knife prior to the shooting. Defendant's witnesses also stated that the victim chased defendant around the car with the knife.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. The trial judge sentenced defendant to

a term of eight years, five years greater than the presumptive sentence. To this court, defendant appealed.

I

[1] Defendant first assigns error to the trial judge's instructions to the jury on self-defense. She alleges that the instruction given by the trial judge was inadequate, misleading, and erroneous as a matter of law. We disagree.

Although it is not clear from the record, defendant contends that during the charge conference, she requested an instruction on self-defense. The trial judge apparently indicated he would give the pattern jury instructions. However, in his instructions to the jury, the trial judge instructed on self-defense, but did not give the pattern instructions. Following his instructions to the jury, the trial judge asked counsel if they objected to the "pattern" instructions he had just given the jury. Both attorneys stated they had no objections.

Under N.C.R. App. P. 10(b)(2), "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." *See State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986); *State v. Norfleet*, 65 N.C. App. 355, 309 S.E.2d 260 (1983). There are, however, two exceptions to this requirement. The first exception applies when the trial judge fails to give any instruction on the requested issue. *State v. Ross*, 322 N.C. 261, 367 S.E.2d 889 (1988). In *Ross*, the trial judge agreed to give a requested instruction on defendant's decision not to testify, but the trial judge neglected to give the promised instruction. There, our Supreme Court held that "a request for an instruction at the charge conference is sufficient compliance with [Rule 10(b)(2)] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions." *Id.* at 265, 367 S.E.2d at 891. The second exception allows a party to seek relief on appeal without making the proper objection if the instructions complained of constitute plain error. *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). Plain error means "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States*

v. McCaskill, 676 F.2d 995, 1002, (4th Cir.), *cert. denied*, 459 U.S. 1018 (1982)).

In the instant case, defendant's counsel failed to object to the jury charge, even though the trial judge gave him ample opportunity outside the hearing of the jury. Defendant's reliance on the *Ross* exception is misplaced since the trial judge did give a self-defense instruction; *Ross* concerns the failure of the trial judge to give any instruction at all. Additionally, because the trial judge stated the law on self-defense in a manner very similar to the pattern instruction, it is clear that no plain error exists with respect to his instructions. We, therefore, find that defendant's assignment of error on this point is without merit.

II

[2] In her next assignments of error, defendant contends that she is entitled to a new trial because the trial court erroneously admitted irrelevant "other crimes" evidence about defendant and her relatives and because the prosecution asked improper questions about those crimes. We disagree.

From the outset, we note that with respect to the evidence about her uncle, defendant has waived her right to preserve this issue on appeal because she neither objected nor moved to strike this evidence. Defendant also cannot appeal inclusion of the evidence relating to her boyfriend because the same information was admitted without objection elsewhere. *See* N.C.R. App. P. 10(b)(1). Additionally, defendant has failed to argue that there was plain error to excuse her failure to object at trial. N.C.R. App. P. 10(c)(4).

We will now examine the "other crimes" evidence which defendant properly preserved for appellate review. At trial, Suzanne Jackson made several remarks on direct examination about defendant "doing that stuff." The trial judge, however, did not allow the witness to define the "stuff." Later in the trial, the prosecutor asked defendant's sister the following question: "As a matter of fact, there are not too many days when Alice isn't on cocaine, is there?" The trial judge overruled defendant's objection to this question.

Evidence relating to a defendant's "other crimes" or prior bad acts is governed by Rule 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he

> acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.R. Evid. 404(b). Our Supreme Court has interpreted Rule 404(b) as "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in the original).

In this case, Ms. Jackson's testimony and the prosecutor's questioning of defendant's sister suggested that defendant had a propensity to break the law. Even though the standard for inclusion under Rule 404(b) is very broad, the state advanced no argument as to *any* permissible purpose for introducing this evidence. We, therefore, find that the trial court should have excluded this evidence of defendant's "other crimes." *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912 (1988).

Having found the inclusion of this evidence to be error, we now must determine whether defendant is entitled to a new trial. To obtain a new trial, the defendant must show that her rights were prejudiced and that, had the error in question not been committed, a different result would have been reached at trial. *State v. Scott*, 242 N.C. 595, 89 S.E.2d 153 (1955); *State v. Keys*, 87 N.C. App. 349, 361 S.E.2d 286 (1987). The evidence in this case clearly showed that defendant shot Jackson; and there was substantial evidence presented at trial that Jackson was walking towards her home when defendant shot her, negating defendant's self-defense claim. Considering these facts and other evidence presented at trial, we hold that the "other crimes" evidence did not prejudice the defendant. Accordingly, we overrule defendant's assignments of error on this point.

III

[3] In her final assignment of error, defendant contends that she is entitled to a new sentencing hearing because the trial court's finding of the statutory aggravating sentencing factor of prior convictions is not supported by any record evidence. We agree.

A trial judge's finding of an aggravating sentencing factor must be supported by a preponderance of the evidence introduced at the sentencing hearing. N.C.G.S. § 15A-1340.4(a) (1988). Evidence of prior convictions "may be proved by stipulation of the parties or by the original or certified copy of the court record of the prior conviction." *Id.* § 15A-1340.4(e). In *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986), our Supreme Court stated that "a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists." *See also State v. Thompson*, 309 N.C. 421, 424-25, 307 S.E.2d 156, 159 (1983) ("We also agree with the Court of Appeals that the prosecuting attorney's statement concerning a prior conviction of larceny in Jones County constituted insufficient evidence to support a finding of that prior conviction . . . ."). *But see State v. Canady*, 99 N.C. App. 189, 190, 392 S.E.2d 457, 458 (1990) (The State failed to prove prior convictions with exhibits, but this Court held that defendant waived the right to appeal by failing to object.); *State v. Bradley*, 91 N.C. App. 559, 565, 373 S.E.2d 131, 133, *disc. rev. denied*, 324 N.C. 114, 377 S.E.2d 238 (1989) (same). Furthermore, this court has held that "[d]efendant's failure to object to the prosecutor's statement at the sentencing hearing . . . was not fatal; error based on the insufficiency of evidence as a matter of law can be reviewed absent an objection." *State v. Williams*, 92 N.C. App. 752, 753, 376 S.E.2d 21, 22, *disc. rev. denied*, 324 N.C. 251, 377 S.E.2d 762 (1989). *See* N.C.G.S. § 15A-1446(d)(5) (1983) (Errors based on the insufficiency of the evidence as a matter of law may be the subject of appellate review even though no exception has been made in the trial division.).

In the instant case, the prosecutor, at the sentencing hearing, orally listed prior offenses committed by defendant. Defendant's counsel failed to object. The trial court found the presence of the aggravating sentencing factor of prior convictions and sentenced defendant to an eight-year prison term, five years beyond the presumptive. The trial judge based his finding of the aggravating factor of prior convictions solely on the prosecutor's unsworn statements. These statements, standing alone, are insufficient to prove defendant's prior convictions under N.C.G.S. § 15A-1340.4(a)(1)(o) and under our Supreme Court's holdings in both *Swimm* and *Thompson*. Moreover, defendant's failure to object at trial does not bar her from appealing this issue since we find

the evidence insufficient as a matter of law. Accordingly, we remand the case for resentencing.

No prejudicial error in trial. Sentence is vacated and remanded for resentencing in accordance with this opinion.

Judges WELLS and PARKER concur.

HARRIET HART CIOBANU v. THEODORE J. CIOBANU

No. 9110DC72

(Filed 5 November 1991)

Divorce and Separation § 123 (NCI4th)— equitable distribution— real property—pre-separation appreciation—findings

An equitable distribution order was remanded for appropriate findings where defendant had acquired two properties before the marriage which increased in value during the marriage; plaintiff's evidence was that she helped to manage the investment property, made significant homemaker contributions to the other property, and helped improve both properties; defendant introduced evidence that the increases in value were caused by inflation; and the court concluded that all the increases were marital property and awarded one half to plaintiff. The conflict in the evidence required the trial court to resolve the issue of whether the increases were entirely active, entirely passive, or a combination of both, but the trial court's order did not disclose the steps by which the court arrived at its conclusion that the entire increase was marital property, and the Court of Appeals could not determine whether the trial court correctly applied the source of funds theory to the facts. Although the findings show that plaintiff made contributions, there is no finding relating the plaintiff's contributions to the increases in value, nor is there a finding establishing the interest the marital estate "acquired" consistent with its contributions.

Am Jur 2d, Divorce and Separation § 891.

APPEAL by defendant from order entered 16 August 1990 in WAKE County District Court by *Judge Donald W. Overby*. Heard in the Court of Appeals 7 October 1991.

No brief filed for plaintiff-appellee.

Wyrick, Robbins, Yates & Ponton, by Roger W. Knight and John F. Wible, for defendant-appellant.

GREENE, Judge.

Defendant appeals from an equitable distribution order which classified and distributed as marital property the post-marriage/pre-separation increased value of two pieces of defendant's separate real property.

The plaintiff filed a complaint seeking, among other things, equitable distribution of the marital property. The order of equitable distribution contains the following relevant findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

2. That the parties were lawfully married to each other on May 4, 1977; that the parties lived together as if man and wife for in excess of ten years immediately preceding their marriage.

3. That the Plaintiff and Defendant separated from each other on May 2, 1987; and that they were divorced from each other on May 18, 1988. . . .

. . . .

7. That Defendant moved to Raleigh a few months before the Plaintiff joined him. During the interim months the Defendant bought a house and lot located at 7001 Leesville Road, Raleigh, North Carolina for $15,442.40 and then moved Plaintiff down to Raleigh. The parties were not married at the time. The property is titled in Defendant's sole name and had an appraised value of $56,000.00 as of the date of separation with an outstanding loan balance of $8,000.00 for a net value of $48,000.00. The parties stipulated that the value of this property on the date of their marriage was $26,387.87. The value

of the property which accrued during the marriage was $21,612.13.

8. That Defendant bid upon and purchased a house and lot located at 2003 Glenwood Avenue from an estate for approximately $12,000.00 in 1970. The property was purchased while the parties were living together but not married. The property was titled in Defendant's sole name. The value as of the date of separation was $82,000.00 with an outstanding mortgage of $5,200.00 for a net value of $76,800.00. The parties stipulated the value of said property on the date of their marriage was $26,284.19. The value of the property which accrued during the marriage was $50,515.81.

. . . .

10. The parties lived in the 'Leesville' house continuously from its purchase and Plaintiff's move to Raleigh until the date of separation. . . .

11. The Glenwood house was purchased for investment and has been rented during most of the time it has been owned.

. . . .

15. At the Glenwood property, the Plaintiff helped paint the garage (assisted by a young man hired with marital funds to help maintain the property), helped paint the inside and assisted in odd jobs by training the young man in methods of fixing and maintaining the property (e.g. fixing cracks in the walls).

. . . .

17. At the Leesville property, Plaintiff did yard work, panelled the living room, painted inside, stained the woodwork inside and assisted Defendant in fitting trim on windows as well as general maintenance of the household.

18. Plaintiff had contacts with tenants at the Glenwood property and showed the house to prospective tenants a couple of times. She would call Defendant at work if something needed to be done immediately so that he could stop and attend to it after work.

. . . .

24. Both parties performed household duties in the marital home, but Plaintiff was principally responsible for maintaining the household while Defendant pursued his career with IBM.

. . . .

CONCLUSIONS OF LAW

. . . .

4. That the property located at 7001 Leesville Road is marital property from May 4, 1977 to the date of separation on May 2, 1987 with a marital value of $21,612.13 which should be equally divided.

5. That the property located at 2003 Glenwood Avenue is marital property from May 4, 1977 to the date of Separation on May 2, 1987 with a marital value of $50,515.81 which should be equally divided.

Based upon these findings and conclusions, the trial court classified as marital property the post-marriage/pre-separation increased value of the Glenwood and Leesville properties and distributed one-half of the increase to the plaintiff.

The issue is whether the trial court's findings of fact support its conclusions that the post-marriage/pre-separation increases in values to defendant's separate real property are marital property.

In equitable distribution cases, N.C.G.S. § 50-20 (1987) requires the trial court to identify and classify all property as marital or separate. *McIver v. McIver*, 92 N.C. App. 116, 123-24, 374 S.E.2d 144, 149 (1988). In some instances, however, the property may have a dual character of both marital and separate, and in that event, the trial court's classification must reflect this dual nature. *Id.* at 124, 374 S.E.2d at 150; *Wade v. Wade*, 72 N.C. App. 372, 381-82, 325 S.E.2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985) (adopting "source of funds" theory of classification).

Under the source of funds analysis, the acquisition of property is an on-going process which "does not depend upon inception of title but upon monetary or other contributions made by one or both of the parties." *McLeod v. McLeod*, 74 N.C. App. 144, 148, 327 S.E.2d 910, 913, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985). Generally, property "acquired" by a party before marriage

remains that party's separate property, *McIver*, 92 N.C. App. at 124, 374 S.E.2d at 149-50, and increases in value to such separate property are "acquired" by that separate estate but "only to the extent that the increases were passive . . . ." *Lawing v. Lawing*, 81 N.C. App. 159, 174, 344 S.E.2d 100, 111 (1986). Increases in value to separate property attributable to the financial, managerial, and other contributions of the marital estate are "acquired" by the marital estate. *McIver*, 92 N.C. App. at 124, 374 S.E.2d at 150; *McLeod*, 74 N.C. App. at 148, 327 S.E.2d at 913. When the increase in value to separate property is attributable to both the marital and separate estates, each estate is entitled to an interest in the "acquired" increase consistent with its contribution. *Wade*, 72 N.C. App. at 382, 325 S.E.2d at 269. Accordingly, the marital estate shares in the increase in value of separate property "it has proportionately 'acquired' in its own right" through financial, managerial, and other contributions, but does not share in the increase in value of separate property acquired through passive appreciation, such as inflation. *McLeod*, 74 N.C. App. at 148, 327 S.E.2d at 913.

In this case, there is no dispute that the values of the Glenwood and Leesville property on the date of marriage are the defendant's separate property. The disputed issue is whether the increases in value to these properties "acquired" between the dates of marriage and separation are entirely marital, entirely separate, or share a dual character of both marital and separate, and if so, in what proportion.

As this Court has recently stated, "[t]he trial court must classify and identify property as marital or separate 'depending upon the proof presented to the trial court of the nature' of the assets." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (citation omitted). "The burden of showing [by a preponderance of the evidence] the property to be marital is on the party seeking to classify the asset as marital and the burden of showing [by a preponderance of the evidence] the property to be separate is on the party seeking to classify the asset as separate." *Id.*

> The party claiming the property to be marital must meet her burden by showing by the preponderance of the evidence that the property: (1) was 'acquired by either spouse or both spouses'; and (2) was acquired 'during the course of the marriage'; and (3) was acquired 'before the date of the separation

> of the parties'; and (4) is 'presently owned.' N.C.G.S. § 50-20(b)(1) [(1987)]. If this burden is met and a party claims the property to be separate, that party has the burden of showing the property is separate.

Id. at 206, 401 S.E.2d at 787-88. The party claiming the property to be separate meets his burden by showing by the preponderance of the evidence that the property meets the definition of separate property under N.C.G.S. § 50-20(b)(2) (1987). *Id.* at 206, 401 S.E.2d at 788. "If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property." *Id.* This allocation of the burdens of proof is consistent with the General Assembly's recent amendment to N.C.G.S. § 50-20(b)(1) establishing a rebuttable presumption that property acquired between the dates of marriage and separation is marital property. 1991 N.C. Sess. Laws ch. 635, § 1.1 (act applies to equitable distribution actions pending or filed on or after 1 October 1991).

In this case, the plaintiff, as the party claiming the increases in value to be marital, had the burden of showing by the preponderance of the evidence that the increases in value were marital property. As the findings of fact indicate, she met her burden by showing that all the increases in value were "acquired" by either or both spouses, were "acquired" during the course of the marriage, were "acquired" before the date of separation, and were presently owned. *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787. Accordingly, the burden shifted to the defendant to show by the preponderance of the evidence that the "acquired" increases in value to the properties were his separate property. *Id.* at 206, 401 S.E.2d at 787-88. On this issue, the defendant introduced evidence that the increases in value were caused by inflation and were therefore passive. The plaintiff's evidence on this issue, as reflected by the findings of fact, tends to show that the plaintiff helped manage the Glenwood property, made significant homemaker contributions to the Leesville property, and helped improve both properties. This conflict in the evidence required the trial court to resolve the issue of whether the increases were entirely active, entirely passive, or a combination of both. The trial court concluded that all the increases were marital property, but the order contains no findings to support the conclusions. *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988) (appellate review effectively precluded without adequate findings of fact); *McIver*,

92 N.C. App. at 127, 374 S.E.2d at 151 (classification of proportional interests in separate property "must be supported by the evidence and by appropriate findings of fact"). The trial court's order does not disclose the steps by which the trial court arrived at its conclusion that the entire increase was marital property, and therefore, this Court cannot determine whether the trial court correctly applied the "source of funds" theory to the facts. *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). Although the findings show that the plaintiff made contributions, there is no finding relating the plaintiff's contributions to the increases in value, nor is there a finding establishing the interest the marital estate "acquired" consistent with its contributions. Accordingly, we reverse and remand the trial court's order for appropriate findings of fact from the evidence previously submitted and conclusions of law and an order based upon a proper application of the source of funds theory.

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

SAFETY MUTUAL CASUALTY CORPORATION AND NEW JERSEY MANUFACTURERS INSURANCE COMPANY v. SPEARS, BARNES, BAKER, WAINIO, BROWN & WHALEY, A GENERAL PARTNERSHIP, FORMERLY KNOWN AS SPEARS, BARNES, BAKER, HOOF & WAINIO, ALEXANDER H. BARNES, MARSHALL T. SPEARS, ROBERT F. BAKER, JOHN C. WAINIO, CRAIG B. BROWN, GARY M. WHALEY, AND J. BRUCE HOOF, INDIVIDUALLY AND AS GENERAL PARTNERS

No. 9014SC1321

(Filed 5 November 1991)

1. Contribution § 6 (NCI4th); Torts § 4 (NCI3d)— voluntary dismissal of contribution claim—limitation period for refiling

Since the legislature has failed to fix a time in N.C.G.S. § 1B-3(d)(3) for refiling a contribution claim where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim, the three-year limitation period of N.C.G.S. § 1-52(2) applies, and the period begins to run when payment is made in the settlement of the underlying claim.

Am Jur 2d, Contribution §§ 101, 103; Limitation of Actions §§ 311, 313.

2. Attorneys at Law § 47 (NCI4th)— malpractice—failure to refile contribution claim—withdrawal from case—limitation period not expired

Summary judgment was properly entered for defendant attorneys in plaintiff insurers' action for malpractice based on defendants' failure to refile third-party contribution claims for plaintiffs' insureds after those claims were voluntarily dismissed without prejudice where the third-party actions would not have been time barred until a year after defendants withdrew as counsel for plaintiffs' insureds.

Am Jur 2d, Attorneys at Law §§ 219, 220.

What statute of limitations governs damage action against attorney for malpractice. 2 ALR4th 284.

APPEAL by plaintiffs from judgment dated 1 October 1990 by *Judge Donald W. Stephens* in DURHAM County Superior Court. Heard in the Court of Appeals 18 September 1991.

This appeal arises out of a legal malpractice action filed by Safety Mutual Casualty Corporation and New Jersey Manufacturers Insurance Company against Spears, Barnes, Baker, Wainio, Brown & Whaley (Spears Barnes). Plaintiffs contend that defendants breached duties owed to plaintiffs by failing to refile third-party complaints in two civil actions in which defendants represented plaintiffs' insureds.

Plaintiffs employed Spears Barnes to represent their insureds in claims arising out of a traffic accident that occurred on 7 November 1985 on Interstate 85 near Hillsborough. At the time of the accident, REA Construction Company (REA) was repaving the highway under a contract with the North Carolina Department of Transportation (DOT). Because of the construction, traffic had come to a halt on the Interstate. A tractor-trailer truck failed to stop and rear-ended a vehicle causing a chain-reaction that resulted in the deaths of two people, the injury of several others, and extensive property damage. Harry Muhlschegel, who owned the tractor-trailer involved, had leased the truck to Jevic Transportation, Inc. A Jevic employee was driving the truck when the accident occurred. Plaintiff New Jersey Manufacturers Insurance Company was the primary

insurance carrier for Jevic while Safety Mutual Casualty Corporation was the carrier for Muhlschegel.

Defendants represented plaintiffs' insureds in four lawsuits filed as a result of the 7 November 1985 accident. In defending plaintiffs' insureds against these lawsuits, Spears Barnes asserted third-party claims against REA and DOT seeking contribution under the Uniform Contribution Among Tortfeasors Act, G.S. 1B, art. 1. Plaintiffs settled two of the lawsuits and asked Spears Barnes to take voluntary dismissals without prejudice in the third-party claims against REA and DOT in these two actions. Spears Barnes filed notice of dismissal in one action on 31 August 1987 and stipulation of dismissal in the other action on 27 January 1988. In September 1989 Spears Barnes withdrew as plaintiffs' counsel and the third-party claims against DOT and REA Construction were never refiled. On 5 November 1989 plaintiffs sought to have the pleadings amended in one of the other pending lawsuits to include *all* contribution claims against REA and DOT. The trial court denied the motion and concluded (1) that the claims for contribution were time barred under G.S. 1B-1 and Rule 41(a) of the Rules of Civil Procedure and (2) that even if the claims were not time barred, they were "not sufficiently related to the instant action to warrant the addition, consolidation, or joinder with the Plaintiff's claim." Plaintiffs failed to appeal. In this action, plaintiffs allege that the defendants were negligent by failing to refile the contribution claims within "one year from agreement or payment of a claim." The trial court granted summary judgment for the defendants and plaintiffs appeal.

Wishart, Norris, Henninger & Pittman, P.A., by Margaret C. Ciardella and David O. Lewis, for plaintiff-appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and David H. Batten, for defendant-appellees.

Michael E. Mauney for defendant-appellee J. Bruce Hoof.

EAGLES, Judge.

The issue here is whether the trial court erred in granting summary judgment for defendants. We hold that the trial court did not err. Accordingly, we affirm the judgment.

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter

of law. G.S. 1A-1, Rule 56. Defendants contend that they are entitled to summary judgment because the plaintiffs' contribution actions against DOT and REA were not time barred when defendants withdrew as plaintiffs' counsel in the third-party action.

[1] Contribution is governed by Chapter 1B of the General Statutes. Both parties agree that this case is controlled by G.S. 1B-3(d), which provides:

> If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either
>
> (1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment,
>
> (2) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or
>
> (3) While action is pending against him, joined the other tort-feasors as third-party defendants for the purpose of contribution.

The record reveals that third-party claims for contribution were brought on behalf of plaintiffs while the two actions at issue were pending. Accordingly, G.S. 1B-3(d)(3) applies. However, in this case the underlying claims were settled and dismissed with no judgment entered against plaintiffs or their insured. Plaintiffs contend that G.S. 1B-3(d)(3) provides for a one-year limitation period for refiling the contribution claims while defendants contend that a three-year limit applies. We hold that G.S. 1B-3(d)(3) must be read to provide for a three-year statute of limitations.

Unlike G.S. 1B-3(d)(1) and (d)(2) which explicitly state a one-year statute of limitation, G.S. 1B-3(d)(3) is silent as to the statute of limitations period. The Supreme Court has said, "[t]he statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it." *Hardbarger v. Deal*, 258 N.C. 31, 35, 127 S.E.2d 771, 774 (1962) (quoting *Rochester v. Tulp*, 54 Wash. 2d 71, 337 P.2d 1062 (1959)). "[I]f the Legislature has failed to fix

any time, the Courts cannot, in a given case, supply this legislative lapse. The fixing of the time within which to bring suit, under such circumstances, is purely a legislative function. It is not within the power of the judiciary." *Barnhardt v. Morrison*, 178 N.C. 563, 568, 101 S.E. 218, 221 (1919) (quoting *Adams and Freese Co. v. Kenoyer*, 16 L.R.A. (N.S.) 683).

Here, the legislature has failed to fix a time in G.S. 1B-3(d)(3) for refiling contribution claims in the situation where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim. However, the legislature has provided that a three-year statute of limitations applies "[u]pon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it." G.S. 1-52(2). G.S. 1B-3(d)(3) mentions no other time, and we hold that the three-year limit in G.S. 1-52(2) must apply here.

"It is the general rule that the act of payment of compensation to the injured person in satisfaction or partial satisfaction of the common liability fixes and determines the right of action of one joint tortfeasor against another for contribution. His cause of action for contribution accrues at that time, not before, and in the absence of waiver or the like, exists until barred by the pertinent statute of limitations." 18 Am. Jur. 2d *Contribution* § 78 (1985). "North Carolina follows the general rule that a cause of action on an obligation to indemnify normally accrues when the indemnitee suffers actual loss. The same rule applies to the accrual of a cause of action for contribution between joint tort-feasors." *Premier Corp. v. Economic Research Analysts, Inc.*, 578 F.2d 551, 553-54 (4th Cir. 1978) (citations omitted). Here, the record does not indicate precisely on what date payment was made in the settlement of the two lawsuits at issue.

[2] However, the record does establish that New Jersey Manufacturers Insurance Company issued a check on 5 August 1987 in settlement of one lawsuit and another check on 25 November 1987 in settlement of the other lawsuit. New Jersey Manufacturers gave instructions to hold the checks in escrow until receipt of "the Release and Stipulation of Dismissal" and "the appropriate closing documents." Assuming that payment was made on the dates above, the third-party actions would not have been time barred until August 1990 and November 1990, approximately one year after defendants' withdrawal as counsel in September 1989. Accordingly, we hold

that the trial court correctly granted summary judgment for defendants.

Because we have resolved this controversy as discussed above, we need not reach and expressly decline to reach the troublesome issue of whether and to what extent, if any, that legal malpractice claims may be assigned by insured persons to their insurers. *See Hurst v. West*, 49 N.C. App. 598, 272 S.E.2d 378 (1980); *Christison v. Jones*, 83 Ill. App. 3d 334, 405 N.E.2d 8 (1980).

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. BRIAN KEITH SCHIRMER, DEFENDANT

No. 9019SC1130

(Filed 5 November 1991)

1. **Searches and Seizures § 9 (NCI3d)— search of vehicle incident to arrest**

The trial court properly denied defendant's motion to suppress cocaine seized from defendant's car where the evidence on voir dire supported the trial court's findings and conclusions that defendant was under arrest at the time of the search for operating a vehicle without a driver's license, insurance and registration and that the search was incident to this lawful arrest.

Am Jur 2d, Searches and Seizures §§ 39, 96.

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

2. **Criminal Law § 236 (NCI4th)— speedy trial—Interstate Agreement on Detainers—failure to request trial**

The trial court properly denied defendant's motion to dismiss the indictments on the ground that the State failed to try him within the time required by the Interstate Agreement on Detainers where defendant notified the State by mail that he was incarcerated in Florida, a detainer thereafter filed

by the State in Florida contained a request to advise whether defendant chose to exercise his rights under the Interstate Agreement, and defendant failed to give written notice to the prosecutor requesting a final disposition of the pending charges.

Am Jur 2d, Criminal Law §§ 404-407, 867.

Validity, construction, and application of Interstate Agreement on Detainers. 98 ALR3d 160.

3. Evidence and Witnesses § 1308 (NCI4th)— motion to suppress confession during trial—hearing not required

The trial court was not required to conduct a hearing on defendant's motion during trial to suppress use of his confession for impeachment purposes where the record shows that the State did not intend to use the confession at trial and was thus not required to give defendant notice about use of his statement. N.C.G.S. § 15A-975.

Am Jur 2d, Depositions and Discovery §§ 528-530; Evidence § 583; Witnesses §§ 527, 602.

APPEAL by defendant from *Allen (W. Steven), Judge.* Judgment entered 15 June 1990 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 9 October 1991.

Defendant was charged in proper bills of indictment with trafficking in cocaine in violation of G.S. 90-95(h) and possession of drug paraphernalia in violation of G.S. 90-113.22.

The evidence at trial tends to show the following: While on duty on 11 August 1988, Trooper J. A. Brinkley of the North Carolina Highway Patrol observed a 1966 gray Pontiac on Gold Hill Road in rural Randolph County. Trooper Brinkley noticed the car being driven slowly and weaving within the lane of traffic. The car had an Illinois license plate which had expired. Trooper Brinkley engaged his blue light and stopped the car. Defendant stopped and got out of the car. When asked by the trooper for his license and registration, defendant responded that he had a Florida license, but it had burned in a car fire. Defendant gave the Trooper a false name of Keith Brinn and said he would look for identification in the car. While defendant was looking for identification, Trooper Brinkley noticed a gun on the console of defendant's car. When he found no identification, Trooper Brinkley asked

defendant to step back to the patrol car and wait while he ran a license check. Defendant then said his name was Brian Keith Schirmer and gave the officer his birthdate. A license check in Florida showed that defendant's license had expired. At this point, Trooper Brinkley advised defendant that he was going to be arrested for failure to have a license, registration, and insurance. Defendant discussed with Trooper Brinkley, whether to leave the car or to have it towed. Defendant decided to leave the car on the shoulder. After they went back to secure defendant's car and again look for information, testimony shows that defendant made a jumping movement toward the inside of the car. The trooper pulled defendant away from the car, handcuffed him, and placed him at the right rear of the car. As the trooper proceeded toward defendant's car, defendant "hollered," "that coke's not mine." When he picked up the pistol, Trooper Brinkley noticed a cigar box on the floorboard of the car. The box contained three bags of a tan powdery substance, later identified as 71.2 grams of cocaine, and two hypodermic needles. More needles were found in the glovebox and on the seat. After finding the cocaine, Trooper Brinkley called for another patrol car. When it arrived, defendant's car was searched, including the trunk. Fingerprints found on the bags of cocaine were not those of defendant.

A jury found defendant guilty of both charges. From a judgment imposing a prison sentence of twelve years and a fine of $50,000.00 plus costs, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the State.

Robert E. Wilhoit for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns as error the trial court's denial of defendant's motion to suppress evidence seized by Trooper Brinkley and the admission of the extraneous statement by defendant when he "hollered," "that coke's not mine."

Since defendant cites law only to address the suppression of evidence issue, pursuant to Appellate Rule 28(b)(5), we will limit our discussion to this issue.

Defendant contends that the cocaine found in his car was seized during a warrantless search, and not incident to a lawful custodial arrest. We disagree.

At trial, a *voir dire* was conducted on defendant's motion to suppress evidence. The trial judge made findings of fact and conclusions of law that defendant was under arrest at the time of the search and thus, the search was incident to a lawful arrest. The court denied defendant's motion to suppress evidence of cocaine found in his vehicle.

When there is conflicting evidence in a *voir dire* hearing on a motion to suppress evidence, it is incumbent upon the trial judge to make findings of fact and conclusions of law to show the basis for rulings on admissibility of evidence. *State v. Barnett*, 307 N.C. 608, 300 S.E.2d 340 (1983), *State v. Herndon*, 292 N.C. 424, 233 S.E.2d 557 (1977). "The court's findings, if supported by competent evidence, are conclusive on appeal." *Barnett* at 613, 300 S.E.2d at 343. When the evidence is conflicting, the trial judge must resolve the conflicts after hearing the evidence and observing the demeanor of the witnesses. *Barnett* at 614, 300 S.E.2d at 343, *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970).

In the present case, the findings of fact are fully supported by the evidence in the record. After hearing the evidence, the trial judge properly resolved the conflicts and made findings of fact and conclusions of law which will not be disturbed on appeal. *See State v. Miley*, 291 N.C. 431, 230 S.E.2d 537 (1976). Defendant's assignment of error is overruled.

[2] Defendant next assigns as error the denial of his motion to dismiss prior to trial. In his motion, defendant argues that the State failed to afford defendant a trial within the 120 day time period pursuant to G.S. 15A-701.

Defendant erroneously relies on G.S. 15A-701, the article which deals with speedy trials. However, the timeliness of defendant's trial is controlled by G.S. 15A-761, The Interstate Agreement on Detainers (hereinafter, the Act). In article III(a), the Act provides that when a person is incarcerated in a "party" state, and there is a pending untried indictment in another state, the prisoner shall be brought to trial within 180 days after he has given written notice to the prosecuting officer of the place of his imprisonment

and request for a final disposition to be made of the indictment. G.S. 15A-761, Art. III(a).

In the present case, defendant was incarcerated in Florida on 21 June 1989. Defendant sent a letter dated 21 June 1989 to give notice that he was incarcerated in Florida. This information went to defendant's attorney, and was received by the State on 17 July 1989. On 26 October 1989 the State filed a detainer with the Florida Department of Corrections which contained a request to advise whether defendant chose to exercise his rights under the Interstate Agreement on Detainers. Defendant did not file any documents in response to the State's request.

The record before us does not show compliance by defendant with procedures required by the Act. Under the provisions of the Act, defendant has the right to request a speedy trial and final disposition of any pending indictments. The only action taken by defendant was the letter giving notice of where he was incarcerated. The record is without evidence to put the prosecutor on notice that defendant was availing himself of the provisions of the Act and that the prosecutor must try him within 180 days after notice was filed. *See State v. Vaughn*, 296 N.C. 167, 250 S.E.2d 210 (1978), *cert. denied*, 441 U.S. 935, 99 S.Ct. 2060, 60 L.Ed.2d 665 (1979); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978). After the State requested a response concerning whether defendant wanted to avail himself of the Act, defendant remained silent and in no way complied with the requirements set out previously. Defendant's assignment of error is meritless.

[3] Defendant assigns as error the court's failure to rule defendant's out of court statements inadmissible for purposes of impeachment. Defendant argues that the failure to conduct a hearing on whether to suppress his confession had a chilling effect on his decision not to testify.

G.S. 15A-975(b) provides that "[a] motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel, . . . or defendant sooner than twenty working days before trial of its intention to use the evidence and the evidence is (1) [e]vidence of a statement made by a defendant . . . ."

In the present case the court was not obligated to allow a motion for a suppression hearing for the first time at trial. The

record shows that the State did not intend to use such material at trial and thus, a notice to defendant about use of his statement at trial was not warranted. Therefore, the State was under no obligation to give defendant notice and the court properly found that a suppression hearing during trial was not required. Since the court was not required to grant a suppression hearing at trial pursuant to the requirements of G.S. 15A-975, the decision of the court did not have a chilling effect as to demonstrate prejudicial error. Thus, defendant's assignment of error is meritless.

Defendant's last assignment of error is deemed abandoned pursuant to Rule 28(b)(5) of the Rules of Appellate Procedure, because there is no reason or argument in support of it, nor any authority cited.

Defendant received a fair trial free from prejudicial error.

No error.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. JOHNNY RAY MOONEYHAN

No. 907SC1101

(Filed 5 November 1991)

Automobiles and Other Vehicles §§ 790, 848 (NCI4th)— driving while impaired—second degree murder—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss charges of second degree murder, driving while impaired, and driving while his license was revoked arising from an accident where defendant contended that the State failed to prove that defendant was driving the motor vehicle when the accident occurred, but the State's evidence tended to show that defendant drove his truck to a nightclub around 5:30 p.m.; a witness estimated that defendant drank three beers in the hour and a half he was at the club; defendant then drove to the Moose Lodge and had dinner, drinking approximately four more beers over about three hours; a witness saw defendant preparing to leave at around 10:00 p.m. and

warned him not to drive home because of the weather and his alcohol consumption; defendant left the lodge by himself; defendant was involved soon after in the accident, which resulted in the death of a sheriff's deputy; another deputy, who was at the scene when it occurred, testified that defendant was the only one in defendant's truck immediately following the collision; the passenger door of the truck was closed when the deputy approached and the driver's door was jammed and could not be opened; the deputy testified that he did not see anyone outside of any of the vehicles involved at the time; and other witnesses who appeared on the scene later testified that only those persons mentioned above who were involved in the accident were present at the scene.

Am Jur 2d, Automobiles and Highway Traffic §§ 383, 384.

APPEAL by defendant from *Fountain (George M.), Judge.* Judgments entered 15 August 1990 in Superior Court, NASH County. Heard in the Court of Appeals 7 October 1991.

Defendant was charged in proper bills of indictment with second degree murder in violation of G.S. 14-17, with driving while impaired in violation of G.S. 138.1, and with driving while license revoked in violation of G.S. 20-28. The State's evidence tends to show the following: On the evening of 25 January 1990, a witness, Johnny Leonard, saw defendant drive up to a private nightclub alone in his red and white pickup truck. The owner of the nightclub saw defendant at the nightclub around 5:30 p.m., and estimated that in the hour and a half that defendant was in the nightclub that defendant consumed three or four beers.

Afterwards, a group of men, including defendant, left the nightclub and went approximately one mile down the road to the Tarboro Moose Lodge for dinner. Mr. Leonard saw defendant at the Moose Lodge around 7:30 p.m., and estimates that defendant consumed four more beers while having dinner. Leonard also saw defendant at about 10:00 p.m. standing by the door of the lodge preparing to leave. Leonard asked defendant to eat something before he left since he had seen defendant drink at least eight beers that night and thought that was too much to allow the defendant to drive. Leonard offered to call defendant a cab or get him something to eat, and warned defendant that it was raining heavily and that

it was a bad night for anyone to be out driving. Defendant declined Leonard's offer and left the lodge.

At approximately 10:30 p.m., Deputy Jack Sewell was following a car driven by Nola Hines Jackson on Highway 64 Alternate. Jackson testified at trial that she was on a straight stretch of road and saw a truck coming toward her in her lane of travel. She stated that she flashed her high beam headlights at the truck, but that it stayed in her lane. Jackson testified that she jerked her car onto the shoulder of the highway, and saw a red and white pickup truck go by her moving fast in the wrong lane of travel. Jackson stated she then heard an explosion.

Deputy Sewell testified that he was driving on a straight stretch of Highway 64 Alternate, with Deputy Tom Cone following 300 to 400 feet behind him in his patrol car, when he noticed Jackson's car in front of him veer sharply to the right in a fast, jerking motion. Deputy Sewell stated that he slowed his vehicle and began to pull onto the shoulder of the highway and saw a pickup truck coming toward him in the wrong lane of travel. Sewell pulled his car completely onto the shoulder of the highway and had almost come to a complete stop when the pickup truck hit the left front of his patrol car and careened off the left side. Sewell testified that a loud noise followed. Sewell notified the Tarboro dispatcher that he had been involved in a collision at 10:45 p.m.

Deputy Sewell further testified that after reporting the accident he ran to the rear of his car where he saw Deputy Cone's patrol car with heavy damage to its front end, and behind it the red and white pickup truck had come to a stop on top of another vehicle. He stated that he did not see anyone outside of either vehicle at the time. Sewell observed Cone lying on the broken seat of his patrol car, at which point a fire started in the engine of Cone's car. Sewell ran back to his vehicle, got his fire extinguisher and put out the fire. He then tried and failed to find Deputy Cone's pulse. At this point, Sewell estimates that one minute had passed since he had first exited his vehicle. During that time, Sewell testified that he had not seen anyone outside of the vehicles behind him.

Sewell then looked under the truck at the Buick operated by Deborah Rose. Rose stated that she was all right, but had suffered a gash to her forehead. Sewell then looked in the pickup truck, and stated that the driver's door was up in the air and that the passenger door was angled down closer to the surface

of the road. When Sewell looked inside the truck he saw defendant with his feet under the steering wheel and his upper body and head towards the passenger side of the truck. Sewell opened the passenger door and defendant slid out. Sewell testified that he helped defendant to stand and asked him for his driver's license. Sewell stated that defendant responded: "I don't have no fucking driver's license. My fucking license are revoked." Sewell said that defendant did not appear to be injured, but that he had a strong odor of alcohol on his breath, his speech was slurred, his eyes were glassy and red, and he was very unsteady on his feet. Sewell placed defendant under arrest, and as he turned him around to handcuff him defendant asked "Did you get the black-headed girl that was driving the car?"

Trooper Keith Stone transported defendant to the breathalyzer room at the Highway Patrol Station. In a taped conversation, defendant told Stone that there were three people in his truck before the collision. Defendant also stated he was not driving the truck and did not know on what street the collision occurred. Defendant was advised of his chemical analysis rights, and refused to be tested. Stone testified that at that time, his opinion was that the effect of alcohol on defendant's physical and mental faculties was extreme.

The jury found defendant guilty of second degree murder, driving while license revoked, and driving while impaired. Judge Fountain found no mitigating factors, but found as aggravating factors that defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement, had a prior conviction involving impaired driving within seven years of the date of this offense, drove at the time of the current offense while his license was revoked for impaired driving, and caused by his impaired driving at the time of the current offense serious injury to another person. From judgments on the verdicts, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

Farris & Farris, P.A., by Robert A. Farris, Jr., and Thomas J. Farris, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant's first assignment of error is that the trial court erred by denying defendant's motion to dismiss at the close of all evidence because the evidence was insufficient as a matter of law to support all the elements necessary for a conviction. Defendant argues that the State failed to prove that he was driving the motor vehicle when the accident occurred.

In ruling on a motion to dismiss for insufficiency of evidence in a criminal case, all evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State. The State is entitled to every reasonable inference therefrom, and inconsistencies or contradictions are disregarded. The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury. *State v. Scott*, 323 N.C. 350, 372 S.E.2d 572 (1988). The motion for dismissal presents to the court 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 of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is such substantial evidence, the motion for dismissal should be denied. *State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983).

In this case, evidence by the State tended to show that on the evening of 25 January 1990, defendant drove his red and white pickup truck to a nightclub around 5:30 p.m. A witness at the club estimates that defendant drank three beers in the hour and a half that he was at the club. Defendant then drove his truck approximately one mile to the Tarboro Moose Lodge, where he had dinner, and drank approximately four more beers over the course of about three hours. At around 10:00 p.m., a witness saw defendant preparing to leave the lodge, and warned him not to drive home because of the weather and his consumption of alcohol during the evening. Defendant told the witness: "I can make it. I am leaving." The witness further testified that defendant then left the lodge by himself.

Shortly after defendant left the lodge, his truck was involved in the accident which resulted in the death of Deputy Cone. Deputy Sewell, who was at the scene of the accident when it occurred, testified that defendant was the only one in the red and white pickup truck immediately following the collision, that the passenger

door of the truck was closed when he approached, and that the driver's door was jammed and could not be opened. Sewell testified that he did not see anyone outside of any of the vehicles involved at the time. Other witnesses who later appeared on the scene testified that only those persons mentioned above who were involved in the collision were present at the scene of the accident.

When this evidence is viewed in the light most favorable to the State, the testimony of the witnesses constitutes substantial evidence that defendant was the perpetrator of the offense, in that a reasonable mind might accept this evidence as adequate to support that conclusion. We hold the trial court properly denied defendant's motion to dismiss for insufficiency of evidence to show he was the driver of the pickup truck.

Defendant's final two arguments are that the judgment should be arrested because the indictment 90CRS8259 fails to charge an offense because "nowhere in this indictment is the defendant informed of the time and place of the alleged offense," and that the trial court committed plain error in its charge to the jury "by failing to submit the lesser included offenses to the jury and by misstating the law of the case and particularly North Carolina Pattern Jury Instructions 206.32." We find after careful review of defendant's contentions that both of these arguments are meritless.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges EAGLES and GREENE concur.

TIMOTHY H. HENDERSON v. GARY L. HERMAN, WILDA R. HERMAN, TRIAD AVIATION, INC. (FORMERLY TRIAD AIRWAYS, INC.) AND H & H PROPELLER SERVICE, INC.

No. 9015SC1332

(Filed 5 November 1991)

Arbitration and Award § 5 (NCI4th)— arbitration—stay lifted by another judge—error

A superior court judge erred by lifting a stay imposed by another superior court judge where a lawsuit arose from

the sale of plaintiff's interests in defendant corporations; defendants' motions to compel arbitration pursuant to the sales contract and to stay the pending action were granted; a different superior court judge discontinued the action, although discovery was to continue for a time; and another superior court judge subsequently lifted the stay, granted Rule 11 sanctions, struck defendants' answer and counterclaim, entered a default judgment against each defendant upon all the issues, and remanded the case to arbitration on the sole issue of plaintiff's damages. The Uniform Arbitration Act creates a process whereby the existence of an agreement to arbitrate requires a court to compel arbitration on one party's motion and then requires the court to step back and take a hands-off attitude during the arbitration proceeding, reentering the dispute to confirm, modify, deny or vacate the arbiter's award. The court at no time loses jurisdiction, but must not interfere with the arbitration proceeding during the hands-off period. N.C.G.S. § 1-567.1, *et seq.*

Am Jur 2d, Arbitration and Award § 80.

DEFENDANTS appeal an order issued 18 September 1990 by *Judge Orlando F. Hudson* in ALAMANCE County Superior Court granting plaintiff's motion for sanctions, striking defendants' answer and counterclaim, entering a default judgment against each defendant on all issues, and ordering the case to arbitration on the sole issue of damages. Heard in the Court of Appeals 24 September 1991.

White & Crumpler, by Fred G. Crumpler, Jr. and Dudley A. Witt, for plaintiff-appellee.

Wishart, Norris, Henninger & Pittman, by Margaret C. Ciardella and Robert J. Wishart, for defendants-appellants.

LEWIS, Judge.

The issue before this Court is whether one superior court judge can lift a stay granted by another superior court judge on a case which had been referred to arbitration by consent order and "discontinued."

Plaintiff-appellee, Timothy Henderson, was a shareholder, an officer, and a director of both defendant corporations, Triad Airways, Inc. (now Triad Aviation, Inc.) and H & H Propeller Service, Inc. On 10 August 1984, Henderson sold his interest in both defend-

ant corporations to the respective corporations. The sales contract had an arbitration clause which read:

> In the event of a controversy between or among the parties hereto that they are in good faith unable to resolve with respect to any matter arising out of this Agreement, such matters shall be settled by arbitration in Alamance County, North Carolina in accordance with the commercial rules then obtaining of the American Arbitration Association.

On 1 December 1986, Henderson filed suit against the defendant corporations and against the corporate officers individually, Gary and Wilda Herman. Henderson alleged breach of contract, slander, and unfair and deceptive trade practices; later, he was permitted to add the allegations of fraud and misrepresentation. The defendants counterclaimed for breach of contract, slander, unfair and deceptive trade practices, which was later amended to include allegations of fraud and breach of fiduciary duty. The defendants' motion to compel arbitration pursuant to the sales contract and to stay Henderson's pending action were granted by Judge Henry Hight, Jr. on 26 April 1989. The action was discontinued by order of Judge J. B. Allen, Jr. dated 27 April 1989, though discovery was to continue up to 15 June 1989.

Plaintiff filed a motion to lift the stay and a motion for sanctions under Rule 11. The record does not indicate the status of the arbitration proceedings. On 18 September 1990, Judge Orlando F. Hudson entered an order lifting the stay, granting sanctions, striking the defendants' answer and counterclaim, and entering a default judgment against each defendant upon all of the issues. The case was then remanded to arbitration on the sole issue of plaintiff's damages. The defendants appeal.

Defendants allege three errors. First, defendants contend that one superior court judge cannot overrule an order given by another superior court judge in the same case, so that Judge Hudson lacked jurisdiction to lift a stay granted by Judge Hight as part of the arbitration order. As we rule in their favor on the first assignment of error, we decline to address their second and third allegations of error.

We affirm the well settled principle of North Carolina law that superior court judges are all of equal authority, but choose to rule in the defendants' favor based upon our interpretation of

the Uniform Arbitration Act (ACT) and case law. Essentially, the defendants challenge Judge Hudson's authority to lift a stay issued by Judge Hight in conjunction with an order to compel arbitration pursuant to the Uniform Arbitration Act (ACT), Article 45, N.C.G.S. §§ 1-567.1 through 1-567.20 (1983).

Read in its entirety, the Uniform Arbitration Act appears to create a system of problem resolution with minimal judicial intervention. The ACT provides a means by which parties can agree contractually to limit judicial intervention into their disputes. The only prerequisite to invoking the ACT is that there be a valid written agreement to arbitrate the dispute. N.C.G.S. § 1-567.3(a) (1983). There must be a request by at least one party to invoke the ACT in cases subject to it. N.C.G.S. § 1-567.3(a) (1983). Once sent to arbitration, the arbitration proceeding may not be stayed for any reason other than a determination that there is not a valid written agreement to arbitrate the dispute. N.C.G.S. § 1-567.3(b) (1983). A court cannot stay a matter referred to arbitration even to determine if the matter has merit or to determine whether fault grounds have been shown. N.C.G.S. § 1-567.3(e) (1983).

An agreement to arbitrate does not cut off a party's access to the courts. On the contrary, an action compelled to arbitration must have the arbiter's decision confirmed by the court. The ACT provides an appeal from the arbitration proceedings for: 1) denial of motion to compel arbitration, 2) grant of motion to stay arbitration, 3) an order confirming, denying confirmation, modifying or correcting an award, 4) vacating an award without rehearing or 5) judgment entered pursuant to the ACT. N.C.G.S. § 1-567.18(a)(1-6) (1983). Read as a whole, the ACT provides parties with a means to bypass the morass of judicial litigation, while still maintaining the judicial doors ajar for recalcitrant disputes. Hence, it would appear that the legislature intended the courts to send certain predetermined issues to arbitration and then to step back until the arbitration proceeding is complete.

Case law on point supports this view. In *Sims v. Ritter Const. Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983), this Court held that where an agreement to arbitrate was shown, "the Superior Court had no jurisdiction to hear the action arising out of the . . . contract and erred in withdrawing the matter from arbitration and placing it on the trial calendar." *Id.* at 54, 302 S.E.2d at 295. Our Supreme Court explained that a literal reading of this statement is not

correct. Though the ACT requires that certain disputes be removed from direct judicial supervision, the court that compels arbitration does not lose jurisdiction. In a footnote to *Adams v. Nelsen*, 313 N.C. 442, 329 S.E.2d 322 (1985), the Court explicitly states:

> There is a distinction between a lack of jurisdiction and exercising *existing jurisdiction to enforce an agreement under the Uniform Arbitration Act.* Nothing contained in the language of the Act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate.

Id. at 446 n.3, 329 S.E.2d at 324 n.3 (emphasis added).

We note that the Court stated that the trial court has the power to "enforce the agreement" under the ACT. The ACT gives the trial court the power to act both before and after the arbitration proceeding. The question left open is whether the trial court has the power to act *during* the arbitration proceeding; specifically, whether or not a trial court may stay an arbitration proceeding to rule on a motion. We find the *Adams* Court's use of the term "existing" jurisdiction significant. Had the term "concurrent" jurisdiction been used it would have given both the trial court and the arbiter the power to act at the same time. We believe that the choice of "existing" over "concurrent" means that the trial court has authority to act both before and after, rather than during the arbitration proceeding. This interpretation is supported by the fact that the ACT will not permit an arbitration proceeding to be stayed for any reason other than to determine whether the prerequisite agreement to arbitrate exists or if the contract was induced by fraud.

Sims and *Adams* are logically consistent with each other and are consistent with the ACT when the ACT is read to create a process whereby the existence of an agreement to arbitrate requires a court to compel arbitration on one party's motion and then requires the court to step back and take a "hands-off" attitude during the arbitration proceeding. The trial court then reenters the dispute arena to confirm, modify, deny or vacate the arbiter's award. At no time does the trial court lose jurisdiction. However, during the "hands-off" period, the trial court must not interfere with the arbitration proceeding. Hence, we conclude that it was error for the arbitration proceeding in the case at bar to be disturbed as in this case.

The order of Judge Hudson is vacated and the case remanded for further proceedings in arbitration.

Vacated and remanded.

Judges ARNOLD and COZORT concur.

DAVID JOHNATHON TURNER v. SAMUEL HATCHETT AND THOMAS EDWARD NEWBY, SR.

No. 9117SC3

(Filed 5 November 1991)

Judgments § 2 (NCI3d)— judgment out of session—lack of consent of parties

The trial court lacked subject matter jurisdiction to enter an order imposing Rule 11 sanctions against plaintiff's attorney by signing the order ten weeks after the close of the session at which the motion for sanctions was heard where there is nothing in the record to indicate that the trial court announced its ruling on the motion in open court or at any time during the session or that the parties consented to entry of the order out of session.

Am Jur 2d, Judgments § 160.

APPEAL by plaintiff from order signed 28 September 1990 by *W. Douglas Albright*. Heard in the Court of Appeals 7 October 1991.

This is a civil action in which the defendant-appellees (defendants) sought and recovered Rule 11 sanctions against the plaintiff's attorney, Franklin Smith. Because a decision of the facts of the underlying dispute or the conduct which prompted the trial judge to impose sanctions is not essential to the disposition of this appeal, we do not address them.

On 16 July 1990 Judge Douglas Albright heard defendant's motion for Rule 11 sanctions against Mr. Smith. On 28 September 1990 Judge Albright signed an order imposing Rule 11 sanctions against Mr. Smith in the amount of $2,996.95.

Plaintiff appeals.

Franklin Smith and John E. Hall for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Dewey W. Wells and Nancy R. Hatch, for defendant-appellees.

EAGLES, Judge.

During oral argument on appeal Mr. Smith's counsel raised the question of lack of jurisdiction and argued that the trial court's order should be vacated because the trial court lacked subject matter jurisdiction. After careful review of the record, we agree.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action." N.C.R. Civ. P. 12(h)(3) (emphasis added). "And objection to such jurisdiction may be made *at any time* during the progress of the action." *Baker v. Varser*, 239 N.C. 180, 185, 79 S.E.2d 757, 761 (1953) (emphasis added).

In *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984), our Supreme Court stated:

> The general rule concerning judgments and orders is as follows:
>
> > "[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). In prior and subsequent cases, this rule has been stated in various forms, and it has been consistently applied in both criminal and civil cases. *See State v. Saults*, 299 N.C. 319, 261 S.E.2d 839 (1980); *Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757 (1954); *State v. Alphin*, 81 N.C. 566 (1879). We still adhere to this rule today.

Boone, 310 N.C. at 287, 311 S.E.2d at 555.

"[W]e note *ex mero motu* that we may take judicial notice of the assignments of trial judges to hold court, of the counties that make up a certain district and of the resident district of a superior court judge." *State v. Saults*, 299 N.C. 319, 324, 261 S.E.2d 839, 842 (1980) (citing *Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757 (1954)). Accordingly, we take judicial notice of the following: During July 1990 Judge Albright was assigned to District 17B and was assigned to hold a civil session in Surry County Superior Court. The session was scheduled to begin on 16 July 1990 and to last two weeks. Surry County lies within District 17B. During September 1990 Judge Albright was assigned to District 17B and was assigned to hold a one week criminal session in Stokes County Superior Court beginning 24 September 1990. Stokes County lies within District 17B.

Judge Albright held the Rule 11 sanction hearing in Surry County on 16 July 1990. At that hearing Judge Albright heard arguments of counsel, received exhibits and requested counsel for both parties to submit proposed orders to the Court within thirty days. Both parties submitted proposed orders. Judge Albright later entered his order on 28 September 1990. This order, which was signed ten weeks after the Surry County civil session had ended, was issued out of session. The order does not contain any recital or other evidence of a stipulation of the parties that the order could be signed out of session. The issues here are whether, without consent of the parties, the trial court had jurisdiction to enter the written order and if not, whether the trial court entered the order out of session with the consent of the parties.

We are aware of the case law that allows written orders to be entered out of session in those situations where the trial court made an oral ruling in open court and in session. *See e.g.*, *State v. Smith*, 320 N.C. 404, 415-416, 358 S.E.2d 329, 335 (1987); *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984); and *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978). However, in the instant case, there is nothing in the record before us to support a finding that the trial court announced his ruling on the motion in open court or at any time during the session. Similarly, there is nothing of record indicating that the trial court made its decision before the session had ended. From the record before us, the critical decision here, the ruling of the court contained in the order granting the Rule 11 sanctions, was not made until

after the session had ended. The determinative factor here is whether the order was entered out of session with the consent of the parties.

Defendants argue that Mr. Smith gave implied consent to the trial court's subject matter jurisdiction by submitting a proposed order and cover letter to Judge Albright on 24 August 1990. We disagree. The letter and order were made in compliance with a direct request of the superior court judge and was not the product of a waiver or consent by the attorney. Upon careful review we conclude that there is nothing in the record before us which indicates that the parties consented to having the order entered out of session. (We note in passing that the 28 September 1990 order did not indicate on its face in what county or district the order was actually signed or whether the parties consented to the order being issued out of session. The better practice is for a proposed order or judgment to indicate on its face when it was signed, where it was signed and whether the parties have stipulated to the order or judgment being signed out of session.)

Because the order here was entered out of session without the parties' consent, the order is null and void, *Saults*, 299 N.C. at 325, 261 S.E.2d at 842, and must be vacated.

Vacated.

Chief Judge HEDRICK and Judge GREENE concur.

THOMAS J. REHM, PLAINTIFF v. LYNNE BARRETT REHM, DEFENDANT

No. 9012DC1297

(Filed 5 November 1991)

1. Divorce and Separation § 30 (NCI4th)— separation agreement —alimony—terminated upon cohabitation

There was sufficient evidence to support the trial judge's conclusion that defendant had cohabited with someone of the opposite sex and that plaintiff's obligation to pay alimony under a separation agreement incorporated into a divorce decree had terminated where the court found that defendant had begun a relationship with a member of the opposite sex, Mr.

Blashfield, and had become intimate with him; Blashfield stayed in defendant's house as many as five nights a week, although he maintained a separate residence; he was observed on two occasions spending the night at defendant's home, leaving in different clothes from the night before, and kissing defendant good-bye at the front porch prior to getting into his own car and driving away; Blashfield and defendant took trips together lasting more than one day, often including the minor child; and defendant and Blashfield have an exclusive, monogamous relationship for both sexual and regular domestic purposes.

Am Jur 2d, Divorce and Separation § 850.5.

Divorced or separated spouse's living with member of opposite sex as affecting other spouse's obligation of alimony or support under separation agreement. 47 ALR4th 38.

2. Appeal and Error § 106 (NCI4th)— alimony—contempt—obligation terminated—immediately appealable

An order holding that plaintiff was not in contempt and terminating his obligation to pay alimony affected a substantial right of defendant and was appealable.

Am Jur 2d, Appeal and Error §§ 168-170; Contempt § 45.

APPEAL by defendant from order entered 31 October 1990 by *Judge James Floyd Ammons, Jr.*, in CUMBERLAND County District Court. Heard in the Court of Appeals 29 August 1991.

Plaintiff and defendant entered into a Separation Agreement 7 February 1989 and were granted a divorce 25 January 1990, with the separation agreement being incorporated by reference into the final decree. The "Contract of Separation and Property Settlement Agreement" provided that defendant shall receive alimony payments beginning January 1989, and the payments "shall continue until the first to occur of the following events: (i) the death of wife, (ii) the remarriage of wife, (iii) the death of husband, (iv) the passing of thirty six (36) months, or *if the wife cohabits with someone of the opposite sex.*" (Emphasis added.)

In June 1990 plaintiff ceased paying alimony, and on 23 July 1990 defendant filed a motion in the cause for recovery of the sum due, praying that defendant be adjudged in willful contempt of court. That same day, an order to show cause was issued against plaintiff. On 13 October 1990, an order was entered denying defend-

ant's motion in the cause for contempt and ordering that plaintiff's obligation to pay alimony be terminated.

From this judgment, defendant appeals.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by F. Thomas Holt, III, for plaintiff-appellee.

Blackwell, Strickland & Luedeke, P.A., by John V. Blackwell, Jr., and Kenneth D. Burns, for defendant-appellant.

ORR, Judge.

[1] The basic issue for our determination is whether the trial court erred in determining that defendant cohabited with someone of the opposite sex. For the reasons below, we affirm the order of the trial court.

> It is well settled that in contempt proceedings the trial court's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. The trial court is not required to make separate conclusions of law.

Glesner v. Dembrosky, 73 N.C. App. 594, 597, 327 S.E.2d 60, 62 (1985) (citations omitted).

The trial court stated in its findings of fact:

> 6. Beginning in November, 1989, the Defendant herein began having a relationship with a member of the opposite sex namely, Matthew Blashfield. Thereafter, Defendant became intimate with Mr. Blashfield and had sexual relations with him. Defendant has had sexual relations with no other person other than Mr. Blashfield since they met in November, 1989, and Defendant continues to have sexual relations with Blashfield and he has been a guest in her home as many as five times per week.
>
> 7. The relationship between Mr. Blashfield and Defendant existed to the extent whereby Defendant allowed Mr. Blashfield to stay at her house over night as many as five times per week; on at least two occasions during the time period beginning January 1 until June of 1990, Mr. Blashfield was observed spending the night at the Defendant's home, leaving the Defendant's home dressed in different clothes than he was ob-

served wearing the previous night; kissing the Defendant goodbye at the front porch prior to getting into his own car, and driving away. Defendant and Mr. Blashfield have taken trips together lasting for more than one day and have often included the minor child.

8. Defendant and Mr. Blashfield have an exclusive, monogamous relationship for both sexual and regular domestic purposes.

9. Defendant testified Mr. Blashfield maintained a separate residence.

Then the trial court concluded that "the Defendant has cohabited with someone of the opposite sex and therefore Plaintiff's obligation to pay alimony has terminated." The trial court then ordered that plaintiff was not in contempt of the prior orders and that his obligation to pay alimony was terminated.

Cohabitation is defined as: "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." Black's Law Dictionary 236 (5th ed. 1979). In *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945), where defendant alleged intrinsic fraud in procuring a judgment of divorce on the grounds of false and fraudulent allegations of separation by mutual agreement, the Court stated: "Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations." *Id.* at 344, 34 S.E.2d at 157. In *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945), where the question presented was whether the parties had lived separate and apart for two years, the Court stated:

> Cohabit, according to Winston's Dictionary, Encyclopedia Edition (1943), means: "To live together as man and wife; usually, though not necessarily, implying sexual intercourse." Black's Law Dictionary, Third Edition, defines the meaning of cohabitation, as: "Living together, living together as man and wife; sexual intercourse." Cohabitation includes other marital duties besides marital intercourse.

Id. at 85-86, 33 S.E.2d at 490-91.

"The trial court, when sitting as a trier of fact, is empowered to assign weight to the evidence presented at trial as it deems

appropriate." *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 112, 362 S.E.2d 807, 811 (1987). Here we conclude that the trial court did not err in determining defendant cohabited with someone of the opposite sex, thereby terminating plaintiff's obligation to pay alimony. There was sufficient evidence of record to support the findings of fact and adequate findings of fact to support the trial court's conclusions of law.

[2] Plaintiff also argues that the trial court's order holding plaintiff not in contempt and terminating plaintiff's obligation to pay alimony is not appealable. Terminating plaintiff's obligation to pay alimony affects a substantial right of defendant, and therefore the order is appealable. *See Piedmont Equipment Co. v. Weant*, 30 N.C. App. 191, 226 S.E.2d 688 (1976) (an order dismissing a charge of indirect civil contempt is appealable where there was no other proceeding by which plaintiff could enforce its rights, thereby affecting a substantial right).

Affirmed.

Judges COZORT and LEWIS concur.

COLLEGE HEIGHTS CREDIT UNION, PLAINTIFF(S) v. GEORGE BOYD AND WIFE, ALICE BOYD, DEFENDANT(S)

No. 9012DC1334

(Filed 5 November 1991)

Ejectment § 5 (NCI4th) — property purchased at tax sale — summary ejectment — no subject matter jurisdiction

The trial court lacked subject matter jurisdiction to hear a summary ejectment action and its judgment was vacated where the standard AOC summary ejectment form alleged that defendants had entered into the premises as a lessee of plaintiff, but also alleged that plaintiff had purchased the property from the I.R.S. and was seeking possession. The jurisdiction of a court in summary ejectment proceedings is purely statutory and may be exercised only in cases where the relationship of landlord and tenant exists and the tenant holds over after the expiration of his term or otherwise violates

the provisions of his lease. The evidence here shows that plaintiff acquired a quitclaim deed to defendants' property at a tax sale and attempted to quiet title or to establish title through a summary ejectment proceeding. There is no evidence which would support a finding of a landlord-tenant relationship between the parties. N.C.G.S. § 42-26.

Am Jur 2d, Landlord and Tenant §§ 1232, 1236.

APPEAL by defendants from judgment entered 24 April 1990 in CUMBERLAND County District Court by *Judge A. Elizabeth Keever* and from an order denying defendants' motion to have that judgment set aside which was entered 11 December 1990. Heard in the Court of Appeals 24 September 1991.

Plaintiff sought to summarily eject defendants from property which plaintiff claims to have title. This action was begun by the filing of a complaint and summons for summary ejectment. The complaint, on a standard AOC Summary Ejectment form, alleged that defendant[s] entered into the described premises as a lessee of plaintiff, but also alleged that "plaintiff purchase[d] [the] house and lot from [the] I.R.S. January 19th 1990 and now want possession." The complaint, dated and filed 27 March 1990, was served on 5 April 1990 by a standard AOC Magistrate Summons, clearly marked "For Use In Summary Ejectment Cases Only." The Magistrate's Court found this action beyond its jurisdiction and transferred it to the District Court of Cumberland County.

No answer was filed by defendants and a trial was held before Judge Keever on 23 April 1990, eighteen days after service of complaint and summons. All of the evidence presented at trial tended to show that defendants, George and Alice Boyd, lived in a house in Hope Mills, North Carolina. In July 1989, plaintiff, College Heights Credit Union, was present at a tax sale conducted by the Internal Revenue Service (I.R.S.), when defendants' house was placed for sale by the I.R.S. to recover back taxes owed by them. Plaintiff bid upon and received a quitclaim deed from the I.R.S. to defendants' house in Hope Mills. Plaintiff informed defendants of the deed they held to their house and asked them to leave the premises. Defendants refused and plaintiff filed this action in summary ejectment. The District Court of Cumberland County entered judgment finding and concluding that College Heights Credit Union had acquired title to defendants' property and ordered de-

fendants to vacate. Following the trial court's decision, defendants moved for a new trial and requested rehearing of the motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. These motions were denied by the trial court. Defendants appeal.

Mitchel E. Gadsen for plaintiff-appellee.

Charles E. Sweeny for defendant-appellants.

WELLS, Judge.

We note at the outset that the trial court lacked subject matter jurisdiction to hear this action and vacate the judgment of the trial court. We therefore confine our discussion of the case to this narrow issue and do not reach defendants' assignments of error asserting their entitlement to a new trial.

N.C. Gen. Stat. § 42-26 governs actions in summary ejectment. This statute states:

> Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:
>
> (1) When a tenant in possession of real estate holds over after his term has expired.
>
> (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
>
> (3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

Regarding the jurisdictional application of this statute, this Court held in *Jones v. Swain*, 89 N.C. App. 663, 367 S.E.2d 136 (1988) that,

> under this statute it is no longer necessary to allege that a landlord-tenant relationship exists between the parties as a jurisdictional matter, but it is still necessary to show that the relationship exists in order to bring the case within the provisions of this section before the summary ejectment remedy may be properly granted. (Citation omitted).

The remedy provided by N.C. Gen. Stat. § 42-26 is restricted to cases where the relation between the parties is simply that of landlord and tenant. *Hauser v. Morrison*, 146 N.C. 248, 59 S.E. 693 (1907); *Jones, supra.* The jurisdiction of a court in summary ejectment proceedings is purely statutory and may be exercised only in cases where the relationship of landlord and tenant exists, and the tenant holds over after the expiration of his term, or has otherwise violated the provisions of his lease. *Howell v. Branson*, 226 N.C. 264, 37 S.E.2d 678 (1946); *Jones, supra.*

It is clear that the trial court lacked jurisdiction to decide the issue of title or to order ejectment in this case. There was no evidence presented by either party which would support a finding of a landlord-tenant relationship between the parties. There is no evidence of any contract or lease between the parties concerning the leasing or occupancy of this property. The evidence shows that plaintiff acquired a quitclaim deed to defendants' property at a tax sale. Plaintiff then attempted to quiet title or to establish title to this property through a summary ejectment proceeding. This is simply the wrong action to quiet title and the wrong circumstances under which to bring an action in summary ejectment.

For the reasons stated, we vacate the judgment of the trial court.

Judgment vacated.

Judge PARKER concurs in the result.

Judge WYNN concurs.

STATE OF NORTH CAROLINA v. CHESTER FLETCHER WALLACE

No. 9121SC67

(Filed 19 November 1991)

1. **Evidence and Witnesses § 526 (NCI4th)— robbery—toboggan—not used in crime—admission not prejudicial**

There was no prejudicial error in an armed robbery prosecution from the erroneous admission of a toboggan with holes cut in the front, like a mask, where there was no evidence that masks were used in the robbery. In light of the substantial evidence of defendant's guilt, there was no reasonable possibility that the verdict returned by the jury was affected by the introduction of the toboggan testimony.

Am Jur 2d, Robbery § 55.

2. **Evidence and Witnesses § 526 (NCI4th)— robbery—bullets—admissible**

Bullets found in the vehicle defendant was driving when arrested were admissible in an armed robbery prosecution where four witnesses testified that pistols were used in the robbery, two witnesses testified that defendant planned the armed robbery and instructed the others, one witness testified that defendant used a loaded gun to coerce his participation, and the same witness testified that defendant supplied the pistol the witness used in the robbery. The trial court did not abuse its discretion by admitting the testimony in light of the probative value of evidence in regard to defendant's participation, the only issue at trial, and the evidence would not have an undue tendency to improperly influence the jury in light of the uncontradicted evidence of defendant's guilt.

Am Jur 2d, Robbery §§ 55, 58.

3. **Criminal Law § 793 (NCI4th)— armed robbery—acting in concert—essential element—failure to instruct**

The trial court's failure to instruct on presence at the scene in a prosecution for armed robbery under the theory of acting in concert constituted error because the two essential elements of acting in concert are presence at the scene of the crime and acting together with another who does the acts necessary to constitute the crime pursuant to a common plan

or scheme. However, defendant failed to object at trial and cannot obtain relief absent plain error.

Am Jur 2d, Criminal Law § 168; Robbery §§ 10, 11, 71.

4. **Criminal Law § 886 (NCI4th)— armed robbery—acting in concert—instructions—no reversible error per se**

There was no reversible error per se in a prosecution for armed robbery under the theory of acting in concert where the trial court failed to instruct the jury on one of the essential elements of acting in concert, presence at the scene. An instructional error of this type is subject to either a harmless error or plain error analysis depending on whether defendant lodged an objection at trial or raised the error for the first time on appeal.

Am Jur 2d, Criminal Law § 168; Robbery §§ 10, 11, 71.

5. **Criminal Law § 887 (NCI4th)— armed robbery—acting in concert—instructions—no plain error**

There was no plain error in a prosecution for armed robbery under the theory of acting in concert where the court did not instruct the jury on an essential element of acting in concert, presence at the scene. The failure to instruct on presence did not have a probable impact on the jury's finding of guilt because there was substantial evidence of defendant's constructive presence at the scene of the robbery.

Am Jur 2d, Criminal Law § 168; Robbery §§ 10, 11, 71.

APPEAL by defendant from judgment entered 12 June 1990 in FORSYTH County Superior Court by *Judge James M. Long*. Heard in the Court of Appeals 9 October 1991.

Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 12 June 1990, which judgment was based upon a jury verdict convicting defendant

of robbery with a dangerous weapon, N.C.G.S. § 14-87 (1986), under the theory of acting in concert.

The State's evidence tends to show that on the afternoon of 31 January 1990, defendant, Christopher White (White), Allyn Buie (Buie), and a man named Tim traveled in defendant's car from Durham to Greensboro where they stopped at a motel and rented a room. The men spent a short time in the motel room discussing plans to commit a robbery, and then returned to the car and proceeded to Winston-Salem. The evidence at trial tended to establish that it was defendant's idea to commit the robbery. Once in Winston-Salem, the men stopped at a store, but determined that it was too small to rob. They drove on to Central Carolina Grocery (the Grocery), and Buie, White, and Tim went in. Defendant remained in the car, the plan being that he would wait in the vicinity in order to help the three men escape when they had completed the robbery.

Joe Choplin (Choplin), the manager of the Grocery, and his son William were present when Buie, White, and Tim entered the store. White pointed a gun at Choplin and demanded money. Choplin testified that he ducked behind a counter and grabbed a bag containing a pistol which belonged to his son. Choplin stated that he tossed the bag at White and said, "Here's the money," and that the bag fell on the floor. Subsequently, according to Choplin, White became agitated, struck Choplin in the face with the barrel of his gun, and ran out of the store with another man whom Choplin could not identify. Once the men were gone, Choplin searched for the bag and gun, but never found either item. White testified that he did not strike Choplin with his pistol, and denied taking the bag and gun.

Buie testified that he became scared during the robbery and left the store. Buie stated that twenty to twenty-five seconds after he left the store, defendant drove up and told Buie to enter the car. Defendant then dropped Buie off near a wooded area and told him to wait there while defendant went to look for White and Tim. Defendant found Tim, but could not find White. White testified that he was not familiar with the area and became lost after he ran out of the store. Defendant, Buie, and Tim drove back to Greensboro. White remained in the vicinity of the store and was apprehended by Winston-Salem police. In the early morning hours of 1 February 1990, a Greensboro police officer, using

information supplied by White, arrested defendant after the officer watched defendant leave the motel room. Buie was arrested a few hours later. Tim was never apprehended.

Winston-Salem police officers conducted an inventory search of the vehicle defendant was driving at the time of his arrest, and found, among other things, 61 .38 caliber bullets, one spent .38 caliber shell, and a toboggan with holes cut out in the front like a mask. The car, a burgundy Nissan 200 SX, was registered to Marsha Van Hook of Durham, defendant's wife. The evidence showed that the Nissan was not the car involved in the robbery of the Grocery. The record reveals that police recovered from White the gun used by White during the robbery. This gun, which was made a part of the record on appeal, contained no visible caliber markings. Buie testified that during the robbery he used a gun which had been given to him by defendant. There is no evidence of its caliber in the record, and Buie testified that it was not loaded during the robbery.

Defendant did not testify and offered no evidence.

The issues presented are I) whether the trial court committed prejudicial error by admitting testimony that a detective found bullets and a toboggan cut out like a mask in a search of the car defendant was driving when arrested; and II) whether the trial court committed plain error by failing to instruct the jury that proof of a defendant's actual or constructive presence at the scene of the crime is required in order to prove defendant's guilt under the theory of acting in concert.

I

[1] Defendant contends that the trial court erred by admitting, over defendant's objection, testimony by Winston-Salem Police Department Detective R.D. Peddycord (Peddycord) that Peddycord found bullets and a cut-out toboggan during an inventory search of the car defendant was driving when arrested. Defendant argues that the State failed to link these items to the charged offense, and that therefore the testimony was irrelevant. Defendant further argues that this evidence was inflammatory and prejudicial because it impliedly characterized defendant as violent and dangerous.

Evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, among other things, the

danger of unfair prejudice. N.C.G.S. § 8C-1, Rules 402 and 403 (1988). Relevant evidence is defined as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988). Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence. *See* C. Wright & K. Graham, 22 Federal Practice and Procedure § 5166 (1978) (hereinafter Wright & Graham); *see also State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986). Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Wright & Graham at § 5166.

Toboggan

There is no evidence in the record that masks were used in the commission of the robbery, nor does the State make such a contention. Items such as this toboggan which have not been connected to the crime charged and which have no logical tendency to prove any fact in issue are irrelevant and inadmissible. *See State v. Patterson*, 59 N.C. App. 650, 653, 297 S.E.2d 628, 630 (1982) (introduction of testimony about sawed-off shotgun found in defendant's car where no evidence connected weapon with crime charged was erroneous). However, when the trial court erroneously admits irrelevant evidence, the defendant must show that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C.G.S. § 15A-1443(a) (1988); *see also State v. Norwood*, 303 N.C. 473, 479, 279 S.E.2d 550, 554 (1981).

The State presented the testimony of Buie and White—two eyewitnesses to defendant's participation in the robbery. These witnesses testified that defendant planned the robbery, selected the store to be robbed, drove the participants to the location, gave them instructions, gave one of them a gun, and waited in the vicinity in order to help the participants escape after the robbery. Defendant argues that he is entitled to a new trial because, had the trial court not erroneously admitted the toboggan testimony,

there is a "reasonable possibility" that the jury would not have convicted defendant since the only evidence of his guilt was the uncorroborated testimony of two biased accomplices. We disagree. It is well settled in North Carolina that uncorroborated accomplice testimony is sufficient to sustain a conviction. *State v. Brooks*, 49 N.C. App. 14, 20, 270 S.E.2d 592, 597 (1980), *disc. rev. denied*, 301 N.C. 723, 276 S.E.2d 285 (1981). Furthermore, Buie and White, with immaterial exceptions, testified consistently regarding defendant's participation in the robbery. In light of the substantial evidence of defendant's guilt, we conclude that there is no reasonable possibility that the verdict returned by the jury was affected by the erroneous introduction of the toboggan testimony. *See State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) (even if introduction of pistols seized from defendants at time of arrest was error, no prejudice in view of the evidence of guilt presented by the State).

Bullets

[2] A thorough review of the record shows that Peddycord's testimony describing the bullets was relevant. Four witnesses (Choplin, Choplin's son, White, and Buie) testified at trial that pistols were used in the commission of the robbery. Both Buie and White testified that defendant planned the armed robbery and gave the others instructions concerning its implementation. In fact, Buie testified that defendant used a loaded gun to coerce Buie into participating in the robbery. Buie also testified that defendant supplied the pistol Buie used in the robbery. There is no evidence in the record of its caliber. That defendant had pistol ammunition in his possession only a few hours after the commission of a robbery in which pistols were used and in which he has been implicated has a tendency to make defendant's participation in the robbery "more probable . . . than it would be without the evidence." The jury could decide how much weight to give this evidence. *See State v. Sanchez*, 328 N.C. 247, 250, 400 S.E.2d 421, 424 (1991) (once disputed evidence is admitted at trial, its weight and credibility are for the jury).

Although we have determined that the bullet testimony is relevant, relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1988). As used in Rule 403, "unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an

emotional one." *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). In North Carolina, whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. *Id.* at 731, 340 S.E.2d at 435. Here, the trial court did not abuse its discretion by admitting Peddycord's bullet testimony in light of the probative value of this evidence with regard to the only issue at trial: defendant's participation in an armed robbery. Moreover, in light of the uncontradicted evidence of defendant's guilt, we do not believe that the bullet evidence would have an undue tendency to improperly influence the jury.

II

[3] Defendant next contends that the trial court committed plain error by failing to instruct the jury that proof of a defendant's guilt under the theory of acting in concert requires proof of the defendant's actual or constructive presence at the scene of the crime. Because this contention necessarily raises the threshold question of whether the trial court's failure to instruct on presence was error at all, we first address the propriety of the court's concerted action instruction.

In North Carolina, a trial judge is not required to follow any particular form in giving instructions and has wide discretion in presenting the issues to the jury. *State v. Harris*, 306 N.C. 724, 728, 295 S.E.2d 391, 393 (1982). A judge is not required to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence, although he may elect to do so in his discretion. N.C.G.S. § 15A-1232 (1988); *see also State v. Carter*, 326 N.C. 243, 247, 388 S.E.2d 111, 114 (1990). A trial judge must, however, charge every essential element of the offense. *State v. Hairr*, 244 N.C. 506, 509, 94 S.E.2d 472, 474 (1956); *accord State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654 (1982).

Our Supreme Court in *State v. Williams*, 299 N.C. 652, 263 S.E.2d 774 (1980), specifically delineated two essential elements of acting in concert: 1) presence at the scene of the crime, and 2) acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose. *Williams*, 299 N.C. at 656-57, 263 S.E.2d at 777-78. The presence required for acting in concert can be either actual or constructive. *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *vacated in part on other grounds, Westbrook v. North Carolina*, 408 U.S. 939, 33 L.Ed.2d 761 (1972). Because presence at the scene of the

crime is an essential element of acting in concert, a trial court must instruct on this element when a defendant is charged with a crime under this theory. *See Hairr, supra.* The trial court's failure to do so here constituted error. However, defendant failed to object to the instruction at trial and, therefore, cannot obtain relief unless the error constitutes plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Defendant contends that the trial court's erroneous instruction constitutes "plain error *per se*." In other words, defendant argues that a trial court's failure to instruct the jury on an essential element of the crime requires automatic reversal of a conviction. Alternatively, defendant argues that the trial court committed plain error by failing to instruct the jury on presence.

Plain Error Per Se

[4] Although most constitutional violations are subject to a "harmless error" analysis (i.e., reversal of conviction not required if reviewing court deems error harmless beyond a reasonable doubt), some errors are so gross that their commission requires automatic reversal of a conviction. *See Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705 (1967) (use of coerced confession, complete denial of counsel, and denial of impartial judge can never be treated as harmless error); *see also* N.C.G.S. § 15A-1443(b) (1988), Official Commentary (North Carolina's codification of harmless error principle reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States as set out in *Chapman*); *State v. Huff*, 325 N.C. 1, 32-35, 381 S.E.2d 635, 653-54 (1989), *cert. granted and judgment vacated on other grounds, Huff v. North Carolina*, --- U.S. ---, 111 L.Ed.2d 777 (1990) ("harmless beyond a reasonable doubt" is also proper standard of prejudice for violations of State Constitution). Generally, instructional errors are subject to a harmless error analysis. *See Pope v. Illinois*, 481 U.S. 497, 95 L.Ed.2d 439 (1987) (harmless error analysis applied to obscenity instruction which erroneously charged jury to apply contemporary community standard to the "value" element of the offense); *Rose v. Clark*, 478 U.S. 570, 92 L.Ed.2d 460 (1986) (harmless error analysis applied to malice instruction in murder trial which unconstitutionally shifted burden of proof to defendant). An instructional error of the type here presented is not unlike the errors at issue in *Pope* and *Rose* and is not, as defendant urges, reversible error *per se*; instead, such an error

is subject to either a harmless error or plain error analysis, depending on whether the defendant lodged an objection at trial or raised the error for the first time on appeal. *See Hennessy v. Goldsmith*, 929 F.2d 511, 515 (9th Cir. 1991); *United States v. Kerley*, 838 F.2d 932, 939 (7th Cir. 1988).

Plain Error

[5] "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79 (*citing United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L.Ed.2d 1137 (1978)). Only in the "rare case" will an improper instruction "justify reversal of a criminal conviction when no objection has been made at trial." *Id.* at 661, 300 S.E.2d at 378 (*quoting Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed.2d 203, 212 (1977)).

If upon review of the entire record there is not substantial evidence of the defendant's presence, actual or constructive, at the scene of the crime, the failure to instruct on presence would be plain error. *See State v. Gilmore*, 330 N.C. 167, 409 S.E.2d 888 (1991) (where there is not "sufficient" evidence of presence at scene of crime, charge on presence required). Constructive presence is not determined by the defendant's actual distance from the crime; the accused simply must be near enough to render assistance if need be and to encourage the actual perpetration of the crime. *State v. Wiggins*, 16 N.C. App. 527, 531, 192 S.E.2d 680, 683 (1972). Thus, the driver of a "get-away" car may be constructively present at the scene of a crime although stationed a convenient distance away. *Id.* at 530, 192 S.E.2d at 682-83; *see also State v. Lyles*, 19 N.C. App. 632, 636, 199 S.E.2d 699, 702 (1973) (defendant driver of "get-away" car was "present" at scene of crime even though he was waiting in trailer park located 100 feet behind store being robbed); *but cf. State v. Buie*, 26 N.C. App. 151, 215 S.E.2d 401 (1975) (defendant not constructively present where he arranged for others to steal tools from a sawmill, and, in response to actual participants' telephone call to defendant's nearby home, picked up and drove participants away from scene of crime).

This record reveals substantial evidence of defendant's constructive presence at the scene of the robbery. The evidence shows

that defendant drove Buie, White, and Tim to the Grocery, dropped them off, and then waited a few blocks away in order to assist the men with their escape. After the robbery, defendant drove himself, Buie, and Tim back to Greensboro. Therefore, the trial court's failure to instruct on presence did not have a probable impact on the jury's finding of guilt. Accordingly, the instructional omission does not amount to plain error. *See State v. Barnes*, 91 N.C. App. 484, 488, 372 S.E.2d 352, 354 (1988), *aff'd as modified on other grounds*, 324 N.C. 539, 380 S.E.2d 118 (1989) (because evidence showed defendant was either actually or constructively present at all crimes for which he was charged under concerted action theory, trial court's failure to instruct jury on element of presence did not amount to plain error).

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. WILLIAM FORBES AND ALEXZENO VINES

No. 913SC47

(Filed 19 November 1991)

1. Narcotics § 4.3 (NCI3d) — constructive possession — sufficiency of evidence

The State's evidence was sufficient to support defendant's convictions of narcotics offenses on the basis of constructive possession where it tended to show that defendant was in the front bedroom of a trailer when officers entered the trailer to execute a search warrant; officers found cocaine, marijuana and drug paraphernalia in the trailer; cocaine crystals were found floating in the toilet next to the front bedroom where defendant was found; officers found a pawn ticket in a safe in the trailer listing defendant's name and showing her address to be at the trailer; a vehicle outside the trailer was registered to defendant at the trailer address; officers found women's and children's clothing in the front bedroom, and defendant's three children were in the trailer at the time of the search;

and defendant attempted to place under a child's coat a purse containing $3,790.00 and defendant's driver's license.

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

Conviction of possession of illicit drugs found in premises of which defendant was in non-exclusive possession. 56 ALR3d 948.

2. Narcotics § 4.4 (NCI3d) — constructive possession — insufficiency of evidence

The State's evidence was insufficient to support the sixteen-year-old defendant's conviction of possession of cocaine with intent to sell and deliver based on the theory of constructive possession where it tended to show that, when officers entered a trailer to execute a search warrant, they found four bags containing cocaine in the hallway near the door to the bathroom in which defendant was found seated on the toilet; officers found $546.00 in the sink next to defendant; and defendant did not have exclusive possession of the trailer.

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

Conviction of possession of illicit drugs found in premises of which defendant was in non-exclusive possession. 56 ALR3d 948.

Judge WELLS concurring.

APPEAL by defendants from judgment entered 17 July 1990 in PITT County Superior Court by *Judge Herbert Small.* Heard in the Court of Appeals 8 October 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David N. Kirkman, for the State.

Robert L. White for defendant-appellant, Vines.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant, Forbes.

WYNN, Judge.

These are criminal cases involving constructive possession of cocaine in which the defendants were charged and tried jointly.

The State's evidence tended to show that shortly after midnight on February 9, 1990, nine police officers went to a trailer home located at Lot 39, River Road Estates in Pitt County. The officers announced their presence and heard the sounds of people running throughout the trailer and of toilets flushing, from both ends of the trailer. When the officers kicked in the front and back doors and moved through the trailer, they found defendant Vines in the front bedroom and her sixteen-year-old son, defendant Forbes, in the bathroom in the back of the trailer.

During the search of the trailer, the officers found white crystals (later identified as cocaine) floating in the water of the toilet next to the front bedroom where Vines was found. The officers also found a pawn ticket with the Vines' name and address listed as Lot 39, River Road Estates, and a purse containing $3,790.00 in cash and Vines' driver's license. The State's evidence also tended to show that a witness, Sharon Swinnely ("Swinnely"), placed Vines at the trailer throughout the day of the raid and testified that together, she and Vines, smoked a deadly form of crystallized cocaine commonly referred to as "crack." In addition, Swinnely testified that she bought "crack" from the defendant on the day of the raid.

Defendant Vines testified that she lived with her sister in Farmville and, contrary to the State's evidence, she stated that she never lived at the trailer. She testified that she had just arrived, on the day of the raid, from Maryland. Vines also asserted that the money that was found belonged to her sister who brought it so the defendant could make bail.

With regard to the defendant Forbes, the police officers testified that they found four bags of a white substance scattered along the hallway, in the vicinity of the door of the bathroom. The officers testified that they entered the bathroom to find Forbes sitting on a toilet, and it was apparent that he had used the bathroom. The officers found $546.00 lying in the sink next to the toilet.

The State also presented testimonial evidence from Swinnely who stated that when Forbes heard the police announce their presence, he ran from the living room toward the back of the trailer; that the owner of the trailer, Walter Speight, then threw Forbes a pill bottle and "told him to get rid of it"; and that she had seen Forbes with "crack" several times before the raid and had bought "crack" from him in the past.

Defendant Forbes presented evidence that he had come to North Carolina to visit his mother on the day before the raid. On the day of the raid, February 9, 1990, he had visited Walter Speight's trailer to play video games. Later in the evening, he went to the bathroom and while there, he heard a commotion coming from the front of the trailer and suddenly the police entered the bathroom. He testified that he had never used drugs and that he had never sold drugs.

Defendant Vines was charged with four counts: possession of cocaine with intent to sell or deliver; possession of marijuana with intent to sell or deliver; knowingly and intentionally maintaining a dwelling for the purpose of keeping controlled substances; and possession of drug paraphernalia. Vines was found guilty on all charges except the possession of marijuana with intent to sell or deliver of which she was convicted of the lesser charge of marijuana possession. She appeals from the judgment entered on 17 July 1990, sentencing her to eleven years imprisonment.

Defendant Forbes was charged with possession with intent to sell or deliver cocaine and was found guilty as charged. He appeals from a judgment entered on 17 July 1990, sentencing him to three years imprisonment.

Each defendant assigns as error the denial of their respective motions to dismiss. For the reasons set forth herein, we find no error as to defendant Vines' appeal; however, we find reversible error in the case of defendant Forbes.

I. Defendant Vines' Appeal

[1] The sole issue on appeal is whether the evidence was sufficient to convict the defendant based on the theory of constructive possession. The defendant contended that the trial court erred in denying her motion to dismiss made at the close of the State's case in chief and renewed at the close of all the evidence. We disagree.

In ruling upon a motion to dismiss, the trial court must examine the evidence "in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn from the evidence presented; all contradictions and discrepancies are resolved in the State's favor." *State v. Morris*, 102 N.C. App. 541, 544, 402 S.E.2d 845, 847 (1991). "If there is substantial evidence—whether direct, or circumstantial, or both—to support a finding that the offense charged has been committed and that

the defendant committed it, a case for the jury is made and nonsuit should be denied. *Id.* (citing *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975)). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Autry*, 101 N.C. App. 245, 251, 399 S.E.2d 357, 361 (1991) (citing *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981)).

The law of North Carolina is clear with regard to the issue of constructive possession. "Constructive possession of a substance applies where the defendant 'has both the power and the intent to control its disposition or use.' " *Id.* at 251, 399 S.E.2d at 361-62 (citing *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)). If, as in the case at bar, the defendant does not have exclusive control over the premises, constructive possession cannot be shown without other incriminating circumstances. *Autry*, 101 N.C. App. at 253, 399 S.E.2d at 362 (1991).

Since the State in this case did not show that the defendant had exclusive possession of the trailer home that was searched, the focal issue becomes whether evidence was brought to light during the trial that established other incriminating circumstances. *See State v. Morris*, 102 N.C. App. 541, 402 S.E.2d 845 (1991) (constructive possession inferred from the facts that defendant conversed with an individual engaged in a drug transaction, pointed in the direction of drugs and ran from the police); *State v. Autry*, 101 N.C. App. 245, 399 S.E.2d 357 (1991) (incriminating evidence found where defendant was arrested standing in kitchen near a table where his jacket and cocaine were found); *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989) (incriminating evidence included a prescription bottle and mobile home registration papers naming the defendant as owner); *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987) (defendant lived in house where drugs were found but was not present at time of search by police, constructive possession not found).

In the case at hand, when the police officers executed the search warrant, the defendant was found in the front bedroom of the trailer. The officers also found a safe in the trailer home and inside the safe was a pawn ticket listing the defendant's name and her address as Lot 39, River Road Estates. A vehicle was found outside the trailer that also was registered to the defendant at the River Road address. In addition to the pawn ticket and

vehicle registration, the officers found women's and children's clothing in the front bedroom. Defendant's three children were found in the trailer home at the time of the search.

Subsequent to the search, officers called the defendant's sister to pick up the youngest child. Defendant, while preparing the child to leave, attempted to place under the child's coat a small purse which fell to the ground. The purse contained $3,790.00 in cash and the defendant's driver's license.

Keeping in mind that all contradictions and discrepancies are ruled in favor of the State, the aforementioned evidence was sufficient for a reasonable mind to infer and conclude from the circumstances that Vines had the determination and intent to exercise control over the cocaine, marijuana, and drug paraphernalia that were found in the trailer home. Accordingly, we uphold the decision of the trial judge to submit the question of constructive possession to the jury.

II. Defendant Forbes' Appeal

[2] Defendant Forbes first assigns error to the trial court's denial of his motion to dismiss made at the close of the State's evidence and renewed at the close of all evidence. He contends that the evidence was insufficient to convict him based on the theory of constructive possession.

Defendant Forbes, like defendant Vines, did not have exclusive possession of the trailer home and was found guilty of the charged offense under the theory of constructive possession. As such, it was incumbent upon the State to prove his guilt by showing the existence of other incriminating circumstances. *Autry*, 101 N.C. App. at 253, 399 S.E.2d at 357. Unlike defendant Vines, however, we conclude that such evidence was not presented in the case of defendant Forbes.

The decision of *State v. Givens*, 95 N.C. App. 72, 381 S.E.2d 869 (1989), is illustrative to the case at bar. In *Givens*, the co-defendant, Canty, was at a "drink house" and pool hall when the police entered the building and executed a search warrant. Defendant, Canty, was standing near a bicycle which had five bags of cocaine lodged in the spokes. Additionally, 1.16 grams of cocaine were found in a jacket in the building. No evidence was presented at trial to show that Canty owned the bicycle, jacket or building, itself. This Court held that "[a]lthough there is evidence that Canty

knew that there was cocaine in the building, and that he was 'waiting for his' and 'he come [sic] to receive some drugs,' this [was] not substantial evidence that Canty had the capability to maintain control and dominion over [the] cocaine." *Id.* at 77, 381 S.E.2d at 872.

In the case at hand, the officers found the defendant seated on the toilet having just used it for its proper purpose. Next to him, in the sink, the officers found $546.00 in cash. The defendant told the officers that he was not in possession of any drugs. Moreover, no drugs were found in the bathroom where the defendant was seated. Indeed, the closest point to the defendant that drugs were found was in the hallway outside the bathroom where the officers found four bags of a white substance, later identified as cocaine.

The State also presented evidence that Swinnely had bought cocaine from the defendant in the past; however, there was no evidence presented that, on the night of the raid, the defendant was selling or using cocaine. There was testimony from Swinnely that, when the officers arrived, Forbes caught a pill bottle thrown to him by Walter Speight and ran towards the bathroom. The unsubstantiated inference is that Forbes did so in order to dispose of cocaine. However, the defendant is charged with possessing that cocaine found in the hallway outside the bathroom, not with the cocaine Swinnely testified that she assumed was in the pill bottle.

Therefore, we find that there was not substantial evidence that Forbes had the capability to maintain control and dominion over the contraband. For the foregoing reasons, we conclude that the trial court erred in denying Forbes' motion to dismiss. Due to our determination of this issue we need not discuss the other issue raised in the defendant's appeal.

For the foregoing reasons the defendant Forbes' conviction is reversed and we find no error with regard to the conviction of Vines.

As to 90 CRS 3177-3179, defendant Vines,

No error.

As to 90 CRS 3176, defendant Forbes,

Reversed.

Judge PARKER concurs.

Judge WELLS concurs in a separate opinion.

Judge WELLS concurring.

With respect to defendant Vines, I concur with the majority opinion.

With respect to defendant Forbes, this was not a "premises" case; i.e., there was no evidence that Forbes possessed or controlled the premises on which the contraband was found. As to Forbes, this was a "close proximity case"; i.e., the State relies on the evidence that bags containing cocaine were found scattered in the hallway approaching the bathroom where Forbes was found. I agree that this evidence was insufficient to establish Forbes' constructive possession of cocaine, and therefore his conviction cannot stand.

STATE OF NORTH CAROLINA v. ROBERT LEE MITCHELL, JR.

No. 9010SC1224

(Filed 19 November 1991)

1. **Narcotics § 4 (NCI3d)— maintaining vehicle for illegally keeping drugs—sufficiency of evidence**

Evidence tending to show that defendant got out of his car and went into a store with two plastic bags containing marijuana in his shirt pocket was sufficient for the jury to find that defendant possessed marijuana while he was in the vehicle and that he was guilty of maintaining a vehicle for illegally keeping drugs in violation of N.C.G.S. § 90-108.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 27, 47, 48.7.

2. **Narcotics § 4 (NCI3d)— weight of marijuana—sufficiency of evidence for felony conviction**

The State presented sufficient evidence of the quantity of marijuana to permit the jury to find defendant guilty of felonious possession of more than one and a half ounces, although the State did not offer evidence of the weight of the marijuana,

where the marijuana was in evidence and the jury had the opportunity to observe and examine it.

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

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

The State presented sufficient evidence of defendant's constructive possession of controlled substances and contraband in his residence to permit the jury to convict him of possession of cocaine, possession of marijuana, possession of drug paraphernalia, and maintaining a dwelling for keeping illegal drugs where the evidence tended to show that defendant owned the house in which the items were found and occupied the house with his wife and daughter; marijuana cigarettes and wrapping papers were found under men's clothing in the master bedroom; and defendant testified that he owned plastic bags of a type used for selling narcotics which were found in a kitchen cabinet with scales covered with cocaine residue.

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

Conviction of possession of illicit drugs found in premises of which defendant was in non-exclusive possession. 56 ALR3d 948.

4. **Searches and Seizures § 24 (NCI3d)— warrant to search residence—probable cause**

A magistrate had probable cause to issue a warrant to search defendant's residence based on the affidavits of two police officers where one officer's affidavit stated that a store clerk who was an off-duty police officer told him that someone matching defendant's description came into the store with marijuana in his shirt pocket; the affidavit stated that the officer ran a check on the license tag number the clerk had written down and determined that the car driven by the suspect belonged to defendant's wife; the affidavit also stated that the officer had received information from a confidential informant within the past forty-eight hours that defendant possessed marijuana at his residence and that marijuana was also located at an auto shop where defendant was responsible for paying the utilities; and the second officer's affidavit stated that he lived next door to defendant and had observed vehicles parked

at defendant's residence for brief periods in the early morning hours on weekends in what appeared to be the traffic pattern of a drug dealer.

Am Jur 2d, Searches and Seizures §§ 64, 65, 68, 69.

5. **Criminal Law § 329 (NCI4th)— absence of motion to sever—waiver**

Defendant waived his right to allege on appeal that the trial court erred in joining for trial narcotics offenses that occurred on different dates where he failed to make a motion for severance prior to trial. N.C.G.S. § 15A-927(a)(1).

Am Jur 2d, Trial § 151.

6. **Evidence and Witnesses § 3003 (NCI4th)— convictions over ten years old—invited cross-examination**

When defendant implied during his testimony on direct examination that he had only one prior conviction, he invited cross-examination by the State about his prior convictions that were more than ten years old.

Am Jur 2d, Witnesses §§ 524, 525.

Judge JOHNSON concurring in part and dissenting in part.

APPEAL by defendant from judgments entered 20 July 1990 by *Judge Donald W. Stephens* in WAKE County Superior Court. Heard in the Court of Appeals 18 September 1991.

The State's evidence at trial tended to show the following: On 6 September 1989 at approximately 9:30 p.m. defendant got out of a dark vehicle and went into Jimmy's Variety Pic-Up in Zebulon. The clerk in the store was an off-duty Bunn police officer. She testified that when defendant came into the store he had two plastic bags "sticking up" approximately four inches out of the left pocket of his shirt. Defendant brought beer from the cooler to the counter and asked the clerk for rolling papers. The clerk asked defendant what he had in his pocket and he told her that it was marijuana. She asked to see it. When defendant gave her the bags, she kept them. She testified that she put the two plastic bags and their contents into a paper bag and wrote down a description of defendant and his car. She said that she was not able to see inside the car because the windows were tinted dark. Defendant left and the clerk called the police. Before the police arrived,

defendant returned to the store in a silver vehicle and told the clerk that he wanted his marijuana and that if she did not return it, he would "break [her] neck." She wrote down the license plate number of this vehicle and called the police again. Defendant left and the Zebulon police arrived shortly thereafter.

A detective-sergeant with the Zebulon Police Department ran a check on the tag number that the clerk had given him and determined that the car belonged to defendant's wife. He recognized the description that the clerk had written down as matching the defendant. He then drove by defendant's house and saw a black vehicle and a silver car there with the same license tag number that the store clerk had given him. The next day, 7 September 1989, the detective-sergeant obtained a search warrant and searched defendant's house. During the search he found two marijuana cigarettes and rolling papers under some clothing in a dresser drawer in the master bedroom. He also found scales which had cocaine residue on them and small plastic bags in a cabinet in the kitchen.

Defendant contends that the marijuana was already on the counter in the convenience store on 6 September 1991 when he paid for the items he purchased. A former police officer testified that he was with defendant when he stopped at the convenience store on 6 September 1989 and that defendant took nothing into the store except a $100 bill in his shirt pocket. Defendant testified that he used the small plastic bags found during the search of his home to store parts for watches, which he repaired. He also offered testimony to suggest that the scales belonged to his wife's stepson.

Defendant was found guilty of (1) felonious possession of marijuana on 6 September 1989; (2) maintaining a vehicle for illegally keeping drugs; (3) misdemeanor possession of cocaine; (4) possessing drug paraphernalia; (5) misdemeanor possession of marijuana on 7 September 1989; and (6) maintaining a dwelling house for keeping illegal drugs. Defendant was sentenced to a total of four years imprisonment with a recommendation of work release.

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

A. Larkin Kirkman for defendant-appellant.

EAGLES, Judge.

In this appeal defendant contends that the the court erred in denying his motions to dismiss the charges of maintaining a vehicle, felony possession of marijuana, possession of cocaine, possession of marijuana, possession of drug paraphernalia, and maintaining a dwelling. Defendant also contends that the court erred in denying his motion to suppress the evidence derived from the search of his home, in joining the charges arising out of the events of 6 and 7 September 1989 for trial, and in admitting evidence of his prior convictions. We find no error.

[1] Defendant first argues that the State did not show sufficient evidence of keeping a controlled substance to allow a conviction for maintaining a vehicle in violation of G.S. 90-108. "In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence . . . . The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (citations omitted). Here, the store clerk testified that at

> [a]pproximately 9:30 a black male walks inside the store. The reason I noticed this man is because he got out of a dark vehicle with dark tinted windows. In his left pocket he had two bags sticking up approximately four inches out of his pocket. I let him get inside the store. He went to the beer box, brought beer back—I don't remember what kind—and then he—he come up to the counter and he asked for some rolling papers I had never heard of. And, I asked him, I said, Well, what have you got in your pocket there, buddy? He says, It's dope or marijuana.

We think that this evidence permits an inference that the defendant possessed marijuana before he came into the store while he was in the vehicle. This assignment of error is overruled.

[2] Defendant also contends that the State presented insufficient evidence of the quantity of marijuana to allow the jury to find defendant guilty of felonious possession. Here, the State did not offer evidence of the weight of the marijuana. The trial court denied the State's motion to reopen the evidence to determine the weight

and concluded that "visually and quantitatively the jury could obviously infer from that evidence that the marijuana contained therein exceeds one and a half ounces in weight." While we agree with defendant that the better practice is to present testimony regarding the exact weight, here the marijuana was in evidence and the jury had the opportunity to observe and examine it. "Whatever the jury may learn through the ear from descriptions given by witnesses, they may learn directly through the eye from the objects described." *State v. Brooks*, 287 N.C. 392, 407, 215 S.E.2d 111, 122 (1975) (quoting 1 Stansbury's N.C. Evidence § 117 (Brandis Rev. 1973)). Whether the weight of the marijuana exceeded one and a half ounces was a matter within the scope of knowledge of the jury. On this record, we find no error.

[3] Next defendant contends that the State presented insufficient evidence of constructive possession of any controlled substance or contraband at his residence to allow a jury to convict him of possession of cocaine, possession of marijuana, possession of drug paraphernalia, or maintaining a dwelling. "It is not necessary to show that an accused has exclusive control of the premises where paraphernalia are found, but 'where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances.' " *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (citations omitted). Here, defendant owned the house that was searched. He occupied this residence with his wife and daughter. Marijuana cigarettes and rolling papers were found under what appeared to be men's clothing in a dresser drawer in the master bedroom. He testified that he owned the plastic bags, which were of a type used for selling and delivering narcotics and which were found in a kitchen cabinet with scales covered with cocaine residue. His admitted ownership of the bags suggests some relationship between the bags and the scales. We hold that this evidence is sufficient to link defendant to the items found although defendant had nonexclusive control over his residence.

[4] Defendant contends that the trial court erred by failing to suppress evidence seized from the search of his home because there was not a sufficient link between any controlled substance and his home. In *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), the Supreme Court adopted the totality of the circumstances test set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), for determining the sufficiency of probable cause to support the issuance of a search warrant. Here, the

magistrate issued the search warrant based on the affidavits of two Zebulon police officers. One officer's affidavit stated that the store clerk, an off-duty Bunn police officer, told him that someone matching defendant's description had come into the store with marijuana in his shirt pocket. The officer ran a license tag check on the number the clerk had written down and determined that the silver car driven by the suspect belonged to defendant's wife. The officer's affidavit said that within 48 hours of the date he applied for the search warrant, he had received information from a confidential informant that defendant possessed marijuana at his residence and that marijuana was also located at a Zebulon auto shop where defendant was responsible for paying for the utilities. Another officer also stated that he lived next door to defendant and had observed vehicles park at defendant's residence for brief periods in the early morning on weekends "in what appeared to be a traffic pattern of a drug dealer." Under the *Gates* totality of the circumstances analysis, we find a substantial basis for the magistrate's finding of probable cause.

[5] Defendant also contends that the trial court erred in trying the events of 6 September and 7 September 1987 together. Generally, a motion for severance of offenses must be made before trial and "[a]ny right to severance is waived if the motion [for severance of offenses] is not made at the appropriate time." G.S. 15A-927(a)(1). Here, defendant made no motion to sever and has waived the right to allege on appeal that the trial court erred in joining the offenses for trial.

[6] Finally, defendant argues that the trial court erred in admitting evidence of his prior criminal convictions that were more than ten years old and the testimony of his parole officer that police found a marijuana cigarette in defendant's car at the time of his arrest. "Evidence which might not otherwise be admissible against a defendant may become admissible to explain or rebut other evidence put in by the defendant himself." *State v. Small*, 301 N.C. 407, 436, 272 S.E.2d 128, 145-46 (1980). Here, the defendant testified that he was on parole after being convicted of a federal crime in 1976. We agree with the State that defendant created the inference by his direct examination testimony that he had only one prior conviction and thereby invited the cross-examination of which he now complains. As to the testimony of his parole officer, we note that defendant did not object to this testimony at trial

and has failed to preserve this question for appellate review. N.C.R. App. P. 10(b)(1).

For the reasons stated, we find that defendant received a fair trial free from prejudicial error.

No error.

Judge PARKER concurs.

Judge JOHNSON concurs in part and dissents in part.

Judge JOHNSON concurring in part and dissenting in part.

I concur in all respects except defendant's conviction of felony possession of marijuana. As to this conviction, I respectfully dissent.

The punishment for possession of marijuana varies with the quantity possessed. G.S. § 90-95(d)(4). For amounts up to ½ ounce the punishment is not more than 30 days or a $100.00 fine, or both, with imprisonment suspended. For amounts greater than ½ ounce and up to 1½ ounce, possession is punished as a general misdemeanor. Possession of greater than 1½ ounces can result in a conviction punishable as a Class I felony with a presumptive sentence of two years imprisonment. Thus, the severity of the punishment for possession of small amounts of marijuana varies dramatically with small increases in the weight of the material possessed—a fraction of an ounce can be translated into months in prison.

In this case, no evidence was admitted at trial as to the weight of the marijuana. It was left entirely to the judgment of the jury whether the amount displayed at trial was greater than 1½ ounces, an essential element of felony possession. The record on appeal is similarly devoid of any evidence from which one could infer that the amount of marijuana was clearly greater than 1½ ounces.

While jurors may and do rely on their five senses and their life experience in deciding the facts from the evidence placed before them, I would not place a defendant in jeopardy of a felony conviction based on the jury's perception of the total weight of dried vegetable material contained in two small plastic bags—material with which the jurors presumably have little or no experience, either in handling generally or in the weighing of it. Most people,

in fact, do not have experience dealing in ounces of anything, much less a substance with the specific density and bulk of marijuana. It is basic to our criminal law that the State must prove the essential elements of its case beyond a reasonable doubt and I would not relieve the State of that burden. Here, the State has failed as a matter of law to meet its burden of proof.

I vote to remand for resentencing on misdemeanor possession.

JAMES R. WARREN, PLAINTIFF-APPELLANT v. NEW HANOVER COUNTY BOARD OF EDUCATION, JEREMIAH PARTRICK, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, CARL UNSICKER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, LUCILLE T. SHAFFER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, AND ANN KING, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE NEW HANOVER BOARD OF EDUCATION, AND RALPH DAVIS, DEFENDANT-APPELLEES, AND NORTH CAROLINA STATE BOARD OF EDUCATION, DEFENDANT-INTERVENOR-APPELLEE

No. 915SC8

(Filed 19 November 1991)

1. **Master and Servant § 10.2 (NCI3d)— teacher—promotion denied—violation of free speech**

To establish a cause of action for wrongful discharge or demotion in violation of an employee's First Amendment rights, the employee must show first that the speech complained of qualified as protected speech or activity and second that such protected speech or activity was the motivating or "but for" cause for the discharge or demotion.

Am Jur 2d, Schools § 182.

2. **Schools § 13 (NCI3d)— teacher—promotion denied—violation of free speech**

The trial court erred by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff teacher, as president of the New Hanover County North Carolina Association of Educators, reported to defendant Board unfavorable results of a survey of teachers in the career development pilot program; plaintiff had received very positive evaluations of his teaching performance before he reported

the results of the survey, including a promotion to Career Status I and teacher of the year awards; shortly after publicizing the survey he received unfavorable evaluations and was denied promotion to Career Status II; and plaintiff was promoted to Career Status II after he was no longer an NCAE officer. The speech at issue here was constitutionally protected in that it involved matters of public concern rather than the internal working conditions of teachers, and no interest of the State as an employer in regulating the speech could have outweighed the teacher's interest as a citizen in publicizing and commenting on the results of the survey. As to whether plaintiff's speech was the motivating factor in the decision not to promote him, the complaint was sufficient to withstand defendants' motion to dismiss when his allegations are taken as true.

Am Jur 2d, Schools § 182.

3. Schools § 13 (NCI3d)— teacher—promotion denied—right to appeal to Superior Court

A teacher who is denied a promotion under the career ladder program may appeal to the Superior Court after exhausting his administrative remedies by appealing to the local board of education. The standards for judicial review set forth in N.C.G.S. § 150B-51, the whole record test, govern appeals from decisions of city or county boards of education.

Am Jur 2d, Schools § 210.

APPEAL by plaintiff from judgment entered 1 October 1990 by *Judge Napoleon B. Barefoot* in NEW HANOVER County Superior Court. Heard in the Court of Appeals 15 October 1991.

In 1985 the General Assembly enacted the Career Development Pilot Program, a merit pay promotion system, "to improve the quality of classroom instruction, to increase the attractiveness of teaching, and to encourage the recognization and retention of high quality teachers." G.S. 115C-363.2(a). Under the program, teachers are observed and evaluated using established criteria as provided in G.S. 115C-363.3, and those who receive the required evaluation ratings are recommended for promotion to a higher pay level. G.S. 115C-363.3. The program established three promotional levels: Career Status I, Career Status II, and Career Status III.

The pilot program was initiated in New Hanover County and 15 other school systems.

In January 1987, the North Carolina Association of Educators (NCAE) completed a survey of teachers in the career development pilot program. In New Hanover County, almost all of the teachers surveyed by NCAE indicated that they were dissatisfied with the experimental merit pay program. Plaintiff, a public school teacher, had been elected president of the New Hanover County NCAE for the 1986-87 school year, and as president it was his duty to publicize the results of the survey to the Board of Education.

Before he reported the results of the survey to the Board, plaintiff had received very positive evaluations of his teaching performance. He had taught elementary school in New Hanover County for more than 21 years. During the 1985-86 school year, plaintiff applied for and received a promotion to Career Status I. At the conclusion of the 1985-86 school year he was selected Teacher of the Year at College Park School. He had received this honor twice before. Additionally, he finished third in the balloting for New Hanover County Teacher of the Year for the 1985-86 school year. He alleges that as a result of his publicizing the NCAE survey, he shortly thereafter received unfavorable evaluations and his school's principal denied plaintiff's promotion to Career Status II. The Superintendent upheld the principal's decision and plaintiff appealed to the three-member review panel who upheld the decision. Plaintiff then appealed to the Board of Education, which voted four-to-three to uphold the principal's decision. In the fall of 1987 after plaintiff was no longer an NCAE officer, he reapplied for and was promoted to Career Status II.

Plaintiff filed suit on 2 September 1988 alleging, among other things, that defendants violated his federal and state constitutional rights to free speech when they denied him a merit pay promotion. Plaintiff also filed a petition for judicial review of the Board's denial of his promotion under G.S. 115C-305. On 1 October 1990 the trial court granted defendants' Rule 12(b)(6) motion to dismiss. Plaintiff appeals.

Ferguson, Stein, Watt, Wallas, Adkins and Gresham, P.A., by Thomas M. Stern, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by James R. Morgan Jr., and Hogue, Hill, Jones, Nash & Lynch, by William L. Hill, II, for defendant-appellees.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Laura E. Crumpler, for defendant-intervenor-appellee.

EAGLES, Judge.

On appeal plaintiff contends that the trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss plaintiff's free speech claims and denying plaintiff the right to appeal the Board's decision directly to the Superior Court. We agree and reverse the trial court's order as to the free speech claims and the right to appeal under G.S. 115C-305.

"The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. . . . 'The function of a motion to dismiss is to test the law of a claim, not the facts which support it.'" *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979) (citations omitted). "This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (quoting *American Dairy Queen Corp. v. Augustyn*, 278 F. Supp. 717 (N.D. Ill. 1967)).

[1] Here, plaintiff alleged that by denying his promotion to Career Status II based on his presentation of the NCAE report, defendants deprived him of his free speech rights under the First Amendment of the U.S. Constitution and Article I, sec. 14 of the North Carolina Constitution and accordingly violated 42 U.S.C. 1983. 42 U.S.C. 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To establish a cause of action for wrongful discharge or demotion in violation of the employee's First Amendment rights, the employee must show first "that the speech complained of qualified as protected speech or activity" and second "that such protected speech or activity was the 'motivating' or 'but for' cause for his discharge or demotion." *Jurgensen v. Fairfax County*, 745 F.2d 868, 877-78

(4th Cir. 1984). "[T]he resolution of these two critical issues is a matter of law and not of fact." *Id.* at 878.

[2] In applying the first prong of this two-part test we note that "[s]peech is constitutionally protected only if it relates to matters of public concern and if the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace." *Piver v. Pender County Board of Education*, 835 F.2d 1076, 1078 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206, 108 S.Ct. 2847, 101 L.Ed.2d 885 (1988) (citing *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) and *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)).

We agree with plaintiff that the speech at issue here involved matters of public concern rather than the internal working conditions of teachers. The General Assembly initiated the Career Development Pilot Program in New Hanover County and fifteen other school systems "to enable the State Board [of Education] and the General Assembly to analyze all facets of a career development plan prior to statewide implementation." 1985 N.C. Sess. Laws ch. 479, § 40. The survey that was the subject of plaintiff's speech related to efficiency and teacher acceptance of the pilot program which was of interest to the Board of Education, the General Assembly, and the citizens of North Carolina. Plaintiff, as president of the New Hanover County NCAE, addressed the Board about the survey results at a public school board meeting.

Additionally, we fail to see how any interest the State, as employer, may have had in regulating the speech could have outweighed the teacher's interest, as a citizen, in publicizing and commenting on the results of the survey. Examples of legitimate employer concerns are discipline and harmony in the workplace, confidentiality, and protection of close working relationships that require loyalty and confidence. *Pickering v. Board of Education*, 391 U.S. 563, 569-70, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811, 818 (1968). "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150, 103 S.Ct. 1684, 1692, 75 L.Ed.2d 708, 722 (1983). At the center of the employee's interest is the first amendment protection of the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354

U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506 (1957). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125, 133 (1964).

Having concluded that the speech at issue was constitutionally protected, we turn to the second prong of the test. To survive defendants' Rule 12(b)(6) motion, plaintiff also had to show that his speech was the motivating factor behind the decision not to promote him to career Status II. Here, plaintiff alleged that before he disclosed the results of the survey he had consistently received excellent evaluations and that he had been selected Teacher of the Year at his school and had finished third in the balloting for New Hanover County Teacher of the Year for the 1985-86 school year. He alleged that early in December 1986 a plan evaluator and the principal of his school evaluated his teaching and that both gave him high marks. The same plan evaluator observed plaintiff's teaching on 6 February 1987, just *three days* after his report to the Board, gave plaintiff low scores and accused him of trying to undermine the Assistant Superintendent in charge of the Career Development Plan. On the day the results were scheduled for release to the Board of Education, the school principal "threatened plaintiff by stating that people were going to be upset with the results, and plaintiff might get caught 'like the Nazis got the Jews.' " On 12 February 1987 the principal evaluated plaintiff's teaching, said plaintiff needed improvement, and showed hostility toward plaintiff. On 28 April 1987 the principal prepared plaintiff's summative evaluation and rated plaintiff "at standard" in four functions. One "at standard" rating was sufficient to prevent plaintiff's promotion to Career Status II. By contrast, in his 1986 evaluation plaintiff had received no scores lower than "above standard." Plaintiff reapplied for and received a promotion to Career Status II in the Fall of 1987 after he was no longer an NCAE officer. During plaintiff's evaluations that year, no observer found that any area of plaintiff's teaching needed improvement. His summative evaluation scores at the end of the school year consisted exclusively of "well above standard" and "superior" ratings. Taking plaintiff's allegations as true, we conclude that the complaint was sufficient to withstand defendants' Rule 12(b)(6) motion to dismiss.

Additionally, we find it unnecessary to address defendants' arguments regarding qualified immunity. The Supreme Court has said:

> By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. . . .
>
> Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question.

Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923-24, 64 L.Ed.2d 572, 577-78 (1980).

[3] Finally, we address plaintiff's contention that the trial court erred in denying him the right to appeal the Board's decision to the Superior Court under G.S. 115C-305. For the reasons stated in *Williams v. New Hanover County Board of Education*, 104 N.C. App. 425, 409 S.E.2d 753 (1991), we hold that a teacher who is denied a promotion under the career ladder program may appeal to the Superior Court after exhausting his administrative remedies by appealing to the local board of education. We note that the standards for judicial review set forth in G.S. 150B-51, the whole record test, govern appeals from decisions of city or county boards of education. *Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 317, 283 S.E.2d 495, 498 (1981).

Accordingly, the order of the trial court is reversed as it relates to plaintiff's free speech claims and right to appeal to the Superior Court.

Reversed.

Chief Judge HEDRICK and Judge GREENE concur.

STATE OF NORTH CAROLINA v. WILLIE OTHA BEASLEY

No. 9111SC628

(Filed 19 November 1991)

1. **Evidence and Witnesses § 672 (NCI4th)— objection to testimony—similar testimony admitted without objection**

Defendant waived objection to an officer's opinion testimony of the speed of his car on the ground that the officer had not stated a foundation for his opinion when he failed to object to subsequent testimony by the officer restating his opinion after having stated the basis for that opinion.

Am Jur 2d, Trial § 412.

2. **Evidence and Witnesses § 1237 (NCI4th)— statement after traffic stop—no custodial interrogation—Miranda warnings not required**

An officer's question to defendant as to how much he had been drinking, asked while defendant was sitting in the officer's patrol car after a traffic stop, did not constitute custodial interrogation where the officer had not yet informed defendant that he was under arrest for driving while impaired, and defendant's statement that he had had only one drink was admissible even though defendant was not given the Miranda warnings.

Am Jur 2d, Evidence § 545.

3. **Automobiles and Other Vehicles § 845 (NCI4th)— driving while impaired—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of impaired driving in violation of N.C.G.S. § 20-138.1, although no evidence was presented that defendant had a blood alcohol content of 0.10 or more, where it tended to show that defendant failed to dim his lights when meeting another vehicle on the highway; his car crossed the center line and he was speeding; when stopped by a highway patrolman, defendant smelled of alcohol and had glassy eyes; there were empty beer cans in defendant's car; and the patrolman had ample opportunity to observe defendant and his driving and formed the opinion that defendant was impaired.

Am Jur 2d, Automobiles and Highway Traffic §§ 375, 376.

4. Evidence and Witnesses § 2906 (NCI4th)— redirect examination—new issue

The trial court in a prosecution for impaired driving and speeding did not abuse its discretion in refusing to allow defendant to introduce on redirect examination evidence of his character for abiding by traffic laws where the excluded testimony did not relate to matters raised either on direct or cross-examination.

Am Jur 2d, Witnesses § 425.

APPEAL by defendant from judgment entered 14 February 1991 by *Judge Wiley F. Bowen* in JOHNSTON County Superior Court. Heard in the Court of Appeals 8 November 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Hal F. Askins, for the State.

George R. Murphy for defendant-appellant.

WYNN, Judge.

Defendant was charged in a citation with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and driving sixty-eight miles per hour in a fifty-five miles per hour speed zone in violation of N.C. Gen. Stat. § 20-141. The evidence presented at trial tends to show the following:

At about 2:50 a.m. on 22 January 1989, Trooper N.C. Johnson of the North Carolina Highway Patrol was on duty patrolling Rural Paved Road 1005 in Johnston County. Trooper Johnson observed two Cadillacs travelling very closely together. He noticed that the car in front did not dim its headlights as he approached and was across the center line. He formed an opinion that the cars were travelling about seventy miles per hour. A radar reading showed that in fact the lead car was travelling sixty-eight miles per hour. Trooper Johnson turned his car around and began following the Cadillacs. The cars turned onto Rural Paved Road 1106 and then turned into a driveway, and Trooper Johnson followed.

Trooper Johnson got out of his car and walked to the car which had been in front. Defendant was in the driver's seat and a woman was sitting in the passenger's seat. Trooper Johnson asked defendant for his driver's license. Defendant stepped out of the vehicle and had some difficulty in getting his wallet out

of his pocket and in getting his license out of his wallet. Trooper Johnson noticed a "very strong odor" of alcohol on defendant's breath. Defendant swayed as he stood and his eyes appeared red and glassy. Trooper Johnson saw three or four empty beer cans in the car's floorboard and an open, almost full, beer can sitting between the car's seats.

Trooper Johnson told defendant to have a seat in the patrol car and informed defendant why he had been stopped. He asked defendant how much he had been drinking. Defendant replied that he had one drink. Trooper Johnson then told defendant that he was under arrest, and he left defendant in the car while he gave the other driver a speeding ticket. While talking to the other driver, the passenger in defendant's car approached defendant and asked for the keys to his house. Defendant complied and the passenger went inside the house by way of a side entrance. The passenger returned and gave the keys back to defendant. While Trooper Johnson completed some paperwork, defendant said that he needed to go check his back door. Trooper Johnson told him to remain in the seat, but defendant jumped out of the car and went toward the house. Trooper Johnson followed defendant and saw him enter the house and close the door behind him. Both he and the passenger attempted to persuade defendant to come back out. Trooper Johnson tried to open the door and finally pushed it open with his shoulder. Trooper Johnson could not find defendant in the house, but he found another exterior door ajar. Trooper Johnson assumed that defendant had exited through the door.

Several witnesses testified on defendant's behalf that defendant did not drink and had not been drinking on 22 January 1989. Defendant testified that he had been sitting in Trooper Johnson's car when he decided to check his back door. After locking the back door behind him, he was going out his front door when Trooper Johnson "knocked the back door off." Defendant was scared and went across the road to his son's house. Defendant further testified that he did not drink beer and had not been drinking on that night.

The jury found defendant guilty as charged. He was sentenced to 120 days in jail, suspended, with one year of probation on condition that he serve an active jail term of two days, pay a fine and costs, and surrender his driver's license. Defendant appealed.

[1] Defendant first assigns as error the trial court's overruling of his objection to Trooper Johnson's opinion testimony concerning

the speed of his car. Specifically, defendant contends Trooper Johnson had not stated a foundation for his opinion. Assuming *arguendo* that Trooper Johnson initially had not stated a foundation for his opinion, he subsequently testified concerning the basis for his opinion and restated that the car was travelling about seventy miles per hour. Defendant did not object to this subsequent testimony. It is well settled that where evidence is admitted over objection, and the same evidence is later admitted without objection, the benefit of the objection is lost. *State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984). This assignment of error is overruled.

[2] Defendant next argues that statements he made to Trooper Johnson should not have been admitted into evidence because they were made while he was in custody and without the proper warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). The evidence shows that Trooper Johnson asked defendant to get into the patrol car so that he could ask him some questions. It was only after Trooper Johnson asked defendant how much he had been drinking, and after defendant answered that he had one drink, that defendant was told that he would be charged with driving while impaired. During a traffic stop, a driver is not considered in custody when he is asked a moderate number of questions and when he is not informed that his detention will be other than temporary. *Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed.2d 317 (1984). The statement made by defendant was made before he was told that he was being charged, and it was not reasonable for him to believe that he was deprived of his freedom of movement in any significant way at that time. *See State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Defendant was not in custody for purposes of *Miranda* until he was informed he was under arrest. Trooper Johnson was not required to inform him of his rights under *Miranda* until that time. Therefore, the statements made by defendant prior to his arrest were admissible.

Defendant further argues that the trial court erred by failing to properly instruct the jury to disregard Trooper Johnson's testimony that he had arrested defendant once before. Defendant objected to the testimony and moved to strike. The record indicates that the trial judge then stated: "Motion's allowed, you will disregard the last answer." Defendant has failed to show that the jury did not follow the trial court's instruction. Defendant's argument is meritless.

[3] Defendant also argues that the trial court erred by denying his motion to dismiss. In considering a motion to dismiss, the trial court must determine whether there is substantial evidence that the offense charged was committed and that defendant committed it. *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988). The trial court must view the evidence in the light most favorable to the State. *Id.* In this case, while there was no evidence presented that defendant had a blood alcohol concentration of 0.10 or more, there is evidence that he drove a vehicle on a highway while under the influence of an impairing substance. The evidence taken in the light most favorable to the State shows that defendant was operating a vehicle on Rural Paved Road 1005, that he failed to dim his car's headlights upon meeting another vehicle, that his car crossed the center line, and that he was speeding. Additionally, a highway patrolman noted that defendant smelled of alcohol, that defendant swayed as he stood, that defendant had glassy eyes, and that there were empty beer cans in defendant's car. The evidence further shows that the officer had ample opportunity to observe defendant and defendant's driving, and that the officer formed an opinion that defendant was impaired. Clearly, this evidence was sufficient to take the case to the jury. Defendant's argument is without merit.

[4] Defendant contends the trial court erred by refusing to allow him to introduce on redirect examination evidence of his character as a law-abiding citizen and particularly his character for abiding by traffic laws. This argument is technically not reviewable since defendant failed to present for the record what the evidence would have been. *State v. Pearson*, 59 N.C. App. 87, 295 S.E.2d 499 (1982), *disc. review denied*, 307 N.C. 472, 299 S.E.2d 227 (1983). Even so, we have reviewed the argument and can find no error. Redirect examination is limited to clarifying the subject matter of direct examination or addressing matters raised during cross-examination. *Id.* Because the matters defendant sought to testify about on redirect examination were not raised during direct examination and defendant's prior criminal history was not introduced during cross-examination, the trial court did not abuse its discretion in refusing to allow the testimony.

Finally, defendant argues that the trial court erred by instructing the jury on flight. Defendant cites no authority in support of his argument and fails to show the instruction was in any way improper.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

JANUS THEATRES OF BURLINGTON, INC. v. ARAGON, A GENERAL PARTNERSHIP

No. 9015SC1326

(Filed 19 November 1991)

1. **Appeal and Error § 119 (NCI4th)— notice to exercise lease option—notice by regular mail—partial summary judgment —appealable**

A partial summary judgment for plaintiff was appealable where a declaratory judgment action arose from a disputed lease renewal, the trial court held that notice by regular mail was sufficient to exercise an option to renew and that there was no requirement of registered mail or receipt by the landlord, and the court reserved for the jury the issue of whether defendant had waived objection to the renewal or was estopped to deny the renewal. The order was effectively a final judgment and affected a substantial right because waiver of notice or estoppel of notice are irrelevant if sending a notice by regular mail is in and of itself sufficient.

Am Jur 2d, Appeal and Error § 104; Landlord and Tenant §§ 1184, 1186.

2. **Landlord and Tenant § 13.3 (NCI3d)— lease option—exercise by regular mail—summary judgment for tenant improper**

The trial court erred by granting partial summary judgment for plaintiff tenant on the issue of whether exercise of a lease option by regular mail is sufficient. Unlike *Mer Properties-Salisbury v. Golden Palace, Inc.*, 95 N.C. App. 402, there was a genuine issue of material fact as to whether timely notice was received.

Am Jur 2d, Landlord and Tenant §§ 1181-1184; Summary Judgment § 27.

APPEAL by defendant from order entered 18 September 1990 by *Judge Orlando F. Hudson* in ALAMANCE County Superior Court. Heard in the Court of Appeals 18 September 1991.

In August 1987 plaintiff purchased Terrace Theater and obtained an assignment of the existing lease. The initial term of the 20 year lease began 12 March 1970. The lease also provided for three separate options to renew for five years each. Article XXV entitled "Options to Renew" states: "Tenant shall exercise this option in writing to Landlord at least six (6) months prior to the expiration of the original term of this lease." Article XXII entitled "Provisions for Notice" states: "Whenever notice is to be given to Landlord it shall be sent by registered mail addressed to Landlord at such address as shall have been last designated by Landlord in writing to Tenant. . . ."

Plaintiff brought this declaratory judgment action seeking a determination as to the rights and duties arising under the lease. Plaintiff alleged it sent a lease renewal notice by ordinary mail. Defendant in its answer denied receiving timely notice and counterclaimed seeking an order of ejectment. The trial court entered the following order:

> 1. Defendant's motion for summary judgment in its favor is denied.
>
> 2. Plaintiff's motion for partial summary judgment is granted, and a judgment and declaration is hereby entered as a matter of law that with respect to and under the terms of the lease between plaintiff tenant and defendant landlord, the dispatch by plaintiff of a written letter of renewal by regular mail within the time permitted under the lease is a sufficient exercise of the option to renew the lease, and there is no requirement that the option to renew be exercised by registered mail or received by landlord in order to be effective.
>
> 3. The issue as to whether defendant has waived any objection to, or is estopped to deny, the tenant's renewal of the lease is a factual issue to be determined by the jury.

From this order, defendant appealed. Plaintiff filed a motion to dismiss on the grounds the judgment is interlocutory.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and S. Kyle Woosley, for plaintiff-appellee.

Wishart, Norris, Henninger & Pittman, P.A., by Robert J. Wishart, June K. Allison and Elizabeth Leonard McKay, for defendant-appellant.

ORR, Judge.

[1] The first issue is whether the trial court's order is appealable.

All judgments are either interlocutory or final. *See* N.C. Gen. Stat. § 1A-1, Rule 54(a) (1990).

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazy v. Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (citations omitted).

An interlocutory judgment may be appealed under certain circumstances pursuant to N.C. Gen. Stat. §§ 1-277 (1983) and 7A-27(d) (1989). Sections 1-277 and 7A-27(d) "prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). "Interlocutory appeals are most commonly allowed under [these sections] if delaying the appeal will prejudice any substantial rights." *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). To determine if a substantial right will be prejudiced if the appeal is delayed, we look to the facts and the procedural context. *Id.*

Here the trial court in its "order and partial summary judgment" reserves for the jury the "issue as to whether defendant has waived any objection to, or is estopped to deny, the tenant's renewal of the lease." Defendant argues that the order leaves no further action for the trial court to dispose of the case. Though the order reserves an issue for the jury, defendant argues that

because the trial court determined that it is irrelevant whether notice was received, there is no requirement for a trial on the issues of waiver or estoppel. Defendant contends that

> [t]he only evidence which will be admissible under the court's order is whether the notice was sent, and Aragon has no way of rebutting plaintiff's evidence that the notice of renewal was, in fact, placed in a mail box. Aragon is, therefore, effectively denied a trial on the factual issue of receipt, and, whether defendant waived notice or is estopped to deny the notice is irrelevant if, as a matter of law as this order holds, sending a notice by regular mail is in and of itself sufficient.

Therefore, defendant argues the order is effectively a final judgment and affects a substantial right. We agree.

* * *

[2] Defendant first argues that the trial court erred in denying defendant's motion for summary judgment, allowing plaintiff's motion for partial summary judgment, and entering a judgment and declaration that exercise of an option to renew is sufficient if sent by regular mail. "[S]ummary judgment is appropriate in a declaratory judgment action where there is no genuine issue as to any material fact and either party is entitled to a judgment as a matter of law." *Threatte v. Threatte*, 59 N.C. App. 292, 294, 296 S.E.2d 521, 523 (1982), *disc. review allowed*, 307 N.C. 582, 299 S.E.2d 650, *review improvidently granted*, 308 N.C. 384, 302 S.E.2d 226 (1983).

In *Mer Properties-Salisbury v. Golden Palace, Inc.*, 95 N.C. App. 402, 382 S.E.2d 869 (1989), the lessee sent renewal notice by ordinary mail even though a provision in the lease required notices to be given by registered or certified mail. The lessor argued that the requirement of registered mail would eliminate the problem of proof of notice and bring certainty to business transactions. We stated that "[t]his argument might be persuasive if there was a question of receipt of the notice and [the lessee] were relying on the presumption that arises upon proof of mailing." *Id.* at 405, 382 S.E.2d at 871. This Court noted that other jurisdictions are divided:

> Some courts have held that a lessee's failure to send the notice by registered mail as required by the lease does not relieve the lessor of its contractual obligations under the renewal provision when it is clear the lessor actually received notice. Other

> courts, however, have required that the lessee strictly comply with the notice requirement as specified in the lease.

Id. at 405, 382 S.E.2d at 870-71 (citations omitted). Our Court held that sending notice by ordinary mail was sufficient since the lessor received timely notice of the lessee's intention to exercise the renewal option, was not prejudiced by the lessee's failure to use registered mail, and the requirement for registered mail was located in a section entitled "Miscellaneous Provisions" fourteen pages after the renewal clause. *Id.* at 406, 382 S.E.2d at 871. We stated that

> [t]he facts bring this case more nearly in line with the rationale of those decisions excusing strict compliance with the registered mail requirement of a lease when there is no denial that the notice was timely received. . . . The purpose of registered mail is to substantiate receipt, and in this case, receipt has been substantiated.

Id. at 406-07, 382 S.E.2d at 871-72.

Significantly here, unlike in *Mer*, receipt has not been substantiated, and defendant denies receiving any timely notice. Therefore, we hold that the trial court erred in determining that "there is no requirement that the option to renew be exercised by registered mail or received by landlord in order to be effective" and that the letter sent by ordinary mail is "sufficient exercise of the option to renew. . . ." A genuine issue of material fact exists as to whether timely notice was received, and thus the trial court erred in granting summary judgment in favor of plaintiff. This case must be remanded for appropriate further proceedings.

Reversed and remanded.

Judges COZORT and LEWIS concur.

TERESA G. ROSE, PLAINTIFF v. STEEN CLEANING, INC., D/B/A STEEN CLEANING AND MAINTENANCE, DEFENDANT

No. 9121SC12

(Filed 19 November 1991)

Negligence § 57.8 (NCI3d)— fall on newly waxed mall floor—notice of dangerous condition—summary judgment improper

In an action to recover for injuries suffered by plaintiff when she fell on a newly waxed floor in a mall corridor, the forecast of evidence in plaintiff's deposition presented a genuine issue of material fact as to whether defendant's cleaning crew gave proper notice of a dangerous condition to plaintiff where it tended to show that plaintiff left her store after mall operating hours to make a deposit at a bank located at the opposite end of the mall; she knew it was customary for defendant's cleaning crew to clean the mall floors after operating hours and that the crew started at one end of the mall and worked toward the other end; plaintiff passed at least ten orange cones and warning signs along her route to the bank and knew that they were usually associated with the crew cleaning or waxing the floors; however, plaintiff did not see any cones or signs "for some distance" prior to turning into the corridor in which the bank was located and did not see anyone working on the floors in the corridor; plaintiff's view of the corridor was blocked by construction in a mall store located on the corner of the corridor; immediately after turning into this corridor, plaintiff slipped and fell on a newly waxed floor and was injured; and the floor in the area in which she fell was so slick that in order for her to continue to the bank she had to hold on to the walls to keep from falling again. Therefore, the trial court erred in entering summary judgment for defendant on issues of negligence and contributory negligence.

Am Jur 2d, Premises Liability § 582.

Liability of proprietor of store, office, or similar business premises for fall on floor made slippery by waxing or oiling. 63 ALR3d 591.

APPEAL by plaintiff from summary judgment entered 3 October 1990 in FORSYTH County Superior Court by *Judge William H. Freeman*. Heard in the Court of Appeals 8 October 1991.

Plaintiff instituted this negligence action to recover for injuries she suffered as a result of her falling on a newly waxed floor on 17 May 1987. Defendant answered denying plaintiff's allegations and asserted plaintiff was contributorily negligent. Defendant moved for summary judgment and submitted plaintiff's deposition testimony to support its motion. Plaintiff did not submit any separate material and relied on the forecast of evidence presented by her deposition testimony. Defendant's motion for summary judgment was granted by the trial court and plaintiff appeals.

Gregory Davis for plaintiff-appellant.

Hutchins, Tyndall, Doughton & Moore, by Kent L. Hamrick, for defendant-appellee.

WELLS, Judge.

Plaintiff brings forth only one assignment of error for our review, contending that the trial court erred in granting defendant's motion for summary judgment. For the reasons set forth below, we agree and reverse. This Court, as well as our Supreme Court, has repeatedly stated that summary judgment is not a preferable manner in which to dispose of negligence cases. As a general proposition, issues arising in negligence cases are ordinarily not susceptible to summary adjudication because application of the prudent person test, or any other applicable standard of care, is generally for the jury. *See Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987), and cases cited therein.

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) (1990). In summary judgment, the burden is on the moving party to (1) prove an essential element of the opposing party's claim is non-existent, or (2) show through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills*, 296 N.C. 467, 251 S.E.2d 419 (1979). Summary judgment is a drastic measure and it should be used

with caution. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

To make out an actionable claim for negligence the 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, 331 S.E.2d 662 (1985). In the present case, we believe there exists a genuine issue of material fact concerning whether the defendant gave proper notice of a dangerous condition to the plaintiff; therefore, the trial court erred in granting summary judgment.

The testimony contained in plaintiff's deposition tended to show that plaintiff was employed by The Body Shop, a vendor located in Hanes Mill Mall in Winston-Salem, North Carolina. Plaintiff was taking inventory in this shop on 17 May 1987. The nature of this work required the plaintiff to continue to work past the normal closing time of this and other stores in the mall. While continuing to work, plaintiff noticed defendant Steen's cleaning crew working on the floor near her shop. Plaintiff knew it was customary for this crew to clean the mall floors after mall operating hours. She also knew it was customary for the crews to start at one end of the mall and work towards the other.

At approximately 9:30 p.m. on 17 May 1987, plaintiff left her store to make a night deposit at a bank located at the opposite end of the mall in which plaintiff's store was located. Plaintiff carried a money deposit bag and was cautious on her journey to the other end of the mall. She stated she regularly took precautions to look for persons who might try to rob her on the way to the bank. Plaintiff noticed several orange cones and warning signs along her route to the bank. These cones and signs were usually associated with the crews cleaning or waxing the floors. Plaintiff continued to pass orange cones and warning signs until she reached the opposite end of the mall. She did not see any cones or signs "for some distance" prior to the area in which she fell.

Plaintiff approached the corridor in which the bank was located, then turned to her left and began to walk towards the bank. Almost instantly, she slipped and fell on a newly waxed floor and was injured. There were no cones or signs in the corridor approaching

the bank to warn of any cleaning activity. Plaintiff stated there was a member of the cleaning crew at the end of this corridor. However, she did not see this person prior to her fall. Plaintiff explained her view of this corridor was blocked by construction in a mall store located on the corner of the corridor in which plaintiff fell. The windows of this store normally offered a view of the corridor to the plaintiff prior to entering it. Plaintiff's testimony revealed that, in the area in which she fell, the floor was so slick that in order for her to progress to the bank she had to hold on to the walls to keep from falling again.

As defendant aptly emphasizes, it is not negligence *per se* to wax and polish the aisles of a store, *citing Hedrick v. Tigmore*, 267 N.C. 62, 147 S.E.2d 550 (1966). Such a general statement does not provide the basis for disposition of this case. It is well established that a person, engaged in an otherwise lawful activity who has nevertheless created a potentially dangerous or hazardous condition, has a duty to use reasonable care to warn others who may be put at risk by the condition. *See generally Pittman v. N.C. Dept. of Transportation*, 97 N.C. App. 658, 389 S.E.2d 275, *cert. denied*, 326 N.C. 801, 393 S.E.2d 899 (1990); *Holt v. City of Statesville*, 35 N.C. App. 381, 241 S.E.2d 362 (1978).

Defendant contends that the deposition testimony of plaintiff establishes that plaintiff was given adequate notice of the potential danger of walking upon newly waxed floors and that their efforts to warn of the potential dangers of the floor's condition were enough to absolve them from negligence. The deposition testimony, submitted by defendant and relied upon by plaintiff, showed defendant placed at least ten cones and signs in and around areas in which the cleaning crews were working. Plaintiff passed all of these on her way to the bank. Plaintiff was familiar with the process defendant followed in performing work on the mall floors. She knew defendant's crew members began working at one end of the mall and worked down to the other end. However, as plaintiff approached the end of the mall near her destination she did not see anyone performing work on the floors nor did she see any cones or signs "for some distance" prior to turning into the corridor in which she fell.

Plaintiff contends the forecast of evidence in her deposition shows the notice provided by defendant was less than adequate and did not fully warn a reasonable person of the potential dangers associated with defendant's activity. She contends the presence

of the warning signs and cones throughout the mall would lead a reasonable person to conclude a danger existed only where the warnings were found. In short, plaintiff contends the lack of signs and cones at the location she fell would lead a reasonable person to believe no danger existed there.

Simply stated, on these facts reasonable minds could differ on the issue of negligence and contributory negligence, and this case should therefore proceed to trial.

Reversed and remanded.

Judges PARKER and WYNN concur.

STATE OF NORTH CAROLINA v. ANDREW RUSSELL LUNDBERG, DEFENDANT

No. 901SC1230

(Filed 19 November 1991)

Criminal Law § 67 (NCI4th)— offenses while juvenile—defendant now adult—jurisdiction of superior court

The superior court has jurisdiction to try a twenty-three-year-old defendant for arson offenses committed while he was a juvenile even though the superior court lacked jurisdiction over the juvenile defendant at the time the offenses were committed.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 27.

APPEAL by the State from a ruling by *Judge Howard E. Manning, Jr.* filed 6 August 1990 in PASQUOTANK County Superior Court. Heard in the Court of Appeals 18 September 1991.

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

Lennie L. Hughes for the defendant-appellee.

LEWIS, Judge.

The issue before this Court is whether or not a superior court, which lacked jurisdiction over a juvenile defendant at the time of the offense due to the law then applicable, may presently obtain jurisdiction over the now adult defendant.

On 2 April 1990, a grand jury indicted the 23 year old defendant-appellee on two counts each of arson and soliciting arson. The first indictment alleged that the unlawful act was committed on 30 June 1979 (courthouse arson) when the defendant was 13 years old. The second indictment alleged that the second unlawful act (dwelling arson) took place on 26 September 1981 when defendant was 15 years old. The State attempted to prosecute defendant on both counts in superior court. Defendant filed a motion to quash prosecution on the 1979 courthouse arson indictment, based upon the superior court's lack of jurisdiction over the defendant at the time of the commission of the crime. N.C.G.S. §§ 7A-279 and 7A-280 (1969). The trial judge granted defendant's motion to quash.

The State and defendant appeal. The State assigns as error the trial court's quashing the first indictment. The State also alleges error in the court's concluding that the defendant could never be tried as an adult on the 1979 courthouse arson. Defendant Lundberg assigns as error the superior court's finding that he can be tried as an adult on the second indictment, the 1981 dwelling arson.

Present juvenile law indicates that a court's jurisdiction over juveniles is determined by the defendant's age at the time of the alleged offense. N.C.G.S. § 7A-523(a) (1989). Under this version of the juvenile code, a juvenile is defined as an unemancipated or unmarried civilian who has not reached his or her eighteenth birthday. N.C.G.S. § 7A-517(20) (1990 cum. sup.). A court's jurisdiction over adults is based not upon age, but upon the classification of the crime. Jurisdiction over felonies lies in the superior court, while jurisdiction over misdemeanors lies in the district court. In the case at bar, the defendant is a 23 year old adult indicted for the alleged commission of a felony. As such, defendant Lundberg is subject to prosecution for arson as an adult in superior court.

The defendant argues that because his age at the time of the indictment prevented the district court from gaining jurisdiction over him and because the superior court lacked jurisdiction over him at the time of the offense, that he may never be prose-

cuted for the 1979 courthouse arson alleged in count one. With this reasoning, we disagree. Should we find as defendant suggests, we would truly exalt form over substance. The case at bar turns not upon defendant's age at the time of the crime, but upon whether or not the defendant is entitled to the continued protection of the juvenile code at the present time. Because the new juvenile code explicitly terminates the district court's jurisdiction over all who turn 18, we find that defendant Lundberg is no longer entitled to the protection of the juvenile code. Therefore, we hold that the defendant may now be tried as an adult in superior court.

Defendant Lundberg is not entitled to the protection of the juvenile system as evidenced by the juvenile codes enumerated purposes. The North Carolina Juvenile Code (Code) indicates that it is to be interpreted according to its purposes: 1) to divert juvenile offenders from the juvenile system so that they may remain in their own homes, 2) to assure equitable hearings that protect the constitutional rights of juveniles, 3) to develop a procedure which will balance the needs and interests of the child, parents, and society, and 4) to protect juveniles. N.C.G.S. § 7A-516 (1989). It does not appear from the facts that any of the Code's purposes would be served in this 23 year old defendant's situation. Though he was under the age of 18 when the alleged offense occurred, defendant is no longer a "juvenile" and thereby entitled to the insulation afforded by the Code's special procedures. The protection provided by the Code does not cover adult defendants, nor do we believe these benefits were intended to do so. Hence, the adult Lundberg must be tried as an adult.

It is argued that prosecutors may actively subvert the district court's exclusive jurisdiction by postponing indictment until after a juvenile defendant's eighteenth birthday. This is unlikely. The applicable statutes of limitation will deter this machiavellian scenario in misdemeanor cases. In felony cases, juveniles are not guaranteed trial in a district court in the first place. Juvenile defendants may be tried in superior court as adults after their sixteenth birthday for any offense or "upon order of the court." N.C.G.S. § 7A-524 (1989).

This issue is sparsely covered in North Carolina case law. In *In re Mario Lopez Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982), an 18 year old defendant was indicted for allegedly committing several felonies on 3 December 1978 when he was age 15. The Court indicated that "under both the old law and the new [juvenile

law], it is clear that on 3 December 1978 the district court had exclusive original jurisdiction over [the defendant]." *Id.* at 98, 286 S.E.2d at 531. The Court emphasized that the district court lost this exclusive jurisdiction when the defendant reached age 18. As defendant Stedman had reached age 18 prior to the hearing, the Court vacated the district court's orders. Stedman's attainment of majority prior to the hearing eliminated the district court's jurisdiction over the defendant and the subject matter pursuant to N.C.G.S. § 7A-524 (1989). The Court did not remand the matter to the district court for further action, but stated that "Stedman may now be tried in Superior Court of Alamance the same as any other adult." *Stedman*, at 105, 286 S.E.2d at 535. Further, the Court indicated that Stedman would not be placed in double jeopardy because the district court's probable cause hearing "may not be equated with an adjudicatory hearing where jeopardy attaches when the judge begins to hear evidence." *Id.*

Like *Stedman*, the defendant at bar committed a felony prior to the adoption of the new juvenile code and was subject to the exclusive original jurisdiction of the district court. Defendant Lundberg attempts to distinguish *Stedman* by arguing that the *Stedman* Court permitted defendant Stedman to be tried as an adult in superior court only because he was subject to superior court jurisdiction under the old juvenile code. This is contrary to the Court's explicit statement that defendant Stedman was subject to the district court's "exclusive original jurisdiction" under both old and new rules. Like *Stedman*, the defendant at bar aged out of the district court's jurisdiction. N.C.G.S. § 7A-524 (1989). As emphasized in the Court's ruling and refusal to remand to the district court even for administrative matters, the defendant at bar, like defendant Stedman, is subject to superior court jurisdiction. As in *Stedman* we note that defendant Lundberg is not placed in double jeopardy as no proceedings on either arson charge have progressed past the indictment stage.

The defendant assigns as error the superior court's finding that the defendant can be tried as an adult on indictment count two despite his age at the time of the offense. Defendant's brief does not address his appeal of the second indictment, the 1981 dwelling arson. As per Appellate Rule 28(b)(5), this assignment of error is abandoned. Further, we do not distinguish the case we find controlling, *In re Matter of Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982), and so affirm the superior court's ruling that

defendant Lundberg may be tried in superior court on the 1981 arson alleged in indictment count two.

Reversed as to count one.

Affirmed as to count two.

Judges COZORT and ORR concur.

JANET RUTH BROWN v. ELBERT FERRELL BROWN

No. 9127DC647

(Filed 19 November 1991)

Divorce and Separation § 263 (NCI4th)— alimony—post-separation failure to support dependent spouse—evidence sufficient for jury

The trial court did not err by denying defendant's motions for a judgment n.o.v. and a new trial in an action for permanent alimony where the jury found that defendant did not abandon plaintiff or offer indignities against her, but found that defendant willfully failed to provide plaintiff with necessary subsistence according to his means and condition so as to render plaintiff's condition intolerable and her life burdensome, and the court awarded plaintiff permanent alimony. There was sufficient evidence to submit to the jury; absent a valid separation agreement waiving all alimony rights under N.C.G.S. § 50-16.6(b), post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. N.C.G.S. § 50-16.2(10).

Am Jur 2d, Divorce and Separation § 626; Husband and Wife §§ 387, 389, 390.

APPEAL by defendant from judgment entered 30 January 1991 in GASTON County District Court by *Judge Larry B. Langson.* Heard in the Court of Appeals 15 November 1991.

Kelso & Ferguson, by Lloyd T. Kelso, for plaintiff-appellee.

Frank Patton Cooke for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 30 January 1991 awarding plaintiff permanent alimony. He assigns error to the trial court denying his motions for judgment notwithstanding the verdict and a new trial.

Plaintiff instituted this action seeking a divorce from bed and board, alimony *pendente lite*, custody of the two minor children born to the marriage, and permanent alimony. Plaintiff alleged in her complaint that defendant abandoned her, committed adultery, and refused to provide adequate financial support for her during the period of their separation. Defendant answered, denying the allegations of fault and seeking a divorce from bed and board. On 6 December 1988, the trial court entered an order awarding plaintiff custody of the children, and ordering, *inter alia*, defendant to pay child support and alimony *pendente lite*. A judgment of absolute divorce was entered on 6 October 1989. A hearing on plaintiff's claim for permanent alimony was held and on 28 November 1990, the jury returned answers to the three issues addressing the fault grounds alleged by plaintiff. The jury found (1) that defendant did not willfully abandon plaintiff without just cause or provocation; (2) that defendant did not, without provocation, offer such indignities to plaintiff as to render her life intolerable; and (3) that defendant willfully failed to provide plaintiff with necessary subsistence according to his means and condition so as to render plaintiff's condition intolerable and her life burdensome. After the jury returned the verdict, defendant moved for a judgment notwithstanding the verdict and a new trial. The trial court denied defendant's motions, and on 30 January 1991 entered its judgment awarding plaintiff permanent alimony.

The issue is whether post-separation failure to support a dependent-spouse constitutes a ground for alimony under N.C.G.S. § 50-16.2(10) (1987).

Defendant's sole contention on appeal is that the trial court erred by denying his motions for a judgment notwithstanding the verdict and for a new trial. Defendant argues that because the jury found that defendant did not abandon plaintiff or offer indignities against her, the jury "obviously found the Plaintiff to be at fault for bringing this marriage to an end." He then concedes that defendant failed to support plaintiff after the separation but

claims that this was justified because plaintiff wrongfully ended the marriage.

A motion for a judgment notwithstanding the verdict is essentially the renewal of an earlier motion for directed verdict. *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 319 S.E.2d 290, *disc. rev. denied*, 312 N.C. 622, 323 S.E.2d 923 (1984). Thus, the rules regarding the sufficiency of the evidence to go to the jury are equally applicable to a motion for a judgment notwithstanding the verdict. *Id.* In ruling upon a defendant's motion for a judgment notwithstanding the verdict, the evidence is to be considered in the light most favorable to the plaintiff, and the plaintiff is entitled to all reasonable inferences that can be drawn from that evidence. *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986). The question presented by a defendant's motion is whether the plaintiff's evidence was sufficient for submission to the jury. *Morrison v. Concord Kiwanis Club*, 52 N.C. App. 454, 279 S.E.2d 96, *disc. rev. denied*, 304 N.C. 196, 285 S.E.2d 100 (1981). When a motion for a judgment notwithstanding the verdict is joined with a motion for a new trial, the trial court has a duty to rule on both motions. *Graves v. Walston*, 302 N.C. 332, 275 S.E.2d 485 (1981). The denial of a motion in the alternative for a new trial lies within the discretion of the trial judge and the decision will not be disturbed absent a showing of a clear abuse of discretion. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

After reviewing the evidence in this case, we believe that it was sufficient for submission to the jury. Plaintiff testified that defendant, after leaving the marital home on 25 June 1988, continued to send her most of his weekly pay for approximately two months. Defendant told her that he would support her until the end of August at which time he would cut off all of her support. Plaintiff was unemployed at the time and was attempting to get disability benefits. She stated that she had been relying solely on defendant for money and that she had no other source of income. Plaintiff testified that she needed money to buy food and to pay for the mobile home where she and the two minor children resided. She also testified that when defendant left the home, he was working at United Spinners. After separation, defendant lived with his father and gave plaintiff $300.00 per week which was all but about $50.00 of his paycheck. Plaintiff testified and defendant admitted on cross-examination that he did not support plaintiff after the end of August, 1988. This is sufficient evidence to submit to the

jury on the issue of whether defendant willfully failed to provide plaintiff with necessary subsistence according to defendant's means and condition during the period of their separation so as to render the condition of plaintiff intolerable and her life burdensome. N.C.G.S. § 50-16.2(10). Absent a valid separation agreement waiving all alimony rights under N.C.G.S. § 50-16.6(b) (1987), post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. *Cf. Adams v. Adams*, 92 N.C. App. 274, 278-79, 374 S.E.2d 450, 452-53 (1988) (adultery during period of separation is ground for alimony). Defendant's argument that the jury, by its answers, necessarily found that plaintiff was the party at fault, is without merit. Furthermore, defendant has shown no abuse of discretion by the trial court in denying his motion for a new trial. Accordingly, the judgment of the trial court is

Affirmed.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES H. WARD

No. 904SC1199

(Filed 19 November 1991)

1. Evidence and Witnesses § 315 (NCI4th)— rape—prior offenses —no error

There was no error in a rape prosecution from admission of the victim's testimony that defendant had told her that she would pay because another woman had "done him wrong" or from a deputy's stricken testimony that defendant had said that he had been accused of rape before. The victim's statement does not convey any information as to a previous rape and is too oblique to be prejudicial, and the deputy's testimony was properly excluded with an adequate curative instruction to the jury.

Am Jur 2d, Rape § 71.

2. Criminal Law § 1098 (NCI4th)— second degree rape—aggravating factor—use of deadly weapon—improper

The trial court erred when sentencing defendant for second degree rape by finding in aggravation that defendant had used a deadly weapon where defendant had been indicted for first degree rape and the jury had clearly rejected the theory that the defendant employed a deadly weapon in commission of the crime.

Am Jur 2d, Criminal Law § 599; Rape §§ 114, 115.

APPEAL by defendant from judgment and sentence for one count of second degree rape entered by *Judge William C. Griffin* on 29 March 1990 in JONES County Superior Court. Heard in the Court of Appeals 17 September 1991.

Attorney General Lacy H. Thornburg, by Associate Attorney General V. Lori Fuller, for the State.

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

LEWIS, Judge.

Defendant was indicted on 16 January 1990 for one count of rape and one count of kidnapping. He was tried by a jury and found not guilty of kidnapping but convicted of second degree rape and sentenced to forty years.

At trial, the State's evidence tended to show that the alleged victim went to a party with defendant on the night of 2 July 1989. She drove as they left her house at 10:00 p.m. They went to three different clubs where defendant drank alcoholic beverages, and they started home early in the morning. Defendant directed her down a deserted road where she stopped the car and they talked for about twenty minutes. The victim testified that the defendant pulled a knife from under the seat and ordered her to disrobe. The female claimed that defendant raped her and then passed out. She testified that she threw the knife into a field. She tried to start the car but could not do so. She left on foot and eventually got a ride home. Upon returning to the car with a police officer, she found defendant still asleep with his pants down. No knife was found but a knife sheath was found in the car.

[1] Defendant's first assignment of error is that the trial court erred in allowing into evidence unfairly prejudicial testimony of an alleged prior rape by the defendant, and in denying defendant's motion for a mistrial. Defendant argues that he is prejudiced by the victim's testimony that the defendant told her she would pay because another woman had "done him wrong." Defendant did not object to this testimony. Defendant argues that this reference to a previous rape charge was compounded when Deputy Lyndora Perry testified that "he told her it didn't make any difference whether she wanted to or not, he was going to have it, he said he had been accused of rape before." Defendant objected and made a motion to strike. The court sustained the objection and instructed the jury not to consider the witness' last statement. Defendant contends that despite the trial court's limiting instruction, this statement by Deputy Perry resulted in substantial and irreparable prejudice to his case.

We conclude from the record that the trial court did not err concerning either of the statements in question. The victim's statement, to which the defendant did not object, that another woman had "done (the defendant) wrong," does not convey any information as to a previous rape and as such is too oblique to be prejudicial. Deputy Perry's testimony was properly excluded by the court with an adequate curative instruction to the jury. *State v. Pruitt*, 301 N.C. 683, 688, 273 S.E.2d 264, 267-68 (1981). Defendant has failed to show an error at trial which resulted in "substantial and irreparable prejudice" such that the trial court should have declared a mistrial. N.C.G.S. § 15A-1061. *See State v. Rogers*, 52 N.C. App. 676, 685, 279 S.E.2d 881, 888 (1981). We therefore overrule this assignment of error.

[2] Defendant next assigns error to the trial court's finding as an aggravating factor for sentencing that "a deadly weapon was used in the commission of the offense." Defendant was indicted for first degree rape under N.C.G.S. § 14-27.2, which states in relevant part that:

> A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . .
>
> (2) With another person by force and against the will of the other person, and

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous and deadly weapon.

The defendant was convicted of the lesser included offense of second degree rape under N.C.G.S. § 14-27.3, which states in relevant part:

A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person.

Insofar as the jury found the defendant not guilty of first degree rape but guilty only of second degree rape, the jury clearly rejected the theory that the defendant employed a deadly weapon in commission of the crime. Where defendant was in effect found innocent by the jury of an element of a crime with which he was charged, in this case the use of a deadly weapon, the court cannot then find such as a factor in aggravation. *State v. Marley*, 321 N.C. 415, 424-25, 364 S.E.2d 133, 138-39 (1988). A new sentencing hearing is therefore required.

Guilt phase—no error.

Remanded for sentencing.

Judges COZORT and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 NOVEMBER 1991

BARKER v. WILLIAMS No. 919SC600	Vance (89CVS161)	No Error
BURTON STEEL ERECTION CO. v. HIATT No. 905SC1328	New Hanover (88CVS1314)	Affirmed
JOHNSON v. JOHNSON No. 9020DC1352	Union (88CVD0089)	Affirmed in part, reversed in part and remanded
MORGAN v. MARTIN No. 9129SC585	Polk (90CVS139)	Affirmed
PENLEY v. EAST WEST, INC. No. 9010IC1269	Ind. Comm. (562399)	Affirmed
POWELL v. POWELL No. 9017DC1354	Rockingham (87CVD1146)	Affirmed
ROUSE v. PITT COUNTY MEMORIAL HOSPITAL No. 903SC944	Pitt (89CVS169)	Appeal Dismissed
STATE v. BAYSE No. 9018SC1205	Guilford (90CRS4719) (90CRS4720)	Reversed
STATE v. BRADDOCK No. 9120SC70	Moore (90CRS6617)	No Error
STATE v. FAISON No. 916SC466	Halifax (89CRS6035) (89CRS6036)	No Error
STATE v. FEREBEE No. 903SC1206	Craven (89CRS14313) (89CRS14314) (89CRS14315)	In case of 89CRS14214, defendant's conviction is vacated. In case of 89CRS14315, defendant's conviction is vacated and remanded for entry of appropriate judgment.

STATE v. JACKSON No. 9118SC19	Guilford (89CRS65322)	No Error
STATE v. KINDLEY No. 9119SC593	Randolph (88CRS8576)	Affirmed
STATE v. MOBLEY No. 9026SC999	Mecklenburg (89CRS39453)	No Error
STATE v. MOORE No. 908SC1358	Lenoir (90CRS2466)	No Error
STATE v. PICKARD No. 919SC531	Person (90CRS3051) (90CRS3053) (90CRS3054) (90CRS3056) (90CRS3057) (90CRS3058) (90CRS3059)	No Error
STATE v. PROCTOR No. 9029SC1191	Rutherford (88CRS7553) (88CRS7554)	New Trial
STATE v. ROGERS No. 9116SC453	Robeson (90CRS14696) (90CRS14697) (90CRS14698)	Affirmed
STATE v. SHERARD No. 9121SC549	Forsyth (86CRS30459)	No Error
STATE v. TAYLOR No. 9117SC545	Caswell (87CRS1825) (89CRS1826) (89CRS1827) (89CRS1828) (89CRS1829) (89CRS1830) (87CRS1834) (87CRS1835) (87CRS1836) (87CRS1837) (87CRS1838)	No Error
STATE v. TILTON No. 915SC537	New Hanover (89CRS9736)	No Error
STATE v. WEBSTER No. 9029SC1135	Rutherford (87CRS6050)	No Error

FILED 19 NOVEMBER 1991

BROOKS v. FLYNT, INC. No. 9010IC1272	Ind. Comm. (916506)	Affirmed
IN RE BRYAN No. 9114DC609	Durham (83J157B)	Affirmed
IN RE POTTER No. 9123DC677	Ashe (90J34)	Affirmed
PRIVETTE v. MERRITT No. 9110SC642	Wake (89CVS10058)	Reversed
REEVES v. WILKINS No. 9110IC767	Ind. Comm. (640809)	Affirmed
STATE v. ANEMONT No. 9113SC541	Brunswick (90CRS2051) (90CRS2052) (90CRS2053) (90CRS2054)	No Error
STATE v. BLAKENEY No. 9126SC704	Mecklenburg (90CRS64588) (90CRS64589)	Reversed
STATE v. CHAVIS No. 9119SC641	Randolph (90CRS7914) (90CRS9635)	No Error
STATE v. GAMBLE No. 9112SC626	Cumberland (90CRS5607) (90CRS5608) (90CRS5609)	No Error
STATE v. HENRY No. 9117SC683	Rockingham (89CRS7666) (89CRS8479)	No Error
STATE v. HICKS No. 9025SC1080	Catawba (90CRS4023) (90CRS4025)	No Error
STATE v. HOWELL No. 918SC668	Wayne (90CRS4003)	Affirmed
STATE v. JEFFERSON No. 912SC747	Beaufort (90CRS2630)	No Error
STATE v. JENKINS No. 9118SC658	Guilford (90CRS10048)	No Error
STATE v. JONES No. 9126SC570	Mecklenburg (90CRS39102)	No Error

STATE v. LEONARD No. 9116SC720	Robeson (90CRS7881)	No Error
STATE v. OATES No. 9126SC685	Mecklenburg (90CRS75001)	No Error
STATE v. PATTON No. 9110SC775	Wake (88CRS69970)	No Error
STATE v. PHIPPS No. 914SC639	Duplin (90CRS3322)	No Error
STATE v. ROSE No. 9110SC776	Wake (90CRS78626)	No Error
STATE v. ROUSE No. 915SC592	New Hanover (90CRS8635)	No Error
STATE v. WARE No. 9126SC733	Mecklenburg (91CRS7656)	No Error
STATE v. WARREN No. 9115SC597	Alamance (88CRS16936)	No Error
STATE v. WHALEY No. 9113SC808	Brunswick (91CRS707) (91CRS708(b))	No Error
STEELE ELECTRIC CO. v. J. W. COOK & SONS, INC. No. 9113SC645	Columbus (89CVS1238)	Affirmed
WALKER v. CONSOLIDATED FREIGHTWAYS CORP. No. 9126SC697	Mecklenburg (90CVS10907)	Affirmed

STATE OF NORTH CAROLINA v. SHAWN MICHAEL JOYCE AND DEAN MORRIS WOLVINGTON

No. 9028SC1250

(Filed 3 December 1991)

1. **Criminal Law § 553 (NCI4th)— robbery and kidnapping— perjured testimony—mistrial denied**

The trial court did not abuse its discretion in denying defendants' motions for a mistrial in a robbery and kidnapping prosecution where a State's witness, the assistant manager of the Little Caesar's which was robbed, identified defendant Joyce as the person carrying the knife in the restaurant. Although the testimony is clearly inconsistent, the record does not reflect that the District Attorney knew that the witness would recite false testimony and the District Attorney took appropriate steps to discredit the witness by immediately calling an officer to the stand to refute the identification and by discrediting the testimony in closing arguments.

Am Jur 2d, Criminal Law § 784; Evidence § 1082; Trial § 254.

2. **Kidnapping § 1.2 (NCI3d)— kidnapping as part of robbery— removal of victim to another room—evidence of kidnapping sufficient**

The trial court did not err by denying defendants' motion to dismiss second degree kidnapping charges where the charges arose from several robberies; all of the victims were moved from one room to another, where they were confined; and the removals were not an integral part of the crime nor necessary to facilitate the robberies since the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken.

Am Jur 2d, Abduction and Kidnapping §§ 11 et seq.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

3. **Kidnapping § 1.3 (NCI3d)— kidnapping as part of robbery— instructions—no error**

The trial court did not err in a prosecution for kidnapping and robbery by denying defendants' request to instruct the

jury in accordance with requested instructions which focused on the issue of whether the removal was an inherent and integral part of the robberies. When giving instructions, the trial court is not required to adopt the exact words used by an appellate opinion in setting forth the law on a particular subject.

Am Jur 2d, Trial §§ 589, 594, 611, 713.

4. Constitutional Law § 323 (NCI4th)— robbery and kidnapping—speedy trial—no constitutional violation

There was no violation of defendant Joyce's Sixth Amendment right to a speedy trial where 269 days passed between arrest and trial, but defendant's failure to object to the length of his incarceration or to raise the speedy trial violation until trial indicates that his objection was one merely of form. Moreover, he cannot demonstrate how his defense was hampered or how the delay prejudiced him.

Am Jur 2d, Criminal Law §§ 652 et seq., 849 et seq.

Waiver or loss of accused's right to speedy trial. 57 ALR2d 302.

Accused's right to speedy trial under federal constitution—Supreme Court cases. 71 L. Ed. 2d 983.

5. Evidence and Witnesses § 887 (NCI4th)— robbery and kidnapping—out of court statements—admissible

The trial court did not err in a prosecution for robbery and kidnapping by allowing a witness to read aloud prior written statements she had given to police officers where the testimony was offered to bolster the testimony she gave on the stand rather than to prove the truth of the matter asserted. The trial court properly gave the pattern jury instruction on corroboration to the jury when the statements were published and repeated the instruction in the final charge to prevent the jury from considering the statements as substantive evidence.

Am Jur 2d, Evidence § 500; Witnesses §§ 641 et seq.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases. 58 ALR4th 1014.

6. Criminal Law § 382 (NCI4th)— robbery and kidnapping— references to codefendant—witness instructed to omit—no error

The trial court did not err in a robbery and kidnapping prosecution by asking a witness if he could refrain from mentioning "the cousins" where the witness was a cellmate of defendant Joyce and was testifying about an admission by Joyce, and defendant Wolvington was Joyce's cousin. A trial judge's duty to control the trial encompasses the authority and discretion to examine a witness for the purpose of clarifying or understanding his or her testimony. The court here was merely ensuring that the testimony would accurately reflect the substance of the statement given to the police and the questions posed by the judge were to protect both defendants.

Am Jur 2d, Trial §§ 88, 113.

7. Evidence and Witnesses § 2947 (NCI4th)— witness's psychiatric records—not released to defendant—no error

The trial court did not err by not releasing the psychiatric records of a State's witness to defendant where defendant had subpoenaed the records, the judge conducted an *in camera* inspection of the records, and the judge concluded that the records would not have a significant effect on the case. This witness was not the most important prosecuting witness in the case; the witness was cross-examined rigorously and extensively by both defense attorneys and both successfully elicited testimony from the witness about his long history of drug use, his violent behavior, and his criminal record; and any extra impeaching evidence gleaned from the mental health records would have been redundant.

Am Jur 2d, Evidence §§ 518, 519, 546, 563, 569.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility. 44 ALR3d 1203.

8. Criminal Law § 113 (NCI4th)— discovery—State's failure to comply—sanctions

The trial court did not abuse its discretion in the severity of sanctions imposed for the State's violation of discovery procedures where defendant Wolvington waived his probable cause hearing in exchange for an open file from the State, but a statement by a State's witness concerning a telephone call was not disclosed. The trial judge reprimanded the District

Attorney and refused to allow into evidence any testimony concerning the substance of the telephone conversation. The trial court has discretion in determining which of the remedies available should be applied under the circumstances. N.C.G.S. § 15A-910.

Am Jur 2d, Depositions and Discovery §§ 426, 427, 428 et seq.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirement as to statements made by defendants or other nonexpert witnesses—modern cases. 33 ALR4th 301.

9. **Indictment and Warrant § 12.1 (NCI3d)— armed robbery—knife amended to firearm—no error**

There was no error in an armed robbery prosecution where the court on the first day of trial allowed the prosecutor's motion to amend the indictment to change "knife" to "firearm." The change does not alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury. Moreover, defendant cannot demonstrate any prejudice due to the amendment. N.C.G.S. § 15A-923(e).

Am Jur 2d, Indictments and Informations §§ 173 et seq.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money. 15 ALR3d 1357.

10. **Criminal Law § 439 (NCI4th)— prosecutor's closing argument—characterization of defendant—no error**

There was no prejudicial error in a prosecution for robbery and kidnapping where the prosecutor commented in his closing argument, "if you're going to try the devil, you've got to go to hell for the witnesses."

Am Jur 2d, Trial §§ 193, 180.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.

APPEAL by defendants from Judgments entered 8 March 1990 by *Judge C. Walter Allen* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 18 September 1991.

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

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by John A. Dusenbury, Jr., for defendant appellant Shawn Michael Joyce.

Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux & Belser, P.A., by David G. Belser and Barry L. Master, for defendant appellant Dean Morris Wolvington.

COZORT, Judge.

Defendant Shawn Michael Joyce was convicted of one count of common law robbery, two counts of robbery with a dangerous weapon, and two counts of second-degree kidnapping. Defendant Dean Morris Wolvington was convicted of one count of common law robbery, two counts of robbery with a dangerous weapon, and three counts of second-degree kidnapping. Defendants jointly contend the trial court erred in denying defendants' motion for a mistrial based on the admission of false testimony by one of the State's witnesses, in failing to dismiss the second-degree kidnapping charges, and in refusing to honor defendants' request for specific instructions as to second-degree kidnapping. Additionally, defendants present individually several other issues for determination. We conclude that both defendants received a fair trial free from prejudicial error.

The State's evidence at trial tended to show that the charges stemmed from a series of three robberies occurring in 1989. The robberies were committed at the following locations and times: (1) the Little Caesar's Pizza restaurant in Skyland, North Carolina, on 4 February 1989; (2) the Oak Park Phillips 66 Convenience Store in Arden, North Carolina, on 2 April 1989; and (3) the Cedar Cliff Grocery in Fairview, North Carolina, on 7 May 1989. Defendants Joyce and Wolvington were arrested for the robberies based on a confession by Mark Moore, who participated in the robberies, and the statements of Linda Moore, the wife of Mark Moore. Mark Moore was apprehended on 27 May 1989 by the Buncombe County Sheriff's Department for robbing a Domino's Pizza Restaurant in

Arden. During questioning, Moore not only confessed to the Domino's robbery, but admitted his involvement in the robberies at Little Caesar's Pizza, the Oak Park Phillips 66 Convenience Store, and the Cedar Cliff Grocery. Moore signed statements implicating Joyce and Wolvington. At the time of trial, Mark Moore had already entered pleas of guilty to charges relating to the robberies. Also testifying for the State, Linda Moore stated that on the night her husband was taken into custody for the Domino's Pizza robbery, she was separated from him and then questioned. Linda Moore voluntarily informed the police that her husband had robbed Domino's. When asked about the other robberies, Linda Moore recalled that, on the nights of the three robberies, she saw her husband and both defendants divide money and other stolen items while sitting on the floor at defendant Wolvington's residence. On each occasion, the men told her what had transpired earlier in the evening by specifically discussing the robberies. Linda Moore recounted facts in great detail which were consistent with those given to the police by her husband.

Defendant Joyce took the stand on his own behalf. He presented an alibi for each of the evenings of the robberies. Every alibi involved Joyce's spending time with his cousin, defendant Wolvington. Defendant Wolvington also testified on his own behalf. His testimony mirrored that of Joyce. Vicki Wolvington corroborated her husband's alibi. Other evidence presented by both the State and the defense will be discussed in more detail as each issue is examined.

[1] We now turn to defendants' contentions on appeal. Both defendant Joyce and defendant Wolvington contend that the trial court erred in denying their motions for a mistrial based on alleged perjured testimony from State's witness James Dill. Defendants argue that James Dill's testimony destroyed the defendants' alibi theory, surprised the defense counsel and caused the defendants to suffer irreparable prejudice. Whether a mistrial should be granted pursuant to N.C. Gen. Stat. § 15A-1061 (1988) is a matter which rests in the sound discretion of the trial judge. *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982). Because such a ruling is within the trial judge's discretion, a mistrial is only appropriate where such serious procedural or other improprieties would make it impossible for a fair and impartial verdict to be rendered under the law. *Id.*

James Dill was the assistant manager at the Little Caesar's restaurant on the evening of 4 February 1989. Another employee, Lisa Yerkes, witnessed the robbery with Dill. Both Mr. Dill and Ms. Yerkes' testimony indicated that, as the two employees were preparing to close the restaurant at approximately 11:00 p.m., the doorbell rang. Two men entered the restaurant; one wore pantyhose over his head, and the other wore a blue ski mask. One of the perpetrators carried a knife; one held a gun. The man with the knife pointed it at Ms. Yerkes and ordered the workers into the office. The man holding the gun told Dill to come out of the office and to open the safe, then pushed Dill back into the office once the safe had been opened. The gunman ordered the employees to "drop [their] pants," and to throw their wallets onto the floor. Dill and Yerkes complied. Despite Dill's instructions on how to open the cash register, the gunman failed to open the machine. When headlights appeared at the front of the building, the two robbers exited out the back door.

Yerkes' and Dill's testimony was essentially identical, except for an identification made by Dill at trial. On direct examination, James Dill testified, "I asked [the robber] what he was doing [there] because he looked familiar. I knew who he was." When the District Attorney responded, "You knew who the person in the stocking was?," Dill replied, "Yes." Dill stated on cross-examination that the person carrying the knife in Little Caesar's was "Shawn Joyce." Dill went on to say that he had given this information to a black detective who investigated the robbery. Dill admitted, however, that he had never told the District Attorney or the detective in charge of the investigation about the identification. Defendants moved for a mistrial, since subsequent testimony by two State's witnesses would show that defendant Joyce was never in the Little Caesar's restaurant. Mark and Linda Moore would testify later in the trial that Mark Moore and Dean Wolvington were the robbers at Little Caesar's and that Shawn Joyce remained in the car during the entire robbery. The trial court denied the motion and ruled that Dill's testimony would be an issue of credibility for the jury to decide, since at that point in the trial, no evidence was before the court to show the truth or falsity of Dill's testimony. The District Attorney subsequently called Officer Patrick of the Asheville Police Department immediately to the stand to cast doubt on Dill's identification. Officer Patrick was the only black officer who investigated the Little Caesar's robbery. He testified that

Dill had never at any time indicated to him or to any other officer that he could identify either robber. Additionally, the District Attorney told the jury during closing argument that Dill's identification testimony was "not worth believing," because "[i]t couldn't have been that way."

The law is clear that a prosecutor's presentation of known false evidence, allowed to go uncorrected, is a violation of a defendant's right to due process. *Napue v. Illinois*, 360 U.S. 264, 269, 3 L.Ed.2d 1217, 1221-22 (1959). The District Attorney has a duty to correct any false evidence which in any reasonable likelihood could affect the jury's decision. *Id.* Conversely, if the evidence is an inconsistency rather than a knowing falsehood, such contradictions in the State's evidence are for the jury to consider and resolve. *State v. Edwards*, 89 N.C. App. 529, 531, 366 S.E.2d 520, 522 (1988). Although Dill's testimony was clearly inconsistent in this case, the record does not reflect that the District Attorney knew Dill would recite false testimony. Furthermore, the District Attorney took appropriate steps to discredit Dill by calling Officer Patrick immediately to the stand to refute Dill's identification. The State also discredited Dill's testimony in closing argument. With no evidence that the State knowingly used false evidence, the District Attorney's remedial measures in this case were sufficient to correct the false evidence. The inconsistencies in the evidence were properly left for the jury's consideration. Consequently, the trial court did not abuse its discretion in denying defendants' motion for a mistrial.

[2] Both defendants next submit that the trial court erred in failing to dismiss the second-degree kidnapping charges based on the insufficiency of the State's evidence. Defendants claim the kidnapping charges should have been dismissed because the victims were not "removed" within the meaning of the statute. We disagree. The kidnapping statute provides:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C. Gen. Stat. § 14-39 (Cum. Supp. 1991). Often when a defendant is charged with kidnapping, and the charge is based on the defendant's confinement, restraint, or removal of the victim for the purpose of facilitating the commission of a felony, he or she is also charged with the underlying felony. *State v. Parker*, 81 N.C. App. 443, 447, 344 S.E.2d 330, 332 (1986). To prevent any double jeopardy violation from arising, our Supreme Court has declared it impermissible "to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981). The facts of *Irwin* showed that the defendant and an accomplice entered a drug store which had a main room with a fountain counter and another area with a prescription counter. In the rear of the store was an office and a separate prescription room. The accomplice forced the employee to walk from her position near the fountain cash register to the back of the store where the prescription counter and safe were located. He then made the victim sit on the step leading to the prescription room. All the activity occurred in the main room of the store. The *Irwin* court, reversing the kidnapping conviction, found the employee's removal to the back of the store to be "an inherent and integral part of the attempted armed robbery," since the employee was needed to open the safe. *Id.* at 103, 282 S.E.2d at 446.

In *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), this Court upheld the denial of a motion to dismiss kidnapping charges in a case with facts similar to the case at bar. *Davidson* involved an armed robbery in which three people in a clothing store were forced at gunpoint to go from the front of the store to a dressing room in the rear some thirty to thirty-five feet away. The Court found that since none of the property was kept in the dressing room, it was not necessary to move the victims there in order to commit the robbery. *Id.* at 543, 335 S.E.2d at 520.

The Court reasoned that removal of the victims to the dressing room was not an integral part of the robbery, but constituted "a separate course of conduct designed to remove the victims from the view of passersby who might have hindered the commission of the crime." *Id.* Thus, for a kidnapping charge to stand, the removal of the victim from one place to another must clearly be a removal which is independent from the movement necessary for the commission of the underlying felony.

In the present case, defendant Joyce was charged with two counts of kidnapping which arose from the Oak Park Convenience Store robbery and the Cedar Cliff Grocery robbery. Defendant Wolvington faced those same kidnapping charges plus additional charges relating to the Little Caesar's Pizza robbery. First, in the Little Caesar's robbery, Lisa Yerkes and James Dill were ordered to move from the front of the restaurant back into the office. Second, in the Oak Park Convenience Store robbery, employee John Moss testified that the robbers forced him from the game room into the back of the store and shut him in the bathroom. Lastly, Amy Zimmerman, the cashier at the Cedar Cliff Grocery, testified that the perpetrators moved her out of the main store area, pushed her into the bathroom, and forced her to lock the door. These facts are different from the facts in *Irwin* and are more comparable to those in *Davidson*. All victims in the case at bar were moved from one room to another room where they were confined. The removals were not an integral part of the crime nor necessary to facilitate the robberies, since the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken. As a result, we distinguish *Irwin* and find the evidence presented sufficient to prove the second-degree kidnapping charges. The trial court did not err in denying defendants' motion to dismiss the second-degree kidnapping charges.

[3] Finally, both defendants assert that the trial court erred in denying their request to instruct the jury in accordance with defendants' proposed instructions on second-degree kidnapping. Prior to the jury charge, defendant Wolvington joined in defendant Joyce's proposed written jury instruction on second-degree kidnapping. The proposed instruction included language taken from the *Irwin* case. The language focused specifically on the issue of whether the removal of the victims in each of the three cases was an inherent and integral part of the armed robberies, or whether the removal was

an act separate from the underlying crime. The trial judge declined to tender the offered instruction and charged the jury according to the pattern instruction on kidnapping.

Where the trial judge's charge fully instructs the jury on all substantive areas of the case, and defines and applies the law thereto, it is sufficient. *State v. McNeil*, 47 N.C. App. 30, 40, 266 S.E.2d 824, 830 (1980), *cert. denied*, 450 U.S. 915, 67 L.Ed.2d 339 (1981). When giving instructions, the trial court is not required to adopt the exact words used by an appellate opinion in setting forth the law on a particular subject. *State v. Vaughan*, 59 N.C. App. 318, 321, 296 S.E.2d 516, 518 (1982), *disc. review denied*, 307 N.C. 582, 299 S.E.2d 650 (1983). The pattern jury instructions given in this case varied only slightly from the instructions offered by defendants. Furthermore, the trial court was not required to recite the exact language from *Irwin* in charging the jury. In *State v. Clinding*, 92 N.C. App. 555, 374 S.E.2d 891 (1989), this Court found that the general statutory language of removal was enough to satisfy " 'the requirement of *Irwin* that the jury find that the removal be separate and apart from the other felony in order to find [defendant] guilty of kidnapping.' " *Id.* at 561, 374 S.E.2d at 894 (citation omitted), citing *State v. Battle*, 61 N.C. App. 87, 93, 300 S.E.2d 276, 279 (1983). This assignment of error has no merit.

[4] We now turn to issues raised separately by each defendant. Defendant Joyce initially argues the trial court erred in refusing to dismiss all charges against him on the ground that he was denied his right to a speedy trial. North Carolina's Speedy Trial Act, N.C. Gen. Stat. § 15A-701, *et seq.*, was repealed 1 October 1989, thus, we now apply federal constitutional standards to speedy trial issues. The right to a speedy trial guaranteed by the sixth amendment applies to the states via the fourteenth amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 222, 18 L.Ed.2d 1, 7-8 (1967). To determine whether a defendant's right to a speedy trial has been denied, four factors must be examined: the length of the delay, reasons for the delay, defendant's assertion of the right, and prejudice suffered by the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed.2d 101, 117 (1972). These four factors are considered together to determine under the circumstances whether a sixth amendment violation has occurred. *Moore v. Arizona*, 414 U.S. 25, 26-27, 38 L.Ed.2d 183, 185-86 (1973). Defendant Joyce encountered a delay of 269 days between the date of his arrest and the date of trial. The reason for the delay was partially due to the overloaded

trial docket, and partially because Joyce's case was joined with defendant Wolvington's case. Prior to and following the joinder, codefendant Wolvington made motions for continuances which were granted. Defendant Joyce did not contest these motions or object to the delay at that time. The law indicates that a defendant who fails to demand a speedy trial does not forever waive the right. *Barker*, 497 U.S. at 528, 33 L.Ed.2d at 115. The *Barker* decision, however, places great emphasis on whether the defendant asserted the right at an early stage, or objected as a matter of form. *Id.* at 531-32, 33 L.Ed.2d at 117-18. Defendant Joyce's failure to object to the length of his incarceration or to raise the speedy trial violation until trial indicates his objection was one merely of form. As for prejudice, defendant Joyce cannot demonstrate how his defense was hampered or how the delay prejudiced him. Thus, we find no sixth amendment violation.

[5] Defendant Joyce further alleges the trial court erred in admitting into evidence the out-of-court statements given to police by State's witness Linda Moore. Linda Moore testified to her presence at codefendant Wolvington's home following the three robberies where she observed her husband and the defendants dividing up the proceeds from the robberies. Following cross-examination by both defendants, the prosecutor had Moore read aloud prior written statements she gave to the police officers. The written statements were introduced into evidence and published to the jury. Defendant argues that the statements constituted inadmissible hearsay because they did not logically rebut or contradict defendant's contention that her testimony was recently fabricated. We disagree. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1988). In the present case, the prior statements in question were not offered to prove the truth of the matter asserted; rather, they were offered to bolster the testimony which Linda Moore gave on the stand. If a proper foundation is laid, prior consistent statements are admissible as corroborative evidence even when the witness has not been impeached if the statement in fact corroborates the testimony. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). "Corroborative" has been defined by our courts as meaning " 'to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence.' " *State v. Riddle*, 316 N.C. 152, 157, 340 S.E.2d 75, 78 (1986), citing *State*

v. Higginbottom, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985). Linda Moore's statement served to corroborate her earlier testimony. The trial court properly gave the pattern jury instruction on corroboration to the jury when the statements were published and repeated the instruction in the final charge to prevent the jury from considering the statements as substantive evidence. The trial court did not err in admitting this testimony into evidence.

[6] Defendant Joyce next argues the trial court erred by instructing State's witness Charles Crain as to the manner in which to testify. Charles Crain was a cell mate of defendant Joyce while both were incarcerated in the Buncombe County Jail. Crain testified regarding an alleged admission by Joyce which detailed Joyce's involvement in the robberies. Crain's statement was reduced to writing by a police officer and offered at trial. An examination of the transcript indicates that following a voir dire of Crain, the trial judge redacted Crain's written statement to delete any reference to Shawn Joyce's "cousin" or "cousins." The trial judge took these measures because codefendant Wolvington was Shawn Joyce's cousin. The following exchange then occurred:

> THE COURT: Now, Mr. Crain if the Court requests you to, can you refrain from making certain statements. And this is to everybody present so you'll know I'm not trying to ask you to do something you shouldn't do. Could you in testifying, when Mr. Bidwell is asking you questions, or to Mr. Belser or Mr. Dusenbury, such that it's important that you not mention the cousins, that the only person that you can mention would be Mr. Joyce, or Shawn?
>
> WITNESS: Yeah.
>
> COURT: Now, do you think you can limit your testimony to him and not mention anything about discussing his cousin or cousins?
>
> WITNESS: I don't know. I mean, I—
>
> COURT: You would attempt to do that?
>
> WITNESS: Yeah, I guess I would, yeah.

Defendant Joyce argues that the lower court essentially fashioned the witness's testimony for him and that such instructions amounted to advocacy against defendant by the court and violated defendant's right to due process and to an impartial tribunal. We disagree.

A trial judge's duty to control the trial encompasses the authority and discretion to examine a witness for the purpose of clarifying or understanding his or her testimony. *State v. Redfern*, 98 N.C. App. 129, 131, 389 S.E.2d 846, 847 (1990). In the case now before us, the questions posed by the trial judge were to protect defendant Joyce as well as codefendant Wolvington. The court was merely ensuring that Crain's testimony would accurately reflect the substance of the statement given to police. There was no error.

Turning now to defendant Wolvington's separate issues, we first address his contention that the trial court committed error by admitting into evidence the written statements of Linda Moore and Mark Moore. Defendant Wolvington objects on the theory that as past recollections recorded, the statements could not have been entered into evidence except by an adverse party. We find this assignment of error subject to the same analysis we used above in discussing codefendant Joyce's objection to the admission and publication of Linda Moore's written statement. Because the statements were corroborative and not substantive, their admission into evidence and publication to the jury did not constitute prejudicial error.

[7] Defendant Wolvington additionally contends that the trial court committed error in denying his request to review the psychiatric records of State's witness Charles Crain for use at trial. Defendant asserts that the court's refusal to allow him use of the records for impeachment deprived him of his right to due process. Defendant subpoenaed the mental health records of Charles Crain from the Blue Ridge Mental Health Center. The trial judge conducted an *in camera* inspection of the records and concluded they did not have a significant effect on the case which would warrant their release to the defendant. Defendant reviewed the psychiatric records during his preparation of the record on appeal. The defendant contends the records contained many fruitful areas for impeachment on cross-examination. These areas included a documented history of drug and alcohol addiction; use of multiple drugs (cocaine, valium, and xanax); and problems with bad temper and depression. Defendant argues the withholding of the records constituted prejudice which was not harmless beyond a reasonable doubt. We cannot agree.

Defendant compares the case at bar to *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980), in which the Fourth Circuit Court

of Appeals reversed and remanded the conviction of Benjamin Chavis and nine co-petitioners. The *Chavis* court determined that suppression of psychiatric records of two of the prosecution's crucial witnesses denied defendants' due process rights in light of their specific request for "psychiatric or other reports which might tend to reflect on the credibility or competency of . . . prospective witnesses." *Id.* at 224-25. The court in *Chavis* further indicated that the test of whether a defendant's due process rights have been violated by withholding such records is "if there was a 'reasonable possibility' that the undisclosed evidence would have materially affected the verdict." *Id.* at 223. The case at bar is distinguishable from *Chavis*. First, Charles Crain was not the most important prosecuting witness in the current case, unlike the witnesses in *Chavis* whose testimony constituted the very foundation of the State's case. Here, the main prosecution witnesses were Linda and Mark Moore; Crain only served to buttress their testimony. Furthermore, a careful examination of the record discloses that Crain was cross-examined rigorously and extensively by both defense attorneys. Both successfully elicited testimony from Crain on cross-examination about his long history of drug use, his violent behavior, and his criminal record. Any extra impeaching evidence gleaned from the mental health records would have been redundant. We therefore conclude that defendants had ample weaponry in their cross-examination arsenal to attack Crain. Defendant Wolvington's due process rights were not violated, and he cannot demonstrate how he was prejudiced by the suppression of Crain's mental health records.

[8] Defendant also assigns as error the trial court's failure to impose adequate sanctions against the State for the District Attorney's violation of discovery procedures. Defendant Wolvington requested sanctions pursuant to N.C. Gen. Stat. § 15A-910 (1988) which allows the court to sanction a party for noncompliance with discovery procedures. The request for sanctions in this case arose from the District Attorney's alleged "sandbagging" of certain evidence. Defendant Wolvington waived his probable cause hearing in exchange for an open file from the State. When Lisa Yerkes testified for the State, however, a statement came to light which had not previously been brought to defendant Wolvington's attention. The statement concerned the substance of a telephone call which Yerkes received from codefendant Joyce on the night of the Little Caesar's robbery while she was working at the restaurant.

The statement was not found in the discovery file and defendant had no knowledge about the phone call prior to trial because of the District Attorney's failure to disclose the material. A voir dire examination of Ms. Yerkes indicated that the District Attorney had spoken to Yerkes about her testimony, including the phone conversation, many times prior to trial. The trial judge reprimanded the District Attorney for the violation, and refused to allow into evidence any testimony concerning the substance of the telephone conversation which occurred between Ms. Yerkes and Wolvington's codefendant Shawn Joyce. N.C. Gen. Stat. § 15A-910 (1988) allows the trial judge to sanction parties for discovery violations and enumerates various sanctions which may be ordered. The trial court has discretion in determining which of the remedies available should be applied under the circumstances. *State v. Taylor*, 311 N.C. 266, 271, 316 S.E.2d 225, 228 (1984). One of the options available to the trial judge is to "[p]rohibit the party from introducing evidence not disclosed." N.C. Gen. Stat. § 15A-910(3) (1988). The trial judge in this case took such a measure by excluding from evidence any content of the telephone conversation. We find no abuse of the trial court's discretion.

[9] Defendant next argues that the trial court erred in allowing the District Attorney's motion to amend indictment No. 89-CRS-1152. On the first day of trial, the prosecutor moved to amend the indictment which charged defendant for robbery with a dangerous weapon in the Oak Park Convenience Store. The State sought to amend the indictment to change the word "knife" to "firearm" in the charge. N.C. Gen. Stat. § 15A-923(e) (1988) provides: "A bill of indictment may not be amended." The term "amendment" in subsection (e) is defined as any change in the indictment which would substantially alter the charge set forth in the indictment. *State v. Bailey*, 97 N.C. App. 472, 475, 389 S.E.2d 131, 133 (1990). The change made in this case from "knife" to "firearm" does not alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury. Defendant also cannot demonstrate how he suffered any prejudice due to this amendment. This assignment of error is dismissed.

[10] Defendant's final argument challenges comments made by the District Attorney during closing argument. Defendant claims the prosecutor's characterization of defendant prejudiced him. In his closing, the prosecutor commented, "if you're going to try the devil, you've got to go to hell for the witnesses." This exact phrase

has been found to be no prejudicial error in *State v. Hudson*, 295 N.C. 427, 435, 245 S.E.2d 686, 692 (1978).

No error.

Judges ORR and LEWIS concur.

VIRGINIA HUDNELL HARRIS v. HASSELL JUNIUS HARRIS

No. 912DC621

(Filed 3 December 1991)

1. **Divorce and Separation § 451 (NCI4th)— child custody—Virginia defendant—jurisdiction**

The trial court properly denied defendant's motion to dismiss a child custody action for lack of personal jurisdiction where defendant did not contest the issues of subject matter jurisdiction, personal "jurisdictional grounds," and notice. Minimum contacts are not required in child custody actions.

Am Jur 2d, Divorce and Separation §§ 963 et seq.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 ALR4th 742.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances. 35 ALR3d 520.

2. **Divorce and Separation § 451 (NCI4th)— child support—Virginia defendant—jurisdiction**

The trial court properly denied defendant's motion to dismiss a child support action for lack of personal jurisdiction where defendant did not contest the issues of subject matter jurisdiction, personal "jurisdictional grounds," and notice. Defendant has the required minimum contacts with North Carolina in that defendant moved to North Carolina at an early age and lived here until 1974; he and plaintiff were married in North Carolina in 1971, had a child here in 1971, and resided

here as husband and wife for nearly three years before moving to Virginia; they maintained contacts with family members in North Carolina while in Virginia, visiting during various holidays; the parties separated in 1989 and the plaintiff returned to North Carolina with their third child and was later joined by their second child; defendant has maintained his contacts with family members in North Carolina since the separation, visiting them on at least two occasions; and defendant has established and maintained contacts in North Carolina and has traveled routinely to this state to participate in business-related activities.

Am Jur 2d, Divorce and Separation §§ 963 et seq.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 ALR4th 742.

APPEAL by defendant from judgment entered 29 April 1991 in BEAUFORT County District Court by *Judge James W. Hardison.* Heard in the Court of Appeals 15 November 1991.

Conrad E. Paysour, III for plaintiff-appellee.

Stephen A. Graves for defendant-appellant.

GREENE, Judge.

The defendant appeals from a judgment entered 29 April 1991 denying his motion to dismiss the plaintiff's child custody and child support action for lack of personal jurisdiction.

The findings of fact relevant to this appeal show the following: The defendant was born in Virginia. When he was in the seventh grade, he moved to Beaufort County, North Carolina where he was reared by his aunt and uncle. His aunt and uncle continue to reside in Beaufort County, North Carolina. The defendant attended the public schools of North Carolina, Chowan College, and East Carolina University in this State. He and the plaintiff were married in North Carolina on 9 October 1971 and established their marital residence in this State until they moved to Virginia in July, 1974. The parties' first child was born in North Carolina, and their two other children were born in Virginia. After moving to Virginia, the parties regularly returned to visit family in North Carolina,

including the plaintiff's parents and the defendant's aunt and uncle. In November, 1989, the parties separated, and the plaintiff returned to Beaufort County with the parties' third child, one of the two children involved in this action. On 10 June 1990, the second child, the other child involved in this action, moved to Beaufort County, North Carolina to live with her mother and younger brother. The parties' first child continues to reside in Virginia.

Since December, 1990, the defendant has made at least two social visits to family members in Beaufort County, once at Christmas and once on a family anniversary. The defendant owns a dog training business in Port Royal, Virginia. He maintains business contacts with dog trainers, sellers, and purchasers in North Carolina and in the past has travelled to this State at least once a year to participate in dog training exercises or dog shows and competitions.

In response to the plaintiff's complaint, the defendant filed an answer and motion to dismiss the complaint for lack of personal jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2). The trial court denied his motion to dismiss, and the defendant appealed. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (denial of motion to dismiss for lack of personal jurisdiction immediately appealable).

The issues are (I) whether "minimum contacts" by the non-resident parent-defendant are required in child custody actions; and (II) whether "minimum contacts" by the non-resident parent-defendant are required in child support actions.

I

Child Custody

[1] A trial court may render an order of child custody only where the court has subject matter jurisdiction over the action and personal jurisdiction over the defendant.

A

Subject Matter Jurisdiction

Whether a trial court has subject matter jurisdiction over a child custody action is governed by the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.S. § 1738A (Law. Co-op. 1989), and our own Uniform Child Custody Jurisdiction Act

(UCCJA), N.C.G.S. § 50A-3 (1989). *In re Bhatti*, 98 N.C. App. 493, 494-95, 391 S.E.2d 201, 202 (1990); *Gasser v. Sperry*, 93 N.C. App. 72, 73-75, 376 S.E.2d 478, 479-80 (1989) (to the extent that the UCCJA conflicts with the PKPA, the PKPA controls); *see also* N.C.G.S. § 7A-244 (1989) (district court has subject matter jurisdiction over child custody actions). Because the defendant does not argue that the trial court lacked subject matter jurisdiction, we do not address the issue.

B

Personal Jurisdiction

Generally, whether a trial court has personal jurisdiction over a non-resident defendant depends upon whether (1) our legislature has authorized our courts to exercise personal jurisdiction over the defendant in the action, (2) the plaintiff has properly notified the defendant of the action, and (3) the defendant has "minimum contacts" with this State. We now apply these general principles to this child custody dispute.

Long Arm Statute

Pursuant to N.C.G.S. § 1-75.3(b) (1983), "[a] court of this State having jurisdiction of the subject matter may render a judgment against a party *personally* only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 . . . ." [Emphasis added.] Without personal "jurisdictional grounds," a trial court lacks the authority to render a child custody order against a non-resident defendant. *Cf. Byham v. National Cibo House Corp.*, 265 N.C. 50, 57, 143 S.E.2d 225, 232 (1965) (foreign corporation); *United Buying Group, Inc. v. Coleman*, 37 N.C. App. 26, 28, 245 S.E.2d 402, 403 (1978), *aff'd in part and rev'd in part on other grounds*, 296 N.C. 510, 251 S.E.2d 610 (1979); J. Glannon, Civil Procedure ch. 2, at 19-20 (1987). North Carolina Gen. Stat. § 1-75.4(12) (1983) provides the required jurisdictional ground in this case. Specifically, the statute authorizes our trial courts to render child custody orders against non-resident defendants where, as here, the child custody action under Chapter 50 of the General Statutes arises out of the parties' marital relationship within this State. N.C.G.S. § 1-75.4(12).

Notice

Absent a general appearance by the non-resident defendant, "reasonable notice and opportunity to be heard" must be given

to the defendant "in a manner reasonably calculated to give actual notice and shall be served in the same manner as the manner of service of process set out in G.S. 1A-1, Rule 4." N.C.G.S. §§ 50A-4, -5 (1989); N.C.G.S. § 1-75.3(b)(1)-(2) (1983) (unless dispensed with under N.C.G.S. § 1-75.7 (1983), service of summons required for personal jurisdiction); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-15, 94 L.Ed. 865, 872-73 (1950) (notice required by due process clause); *Eason v. Spence*, 232 N.C. 579, 583-84, 61 S.E.2d 717, 721 (1950) (notice required by N.C. Const. art. I, § 19, the "law of the land" clause); 1 A. McIntosh, McIntosh North Carolina Practice and Procedure § 933(1) (2d ed. 1956). Here, the defendant was personally served with a copy of the summons and complaint in Virginia by a Deputy Sheriff of Caroline County, Virginia. Furthermore, he does not argue that the notice was inadequate under N.C.G.S. § 1A-1, Rule 4.

Minimum Contacts

As a general proposition, a trial court lacks personal jurisdiction over a non-resident defendant unless, consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, the defendant has certain "minimum contacts" with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945). The plaintiff argues that the "minimum contacts" test of *International Shoe* does not apply when the action is one for child custody.

In *May v. Anderson*, 345 U.S. 528, 533-34, 97 L.Ed. 1221, 1226-27 (1953), the United States Supreme Court essentially held that the full faith and credit clause of the United States Constitution does not *require* a state court to honor the custody decree of a sister state rendered in an action where the non-resident defendant did not have "minimum contacts" with the sister state. Our appellate courts, consistent with *May*, have refused to recognize in North Carolina out-of-state child custody decrees in actions where the non-resident defendants lacked "minimum contacts" with the sister state. *Lennon v. Lennon*, 252 N.C. 659, 667, 114 S.E.2d 571, 576 (1960); *McAninch v. McAninch*, 39 N.C. App. 665, 667, 251 S.E.2d 633, 634, *disc. rev. denied*, 297 N.C. 300, 254 S.E.2d 920 (1979). It follows, courts and commentators suggest, that *May* requires that the non-resident defendant have "minimum contacts" with the state before any court of that state may render, consistent with the due process clause, a valid child custody order. 1 H. Clark,

The Law of Domestic Relations in the United States § 13.5, at 780-81 (2d ed. 1987) [hereinafter 1 H. Clark] ("only logical meaning" of *May*); Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 Va. L. Rev. 379, 383-84 (1959); *Ex parte Dean*, 447 So. 2d 733, 735 (Ala. 1984); *but see In re Hudson*, 434 N.E.2d 107, 117 (Ind. Ct. App. 1982), *cert. denied*, 459 U.S. 1202, 75 L.Ed.2d 433 (1983) (court may determine custody without "minimum contacts"); *In re Markowski*, 749 P.2d 754, 756 n. 2 (Wash. Ct. App. 1988).

The North Carolina Supreme Court has not considered the validity of this broad reading of *May*, and despite its potential validity, this Court has repeatedly held without analysis that a North Carolina trial court may enter a child custody decree in the absence of "minimum contacts" by the non-resident defendant with North Carolina. *Hart v. Hart*, 74 N.C. App. 1, 7, 327 S.E.2d 631, 635 (1985); *see also Shingledecker v. Shingledecker*, 103 N.C. App. 783, 785, 407 S.E.2d 589, 591 (1991); *Carroll v. Carroll*, 88 N.C. App. 453, 455, 363 S.E.2d 872, 873 (1988); *but cf. In re Finnican*, 104 N.C. App. 157, 161-62, 408 S.E.2d 742, 745 (1991) ("minimum contacts" required to terminate parental rights); *In re Trueman*, 99 N.C. App. 579, 580-81, 393 S.E.2d 569, 570 (1990) (same). We are therefore bound by the prior decisions of this Court dealing with child custody and again hold that non-resident defendants need not have "minimum contacts" with North Carolina as a prerequisite to the trial court's exercise of personal jurisdiction over them. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (panel of Court of Appeals bound by decisions of prior panels unless they have been overturned by higher court).

In summary, because the defendant does not contest the issues of subject matter jurisdiction, personal "jurisdictional grounds," and notice, and because "minimum contacts" are not required in child custody actions, we affirm the trial court's order with regard to the issue of child custody.

II

Child Support

[2] A trial court may render an order for child support only where the court has subject matter jurisdiction over the action and personal jurisdiction over the defendant.

A

Subject Matter Jurisdiction

A trial court has subject matter jurisdiction over a child support action pursuant to N.C.G.S. § 50-13.5(c)(1) (Supp. 1991). *See also* N.C.G.S. § 7A-244 (district court has subject matter jurisdiction over child support actions). Because the defendant does not argue that the trial court lacked subject matter jurisdiction, we do not address the issue.

B

Personal Jurisdiction

Generally, whether a trial court has personal jurisdiction over a non-resident defendant depends upon whether (1) our legislature has authorized our courts to exercise personal jurisdiction over the defendant in the action, (2) whether the plaintiff has properly notified the defendant of the action, and (3) the defendant has minimum contacts with this State. We now apply these general principles to this child support dispute.

Long Arm Statute

The trial court concluded, and the defendant does not deny, that N.C.G.S. § 1-75.4 authorizes its exercise of personal jurisdiction over the defendant. We agree. Because the child support action under Chapter 50 arises out of the parties' marital relationship within this State, N.C.G.S. § 1-75.4(12) authorizes the exercise of personal jurisdiction over this defendant. *Powers v. Parisher*, 104 N.C. App. 400, 403, 409 S.E.2d 725, 727 (1991); *see also Miller v. Kite*, 313 N.C. 474, 476, 329 S.E.2d 663, 665 (1985) (Supreme Court assumed *arguendo* that N.C.G.S. § 1-75.4 gives North Carolina courts *in personam* jurisdiction over non-resident parent); *Marion v. Long*, 72 N.C. App. 585, 586, 325 S.E.2d 300, 302, *appeal dismissed and disc. rev. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985) (N.C.G.S. § 1-75.4 should be liberally construed).

Notice

As required by N.C.G.S. § 1-75.3(b)(1), N.C.G.S. § 50-13.5(e)(1) (Supp. 1991), the due process clause, and the "law of the land" clause, the plaintiff notified the defendant in Virginia of the child support action. *Mullane*, 339 U.S. at 313-15, 94 L.Ed. at 872-73; *Eason*, 232 N.C. at 583-84, 61 S.E.2d at 721. Again, because the

defendant does not argue that the notice was inadequate, we proceed to the third step of the required analysis.

Minimum Contacts

In contrast to child custody proceedings, North Carolina courts have consistently required minimum contacts with North Carolina by non-resident defendants in child support actions. *Miller*, 313 N.C. at 476, 329 S.E.2d at 665; *see also Kulko v. Superior Court of California*, 436 U.S. 84, 56 L.Ed.2d 132 (1978). Commentators agree that this double standard of jurisdiction for child custody and child support actions has "created a splintered domestic relations jurisdiction." Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 Rutgers L.J. 569, 592-93 (1991); *see also* Benson, *Can a Case Be Made for the Use of the Uniform Child Custody Jurisdiction Act in Child Support Determinations?*, 26 Gonz. L. Rev. 125, 141 (1990-91) (suggesting that "minimum contacts" should not be required in actions where child custody and support are raised together). Nevertheless, in North Carolina, the due process clause is construed to require "minimum contacts" in child support actions. *Miller*, 313 N.C. at 477, 329 S.E.2d at 665. Our courts consider the following factors in determining the existence of "minimum contacts": "(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties." *Marion*, 72 N.C. App. at 587, 325 S.E.2d at 302.

The facts of this case show that the defendant has substantial past and present contacts with North Carolina. The defendant moved to North Carolina at an early age and lived here until 1974. He and the plaintiff were married here in 1971, had a child here in 1973, and resided in North Carolina as husband and wife for nearly three years before moving to Virginia. While in Virginia, they maintained contacts with family members in North Carolina, visiting them during the various holidays. In 1989, the parties separated and the plaintiff returned to North Carolina with their third child and was joined later by their second child. Since the parties' separation, the defendant has maintained his contacts with family members in this State, visiting them on at least two occasions. Furthermore, the defendant has established and maintained business contacts in North Carolina and has travelled routinely to this State to par-

ticipate in business-related activities. Viewed in light of North Carolina's "important interest in ensuring that non-resident parents fulfill their support obligations to their children living here," *Miller*, 313 N.C. at 480, 329 S.E.2d at 667, the quantity, nature, and quality of the defendant's past and present contacts with North Carolina support a finding of "minimum contacts" and therefore support the exercise of personal jurisdiction over him in our courts, probably the most convenient forum for this action. *Id.; see also Powers*, 104 N.C. App. at 405, 409 S.E.2d at 728; *Stevens v. Stevens*, 68 N.C. App. 234, 314 S.E.2d 786, *disc. rev. denied*, 312 N.C. 89, 321 S.E.2d 908 (1984); *Brown v. Brown*, 47 N.C. App. 323, 267 S.E.2d 345 (1980); I. Ellman, P. Kurtz, & K. Bartlett, Family Law ch. 7, at 626 (2d ed. 1991).

We are aware of the Uniform Reciprocal Enforcement of Support Act (URESA) and the remedies it provides the plaintiff for the non-payment of child support by the non-resident defendant. N.C.G.S. §§ 52A-1-52A-32 (1984 & Supp. 1991); Va. Code Ann. §§ 20-88.12-.31 (1990 & Supp. 1991) (RURESA). For various reasons, however, URESA is not always "an adequate substitute" for a child support action brought under Chapter 50. *See* 1 H. Clark, *supra*, § 13.4, at 760 (discussing why URESA is not often effective). Furthermore, despite these remedies, the plaintiff cannot be required to proceed under URESA.

In summary, because the defendant does not contest the issues of subject matter jurisdiction, personal "jurisdictional grounds," and notice, and because the defendant has the required "minimum contacts" with North Carolina, we affirm the trial court's order with regard to the issue of child support. Accordingly, the trial court's order denying the defendant's motion to dismiss for lack of personal jurisdiction is

Affirmed.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. ROGER DALE CORNELIUS

No. 9026SC978

(Filed 3 December 1991)

1. **Searches and Seizures § 11 (NCI3d)— investigatory stop— reasonable suspicion—subsequent arrest—lawfulness of search**

An officer had a reasonable, articulable suspicion of criminal activity to justify an investigatory stop of defendant's vehicle where the officer received a radio dispatch that a black male in a black BMW with a temporary license tag was selling controlled substances on a certain street in a neighborhood with a reputation as an area in which drugs were sold; the officer arrived at the street and saw a black BMW with a temporary tag driven by a black male pass by him; and the effective dates of the temporary tag were illegible. Furthermore, a search of defendant's vehicle following the investigatory stop was lawful as incident to a lawful arrest and based on probable cause and exigent circumstances where the officer arrested defendant for giving false information when defendant failed to produce identification and gave conflicting birth dates; the officer also arrested defendant for driving with a revoked license; a second officer smelled the odor of marijuana in the BMW; a passenger indicated that there were drugs in a bag in the backseat of the BMW; the second officer saw plastic baggies and small scales in the bag in the backseat of the BMW; and the BMW was then searched and cocaine and other items were seized by the officers.

Am Jur 2d, Searches and Seizures §§ 37, 41, 56, 96, 99, 102.

Odor of narcotics as providing probable cause for warrantless search. 5 ALR4th 681.

2. **Searches and Seizures § 12 (NCI3d)— investigatory stop— legitimate duration**

An investigatory stop of defendant's vehicle did not exceed its legitimate scope where defendant's own behavior in refusing to give his correct name and birth date was responsible for the delay; only three to five minutes passed between the time of the stop and the initial arrest of defendant for giving false information; and a total of ten minutes lapsed between the time of the stop and a passenger's statement

that there were drugs in the vehicle, after which the vehicle was searched.

Am Jur 2d, Searches and Seizures § 103.

Validity, under federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 66 L. Ed. 2d 882.

3. Searches and Seizures § 47 (NCI3d)— lawfulness of investigatory stop—reputation of area for drug sales

An officer's testimony that the area in which defendant was arrested had a reputation as a high crime area for sales of drugs was admissible to show the totality of the circumstances known by the officer at the time he made an investigatory stop of defendant's vehicle.

Am Jur 2d, Searches and Seizures §§ 99, 103.

Validity, under federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 66 L. Ed. 2d 882.

APPEAL by defendant from Order of *Judge Kenneth A. Griffin* entered 29 March 1989 in MECKLENBURG Superior Court. Heard in the Court of Appeals 22 August 1991.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Lucien Capon, III, and Valerie Spalding for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

COZORT, Judge.

Defendant was charged with trafficking in cocaine by possession and trafficking in cocaine by transportation. The trial court judge denied defendant's motion to suppress evidence discovered during a search of defendant's car. Defendant then entered a guilty plea as to both charges. The trial court consolidated the offenses and imposed the presumptive seven-year term and a $50,000 fine. Defendant appeals the denial of the motion to suppress. We affirm.

Defendant raises three issues on appeal: (1) whether the police officers seized and searched defendant without probable cause or reasonable articulable suspicion in violation of his constitutional rights, (2) whether there was a pretextual stop of his vehicle and

an unjustifiably long detention after the stop, and (3) whether the trial court erred in admitting evidence of the character of the neighborhood where defendant's automobile was stopped.

Our scope of appellate review for the denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and whether those findings of fact in turn support the conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

The trial court made the following findings of fact: On 25 September 1989, Officer L. E. Griffin was on patrol in the Town of Cornelius, North Carolina, when he received a call from the dispatcher that a black male in a black BMW with a temporary license tag was selling controlled substances from the car on Meridian Street. Within sixty seconds, Officer Griffin arrived at the street and saw a black BMW with a temporary license tag driven by a black male pass by him. Officer Griffin was unable to observe the effective dates of the temporary tag and it was his training and experience to stop and inquire about the validity of the registration and insurance coverage. Officer Griffin turned his car around and proceeded to stop the car which was being driven by defendant. A passenger, later identified by another officer as Scotty Ponder, sat in the front seat of the car.

Officer Griffin asked defendant for his driver's license and vehicle identification, but defendant stated that he had lost these items. When asked for some other form of identification, defendant mumbled a name which sounded to the officer like "Pawna." After several requests for identification and date of birth, Officer Griffin asked defendant to step out of the car. Once defendant stepped out of the car, Officer Griffin again asked defendant for identification and his date of birth. Defendant replied that the passenger in the car could identify him, and he gave conflicting dates for his date of birth.

Officer Griffin then placed defendant under arrest for giving false information. Officer Griffin searched defendant and discovered a card identifying him as Roger D. Cornelius. Officer Griffin learned by radio check that defendant's license had been permanently revoked. He placed defendant under arrest on a charge of driving while license revoked.

Sergeant L. D. Means also responded to the dispatcher's message and arrived at the scene shortly after Officer Griffin. While Officer Griffin talked to defendant, Sergeant Means smelled the odor of marijuana in the BMW and walked over to the BMW. At that point, Ponder, who had been moved to a patrol car, called to Sergeant Means and stated that there were drugs in a "waist bag" in the backseat of defendant's car. Officer Means found the bag in the backseat and discovered cocaine, baggies and a small set of scales. Upon a search of the vehicle, Sergeant Means found in the glove compartment a bill of sale, a warranty paper for the car, and some bank deposit slips. These findings of fact are supported by the testimony of Officer Griffin and Sergeant Means and are therefore binding on appeal.

Based upon the findings of fact, the trial court concluded that (1) the officer had probable cause to stop defendant's vehicle; (2) having probable cause to stop the vehicle, the officers had the right to remove defendant and the passenger from the car for the officers' protection; (3) Officer Griffin had probable cause to search the vehicle based upon what he observed outside the vehicle and the smell of marijuana; and (4) statements made by defendant were not in violation of his constitutional rights.

[1] Defendant contends that the officers violated his state and federal constitutional rights because they lacked probable cause or reasonable suspicion to justify the initial stop of the BMW. We disagree.

In *United States v. Cortez*, 449 U.S. 411, 417, 66 L.Ed.2d 621, 628 (1981), the United States Supreme Court stated that an investigatory stop of a vehicle is constitutionally permissible if the stop is "justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." Our state Supreme Court has echoed this standard in *State v. Trapper*, 48 N.C. App. 481, 486, 269 S.E.2d 680, 683, *appeal dismissed*, 301 N.C. 405, 273 S.E.2d 450 (1980), *cert. denied*, 451 U.S. 997, 68 L.Ed.2d 856 (1981), providing that an officer may make an investigatory stop of a vehicle "if the officer has a reasonable suspicion, that can be articulated, that a crime is being committed." The standard of reasonable suspicion to justify an investigatory search requires the court to examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of defendants, and the rational inferences which the officers

were entitled to draw from those facts. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979).

Defendant argues that *State v. Williams*, 32 N.C. App. 204, 231 S.E.2d 282, *appeal dismissed*, 292 N.C. 470, 233 S.E.2d 924 (1977) is dispositive of this case. In *Williams*, a police officer saw defendant and another unidentified man join hands in "an area of substantial drug traffic." *Id.* at 206, 231 S.E.2d at 283. The officer did not see anything in the hands of either man. After the men joined hands, defendant put his left hand into his pocket and walked towards the motel where the officer was standing. The officer then approached defendant, asked for identification, and when defendant was unable to produce identification, told him to face the wall and assume frisking position. Defendant then fled but was caught by the officer and arrested. A search uncovered a bag and envelope of marijuana. *Id.* at 207, 231 S.E.2d at 284.

The trial court found that there was probable cause for the arrest. This Court reversed and remanded on the grounds that the officer did not have probable cause to make the arrest, stating:

> At most the circumstances would support a reasonable suspicion of defendant's possession of a contraband drug which would have justified an approach and temporary detention of the defendant in an appropriate manner for purposes of investigating his possible criminal behavior. Had the officer done so, he may well have been able to determine that defendant was in possession of marijuana. Instead, the officer resorted to aggressive and unlawful behavior.

Id. (citation omitted).

Williams is not dispositive of the case at bar. We find the facts of this case to be more analogous to *State v. Williams*, 87 N.C. App. 261, 360 S.E.2d 500 (1987), in which officers were sent to investigate break-ins that had just been reported. Upon arriving in the area, the officers met four black males in a Pontiac. The officers stopped the car, but then let the men leave shortly thereafter. After learning through a radio dispatch that stolen items had been located between the site of the break-ins and the site of the Pontiac stop, the officers stopped the Pontiac again and told the occupants to wait until another officer arrived to step outside. *Id.* at 262, 360 S.E.2d at 500. When the additional officer arrived, defendants

stepped outside, and the officers observed stolen items. *Id.* at 263, 360 S.E.2d at 501-02. On appeal, this Court agreed that the stop was based on reasonable suspicion that the occupants were engaged in criminal activity. *Id.*

In the case at bar, the totality of circumstances warranted the initial stop of the vehicle. Officer Griffin stopped defendant's vehicle after receiving a dispatch that a black male in a black BMW with a temporary license tag was selling controlled substances on Meridian Street in a neighborhood with a reputation as a high crime area for sale of controlled substances. After the stop, Officer Griffin did not resort to aggressive and unlawful behavior; rather, he asked defendant for some identification. Once defendant failed to produce identification and gave conflicting birth dates, the officer made a lawful arrest for giving false information. The officer also arrested defendant for driving with a permanently revoked driver's license. Defendant's car was searched only after the lawful arrest, Officer Means smelled marijuana, the passenger indicated that there were drugs in the backseat, and Officer Means saw plastic baggies and small scales in the waist bag in the backseat.

Incident to a lawful arrest, an officer may search the passenger compartment of a vehicle and the containers therein without a search warrant. *New York v. Belton*, 453 U.S. 454, 460, 69 L.Ed.2d 768, 775 (1981); *State v. Cooper*, 304 N.C. 701, 705-06, 286 S.E.2d 102, 104-05 (1982). Here, the officer made a lawful arrest pursuant to N.C. Gen. Stat. §§ 20-29 (1989) and 20-28(b) (1989) after a lawful investigatory stop. In addition, we note that once Officer Means smelled marijuana near the car, he had probable cause to search the vehicle. *See State v. Greenwood*, 47 N.C. App. 731, 268 S.E.2d 835, 841 (1980), *rev'd on other grounds*, 301 N.C. 705, 273 S.E.2d 438 (1981). In *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576-77 (1987), the North Carolina Supreme Court held that "no other exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle if there is probable cause to believe that it contains the instrumentality of a crime or evidence pertaining to a crime and the vehicle is in a public place." Accordingly, we find the search lawful as incident to arrest and based upon probable cause and exigent circumstances.

Defendant further argues that Article I, Section 20 of the North Carolina Constitution, prohibiting general warrants, should

be construed more broadly than the prohibition against unreasonable search and seizures found in the Fourth Amendment of the United States Constitution. To support his point, defendant relies upon *State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988), in which the North Carolina Supreme Court refused to recognize a good faith exception to the legislatively created exclusionary rule. In *Carter* the Court recognized that "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution." *Id.* at 713, 370 S.E.2d at 555. Cornelius is not the first defendant since the *Carter* decision to assert that his state constitutional rights have been violated by an unreasonable search. *See, e.g., State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989), *appeal dismissed*, 326 N.C. 366, 389 S.E.2d 809 (1990). To date, we have not applied a different standard for determining the reasonableness of a stop under the North Carolina Constitution than under the United States Constitution, and we decline to do so here.

Considering the articulable facts known to Officer Griffin and the reasonable inferences drawn therefrom, we conclude that the officer did have at least reasonable suspicion that criminal activity was afoot when he stopped defendant's vehicle.

Defendant also contends that the trial court erred in denying the motion to suppress the evidence because the stop was based upon the pretext of an illegible temporary license tag. Officer Griffin testified that he stopped the car for two reasons: the radio dispatch and the illegible tag. Since we find that the officer had reasonable suspicion based upon the radio dispatch to justify the stop, we need not analyze the facts in light of defendant's contention that the stop was pretextual.

[2] Defendant argues that, even if Officer Griffin had reasonable suspicion to justify the initial stop of his vehicle, the stop exceeded its legitimate scope. We disagree. In *United States v. Sharpe*, 470 U.S. 675, 686, 84 L.Ed.2d 605, 615-16 (1985), the United States Supreme Court stated that

> [i]n assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

Id. The court concluded that a twenty-minute delay between the initial stop of defendant's vehicle and his arrest was reasonable since the police acted diligently in their investigation, and defendant's evasive actions contributed to the delay. *Id.* at 687-88, 84 L.Ed.2d at 616-17.

Similarly, in the case before us, the officers acted diligently in their investigation. Certainly, an officer is permitted to ask for identification. *See INS v. Delgado*, 466 U.S. 210, 216, 80 L.Ed.2d 247, 255 (1984). As in *Sharpe*, defendant's own behavior in refusing to give his correct name and birth date was responsible for the delay about which he now complains. Although the trial court made no findings of fact regarding the length of detention, there was uncontradicted evidence that three to five minutes passed between the time of the stop and the initial arrest, and that a total of ten minutes lapsed between the time of the stop and Ponder's statement that there were drugs in the car. We find the stop did not exceed its legitimate scope.

[3] Finally, defendant contends that the trial court improperly considered testimony concerning the reputation of the neighborhood where the arrest occurred as a low income, high crime area known for controlled substances and for sales and delivery of controlled substances. Defendant incorrectly asserts that *State v. Givens*, 95 N.C. App. 72, 381 S.E.2d 869 (1989) is controlling on this issue. In *Givens*, we found that testimony regarding prior sales of alcohol at defendant's house was irrelevant in his trial for the manufacturing and possession of cocaine. *Id.* at 79, 381 S.E.2d at 873. The reputation testimony in the case before us does not attempt to establish defendant's guilt through prior acts or through his presence in a high crime area. Rather, the trial court considered the reputation testimony as part of the totality of the circumstances known to the officer at the time of the initial stop. In addition to his opinion of the neighborhood, the officer had received a radio dispatch indicating illegal activity, and within sixty seconds of receiving that dispatch observed a car and person matching the dispatch information. Reputation testimony concerning a particular area has been recognized in both United States Supreme Court cases and our state cases as a factor in establishing reasonable suspicion. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85, 45 L.Ed.2d 607, 618-19 (1975); *Adams v. Williams*, 407 U.S. 143, 147, 32 L.Ed.2d 612, 618 (1972); *State v. Williams*, 32 N.C. App. 204, 231 S.E.2d 282, *appeal dismissed*, 292 N.C. 470, 233 S.E.2d 924

(1977). We find no error in the admission of the reputation testimony here.

For all the reasons set forth above, the judgment below is

Affirmed.

Judges ORR and LEWIS concur.

STATE OF NORTH CAROLINA v. MARGARET ANN CRAWFORD

No. 9126SC97

(Filed 3 December 1991)

1. Searches and Seizures § 23 (NCI3d)— narcotics—search warrant—probable cause

There was a substantial basis for a magistrate's finding of probable cause to issue a search warrant which resulted in a prosecution for cocaine offenses where the affidavit identified defendant's apartment and stated that five persons were arrested for possession within an hour on 19 April 1990 as they exited this residence; the affidavit described the traffic pattern at the residence after 19 April, with visitors staying in the apartment for about one minute; and the affidavit identified the officer observing the residence as a veteran officer of twenty years who had made sixty drug possession arrests in the four-block area surrounding the apartment in the preceding three and one-half months. Defendant's contention that the affidavit must show that drugs were seen on the premises was rejected; the law does not require absolute certainty, only that probable cause exists to believe that drugs are on the premises.

Am Jur 2d, Searches and Seizures §§ 42, 43, 67-69.

2. Searches and Seizures § 23 (NCI3d)— search warrant—allegedly conflicting testimony from officer

The trial court did not err in a narcotics prosecution by denying defendant's motion for reconsideration of a motion to suppress evidence seized pursuant to a search warrant where defendant contended that an officer's testimony contradicted

information attributed to him and relied upon by the magistrate in finding probable cause for issuance of the search warrant. The officer's testimony did not conflict materially with the information in the affidavit and, because the affiants did not act in bad faith or include materially false statements in their search warrant application, the *Franks* test need not be applied.

Am Jur 2d, Searches and Seizures §§ 64-66.

Disputation of truth of matters stated in affidavit in support of search warrant—modern cases. 24 ALR4th 1266.

3. Narcotics § 3.1 (NCI3d)— arrests outside residence—admissible

The trial court did not err in a prosecution which resulted in convictions for possession of cocaine, maintaining a building for keeping or selling a controlled substance, and possession of drug paraphernalia by denying defendant's motion in limine to exclude evidence concerning drug arrests made outside her residence.

Am Jur 2d, Evidence § 266.

4. Narcotics § 3.1 (NCI3d)— reputation of neighborhood—inadmissible—harmless error

There was no prejudice in a narcotics prosecution from the denial of defendant's motion in limine to exclude evidence of the reputation of defendant's neighborhood. Such evidence is inadmissible hearsay, but there was an abundance of other evidence properly admitted about the traffic pattern at the apartment, the arrest of persons exiting the apartment, and other evidence overwhelmingly establishing defendant's guilt.

Am Jur 2d, Evidence §§ 497, 503.

5. Narcotics § 4.3 (NCI3d)— cocaine—constructive possession—evidence sufficient

The evidence of constructive possession of cocaine found on a kitchen table was sufficient to survive a motion to dismiss where, at the time of the search, the occupants of the kitchen and defendant stated that the apartment belonged to defendant and the lease designated defendant as the sole tenant.

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

6. Narcotics § 4.6 (NCI3d)— instructions—knowledge of possession—no error

There was no error in a narcotics prosecution in the court's refusal to include defendant's proposed instruction on knowledge in the charge to the jury where the instruction given by the trial court correctly stated the law and conveyed the substance of defendant's requested instruction.

Am Jur 2d, Trial §§ 588 et seq., 604 et seq.

7. Criminal Law § 957 (NCI4th)— motion for appropriate relief—not timely

A motion for appropriate relief in a cocaine prosecution was properly dismissed where the motion was filed 13 days after entry of judgment. A motion for appropriate relief under N.C.G.S. § 15A-1414(a) is timely only if made "not more than 10 days after entry of judgment."

Am Jur 2d, Appeal and Error §§ 292 et seq.

APPEAL by defendant from Judgment entered 22 October 1990 in MECKLENBURG County Superior Court by *Judge Samuel A. Wilson, III.* Heard in the Court of Appeals 10 October 1991.

Lacy H. Thornburg, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Grady Jessup, Assistant Public Defender, for defendant-appellant.

WYNN, Judge.

The State's evidence tended to show that in February 1990, veteran Officer Stanton, assigned to the Charlotte Police Department's drug task force, conducted ongoing surveillance of a four-block area encompassing an apartment at 2600 Kenhill Drive. He drove on Kenhill three to four times daily and saw people "in and around that apartment." The officer also observed activity at 2600 Kenhill using a spotting telescope set up in a vacant apartment nearby. On 19 April 1990, Officer Stanton saw William Boyd leave his own apartment at 2617 carrying a small pouch. A woman later identified as defendant let him in at 2600. Boyd left after five minutes without the pouch. Five persons were arrested on this day with cocaine in their possession after leaving the apart-

ment, and the packages they were carrying were identical in appearance.

Officer Stanton continued to observe activity at 2600 Kenhill between 19 April and 30 April, and he saw persons arrive by car at the rate of eight every two or three hours. They left after staying in the apartment only two or three minutes. No one other than defendant ever answered the door.

The State's evidence further showed that Officer Stanton continued surveillance until 8 May 1990. Officers Brown and Cunningham examined Officer Stanton's file and secured a warrant to search 2600 Kenhill. A total of nine officers executed the warrant on the morning of 10 May 1990. After twice identifying themselves as law officers and announcing that they had a search warrant, they gained entry by kicking in the inner door. Officer Cunningham found defendant with her two children in the den; and, after defendant said the apartment was hers, Officer Cunningham read her the warrant.

The officers continued the search and seized two pieces of crack cocaine, one from the kitchen table and the other from William Boyd, one of the three adults found by the police in the kitchen. They also seized items used in the distribution and use of cocaine, such as scales, pipes, forceps, alcohol, razor blades, copper screens, cotton, and mirrors. The officers found a cocaine pipe within defendant's reach and found drug order forms in the same drawer as defendant's driver's license.

At trial, defendant denied that she resided at 2600 Kenhill on the day of the search. She testified that she had lived with her mother since February and had returned on May 9 to collect her belongings. She stated she was the only tenant named in the lease, but that Loretta Falls, one of the three adults found in the kitchen, had been paying the rent. Defendant also denied knowing that cocaine was being sold in the apartment.

The jury found defendant guilty of possession of cocaine, knowingly maintaining a building for the keeping or selling of a controlled substance, and possession of drug paraphernalia. To this court, defendant appealed.

I.

[1] Defendant first contends that the trial court erred by denying her motion to suppress evidence. She argues that the affidavit

supporting the application for the search warrant was insufficient to establish probable cause for the following reasons: (1) the affiant failed to state that a controlled substance had been seen or purchased upon the premises, (2) the affidavit contained conclusory statements, and (3) the hearsay information in the affidavit did not constitute sufficient detail. We disagree.

Constitutional and statutory provisions require that a search warrant be based on probable cause. U.S. Const. amend. IV; N.C.G.S. § 15A-244 (1988). *See State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991). The standard definition of probable cause is reasonable grounds to believe a search of the premises would produce the objects sought and that the objects would aid in the apprehension or conviction of the offender. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). The presence of probable cause is a pragmatic question which turns on the particular set of facts and the type of offense involved. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973). "[R]esolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109, 13 L.Ed.2d 684, 689 (1965). When reviewing a magistrate's determination of probable cause, this court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that the articles searched for were probably present. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971).

All applications for search warrants must be in writing upon oath or affirmation and contain the following:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C.G.S. § 15A-244 (1988). If the affidavit is based on hearsay information, then it must contain the circumstances underlying the informer's reliability and the basis for the informer's belief that a search will uncover the objects sought by the police. *State v. Campbell*, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972).

In the case at bar, the affidavit identified defendant's apartment and stated that five persons were arrested for possession within an hour on 19 April 1990, "as they exited this residence." The affidavit further described the traffic pattern at the residence after 19 April, with visitors only staying in the apartment for about one minute. Additionally, the affidavit identified the officer observing the residence as a veteran officer of twenty years who had made sixty drug possession arrests in the four-block area surrounding the apartment in the preceding three-and-one-half months.

We find that there was a substantial basis for the magistrate's finding of probable cause. The information that Officers Cunningham and Brown used to apply for the warrant was supplied by a very experienced law officer, Officer Stanton. *See State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984) (Officers may rely on information obtained from fellow officers when applying for a search warrant.). There were sufficient facts and details to support the magistrate's issuance of the search warrant. Furthermore, we reject defendant's contention that the affidavit must show that drugs were seen on the premises. The law does not require absolute certainty, it requires only that probable cause exists to believe there are drugs on the premises. *State v. Eutsler*, 41 N.C. App. 182, 254 S.E.2d 250, *disc. review denied*, 297 N.C. 614, 257 S.E.2d 438 (1979). We find no merit to the defendant's argument on this issue.

[2] Additionally, defendant contends that the trial court committed error by denying defendant's motion for reconsideration of the motion to suppress evidence. Defendant asserts that Officer Stanton's testimony contradicted information attributed to him and relied upon by the magistrate in finding probable cause for issuance of the search warrant.

In *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667 (1978), the United States Supreme Court announced the remedy for materially false statements in search warrant applications:

> [W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and

> intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56, 57 L.Ed.2d at 672. *See State v. Loucheim,* 296 N.C. 314, 250 S.E.2d 630, *cert. denied,* 444 U.S. 836, 62 L.Ed.2d 47 (1979).

Defendant specifically points to three alleged conflicts between the affidavit and Officer Stanton's testimony at trial: (1) the affidavit described surveillance beginning in February 1990, (2) observations ending at 11:00 p.m. each day, and (3) the arrests of five persons leaving the residence with cocaine on 19 April. Officer Stanton's testimony, however, did not conflict materially with this information in the affidavit. At trial, Officer Stanton did not contradict the information in the affidavit that surveillance began in February 1990; he merely testified that the surveillance of 2600 Kenhill began from a nearby apartment on 19 April. Also, Officer Stanton's shift did end at 3:00 p.m., but he exchanged information with other officers who conducted surveillance during the second shift. Finally, although Officer Stanton only testified at trial about two arrests on 19 April, he at no time stated that only two took place. Because we find that the affiants, Officers Cunningham and Brown, did not act in bad faith nor did they include materially false statements in their search warrant application, we need not apply the *Franks* test to the instant case. We, therefore, affirm the trial court's denial of defendant's motion to suppress.

II.

[3] Prior to trial, defendant made a motion in limine seeking to exclude evidence concerning the drug arrests that were made outside her residence and the reputation of her neighborhood. The trial judge partially granted defendant's motion by excluding testimony that 2600 Kenhill was reputed to be a "drug house." Defendant assigns error to the extent that her motion was denied

on the basis that the evidence was irrelevant, immaterial, and so prejudicial that she should be granted a new trial.

In *State v. Alston*, 91 N.C. App. 707, 713, 373 S.E.2d 306, 311 (1988), this Court held that testimony regarding drug-related arrests which occurred at the place where police arrested defendant was admitted properly. This Court reasoned that such evidence was relevant to the charge of maintaining a building for the purpose of keeping or selling a controlled substance. *Id.* at 714, 373 S.E.2d at 311. Likewise, in the instant case, the trial court properly denied defendant's motion to exclude evidence of those persons who were arrested for possessing drugs while exiting her residence.

[4] We find error, however, regarding the denial of defendant's motion to exclude evidence of the reputation of defendant's neighborhood. The rule in North Carolina respecting evidence of the reputation of defendant's home or neighborhood is that such evidence is inadmissible hearsay. *See, e.g., State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1985); *State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965); *State v. Springs*, 184 N.C. 768, 114 S.E. 851 (1922). In the case at bar, the State failed to advance any argument concerning the admissibility of this evidence. Accordingly, we find that the trial court erred in denying defendant's motion in limine to exclude the reputation evidence of defendant's neighborhood.

Although we have determined that the trial court erred with respect to this reputation evidence, errors not amounting to constitutional errors do not warrant the granting of 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 the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1988). If there is overwhelming evidence of defendant's guilt or an abundance of other evidence to support the State's contention, the erroneous admission of evidence is harmless. *Weldon*, 314 N.C. at 411, 333 S.E.2d at 707. The record indicates that there was an abundance of other evidence properly admitted at trial about the traffic pattern at 2600 Kenhill, the arrest of persons while exiting the apartment, and other evidence overwhelmingly establishing defendant's guilt. The absence of the evidence admitted regarding the reputation of defendant's neighborhood presents no reasonable possibility that the result in this trial would have been different. We conclude that this error was harmless and,

accordingly, overrule defendant's assignment of error on this point.

III.

[5] Defendant also contends that the trial court improperly denied her motion to dismiss because there was insufficient evidence that she was in constructive possession of cocaine. At trial, the State conceded that defendant was not sufficiently close to the cocaine on the kitchen table to establish actual possession.

Constructive possession of a substance exists when the defendant "has both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). If the defendant does not have exclusive control over the premises, there must be present other incriminating circumstances before the court can find constructive possession. *State v. Autry*, 101 N.C. App. 245, 253, 399 S.E.2d 357, 362 (1991).

In the instant case, at the time of the search, the occupants of the kitchen and defendant stated that the apartment belonged to her. Also, the lease designated defendant as the sole tenant. We, therefore, find that the trial court properly denied defendant's motion to dismiss. This was ample evidence of defendant's exclusive possession of 2600 Kenhill to survive a motion to dismiss. *See State v. Morris*, 102 N.C. App. 541, 402 S.E.2d 845 (1991) (The trial court must view the evidence in the light most favorable to the State.).

IV.

[6] Defendant next assigns error to the trial court's refusal to include defendant's proposed instruction on knowledge in the charge to the jury. Defendant submitted a written request for an instruction in accordance with *State v. Elliott*, 232 N.C. 377, 61 S.E.2d 93 (1950) as follows:

> [M]embers of the Jury the State is prosecuting Ms. Crawford for Possession of Cocaine With Intent to Sell or Deliver; Possession of Cocaine; Possession of Drug Paraphernalia, and Maintaining a Place to Keep Controlled Substances. The defendant has testified that she did not have knowledge of the presence of cocaine or drug paraphernalia, or that cocaine was being kept or sold at 2600 Kenhill Drive, Charlotte, North Carolina.

> Therefore, I instruct you the burden is not upon the accused to prove that She did not have knowledge, but upon the State to prove her guilt beyond a reasonable doubt. Therefore, before you may enter a finding of guilty in these cases, the State must prove beyond a reasonable doubt that defendant had knowledge of the presence of cocaine and drug paraphernalia at the premises, and that the premises were maintained to keep or sell a controlled substance.
>
> If the State does not so prove, or if you have a reasonable doubt about the same you must enter a verdict of not guilty.

The trial judge did not give the exact instruction requested by defendant. He did, however, repeatedly charge the members of the jury that they could convict defendant only if she knowingly possessed contraband and drug paraphernalia. For example, when instructing on the charge of possessing a controlled substance with the intent to sell or deliver, the trial judge charged that "the State must prove two things beyond a reasonable doubt: first, that the defendant knowingly possessed cocaine." The judge further stated that "[a] person had actual possession of a substance if he or she has it on his or her person, is aware of its presence, and either by herself or together with others has both the power and intent to control its disposition or use." Additionally, when instructing on the charge of possession of drug paraphernalia, the trial judge stated the following:

> The second thing the State must prove beyond a reasonable doubt for you to find the defendant guilty of unlawfully and knowingly possessed with the intent to use drug paraphernalia is that the defendant did this knowingly.
>
> A person possesses drug paraphernalia knowingly when she is aware of its presence and has either by herself or together with others both the power and intent to control the disposition and use of such paraphernalia.

Because the instruction given by the trial judge correctly stated the law and conveyed the substance of defendant's requested instruction, we find no merit in defendant's assignment of error.

V.

[7] Finally, defendant contends that the trial court improperly dismissed her motion for approprate relief. A motion for appropriate

relief under N.C.G.S. § 15A-1414(a) (1988) is timely only if made "not more than 10 days after entry of judgment." In the case at bar, entry of judgment occurred on 24 October 1990. Defendant did not file her motion until 6 November 1990, thirteen days later. Accordingly, we affirm the trial court's dismissal of defendant's motion.

No prejudicial error.

Judges WELLS and PARKER concur.

JOHN HARRELL MANNING AND NANNIE MAE MANNING, PLAINTIFFS v. BILLY RAY TRIPP, DEFENDANT

No. 918SC193

(Filed 3 December 1991)

1. Insurance § 69.2 (NCI3d)— underinsured coverage—meaning of underinsured highway vehicle

Defendant's vehicle was an underinsured highway vehicle under N.C.G.S. § 20-279.21(b)(4) where plaintiffs collided with a vehicle owned and operated by defendant; defendant's automobile was insured under a policy providing liability coverage of $50,000 per person; and plaintiff, Mr. Manning, owned two vehicles, including the subject vehicle, both of which were insured under a policy carrying liability and underinsured coverage up to $50,000 per person for each vehicle. Although the appellant, plaintiffs' insurer, contended that plaintiffs must show as a threshold issue that the limits of liability under defendant's policy are less than the limits of liability under plaintiff's policy, defendant's vehicle was an underinsured highway vehicle under the holdings of *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, and *Amos v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629.

Am Jur 2d, Automobile Insurance §§ 323-325.

Insured's right to bring direct action against insurer for uninsured motorist benefits. 73 ALR3d 632.

2. Insurance § 69 (NCI3d) — underinsured coverage — stacking — plaintiff not owner of policy or vehicles

A plaintiff was entitled to aggregate the limits of UIM coverage on two vehicles insured by Nationwide even though she was neither the owner of the insurance policy nor the insured vehicles. *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, controls this issue.

Am Jur 2d, Automobile Insurance §§ 326-329.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by same insurer to different insured. 23 ALR4th 108.

Judge GREENE dissenting.

APPEAL by defendant from judgment entered 8 November 1990 in LENOIR County Superior Court by *Judge Robert H. Hobgood, Jr.* Heard in the Court of Appeals 14 November 1991.

Beaman, Kellum, Hollows & Jones, P.A., by J. Allen Murphy, for plaintiffs-appellees.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., and M. Greg Crumpler, for defendant-appellant.

WYNN, Judge.

The parties to this appeal have stipulated to the following facts:

Plaintiff passenger, Nannie Mae Manning, sustained injuries in an automobile accident on 7 August 1989. The automobile owned and operated by her husband, John Harrell Manning, plaintiff driver, collided with an automobile owned and operated by defendant, Billy Ray Tripp.

At the time of the accident, Mr. Manning owned two automobiles including the subject vehicle. Both vehicles were insured by Nationwide Insurance Company ("Nationwide") under a policy carrying liability and underinsured coverage up to $50,000 per person for each vehicle. Defendant Tripp's automobile was insured by Allstate Insurance Company under a policy providing liability coverage of $50,000 per person.

Notwithstanding the dispute as to the existence of Underinsured Motorist Insurance Coverage (hereinafter "UIM coverage"),

the parties agreed that Nationwide's maximum exposure to plaintiff is $50,000, the difference between $100,000 (the aggregate of the UIM coverage on the two policies covering the Manning vehicle) and the $50,000 in liability insurance coverage provided by Allstate. By further agreement of the parties, Allstate paid its full limits of liability insurance coverage to plaintiff. The parties further stipulated that if it is adjudicated that Nationwide owes any UIM payment for damages for Mrs. Manning's claim, Nationwide will pay plaintiffs $50,000; but if it is adjudicated that Nationwide owes no UIM payment for damages for her claim, Nationwide shall have no obligation to plaintiffs.

By Consent Order signed by Judge James D. Llewellyn, the claim by Mr. Manning was dismissed, and this action was converted into a Declaratory Judgment action whereby Mrs. Manning sought a determination of her rights to UIM benefits from Nationwide. From the judgment rendered in favor of plaintiff and against Nationwide, who appeared in the action as an unnamed party pursuant to N.C.G.S. § 20-279.21(b)(3) and (4) (1989), Nationwide appealed.

I.

[1] Appellant first contends that, under the facts of this incident, the automobile owned and operated by Tripp was not an "underinsured highway vehicle" as defined by N.C.G.S. § 20-279.21(b)(4). Appellant argues that, as a threshold issue, plaintiffs must show that the limits of liability under defendant's Allstate policy are less than the limits of liability under Mr. Manning's policy with Nationwide. As such, he contends that the separate $50,000 underinsured coverages on the two Manning vehicles should not be aggregated to allow for underinsurance in this case in which the tortfeasor's vehicle also carried $50,000 in coverage. We disagree.

North Carolina General Statutes section 20-279.21(b)(4) governs UIM coverage and provides, in pertinent part,

> An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to 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. . . . Underinsured motorist coverage shall be deemed to apply when, by reason

> of payment or judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of such liability coverage for purpose of any single liability claim presented for underinsured motorist coverage shall be deemed to occur when either (a) the limits of liability per claim have been paid upon such claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage shall be deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant pursuant to the exhausted liability policy.
>
> 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 . . . .

N.C.G.S. § 20-279.21(b)(4) (1989).

Our Supreme Court interpreted this statute 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). The defendant in *Sutton* issued two insurance policies to plaintiff: Policy A provided $50,000 of bodily injury and UIM coverage per person for each of two vehicles, and Policy B provided $100,000 of bodily injury and UIM coverage for each of two other vehicles. The plaintiff was injured in excess of $70,000 when she was struck by a vehicle operated by Anthony V. Genesio. Mr. Genesio had personal injury liability limits of $50,000 per person.

Although the *Sutton* Court did not discuss the definition of an underinsured highway vehicle, it did state that "[i]nterpreting the statute to allow both interpolicy and intrapolicy stacking is consistent with the nature and purpose of the act, which as noted is to compensate innocent victims of financially irresponsible motorists." *Id.* at 266, 382 S.E.2d at 764. The Court determined

that the total UIM coverage available to plaintiff was $300,000. *Id.* at 269, 382 S.E.2d at 765.

Relying on the *Sutton* decision, this Court, in its recent decision in *Amos v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629, 406 S.E.2d 652 (1991), clarified the meaning of an "underinsured motorist." The plaintiff in *Amos* suffered severe injuries while a passenger in an automobile operated by Kevin Coleman. The Coleman vehicle was insured with bodily injury limits of $50,000 per person. Plaintiff was living in the household of her father, Wayne Amos, who owned three motor vehicles insured by defendant in one policy. This policy provided bodily injury liability and UIM insurance limits of $50,000 per person for each of the three vehicles.

Like the defendant in the case at bar, the defendant in *Amos* made the following argument:

> 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.

Id. at 630-31, 406 S.E.2d at 653. This Court overruled all of defendant's contentions, stating that our Supreme Court's decision in *Sutton* warranted such a result. *Amos*, 103 N.C. App. at 630, 406 S.E.2d at 653. This Court further stated 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." *Id.* at 631, 406 S.E.2d at 653. Based on *Sutton* and *Amos*, we hold that defendant's vehicle was an underinsured highway vehicle under section 20-279.21(b)(4). We, therefore, find defendant's assignment of error to be without merit.

II.

[2] Appellant next assigns error to the trial court's determination that Mrs. Manning is entitled to stack or aggregate the limits of liability for UIM coverage applicable to the two automobiles covered by the Nationwide policy. Appellant argues that the trial court erred because Mrs. Manning was neither the owner of the insurance policy nor of the insured vehicles. We disagree.

This Court's decision in *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 404 S.E.2d 499 (1991), controls this issue. 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. The Faust vehicle was insured by State Farm Insurance Company and had liability limits of $100,000. Michelle's medical expenses alone exceeded $100,000. At the time of the accident, Michelle's parents owned three vehicles insured under a single policy by defendant Nationwide Mutual Insurance Company. That Nationwide policy provided uninsured and underinsured motorist coverage of $100,000 per person and $300,000 per accident for each vehicle insured.

The defendant in *Harris* argued that Michelle was not entitled to stack the three vehicles on her parents' policy because she was not the owner of the insured vehicles. This Court disagreed and stated the following:

> 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*. 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.

Id. at 103, 404 S.E.2d at 501 (emphasis in the original).

As our decision in *Harris* indicates, defendant's position that Mrs. Manning cannot aggregate the UIM coverage because she is not an owner of the vehicles is without merit. Based on the foregoing reasons, we are constrained to agree with the trial court that Mrs. Manning is entitled to aggregate the limits of liability for UIM coverage on the two vehicles insured by Nationwide, and

that Nationwide owes a UIM payment for damages with respect to the personal injury claim by Mrs. Manning. We, therefore, overrule these assignments of error.

The judgment of the trial court is

Affirmed.

Judge PARKER concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The facts of this case, like the facts in *Amos v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629, 406 S.E.2d 652, *disc. rev. allowed*, 330 N.C. 193, 412 S.E.2d 52 (1991) (Greene, J., dissenting) and in *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 404 S.E.2d 499, *disc. rev. allowed on additional issues*, 329 N.C. 788, 408 S.E.2d 521 (1991) (Greene, J., dissenting), present two distinct issues. The first issue is "whether intrapolicy stacking is appropriately considered in determining if the tortfeasor's vehicle is underinsured." *Harris*, 103 N.C. App. at 103-04, 404 S.E.2d at 501. For the reasons stated in my dissents in *Amos*, 103 N.C. App. at 631-32, 406 S.E.2d at 653, and 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." *Harris*, 103 N.C. App. at 104, 404 S.E.2d at 501. For the reasons stated in my dissents in *Amos*, 103 N.C. App. at 632, 406 S.E.2d at 653, and 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 judgment.

SUN BANK/SOUTH FLORIDA, PLAINTIFF v. JOHN F. TRACY, DEFENDANT

No. 9130SC69

(Filed 3 December 1991)

Judgments § 51.1 (NCI3d)— foreign judgment—notice of filing—sufficiency of service

The trial court did not err in finding that defendant was properly served with notice of filing of a foreign judgment on the basis of a return of service affidavit filed by a deputy sheriff because the presumption of service accorded by the officer's return was not rebutted by defendant's single affidavit where defendant alleged that his only contact with North Carolina was as a vacationer but he failed to allege facts as to his true domicile, that he was not in North Carolina on the date of service, or that he was not personally served, and defendant's allegation that the affidavit of the judgment creditor lacked the statement that the judgment is "final" and "unsatisfied" was contradicted by the record.

Am Jur 2d, Judgments §§ 621 et seq., 658, 659, 757, 1214 et seq.; Process §§ 330 et seq.

Failure to make return as affecting validity of service or court's jurisdiction. 82 ALR2d 668.

APPEAL by defendant from order entered 23 October 1990 by *Judge J. Marlene Hyatt* in JACKSON County Superior Court. Heard in the Court of Appeals 5 November 1991.

Peter A. Paul for plaintiff-appellee.

Coward, Hicks & Harper, P.A., by William H. Coward, for defendant-appellant.

JOHNSON, Judge.

This case concerns an attempt by plaintiff, a foreign judgment creditor, to enforce its judgment in North Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act, G.S. § 1C-1701 *et seq.* (1990 Cum. Supp.). Defendant alleges that he was never properly served and that the court therefore has no personal jurisdiction over him.

Plaintiff is a Florida bank. Plaintiff obtained a judgment against defendant in Florida. On 23 March 1990, pursuant to the statute, plaintiff filed the Florida judgment and an affidavit with the Clerk of Superior Court in Jackson County, North Carolina. On 2 April 1990, plaintiff filed a notice of filing with the clerk. Plaintiff attempted twice by certified mail to serve defendant. On 13 July 1990, plaintiff's attorney attempted personal service on defendant in the attorney's office by handing defendant a copy of the notice of filing, the judgment and the creditor affidavit. However, defendant left the office without signing an acceptance of service form.

Believing that its attempts at service up to that point had been unsuccessful, plaintiff requested that the sheriff of Jackson County serve defendant. In his "Affidavit of Service," Deputy Sheriff Mathis states in pertinent part:

> 1. That he is Deputy Sheriff.
>
> 2. That pursuant to N.C.G.S. Article 17 § 1C-1704(a) he . . . delivered a copy of the Renotice of Filing . . . to [defendant] by leaving copies thereof at [defendant's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
>
> 3. That said Renotice . . . was served to [defendant] on the 18 day of July 1990.

The Affidavit of Service includes neither the address at which the documents were left nor the name of the person with whom the documents were left.

On 15 August 1990, defendant filed a Motion for Relief and Notice of Defense and moved the court to quash service on him based on a lack of personal jurisdiction, insufficient process and insufficient service of process. Prior to the hearing on his motion, defendant submitted a sworn affidavit in support of his motion in which he states that he does not reside in North Carolina nor own any property here and that his only contacts with the state "have been to take limited vacations" here. He alleges insufficiencies with regard to the service on 13 July 1990. Nowhere in this affidavit nor in any other document of record does defendant allege any other facts which might relate to the service or return of service by Deputy Mathis except perhaps in paragraph 5 of his affidavit where he states:

> No notice of filing of Foreign Judgment has ever been served on me where said Notice was in proper form or had proper documentation attached to it. Specifically, the Affidavit that has been served upon me does not state that the Foreign Judgment is "final and that it is unsatisfied" as required by N.S. [sic] G.S. 1C-1703(a).

Following a hearing on 16 October 1990 at which the court heard arguments of counsel, Judge Hyatt issued an order in which she found that defendant had been properly served as a matter of law and ordered that he respond to the judgment, pursuant to G.S. § 1C-1704(b), within thirty days. Judge Hyatt's order contains no findings of fact to support the conclusion of law. In the record on appeal, the parties stipulate that no oral testimony was taken at the hearing and only the documents in the court file were presented for the court's consideration.

Defendant contends that the trial court erred in denying his motion for relief in that the plaintiff's method of service was incorrect. We affirm the denial of defendant's motion because we find that defendant has utterly failed to rebut the presumption of proper service.

We note that there is no requirement that a trial court make findings of fact although defendant could have requested that the trial judge make written findings and include them in the order. *Williams v. Bray*, 273 N.C. 198, 159 S.E.2d 556 (1968). Under the facts of this case, findings, if included in an order, would have given this Court an indication as to the basis for the lower court's decision. Since there are no findings of fact, it is unclear upon what basis the trial judge found that the plaintiff had been properly served. Defendant-appellant argues on appeal that neither the personal service which occurred in plaintiff's attorney's office on 13 July 1990 nor the service by Deputy Mathis on 18 July 1990 was legally sufficient. Plaintiff-appellee, in its brief, concludes that the 13 July service was insufficient for lack of an acceptance of service signed by defendant and makes no argument as to that.

Under the Uniform Enforcement of Foreign Judgments Act, a foreign judgment filed in this state pursuant to the statute will be enforced the same as any in-state judgment. G.S. § 1C-1703(b),(c). The statute specifically sets out how and where the judgment must be filed, G.S. § 1C-1703, and the specific documents which must be served on the defendant, G.S. § 1C-1704(a). "Service and proof

of service of the notice may be made in any manner provided for in Rule 4(j) of the Rules of Civil Procedure." G.S. § 1C-1704(a). Under G.S. § 1-75.4, our "long arm" statute, a court of this state having jurisdiction over the subject matter acquires personal jurisdiction over a defendant when the defendant is served pursuant to Rule 4(j) when he is present in the state, G.S. § 1-75.4(1)a, or is domiciled within the state, G.S. § 1-75.4(1)b. Service of process may be accomplished upon a natural person by delivering a copy of the papers to him or by leaving copies at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. G.S. § 1A-1, Rule 4(j)(1)a. When a defendant appears in the action and challenges the sufficiency of service upon him, proof of the service of process shall be by the sheriff's certificate showing place, time and manner of service. G.S. § 1-75.10(1)a.

When process is served by an officer authorized by statute to serve process and is proved by return of service, there is a presumption that the service is proper. In *Harrington v. Rice*, 245 N.C. 640, 97 S.E.2d 239 (1957), the Court stated the rule as follows:

> When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, the *officer's return* is evidence upon which the court *may* base a finding that service was made as shown by the return.
>
> Service of process, and the return thereof, are serious matters; and the return of a sworn authorized officer should not 'be lightly set aside.'
>
> Therefore, this Court has consistently held that an officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) *and* is clear and unequivocal. (Original emphasis.) (Citations omitted.)

Id. at 642, 97 S.E.2d at 241. In *Harrington*, the defendant contesting the sufficiency of the service specifically stated that she was not personally served on the date at issue or at any other time and that she was not at the place of service at the time service was attempted but was at a named different place. Further, her co-defendant-husband specifically stated that the sheriff served him and left a copy for his wife but that he never gave the copy to her nor did he inform her of the service. The *Harrington* Court held that where the defendant presented clear and unequivocal evidence that she had not been served and this evidence included supporting testimony from others to that effect, she had rebutted the presumption of service in the officer's return. The Court, however, noted that the presumption of service cannot be rebutted by the contradictory affidavit or contradictory testimony of a single witness. *Id. See also Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977); *Tyndall v. Homes*, 264 N.C. 467, 142 S.E.2d 21 (1965).

We find that on the record before us, defendant has utterly failed to rebut the presumption of proper service which accompanies the return of service affidavit filed by Deputy Mathis. The only evidence in support of defendant's position is his single affidavit. This affidavit contains several allegations with regard to the attempted service on 13 July at the attorney's office and two allegations which might be read to support his contention that the 18 July service is insufficient.

First, he alleges that his only contact with North Carolina is as a vacationer. However, he alleges no specific facts as to his true domicile or to the lengths and frequencies of his stays in North Carolina. He does not allege that he was not in North Carolina on 18 July or that he was not personally served. He provides no supporting affidavits as to his domicile or his location on 18 July 1990. Secondly, in paragraph 5 of his affidavit, defendant alleges that no notice of filing has ever been served on him when such notice was in proper form. He specifically alleges that the affidavit lacks the statement that the judgment is "final and that it is unsatisfied" as required by G.S. § 1C-1703(a). This allegation is no support at all, however, because contrary to defendant's assertion, the affidavit of the judgment creditor which is in the record clearly states that the "foreign final judgment" is "still unsatisfied." In other words, defendant's evidence is limited to a single affidavit which does not clearly contradict the evidence of service in Deputy Mathis' return of service.

We conclude that Deputy Mathis' return of service is uncontradicted by defendant. In the absence of clear and unequivocal contradictory evidence the trial court may find that service was made upon defendant and that conclusion will stand on appeal. *Harrington*, 245 N.C. 640, 97 S.E.2d 239. Defendant has not met his burden to show insufficiency of service and the trial court's conclusion that he was properly served is affirmed.

Affirmed.

Judges EAGLES and ORR concur.

VIRGINIA R. JONES, EXECUTRIX OF THE ESTATE OF CRISMAN S. JONES v. PITT COUNTY MEMORIAL HOSPITAL, INC., EAST CAROLINA UNIVERSITY SCHOOL OF MEDICINE, LEO WAIVERS, ROBERT C. TURNER, JAMES HOLLERAN, ROBERT BRUNER, JANICE BUSHER, DAVID T. WADDELL, LYNNE CHAPMAN, JAMES G. PEDEN, MICHAEL B. KODROFF, TIMOTHY J. CLARK, RICHARD RUMLEY, CINDY SMITH, JOHN HOLT, MOLLY BURGOYNE AND B. LISA BURG

No. 9125SC83

(Filed 3 December 1991)

1. State § 4.2 (NCI3d) — wrongful death — sovereign immunity — Tort Claims Act

The trial court correctly concluded that it lacked jurisdiction to adjudicate plaintiff's claim against the ECU School of Medicine. *Truesdale v. University of North Carolina*, 91 N.C. App. 186, unequivocally holds without regard to the type of action involved that N.C.G.S. § 116-3 allows UNC and its constituent institutions to be sued only as otherwise specifically provided by law. When read together, the language of the Tort Claims Act and N.C.G.S. § 116-3 evidence a legislative intent that all tort claims against UNC and its constituent institutions for money damages be brought before the North Carolina Industrial Commission.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 42, 649.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions. 33 ALR3d 703.

2. Appeal and Error § 342 (NCI4th)— wrongful death action—dismissed without prejudice—appellee's objection—not properly preserved

Defendant's contentions regarding dismissal of plaintiff's wrongful death action without prejudice were not addressed on appeal where defendant failed to appeal or cross-appeal pursuant to N.C. R. App. P. 3, make any cross-assignments of error pursuant to N.C. R. App. P. 10(d), or to present for review in its brief any questions raised by cross-assignments of error pursuant to N.C. R. App. P. 28(c).

Am Jur 2d, Appeal and Error §§ 545, 648-650, 653-654, 657-658.

APPEAL by plaintiff from order entered 6 September 1990 in CALDWELL County Superior Court by *Judge Claude S. Sitton.* Heard in the Court of Appeals 5 November 1991.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and Kenneth B. Oettinger, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, for the State.

GREENE, Judge.

Plaintiff appeals from an order entered 6 September 1990 dismissing plaintiff's claim against defendant East Carolina University School of Medicine for lack of jurisdiction.

Plaintiff Virginia Jones, co-executor of the estate of her deceased husband Crisman S. Jones, instituted this wrongful death action on 11 June 1990 in Caldwell County Superior Court against Pitt County Memorial Hospital, Inc., East Carolina University (ECU) School of Medicine, eight physicians serving on both the faculty of ECU School of Medicine and on the staff at Pitt County Memorial Hospital, and seven residents in training at Pitt County Memorial Hospital. Plaintiff's complaint alleges negligence on the part of the named defendants in the care and treatment of her husband, who died on 10 June 1988 while a patient at Pitt County Memorial Hospital.

On 31 July 1990, defendant ECU School of Medicine filed a motion to dismiss plaintiff's claim on the grounds that the suit against it is barred by the doctrine of sovereign immunity, that

the Caldwell County Superior Court lacks jurisdiction over the action, and that the complaint fails to state a claim upon which relief can be granted. On 6 September 1990, the trial court entered an order dismissing plaintiff's claim against ECU School of Medicine. The court found that ECU School of Medicine is a constituent institution of the University of North Carolina pursuant to N.C.G.S. §§ 116-4 (1987) and 116-40.4 (1987), and this finding is not disputed by the parties. The court concluded that the North Carolina Tort Claims Act, N.C.G.S. § 143-291 (1990) *et seq.*, applies to plaintiff's claim against this defendant and that, accordingly, exclusive original jurisdiction of the claim lies with the North Carolina Industrial Commission. The trial court's order dismissed plaintiff's claim against ECU School of Medicine without prejudice to file a new claim against said defendant within one year of the filing of the order.

The dispositive issues are whether I) a state superior court has jurisdiction to adjudicate tort claims against a constituent institution of the University of North Carolina; and II) the trial court erred in dismissing plaintiff's claim without prejudice to plaintiff to file a new claim against ECU School of Medicine within one year.

I

[1] Plaintiff contends that the trial court erred in dismissing her claim against defendant ECU School of Medicine because N.C.G.S. § 116-3 (1987) provides that the University of North Carolina "shall be able and capable in law to sue and be sued in all courts whatsoever." Plaintiff argues that, as a constituent institution of The University of North Carolina (UNC), *see* N.C.G.S. § 116-2(4) (1987), Section 116-3 applies to defendant ECU School of Medicine. In plaintiff's view, Section 116-3 operates as a clear and unambiguous abolition by our General Assembly of the doctrine of sovereign immunity as it pertains to UNC and its constituent institutions, and thus allows plaintiff's tort action in the Caldwell County Superior Court. We disagree.

It is well established in North Carolina that the State is immune from suit unless and until it has expressly consented to be sued. *Great Am. Ins. Co. v. Gold, Comm'r of Ins.*, 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961). It is for the General Assembly to determine when and under what circumstances the State may be sued, *id.*, and even when legislative action is taken, statutes enacted in derogation of sovereign immunity must be strictly con-

strued. *Nello L. Teer Co. v. State Highway Comm'n*, 265 N.C. 1, 9, 143 S.E.2d 247, 253 (1965). The doctrine of sovereign immunity applies not only to suits in which the State is a named defendant, but also to actions against its departments, institutions, and agencies. *Id.* at 9, 143 S.E.2d at 253; *see also Truesdale v. University of North Carolina*, 91 N.C. App. 186, 371 S.E.2d 503 (1988), *appeal dismissed and disc. rev. denied*, 323 N.C. 706, 377 S.E.2d 229 (1989), *cert. denied*, 493 U.S. 808, 107 L.Ed.2d 19 (1989).

This Court addressed a question nearly identical to the one presented here in *Truesdale v. University of North Carolina, supra.* The plaintiff there alleged federal constitutional violations and violations of 42 U.S.C. § 1983 against the University of North Carolina and one of its constituent institutions, Winston-Salem State University, where plaintiff was employed as a security officer. Like plaintiff in the instant case, the plaintiff in *Truesdale* cited the "able and capable in law to sue and be sued in all courts whatsoever" language of N.C.G.S. § 116-3 in support of her contention that our General Assembly has abolished sovereign immunity insofar as UNC and its constituent institutions are concerned. This Court disagreed, stating:

> The purpose and intent of G.S. 116-3 is to allow UNC and its constituent institutions to sue and be sued in their own names *but only as otherwise specifically provided by law.* We do not believe that the General Assembly intended to abolish the doctrine of sovereign immunity.

Truesdale, 91 N.C. App. at 192, 371 S.E.2d at 507 (emphasis added). We held that, since no other law specifically provided for discrimination suits against UNC and its constituent institutions, the doctrine of sovereign immunity barred plaintiff's claims.

Plaintiff contends that *Truesdale* is distinguishable from the case at bar since *Truesdale* involved a discrimination action against a UNC constituent institution, not a tort claim such as the one involved here. This, however, is a distinction without a difference. *Truesdale* unequivocally holds without regard to the type of action involved that Section 116-3 allows UNC and its constituent institutions to be sued only as otherwise specifically provided by law, and we are bound by it. Moreover, our Supreme Court in *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983), held that a statute with language similar to that of Section 116-3 does not operate as an express waiver of sovereign

immunity. *See* N.C.G.S. § 143B-454(1) (1990) (vesting the North Carolina Ports Authority, a State agency, with the power to "sue or be sued").

However, this case is different from *Truesdale* in that our General Assembly has "specifically provided" in the State Tort Claims Act (the Act) for actions in tort against the State and its agencies and institutions. Under the Act, jurisdiction is vested in the North Carolina Industrial Commission to hear claims against the State for personal injuries sustained by any person as a result of a State employee's negligence while acting within the scope of his employment. *Guthrie*, 307 N.C. at 536, 299 S.E.2d at 626. When read together, the language of the Act and of Section 116-3, making UNC and its constituent institutions "able and capable in law to sue and be sued in all courts whatsoever," evidence a legislative intent that all tort claims against UNC and its constituent institutions for money damages be brought before the North Carolina Industrial Commission. *See Guthrie*, 307 N.C. at 538, 299 S.E.2d at 627. Accordingly, the trial court correctly concluded that it lacked jurisdiction to adjudicate plaintiff's claim against ECU School of Medicine.

II

[2] Defendant argues that the trial court erred in dismissing plaintiff's claim without prejudice because 1) the two-year statute of limitations applicable to plaintiff's claim, N.C.G.S. § 143-299 (1990), ran before the entry of the trial court's order and "no one could extend it"; and 2) even if the statute had not run, the trial court had no jurisdiction to take action extending the statute of limitations and any such action is null and void. Defendant seeks modification of the order to dismissal "with prejudice."

However, defendant has not properly preserved for appellate review any objection that it may have to the trial court's order in this case. Defendant failed to appeal or cross appeal pursuant to R. App. P. 3, or to make any cross-assignments of error pursuant to R. App. P. 10(d), or to present for review in its brief any questions raised by cross-assignments of error (under Rule 10(d)) pursuant to R. App. P. 28(c). Moreover, because defendant does not contend that the trial court's order deprives it of additional bases supporting the court's order, but rather, that certain portions of the order are erroneous, the proper means by which to raise such an attack would have been an independent appeal pursuant to

Rule 3. *See Whedon v. Whedon*, 68 N.C. App. 191, 196, 314 S.E.2d 794, 797 (1984), *rev'd on other grounds*, 313 N.C. 200, 328 S.E.2d 437 (1985). Rule 3 is jurisdictional and if its requirements are not complied with, the appeal must be dismissed. *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, *appeal dismissed and disc. rev. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990). Accordingly, defendant's contentions regarding error in the trial court's order will not be addressed by this Court.

For the foregoing reasons, we affirm the decision of the trial court dismissing without prejudice plaintiff's claim against defendant ECU School of Medicine.

Affirmed.

Judges PARKER and WYNN concur.

GERALD V. GREENUP, EXECUTOR OF THE ESTATE OF JOHN ALLEN GREENUP
v. MYRTLE B. REGISTER

No. 918SC587

(Filed 3 December 1991)

Rules of Civil Procedure § 4 (NCI3d)— process—delivery to place of business—improper service

A deputy sheriff's delivery of the summons and complaint to defendant's brother at defendant's place of business rather than at her residence failed to comply with N.C.G.S. § 1A-1, Rule 4(j)(1)(a) and was insufficient to give the court jurisdiction over defendant.

Am Jur 2d, Process §§ 198, 201, 203, 205, 219, 223-226.

Who is "person of suitable age and discretion" under statutes or rules relating to substituted service of process. 91 ALR3d 827.

APPEAL by defendant from order entered 25 February 1991 by *Judge James D. Llewellyn* in LENOIR County Superior Court. Heard in the Court of Appeals 8 November 1991.

No brief for plaintiff-appellee.

Bruce and Bryant, P.A., by R. Michael Bruce, for defendant-appellant.

WYNN, Judge.

Plaintiff filed a complaint dated 19 April 1990, alleging that decedent had loaned money to defendant upon defendant's promise to repay the loans. The complaint alleged that plaintiff had made demand of defendant, but that no part of the loan had been repaid. Plaintiff sought to recover $94,520.00 plus interest. A summons was issued on 23 April 1990, but was returned with the notation that defendant was not served because she "[l]ives in Sampson County on U.S. 421 near Midway School." Thereafter, an alias and pluries summons was issued on 2 May 1990, and defendant's address was listed as follows:

Route 5, Box 488
Dunn, North Carolina 28334

The return of service states that on 8 May 1990, Deputy Sheriff E.L. Vann left a copy of the summons with defendant's brother, James "Buddy" Barefoot, at the "dwelling house or usual place of abode of the defendant. . . . " Defendant failed to file an answer, and upon plaintiff's motion, a default judgment was entered against defendant on 25 June 1990. Thereafter, defendant filed a motion to set aside the default judgment on the grounds that she had not been properly served. On 25 February 1991, the trial court entered an order denying defendant's motion to set aside the default judgment. Defendant appeals.

Essentially, defendant argues the trial court erred in failing to set aside the default judgment because service was improper. She asserts that she was not served according to the provisions of N.C. Gen. Stat. § 1A-1, Rule 4(j).

N.C. Gen. Stat. § 1A-1, Rule 4(j) provides:

> In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> (1) Natural Person.—Except as provided in subsection (2) below, upon a natural person:

> a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

The requirements of this section must be construed strictly and the prescribed procedure must be followed strictly. *Guthrie v. Ray*, 31 N.C. App. 142, 228 S.E.2d 471 (1976), *rev'd on other grounds*, 293 N.C. 67, 235 S.E.2d 146 (1977). Unless the requirements are met, there is no valid service. *Id.* When the officer's return of the summons shows legal service, a presumption of valid service of process is created. *Harrington v. Rice*, 245 N.C. 640, 97 S.E.2d 239 (1957). However, this presumption is rebuttable. *Id.*

Deputy Sheriff Edward Vann testified at the hearing on defendant's motion that on 8 May 1990, he served an alias and pluries summons on defendant by leaving a copy of the summons and complaint with defendant's brother. He testified that at approximately 11:45 p.m., he arrived at the Green Top Grill and saw defendant's two brothers, Charles and Buddy, locking the door to the grill. Vann asked where defendant was and explained that he had papers to serve on her. Buddy Barefoot told him that he would take a copy of the summons and deliver it to defendant. Vann gave him a copy of the summons and complaint.

Defendant testified that she did not receive the summons. Charles Barefoot testified that Deputy Vann arrived at the grill as he and his brother were closing for the night. Charles told Vann that he would deliver the papers to defendant. He put the papers in the glove compartment of the truck that he was driving that night and forgot about them until defendant found out that there was a judgment of default against her.

In *Hall v. Lassiter*, 44 N.C. App. 23, 260 S.E.2d 155 (1979), *disc. review denied*, 299 N.C. 330, 265 S.E.2d 395 (1980), a Randolph County deputy sheriff left copies of the summonses and complaints with Douglas Lassiter, a son of one of the defendants, at the defendants' place of business. This Court concluded that the delivery of the papers to Douglas Lassiter at the defendants' place of business instead of defendants' respective residences was not in compliance with Rule 4(j)(1); thus, jurisdiction over the defendants was not obtained.

Likewise, in the present case, jurisdiction was not obtained over defendant. All of the undisputed evidence offered at the hearing showed that the Green Top Grill was defendant's place of business and not a place of residence. Defendant offered evidence that although she worked in excess of 12 hours per day at the grill, she resided in a house which was several hundred feet from the grill. Deputy Sheriff Vann himself testified that he did not know where defendant lived and he never inquired as to such. Buddy Barefoot testified that he resided in Johnston County approximately ten miles from the grill and that his brother, Charles, lives next to him. He also testified that at no time has defendant resided with him. Plaintiff offered absolutely no evidence that defendant's residence was the Green Top Grill nor did he offer any evidence that Buddy Barefoot resided with defendant therein. Thus, we hold that the delivery of the papers to one of defendant's brothers at defendant's place of business was not in compliance with Rule 4(j)(1)(a), and jurisdiction over defendant was not obtained. Accordingly, the order of the trial court denying defendant's motion to set aside the default judgment is reversed, and the cause remanded to the Superior Court of Lenoir County for the entry of an order setting aside the default judgment and dismissing the action.

Reversed and remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

KATHLEEN WIENECK-ADAMS, PLAINTIFF v. ROY REX ADAMS, DEFENDANT

No. 9113DC290

(Filed 3 December 1991)

Divorce and Separation § 161 (NCI4th)— equitable distribution— waiver of child support—payment of marital debt

The trial court did not abuse its discretion in an action for divorce and equitable distribution by awarding defendant the marital home in exchange for his payment of the marital debt to the IRS. The trial court heard evidence as to the informal agreement of the parties, including plaintiff's contention that payment of back taxes was in return for waiver

of child support, and nonetheless awarded defendant the deed to the house. In the absence of a separation agreement, nothing in the statute requires the trial court to take a waiver of child support into account in calculating an equitable distribution. Insofar as the court apparently sought to make as equal a division as possible, the court is not required to make further findings of fact to support its distribution.

Am Jur 2d, Divorce and Separation §§ 903, 923, 930, 1018, 1024.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Divorce and separation: effect of trial court giving consideration to needs of children in making property distribution—modern status. 19 ALR4th 239.

Spouse's acceptance of payments under alimony or property settlement or child support provision of divorce judgment as precluding appeal therefrom. 29 ALR3d 1184.

Judge COZORT dissents.

APPEAL by plaintiff from order entered 26 September 1990 by *Judge D. Jack Hooks, Jr.* in BRUNSWICK County District Court. Heard in the Court of Appeals in special session in Wilmington on 16 October 1991.

Shipman and Lea, by James W. Lea, III, for plaintiff-appellant.

David P. Ford for defendant-appellee.

LEWIS, Judge.

Plaintiff instituted this action on 28 July 1988, seeking an absolute divorce, equitable distribution of marital property, child custody and child support. Plaintiff subsequently dismissed her claim for child support. Plaintiff obtained an absolute divorce from the defendant on 2 March 1989. At the time of their separation the most significant asset was a marital home with a net equity of $11,394.71, and the most significant debt taxes due for the year 1981 in the amount of $11,964.28 and for the year 1982 in the amount of $11,078.42. After a trial on the issue of equitable distribution, the trial court granted the marital home to the defendant and noted his payment of the joint marital debt to the Internal Revenue Service.

Plaintiff assigns as error the trial court's granting the marital home to the defendant in exchange for his payment of the marital debt. Plaintiff argues that she dismissed the claim for child support pursuant to an unwritten agreement that the defendant would, in consideration, pay all back taxes. At trial defendant contended that under the agreement he also received plaintiff's interest in the marital home. The plaintiff presented evidence that this was not the case and now argues that the trial court's award of plaintiff's interest in the home to the defendant results in an inequitable distribution of the marital property.

Our review of equitable distribution orders is limited to determining whether the court clearly abused its discretion. *Andrews v. Andrews*, 79 N.C. App. 228, 231, 338 S.E.2d 809, 812 (1986), *disc. rev. denied*, 316 N.C. 730, 345 S.E.2d 385 (1986). A discretionary order of equitable distribution must be accorded great deference. *Id.* The trial court heard evidence as to the informal agreement of the parties, including the plaintiff's contention that payment of back taxes was in return for waiver of child support, and nonetheless awarded defendant the deed to the house. The trial judge's discretion is to be upheld unless it fails to comply with the requirements of the statute, N.C.G.S. § 50-20(c). In the absence of a separation agreement, nothing in the statute requires the trial court to take a waiver of child support into account in calculating an equitable distribution. To the contrary, the determination of child support is to be made separately from that of equitable distribution. N.C.G.S. § 50-20(f) states that: "The court shall provide for an equitable distribution without regard to . . . support of the children of both parties." Having heard the plaintiff's testimony, the trial judge, in his discretion, declined to take the waiver of child support into account in determining the distribution. In recognition of the fact that the defendant had paid off a joint debt of $23,042.70, the court awarded the defendant the deed in the house, which had $11,394.71 in equity.

Plaintiff argues on appeal that the trial court failed to make clear findings of fact to justify its unequal distribution. Insofar as the court apparently sought to make as equal a division as possible, the court is not required to make further findings of fact to support its distribution. *Weaver v. Weaver*, 72 N.C. App. 409, 417, 324 S.E.2d 915, 920 (1985).

The order of the trial court is therefore,

Affirmed.

Judge ARNOLD concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I believe the trial court's order cannot stand, and I vote to reverse the order and remand the cause for further proceedings.

The trial court found and concluded that "an equal distribution is equitable." The court then awarded plaintiff marital property worth $2,450.00. The trial court then awarded defendant marital property worth $13,844.74, with the difference in the two awards being the net equity in the house, which was awarded to the defendant. Obviously, awarding the defendant $11,394.74 more than the plaintiff is not equal, is inconsistent with the trial court's determination that the division of the marital property should be equal, and is reason enough to reverse the trial court's order and remand the cause to the trial court for further proceedings.

However, even if we were somehow able to get beyond this obvious internal inconsistency in the trial court's order and proceeded to review the trial court's discretion in deciding to give the defendant the house and the plaintiff virtually nothing, we must find that the trial court abused its discretion. The evidence indicates that when the parties separated, they agreed that plaintiff would have custody of the children, that defendant would pay off the $23,042.70 debt to the IRS, and that plaintiff would not demand child support from defendant while defendant was paying off the debt to the IRS. By giving defendant credit for paying plaintiff's half of the IRS debt, while at the same time giving plaintiff no credit for not pursuing a claim for child support of more than $24,000.00 against the defendant, the trial court has given the defendant double credit by awarding him all the value of the house. That kind of double credit is an abuse of discretion, and we should not let it stand. I must dissent.

IN THE MATTER OF: MAMIE LEE CURTIS, MINOR CHILD, HOGAN, GEORGE W. AND LINDA J. v. CURTIS, ROBIN DALE AND KING, TWANA LYNN

No. 9128DC438

(Filed 3 December 1991)

Parent and Child § 1.5 (NCI3d)— termination of parental rights— summary judgment—error

The trial court erred by granting partial summary judgment on the issue of abuse in an action for termination of parental rights. The trial court was required under N.C.G.S. § 7A-289.30(e) to hold an adjudicatory hearing in order to take evidence, find the facts, and adjudicate the existence or nonexistence of the circumstances set forth in N.C.G.S. § 7A-289.32. However, properly admitted evidence of the father's conviction of first-degree sexual offense against the minor child constitutes sufficient clear, cogent, and convincing evidence of the respondent's abuse of the child and the child's testimony will not be necessary at the adjudicatory stage on remand.

Am Jur 2d, Parent and Child § 34.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.

Validity of state statute providing for termination of parental rights. 22 ALR4th 774.

APPEAL by respondent from Order entered 25 February 1991 by *Judge Rebecca B. Knight* in BUNCOMBE County District Court. Heard in the Court of Appeals 26 August 1991.

Gum & Hillier, P.A., by Ingrid Friesen, for petitioner appellees.

Robert G. Karriker, as Guardian ad Litem for Mamie Lee Curtis, appellee.

Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux & Belser, P.A., by David G. Belser and Barry L. Master, for respondent appellant.

COZORT, Judge.

Petitioners George and Linda Hogan instituted this action seeking the termination of respondent's parental rights. Respondent

Twana Lynn King did not file an answer and an order was entered 22 June 1990 terminating her parental rights. As to respondent Robin Dale Curtis [hereinafter respondent], the petition alleged that he had abused and neglected the minor child and that respondent had abandoned the minor child for at least six months preceding the filing of the petition. By motion dated 28 January 1991, petitioners moved for partial summary judgment alleging that no genuine issue of material fact existed as to their claim that respondent abused the minor child "in that he has been convicted by a jury of First Degree Sexual Offense against his daughter." After a hearing in which the trial court reviewed the record and heard arguments of counsel, the court entered an order on 25 February 1991 granting petitioners' motion for partial summary judgment on the issue of abuse. Respondent appeals.

Respondent's sole contention on appeal is the trial court erred in granting partial summary judgment on the issue of abuse in a termination of parental rights proceeding. Respondent asserts that the statutory scheme set forth in Article 24B of the North Carolina General Statutes does not envision or authorize a summary procedure based on Rule 56 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 56 (1990). We agree.

The legislative intent and construction to be given Article 24B is defined in N.C. Gen. Stat. § 7A-289.22(1) (1989) as follows:

> The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

The exclusive judicial procedure to be used in termination of parental rights cases is prescribed by the Legislature in N.C. Gen. Stat. § 7A-289.22, *et seq. In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

In *Peirce*, the parents-respondents attempted to file counterclaims along with their answer to the petition filed to terminate parental rights. The trial court struck paragraphs three and four of the respondents' Further Answer and Defense and Counterclaim. The respondents argued on appeal that the trial court erred in striking those paragraphs because the additional

filing of the counterclaims attached to the answer was admissible based on an analogy to Rule 7(a) and Rule 13 of the North Carolina Rules of Civil Procedure. This Court stated:

> The sections of Art. 24B comprehensively delineate in detail the judicial procedure to be followed in termination of parental rights. This article provides for the basic procedural elements which are to be utilized in these cases. . . . Due to the legislature's prefatory statement in G.S. 7A-289.22 with regard to its intent to establish judicial procedures for the termination of parental rights, and due to the specificity of the procedural rules set out in the article, we think the legislative intent was that G.S., Chap. 7A, Art. 24B, exclusively control the procedure to be followed in the termination of parental rights. It was not the intent that the requirements of the basic rules of civil procedure of G.S. 1A-1 be superimposed upon the requirements of G.S., Chap. 7A, Art. 24B. Therefore, in this case we need only ascertain whether the trial court correctly followed the procedural rules delineated in the latter.

Id. at 380, 281 S.E.2d at 202-03. The Court went on to hold that, because the article did not specifically grant the respondent in such cases the right to file a counterclaim, the statutorily established procedure did not include such a right. The Court declined to add that right by imputation.

Likewise, Article 24B does not grant a petitioner the right to file a motion for summary judgment. The termination of parental rights statute provides for a two-stage termination proceeding. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). At the adjudication stage, the petitioner is required to prove the existence of grounds for termination set forth in N.C. Gen. Stat. § 7A-289.32 (1989), by clear, cogent and convincing evidence. *In re White*, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). At the disposition stage, the trial court, in its discretion, must decide whether to terminate parental rights. *Id.* Since the Legislature did not intend for the requirements of the basic rules of civil procedure of N.C. Gen. Stat. § 1A-1 to be superimposed on this article, we need only ascertain whether the trial court correctly followed the procedural rules delineated in the article. After reviewing the applicable statutes, we find that it did not. Article 24 of Chapter 7A does not provide for a summary proceeding to determine whether the petitioner has

proven the existence of one or more of the grounds for termination. N.C. Gen. Stat. § 1A-1, Rule 56 (1990) has no application here. Thus, we hold the trial court erred in granting petitioners' motion for partial summary judgment. The trial court was required under N.C. Gen. Stat. § 7A-289.30(e) (1990) to hold an adjudicatory hearing in order to take evidence, find the facts, and adjudicate the existence or nonexistence of the circumstances set forth in N.C. Gen. Stat. § 7A-289.32 (1990) which authorizes the termination of parental rights of respondent. The trial court erred in granting summary judgment for petitioners.

The petitioners and the guardian ad litem appointed for the child argue that reversal of summary judgment will force the child to repeat the traumatic experience of testifying again about the actions which led to her father's conviction. We do not agree. Properly admitted evidence of the father's conviction of first-degree sexual offense against the minor child constitutes sufficient, clear, cogent, and convincing evidence of the respondent's abuse of the child. The child's testimony will not be necessary at the adjudicatory stage. Accordingly, the order of the trial court is reversed and the cause remanded to the District Court of Buncombe County for a hearing on the termination of respondent's parental rights.

Reversed and remanded.

Chief Judge HEDRICK and Judge LEWIS concur.

ROBERT A. BURGE, PLAINTIFF v. INTEGON GENERAL INSURANCE COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. R. GREG ELLEDGE, THIRD PARTY DEFENDANT

No. 9119SC66

(Filed 3 December 1991)

Rules of Civil Procedure § 56.1 (NCI3d)— interrogatories not fully answered—summary judgment premature

The trial court erred in entering summary judgment for defendant insurer before plaintiff insured's interrogatories were fully answered by defendant where the interrogatories attempted to obtain information on the central factual question of

whether third party defendant acted within the scope of his actual or apparent authority in representing to plaintiff that defendant would pay a car rental claim; defendant served incomplete answers to the interrogatories on 21 September and summary judgment was entered on 6 November; and plaintiff relied on an agreement with defendant that defendant would provide further answers to the interrogatories.

Depositions and Discovery §§ 211 et seq.; Summary Judgment §§ 26 et seq.

Propriety of considering answers to interrogatories in determining motion for summary judgment. 74 ALR2d 984.

APPEAL by plaintiff from order entered 6 November 1990 by *Judge Russell G. Walker, Jr.* in RANDOLPH County Superior Court. Heard in the Court of Appeals 4 November 1991.

Eugene S. Tanner, Jr. for plaintiff appellant.

Frazier, Frazier & Mahler, by Robert A. Franklin and James D. McKinney, for defendant and third party plaintiff appellee.

WALKER, Judge.

This appeal arises out of an automobile insurance coverage dispute between the insured Robert A. Burge and Integon General Insurance Company. A default judgment was entered against third party defendant R. Greg Elledge on 19 June 1990.

The facts indicate that on 15 March 1989 plaintiff purchased an automobile insurance policy through Elledge and written by Integon. Thereafter, plaintiff reported that he sustained both windstorm and collision damage to his automobile on 20 March 1989 and 29 March 1989. Soon after these damages were incurred, plaintiff notified Elledge that he desired a rental car while his automobile was undergoing repairs. Elledge responded that the cost of temporarily renting a replacement car was covered under the insurance policy and Elledge advanced plaintiff $299 on a car rental. In addition, Elledge stated that each week he would send plaintiff a check to cover the rental expense. Plaintiff incurred expense for a rental car in the sum of $4,483.49, less the $299 advanced by Elledge. Integon denied plaintiff's claim for rental expense.

After filing the complaint, plaintiff filed an amendment to the complaint on 22 June 1990 with defendant's consent. He alleged that Elledge was the authorized agent of Integon and was acting within the scope of his authority when he represented to plaintiff that his car rental expense would be paid by Integon. On 31 July 1990, Integon answered and denied this allegation.

Plaintiff served interrogatories on Integon on 16 July 1990. He asserts Integon's answers, served on 21 September 1990, were incomplete, some not answered, and the parties had agreed that Integon could have additional time within which to further answer them, but had failed to do so by the time of the hearing on Integon's motion for summary judgment. On 6 November 1990, the trial court granted Integon's motion for summary judgment.

The general purpose of discovery is to assist in the disclosure prior to trial of any relevant unprivileged materials and information. Such exchanges help the parties narrow and sharpen the basic facts and issues prior to trial. Summary judgment is however designed to eliminate formal trials where facts are not disputed and only questions of law are involved. Since summary judgment is a drastic remedy, it should be used cautiously and never as a tool to deprive any party of a trial when genuinely disputed facts exist. *See Brown v. Greene*, 98 N.C.App. 377, 390 S.E.2d 695 (1990). "Moreover, '[o]rdinarily, it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so.' . . . Generally, motions for summary judgment should not be decided until all parties are prepared to present their contentions on all the issues raised and determinable under Rule 56." *American Travel Corp. v. Central Carolina Bank and Trust Co.*, 57 N.C.App. 437, 441, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982) (citation omitted).

Even though plaintiff did not serve his interrogatories until after his amended complaint, they attempt to obtain information on the central factual question of whether Elledge was acting within the scope of his actual or apparent authority in representing that Integon would pay the car rental claim. Only after compliance with requests for discoverable material should the court entertain a motion for summary judgment. We do not mean to suggest that

in every case a party, without exercising such remedies as a motion to compel, can wait until the hearing on summary judgment to assert the other party's failure to comply with requested discovery. In the case before us, considering the short period of time between the serving of the answers to the interrogatories and the hearing on summary judgment, coupled with plaintiff's apparent reliance on some agreement that Integon would provide further answers to these interrogatories, we cannot conclude that plaintiff has been dilatory. Therefore, at this early stage summary judgment was improper and both parties should have the opportunity to further develop the facts on the issue of agency.

Upon remand, the trial court should determine whether Integon, in answering plaintiff's interrogatories, has complied with Rule 33(a), N.C. Rules of Civil Procedure. The trial court should also permit further discovery by either party consistent with the provisions of Rule 26(d), N.C. Rules of Civil Procedure. Accordingly, we reverse the trial court's entry of summary judgment and remand this matter for further proceedings consistent with our decision herein.

Reversed and remanded.

Judges WELLS and LEWIS concur.

TIMOTHY S. HOLLOWAY, JR., PLAINTIFF v. WACHOVIA BANK & TRUST COMPANY, N.A., DEFENDANT, AND WACHOVIA BANK & TRUST COMPANY, N.A., THIRD-PARTY PLAINTIFF v. MARCIA CRISP COLEMAN, INDIVIDUALLY AND IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF ROUNTREE CRISP, SR., THIRD-PARTY DEFENDANT

No. 915SC294

(Filed 3 December 1991)

Gifts § 1 (NCI3d)— certificate of deposit—language of agency—elements of gift absent

The trial court properly granted summary judgment for defendant in an action to recover the amount of a certificate of deposit plus interest where the certificate was found in the safe deposit box of Rountree Crisp after his death; the

certificate was issued to "Timmy S. Holloway, Jr. by Rountree Crisp, Agent"; plaintiff's mother and grandmother endorsed the certificate as administratrices of Mr. Crisp's estate; defendant paid them upon the endorsement; and plaintiff brought this action upon his majority. Each of the elements of a gift *inter vivos* fails in that Mr. Crisp's intent to relinquish control is negated by the portion of the statement found on the certificate, "by Rountree Crisp, Agent," which is indicative of an intent to retain some degree of control; neither plaintiff nor his mother was aware of the existence of the certificate until it was found in the safe deposit box, so that no delivery, actual or constructive, occurred; and none of the statutory provisions applicable to certificates of deposit have bearing upon this situation. The language on the certificate of deposit is that of an agency and, when Mr. Crisp died, the agency terminated and the funds became a part of his estate.

Am Jur 2d, Agency §§ 17 et seq.; Banks §§ 455 et seq.; Gifts §§ 17, 20 et seq.

Delivery of personalty to third person with directions to deliver to donee after donor's death as valid gift. 57 ALR3d 1083.

APPEAL by plaintiff from order entered 14 December 1990 by *Judge Ernest B. Fullwood* in NEW HANOVER County Superior Court. Heard in the Court of Appeals 17 October 1991.

On 13 October 1975 defendant issued a $20,000.00 certificate of deposit, No. 197633, to "Timmy S. Holloway, Jr. by Rountree Crisp, Sr., Agent." Plaintiff was a minor at the time of issuance. The certificate of deposit was found in Mr. Crisp's safe deposit box after his death on 5 April 1978. On 11 April 1980 Marcia Crisp Coleman, plaintiff's mother, and Mrs. Crisp, plaintiff's grandmother, endorsed the certificate of deposit as administratrices of Mr. Crisp's estate. Defendant paid them upon this endorsement.

Plaintiff demanded payment from defendant for the face amount of the certificate of deposit plus accrued interest after obtaining his majority on 5 September 1987. Following defendant's refusal to comply, plaintiff filed this action. From the trial court's order granting summary judgment for defendant, plaintiff appeals.

Maupin Taylor Ellis & Adams, P.A., by Karon B. Thornton, Daniel K. Bryson and James E. Gates, for plaintiff-appellant.

Stevens, McGhee, Morgan, Lennon & O'Quinn, by Richard M. Morgan, for defendant-appellee.

No brief filed by third-party defendant Marcia Crisp Coleman.

ARNOLD, Judge.

Plaintiff contends the trial court erred in denying his motion for summary judgment and allowing defendant's motion for summary judgment as to the proceeds of the certificate of deposit issued to "Timmy S. Holloway, Jr. by Rountree Crisp, Sr., Agent." No triable issue of fact exists and neither party disputes the case is appropriate for summary judgment.

Ownership of the certificate of deposit is controlled by the law of gifts. The burden of proof is upon plaintiff to show each element of the gift *inter vivos*. *Fesmire v. First Union Nat. Bank of N.C.*, 267 N.C. 589, 148 S.E.2d 589 (1966).

> The essential elements of a gift *inter vivos* are: (1) the intent by the donor to give the donee the property in question so as to divest himself immediately of all right, title and control therein; and (2) the delivery, actual or constructive, of the property to the donee. 6 Strong's N.C. Index 3d, Gifts § 1 (1977).

Plymouth Pallet Co., Inc. v. Wood, 51 N.C. App. 702, 704, 277 S.E.2d 462, 464, *review denied*, 303 N.C. 545, 281 S.E.2d 393 (1981).

Each of these elements fails in regard to the certificate of deposit. Mr. Crisp's intent to relinquish control is negated by the portion of the statement found on the certificate of deposit, "by Rountree Crisp, Sr., Agent." Such language is indicative of an intent to retain some degree of control over the certificate of deposit. Neither plaintiff nor his mother was aware of the existence of the certificate of deposit until it was found in Mr. Crisp's safe deposit box after his death. No delivery, actual or constructive, occurred.

Of the various statutory provisions applicable to certificates of deposit, none have bearing upon this situation. North Carolina General Statute § 41-2.1(a) (1984) requires a signed writing that expressly provides for the right of survivorship. *O'Brien v. Reece*, 45 N.C. App. 610, 263 S.E.2d 817 (1980). "This statute applies to

the purchase of certificates of deposit, and has been strictly construed." *Napier v. High Point Bank & Trust Co.*, 100 N.C. App. 390, 393, 396 S.E.2d 620, 622 (1990) (citation omitted). Mr. Crisp did not fill out or sign the survivorship provision on the certificate of deposit.

Nothing in the record suggests Mr. Crisp attempted to establish either a trust account pursuant to N.C. Gen. Stat. § 53-146.2 (1990) or a personal agency account pursuant to N.C. Gen. Stat. § 53-146.3 (1990). There is no evidence of a transfer or assignment of a present beneficial interest. Nor does the language used comply with the requirements of a will. N.C. Gen. Stat. § 31 (1984).

In an analogous situation to the case *sub judice*, an individual deposited money in an account in the name of himself "or" another person.

> [T]he term "or," absent evidence of a separate agreement or a gift, merely creates an agency in the other person to withdraw such funds, and upon the depositor's death the agency terminates and the funds become a part of the depositor's estate. *Hall v. Hall*, 235 N.C. 711, 71 S.E.2d 471 (1952); *Nannie v. Pollard*, 205 N.C. 362, 171 S.E.2d 341 (1933). Thus, in this case, nothing in the certificate of deposit serves to comply with G.S. 41-2.1(a) requiring a signed writing that expressly provides for the right of survivorship.

O'Brien, 45 N.C. App. at 618, 263 S.E.2d at 821. There is no evidence plaintiff provided any funds for the purchase of the certificate of deposit. The language on the certificate of deposit is that of an agency. When Mr. Crisp died, the agency terminated and the funds became a part of his estate.

In view of the foregoing discussion, we decline to address plaintiff's second contention. The trial court's order is affirmed.

Affirmed.

Judges COZORT and LEWIS concur.

IN THE MATTER OF: THE APPEAL OF FORSYTH COUNTY AND ITS ASSESSOR CONCERNING THE APPRAISAL OF CERTAIN PROPERTY OWNED BY TURNPIKE PROPERTIES, INC. (RAMADA INN NORTH) BY THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1988

No. 9110PTC13

(Filed 3 December 1991)

Taxation § 25.11 (NCI3d)— property tax—appeal by county to Property Tax Commission—no standing

The Property Tax Commission properly dismissed the appeal of petitioner Forsyth County and its assessor from the State Board of Equalization and Review. It is clear by language contained in N.C.G.S. § 105-290(b) that the Legislature intended the right of appeal in these cases to extend only to taxpayers or those persons who have ownership interests in the property subject to taxation. In this case, Forsyth County is neither a taxpayer nor a person having ownership interest in the property subject to taxation, and the language of the new statute conspicuously omits a right of appeal to the Commission by a county or any county official on behalf of a county.

Am Jur 2d, State and Local Taxation §§ 807, 810, 1142.

Standing of one taxpayer to complain of underassessment or nonassessment of property of another for state and local taxation. 9 ALR4th 428.

APPEAL by Forsyth County and its tax assessor from an order of the North Carolina Property Tax Commission entered 10 October 1990. Heard in the Court of Appeals 14 October 1991.

This is an appeal from the North Carolina Property Tax Commission (hereinafter the Commission), sitting as the State Board of Equalization and Review (hereinafter the Board). Petitioner Forsyth County and its assessor appeals the Commission's order dismissing petitioners' appeal from the Board. In 1988, the Forsyth County Tax Assessor valued property held by Turnpike Properties, Inc. at $3,285,700 for tax purposes. Turnpike Properties appealed this assessment to the Board and on 18 April 1989, the Board rendered a decision reducing the assessed value of property owned by Turnpike Properties, Inc. from $3,285,700 to $2,035,000.

Petitioners filed notice of appeal and application for hearing with the Commission. Respondent, Turnpike Properties, Inc., filed a motion to dismiss. The Commission granted Turnpike's motion to dismiss petitioners' appeal, finding petitioners lacked standing to appeal a decision of the Board. Petitioners appeal.

Davida W. Martin and P. Eugene Price, Jr., for petitioner-appellants.

Petree Stockton & Robinson, by G. Gray Wilson and Urs R. Gsteiger, for respondent-appellee.

WELLS, Judge.

Petitioners bring forth fourteen assignments of error for our review. They do not address their first, seventh and thirteenth assignments of error in their brief and they are therefore deemed abandoned. N.C.R. App. P., Rule 28. Petitioners contend the Commission erred in concluding that N.C. Gen. Stat. § 105-290(b) does not give petitioners the right to appeal from a decision of the local County Board of Equalization and Review. We disagree. The language set out in N.C. Gen. Stat. § 105-290(b) being dispositive to the issue of petitioners' right to appeal to the Commission, we limit our discussion to petitioners' assignments which address this issue.

N.C. Gen. Stat. § 105-290(b) provides:

> (b) *Appeals from Appraisal and Listing Decisions.*—The Property Tax Commission shall hear and decide appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review and boards of county commissioners. *Any property owner* of the county may except to an order of the county board of equalization and review or the board of county commissioners concerning the listing, appraisal, or assessment of property and appeal the order to the Property Tax Commission. (Emphasis added.)

Petitioners contend the language "any property owner" found in N.C. Gen. Stat. § 105-290(b) can be construed to include the county itself because the county owns property within its own boundaries. However, this argument fails to recognize the restrictions found in N.C. Gen. Stat. § 105-290(b)(1), which states in pertinent part:

> In such cases, *taxpayers and persons having ownership interests in the property subject to taxation* may file separate appeals or joint appeals at the election of one or more of the taxpayers. (Emphasis added.)

It is clear by the language contained in this paragraph that the Legislature intended the right of appeal in these cases to extend only to taxpayers or those persons who have ownership interests in the property subject to taxation. In this case, Forsyth County is neither a taxpayer nor a person having ownership interest in the property subject to taxation.

The intent of our Legislature to restrict the class of persons who may appeal such cases to the Commission is evidenced by the repealing of former N.C. Gen. Stat. § 105-324(b). This statute allowed a "property owner of a county or *member of the board of county commissioners or board of equalization and review*" to appeal to the Commission. (Emphasis added.) This statute was repealed effective January 1, 1988 and appeals in such cases are now governed by N.C. Gen. Stat. § 105-290(b). The language of the new statute conspicuously omits a right of appeal to the Commission by a county or any county official on behalf of a county. *Compare In re Appeal of Moravian Home, Inc.*, 95 N.C. App. 324, 382 S.E.2d 772, *rev. denied and appeal dismissed*, 325 N.C. 707, 388 S.E.2d 457 (1989) (holding that neither county nor county tax assessor had standing under former statute to appeal to the Tax Commission from the decision of its County Board of Equalization and Review). Petitioners failed to show any statutory right to appeal to the Commission and we therefore affirm the dismissal of this appeal.

Affirmed.

Judges PARKER and WYNN concur.

IN THE MATTER OF ATTORNEY BARRY NAKELL

No. 9016SC403

(Filed 17 December 1991)

1. **Contempt of Court § 21 (NCI4th)— disruption of court by attorney—criminal contempt hearing—refusal to recuse**

The trial judge did not err by denying Nakell's motion for the judge to recuse himself from a criminal contempt hearing where the contempt was committed before the judge but the record reveals no bias, prejudice, or proof that would require the judge to recuse himself from conducting a hearing. The interview with the press cited by Nakell as an indication of bias occurred after the finding of contempt.

Am Jur 2d, Contempt §§ 187, 188, 190, 191.

Disqualification of judge in state proceedings to punish contempt against or involving himself in open court and in his actual presence. 37 ALR4th 1004.

2. **Contempt of Court § 15 (NCI4th)— criminal contempt—hearing two days after incident—substantially contemporaneous**

A criminal contempt hearing was substantially contemporaneous as required by N.C.G.S. § 5A-14 where the conduct occurred late in the afternoon of 14 November 1989; at the request of the person charged with contempt, Nakell, the court gave Nakell a specification of contempt and set a hearing for Nakell to return for a further consideration of the matter on 16 November at 2:30 p.m.; and it is clear that the hearing on 16 November was in continuation and was substantially contemporaneous with the events of 14 November.

Am Jur 2d, Contempt § 217.

3. **Contempt of Court § 24 (NCI4th)— criminal contempt—obstruction of proceeding by attorney—sufficiency of evidence**

The arguments of a criminal contempt defendant, attorney Nakell, relating to the court's refusal to hear Nakell were meritless where his argument was based on the premise that Hatcher was Nakell's client and there was nothing in the record to support that assumption. The record demonstrates conclusively that Nakell did not represent Hatcher, that Nakell did not

have a client, and that Nakell was an interloper at the time he entered the courtroom and seated himself beside Hatcher.

Am Jur 2d, Contempt §§ 67, 193, 208.

4. **Contempt of Court § 24 (NCI4th)— criminal contempt— disruption of proceeding by attorney—sufficiency of findings**

Although a criminal contempt defendant, attorney Nakell, contended that the findings and the evidence failed to support the trial judge's conclusions that Nakell willfully disobeyed the court, intended that his conduct should be disruptive, and in fact disrupted the proceeding and impaired the respect due the court, the record manifests that Nakell intended to disrupt the proceeding when he, as an interloper, continually interrupted the proceeding by attempting to argue matters not then being considered; the trial judge repeatedly ordered Nakell to sit down and be quiet; Nakell nevertheless willfully disobeyed the order and continued to interfere and disrupt the proceeding; Nakell's language, conduct and attitude precipitated a violent outburst from Hatcher and applause from Hatcher's supporters in the courtroom; and Hatcher's outbursts halted the proceeding and he had to be removed from the courtroom, bound and gagged.

Am Jur 2d, Contempt §§ 67, 212, 213.

APPEAL by defendant Barry Nakell from *Lake (I. Beverly, Jr.), Judge*. Order entered 17 November 1989 in Superior Court, ROBESON County. Heard in the Court of Appeals 19 August 1991.

Barry Nakell (hereinafter "Nakell"), a member of the North Carolina State Bar and a professor at the University of North Carolina School of Law, was held in direct criminal contempt as a result of his conduct in a proceeding before Judge I. Beverly Lake, Jr. on 14 November 1989.

The record discloses the following: On 26 January 1989, Judge Anthony Brannon entered an order which transferred the cases and legal representation of defendant Eddie Hatcher (hereinafter "Hatcher") to Angus Thompson, Chief Public Defender of the 16th Judicial District. On 5 September 1989, Judge Robert Farmer entered an order which stated that the Public Defender of Judicial District 16B was the only counsel of record for Hatcher, and that out-of-state attorneys William M. Kunstler and Ronald Kuby had never been

properly admitted to practice *pro hac vice* or acquired eligibility to appear in this case and thus were not permitted to represent Hatcher in any proceeding or trial of his case. On 6 September 1989, Judge Farmer entered an order which stated that if Hatcher planned to represent himself without the assistance of counsel that he be returned to the court for inquiry pursuant to G.S. 15A-1242 prior to any further proceeding. That order also stated that Angus Thompson, Public Defender of Judicial District 16B, was counsel of record for Hatcher until the court received in writing from Hatcher a statement that he planned to represent himself and did not wish to have the services of the Public Defender, or that he had retained counsel licensed in North Carolina along with the name and address and a notice of a general appearance filed by said attorney with the court. On 16 October 1989, Judge Farmer entered an order which stated that G.S. 84-4.1 had not been complied with and the court was without power to allow or reject the applications or motions by the said out-of-state attorneys to appear in Hatcher's case, and that the Public Defender of Judicial District 16B was still counsel of record for Hatcher.

On 14 November 1989, a pre-trial hearing was held by Judge Lake in the Superior Court, *State of North Carolina v. Hatcher*, to consider a motion by Hatcher to represent himself, as well as defendant's motion for reconsideration of the order removing counsel from the defense team. At the hearing, Hatcher was represented by the Public Defender, Angus Thompson. After the hearing began, Nakell entered the courtroom and sat beside Hatcher. While Judge Lake was explaining the "predicate" for the hearing, Nakell, who did not represent Hatcher, interrupted and stated:

> MR. NAKELL: Your Honor, before the Court addresses that, may I be heard briefly? My name is Barry Nakell, Your Honor."
>
> THE COURT: "No, sir, not at this—not at this time."
>
> THE DEFENDANT: "May I be heard, Your Honor?"
>
> THE COURT: "No sir, not at this point."
>
> THE DEFENDANT: "I would like to ask—
>
> THE COURT: I said no, sir, not at this point.
>
> THE DEFENDANT: But I will be allowed to be heard, won't I?

THE COURT: Yes, sir.

THE DEFENDANT: I appreciate that. Thank you.

Judge Lake continued to state the "predicate" and the order for consideration of matters before the court. Nakell again interrupted and asked to be heard regarding a notice of limited appearance he filed for the proceeding that morning. Judge Lake stated: "As I have already indicated, [the notice] is not in compliance in this Court's considered opinion with the order of September 6th entered by Judge Farmer." Judge Lake and Nakell continued to discuss the prior orders briefly, concluding with the following interchange:

THE COURT: No sir, Mr. Nakell, I'm not going to hear you.

MR. NAKELL: But I simply want to point out, Judge, that there are—

THE COURT: I said I'm not going to hear you. Sit down. Sit down.

THE DEFENDANT: Stand.
Well, if he ain't going to be heard, I'm going to be heard.

THE COURT: The only attorney of record—

THE DEFENDANT: What was the ex parte conference you had with the district attorney prior to this hearing? An ex parte conference you and Mr. Townsend had?

THE COURT: Do you want to be removed from this courtroom?

MR. NAKELL: Your Honor, I simply want to point out that the difficulty in that perspective is that there are two orders. There are conflicting orders in this case.

THE COURT: I said sit down. Mr. Nakell. That's a direct order from the Court.

MR. NAKELL: Your Honor—

THE DEFENDANT: Argue.

THE COURT: Do you want to be held in direct criminal contempt of this Court?

THE DEFENDANT: This is not a court, you're a racist, segregated, son-of-a-bitch you.

THE COURT: Mr. Nakell.

MR. NAKELL: Your Honor, in a very polite manner, I'm simply trying to be of assistance to the Court.

THE COURT: I am directing you specifically to sit down and be quiet.

At this point in the hearing, the Public Defender and Hatcher questioned Judge Lake about the prior orders in the case. The trial judge warned Hatcher that if he continued to "insist on interrupting the Court, I'll sit you down in that chair and I'll have you bound and gagged." The Public Defender resumed addressing the previous order, and Nakell again interrupted to give his opinion on this matter. After some discussion with the court, the following exchange took place:

THE COURT: Judge Farmer, Mr. Nakell—and, again, I'm going to direct you not to interrupt me now. If you want to—

MR. NAKELL: I'm sorry. I thought you had finished, Your Honor.

THE COURT: If you want to pose a question to the Court, you do so through Mr. Thompson.

MR. NAKELL: Your Honor, I'm—I'm a little bit in limbo in this because Judge Farmer did not address the question of my participation.

THE COURT: Well, I am doing so.

MR. NAKELL: I don't understand any basis—

THE COURT: I am doing so now. The Court does not recognize your representation of this defendant.

MR. NAKELL: May I inquire, Your Honor, about the basis for that so that I can understand—

THE COURT: Judge Farmer's order.

MR. NAKELL: —what I need to do?

THE COURT: Judge Farmer's order.

THE DEFENDANT: You said his order was only in effect while he was here. He's gone. That's what you said.

THE COURT: Judge Farmer's order.

MR. NAKELL: Judge Farmer, Your Honor, in open court in the hearing on September the 5th did, in fact, say something about my not being able to appear; but none of his written orders addressed my participation in the case at all, and I don't understand any basis for precluding me—

THE COURT: Well, let me see if I can make you understand, Mr. Nakell. I am denying your request for a limited appearance on behalf of this defendant and I'm directing you to sit down and be quiet and not say another word to the Court except if you want to say something, do it through Mr. Thompson.

MR. NAKELL: All right. Mr. Thompson, would you inquire about the basis—legal basis for a licensed North Carolina attorney from appearing on behalf of a defendant in a criminal case in association with a public defender—

THE COURT: Mr. Nakell.

MR. NAKELL: —to assist on—

THE DEFENDANT: I'll fuck you.

MR. NAKELL: Would you make that inquiry, Mr. Thompson?

THE DEFENDANT: Make that inquiry please, Mr. Thompson.

THE COURT: All right. Mr. Bailiff, remove this man from the courtroom and hold him for further action by the Court.

Nakell was escorted from the courtroom, at which point Hatcher threw a pen at the bench and said, "Cite me. Hit me with something." Judge Lake replied, "All right. Mr. Bailiff." Hatcher retorted, "You son of a bitch'n, racist, motherfucker—." Judge Lake then asked the court reporter to take note that Hatcher had thrown something at the bench and requested the bailiff to take Hatcher out and have him bound and gagged.

At the conclusion of the pre-trial hearing, Nakell was brought back to the courtroom and advised by the court of the following specific conduct considered to be in direct criminal contempt: (1) refusal to sit down after a direct order to do so; (2) refusal to be quiet after a direct order to do so; (3) continual interruption of the presiding judge by speaking over the voice of the court; (4) disrupting the court proceedings; (5) unduly prolonging the court proceedings; and (6) pandering to the courtroom audience and encouraging Hatcher to be disruptive to the court. Judge Lake directed

defendant to return and respond to the charges by the court on 16 November 1989.

At the hearing on 16 November 1989, Nakell moved the trial court to continue the matter so as to "place it before another judge." The court denied the motion, noting that the proceeding was a continuation of the hearing on 14 November 1989 which "could have been summarily adjudicated and determined by the court at that time," but in deference to Nakell, was continued until 16 November 1989 to afford Nakell notice and an opportunity to be heard.

Thereafter, Judge Lake made findings of fact and conclusions of law which except where quoted are summarized as follows: That on 14 November 1989, Hatcher appeared with court-appointed counsel, Mr. Angus Thompson, the Public Defender, and Assistant Public Defender Freda Bowman. The State was represented by District Attorney Richard Townsend. The court also found that while recognizing the persons present representing the various parties, and beginning to "state the predicate" for the hearing, Nakell entered the courtroom, approached and sat at counsel table with Hatcher.

The court found that while attempting to "state the predicate" and the court's understanding of the previous orders entered in the case and while trying to establish the order for consideration of the matters before the court, Nakell addressed Judge Lake at least three times and "was told by the Court, (following the initial communication that he would not be heard at that time) to sit down and be quiet with the Court specifically warning the Respondent [Nakell] against direct criminal contempt." The court further found that Nakell "on at least three occasions refused to do so and continued to address the Court . . . all of which considerably delayed the Court and interrupted the Court's statement of the predicate or matters before the Court and the order in which the Court desired to hear them." Judge Lake also found "that it was made abundantly clear on several occasions to Mr. Nakell that the Court was recognizing Attorney Angus Thompson as the only attorney of record for the Defendant, Eddie Hatcher, and that the Court was not recognizing Mr. Nakell, and was not accepting his limited appearance" because it did not comply with the 6 September order entered by Judge Farmer.

The court also found "that there was not and could not have been any misunderstanding in the mind of Mr. Nakell as to the Court's ruling and that he was not being recognized by the Court and that the Court desired him to sit down and be quiet." The findings state that after Judge Lake reaffirmed the orders of Judge Farmer and made clear that Mr. Nakell did not have standing in the court, that Nakell "completely ignored the Court's ruling and further proceeded to address the court and make arguments . . . ." The court again ordered Nakell to sit down and directed him not to interrupt. Nakell was then specifically directed to make any communication to the court through the Public Defender, and Judge Lake found that from his observation and in light of the foregoing findings, that "Nakell fully understood what was said to him by the court and the import of that directive." Judge Lake found that thereafter Nakell again interrupted and the court advised him that it was denying his request for a limited appearance and directed Nakell to sit down and be quiet and not say another word to the court except through the Public Defender. The court further found that Nakell did not sit down, turned sideways to the Public Defender, and in the same tone of voice and with the same volume asked the same repeated question and argument regarding the legal basis for the ruling which had already been explained to him. When Judge Lake tried to interject, the findings state that Nakell refused to heed the court and continued with his statement to the court while looking at the Public Defender.

Judge Lake found at that point, with the court directing the bailiff to remove Nakell, Nakell made a statement to the Public Defender which resulted in substantial applause from the supporters of Hatcher in the audience. The effect on Hatcher of Nakell's statement was further obscenities directed toward the court followed by Hatcher resorting to violence with an attack upon the court by throwing a pen or some other object which struck the bench. The court also found that upon close and direct observation of the entire sequence of events, that the conduct of Nakell, including the tone and volume of his voice and expression on his face, was the direct cause of the disturbance and applause from the audience and was the direct cause of Hatcher's behavior in exceeding his previous attacks on the court by his language and launching into a violent attack upon the court. Judge Lake concluded by finding that all of the foregoing occurred in the direct view and observation of the court, that the conduct of Nakell was "willfully

contemptuous, was deliberate and calculated and designed to disrupt the proceedings of the court," and that the foregoing acts of Nakell "were preceded by numerous distinct, direct and clear warnings by the Court that the conduct was improper."

Based on these findings of fact, the court made the following conclusions of law:

> 1. The conduct of Attorney Barry Nakell constituted willful behavior committed during the sitting of a Court and directly tended to interrupt its proceedings.
>
> 2. The conduct of Attorney Barry Nakell constituted willful behavior committed during the sitting of a Court in its immediate view and presence and directly tended to impair the respect due the authority of the Court.
>
> 3. The conduct of Attorney Barry Nakell constituted willful disobedience of and resistance to or interference with a Court's lawful direction and order.

The court found Nakell guilty of direct criminal contempt in violation of G.S. 5A-11(a). From a judgment imposing a fine of $500 and imprisonment for ten days in the custody of the Sheriff of Robeson County, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John H. Watters, and Assistant Attorney General David F. Hoke, for the State.

Smith, Patterson, Follin, Curtis & James, by Norman B. Smith, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Nakell first contends Judge Lake erred in denying his motion for the judge to recuse himself from the hearing on 16 November 1989. Nakell argues that "North Carolina statutory and case law establish that a judge *must* disqualify himself upon motion of a party if he is unable to render an impartial decision because of prejudice or a reasonable suspicion of his impartiality."

G.S. 15A-1223(b) in pertinent part provides:

> A judge on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is: (1) prejudiced against the moving

> party or in favor of the adverse party; or . . . (4) for any other reason unable to perform the duties required of him in an impartial manner.

The standard to be applied when a defendant makes a motion that a judge be recused places "the burden on the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). Due process standards require that where the trial judge is so embroiled in a controversy with the defendant that there is a likelihood of bias or an appearance of bias, the judge may be "unable to hold the balance between vindicating the interests of the court and the interests of the accused," and should recuse himself from the proceeding. *In re Paul*, 28 N.C. App. 610, 618, 222 S.E.2d 479, 484, *cert. denied*, 289 N.C. 614, 223 S.E.2d 767 (1976), *citing*, *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed. 921 (1964).

In the present case Judge Lake addressed the issue of his personal involvement at the proceeding on 16 November 1989 as follows:

> Personally, what Mr. Nakell said and did, did not bother me. It bothered me as a lawyer and it bothered me as a judge. It bothered me as an officer of the Court and the State presiding over a courtroom in a highly volatile situation . . . . I'm not concerned with the several times that I told Mr. Nakell to sit down and be quiet before we had several long exchanges . . . except . . . as it bears on what happened later . . . . What bothers me and why I had Mr. Nakell removed was with all that predicate, he then turned, in what I saw and perceived to be a most disrespectful manner, to Mr. Thompson after being directly ordered to sit down and be quiet and not address the Court, but to communicate only through Mr. Thompson, he refuses to do that, remains standing and in a loud voice directs again his same inquiry to the Court but by looking at Mr. Thompson and saying, 'Mr. Thompson will you ask.' . . . It was at that point that I saw I had no alternative but to remove Mr. Nakell. And the immediate effect of that, the bailiffs coming up, following the outburst from the audience, was the violent attack . . . by Eddie Hatcher against the Court.

Nakell argues "the most salient indication of this [Judge Lake's] bias is his telling a newspaper reporter, before Mr. Nakell's hearing, that he had warned Mr. Nakell three times before having him removed, and that Mr. Nakell had been 'disruptive of the proceedings,' 'pandering to the audience and the defendant [Hatcher],' and encouraging Mr. Hatcher to be disruptive." Nakell asserts that he was convicted in the press before the hearing and the trial judge should have recused himself based on this prejudgment of the merits.

Our examination of the record reveals no bias, prejudice, or proof that would require the judge before whom the contempt was committed to recuse himself from conducting a hearing. The interview with the press occurred after the finding of contempt on 14 November 1989 and the ruling made by the trial judge at that proceeding was tantamount to a finding of contempt, and thus prejudgment could not have occurred. Thus, we hold Judge Lake did not err in denying Nakell's motion that he disqualify himself.

[2] Defendant Nakell's next argument, Assignment of Error No. 1, is set out in the record as follows:

> 1. Did the trial court on November 16, 1989, err in conducting an evidentiary hearing and imposing punitive measures against the defendant on account of alleged misconduct occurring on November 14, 1989, purportedly under its summary contempt authority established by G.S. § 5A-14, when such action was not necessary to restore order or maintain the dignity and authority of the court and when the measures imposed were not imposed substantially contemporaneous with the alleged contempt?

Nakell argues in his brief the hearing conducted on 16 November 1989 was not "in continuation" of the 14 November 1989 hearing and therefore the "measures" were not "imposed substantially contemporaneously with the contempt" as required by G.S. 5A-14.

> N.C.R. App. P. 10(c)(1) provides in pertinent part:
>
> 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 argument, 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.

While Nakell's first assignment of error is in clear violation of the rule, and is subject to a dismissal, because of the serious nature of this case, we will respond to Nakell's contentions with respect to this assignment of error.

This Court addressed this question in *State v. Johnson*, 52 N.C. App. 592, 279 S.E.2d 77, *disc. review denied and appeal dismissed*, 303 N.C. 549, 281 S.E.2d 390 (1981). There, we held that the term "substantially contemporaneously" is construed in the light of its legislative purpose—that is to meet due process safeguards. We held that "[t]he word 'substantially' qualifies the word 'contemporaneously' and clearly does not require that the contempt proceedings immediately follow the misconduct." We further noted that factors bearing on the time lapse included the contemnor's notice or knowledge of the misconduct, the nature of the misconduct and other circumstances that may have some bearing on the right of the defendant to a fair and timely hearing.

In the present case, the conduct of Nakell which gave rise to his being held in direct criminal contempt occurred late in the afternoon of 14 November 1989. At Nakell's request, the court gave him "specification of the contempt" and set a hearing for Nakell to return "for a further consideration of this matter by the Court" on 16 November at 2:30 p.m. It is clear that the hearing on 16 November was in continuation and was "substantially contemporaneous" with the events of 14 November. Indeed, Judge Lake, at the hearing on 16 November, explained that the hearing was pursuant to G.S. 5A-14 and had been continued to 16 November "to afford Attorney Nakell adequate opportunity to respond to the direct criminal contempt charge." Clearly under the circumstances of the case, we find no conceivable error or prejudice to Nakell.

[3] By Assignment of Error No. 4, Nakell contends there is insufficient evidence to prove beyond a reasonable doubt that he violated a clear order, that he acted with willful intent to obstruct the proceedings, and that his conduct materially obstructed the proceedings as to constitute criminal contempt. This assignment of error is purportedly based on exceptions to Findings of Fact Nos. 4-14, Conclusions of Law Nos. 1-3, and the order entered.

We note at the outset that most of Nakell's argument in support of this assignment of error is based on the premise that Hatcher was Nakell's client. There is nothing in the record before us to support this assumption. In fact, the record demonstrates conclusively that Nakell did not represent Hatcher, that Nakell did not have a client, and that Nakell was an interloper at the time he entered the courtroom on 14 November and seated himself beside Hatcher. Indeed, Judge Lake found as a fact that the court made it abundantly clear to Nakell that Angus Thompson was the only attorney of record for Hatcher, that Nakell was not recognized by the court as having standing in the court, and that the court was not accepting his limited appearance. This finding of fact, although excepted to by Nakell, is not challenged in his brief. As stated before, Nakell merely assumes that he had a client. Thus, all of defendant's arguments relating to the court's refusal to hear Nakell are meritless.

[4] The balance of Nakell's argument in his brief in support of Assignment of Error No. 4 raises the question of whether the findings of fact and evidence support the conclusions of law and the order entered.

G.S. 5A-11(a) provides instances of criminal contempt. These include:

> (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
>
> (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
>
> (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

Criminal contempts are crimes, and therefore the accused is entitled to the benefits of all constitutional safeguards. *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985). Evidence is sufficient to support a conviction if there is substantial evidence of every element of the crime. *State v. Jordan*, 321 N.C. 714, 365 S.E.2d 617 (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Erwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981). Conduct which is designed and reasonably calculated to interrupt the pro-

ceedings of the court then engaged in the administration of justice and the dispatch of business presently before it is punishable as criminal contempt. *State v. Little*, 175 N.C. 743, 94 S.E. 680 (1917).

Nakell argues the record, the findings of fact, and the evidence fail to support the three conclusions of law drawn from the findings of fact made by Judge Lake. He contends that there is no support for the conclusion that he willfully intended that his conduct should be disruptive, or that the proceeding was disrupted in any way, nor that his conduct impaired the respect due the authority of the court, nor that he willfully and intentionally disobeyed, resisted and interfered with a lawful direction and order of the court.

The record before us manifests that Nakell intended to disrupt the proceeding wherein he, as an interloper, continually interrupted the proceeding by attempting to argue matters not then being considered. The trial judge repeatedly ordered Nakell to sit down and be quiet. Nevertheless, Nakell willfully disobeyed the order and continued to interfere and disrupt the proceeding. Nakell not only intended that his conduct should disrupt the proceeding, it did in fact do so. His language, conduct, and attitude precipitated the violent outburst from Hatcher and applause from Hatcher's supporters in the courtroom. Hatcher's outbursts halted the proceeding and he had to be removed from the courtroom, bound and gagged. We cannot imagine a scenario more calculated to disrupt the proceeding and to impair the respect due the authority of the court.

We find no error in the proceeding and affirm the order dated 17 November 1989 adjudging Barry Nakell to be in direct criminal contempt and ordering him to pay a fine of $500 and be imprisoned for ten days in the custody of the Sheriff of Robeson County.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

Judge Phillips concurred in this decision prior to his retirement on 1 October 1991.

SYLVIA ADAIRE FOGL SALT v. APPLIED ANALYTICAL, INC.

No. 915SC336

(Filed 17 December 1991)

1. **Master and Servant § 10.2 (NCI3d)— employee discharge—violation of personnel manual—no breach of contract**

The trial court properly granted summary judgment for defendant employer on plaintiff's claim for breach of her employment contract based on defendant's failure to follow the disciplinary procedures outlined in its personnel manual when it terminated plaintiff's employment where the evidence before the court showed that the personnel manual cannot be considered as part of plaintiff's contract of employment.

Am Jur 2d, Master and Servant §§ 48.3, 48.5.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge. 33 ALR4th 120.

2. **Master and Servant § 10.2 (NCI3d)— employment handbook—*no unilateral contract***

An employment handbook does not constitute a unilateral contract which will give rise to a breach of contract action.

Am Jur 2d, Master and Servant §§ 48.3, 48.5.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge. 33 ALR4th 120.

3. **Master and Servant § 10.2 (NCI3d)— wrongful discharge—no additional consideration—employment at will applicable**

Plaintiff did not contribute additional consideration which would remove her employment from the scope of the employment at will doctrine where she failed to show that her move from Greenville to accept employment by defendant in Wilmington was induced by assurances concerning the duration of her employment or the discharge policies of defendant employer.

Am Jur 2d, Master and Servant §§ 32, 33.

4. Master and Servant § 10.2 (NCI3d) — wrongful discharge — bad faith — insufficient allegations

Plaintiff's allegations that defendant breached its covenant of good faith and fair dealing by disregarding its promise of a permanent job and by giving third parties false reasons for discharging plaintiff were insufficient to sustain a claim for wrongful discharge.

Am Jur 2d, Master and Servant § 43.

Modern status of rule that employer may discharge at-will employee for any reason. 12 ALR4th 544.

5. Master and Servant § 10.2 (NCI3d) — wrongful discharge — bad faith — necessity for public policy violation

There is no independent tort action for wrongful discharge of an at-will employee based solely on allegations of discharge in bad faith in the absence of a public policy violation. Furthermore, even if prior decisions created a wrongful discharge action based solely on bad faith in failing to follow personnel manual procedures, plaintiff has no cause of action against defendant because the policy manual given to her was not made an express part of her contract or made otherwise applicable to her, and her termination was not governed by the policy manual.

Am Jur 2d, Master and Servant §§ 48.3, 48.5, 48.7.

Modern status of rule that employer may discharge at-will employee for any reason. 12 ALR4th 544.

APPEAL by plaintiff from Order entered 22 January 1991 by *Judge Herbert O. Phillips, III*, in NEW HANOVER County Superior Court. Heard in the Court of Appeals in Wilmington on 17 October 1991.

Patterson, Harkavy, Lawrence, Van Noppen & Okun, by Martha A. Geer, for plaintiff appellant.

Stevens, McGhee, Morgan, Lennon & O'Quinn, by Robert A. O'Quinn, for defendant appellee.

COZORT, Judge.

Plaintiff employee brought an action for breach of employment contract and for wrongful discharge allegedly based on breach of

implied covenant of good faith and fair dealing. The trial court granted summary judgment for defendant employer. We affirm.

The depositions and other materials in the record demonstrate that, in 1985, plaintiff was employed at Burroughs Wellcome Company in Greenville, North Carolina, as a chemist testing pharmaceutical products. She held 11½ years of seniority, earned $22,000 a year, and received many company benefits. An employee of the defendant, Applied Analytical, Inc. ("AAI"), approached plaintiff about taking a chemist's position with AAI at a salary of $17,500-$18,500 per year. She declined the initial offers, but following negotiations, plaintiff accepted a position with defendant. One of the main topics discussed during the negotiations was plaintiff's need for job security. She informed defendant that if the job with AAI turned out to be unsatisfactory for either party, she would be unable to return to her job at Burroughs Wellcome, or any other pharmaceutical company, because she did not hold a four-year degree in chemistry. In response, the general manager at AAI discussed career growth with plaintiff and talked of plaintiff's future with the company in general terms. The letter from AAI's general manager confirming defendant's offer of employment stated:

> This letter is to confirm in writing my verbal offer to you of a Chemist position at Applied Analytical Industries, with an initial annual salary of $17,500.00.
>
> All of us at AAI are impressed with your qualifications and believe you can make significant contributions to our company. We hope you will accept our offer and believe you will find the position challenging and rewarding. As I indicated today during our telephone conversation, I believe the position which we are offering you will allow opportunities for your continued career growth in new areas involving method development for pharmaceutical dosage forms and bioanalytical assays for drugs in biological fluids.
>
> We would appreciate a response to our offer by April 8, 1985.

Plaintiff accepted defendant's offer and moved to Wilmington, North Carolina, where she began working for defendant in August 1985. In January, 1986, defendant granted plaintiff early tenure in the company, increased her salary by $2,000.00, and made her eligible for profit-sharing and a bonus. Plaintiff received positive evaluations from AAI supervisors after six months of employment,

and again after one year with the company. On 14 November 1986, AAI's president, Frederick Sancilio, called plaintiff into his office and presented her with a letter of termination. The letter stated plaintiff was being discharged for low productivity and for bothering other employees. Plaintiff adamantly protested the grounds for termination, reluctantly signed the letter, packed her personal belongings, and left the same day.

Plaintiff filed a complaint against defendant on 9 November 1988, alleging a claim for breach of contract. On 26 July 1989, the North Carolina Supreme Court handed down its decision in *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 381 S.E.2d 445 (1989). Based on the *Coman* decision, plaintiff moved to amend her complaint on 7 September 1989 to include a tort claim for breach of implied covenant of good faith and fair dealing. Defendant's responsive pleadings included a motion for summary judgment. The trial court granted summary judgment for defendant on 18 January 1991, and plaintiff filed timely notice of appeal.

The question before the Court when reviewing a summary judgment motion is whether 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 a material fact and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Meadows v. Cigar Supply Co.*, 91 N.C. App. 404, 371 S.E.2d 765 (1988). We consider first whether the trial court properly granted summary judgment on plaintiff's breach of contract claim.

It is clear in North Carolina that, in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971). This Court has held, however, that in some circumstances employee manuals setting forth reasons and procedures for termination may become part of the employment contract even where an express contract is nonexistent. *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).

[1] Plaintiff argues initially that defendant's personnel manual constituted part of her employment contract. She contends the contract was breached because defendant failed to follow the disciplinary procedure outlined in the manual. In her deposition, plaintiff testified

she was given a copy of AAI's personnel manual on or about her first day of work at the company. Each employee, including plaintiff, was required to sign a statement verifying the receipt of the manual. Employees were also required to sign periodic verifications acknowledging they had read revisions to the manual. According to the defendant's manual, employees were classified as either "probationary" or "tenured." An employee would be classified as probationary for the first six months of satisfactory performance. The employee then is classified as a tenured employee.

The manual made no specific reference to "employment at-will." The section of the manual describing disciplinary procedures provided: "[T]he Company reserves the right, with or without guideline notification to: Terminate an employee at any time. Suspend from work any employee . . . [or] [r]eturn to probationary status from tenured status any employee . . . ." These rights were reserved for a "severe violation" of standards or rules by a "permanent" or "tenured" employee. The handbook's illustrations of "severe violations" included, but were not limited to: "blatant safety rule violations which endanger the health and safety of the employee and/or his fellow workers, falsification of Company records or data, misappropriation or misuse of Corporate assets, soliciting or engaging in outside activities of any kind or for any purposes on Company property at any time." For non-severe violations committed by a "tenured" employee, the manual provided for a verbal warning upon the first violation and written notices for the second and third violations. A tenured employee would be terminated after a fourth non-severe violation. Plaintiff contends she never received a verbal or written notice prior to termination, in violation of the prescribed disciplinary procedure.

It is clear that "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." *Walker*, 77 N.C. App. at 259, 335 S.E.2d at 83-84. In *Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 370 S.E.2d 605, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 590 (1988), this Court found no breach of contract by an employer when the employer's personnel policies were not incorporated into the oral contract for employment. The plaintiff received the employment manual when he was hired, and was told it would be his "work bible." The manual included a salary scale, conditions of employment, expected conduct of employer and the

employee, and procedures to be followed for disciplinary actions. *Id.* at 81, 370 S.E.2d at 608. The *Rosby* court stated:

> While we are sensitive to the "strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice" as enunciated in *Westinghouse, supra*, at 259, 335 S.E.2d at 83 (1985), we find that in the case *sub judice*, the material contained within the manual was neither inflexible nor all-inclusive on the issue of termination procedures. The manual, although presented as plaintiff's "work bible" when he was hired, was not expressly included within his terminable-at-will contract.

Id.

In contrast, in *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617, *disc. review denied*, 316 N.C. 557, 344 S.E.2d 18 (1986), this Court held that plaintiff stated a claim for breach of contract based on her allegation that the employer's policy manual was part of her employment contract. There the plaintiff was required to sign a statement indicating she had read the defendant's policy manual which provided she could be discharged "for cause" only and which stated that certain procedures must be followed in order for her to be discharged. *Id.* at 760, 338 S.E.2d at 618. The plaintiff alleged she was discharged without cause and without the benefit of the personnel manual procedures. *Id.* The Court concluded that "on hearing on a Rule 12(b)(6) motion the plaintiff has sufficiently alleged that the policy manual was a part of her employment contract which was breached by her discharge to survive her motion." *Id.* at 762, 338 S.E.2d at 620.

In *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987), the North Carolina Supreme Court limited the rule in *Trought* to those specific facts. The plaintiff in *Harris* contended that his employment manual was part of his contract for employment with defendant and that he was entitled to recover for breach of contract when he was discharged in violation of the manual's provisions. *Id.* at 630, 356 S.E.2d at 358. The Court distinguished *Trought*, finding that Harris had not been told that he could be discharged only "for cause." *Id.* The Court also noted that the employment manual in *Harris* provided rules of conduct which were directed specifically toward management and not targeted at employees. *Id.*

It is clear from the evidence below that the handbook given plaintiff by defendant cannot be considered part of her original contract. As a result, plaintiff's breach of contract claim based on this theory must fail.

[2] Plaintiff next argues that the employment handbook was an independent unilateral contract made by defendant to her. She argues she is entitled to recover for defendant's breach of that unilateral contract. We disagree. North Carolina has recognized a unilateral contract theory with respect to certain benefits relating to employment. In *Brooks v. Carolina Telephone*, 56 N.C. App. 801, 290 S.E.2d 370 (1982), the Court found severance payments part of a unilateral contract. In *Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 354 S.E.2d 746, *disc. review denied*, 320 N.C. 638, 360 S.E.2d 107 (1987), the court acknowledged vacation and retirement benefits. In *White v. Hugh Chatham Memorial Hosp. Inc.*, 97 N.C. App. 130, 387 S.E.2d 80, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990), the Court accepted disability payments. However, in *Rucker v. First Union Nat'l Bank*, 98 N.C. App. 100, 389 S.E.2d 622, *disc. review denied*, 326 N.C. 801, 393 S.E.2d 899 (1990), the Court declared, "We decline to apply a unilateral contract analysis to the issue of wrongful discharge. . . . [T]o apply a unilateral contract analysis to the situation before us would, in effect, require us to abandon the 'at-will' doctrine which is the law in this State. This we cannot do." *Id.* at 103, 389 S.E.2d at 625. We find *Rucker* to be dispositive in this case.

[3] Plaintiff next alleges she contributed additional consideration which would remove the contract from the scope of the employment at-will doctrine. In *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985), this Court carved out a significant exception from the employment at-will rule. There the plaintiff did not have an employment contract and thus was employed at-will. The plaintiff's complaint alleged that she was assured by Duke she could be discharged only for "incompetence," and these assurances induced her to move from Michigan to accept a job in Durham. *Id.* at 333, 328 S.E.2d at 821. The Court stated:

> Generally, employment contracts that attempt to provide for permanent employment, or "employment for life," are terminable at will by either party. Where the employee gives some special consideration in addition to his services, such as relinquishing

> a claim for personal injuries against the employer, *removing his residence from one place to another in order to accept employment*, or assisting in breaking a strike, such a contract may be enforced. (Emphasis added.)

Id. at 345, 328 S.E.2d at 828 (quoting *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682, *disc. review denied*, 297 N.C. 298, 254 S.E.2d 918 (1979)). The Court then determined:

> The additional consideration that the complaint alleges, her move from Michigan, was sufficient, we believe, to remove plaintiff's employment contract from the terminable-at-will rule and allow her to state a claim for breach of contract since it is also alleged that her discharge was for a reason other than the unsatisfactory performance of her duties.

Id.

We find the facts below distinguishable from *Sides*. In *Sides*, the defendant assured the plaintiff "both at her job interview and again when the job was offered to her that nurse anesthetists at [the hospital] could only be discharged for incompetence." *Id.* at 333, 328 S.E.2d at 821. In the case at bar, the plaintiff cannot point to any specific assurances given to her which compare to the assurances given to the plaintiff in *Sides* that she would not be discharged except for "incompetence." The assurances upon which plaintiff here bases her breach of contract theory do not contain any specific terms or conditions, as in *Sides*. Plaintiff's deposition reveals:

> Q. When you had your discussions with [the general manager], did you tell him that you would not take the job unless you understood that you had a permanent position there?
>
> A. Not in those particular words, but—
>
> Q. What did you tell him?
>
> A. —I feel like we established the fact that if I were leaving my job at Burroughs Wellcome then I was going into a job—well, he told me he felt like I could have some career growth there, that there were things that they wanted me to do in the future as far as their microbiology lab and at the time it didn't exist but they wanted me to help them with the microbiology lab.

> And, we just talked about things that were far into the future that I couldn't just go to work there and just do.
>
> And, he felt like I had a chance for some real career growth there and, you know, that it was for a permanent job.

Furthermore, a reading of defendant's letter confirming plaintiff's employment indicates no assurances concerning the duration of plaintiff's employment or relating to the discharge policies of the company. The letter's reference to "continued career growth" does not suffice. Plaintiff can show no more than an offer of employment for an undetermined time. The trial court's entry of summary judgment on plaintiff's breach of contract claim was properly granted.

We now turn to the claims plaintiff raised by the amendment to her complaint. Plaintiff asserts a claim against defendant for breach of implied covenant of good faith and fair dealing implicit in her employment contract. Plaintiff contends that defendant breached its implied covenant of good faith and fair dealing by discharging plaintiff in violation of defendant's personnel policy, by breaching defendant's assurance of permanent employment and by communicating to third parties false reasons for discharging plaintiff. We conclude the trial court properly granted summary judgment on this claim.

In *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 381 S.E.2d 445 (1989), the North Carolina Supreme Court created an exception to the employment at-will doctrine by authorizing a tort claim for wrongful discharge for an at-will employee whose discharge is in violation of a public policy. The Court specifically approved language from *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985). The Court, quoting *Sides*, stated:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Coman, 325 N.C. at 175, 381 S.E.2d at 447 (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826). The Court defined public policy as being "the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public

or against the public good." *Id. Coman* therefore provides an exception to the employment at-will doctrine for employees who have been wrongfully discharged for an unlawful reason or for a reason which offends the public good.

In dicta, the Court, discussed the issue of firing an employee in bad faith:

> This Court has never held that an employee at will could be discharged in bad faith. To the contrary, in *Haskins v. Royster*, 70 N.C. 601 (1874), this Court recognized the principle that a master could not discharge his servant in bad faith. Thereafter, this Court stated the issue to be whether an agreement to give the plaintiff a regular permanent job was anything more than an indefinite general hiring terminable in *good faith* at the will of either party. *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E.2d 436 (1943) (emphasis added).

Id. at 176-77, 381 S.E.2d at 448.

[4] The Court also said, "Bad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." *Id.* at 177, 381 S.E.2d at 448. The plaintiff here does not contend that she has a cause of action because her termination contravened any public policy. Instead, she argues that *Coman* created a cause of action based solely on "a breach of the implied covenant of good faith and fair dealing." She contends the bad faith of the defendant is proven by defendant's disregarding its promise of a permanent job and by giving false reasons—poor performance—for her discharge. We do not find this evidence sufficient to sustain a tort claim for wrongful discharge.

In *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 382 S.E.2d 836, *disc. review denied*, 325 N.C. 546, 385 S.E.2d 498 (1989), this Court discussed whether the plaintiff there had sufficiently alleged a claim based on bad faith discharge. The plaintiff alleged that he had been fired because he struck a subordinate on the face with his hand while defending himself from an attack by the subordinate. This Court said:

> Along with the compelling public-policy concerns in those cases, moreover, the holdings in *Sides* and *Coman* are consistent with the principle that our courts do not give their imprimatur to employers who discharge employees in bad faith. . . . We cannot say, however, that defendants' actions amounted

> to bad faith. *Sides*, in language quoted with approval by our Supreme Court, noted the employer's right to terminate an at-will contract for "no reason, or for an arbitrary or irrational reason." The conduct of defendants in this case, in its worst light indifferent and illogical, does not demonstrate the kind of bad faith that prompted our courts to recognize causes of action in *Sides* and *Coman*.

McLaughlin, 95 N.C. App. at 306-07, 382 S.E.2d at 840 (citation omitted).

[5] The question presented here is whether *Sides*, *Coman*, and *McLaughlin*, read together, create a separate tort action based exclusively on discharge in bad faith, where no contravention of public policy is alleged or proven. We hold that there is no independent tort action for wrongful discharge of an at-will employee based solely on allegations of discharge in bad faith. As many have pointed out, the discussion of "bad faith" in *Coman* was pure dicta completely unnecessary to the Court's decision. *See, e.g.*, Alford, *Coman v. Thomas Manufacturing Co.*: **Recognizing a Public Policy Exception to the At-Will Employment Doctrine**, 68 N.C.L. Rev. 1178, 1192. Both *Coman* and *Sides* involved violations of public policy. Our research has not discovered a single case from a North Carolina court which has allowed a claim of wrongful discharge based solely on the theory of bad faith.

The federal courts sitting in North Carolina and applying North Carolina law to this issue are split on whether to allow bad faith discharge claims independent of public policy violations. One federal court in the Eastern District has specifically rejected the idea of permitting such a claim. In *English v. General Elec. Co.*, 765 F.Supp. 293 (E.D.N.C. 1991), the court refused to allow a plaintiff to maintain a bad faith discharge claim in the absence of an egregious public policy violation. The court reasoned:

> Despite plaintiff's assertion that North Carolina recognizes a cause of action for bad faith discharge, the court finds that the present position of the North Carolina courts is more limited. Currently, the judicially-created exception to the general rule that employees are terminable at will extends only to cases where the discharge violates some well established public policy.
>
> Clearly, the *Coman* and *McLaughlin* decisions contain language which could arguably lead to the adoption of a good

> faith requirement for discharge in future cases. However, *Coman* and *McLaughlin* are grounded solely on the premise that North Carolina has created a public policy exception to the employment at-will doctrine, and any suggestion in those cases that there is a broader prohibition against discharges in bad faith is purely dicta. Although plaintiff argues that North Carolina courts would now recognize an exception to the employment at-will doctrine for bad faith discharges, the North Carolina Supreme Court in commenting on the effect of *Coman* stated that the employment at-will doctrine has "been *narrowly* eroded by statutory and public policy limitations on its scope." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 210, 388 S.E.2d 134 (1990) (emphasis added).

English, 765 F.Supp. 293, 295-96 (citations omitted). The same rationale was applied in *Percell v. Int'l Business Machines, Inc.*, 765 F.Supp. 297 (E.D.N.C. 1991).

Courts in the Middle District, however, have held that a bad faith exception to employment at will exists under certain circumstances. *See, e.g., Iturbe v. Wandel & Goltermann Technologies, Inc.*, No. 90-CV-00242, (M.D.N.C. May 23, 1991); *Riley v. Dow Corning Corp., et al.*, 767 F.Supp. 735 (M.D.N.C. 1991); *Mayse v. Protective Agency, Inc.*, 772 F.Supp. 267 (1991). In *Iturbe*, the court upheld a plaintiff's claim for wrongful discharge based on two theories. First, the court allowed plaintiff's claim that she was wrongfully discharged in violation of the public policy against sex and ethnic discrimination. Second, the court ruled plaintiff had stated a claim of wrongful discharge based on bad faith where the defendant failed to follow personnel manual procedures when it discharged plaintiff.

To support its bad faith holding, the court in *Iturbe* discussed two cases cited in *Coman* which illustrated other jurisdictions' willingness to accept a bad faith exception to the employment at-will doctrine. Both cases allowed for a bad faith exception to employment at will where employees were fired in violation of written policy manuals. *See Kerr v. Gibson's Products Co.*, 226 Mont. 69, 733 P.2d 1292 (1987); *Cleary v. American Airlines Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The court in *Iturbe* found the plaintiff had stated an action where it was alleged that plaintiff's employers "had a written procedure for layoffs in which job performance was the primary factor in determining which employees

would be laid off and seniority was a determining factor in cases where job performance was considered to be equal." *Iturbe*, slip opinion at 13. The court denied the defendant's motion to dismiss for failure to state a cause of action, concluding the plaintiff "has stated a claim that her termination was in violation of this written procedure. This is the type of bad faith discharge claim that the court believes the *Coman* and *McLaughlin* cases recognized." *Id.*, slip opinion at 14.

We believe the opinion in the *English* case from the Eastern District is a more accurate analysis of North Carolina law. Moreover, assuming arguendo that our Supreme Court intended, as the Middle District Court in *Iturbe* believes, to create a separate wrongful discharge claim grounded solely on bad faith with no claim based on public policy violations, the plaintiff in the case at bar still cannot survive defendant's summary judgment motion. A footnote in *Iturbe* gives the rationale for the Court's decision: "Since the court today only rules on the sufficiency of [plaintiff's] complaint, the court accepts as true [plaintiff's] allegations that the written procedure existed and that it *somehow governed her employment relation with [defendants], or her termination.*" *Id.*, slip opinion at 13 (emphasis added). As we stated earlier, plaintiff's employment relationship with defendant AAI was not "governed" by the policy manual given to her; the manual was not made an express part of her contract or made otherwise applicable to her. Therefore, even if we were to follow *Iturbe's* analysis of *Coman* and *McLaughlin*, plaintiff still has no cause of action because her termination was not governed by the employment manual. Plaintiff's allegations of bad faith, consisting of charges that defendant breached its assurance of permanent employment and that defendant communicated false reasons for firing plaintiff, simply have not been recognized as sufficient to sustain a cause of action for wrongful discharge.

To summarize, plaintiff has failed to prove a claim for breach of contract because (1) the employment manual upon which her contract claim was based was not a part of her employment contract; (2) unilaterally promulgated employment manuals do not affect the at-will nature of employment in North Carolina; and (3) plaintiff's additional consideration, moving from Greenville to Wilmington, was not in exchange for assurances of discharge only for fault. As to the tort claim alleging wrongful discharge, North Carolina law does not allow claims of bad faith discharge in the

absence of public policy violations. Assuming arguendo that such a claim is valid, plaintiff's evidence failed to prove that she has a claim for bad faith discharge.

The trial court's entry of summary judgment for defendant is

Affirmed.

Judges ARNOLD and LEWIS concur.

ANDRE LEONARD AND RENEE LEONARD v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 917SC153

(Filed 17 December 1991)

1. **Appeal and Error § 119 (NCI4th)— partial summary judgment—not immediately appealable**

An order granting partial summary judgment for plaintiff on the issues of whether plaintiff is covered under his brother's automobile insurance policy issued by defendant and whether plaintiff is entitled to "stack" the limits of liability of underinsured motorist coverage under that policy did not affect a substantial right and was not immediately appealable where the alleged tortfeasor's liability for the accident and plaintiff's damages have not been determined.

Am Jur 2d, Appeal and Error § 104; Summary Judgment § 40.

2. **Insurance § 69 (NCI3d)— underinsured motorist coverage—changing tire—not occupancy of vehicle**

Plaintiff was not "occupying" his brother's insured van at the time of an accident and thus was not an "insured" under the brother's automobile insurance policy for purposes of underinsured motorist coverage where he was outside the van helping his brother change a flat tire when he was struck by another vehicle.

Am Jur 2d, Automobile Insurance §§ 312, 314, 322.

3. Insurance § 69 (NCI3d)— underinsured motorist coverage— changing tire—use of vehicle—person insured under statute

Where plaintiff was riding to work as a passenger in his brother's van and was struck by another vehicle while outside the van helping his brother change a flat tire on the van, plaintiff was "using" the van both before and at the time of the accident and was thus a member of the second class of "persons insured" pursuant to N.C.G.S. § 20-279.21 for purposes of underinsured motorist coverage under his brother's automobile insurance policy.

Am Jur 2d, Automobile Insurance §§ 311-314, 332.

4. Insurance § 69 (NCI3d)— underinsured motorist coverage— second class of persons insured—intrapolicy stacking

N.C.G.S. § 20-279.21(b)(4) permits intrapolicy stacking of underinsured motorist coverages to determine an insurer's limit of liability when the injured person is a member of the second class of "persons insured" under N.C.G.S. § 20-279.21(b)(3).

Am Jur 2d, Automobile Insurance §§ 326, 329.

Judge WYNN concurring in part and dissenting in part.

Judge PARKER concurs in this concurring and dissenting opinion.

APPEAL by defendant from order entered 6 December 1990 in NASH County Superior Court by *Judge Leon Henderson, Jr.* Heard in the Court of Appeals 13 November 1991.

Duffus & Coleman, by J. David Duffus, Jr., for plaintiff-appellee Andre Leonard.

No brief filed for plaintiff-appellee Renee Leonard.

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

GREENE, Judge.

Defendant appeals from an order entered 6 December 1990 granting partial summary judgment for the plaintiffs on the issues of whether Andre Leonard (plaintiff) is covered under his brother's automobile insurance policy issued by the defendant and whether

the plaintiff is entitled to "stack" the limits of liability of underinsured motorist (UIM) coverage under that policy.

On 20 February 1988, the defendant issued an automobile insurance policy to Jimmy Leonard (Leonard), the plaintiff's brother. The policy covered three vehicles and provided liability and UIM coverage for bodily injury in the amount of $50,000.00 per person and $100,000.00 per accident. In August, 1988, Leonard and the plaintiff worked for the Department of Sanitation in Raleigh, North Carolina. Leonard lived in Spring Hope, North Carolina, and the plaintiff lived somewhere nearby with his mother-in-law. To get to work in Raleigh, Leonard usually drove them both to work in his van, one of the three vehicles covered by his automobile insurance policy.

At approximately 5:30 a.m. on 11 August 1988, Leonard, the plaintiff, and several other people left Spring Hope to go to work in Raleigh. Leonard drove the van, and the plaintiff rode in the back seat. After driving along U.S. Highway 264 for about fifteen minutes, the left rear tire of the van went flat. Leonard drove the van onto the right shoulder of the road to change the tire. Because the shoulder of the road was not wide enough to park the van entirely off the road, Leonard parked the van so that the left front and rear tires remained on the white line of the paved portion of the shoulder of the road. He then turned on the emergency flashers, and he and the plaintiff exited the van to change the tire. After the plaintiff loosened the lug nuts, Leonard jacked up the van and removed the lug nuts. Leonard then asked the plaintiff to bring him the spare tire from the back of the van. The plaintiff got the tire for Leonard and began rolling it around the left side of the van. As he rolled the tire towards his brother, he was struck by a vehicle driven by Christopher Wilkerson (Wilkerson) and sustained severe and disabling injuries. He also incurred medical bills in excess of $53,000.00.

At the time of the accident, Wilkerson's vehicle was covered by an automobile insurance policy issued by Allstate Insurance Company with limits of liability of $25,000.00 per person and $50,000.00 per accident. On 12 December 1988, the plaintiff and his wife filed a personal injury action against Wilkerson. On 21 March 1990, the plaintiffs released their claims against Wilkerson in exchange for $25,000.00, the limit of liability under Wilkerson's automobile insurance policy, and voluntarily dismissed with prejudice their action against Wilkerson.

On 23 March 1990, the plaintiffs filed a complaint against the defendant seeking UIM coverage under Leonard's automobile insurance policy in an amount of $150,000.00, the aggregate of the three $50,000.00 coverages provided by the policy, less the $25,000.00 paid by Wilkerson's insurance carrier. The defendant filed an answer on 18 June 1990. The plaintiffs and the defendant made summary judgment motions, and on 6 December 1990, the trial court entered partial summary judgment for the plaintiffs on the issues of coverage and stacking and denied the defendant's motion.

[1] The record reflects and the defendant's counsel conceded at oral argument that Wilkerson's liability for the accident and the plaintiff's damages have not been determined. Therefore, we note that the trial court's partial summary judgment order from which the defendant appeals is an interlocutory order not affecting a substantial right. *Tridyn Indus. v. American Mut. Ins. Co.*, 296 N.C. 486, 491-92, 251 S.E.2d 443, 447-48 (1979); *Coleman v. Interstate Cas. Ins. Co.*, 84 N.C. App. 268, 270, 352 S.E.2d 249, 251 (1987). Furthermore, although the trial court certified in this multiple plaintiff action "that there is no just reason for delay in obtaining appellate review" of its order, the partial summary judgment order as to the plaintiff is not a final order and therefore not immediately appealable. *Tridyn*, 296 N.C. at 491, 251 S.E.2d at 447. In our discretion, however, we treat the purported appeal as a petition for certiorari and address its merits. N.C.R. App. P. 21(a)(1); N.C.G.S. § 7A-32(c) (1989); *Coleman*, 84 N.C. App. at 270, 352 S.E.2d at 251.

The issues are (I) whether the plaintiff (A) is an insured under Leonard's automobile insurance policy, and if not (B) is a "person insured" under N.C.G.S. § 20-279.21(b)(3) (1989); and (II) whether N.C.G.S. § 20-279.21(b)(4) (1989) permits intrapolicy stacking to determine an insurer's limit of liability where the injured person is a member of the second class of "persons insured" under N.C.G.S. § 20-279.21(b)(3).

I

(A) POLICY

[2] Under the UM/UIM provision of the automobile insurance policy, the defendant contracted to "pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle [and an underinsured motor vehicle]

because of . . . [b]odily injury sustained by an insured and caused by an accident . . . ." Furthermore, "[t]he owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the" underinsured motor vehicle. The defendant does not deny that Wilkerson's vehicle was an underinsured motor vehicle, nor does it deny that Wilkerson's alleged liability for the plaintiff's injuries arose out of Wilkerson's use of his vehicle. The defendant argues, however, that the plaintiff is not an "insured" person under the policy and therefore is not entitled to the policy's UIM coverage.

With regard to UM/UIM coverage, the policy defines an "insured" as being the named insured shown in the declarations, that person's spouse if a resident of the named insured's household, any family member if a resident of the named insured's household, and "[a]ny other person occupying . . . your covered auto . . . or . . . any other auto operated by you." "Your covered auto" generally means "[a]ny vehicle shown in the Declarations." Here, the plaintiff was not a named insured, that person's spouse, or a family member residing in the named insured's household. Accordingly, the only way the plaintiff can be classified as an "insured" under the policy is if he was "occupying" Leonard's van, a vehicle shown in the declarations. The policy defines "occupying" as meaning "in; upon; getting in, on, out or off." When the plaintiff was struck by Wilkerson's vehicle, the plaintiff was doing none of these things. To the contrary, he was outside the van helping his brother change a flat tire. Accordingly, because the plaintiff was not "occupying" the vehicle at the time of the accident, he is not an "insured" under the policy for purposes of UIM coverage. *Cf. Jarvis v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co.*, 244 N.C. 691, 692, 94 S.E.2d 843, 844 (1956) (deceased was not "entering" a truck at time of accident for purposes of medical payments provision of automobile insurance policy); *Lautenschleger v. Royal Indem. Co.*, 15 N.C. App. 579, 580, 190 S.E.2d 406, 407, *cert. denied*, 282 N.C. 153, 191 S.E.2d 602 (1972) (plaintiff was not "occupying" the insured vehicle at time of accident for purposes of medical payments provision of automobile insurance policy).

(B) STATUTE

[3] Although the plaintiff is not an "insured" under the applicable policy provisions for UIM coverage, the plaintiff may nonetheless fall into the category of "persons insured" under N.C.G.S.

§ 20-279.21(b)(3) for purposes of UIM coverage. *See Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 143, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991) (because N.C.G.S. § 20-279.21(b)(4) incorporates the definition of "persons insured" under N.C.G.S. § 20-279.21(b)(3), N.C.G.S. § 20-279.21(b)(3) defines "persons insured" for UIM coverage). This is true because our courts have consistently held

> that when a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in it, and if the terms of the policy conflict with the statute, the provisions of the statute will prevail.

Sutton v. Aetna Cas. & Sur. Co., 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

For purposes of UIM coverage, N.C.G.S. § 20-279.21(b)(3) defines "persons insured" as follows:

> 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.

Our courts have repeatedly stated that this statute essentially "establishes 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, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986); *see also Sproles v. Greene*, 329 N.C. 603, 608, 407 S.E.2d 497, 500 (1991); *Smith*, 328 N.C. at 143, 400 S.E.2d at 47. Although "[m]embers of the first class are 'persons insured' even where the insured vehicle is not involved in the insured's injuries," members of the second class are "persons insured" "only when the insured vehicle *is* involved in the insured's injuries." *Smith*, 328 N.C. at 143, 400 S.E.2d at 47 (emphasis added). Here, the plaintiff and the defendant

agree that the plaintiff is not a member of the first class of "persons insured." They disagree, however, as to whether the plaintiff is a member of the second class. Because the van, an insured vehicle under the policy, was involved in the plaintiff's injuries, the plaintiff qualifies as a person insured under the second class of "persons insured" if he was "using" the van with Leonard's consent *or* he was a guest in the van at the time of the accident.

With regard to whether the plaintiff was "using" the van as that term is used in N.C.G.S. § 20-279.21(b)(3), we must examine what the legislature intended by its choice of that term. *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (primary task in statutory construction is to ensure legislative purpose is accomplished). "Where words in a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984); *Lafayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (presume that legislature intended words of statute to be given ordinary meaning). Furthermore, we must liberally construe the verb "use" to ensure that the beneficial purpose of the Financial Responsibility Act will be accomplished. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (legislature intended "to compensate the innocent victims of financially irresponsible motorists").

The ordinary meaning of the verb "use" is "to put into action or service[,] . . . to carry out a purpose or action by means of[, or] . . . [to] make instrumental to an end or process . . . ." Webster's Third New International Dictionary 2523-24 (1968). When compared to its synonyms such as "apply," "avail," "employ," and "utilize," the verb "use" "is general and indicates any putting to service of a thing, . . . [usually] for an intended or fit purpose . . . ." *Id.* at 2524. Given this ordinary meaning of the verb "use," we conclude that the plaintiff was using the van with Leonard's consent both before and at the time of the accident.

In *Whisnant v. Aetna Cas. & Sur. Ins. Co.*, 264 N.C. 303, 305, 141 S.E.2d 502, 503 (1965), a motor vehicle struck the plaintiff as he was trying to push onto the shoulder of the road the insured vehicle he had been driving before it stopped working. Our Supreme Court held that for purposes of a medical payments provision in an automobile insurance policy taken out by the owner of the insured vehicle, the plaintiff was "using" the vehicle at the time

he was injured. *Id.* at 308, 141 S.E.2d at 506. In reaching its decision, our Supreme Court recognized that a person "uses" a motor vehicle when he purposefully uses it as his "means of transportation" to a destination. *Id.* at 308, 141 S.E.2d at 505. Furthermore, in other cases not involving UM or UIM coverage, this Court has recognized broader meanings of the word "use." This Court has held that a person "uses" a motor vehicle when loading and unloading it even when the person is not the driver, *Fidelity & Cas. Co. v. N.C. Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 199, 192 S.E.2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972), and in another case, that a hunter "uses" a motor vehicle while hunting when he reaches into it to get a rifle. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 78 N.C. App. 542, 548, 337 S.E.2d 866, 869 (1985), *aff'd*, 318 N.C. 534, 350 S.E.2d 66 (1986). Accordingly, because the plaintiff was traveling in the van before the accident with Leonard's consent, and because the plaintiff was purposefully using the van as his means of transportation to his job, the plaintiff was "using" his brother's van before the accident as that term is used in N.C.G.S. § 20-279.21(b)(3).

The plaintiff was also "using" the van at the time Wilkerson's vehicle struck him. At the time of the accident, the plaintiff was helping Leonard change the van's flat tire. In *Whisnant*, our Supreme Court recognized that a person "uses" a motor vehicle when he changes a flat tire during a trip. *Id.* at 308, 141 S.E.2d at 505. This is true because the changing of a tire during a trip is

> 'just as much a part of the use of the automobile for that journey as stopping to replenish the gasoline or oil, or for the change of a traffic light, or to remove ice, snow, sleet, or mist from the windshield. By such acts, the journey would not be abandoned. Such adjustments are a part of the use of the automobile—as much as the manipulation of the mechanism by the operator.'

Id. (citation omitted). Accordingly, though not the driver of the van, the plaintiff was nonetheless "using" the van both before and at the time of the accident pursuant to N.C.G.S. § 20-279.21(b)(3). This construction of the verb "use" is consistent with its ordinary meaning and the legislature's purpose in seeking "to compensate the innocent victims of financially irresponsible motorists." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

The defendant argues that this construction of the verb "use" will render meaningless the "guest in such motor vehicle" provision of N.C.G.S. § 20-279.21(b)(3). We disagree. Without attempting to define who qualifies as a "guest in such motor vehicle," we believe that the legislature intended this category of the second class of "persons insured" to include those people riding in an insured vehicle at the invitation of the driver without any particular purpose. Furthermore, although the defendant would have this Court adopt the position that such a person must actually be "in" the insured vehicle at the time of the accident to be considered a member of the "guest" category, we do not decide the issue. We note, however, that such a narrow construction would appear to violate the remedial purpose of the statute. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

In summary, we hold that the plaintiff is a "person insured" under N.C.G.S. § 20-279.21(b)(3) for purposes of UIM coverage.

II

[4] The defendant argues that even if the plaintiff is properly found to be a "person insured" under N.C.G.S. § 20-279.21(b)(3), both the automobile insurance policy and N.C.G.S. § 20-279.21(b)(4) prohibit the plaintiff from stacking the three $50,000.00 UIM coverages to determine the defendant's limit of liability. At oral argument the plaintiff conceded, and we agree, that the automobile insurance policy at issue prevents the stacking of multiple coverages in this case. *See Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 108, 404 S.E.2d 499, 503-04, *disc. rev. allowed on additional issues*, 329 N.C. 788, 408 S.E.2d 521 (1991) (Greene, J., dissenting). Therefore, we must consider whether N.C.G.S. § 20-279.21(b)(4) permits the plaintiff to intrapolicy stack the UIM coverages to determine the defendant's limit of liability.

Consistent with my dissents in *Manning v. Tripp*, 104 N.C. App. 601, 607, 410 S.E.2d 401, 404 (1991), *Amos v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629, 632, 406 S.E.2d 652, 653, *disc. rev. allowed*, 330 N.C. 193, 412 S.E.2d 52 (1991), and *Harris*, 103 N.C. App. at 109, 404 S.E.2d at 504, I conclude that only "owners" may stack intrapolicy coverages under N.C.G.S. § 20-279.21(b)(4). Accordingly, I would reverse the trial court's order allowing the plaintiff, a non-owner, to stack the three $50,000.00 UIM coverages contained in Leonard's automobile insurance policy. As is apparent from the opinion of Judge Wynn that follows, and

the concurrence in it by Judge Parker, my opinion on the issue of stacking is a dissent, and Judge Wynn's opinion is the majority opinion.

In summary, on the issue of coverage, the trial court's order is affirmed. On the issue of stacking, although I would reverse the trial court's order, the majority of this panel affirms the trial court's order.

Affirmed.

Judges PARKER and WYNN concur in the above opinion except on the issue of stacking, and as to that issue Judge PARKER concurs in the following opinion of Judge WYNN.

Judge WYNN concurring in part and dissenting in part.

I agree with the majority on Section I. However, I respectfully dissent from Section II of Judge Greene's opinion in which he concludes that N.C. Gen. Stat. § 20-279.21(b)(4) (1989) does not permit a member of the second class of "persons insured" to intrapolicy stack UIM coverages to determine an insurer's limit of liability.

In *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. review denied*, 316 N.C. 731, 345 S.E.2d 387 (1986), this Court explained the term "person insured,"

> In essence, N.C. Gen. Stat. 20-279.21(b)(3) establishes 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 129-30. A member of the second class is a person insured "only when the insured vehicle is involved in the insured's injuries." *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 143, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). The statute and cases merely define and develop the "person insured"; they do not distinguish between the two classes for stacking purposes.

In *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 103, 404 S.E.2d 499, 501 (1991), this Court stated 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*." This Court relied on this language in *Manning v. Tripp*, 104 N.C. App. 601, 410 S.E.2d 401 (1991), and held that a first class "person insured," who is not the owner of a vehicle, is entitled to aggregate the limits of liability for UIM coverage. In my opinion, these recent cases establish that stacking of UIM coverage is allowable if an injured party qualifies as a "person insured" under N.C. Gen. Stat. § 20-279.21(b)(3). *See also Nationwide Mut. Ins. Co. v. Silverman*, 104 N.C. App. 783, 411 S.E.2d 153 (1991).

STATE OF NORTH CAROLINA v. FRANKLIN HASKINS, AKA FRANK HASKINS

No. 919SC22

(Filed 17 December 1991)

1. Evidence and Witnesses § 287 (NCI4th)— other crimes— admissibility

Evidence of other crimes, wrongs or acts must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction. The party offering the evidence must, if challenged, specify the purpose or purposes for which the evidence is offered. The evidence is relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that defendant was the actor, and the trial court is required to make an initial determination of whether there is sufficient evidence that the defendant in fact committed the extrinsic act. Finally, the question of what evidence should be excluded because its probative value is outweighed by the danger of unfair prejudice is left to the discretion of the trial court. N.C.G.S. § 8C-1, Rules 104(b), 105, and 401-404(b).

Am Jur 2d, Evidence §§ 320, 321, 333.

2. Evidence and Witnesses § 369 (NCI4th)— armed robbery—evidence of another offense—not admissible for identity

Evidence of a prior attempted robbery and shooting was not admissible in an armed robbery prosecution to show identity where the State failed to show the necessary degree of similarity between the robberies. Specifically, there were not sufficient unusual facts present in both crimes which would support a reasonable inference that the same person committed both crimes.

Am Jur 2d, Evidence § 322.

3. Evidence and Witnesses § 369 (NCI4th)— armed robbery—evidence of another offense—admissible for motive

Evidence of a prior attempted robbery and shooting was admissible in an armed robbery prosecution to show motive where motive was in issue because defendant denied his participation in the robbery; there was substantial evidence that there was an attempted robbery and shooting and that defendant was the actor; the fact that defendant was unsuccessful in the prior attempt to obtain money tends to show a motive for defendant's commission of the robbery some two hours later; there was no abuse of discretion in the determination that the probative value of the prior incident was not outweighed by the danger of unfair prejudice in light of the strong evidence of defendant's guilt in the form of positive eyewitness identification of defendant by both victims of the robbery; and the court instructed the jury that the extrinsic evidence was to be considered only for the purposes for which it was admitted.

Am Jur 2d, Evidence § 325.

4. Evidence and Witnesses § 287 (NCI4th)— other crimes—admitted for multiple purposes—one purpose proper and one improper—no prejudice

There was no prejudice in an armed robbery prosecution where the court admitted evidence of a prior attempted robbery to show identity and motive, but only the motive purpose was proper.

Am Jur 2d, Evidence §§ 322, 325.

APPEAL by defendant from judgments entered 26 July 1990 in GRANVILLE County Superior Court by *Judge Richard B. Allsbrook*. Heard in the Court of Appeals 7 October 1991.

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

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

GREENE, Judge.

Defendant appeals from judgments entered 26 July 1990, which judgments were based on jury verdicts convicting defendant of two counts of robbery with a dangerous weapon, N.C.G.S. § 14-87 (1986).

The evidence in this case is conflicting. The State's evidence tended to establish that on 25 February 1989 at approximately 10:45 p.m., an armed robbery occurred at the 7-11 Food Store (the 7-11) on Roxboro Road in Oxford, North Carolina. State's witnesses Jean Hobgood (Hobgood) and William Vaughan (Vaughan) were both working in the 7-11 that evening. Hobgood testified that two men entered the store, and that one of them, whom Hobgood identified as the defendant, shopped around while the other one, later identified as Kenneth Lyons (Lyons), stood at the door. A customer who was already in the store completed his purchases and left. According to Hobgood, the defendant then brought several items to the counter and after Hobgood rang the items up, defendant pointed a gun at Hobgood and demanded money. Hobgood testified that the defendant was in her presence for approximately fifteen to twenty minutes, that the store was well lighted, and that nothing covered the defendant's face. Vaughan testified that he had been outside the store loading groceries and that when he reentered, Lyons pointed a gun at Vaughan and demanded Vaughan's watch and ring, which Vaughan gave him. Vaughan also testified that he saw a man whom he later identified as the defendant pointing a gun at Hobgood while she emptied the contents of the cash register into a paper bag. Vaughan testified that from where he was standing he could see the defendant's side. Both Hobgood and Vaughan identified the defendant and Lyons from a photographic lineup.

The State also presented William King (King), who testified, over defendant's objection, that while on his way to make a night deposit at about 9:15 that same evening, he was shot and wounded by a man who attempted to rob him at the Southern National Bank in Butner. King testified that after he drove up to the night

depository at the bank, he heard someone outside the driver's side window of his truck yell, "This is a holdup!" King turned and saw a man standing with a "big pistol" against the truck glass. King testified that he hesitated briefly, and then as he was reaching for the bag which contained his money, the perpetrator fired a shot at King through the driver's side window, hitting and injuring King. King testified that he immediately jerked the truck into gear and sped away. According to King, no one else was present at the bank during the incident. King later identified the defendant in a photographic lineup as the man who attempted to rob him at the bank. The trial court instructed the jury that it could consider King's testimony only for the purposes of showing the identity and/or motive of the perpetrator of the 7-11 robbery. The court expressly rejected the other purposes for which the prosecutor sought to introduce King's testimony under Rule 404(b), specifically, intent, plan, scheme, system and design, and stated in response to the prosecutor's offer, "Don't try to do the overkill . . . I will not allow it for that. That sounds too much like, has the propensity to commit armed robbery."

The defendant presented the testimony of Kenneth Lyons. Lyons, who had entered a guilty plea and had been sentenced at the time of trial, testified that there were two people involved in the robbery of the 7-11—himself and a man named Darrell Wayne. Lyons testified that the defendant was not involved. Lyons had previously implicated the defendant in the 7-11 robbery, and explained at trial that the reason that he had done so was because police officers told Lyons that the defendant had "ratted on" Lyons with regard to other robberies the two men allegedly had committed. Lyons testified that when he learned that no such statements had ever been made by the defendant, he decided to testify on defendant's behalf in order to pay defendant back for Lyons' mistake (i.e., falsely implicating defendant in the 7-11 robbery). On rebuttal, State's witness Durham police officer Robert Simmons, the investigator who interviewed Lyons, denied telling Lyons that defendant had made a statement against Lyons, and testified that he had never heard of Darrell Wayne prior to Lyons' testimony at trial.

The determinative issues are I) whether evidence of a prior alleged crime, an attempted robbery and shooting in Butner, is admissible to show (A) the identity of the perpetrator of the charged

crime; or (B) the motive for defendant's alleged commission of the charged crime; and II) if admissible for only one of the two purposes, whether defendant is entitled to a new trial.

I

[1] The admissibility of "other crimes, wrongs, or acts" evidence is determined through an application of Rules of Evidence 404(b), 402, 401, 403, 104(b), and 105. *See Huddleston v. United States*, 485 U.S. 681, 691, 99 L.Ed.2d 771, 783-84 (1988). That is, the evidence must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction. A proper application of these rules balances the State's interest in presenting the evidence of "other crimes, wrongs, or acts" against the possibility of unfair prejudice to the defendant.

Purpose

"[O]ther crimes, wrongs, or acts" evidence is admissible only if offered for a proper purpose. A proper purpose includes, among other things, proof of a defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident." N.C.G.S. § 8C-1, Rule 404(b) (1988). Offering evidence solely to show "that the defendant has the propensity to commit an offense of the nature of the crime charged" does not qualify as a proper purpose. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). If challenged, the party offering "other crimes, wrongs, or acts" evidence must specify the purpose or purposes for which the evidence is offered. *See State v. White*, 101 N.C. App. 593, 600, 401 S.E.2d 106, 110 (1991).

Relevancy

Even if offered for a proper purpose under Rule 404(b), evidence of prior "crimes, wrongs, or acts" must be relevant, and such evidence is not relevant unless it "reasonably tends to prove a material fact in issue" other than the character of the accused. *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986); N.C.G.S. § 8C-1, Rule 401 (1988). Furthermore, the "other crimes, wrongs, or acts" evidence is relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor. *See Huddleston*, 485 U.S. at 689-90, 99 L.Ed.2d at 782-83. In this regard, the trial court is re-

quired to make an initial determination pursuant to Rule 104(b) of whether there is sufficient evidence that the defendant in fact committed the extrinsic act. *See United States v. Beechum*, 582 F.2d 898, 913 (5th Cir. 1978), *cert. denied*, 440 U.S. 920, 59 L.Ed.2d 472 (1979). The judge is not required to be convinced beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence, that defendant committed the extrinsic act. *See Huddleston*, 485 U.S. at 690, 99 L.Ed.2d at 782; *Beechum*, 582 F.2d at 913. Rather, as a prerequisite to admitting the evidence, the trial court must find the evidence to be substantial. *State v. Williams*, 307 N.C. 452, 454, 298 S.E.2d 372, 374 (1983) (defining substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion"); *see also Huddleston*, 485 U.S. at 690, 99 L.Ed.2d at 782-83 (trial court must determine "whether the jury could reasonably find . . . by a preponderance of the evidence that defendant committed the extrinsic act"); *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991). If the proponent's evidence is not substantial, the trial court must, if the evidence has been presented in the presence of the jury, instruct the jury to disregard the evidence. *Huddleston*, 485 U.S. at 690, 99 L.Ed.2d at 783; *see also* N.C.G.S. § 8C-1, Rule 104(c) (1988) (hearings on admissibility of evidence shall be conducted out of the hearing of the jury when the interests of justice require); *Stager*, 329 N.C. at 303, 406 S.E.2d at 890 (proper for trial court to conduct *voir dire* hearing to determine whether evidence offered pursuant to Rule 404(b) is admissible).

Unfair Prejudice

Although offered for a proper purpose and relevant, the evidence may nonetheless be excluded if its probative value is substantially outweighed by, among other things, the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1988). The question of what evidence should be excluded under Rule 403 is a matter left to the sound discretion of the trial court. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56.

Limiting Instructions

If after making the foregoing determinations the trial court concludes that the "other crimes, wrongs, or acts" evidence is admissible, the court must, upon request, instruct the jury that the evidence is to be considered only for the purposes for which it was admitted. N.C.G.S. § 8C-1, Rule 105 (1988).

A

Identity

[2] The State specifically offered evidence of the uncharged attempted robbery and shooting in Butner for the purpose of showing the identity of the perpetrator of the 7-11 robbery in Oxford. Identity is a proper purpose within the meaning of Rule 404(b).

Evidence of the attempted robbery in Butner offered to identify the defendant as a perpetrator of the Oxford robbery is relevant only if identity is at issue in the Oxford trial *and* there is substantial evidence that the defendant indeed attempted the robbery in Butner. To be relevant, there must also be "some unusual facts present in both crimes . . . [indicating] that the same person committed both crimes." *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L.Ed. 2d 235 (1988) (quoting *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986)). Although it is not necessary that there be "bizarre and unique signature elements common to the past crimes and the crimes" the State presently seeks to prove, the similarities between the crimes must support "the reasonable inference that the same person committed both the earlier and the later crimes." *Id.* at 604, 365 S.E.2d at 593. In addition, the prior crime must not be "so remote [in time] as to have lost its probative value." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893.

Here, the identity of the perpetrator of the 7-11 robbery was at issue. Although Hobgood and Vaughan identified the defendant as one of the two perpetrators of the 7-11 robbery, Lyons testified that a man named Darrell Wayne, not the defendant, committed the robbery with him. Thus, the identity of the perpetrator was the primary issue at trial. There is also substantial evidence in the record that defendant attempted the robbery and committed the shooting in Butner. William King, the victim of the Butner incident, positively identified the defendant as the perpetrator and testified at trial to that effect.

The State, however, has failed to show the necessary degree of similarity between the attempted robbery in Butner and the 7-11 robbery in Oxford. Specifically, there are not sufficient unusual facts present in both crimes which would support a reasonable inference that the same person committed both the Butner crime and the Oxford crime. There is no evidence in the record that

the method used by the perpetrator of the Butner incident was sufficiently similar to the method used to commit the robbery of the 7-11 in Oxford. The crimes occurred in different towns. Moreover, the record reveals that the Butner incident occurred on the deserted premises of a bank which was closed, involved gratuitous violence, and was committed by only one perpetrator. The robbery in Oxford was of a 7-11 food store which was open for business with customers present, no shooting took place, and two perpetrators were involved. We reject the State's contention that the fact that in both crimes neither perpetrator wore a mask, or that both perpetrators yelled a demand for money, supports a reasonable inference that the same person committed both the earlier and the later crimes. Accordingly, the evidence of the crime in Butner has no relevance with regard to proof of the identity of the 7-11 perpetrator, and is therefore inadmissible for this purpose.

B

Motive

[3] The State also specifically offered evidence of the attempted robbery and shooting in Butner for the purpose of showing the motive for defendant's alleged commission of the 7-11 robbery. Motive is a proper purpose within the meaning of Rule 404(b).

Evidence of the attempted robbery in Butner offered to show the perpetrator's motive for committing the robbery in Oxford is relevant only if motive is at issue in the trial and there is substantial evidence that defendant attempted the Butner robbery. When determining the relevancy of other crimes evidence offered to prove defendant's motive, the degree of similarity between the uncharged and the charged crimes is considerably less important than when such evidence is offered to prove identity. *See Beechum*, 582 F.2d at 911-12, n.15 (discussing the need for varying degrees of similarity between extrinsic act and charged crime, depending on Rule 404(b) purpose for which extrinsic act evidence is offered). Also, "remoteness in time is less significant when the prior conduct is used to show . . . motive . . . ; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893. It is required, however, that the other crimes evidence reveal some motive for the commitment of the crime charged.

Because the defendant denied his participation in the 7-11 robbery in Oxford, motive was at issue in the trial. *See Coffey*, 326 N.C. at 280, 389 S.E.2d at 55 ("where the doing of the act is in dispute" motive is always at issue). As noted earlier, there was also substantial evidence in the record that there was an attempted robbery and shooting in Butner and that defendant was the actor. Furthermore, the fact that defendant's attempt to obtain money in Butner was *unsuccessful* tends to show a motive for defendant's commission of the 7-11 robbery some two hours later.

Moreover, in light of the strong evidence of defendant's guilt in the form of positive eyewitness identification of defendant by both victims of the 7-11 robbery in Oxford, we fail to see any abuse of discretion in the trial court's determination that the probative value of the Butner incident was not substantially outweighed by the danger of unfair prejudice to the defendant. In this regard, the record reveals that the trial court did instruct the jury that the extrinsic evidence was to be considered only for the purposes for which it was admitted. Accordingly, the trial court did not err in admitting evidence of the Butner shooting and attempted robbery on the issue of defendant's motive for the 7-11 robbery in Oxford.

II

[4] This Court has not explicitly addressed the issue of prejudice to defendant when other crimes evidence is admitted for multiple purposes and, on appeal, the reviewing court determines that the evidence was improperly admitted for one of these purposes. This Court has, however, without specifically addressing the issue, held that there was no prejudicial error where at least one of the two purposes for which the prior act evidence was admitted was correct. *State v. Davis*, 101 N.C. App. 12, 18, 398 S.E.2d 645, 649 (1990); *see also United States v. Billups*, 522 F.Supp. 935, 955 (E.D. Va. 1981) (admissibility of other crimes evidence "can be upheld if it was proper for any purpose"). Although it is error to admit other crimes evidence for a purpose not supported in the evidence, the error cannot prejudice defendant when the same other crimes evidence is admitted for a purpose which is supported in the evidence. *See* N.C.G.S. § 15A-1443(a) (1988) (to establish prejudicial error, defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial"). Accordingly, the admission

of the other crimes evidence in this case for the improper purpose of proving identity does not entitle the defendant to a new trial in light of the fact that the other crimes evidence was simultaneously properly admitted for the purpose of proving motive.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

THOMAS HASSETT, PLAINTIFF v. DIXIE FURNITURE COMPANY, INC., DEFENDANT

No. 9122SC15

(Filed 17 December 1991)

1. **Pleadings § 34 (NCI3d)— addition of party defendant—denial of motion to amend**

The trial court did not abuse its discretion in denying defendant's motion to amend the complaint to add a party defendant where the court found upon supporting evidence that the allowance of plaintiff's motion would unduly delay the trial and prejudice defendant.

Am Jur 2d, Parties § 183.

2. **Accord and Satisfaction § 1 (NCI4th)— breach of contract—insufficient evidence of accord and satisfaction and other defenses**

In an action to recover for breach of a contract for plaintiff to provide exclusive furniture design services for defendant manufacturer on an import dining room program, evidence that plaintiff and defendant's president discussed terms under which plaintiff would terminate his participation in the program contract, that plaintiff sent a letter to defendant's president detailing those terms and asking that defendant have its attorney draw up a proper document, and that defendant prepared and sent to plaintiff a termination agreement but plaintiff failed to respond thereto was insufficient to show an unequivocal agreement to terminate the program contract so as to require the trial court to instruct on accord and satisfac-

tion, compromise and settlement, ratification, estoppel, waiver and modification.

Am Jur 2d, Accord and Satisfaction § 55.

3. Contracts § 168 (NCI4th)— personal services contract—damages for breach—no reduction for saved expenses

In an action for breach of a personal services contract under which plaintiff's compensation was based on a percentage of sales, the trial court properly refused to instruct the jury that plaintiff's damages should be reduced by the costs and expenses he saved by not performing the services.

Am Jur 2d, Damages §§ 630, 631.

4. Appeal and Error § 50.2 (NCI3d)— instruction on damages—issue not reached—harmless error

Where the jury found that plaintiff did not breach its contract with defendant, defendant was not prejudiced by the trial court's instructions limiting the amount of damages defendant could recover on its counterclaim.

Am Jur 2d, Appeal and Error § 792.

5. Rules of Civil Procedure § 32 (NCI3d)— deposition testimony—substantive evidence—effect of instructions

Where the trial court admitted as substantive evidence deposition testimony introduced by defendant, the court's subsequent instructions regarding impeaching and corroborative evidence did not deprive defendant of its right to have this deposition testimony considered as substantive evidence. N.C.G.S. § 1A-1, Rule 32(a).

Am Jur 2d, Depositions and Discovery § 197; Trial §§ 1288, 1411.

APPEAL by plaintiff and defendant from *Seay (Thomas W., Jr.), Judge*. Judgment entered 24 May 1990 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 9 October 1991.

This is a civil action wherein plaintiff seeks damages for defendant's alleged breach of contract where defendant failed to pay for services performed by plaintiff pursuant to the parties' contract. Defendant counterclaims, alleging plaintiff failed to perform on a "full-time" basis as agreed.

Evidence presented at trial is summarized as follows: On 1 March 1986, plaintiff, a New Jersey furniture designer, and defendant, a North Carolina furniture manufacturer, entered into a "program contract" whereby plaintiff, together with Charles Taylor, agreed to perform a variety of services for defendant in connection with the establishment of an Import Dining Room Program. The program contract specified that plaintiff and Taylor would perform services "on an exclusive basis," and that during the term of the agreement, plaintiff and Taylor would devote their efforts to the program full time, and would not be employed by, be under contract to, or receive any remuneration from any other person, firm, or business entity, for services rendered on import dining room programs.

In return for these services, defendant agreed to pay plaintiff and Taylor a percentage of the sales from defendant's import dining room program. These obligations to defendant were undertaken jointly by plaintiff and Taylor, and the contract did not divide the responsibility for performance between the two, nor specify a division of compensation. In fact, the contract expressly stated that defendant "has no interest in the division" of compensation between plaintiff and Taylor.

During late 1986 and early 1987, plaintiff and Taylor began to disagree about responsibility for performance of their joint obligations under the contract. At a meeting in the spring of 1987, the parties, together with Taylor, orally agreed to modify the program contract such that defendant agreed to pay plaintiff .75% for the first $20,000,000 in sales and .5% of sales in excess of that amount. Defendant further agreed to pay Taylor 2.25% of the first $20,000,000 in sales and 1.5% of all sales in excess of that amount. The parties exchanged drafts of this modified agreement, but never executed a formal written modification. The parties performed pursuant to this oral agreement until defendant ceased making payments to plaintiff in early 1988.

Between 1986 and 1987, defendant learned that plaintiff had engaged in design activities for one of defendant's competitors, A. Brandt Furniture. Hassett had revised drawings of dining room components which he had previously created and sent them to Brandt's production source in Taiwan, which also happened to be one of defendant's primary overseas production sources. On 21 October 1987 plaintiff and defendant's president, Smith Young, met

to discuss plaintiff's work for Brandt. Young determined that plaintiff was not devoting himself "full-time" to the Import Dining Room Program, and Young testified at trial that he and plaintiff orally agreed to terminate the contract. Young testified that he agreed to pay plaintiff the contract fee for the next four months, and that plaintiff had no further obligation under the contract. Plaintiff agreed that these terms were discussed, but testified that no final agreement was reached.

On 26 October 1987, plaintiff sent Young a letter stating the following: "To review our meeting of October 21st, 1987, in reference to our March 1986 agreement, if I terminate my participation, Dixie Furniture agrees to pay Tom Hassett at the current commission rate of ¾ of 1% of sales for a period of four (4) months, (November, December of 1987, January, February of 1988), and there would be no future conditions or covenants between Tom Hassett and Dixie Furniture. If that is your understanding then please have your attorney draw up a proper document as soon as possible." Defendant prepared and executed a termination agreement and sent it to plaintiff on 16 November 1987, and continued to make payments to plaintiff through the next four months, ending February 1988. Plaintiff accepted these payments, although he made no further contact with defendant. Following February 1988, defendant employed two new designers to perform plaintiff's duties on the import dining room program.

At the close of all the evidence, defendant submitted its written request for jury instructions to the court. The court rejected the proposed issues and only proffered the issues of breach of contract and damages for plaintiff's claim and defendant's counterclaim. The jury subsequently returned a verdict for plaintiff for $325,556.00. From a judgment on the verdict, plaintiff and defendant appealed.

Ben Farmer for plaintiff, appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey, John H. Small, and James H. Jeffries, IV, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Plaintiff's sole argument on appeal is that the trial court erred by denying his motion to amend the complaint adding a party

defendant. Plaintiff contends that the trial court abused its discretion in denying plaintiff's motion to amend, thereby preventing plaintiff from presenting all claims he had against the corporate defendant and wrongfully affording the president of the corporation a permanent exemption from all liability arising from his wrongful conduct.

Plaintiff filed his complaint for breach of contract on 28 December 1988. On 31 October 1989 plaintiff's counsel met with Walter Coles, a former officer of defendant corporation. Plaintiff contends that Coles related information which gave rise to new and additional claims by plaintiff against defendant and, individually, the president of defendant corporation. Coles subsequently executed an affidavit on 14 December 1989 in support of plaintiff's motion to amend the complaint and add a party defendant, which was filed on 24 January 1990. Judge Seay denied plaintiff's motion on 14 February 1990, citing undue delay and prejudice to defendant as his reasons for the denial. The case was calendared for trial on 14 May 1990.

A motion to amend pleadings under N.C.R. Civ. P. 15(a) is addressed to the discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion. *Smith v. McRary*, 306 N.C. 664, 295 S.E.2d 444 (1982). This Court has held there was no abuse of discretion where the trial court denied a motion to amend, finding that the addition of a new cause of action would result in undue prejudice to defendants because of the need for extensive additional discovery. *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

In the present case, plaintiff's motion to amend was heard thirteen months after the action was instituted, and just three months prior to trial. Significantly, plaintiff waited over two months after learning of the new information provided by Mr. Coles to file his motion. If the motion had been allowed, plaintiff would have had to serve his amended complaint on defendant, and an answer would have been due thirty days later, assuming no time extensions were granted. This would have left less than sixty days prior to trial for discovery, pretrial motions, and preparations for the trial of claims for damages exceeding $1,000,000.00.

These facts support the conclusion of the trial court that allowing plaintiff's motion would unduly delay the trial and prejudice defendant. We hold that plaintiff has failed to show a clear abuse

of discretion by Judge Seay, and affirm the denial of plaintiff's motion to amend the complaint and add a party defendant.

[2] Based on assignments of error four through nine in the record, defendant contends "the trial court committed reversible error by refusing to instruct the jury on accord and satisfaction, compromise and settlement, ratification, estoppel, waiver and modification." Defendant argues that the instructions were required "because they were pled, supported by the evidence and were the subject of proposed jury instructions," and that "the court's refusal to instruct on these issues constituted a failure to submit all contested issues to the jury."

N.C.R. Civ. P. 51(a) requires a trial judge, in instructing the jury, ". . . . to declare and explain the law arising on the evidence presented in the case . . . . ." *Brown v. Scism*, 50 N.C. App. 619, 626, 274 S.E.2d 897, 901 (1975), *disc. review denied*, 302 N.C. 396, 276 S.E.2d 919 (1981). When a party contends that certain acts constitute a defense, the trial court must submit the issue to the jury with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted. *Plymouth Pallett Co. v. Wood*, 51 N.C. App. 702, 277 S.E.2d 462, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 393 (1981).

We note at the outset that these assignments of error relate to the meeting between plaintiff and defendant's president, Smith Young, on 21 October 1987, wherein the parties discussed terms if plaintiff would agree to terminate his participation in the program contract. Afterwards, plaintiff sent a letter to defendant's president on 26 October 1987 detailing those terms and asked that "[i]f that is your understanding then please have your attorney draw up a proper document as soon as possible." Defendant then prepared a termination agreement which defendant sent to plaintiff on 16 November 1987. Plaintiff never responded, and defendant continued to pay plaintiff through February, 1988. At that time, defendant employed two new designers for the Import Dining Room Program.

Judge Seay instructed the jury, with respect to this foregoing evidence, that if they found that defendant failed to pay the amount stipulated and provided under the contract, then the jury would answer "yes" to the issue of whether defendant breached the con-

tract. On the other hand, if the jury found that the parties mutually agreed to terminate the contract by their discussion, letter, and termination agreement of October, 1987, Judge Seay charged that the jury should find that no breach occurred and that defendant would have paid the obligations it agreed to pay and there would be no recovery by plaintiff.

In our opinion, the evidence with respect to the meeting of October, 1988 and all subsequent events relates only to whether defendant breached the contract entered into in March, 1986, and modified by the parties on 1 May 1987. We are satisfied that the evidence raises only the issue of whether the program contract was breached, and that it is not sufficient to raise the separate defenses of "accord and satisfaction, compromise and settlement, ratification, estoppel, waiver and modification." The letter written by plaintiff to defendant on 26 October 1987 negates any conceivable construction of the events at the meeting on 21 October 1987 as an unequivocal agreement to terminate the program contract.

[3] Defendant's next argument is that the trial court erred by failing to properly instruct the jury as to the correct measure of damages for breach of a contract for personal services. Defendant contends that he is entitled to a new trial because the trial judge failed to give the proposed jury instruction that plaintiff's damages should be reduced by the costs and expenses he saved by not performing the services.

The proper measure of damages for breach of a personal services contract was addressed in *Arnold v. Ray Charles Enterprises, Inc.*, 264 N.C. 92, 141 S.E.2d 14 (1965). In that case, defendant Ray Charles failed to perform a concert and thereby breached his contract with the plaintiff. The court found as fact that the plaintiff was to have paid the defendant $3,500 plus 50% of gross admission receipts in excess of $7,000, less admission taxes. The defendant argued that the plaintiff's damages should have been reduced by costs and expenses of promoting, which were anticipated but not incurred as a result of the defendant's breach.

In overruling the defendant's argument, the Court held that the amounts which the plaintiff expended or agreed to expend were of no concern to the defendant, since such expenses came out of the plaintiff's half of the gross receipts. While the plaintiff's net profits would depend on the amount of his expenditures, gross profits were the measure of the plaintiff's damages. *Id.*

Similarly, in the present case, according to the program contract as modified 1 May 1987, plaintiff was to be compensated "at the rate of ¾ of 1% (0.75%) on the first $20,000,000.00 in sales" and "at the rate of ½ of 1% (0.50%) of the amount in excess of $20,000,000.00." Based on *Arnold*, plaintiff was entitled to his gross profits without a reduction for expenses or costs not actually incurred. Defendant's argument is overruled.

[4] Defendant's next argument, relating to his counterclaim, is that the trial court erred by instructing the jury that it could only find Dixie to have been damaged to the extent its damages exceeded $325,556.00. Defendant contends that this instruction was "tantamount to a peremptory instruction that Dixie was not entitled to a recovery on its counterclaim."

The court charged the jury with respect to defendant's counterclaim for damages as follows:

> Members of the jury, if you reach this issue and consider it, why members of the jury, there would be one *limitation* on any recovery that the defendant would be entitled to, specifically, in that there would be a consideration by you that the defendant would be entitled to the overage of the amount it paid over $325,556 for the additional services allegedly rendered to it as a substitute for the plaintiff's services when it hired the two additional designers at a cost to Dixie of $216,666 to do the work that the plaintiff, Thomas Hassett, was doing for that period of time between the 1st of April, 1988, and the end of the contract in April of 1990 (emphasis added).

This instruction did not require the jury to find that plaintiff breached the Program contract with defendant only if defendant could prove his damages were in excess of $325,556.00. Instead, the instruction was that defendant's damages would be *limited to* such overage. In order for this question to be addressed, however, the jury must first determine whether plaintiff breached the Program contract with defendant. Since the jury answered this issue "NO," defendant's argument is moot. The jury found that plaintiff did not breach the Program contract, and therefore defendant would not be entitled to any damages. Defendant's assignment of error is without merit.

[5] Defendant's final argument is that the trial court erred by instructing the jury that deposition testimony could only be used to evaluate credibility. Defendant contends that the jury instruction deprived Dixie of its right to have this deposition testimony considered as substantive evidence.

At trial, defendant introduced the deposition testimony of plaintiff which was received by the court as substantive evidence. Following the presentation of evidence, the parties made no written requests for special jury instructions regarding deposition testimony. Immediately preceding deliberations by the jury, defendant generally objected to the instructions concerning the use of testimony not given in court, and asked the court to reinstruct on that issue.

The record discloses that defendant offered the deposition testimony of plaintiff, and that the court received this testimony as substantive evidence in accordance with N.C.R. Civ. P. 32(a). The subsequent general instruction by the court regarding impeaching and corroborative evidence does not destroy the admission of plaintiff's deposition as substantive evidence. Defendant's argument is without merit.

We find no prejudicial error in the trial, and the judgment entered on the verdict will be affirmed.

No error.

Judges EAGLES and GREENE concur.

ALBERT A. McNEIL, ADMINISTRATOR OF THE ESTATE OF CLEMENTINE SMITH McNEIL, PLAINTIFF v. DEREK KENNETH GARDNER, DEFENDANT

No. 915SC37

(Filed 17 December 1991)

1. **Automobiles and Other Vehicles § 542 (NCI4th)— pedestrian struck by vehicle—sufficient evidence of driver's negligence**

In an action to recover for the death of plaintiff's intestate who was struck by defendant's vehicle while crossing a highway at night, plaintiff's evidence was sufficient for submission to the jury on the issue of defendant's negligence where it would

permit the jury to find that defendant operated his vehicle without keeping a proper lookout and at an excessive and unlawful rate of speed under the circumstances; that he failed to decrease the speed of his vehicle as he approached an intersection; and that he failed to see plaintiff's intestate and her daughter as they crossed approximately thirty feet of the traveled portion of the highway directly in front of his vehicle before the accident.

Am Jur 2d, Automobiles and Highway Traffic §§ 479, 490.

2. Automobiles and Other Vehicles § 614 (NCI4th)— pedestrian struck by vehicle—no contributory negligence as matter of law

While the evidence was sufficient to permit the jury to find that plaintiff's intestate was contributorily negligent when she was struck by defendant's vehicle while crossing a highway at night in that she did not keep a proper lookout and did not yield the right of way to defendant, the evidence did not disclose contributory negligence by plaintiff's intestate as a matter of law where it tended to show that the intestate and her daughter stopped and looked in both directions before they began to cross the highway but did not see any approaching vehicles, and that the intestate and her daughter crossed thirty feet of the traveled portion of the highway before she was struck by defendant's vehicle.

Am Jur 2d, Automobiles and Highway Traffic §§ 475, 480-482.

Judge EAGLES dissenting.

APPEAL by plaintiff from *Reid (David), Judge*. Judgment entered 10 October 1990 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 October 1991.

This is a civil action wherein plaintiff seeks damages for the wrongful death of his intestate, Clementine Smith McNeil, allegedly resulting from the negligence of defendant in the operation of a motor vehicle. The evidence at trial tends to show the following: On 15 August 1986 at approximately 10:00 p.m., plaintiff's intestate and her daughter were crossing U.S. Highway 74 from south to north after purchasing a bottle of grapefruit juice at the Scotchman Convenience Store. The store is located on the south side of Highway 74, just west of the intersection of Highway 74 and rural roads 1475 and 1482. Defendant was driving west on Highway 74 ap-

proaching the Scotchman Convenience Store at the time plaintiff's intestate was crossing Highway 74. Defendant's car struck and killed plaintiff's intestate.

Trooper M.C. Brinkley testified that he investigated the accident. The travel portion of Highway 74 at the site of the accident is 35 feet wide—a turn lane and east-bound lane 24 feet in width, and a west-bound lane 11 feet in width. The grapefruit juice bottle was found broken in the roadway two feet, ten inches from the white line marking the northern portion of the west-bound travel lane, and 32 feet west of the center of the intersection of Highway 74 and rural roads 1475 and 1482. Plaintiff's intestate's body was lying on the shoulder of the highway forty-nine feet, seven inches from the broken bottle. Defendant's car stopped 2,364 feet, six inches west of the broken bottle. Trooper Brinkley testified that there were no skid marks on the highway in the general area of the accident. He also stated that there were artificial lights in and around the Scotchman Convenience Store.

Portions of defendant's deposition testimony were entered into evidence at trial. Defendant stated that Highway 74 is generally straight and level, with no hills or curves for at least a mile prior to where the collision occurred. He further stated that although there was nothing to obstruct his view, he did not see plaintiff's intestate until his car hit her. Defendant indicated that plaintiff's intestate would have been more than halfway across the west-bound lane of travel, having crossed two and one-half lanes, before being struck by the right front portion of his car. Defendant could not determine why he had not seen plaintiff's intestate, and was not sure if he had been looking down the road, but did remember being engaged in a conversation with a Mr. Barton and a Mr. Miller at the time.

Tracy Smith, daughter of plaintiff's intestate, testified that at the time of the accident she was wearing a white shirt, white colored sneakers and grass colored shorts, and that her mother was wearing a bright yellow shirt, a pair of jeans, and tennis shoes. Tracy further testified that as they started to cross the highway they "looked both ways and there wasn't anything coming, so we crossed the street." Tracy also stated that she "got right to the shoulder [of the highway] and I felt something push my right shoulder and I fell to the ground." Tracy testified that she fell on the unpaved shoulder of the road, at which point she heard

the bottle her mother had been holding break, and that "I saw my mom laying on the pavement up the street a little ways . . . and she was all broken up and stuff, so I went to Miss Hayes' house . . . and I called an ambulance."

At the close of plaintiff's evidence, the court allowed plaintiff's motion to amend the pleadings to conform to the evidence and allege the doctrine of last clear chance. After amendment of the pleadings, the judge refused to submit the case of negligence and last clear chance to the jury and allowed defendant's motion for directed verdict on the issue of plaintiff's intestate's contributory negligence as a matter of law. Plaintiff appealed.

Yow, Culbreth & Fox, by Stephen E. Culbreth, for plaintiff, appellant.

Smith and Smith, by Walter M. Smith, for defendant, appellee.

HEDRICK, Chief Judge.

The trial judge clearly directed a verdict for defendant because he felt that the evidence disclosed plaintiff's intestate's negligence as a matter of law. When plaintiff argued to the trial court that the issue of defendant's negligence and the issue of last clear chance had not been ruled on, the court stated "I am not going to let it go to the jury on that . . . I am going to let the Court of Appeals decide this issue before we do that."

We hold the trial judge erred in not submitting to the jury the issues of negligence and contributory negligence. When the evidence is considered in the light most favorable to the plaintiff it is sufficient to raise the issue of negligence on the part of defendant in the operation of his motor vehicle which struck and killed plaintiff's intestate.

[1] From the evidence, the jury could find that defendant operated his motor vehicle without keeping a proper lookout, at an excessive and unlawful rate of speed under the circumstances, that he failed to decrease the speed of his motor vehicle as he approached an intersection, and that he failed to see plaintiff's intestate and her daughter as they crossed approximately thirty feet of the travel portion of Highway 74 directly in front of his motor vehicle before the accident. From the evidence, the jury could find that one or more of these negligent acts upon the part of defendant was a proximate cause of death of plaintiff's intestate.

Defendant, citing and relying on *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47, *affirmed*, 315 N.C. 383, 337 S.E.2d 851 (1985), states in his brief "the language of the North Carolina Court of Appeals *in a case very similar to the factual situation in the case at bar* where summary judgment was granted in favor of a defendant on the grounds that the plaintiff's intestate was contributorily negligent as a matter of law is instructive." [Emphasis ours]. The facts in *Meadows*, characterized by defendant as "very similar" were as follows: The defendant pulled out of a bowling alley parking lot onto Highway 64 West, passed a car going in the opposite direction, and a second or two later saw the plaintiff in the middle of his traffic lane at a distance of about 50 to 70 feet. The defendant swerved to the left and applied his brakes. The plaintiff, in an intoxicated condition, staggered one or two steps at a 45 degree angle towards the center of the highway. The middle portion of the bumper of the defendant's car struck the plaintiff, and the accident occurred in the left center of defendant's lane of travel.

The facts in the present case are hardly similar. Plaintiff's intestate was not intoxicated, defendant, although he had a straight and level stretch of roadway, did not even see her or her daughter even though they were wearing bright clothing and had crossed approximately 30 feet of the travel portion of the highway before plaintiff's intestate was killed. Certainly plaintiff's intestate did not stagger back to the middle of the lane in which she was struck and obviously, since defendant did not see her, he did not swerve to avoid her as did the defendant in *Meadows*.

[2] We also hold the trial court erred in directing a verdict for defendant on the grounds that plaintiff's intestate's contributory negligence was a bar to the claim as a matter of law.

> '[T]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than by the trial judge. [Citations omitted]' *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976). *Accord, Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979).

Helvy v. Sweat, 58 N.C. App. 197, 199, 292 S.E.2d 733, 734-35, *disc. review denied*, 306 N.C. 741, 295 S.E.2d 477 (1982). Our courts have held that a pedestrian's failure to yield the right of way as dictated by G.S. 20-174(a) is not contributory negligence *per se*, but is only evidence of negligence to be considered with other evidence in the case in determining whether the plaintiff is chargeable with negligence which proximately caused or contributed to his injury. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E.2d 214 (1975). "[T]he court will only nonsuit . . . when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible." *Ragland v. Moore*, 299 N.C. 360, 364, 261 S.E.2d 666, 668 (1980). "A rule which by definition requires contributory negligence to be so clear 'that no other reasonable inference may be drawn therefrom' will by its nature be satisfied only infrequently and only in extreme circumstances." *Wagoner v. Butcher*, 6 N.C. App. 221, 231-32, 170 S.E.2d 151, 158 (1969).

While the evidence in the present case is sufficient to permit the jury to find that plaintiff's intestate was negligent in that she did not keep a proper lookout, did not yield the right of way to defendant, and that one or more of these negligent acts was a proximate cause of the collision and her death, we cannot say that under all the circumstances of this case that the evidence so clearly establishes her negligence that "no other reasonable inference or conclusion may be drawn therefrom." The evidence in the present case tends to show that plaintiff's intestate and her daughter stopped and looked in both directions before they began to cross the highway and that they did not see any approaching vehicles. The evidence also tends to show that plaintiff's intestate, with her daughter, crossed 30 feet of the travel portion of the highway before she was struck by defendant's vehicle.

From this evidence the jury could infer that the negligence of defendant, hereinbefore described, was the proximate cause of the collision, and not the negligence of plaintiff's intestate in failing to see defendant's vehicle. Ordinarily, proximate cause is a question for the jury.

We hold the trial judge erred in directing a verdict for defendant, and the cause will be remanded to the Superior Court for a new trial.

We need not discuss at this time the question of whether the court erred in not submitting the issue of last clear chance, since that issue can only be decided from the evidence at the new trial.

New trial.

Judge EAGLES dissents.

Judge GREENE concurs.

Judge EAGLES dissenting.

I agree that there is sufficient evidence to submit the issue of the defendant's negligence to the jury. However, I disagree with that portion of the majority's opinion which holds that the plaintiff was not contributorily negligent as a matter of law.

The majority attempts to distinguish the instant case from *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47, *affirmed*, 315 N.C. 383, 337 S.E.2d 851 (1985), because of factual dissimilarities. In doing so, the majority overlooks the sound legal principles applied in *Meadows*, which are equally applicable here. In *Meadows*, this court stated:

> It was plaintiff's duty to look for approaching traffic before she attempted to cross the highway. Having started, it was her duty to keep a lookout for it as she crossed.

Blake v. Mallard, 262 N.C. at 65, 136 S.E.2d at 216-7. *Accord Garmon v. Thomas*, 241 N.C. 412, 85 S.E.2d 589 (1955) (plaintiff was negligent in failing to keep a "timely lookout").

The courts of this State have, on numerous occasions, applied the foregoing standard of due care when the plaintiff was struck by a vehicle while crossing a road at night outside a crosswalk. If the road is straight, visibility unobstructed, the weather clear, and the headlights of the vehicle in use, a plaintiff's failure to see and avoid defendant's vehicle will consistently be deemed contributory negligence as a matter of law. *See Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1976); *Blake v. Mallard; Hughes v. Gragg*, 62 N.C. App. 116, 302

S.E.2d 304 (1983); *Thorton v. Cartwright*, 30 N.C. App. 674, 228 S.E.2d 50 (1976).

Meadows, 75 N.C. App. at 89-90, 330 S.E.2d at 50.

These same guiding legal principles were applied in *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967), and are controlling here. In *Price*, the plaintiff's intestate was killed while crossing U.S. Highway 258 in Onslow County. There was no evidence that plaintiff's intestate was intoxicated or unsteady on his feet. *Id.* at 691, 157 S.E.2d at 349. After reviewing the relevant case law, the Supreme Court concluded that the plaintiff's intestate was contributorily negligent as a matter of law. The Court stated:

> In the instant case, the evidence reveals that defendant's lights were burning and that plaintiff's intestate could have seen them at any time while the defendant's automobile was traveling toward him for a distance of at least one-half mile. The road was straight and level. The weather was clear. We have concluded that plaintiff's evidence provided sufficient inferences of negligence to carry this case to the jury against the defendant on the theory that she failed to keep a proper lookout. If defendant were negligent in not seeing plaintiff's intestate, . . ., in whatever length of time he might have been in the vision of her headlights, then plaintiff's intestate must certainly have been negligent in not seeing defendant's vehicle as it approached, with lights burning, along the straight and unobstructed highway.

Price, 271 N.C. at 696, 157 S.E.2d at 351.

Here, the evidence, when taken in the light most favorable to the plaintiff, shows the following: that the plaintiff's intestate was crossing a long straight segment of U.S. Highway 74 at night; that there was nothing obstructing the visibility of the defendant or the plaintiff's intestate; that the defendant was burning his headlights; and that while the plaintiff's intestate did look both ways before she started to cross the highway, she did not continue to maintain a lookout as she crossed the highway. As in *Price*:

> We must conclude that plaintiff's intestate saw defendant's automobile approaching and decided to take a chance of getting across the road ahead of it, or in the alternative, that [s]he not only failed to yield the right of way to defendant's auto-

mobile, but by complete inattention [failed to maintain a lookout as she crossed the highway].

In any event, the only conclusion that can be reasonably drawn from plaintiff's evidence is that plaintiff's intestate's negligence was at least a proximate cause of [her] death.

Price, 271 N.C. at 696, 157 S.E.2d at 351.

For the reasons stated, I respectfully dissent.

JOANNE ALSTON DANIELS, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL DANIELS, JR., DECEASED, PLAINTIFF v. THE HERTZ CORPORATION, THE ZURICH INSURANCE COMPANY, CORPORATIONS, AND THE RALEIGH-DURHAM AIRPORT AUTHORITY, A MUNICIPAL CORPORATION, DEFENDANTS

No. 9014SC1275

(Filed 17 December 1991)

Compromise and Settlement § 5 (NCI4th)— rental car accident—settlement—fraud and good faith

The trial court erred by granting plaintiff's motion for judgment on the pleadings under N.C.G.S. § 1A-1, Rule 12(c) in an action against Hertz which arose from a previous wrongful death suit for the death of plaintiff's husband. Plaintiff settled that action for $2,115,000, without the participation of Hertz or Zurich Insurance Company, and with the defendant rental car driver's exposure limited to $115,000, the total of his primary insurance coverage. The Zurich Insurance Company and plaintiff settled and plaintiff brought this action to recover a one million dollar judgment against Hertz, which had an agreement with IBM, the driver's employer, to provide $1,000,000 liability protection for IBM employees renting cars from Hertz. The trial court erred by granting judgment on the pleadings because the pleadings raise a material issue of fact concerning whether the amount of the settlement in the first action and the circumstances surrounding it were reasonable and made in good faith.

Am Jur 2d, Compromise and Settlement §§ 27, 29.

APPEAL by defendant from judgment entered 14 June 1990 by *Judge George R. Greene* in DURHAM County Superior Court. Heard in the Court of Appeals 27 August 1991.

This case arises from a previous wrongful death suit in which plaintiff's husband was killed (*Daniels v. Thomas*, Durham County No. 88 CVS 1239). As a result of that suit, plaintiff settled with defendant Thomas for a total of $2,115,000 but limiting Thomas' personal exposure to $115,000, the total of his primary insurance coverage. Of the total settlement amount, the defendant in the present action, The Hertz Corporation (Hertz) was held to be responsible for one million dollars as the insurer for the rental car driver who negligently caused the accident (Thomas). Hertz and Zurich Insurance Company each provided one million dollars in excess liability protection for Thomas, whose personal insurance company provided coverage of $15,000 with the rental car having coverage with a limit of $100,000. Neither Hertz nor Zurich participated in the settlement and subsequent entry of judgment.

After the settlement in the *Daniels v. Thomas* action, plaintiff brought this action to recover the one million dollar judgment against defendant Hertz. On 14 June 1990, Judge Greene entered judgment on the pleadings under Rule 12(c) of the N.C. Rules of Civil Procedure in favor of plaintiff, and defendant gave proper notice of appeal. Zurich Insurance Company and plaintiff have settled. The Raleigh-Durham Airport Authority is not a party to this appeal.

From the judgment of 14 June 1990, defendant appeals.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams and Jerome P. Trehy, Jr.; and Mark J. Simeon, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr. and R. Michael Strickland; and Spears, Barnes, Baker, Wainio, Brown & Whaley, by John C. Wainio, for defendant-appellant.

ORR, Judge.

The dispositive issue on appeal is whether the trial court erred in granting plaintiff's judgment on the pleadings under Rule 12(c) of the N.C. Rules of Civil Procedure. For the following reasons, we hold that the trial court erred in its order of 14 June 1990, and therefore remand.

The pleadings in this case establish the following:

The Present Action

On 19 January 1990, plaintiff filed this action against Hertz to recover $1,000,000 for breach of contract, unfair and deceptive trade practices, punitive damages, violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, breach of contract against defendant Zurich and for specific performance against defendant Raleigh Durham Airport Authority. Zurich has subsequently settled with Daniels, and the Airport Authority is not a party to this appeal. Plaintiff subsequently filed a motion for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure.

This motion was heard before Judge Greene on 11 June 1990. Judge Greene entered his judgment in plaintiff's favor solely on the issue of Hertz's liability to plaintiff for $1,000,000 for breach of contract. Judge Greene further certified that there was "no just reason for delay" and that the judgment was immediately appealable. Hertz subsequently appealed.

The parties briefed the issue of whether the appeal was interlocutory before the Court. After reviewing the briefs and the evidence of record, we conclude that the appeal is not interlocutory and will therefore address the merits.

Under N.C. Gen. Stat. § 1A-1, Rule 12(c) (1990), a party moving for judgment on the pleadings must establish that no material issue of fact exists and that he is entitled to judgment as a matter of law. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 353 S.E.2d 269 (1987). For the purposes of such motion, the movant is deemed to admit all factual allegations in the non-movant's pleadings except those inadmissible in evidence or legally impossible. *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 359 S.E.2d 792 (1987). Under the rule, the trial court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the nonmoving party. *Newbold v. Globe Life Ins. Co.*, 50 N.C. App. 628, 274 S.E.2d 905 (1981). The trial court may consider only the pleadings and any attached exhibits, which become part of the pleadings. *Minor v. Minor*, 70 N.C. App. 76, 318 S.E.2d 865, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

The pleadings, viewed in the light most favorable to Hertz, establish the following facts:

The Underlying Action

The amended complaint in the underlying action alleged that plaintiff's intestate was killed as the result of Thomas' negligent driving. At the time of the accident, Thomas, an IBM employee, was driving a car rented from Hertz pursuant to an agreement between IBM and Hertz. IBM's contract with Hertz obligates Hertz to provide $1,000,000 liability protection for IBM employees renting defendant's cars. The agreement provides in pertinent part:

> 1. STATEMENT OF AGREEMENT
>
> IBM shall recommend to its employees that they use Hertz as the primary Supplier for . . . automobile rentals.
>
> . . .
>
> This Agreement contains the entire understanding of the parties with respect to the subject matter hereof and is intended as a final expression of their agreement and a complete statement of the term [sic] thereof, and shall not be modified, except in writing, signed by the parties hereto.
>
> . . .
>
> 4. RENTAL AGREEMENT
>
> The form of the Rental Agreement in use by Hertz at the time and place of each rental (hereinafter call [sic] the Rental Agreement) shall be signed by each IBM renter.
>
> In the event of any conflict between the terms and conditions of the Rental Agreement a copy [sic] which is attached as Appendix E and the terms and conditions of this Agreement, the provisions most favorable to the IBM renter, to IBM, or such other person authorized to operate or use the rented automobile, shall apply.
>
> . . .
>
> 30. APPLICABLE LAW
>
> This Agreement shall be governed by the laws of the State of New York.
>
> . . .

The insurance override agreement, attached to the contract states:

> Notwithstanding any contrary provisions contained in any Rental Agreement which may be signed by an employee of [IBM], it is expressly understood and agreed that . . . [Hertz] will provide liability coverage for Company, ...
>
> . . .
>
> a) *In the United States*: For each accident $1,000,000 combined single limit for public liability including bodily injury and death liability. . . .

Hertz denied its liability coverage to Thomas, and in a letter to defendant Zurich, declined to defend Thomas because it determined that Hertz's licensee (U-Drive-It Auto Company) was obligated to defend Thomas. Hertz then requested its licensee to defend its interests in the *Daniels v. Thomas* action. At all times pursuant to the underlying action, Hertz refused to personally defend itself or Thomas and instead relied on its licensee to defend its interests.

The defense was handled by the two primary insurers, Prudential Insurance Company and Colonial Penn Insurance Company who retained an attorney, C. Douglas Fisher, to defend Thomas.

On 29 September 1989, Hertz was notified by letter from plaintiff's attorney that he would "seek to have Mr. Thomas stipulate as to the amount of damages which are owed in the case. As you are fully aware, a defendant has the absolute right to stipulate to the amount of damages which he owes as a result of negligence." Hertz admitted in its answer that it received notice in early December 1989 that Thomas' deposition would be taken on 6 December 1989.

On 6 December 1989, Thomas was deposed. Hertz did not send its legal counsel to the deposition. At the deposition, plaintiff submitted to Thomas a request for admissions. Thomas answered the request for admissions upon the advice of his attorney at the deposition. These admissions included acknowledgment of Thomas' negligence in causing the accident, Thomas' legal responsibility for the accident and an admission that plaintiff was entitled to recover $2,115,000 as actual damages in the wrongful death action.

On 7 December 1989, plaintiff filed a motion for summary judgment. On 7 December 1989, Thomas, Prudential, Colonial Penn and plaintiff entered into a settlement agreement whereby plaintiff would receive the primary insurance available from Prudential and Colonial Penn ($115,000) and Zurich and Hertz would be held liable

to plaintiff for their additional coverage of $1,000,000 each. The Agreement purported not to release Thomas from his liability and in pertinent part, states:

> 4. The liability of Mr. Claude B. Thomas and/or U-Drive-it [sic] shall not exceed the application or coverage or protection provided by the insurance policy issued by Zurich American, in the amount of $1,000,000.00; the contractual obligation of Hertz, in the amount of $1,000,000.00; and/or the liability for Hertz, for fraud, bad faith, RICO, negligence, or for any other claim to the extent that Hertz has assets, coverage, or other means to satisfy all or part of any such verdict or settlement no matter what the amount of the verdict or settlement; however, in the unlikely event that the Zurich American Policy, [sic] is held after final judicial determination not to be applicable; and in the unlikely event that Hertz is held after final judicial determination not to have contractual obligations and/or other liability or responsibility, then the liability of Mr. Claude B. Thomas shall not exceed the $115,000.00 tendered to the Court; the intentions of all parties being that the Estate of Nathaniel Daniels, Jr. shall be entitled to recover up to the amount of liability coverage applicable in the case; and/or up to the amount of assets or other coverage of Hertz. Nothing in this Contract shall act as a release to the right of the Plaintiff and the Estate of Nathaniel Daniels, Jr., to pursue all rights, remedies and claims against Hertz and Zurich American for any damages to which Hertz or Zurich American may be liable . . . .
>
> 5. Nothing in this Contract purports to settle this claim on behalf of Hertz and/or Zurich American.
>
> 6. In the exercise of good faith, Colonial Penn and Prudential, have insisted upon the protection of their insured, Mr. Claude B. Thomas, and have insisted that to protect their insured, Mr. Claude B. Thomas, the Plaintiff's rights shall be coexistent with the obligations of Hertz and Zurich American to provide protection and/or insurance, or to otherwise be liable to satisfy any verdict rendered against their insured, Mr. Claude B. Thomas.
>
> . . .
>
> 10. The parties further acknowledge, that the Plaintiff shall have the right to proceed to take this claim to a verdict;

and that the Plaintiff has waived no rights to any claims she may have against Hertz and/or Zurich American; and that she may enforce any final verdict or claims against Hertz and/or Zurich American.

On 7 December 1989, Judge Anthony M. Brannon granted plaintiff's motion for summary judgment against Thomas, finding that as a matter of law, Thomas was negligent and his negligence was the direct and proximate cause of plaintiff's intestate's death. The court then ordered that plaintiff "is entitled to actual damages in the amount of $2,115,000.00 . . . ." There is no mention in this order, the pleadings, or any of *defendant's* attached exhibits in the underlying action of Thomas' alleged negligence due to consumption of alcoholic beverages or drugs. The only mention of Thomas' alleged intoxication appears in Exhibit 8 of plaintiff's pleadings in a letter from Richard P. McEvily, Hertz's managing attorney, to Mary Vener, liability claim specialist for Zurich. In that letter, McEvily states, "it is our understanding that [Thomas] was originally charged with Driving While Intoxicated based upon a Blood Alcohol Count of .24, along with several more serious criminal charges . . . ." Hertz maintains that this is a violation of the rental agreement and therefore voids the coverage Hertz provides to its patrons.

Hertz argues that the trial court improperly granted the Rule 12(c) motion on three grounds: (1) that the settlement in the underlying action does not create an indemnification obligation for Hertz; (2) that the settlement in the underlying action was the product of collusion and was unreasonable; and (3) that the IBM-Hertz agreement does not provide liability protection for IBM employees operating Hertz rental cars while intoxicated.

Hertz now argues each of these defenses and asks this Court to rule on each. Our role, however, under Rule 12(c) is to determine whether the pleadings, viewed in the light most favorable to Hertz, raise a material issue of fact. If so, plaintiff is not entitled to judgment as a matter of law.

After reviewing the pleadings and applying the test under Rule 12(c), we hold that the pleadings raise a material issue of fact concerning whether the amount of the Daniels-Thomas settlement and the circumstances surrounding it were reasonable and made in good faith. We have considered Hertz's other arguments and find them to be without merit.

In its pleadings, Hertz answered, *inter alia*, that the settlement was the result of a collusive arrangement; that plaintiff's claims are barred by the doctrines of unclean hands, laches, waiver and/or estoppel; that Thomas' lawyer permitted him to sign objectionable requests for admissions purporting to bind Hertz to liability; that Thomas stipulated to his liability and consented to the entry of judgment against him in the exact amount of allegedly available insurance coverage ($2,115,000) although actual damage to the plaintiff was less than that amount; that Hertz first heard of the settlement upon receipt of the complaint in the present action; that Hertz was misled and deceived by the representations and actions of Thomas' attorney that he was protecting Hertz's interests as well as Thomas' when he was in fact scheming and colluding with attorneys for the plaintiff to have a judgment entered in the underlying action which prejudiced the rights and interests of Hertz; and that plaintiff's attorneys orchestrated, on behalf of the plaintiff, a collusive agreement. Hertz further alleged that plaintiff allowed the time for appeal to run before it notified Hertz of the agreement.

Under N.C. Gen. Stat. § 1A-1, Rule 8(c):

> *Affirmative defenses.*—In pleading to a preceding pleading, a party shall set forth affirmatively . . . , estoppel, . . . , fraud, illegality, . . . , laches, . . . , waiver, and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. . . .

We hold that the above pleadings are sufficient under Rule 8(c) to raise the affirmative defense of fraud or illegality of the settlement agreement, and that judgment on the pleadings was improper.

We note, moreover, the reasonableness of the settlement agreement concerned Judge Greene at the hearing on the Rule 12(c) motion. Although Judge Greene questioned the reasonableness of the amount of the settlement, he never determined whether or not there was a question of a good faith settlement, or whether there was fraud or illegality involved. Judge Greene determined that he would grant plaintiff's Rule 12(c) motion, but also stated, in the context of encouraging settlement to the case, "I cannot

sit here in good conscience and say that this case is worth two million one hundred and fifteen thousand dollars. That bothers me." At another point, Judge Greene described the settlement amount as "excessive." We are mindful that Judge Greene could not overrule Judge Brannon's explicit approval of the settlement agreement, but Hertz's pleadings raise, at a very minimum, a question of fact concerning the reasonableness and legality of the settlement. Hertz now has the burden of showing lack of good faith. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970) (the party asserting lack of good faith had the burden of showing such).

Taking Hertz's allegations as admitted by plaintiff as we are required to do under Rule 12(c), we hold that the trial court erred in granting plaintiff's motion to dismiss on the pleadings under Rule 12(c). Therefore, we reverse and remand for trial.

Reversed and remanded.

Judges COZORT and LEWIS concur.

FRANKLIN GRADING COMPANY, INC., PLAINTIFF v. DAVID PARHAM, DEROLD LEDFORD, OTTO MORTON, TODAY'S HOUSING CONCEPTS, INC., FOUR "R's," A N.C. PARTNERSHIP, AND OTHER PERSONS UNKNOWN AT THIS TIME WHO ARE PARTIES IN FOUR "R's," A N.C. PARTNERSHIP, DEFENDANTS

No. 9030SC1315

(Filed 17 December 1991)

1. Accounts and Accounts Stated § 21 (NCI4th)— open account— evidence sufficient to warrant instruction

The evidence was sufficient to warrant an instruction on an open account, and the trial court erred in refusing to give such an instruction, where plaintiff's evidence showed that one of the defendants contacted the plaintiff to construct a road through a residential subdivision; plaintiff initially undertook to build a block out road for four-wheel drive vehicles, but expanded its construction plans upon plaintiff's request to build a finished road; plaintiff's president testified that he had told one of the defendants that he could add as many roads as he wanted because plaintiff was doing it on time

and material; after plaintiff began construction on the first road, defendant also requested that plaintiff construct a finished addition to a logging road and to construct two additional side roads; plaintiff performed work on the roads for approximately two months; plaintiff submitted a copy of the account to defendant at the end of two months; the account consisted of three pages of items and services charged to defendant's partnership on different dates; the managing partner admitted that the work performed by plaintiff was charged to an account at defendant in the name of the partnership; and defendant made six payments at irregular intervals over a period of a year and a half.

Am Jur 2d, Accounts and Accounting §§ 4, 19.

2. **Consumer and Borrower § 4 (NCI4th)— finance charges—no dispute—submission to the jury erroneous**

The trial court erred in an action on a debt by submitting to the jury the imposition of finance charges where there was no dispute that defendants owed some amount to the plaintiff and no dispute that defendants had received notification of the interest charge at some point. The issue submitted to the jury was, in effect, the question of whether there was notification of the finance charges, although the parties disputed only the date of notification.

Am Jur 2d, Consumer and Borrower Protection §§ 271, 272.

3. **Consumer and Borrower § 4 (NCI4th)— instruction that finance charge dependent upon finding of account stated—erroneous**

The trial court erred in an action on a debt by making the jury's consideration of an issue regarding the date of notification of a finance charge dependent upon a finding of account stated. Since the parties did not dispute that some amount was owed and that defendants had received notification, plaintiff was entitled to impose finance charges on the amount of credit actually extended, whether or not there was an account stated.

Am Jur 2d, Consumer and Borrower Protection §§ 271, 272.

APPEAL by plaintiff from Judgment entered 18 December 1990 by *Judge James U. Downs* in MACON County Superior Court. Heard in the Court of Appeals 17 September 1991.

Philo & Spivey, P.A., by Steven E. Philo and David C. Spivey, for plaintiff appellant.

McKeever, Edwards, Davis & Hays, P.A., by Fred H. Moody, Jr.; and John F. Henning, for defendant appellees.

COZORT, Judge.

In February or March 1984, plaintiff Franklin Grading Company (Franklin Grading) entered into a contract with defendant Four "R's," a partnership, to construct a road from a state highway through a residential subdivision owned by Four "R's." Franklin Grading submitted to Four "R's" a statement requesting payment of $13,077.35. Over a period of three years, Four "R's" made payments to Franklin Grading totaling $6,127.35. On 8 April 1988, plaintiff filed suit in Macon County Superior Court alleging that Four "R's" and its general partners were "indebted to the Plaintiff in the sum of $11,283.74 plus interest thereon at a rate of 1 1/2% per month from April 24, 1987, on an account." The case was tried before a jury on 20 April 1990. After a verdict for defendant, plaintiff appeals, alleging the trial court failed to properly instruct the jury. We reverse and remand for a new trial.

On appeal, plaintiff makes the following assignments of error: (1) the trial court erred in refusing to charge the jury on the issue of action on account; (2) the trial court erred in submitting the issue of imposition of finance charges to the jury; and (3) the trial court erred in making the consideration of the imposition of finance charges contingent upon a finding of account stated.

" 'It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. This means, among other things, that the judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties. . . . The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial.' " *Bare v. Barrington*, 97 N.C. App. 282, 285, 388 S.E.2d 166, 167, *disc. review denied*, 326 N.C. 594, 393 S.E.2d 873 (1990) (citations omitted). In the case at bar, the trial court improperly refused to give the requested instruction on action on account.

The trial court submitted these issues to the jury, which were answered as follows:

ISSUE 1: Was the account dated May 30, 1984 an account stated between Franklin Grading Company, Inc., and the defendants?

ANSWER: NO

ISSUE 2: If so, did the account stated include a statement that finance charges would be imposed on any sums more than 30 days past due at the rate of 1½% per month or 18% per annum?

ANSWER: _____

ISSUE 3: If so, which of the following dates was the notification of the imposition of the finance charges submitted by the plaintiff to the defendants?

a. May 30, 1984 _____
b. June 1, 1985 _____
c. January 1, 1986 _____

ANSWER: _____

ISSUE 4: Did Franklin Grading Company, Inc. commence this action before the expiration of the three-year statute of limitations?

ANSWER: _____

The trial court instructed the jury that "if you answered the first issue no, then that ends the lawsuit. You will not go on and consider any further issues."

Franklin Grading presented the following evidence: Franklin Grading is a North Carolina corporation in the road construction and grading business. Defendant Four "R's" is a general partnership. The remaining defendants, three individuals and a North Carolina corporation, are general partners of Four "R's." In March or February 1984 the managing partner of Four "R's" contacted Franklin Grading to construct a road from a state highway through a residential division. Defendant managing general partner initially requested plaintiff to construct a "block out" road for use by four-wheel drive vehicles, but later asked plaintiff to construct a finished longer road. Plaintiff undertook and completed the road in approximately two months. After the final work, on 18 May 1984 plaintiff prepared a statement of account reflecting a balance due of $13,077.35. This statement was mailed to the partnership and general partners. The following language appeared on the bottom of the statement:

> Payment due upon receipt of invoice. On accounts over 30 days past due of invoice date, a service charge of 1½% per month will be charged. Annual percentage rate of 18%.

Franklin Grading's president discussed the bill item by item with two general partners who expressed surprise at the cost of the additional work but were satisfied with the explanation. Although stating that they could not pay the bill in lump sum, the general partners agreed to pay as lots in the subdivision were sold.

Defendants made six payments, totaling $6,127.35, on an irregular basis beginning 31 December 1984 and ending 24 April 1987. After the account bill was sent to defendant, there were several discussions between Franklin Grading and Four "R's" in which the managing general partner was informed that interest would be charged if the bill was not timely paid. Franklin Grading sent several notices and letters concerning the account. Defendant's managing partner failed to object to interest assessed on the account balance when presented with receipts upon making payments. The managing partner also promised that payment would be made once Four "R's" had sufficient funds.

Defendants presented the following evidence: Plaintiff's president agreed to construct a completed road for a total of $6,000.00. Plaintiff did not build all the roads it claimed to build and agreed to build additional side roads at no extra cost. The managing partner received the plaintiff's statement in May or June 1984, but the statement did not indicate that interest would be charged if the account was not paid in thirty days. Four "R's" managing partner telephoned plaintiff's president who said that he was almost too embarrassed to send the statement. Plaintiff's president and Four "R's" managing partner never reviewed the bill item by item because the plaintiff had agreed to perform the work for a fixed amount of $6,000.00. The managing partner wrote a letter to Franklin Grading protesting the amount greater than $6,000.00. Any amount paid to Franklin Grading in excess of the $6,000.00 was a mistake. Defendant's managing partner first saw the language indicating interest charge a year after receiving the first statement.

[1] The trial court properly instructed the jury on the issue of an account stated since there was some evidence to support such a finding. In *Woodruff v. Shuford*, 82 N.C. App. 260, 262, 346 S.E.2d 173, 174 (1986), the North Carolina Supreme Court set forth the following elements required to establish an account stated: "(1)

a calculation of the balance due; (2) submission of a statement to plaintiff; (3) acknowledgment of the correctness of that statement by plaintiff; and (4) a promise, express or implied, by plaintiff to pay the balance due." The defendant in *Woodruff* argued that under the facts of the case the trial court should have submitted an issue based on the theory of an open account. The Court summarized the law of accounts as follows:

> *An open account results where the parties intend that the transactions between them are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits, and further dealings between the parties are contemplated. Noland Co. v. Poovey*, 54 N.C. App. 695, 707, 282 S.E.2d 813, 821 (1981). An account stated supersedes an open account, and thus the jury only could have found one or the other if instructed on both. *See Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 530, 126 S.E.2d 500, 506 (1962) (once an agreement as to the amount of balance is reached, the account stated constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular constituent items). *See also Mahafey, supra*, 38 N.C. App. [349] at 351, 247 S.E.2d [772] at 774. *See generally*, 1 Am.Jur.2d *Accounts and Accounting* Sec. 21 at 395 ("When the parties to an open account reach an agreement with respect to the totality of the transactions between them, the new transaction is called a 'statement' of the account, and the situation between the parties is called an 'account stated' . . . .").

Id. at 263-64, 346 S.E.2d at 175 (emphasis added). Noting that any open account that may have existed between the parties had merged into the account stated, the Court concluded that the failure to instruct on an open account was not prejudicial since the defendant's liability on the account stated superseded any liability on an open account. *Id.*

Although an account stated supersedes an open account, we agree with plaintiff that a finding of no account stated does not preclude a finding of an action on account. Unlike an account stated, an action on account does not require that the parties agree to the amount of the debt.

Plaintiff relies upon *Kirby v. Winston*, 39 N.C. App. 206, 249 S.E.2d 882 (1978), to argue that the evidence was sufficient to

justify an instruction on action on account. In *Kirby*, plaintiff and defendant contracted for plaintiff to perform grading and hauling work on plaintiff's land. Upon completion of the work, plaintiff submitted a bill totaling $1,302.00 to defendant. Defendant responded by letter enclosing a $300.00 payment, indicating surprise at the final cost, and stating that he would forward additional payment the next month. Defendant, however, made no further payments and plaintiff filed suit alleging an account stated. Defendant's only defense was his contention that the amount charged was too great. The trial court concluded that the plaintiff was entitled to judgment on his claim but in an amount less than plaintiff sought. On appeal, this Court addressed the sole issue of whether the trial court erred in rendering judgment for an amount less than the full amount of the account stated. In finding that the trial court had no authority to reduce the amount awarded, this Court stated:

> The record before us clearly shows: (1) *the account in question was an open one*; (2) plaintiff billed defendant for the totality of the transactions between them; (3) the exact balance due plaintiff was stated as final; and (4) defendant made a payment on the account leaving a balance of $1,002.00 which he stated that he would pay.

Id. at 210, 249 S.E.2d at 884 (emphasis added).

In the case at bar, the jury found no account stated and made no further determinations. The evidence, however, was sufficient to warrant an instruction on an open account as defined in *Woodruff*. Plaintiff's evidence showed that one of the defendants, a general partner in Four "R's," contacted the plaintiff to construct a road through a residential subdivision owned by Four "R's." Although initially undertaking to build a block out road for four-wheel drive vehicles, upon defendant's request, plaintiff expanded its construction plans to build a finished road. A finished road required additional work such as putting in culverts, hydroseeding the banks, and laying gravel. Franklin Grading's president testified that, "I told [Mr. Parham] he could add on as many roads as he wanted to, he could make as many changes as he wanted to, and we was doing it on time and material. You know, it's up to him what he wanted." After plaintiff began construction on the first road, defendant also requested plaintiff to construct a finished addition to a logging road and to construct two additional side roads. Plaintiff performed work on the roads for approximately two months.

At the end of the two months, plaintiff submitted a copy of the account to defendant. The account consisted of three pages of items and services charged to Four "R's" on different dates beginning in March 1984 and ending May 1984. Four "R's" managing partner admitted that the work performed by Franklin Grading was charged to an account at Franklin Grading in the name of Four "R's" Partnership. Over a period of a year and a half, defendant made six payments at irregular intervals. From this evidence we conclude that a jury could find that the parties intended that the transactions between them to be considered as a connected series rather than independent of each other, a balance was kept by adjustment of debits and credits, and further dealings between the parties were contemplated. Since we find plaintiff's evidence sufficient to warrant a jury instruction on action on account, the trial court erred in refusing to give such instruction and plaintiff is entitled to a new trial.

[2] Plaintiff also argues that the trial court erred in (1) submitting the issue of the imposition of finance charges to the jury, and (2) making consideration of that issue contingent upon a finding of an account stated. Plaintiff argues that since there was no dispute defendants owed some amount to the plaintiff and no dispute defendants had received notification of the interest charge at some point, that as a matter of law plaintiff was entitled to finance charges. The only factual determination remaining for the jury, plaintiff argues, was the date the finance charges began to accrue. We agree with plaintiff.

The trial court instructed the jury that the plaintiff was entitled to finance charges even if there has been no express prior agreement so long as plaintiff proved by the greater weight of the evidence that defendants had received notification of the imposition of finance charges on the amount allegedly owed. The trial court submitted two issues concerning the finance charges:

> ISSUE 2: If so, did the account stated include a statement that finance charges would be imposed on any sums more than 30 days past due at the rate of 1½% per month or 18% per annum?
>
> ANSWER: _____

ISSUE 3: If so, which of the following dates was the notification of the imposition of the finance charges submitted by the plaintiff to the defendants?

a. May 30, 1984 _____
b. June 1, 1985 _____
c. January 1, 1986 _____

The trial court " 'must submit to the jury such issues as when answered by them will resolve all material controversies between the parties. . . .' " *Bare*, 97 N.C. App. at 285, 388 S.E.2d at 167. Issue 2, in effect, submitted to the jury the question of whether there was notification of the finance charges. Although the evidence shows that the parties disputed the date of notification, there was no dispute that the defendants received notification. Therefore, the issue of whether defendants received notification was not a material controversy between the parties. Thus, the submission of Issue 2 to the jury was in error.

[3] We also agree with plaintiff that the trial court erred in making the consideration of Issue 3 dependent upon a finding of account stated. Since the parties did not dispute that some amount was owed and that defendants had received notification, plaintiff was entitled to impose finance charges on the amount of credit actually extended, whether or not there was an account stated. The factual issue for the jury to determine is when the finance charges began to accrue. The trial court can then compute the finance charges due plaintiff upon the jury's finding as to whether the agreement was to build the road for a fixed sum of $6,000.00, as alleged by defendant, or for its actual cost, $13,077.35, as contended by plaintiff.

Reversed and remanded for a new trial.

Judges ORR and LEWIS concur.

MGM DESERT INN, INC. D/B/A DESERT INN HOTEL & CASINO, PLAINTIFF
v. WILLIAM HERBERT HOLZ, DEFENDANT

No. 913SC41

(Filed 17 December 1991)

Constitutional Law § 153 (NCI4th); Judgments § 51 (NCI3d)— foreign judgment—gambling debt—full faith and credit

No exception to the full faith and credit clause exists to prohibit enforcement in North Carolina of a Nevada judgment against defendant predicated on a gambling debt notwithstanding language in the anti-gambling statutes and the Uniform Enforcement of Foreign Judgments Act suggesting otherwise. N.C.G.S. §§ 1C-1708, 16-3.

Am Jur 2d, Judgments §§ 1235, 1244.

APPEAL by defendant from judgment entered 30 November 1990 by *Judge Herbert O. Phillips, III,* in CARTERET County Superior Court. Heard in the Court of Appeals 10 October 1991.

Bennett, McConkey, Thompson, and Marquardt, P.A., by Dennis M. Marquardt, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, Jr., for defendant-appellant.

PARKER, Judge.

In this civil action under the Uniform Enforcement of Foreign Judgments Act, N.C.G.S. §§ 1C-1701 to 1708 (1991), ("uniform act") defendant appeals from summary judgment entered in favor of plaintiff. We affirm the judgment of the trial court.

The pleadings, answers to interrogatories and affidavits before the trial court show that in June 1989 defendant travelled to Las Vegas, Nevada, where he visited plaintiff's casino. According to defendant's affidavit, on 7 June he "commenced to gamble with dice, the dice, or crap table, provided by the Plaintiff." Defendant lost all his cash, $2,700.00, but was advised by plaintiff's agent that credit was available to him if he would make application. Defendant went to an office on plaintiff's premises, completed some forms and was told to return the next day to determine if credit would be available to him. On 8 June defendant returned to the

casino and was told credit was available; all he had to do was sign a marker signifying the amount of credit he desired. On that same day, over the course of several hours during which he lost $20,000.00 at the dice table, defendant signed ten markers, each in the amount of $2,000.00.

Although defendant paid some of this debt, plaintiff sued for the unpaid balance; and in April 1990 judgment by default was entered against defendant in the district court of Clark County, Nevada. The default judgment was in the amount of $14,000.00, with prejudgment interest from 8 June 1989 to the date of entry of judgment at the statutory rate, costs of $104.00, and reasonable attorney's fees of $3,500.00; the total of all these sums was to bear interest at the statutory rate from 16 March 1990 until the judgment was satisfied.

Plaintiff subsequently sued in North Carolina on the Nevada default judgment. Pursuant to the uniform act, plaintiff filed a copy of the judgment in the office of the Clerk of Carteret Superior Court, *see* N.C.G.S. § 1C-1703 (1991), and on 12 July 1990, pursuant to N.C.G.S. § 1C-1704, served notice of this filing on defendant. On 19 July 1990 defendant filed a motion for relief from judgment and notice of defense pursuant to N.C.G.S. § 1C-1705. In this pleading defendant alleged (i) the default judgment was void as being contrary to the public policy of North Carolina and (ii) the uniform act prohibits enforcement of foreign judgments based on claims contrary to the public policies of North Carolina. Defendant also moved for dismissal of the proceeding pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Plaintiff's reply alleged that the federal and state constitutions require the enforcement in North Carolina of foreign judgments. Both parties moved for summary judgment; plaintiff's motion was granted and defendant's was denied.

On appeal defendant contends that (i) plaintiff's claim, being predicated on a gaming debt, is contrary to the public policies of North Carolina, (ii) plaintiff was unable to raise this defense in Nevada, whose laws permit enforcement of such debts, (iii) plaintiff's action is barred by the uniform act, and (iv) the superior court lacked jurisdiction to enforce a foreign judgment predicated on a gaming debt. While we agree that gaming debts incurred in North Carolina are not enforceable in the courts of this state, we find defendant's remaining arguments unpersuasive.

General Statutes, Chapter 16, provides as follows:

> All wagers, bets or stakes made to depend . . . upon any gaming by lot or chance . . . shall be unlawful; and all contracts, judgments . . . and assurances for and on account of any money . . . so wagered, bet or staked, or to repay, or to secure any money . . . lent or advanced for [such] purpose . . . shall be void.

N.C.G.S. § 16-1 (1983). Similarly, futures contracts

> shall be utterly null and void; and no action shall be maintained . . . to enforce any such contract, whether . . . made in or out of the State . . . nor shall any party to any such contract . . . have or maintain any action or cause of action on account of any money . . . paid or advanced . . . on account of such contract . . . nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract.

N.C.G.S. § 16-3 (1983).

The Uniform Enforcement of Foreign Judgments Act provides, "The provisions of this Article shall not apply to foreign judgments based on claims which are contrary to the public policies of North Carolina." N.C.G.S. § 1C-1708 (1991).

The federal constitution provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1. Congress subsequently prescribed the manner and effect of such judicial proceedings thus:

> The records and judicial proceedings of any court of any such State . . . or copies thereof, shall be proved or admitted in other courts within the United States . . . by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such . . . judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court

> within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

28 U.S.C.A. § 1738 (West 1966) (formerly 28 U.S.C. § 687).

In *Fauntleroy v. Lum*, 210 U.S. 230, 52 L. Ed. 1039 (1908), the United States Supreme Court considered whether the State of Mississippi had to enforce a Missouri judgment based on a gambling transaction in cotton futures. The original cause of action arose in Mississippi, where such transactions were illegal and void. Nevertheless the matter was submitted to arbitration in Mississippi, the question of illegality not being included in the submission, and the result was an award against defendant. Finding defendant in Missouri, plaintiff sued on the Mississippi award. The jury found for plaintiff and judgment was entered against defendant. Plaintiff then sued in Mississippi to enforce the Missouri judgment. *Id.* at 234, 52 L. Ed. 1041.

On appeal defendant argued that since the law of Mississippi made dealing in futures a misdemeanor and provided that futures contracts would not be enforced by that state's courts, the Mississippi court was deprived of jurisdiction. *Id.* The Court, however, found this argument unpersuasive. Instead the Court framed the issue as "whether the illegality of the original cause of action in Mississippi can be relied upon there as a ground for denying a recovery upon a judgment of another State." *Id.* at 236, 52 L. Ed. 1042. Citing the predecessor of 28 U.S.C. § 1783, the Court said

> Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. A judgment is conclusive as to all the *media concludendi*; and . . . it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. Of course, a want of jurisdiction over either the person or the subject-matter might be shown. But, as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law.

Id. at 237, 52 L. Ed. at 1042 (citations omitted).

In *Mottu v. Davis*, 151 N.C. 237, 65 S.E. 969 (1909), plaintiff instituted an action in North Carolina on a Virginia judgment

predicated on a gaming debt. Defendant filed two answers to plaintiff's complaint; the second ("further") answer raised the defense that the Virginia judgment was rendered on a demand arising from a gambling transaction. The Court stated

> As we have said, this further answer alleges that the original demand was on a gambling contract; that a recovery thereon is forbidden, both by our public policy and our statute law, and contends that this defense is now open to the defendant, notwithstanding the rendition of the Virginia judgment, but the question presented has been recently decided against the defendant's position by the Supreme Court of the United States, the final arbiter in such matters, in *Fauntleroy v. Lum*, 210 U.S., 230.

Mottu v. Davis, 151 N.C. at 240, 65 S.E. at 970-71.

After *Fauntleroy* the United States Supreme Court considered whether a federal district court in Illinois should entertain jurisdiction of an action on a valid Wisconsin judgment predicated on income tax due from defendant to the State of Wisconsin. *Milwaukee County v. White Co.*, 296 U.S. 268, 80 L. Ed. 220 (1935). The Court considered the narrow question of whether the courts of one state, even though not required to entertain a suit to recover taxes levied under the statutes of another state, "must nevertheless give full faith and credit to judgments for such taxes." *Id.* at 275, 80 L. Ed. at 227. The Court stated

> A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction; or that it has ceased to be obligatory because of payment or other discharge; or that it is a cause of action for which the state of the forum has not provided a court, unless it is compelled to do so by the privileges and immunities clause; or possibly because procured by fraud.

Id. at 275-76, 80 L. Ed. 227 (citations omitted).

In the case under review defendant argues that the statutory denial of jurisdiction to North Carolina courts to hear suits on judgments based on gaming debts or futures contracts has been upheld as an exception to the application of the full faith and credit clause described by the Court in *Milwaukee County* as "a cause of action for which the state of the forum has not provided a court." *See Lockman v. Lockman*, 220 N.C. 95, 16 S.E.2d 670 (1941); *Cody v. Hovey*, 219 N.C. 369, 14 S.E.2d 30 (1941). We disagree.

Admittedly, language in *Lockman* and *Cody* suggests such an exception exists; but after these cases were decided, the United States Supreme Court citing *Fauntleroy*, reiterated that virtually no exceptions exist to the granting of full faith and credit to the judgments of sister states:

> From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other. Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions. And we pointed out in *Williams v. North Carolina* that "the actual exceptions have been few and far between. . . ."
>
> We are aware of no such exception in the case of a money judgment rendered in a civil suit. Nor are we aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition.
>
> The constitutional command requires a state to enforce a judgment of a sister state for its taxes or for a gambling debt . . . .

Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438-39, 88 L. Ed. 149, 154-55 (1943) (citations and footnote omitted), *reh'g denied*, 321 U.S. 801, 88 L. Ed. 1088 (1944).

Similarly, this Court has stated

> The "Fauntleroy Doctrine" was followed by our own Supreme Court in *Mottu v. Davis*, 151 N.C. 237, 65 S.E. 969 (1909). . . .
>
> Defendant points to numerous decisions in which we have stated that a judgment of a court in another state may be attacked on grounds of lack of jurisdiction, fraud in the procurement, *or as being against public policy*. Although we have so asserted, it is rare that we will disregard a sister state judgment on public policy grounds. The *Fauntleroy* decision, as noted by a recent commentator, "narrows almost to the vanishing point the area of state public policy relief from the mandate of the Full Faith and Credit Clause—at least so far as the judgments of sister states are concerned." One exception to the full faith and credit rule is a penal judgment; a state need not enforce the penal judgment of another state. Another exception is when the judgment sought to be enforced is against the public policy of the state where it was initially rendered. The exceptions, however, are few and far between. In general, we are bound by the Full Faith and Credit Clause to recognize and enforce a valid judgment for the payment of money rendered in a sister state.

FMS Management Systems v. Thomas, 65 N.C. App. 561, 563-64, 309 S.E.2d 697, 699 (1983) (emphasis in original, citations omitted) (quoting S.W. Wurfel, *Recognition of Foreign Judgments*, 50 N.C.L. Rev. 21, 43 (1971)), *aff'd per curiam*, 310 N.C. 742, 314 S.E.2d 545 (1984).

In light of the foregoing principles we hold that notwithstanding language in the anti-gambling statutes and uniform act suggesting otherwise, no exception to the full faith and credit clause exists to prohibit enforcement in North Carolina of the Nevada judgment against defendant. Defendant has raised no question as to the jurisdiction of the Nevada district court over either his person or the original claim against him. "[S]ummary judgment will be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . any party is entitled to a judgment as a matter of law.' N.C.R. Civ. P. 56(c)." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). As a matter of law, upon plaintiff's action properly instituted under the Uniform Enforcement of Foreign Judgments Act, this state

cannot refuse to enforce the Nevada judgment against defendant, even though predicated on a gaming debt. Therefore, we hold the trial court did not err in granting summary judgment in favor of plaintiff.

Affirmed.

Judges WELLS and WYNN concur.

STATE OF NORTH CAROLINA v. DAVID LAMONT MILLS

No. 9012SC1198

(Filed 17 December 1991)

1. **Searches and Seizures § 8 (NCI3d)— cocaine—warrantless arrest—search incident to arrest**

A motion to suppress crack cocaine and drug paraphernalia was properly denied where officers entered an area known for drug trafficking and used a commonly known signal; defendant approached the officers' car; the officers had previously observed defendant soliciting stopped cars; defendant walked away from the officers' car in response to a shouted warning from his companion, who was known to be a lookout for drug dealers; defendant looked nervous when the officers stopped him; and one of the officers thought he might run. Although none of these factors alone would be sufficient to establish probable cause, considering all the factors together, based upon the practical considerations of everyday life, a person of reasonable caution acting in good faith could reasonably believe that the defendant was engaged in criminal activity, and the warrantless arrest of defendant was lawful as based upon probable cause. N.C.G.S. § 15A-401(b).

Am Jur 2d, Searches and Seizures §§ 37, 43.

2. **Searches and Seizures § 10 (NCI3d)— cocaine—probable cause and exigent circumstances to search—evidence admissible**

There was probable cause to search where officers approached an area known by reputation and observation for drug dealing; defendant approached their car in response to

a commonly used signal; the defendant had previously been observed by officers soliciting stopped cars; defendant quickly walked away from the officers' car in response to a shout from his companion, who was known to be a lookout for drug dealers; defendant looked nervous when stopped by officers; and one officer thought he might run. Those factors establish probable cause to search in that a reasonable person acting in good faith could reasonably believe that a search of defendant would reveal controlled substances. There were exigent circumstances preventing officers from obtaining a warrant prior to the search in that a delay might have caused a probable absence of the purported drug violater and the probable destruction of the controlled substances.

Am Jur 2d, Searches and Seizures §§ 37, 43, 44.

3. Searches and Seizures §§ 8,10 (NCI3d) — warrantless search — differing state and federal constitutional standards — not applied

A warrantless search of defendant for cocaine did not violate his state constitutional rights. Although acknowledging the authority to construe the two documents differently, neither the North Carolina Supreme Court nor the Court of Appeals has to date applied different standards in analyzing the law of search and seizure under the federal Constitution and under the North Carolina Constitution.

Am Jur 2d, Searches and Seizures §§ 6, 37.

APPEAL by defendant from Order entered 4 June 1990 by *Judge Henry V. Barnette, Jr.*, in the CUMBERLAND County Superior Court. Heard in the Court of Appeals 17 September 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas D. Zweigart, for the State.

Michael G. Howell for the defendant appellant.

COZORT, Judge.

Defendant David Lamont Mills was arrested in Fayetteville, North Carolina, after police officers searched him and discovered "crack" cocaine and drug paraphernalia. On 17 April 1990, defendant was charged with felonious possession of a controlled substance and possession of drug paraphernalia. On 10 May 1990, defendant

moved to suppress all physical evidence and statements obtained from him, alleging an unlawful seizure and search in violation of his constitutional rights. Judge Henry V. Barnette, Jr., denied the motion. Subsequently, defendant gave notice of appeal and pled guilty to the charges. Judge Gregory A. Weeks imposed a five-year suspended sentence, placed the defendant on supervised probation, and ordered the defendant to spend six months in the Department of Correction as a special condition of probation. We find no error in Judge Barnette's order.

On appeal, defendant contends that (1) the trial court erred in denying the motion to suppress on the grounds that the seizure and search violated the provisions of the federal Constitution; and (2) the trial court erred in denying the motion to suppress on the grounds that the seizure and search violated the provisions of the North Carolina Constitution.

The State presented the following evidence: On 19 December 1989, at approximately 11:00 p.m., Officers Cruz and Brigman of the Fayetteville Police Department approached an intersection in Fayetteville in an undercover attempt to purchase controlled substances. Officer Foster followed the officers' unmarked car at a distance. Both Officers Foster and Cruz had observed previous sales of controlled substances at the intersection. The officers testified that, based upon their personal observation, drug dealers approached cars at that intersection when the driver of the car pulled to the side of the road and turned off the headlights. Officers Cruz and Brigman approached the intersection, turned off the headlights, and observed the defendant and another man standing at the corner. Officer Foster had seen the defendant at the corner approximately five times previously in the company of other persons soliciting cars parked at the intersection and twice had observed defendant approaching cars. Based upon his previous observations, Officer Foster also recognized defendant's companion as a "lookout" for drug dealers. The defendant approached the officers' parked car. When the defendant was within one and one-half feet of the car, his companion shouted, "Hey, that's the police" or "No, that's a police car." The defendant then turned and walked quickly away from the car. He was blocked a short distance from the car by Officer Foster. Officer Foster noted that the defendant was "almost shaking" and that he acted very nervous. Officer Cruz joined Officer Foster and defendant on the sidewalk. Officer Foster frisked defendant for weapons. Upon Officer Foster's request, defendant con-

sented to a search of his pockets. Officer Foster discovered a "crack pipe" and a ten dollar bill with "crack" cocaine inside. The defendant was placed under arrest.

Defendant presented the following evidence: On 19 December 1989, he was visiting a female friend who lived in the area. As he was leaving his friend's house he saw a man whom he knew at the intersection. The man warned him that police officers were in the area and to be careful if he possessed any drugs. After this warning, the police officers approached him, got out of their vehicles, told him he was under arrest, and then searched him. The officers had their electric stun guns drawn. Defendant testified that he did not feel free to leave and permitted the officer to search him "[b]ecause if I would have resisted, I would have been charged with delay and obstruct, and I would have probably been electrocuted."

The trial court made findings of fact consistent with the State's evidence. Based upon the findings of fact, the trial court made the following conclusions of law:

> 1. The officers had a reasonable basis to believe that the Defendant had in his possession a controlled substance which he intended to sell. Therefore, they not only had a reasonable basis to make an investigative stop of the Defendant, but also probable cause to search his person.
>
> 2. The Court cannot find that the Defendant's purported consent to have his pockets searched was freely and voluntarily given.
>
> 3. However, the existence of probable cause justified the officers in searching the Defendant. Therefore, the search was reasonable under the Fourth and Fourteenth Amendments to the United States Constitution.

Appellate review of a denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and whether the findings of fact in turn support the conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We find that the trial court's findings of fact are well founded in the evidence presented at the hearing and that the findings of fact support the conclusions of law.

Defendant argues that the trial court erred in concluding that the warrantless search did not violate defendant's federal constitutional rights. Specifically, defendant contends that the seizure and search did not fall within one of the well-recognized exceptions to the warrant requirement. We disagree, finding the search valid on two grounds: incident to arrest and based upon probable cause and exigent circumstances.

[1] A warrantless arrest is lawful if based upon probable cause, *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879 (1949); *State v. Phillips*, 300 N.C. 678, 683-84, 268 S.E.2d 452, 456 (1980), and permitted by state law. *State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E.2d 301, 304 (1977). N.C. Gen. Stat. § 15A-401(b)(1) (Cum. Supp. 1991) provides that "An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence." Facts establishing probable cause must be sufficient to justify the issuance of an arrest warrant even though one has not been requested prior to the arrest. *See Phillips*, 300 N.C. at 684, 268 S.E.2d at 456.

An officer may conduct a warrantless search incident to a lawful arrest. *State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980). A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause. *Wooten*, 34 N.C. App. at 89, 237 S.E.2d at 305.

In *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984), the North Carolina Supreme Court discussed the concept of probable cause for arrest at length, citing *Brinegar*. In *Brinegar*, the United States Supreme Court stated:

> [P]robabilities . . . are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> . . . Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.

Brinegar, 338 U.S. at 175-76, 93 L.Ed. at 1890 (citation omitted). The North Carolina Supreme Court noted that

> [W]hile a reviewing court must, of necessity view the action of the law enforcement officer in retrospect, our role is not to import to the officer what in our judgment, as legal technicians, might have been a prudent course of action; but rather our role is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, believed the suspect committed the crime for which he was later charged.

Zuniga, 312 N.C. at 262, 322 S.E.2d at 147.

In determining whether probable cause existed to arrest a court may consider the following non-exclusive factors: (1) the time of day, *see State v. Rinck*, 303 N.C. 551, 560, 280 S.E.2d 912, 920 (1981); (2) the defendant's suspicious behavior, *see Peters v. New York*, 392 U.S. 40, 66-67, 20 L.Ed.2d 917, 936-37 (1968); and *State v. Bridges*, 35 N.C. App. 81, 85, 239 S.E.2d 856, 858-59 (1978); (3) flight from the officer or the area, *see Zuniga*, 312 N.C. at 263, 322 S.E.2d at 147; and (4) the officer's knowledge of defendant's past criminal conduct, *see Phillips*, 300 N.C. at 684, 268 S.E.2d at 456.

The trial court's findings of fact reveal the following: The officers approached the intersection at 11:00 p.m. The officers knew through personal observations and by reputation that the area was known for drug trafficking. The defendant approached the car apparently in response to a commonly used signal, known by the police officers, of pulling the car over to the curb and turning off the headlights. The officers had observed defendant at the intersection five times before in the company of others soliciting stopped cars and had observed defendant soliciting cars twice before. Defendant's companion was known by one of the officers to be a lookout for drug dealers. The lookout shouted a warning as defendant came close to the police car. Upon the lookout's warning, defendant turned and quickly walked away from the car. When the officers stopped defendant, he looked nervous, and one of the officers thought he might run. Although none of these factors alone would be sufficient to establish probable cause, considering all the factors together, based upon the practical considerations of everyday life, we find that a person of reasonable caution acting in good faith could reasonably believe that the defendant was engaged in criminal activity. Accordingly, we conclude that the warrantless

arrest of the defendant was lawful as based upon probable cause and permitted by N.C. Gen. Stat. § 15A-401(b) (Cum. Supp. 1991). Thus, the search incident to the lawful arrest, whether conducted before or after formal arrest, was constitutionally permissible.

[2] We also find the search constitutionally permissible as based on probable cause and conducted under exigent circumstances. A warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary. *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979). Although probable cause to arrest and probable cause to search are not always identical, we find that the factors set forth above establishing probable cause to arrest also establish probable cause to search, in that a reasonable person acting in good faith could reasonably believe that a search of the defendant would reveal the controlled substances sought which would aid in his conviction. *See State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982).

In order for the warrantless search to be valid, however, we must also find exigent circumstances. In *State v. Johnson*, 29 N.C. App. 698, 225 S.E.2d 650 (1976), we found "exigent circumstances" justifying a warrantless search. In *Johnson*, a police officer received a tip from a confidential reliable informant that the defendant was standing on the street in front of some apartments and offering cocaine for sale. The officer immediately proceeded to the apartments located about twenty minutes away from the police station. The officer did not obtain a search warrant. Upon arriving at the apartments and locating the defendant, the officer conducted an "emergency search" and discovered three bags of heroin. We concluded that the distance of the defendant from the police station and the "known mobility of the drug 'pusher,' justified the officer in proceeding directly to the defendant without first proceeding to a magistrate's office to obtain a search warrant which would have caused substantial delay in arriving at the scene and the probable absence of the purported drug violator." *Id.* at 701, 225 S.E.2d at 652.

In *Wooten*, 34 N.C. App. 85, 237 S.E.2d 301, we recognized the existence of exigent circumstances, although deciding the case on the basis of a lawful search incident to arrest. In *Wooten*, a confidential informant reported to a police officer that the defendant was dealing drugs in a certain area. Later that evening the informant met with the officer and reported seeing the defendant

with heroin in the area known as "the block." The officer, accompanied by three other officers, approached the defendant, searched him, and discovered weapons and cash, but no drugs. After defendant was placed under arrest and taken to the police station, officers discovered in the defendant's hands a manila envelope containing packets of heroin. Noting that the trial court "found as a fact that defendant might leave the area if he was not apprehended and searched, and that the 'exigency' of the situation prevented the officers from first obtaining an arrest warrant or a search warrant," we could not conclude as a matter of law that the findings were unreasonable. *Id.* at 89, 237 S.E.2d at 304.

Similarly in the case at bar, the exigency of the circumstances prevented the officers from obtaining a search warrant prior to the search. The officers detained defendant after he turned and started walking away from the car. If the officers had taken the time to obtain a search warrant, the delay might have caused a "probable absence of the purported drug violator" and also the probable destruction of the controlled substances. Therefore, we conclude that the search was valid as based upon probable cause and conducted under exigent circumstances.

[3] Defendant also argues that the search violated his state constitutional rights. Pointing to the differences in language in the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution, defendant argues that the North Carolina Constitution is "more protective of a person's privacy . . . [and] requires a stricter standard in justifying a warrantless search." Defendant further supports his argument by relying upon *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), in which the North Carolina Supreme Court refused to recognize a good faith exception to the exclusionary rule and acknowledged that "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution," as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision. *Id.* at 713, 370 S.E.2d at 555. Although acknowledging the authority to construe the two documents differently, neither the North Carolina Supreme Court nor this Court has, to date, applied different standards in analyzing the law of search and seizure under the federal Constitution and under the North Carolina Constitution. We decline to do so here. We find no merit in defendant's second assignment of error.

The trial court's order denying the motion to suppress is Affirmed.

Judges ORR and LEWIS concur.

STATE OF NORTH CAROLINA v. DAVID LEE HUNTLEY

No. 9120SC76

(Filed 17 December 1991)

1. **Evidence and Witnesses § 2545 (NCI4th)— competency of child witness—failure to hold voir dire—harmless error**

Where a six-year-old sexual offense victim's preliminary testimony supported a conclusion that she understood her obligation to tell the truth, the trial court's refusal to grant a voir dire examination of the witness by defense counsel was, at most, harmless error.

Am Jur 2d, Rape § 101; Witnesses § 92.

2. **Rape and Allied Offenses § 5 (NCI3d)— sexual offense—sufficient evidence of penetration**

The State presented sufficient evidence of penetration to support defendant's conviction of first degree sexual offense where the six-year-old victim testified that on one occasion defendant "stuck his hand in my private part"; the child pointed to her vaginal area and used anatomically correct dolls to show what had occurred; she stated that it hurt when defendant touched her and that this touching had occurred on more than one occasion; and medical testimony about the victim's hymenal opening and thickening of the edges of her hymenal ring tended to show that some penetration had occurred.

Am Jur 2d, Rape § 88.

3. **Rape and Allied Offenses § 6.1 (NCI3d)— failure to instruct on lesser offense—no plain error**

Failure of the trial court in a prosecution for first degree sexual offense to instruct the jury on the lesser included of-

fense of attempted first degree sexual offense did not constitute plain error.

Am Jur 2d, Rape § 110.

4. Constitutional Law § 374 (NCI4th); Rape and Allied Offenses § 7 (NCI3d)— first degree sexual offense—life sentence—no cruel and unusual punishment

Imposition on defendant of the mandatory life sentence for a first degree sexual offense committed upon a six-year-old child did not constitute cruel and unusual punishment as a matter of law or as applied to defendant.

Am Jur 2d, Rape § 115.

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

APPEAL by defendant from Judgment entered 23 October 1990 by *Judge William H. Helms* in UNION County Superior Court. Heard in the Court of Appeals 9 October 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General, Angelina M. Maletto, for the State.

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

COZORT, Judge.

David Lee Huntley was convicted of first-degree sexual offense and sentenced to a term of life imprisonment. Defendant challenges the following on appeal: (1) the trial court's denial of defendant's motion for a voir dire examination of the prosecuting witness and the court's finding that the witness was competent to testify; (2) the trial court's denial of defendant's motion to dismiss the charges based on insufficiency of the evidence; (3) the trial court's failure to instruct the jury as to the lesser included offense of attempted first-degree sexual offense; and (4) the trial court's imposition of a life sentence as constituting cruel and unusual punishment. We conclude that defendant received a fair trial free from prejudicial error.

The State's evidence tended to show that the six-year-old alleged victim occasionally stayed at the home of her godmother, who is the defendant's sister. The child testified that on one such occasion, she was awakened when the defendant, David Lee "Lebo" Huntley came into the room. Lebo pulled down her shorts and underwear and "stuck his hand in my private part." The child pointed to her vaginal area and used anatomically correct dolls to demonstrate what had occurred. She explained that it hurt when Lebo touched her and stated this touching had occurred on more than one occasion. She made an in-court identification of the defendant as the person who came into the room and touched her. The victim gave conflicting testimony regarding the exact date of the incident for which defendant was charged. At one point, she testified the incident took place prior to Christmas. She later testified that she had told the police the date was near Valentine's Day.

Officer Ted Griffin of the Monroe Public Safety Department testified that he interviewed the child in May of 1990. He recalled the child showing him and telling him what defendant had done to her.

Officer Sonny Rogers of the Monroe Police Department testified that, on 22 May 1990, he was investigating unrelated sex abuse crimes at Benton Heights Elementary School. The guidance counselor at the school, Kathy Tomberlin, asked the officer to speak with the girl. Officer Rogers talked with her briefly, and then placed six photographs of black males in front of her. He told her that he was investigating a case and just because he was showing her the pictures did not mean a guilty party would be among the photos. The child immediately pointed to the defendant's picture, whose photo was in the array by coincidence, and said, "That's my Uncle Lebo. He does it to me all the time." She also told the officer defendant had touched her "in her private area."

Kathy Tomberlin testified that based on conversations with the child's brother who also attended Benton Heights School, she knew someone had been sexually abusing the girl. Ms. Tomberlin corroborated Officer Rogers' testimony relating to the photograph identification. She also indicated at the time of the interview in May 1990, the child was only in kindergarten, and had difficulty identifying what day of the week it was. She testified that the prosecutrix used anatomically correct dolls to demonstrate what happened in a way consistent with what she told the counselor.

Neva Abbott, a public health physician, testified as an expert witness in the field of public health. She told the court that the hymen of a sexually abused child would measure greater than four millimeters and the edges of the hymenal ring might be thickened. She explained how child victims of sex abuse often became upset or cried when specimens were obtained in an examination. Ms. Abbott had examined the prosecutrix and testified concerning the results of the examination. She found thickening around the edges of the hymen which indicated some trauma. She measured the girl's hymenal opening and discovered it was six millimeters in width. She concluded some penetration had occurred. She also stated that the prosecutrix reacted negatively when Dr. Abbott barely touched her vaginal area with a cotton swab.

Defendant testified; he denied sexually abusing the victim. He stated he could not have seen the prosecutrix on 14 February 1990 because he was in jail. Defendant offered two alibi witnesses to corroborate his incarceration.

[1] Defendant first contends the trial court erred in denying his motion for a voir dire examination of the prosecutrix and in eventually finding her competent to testify. Prior to the child's taking the stand, defendant objected to her being sworn as a witness and requested a voir dire. The trial court denied the motion, and the girl was sworn as the State's first witness. After preliminary questioning, the following exchange occurred:

> [MR. WILLIAMS]: And do you know the difference between telling the truth and not telling the truth?
>
> [PROSECUTRIX]: Tell the truth.
>
> Q: Do you know what a lie is?
>
> A: [No answer.]
>
> Q: If I said you were a boy, would that be the truth or not the truth?
>
> A: Not the truth?
>
> Q: And what happens—what does your mother do when you don't tell the truth?
>
> A: [No answer.]
>
> Q: Do you know what happens if you don't tell the truth?

A: No.

Q: Is it good to tell the truth?

A: Yeah.

Q: Are you going to tell the truth today?

A: Yeah.

Q: Do you promise to tell the truth about what happened, about what Lebo did?

A: Yeah.

The court found the prosecutrix to be a competent witness based on the preliminary information and the above testimony.

Generally, every person is competent to be a witness unless disqualified by the Rules of Evidence. *State v. DeLeonardo*, 315 N.C. 762, 766, 340 S.E.2d 350, 354 (1986); N.C. Gen. Stat. § 8C-1, Rule 601(a) (1988). Rule 601(b) states:

> A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

The competency of any witness is a matter within the sound discretion of the trial court based upon its overall impression and observation of the witness. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987). Such a finding will not be disturbed on appeal unless the decision could not have been the product of a reasoned decision. *Id.*

Defendant argues the trial court committed reversible error by refusing to allow defense counsel the opportunity to conduct a voir dire examination of the child witness. To support this contention, defendant cites *State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985), which held the trial court erred in relying on a stipulation of counsel as to the competency of a child witness, rather than depending on its own observation of the child in exercising its discretion in determining the child's competency to testify. In a later case, the North Carolina Supreme Court discussed the meaning of *Fearing* and said:

> As can be seen . . . from *Fearing*, our primary concern was that the trial court exercise its independent discretion in deciding competency after observation of the child and not the particular procedure whereby the court conducted its observation. *Fearing* is not authority for the proposition that a defendant is entitled to a new trial in every instance in which a trial court fails to conduct a voir dire inquiry into the competency of a child witness or fails to make formal findings and conclusions as to a child's competency as a witness.

State v. Spaugh, 321 N.C. 550, 553-54, 364 S.E.2d 368, 371 (1988). The Court in *Spaugh* stated further, "Assuming *arguendo* that the trial court erred in failing to conduct a voir dire examination of the witness and in failing to make specific findings and conclusions as to the witness's competency, we conclude that any such error was harmless." *Id.* at 554-55, 364 S.E.2d at 372. The Court based its decision on the fact that in *Spaugh* the evidence clearly supported a conclusion that the witness was competent, since the child understood the concept of truthfulness; therefore, the lack of a voir dire examination was "at worst, harmless error." *Id.* at 555, 364 S.E.2d at 372. Similarly, in the present case, as long as the victim's preliminary testimony supported a conclusion that she understood her duty to tell the truth, then the court's failure to grant a voir dire examination by defendant's counsel is harmless error. We find the testimony supports such a conclusion, and any error is harmless. The testimony recited demonstrates the child's understanding of her obligation to tell the truth and indicates her promise to tell the court what occurred. Furthermore, other cases have held similar testimony to be competent. *See State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988); *State v. Gilbert*, 96 N.C. App. 363, 385 S.E.2d 815 (1989); *State v. Everett*, 98 N.C. App. 23, 390 S.E.2d 160 (1990). We find no reversible error in the case at bar on this issue.

[2] Defendant next challenges the trial court's denial of defendant's motion to dismiss the charges based on the sufficiency of the State's evidence. To prove a case of first-degree sexual offense, the State must prove there was "penetration, however slight, by any object into the genital or anal opening of another person's body"; that the victim was a child under the age of 13 years old; and the defendant is at least 12 years old and is at least four years older than the victim. N.C. Gen. Stat. §§ 14-27.1 and -27.4 (1989). Defendant argues that the evidence in the present case

was overly contradictory and too vague to support his conviction. We disagree.

When a defendant makes a motion to dismiss, the court must consider all the evidence taken in the light most favorable to the State to determine whether there is substantial evidence of that crime charged in the bill of indictment and that defendant committed the crime. *State v. Perry*, 316 N.C. 87, 95, 340 S.E.2d 450, 456 (1986). Substantial evidence is "evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). In the case at bar, sufficient evidence did exist from which the jury could deduce that defendant penetrated the victim. She not only identified defendant as the perpetrator, but medical evidence additionally indicated she had been sexually abused. The trial court properly denied defendant's motion to dismiss.

[3] Defendant's next argument arises from the trial court's failure to instruct as to the lesser included offense of attempted first-degree sexual offense. A review of the transcript reflects that defendant failed to make objection at trial with respect to the instructions. Under Rule 10(b)(2) of the Rules of Appellate Procedure, defendant has waived review of this issue on appeal unless the given instructions amounted to plain error. The trial judge's instructions in the present case adequately instructed the jury on each substantial issue in the case and do not therefore constitute plain error. This assignment of error is without merit.

[4] Finally, defendant contests the trial court's entry of judgment against him. Defendant argues the mandatory life sentence for first-degree sexual offense constitutes cruel and unusual punishment as a matter of law and as applied to him. The North Carolina Supreme Court has squarely rejected the argument concerning cruel and unusual punishment in *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985). The Court found the imposition of a mandatory life sentence for first-degree sexual offense not to violate the eighth amendment. *Id.* at 764, 324 S.E.2d at 838. Thus, defendant's final argument is without merit.

No error.

Judges ARNOLD and LEWIS concur.

IN THE MATTER OF THE PAPER WRITING OF SUE H. VESTAL

No. 9119SC16

(Filed 17 December 1991)

1. **Judgments § 2 (NCI3d)— judgment not entered out of session**

The trial court's order dismissing a caveat as a sanction for failure of the caveators to answer interrogatories was not improperly entered out of session where the trial judge heard the propounder's motion for sanctions on 5 October 1990 and made his decision on the motion in open court; that same day the judge prepared a handwritten memorandum outlining his findings of fact and his decision to dismiss the caveat; the memorandum indicates that the attorney for the propounder was directed to incorporate the findings into a formal order for later signature; and on 2 November 1990 the trial judge signed the order and filed it with the clerk of court.

Am Jur 2d, Judgments §§ 161-162; Motions, Rules, and Orders § 38.

2. **Rules of Civil Procedure § 33 (NCI3d)— interrogatories— person in military—no right to stay**

The trial court did not abuse its discretion in failing to issue a stay on its own motion postponing a caveator's duty to answer interrogatories where the caveator did not move for a stay or continuance or file an affidavit with the court seeking a stay, and the only mention of the caveator's military service was found in two unverified answers to motions signed by the caveator's attorney which did not indicate whether the caveator ever requested military leave to answer the interrogatories or whether leave was likely to be granted upon request.

Am Jur 2d, Depositions and Discovery §§ 96, 211, 357; Military and Civil Defense §§ 308, 319.

3. **Rules of Civil Procedure § 33 (NCI3d)— interrogatories— death in family—failure to answer not excused**

A caveator was not excused from answering interrogatories because of "a death in the family" where the only mention of this excuse occurred in an unverified answer to a motion to compel discovery; the answer did not indicate decedent's

relationship to the caveator or where decedent had lived; and the statement that the caveator had suffered a death in the family did not explain why she was unable to answer any of the propounder's interrogatories between a 20 August 1990 order compelling discovery and a 5 October hearing at which sanctions were imposed.

Am Jur 2d, Depositions and Discovery §§ 96, 211, 357.

4. Rules of Civil Procedure § 37 (NCI3d)— violation of discovery order—sanction—dismissal of caveat proceeding

The trial court had the authority to dismiss a caveat proceeding with prejudice as a sanction under N.C.G.S. § 1A-1, Rule 37 for violation of an order compelling discovery.

Am Jur 2d, Depositions and Discovery §§ 357, 385, 388.

APPEAL by caveator from order filed 2 November 1990 by *Judge Russell G. Walker, Jr.*, in RANDOLPH County Superior Court. Heard in the Court of Appeals 9 October 1991.

This appeal arises out of a will caveat in which the trial judge dismissed the caveat as a sanction under Rule 37 because the caveators failed to comply with a discovery order.

On 23 November 1988 the caveators filed a caveat alleging that the paper writing submitted by the propounder was not the last will and testament of Sue Hoover Vestal. The propounder answered the caveat and filed interrogatories on 1 March 1989. On 4 May 1990 the propounder filed a motion to compel the caveators to answer the interrogatories. On 20 August 1990 the caveators filed an "ANSWER TO MOTION TO COMPEL" in which they sought a two week extension to answer the interrogatories and an order that the propounder furnish them with copies of the medical records of the testatrix. Judge William H. Helms granted the propounder's motion. Judge Helms ordered the caveators to pay to the propounder reasonable attorney's fees of $150.00 within thirty days of the 20 August 1990 hearing and to answer propounder's interrogatories within two weeks after the 20 August 1990 hearing. Judge Helms also ordered the propounder to furnish to the caveators authorization from the testatrix's personal representative to obtain the testatrix's medical records.

On 27 September 1990 the propounder filed a second motion to compel the caveators to answer the interrogatories. The caveators

answered the motion on 5 October 1990 alleging that they needed the testatrix's medical records in order to respond to "a great majority" of the interrogatories, and that they had paid the attorney's fees ordered by Judge Helms. The motion was heard 5 October 1990. Among his findings, Judge Walker found:

> 4. Only three of the Propounder's twenty-two (22) numbered interrogatories, . . ., could possibly require a reading of the medical records of the decedent to answer and more importantly, the Propounder's interrogatories ask what the Caveators knew of the testatrix's medical condition when they instituted the caveat.
>
> 5. The Caveators have not attempted to answer any of the Propounder's Interrogatories since August 20, 1990, nor have they provided any reasonable excuse for their failure. The Caveators tender of the partial attorneys fees to be paid the Propounder was made fourteen (14) days following the period of time prescribed by Judge Helms in his Order of August 20, 1990.

Based upon these findings Judge Walker concluded that the caveators had "wilfully and blatantly ignored and refused to comply with" the 20 August 1990 order "without justification or excuse." Acting pursuant to Rule 37 of the Rules of Civil Procedure, Judge Walker then struck the caveators' pleadings and dismissed the proceeding with prejudice.

Caveators appeal.

Ottway Burton, attorney for caveator-appellant.

Moser, Ogburn & Heafner, by Rodney C. Mason, for propounder-appellee.

EAGLES, Judge.

I

[1] During oral argument appellant contended that Judge Walker did not have subject matter jurisdiction to enter his order because it was signed out of session. We disagree.

In *State v. Horner*, 310 N.C. 274, 278, 311 S.E.2d 281, 285 (1984), the defendant claimed that a trial court's order was null and void because it had been entered out of session and out of

district without his consent. There, the Supreme Court noted that "it appears from the transcript that the trial judge ruled on each of the objects of the motion . . . at the time of the trial. He later reduced his ruling to writing, signed the order, and filed it with the clerk." *Id.* at 279, 311 S.E.2d at 285. The Court "held that the trial court's order . . . was not improperly entered 'out of session and out of district' where the court passed on each part of the motion . . . in open court as it was argued and later reduced its ruling to writing, signed the order, and filed it with the clerk." *State v. Smith*, 320 N.C. 404, 415-416, 358 S.E.2d 329, 335 (1987).

Here, Judge Walker heard the propounder's motion on 5 October 1990. After hearing counsel's arguments Judge Walker made his decision on the motion in open court. That same day he prepared a handwritten memorandum outlining his findings of fact and his decision to dismiss the caveat. That handwritten memorandum, which appears in the record before us, also indicates that the "[a]ttorney for [the] propounder was directed to incorporate [the] findings into a formal order for later signature." On 2 November 1990 Judge Walker signed the order submitted by the propounder. The order was filed with the clerk of court on 2 November 1990. Accordingly, we conclude that entry of the order was not improper.

II

In their first, third, fourth and fifth assignments of error, the caveators argue that the trial court erred by concluding that the caveators wilfully and blatantly ignored the court's orders without reasonable excuse and that they were openly disrespectful to the court. The caveators argue that "[e]vents, over which they had no control" prohibited them from answering the propounder's interrogatories. Specifically, one caveator, Colonel Robert Weaver, contends that he was prevented from responding due to his involvement with the war in the Persian Gulf. The other caveator, Elizabeth Green, contends that she was unable to answer the questions due to a death in her family. We are not persuaded by either contention.

We note initially that "[i]f a noncomplying party wishes to avoid court-imposed sanctions for his failure [to answer interrogatories], the burden is upon him to show that there is justification for his noncompliance." *Silverthorne v. Coastal Land Co.*, 42 N.C. App. 134, 136, 256 S.E.2d 397, 399, *disc. rev. denied*, 298 N.C. 300, 259 S.E.2d 302 (1979).

A

[2] Colonel Weaver argues that he was not required to respond because of protections afforded him by the Soldiers and Sailors Civil Relief Act (SSCRA). That act provides in pertinent part:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act . . ., unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

50 U.S.C.A. § 521 (1940). This section of the SSCRA allows the court to stay proceedings based upon either the application of a party or the court's own discretionary motion. The dispositive issue is whether Colonel Weaver applied for protection under SSCRA § 521, and if not, whether the trial judge abused his discretion by not granting a stay on its own motion.

In order to apply for a stay of proceedings under § 521 a party must make a motion for continuance, a motion for a stay or file with the court an affidavit which sets forth the basis of his request. *See, e.g., Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E.2d 360 (1978) (trial court did not abuse its discretion in denying a stay where an affidavit did not indicate whether the soldier requested leave, or would be unable to obtain leave, and contained only a mere conclusory statement of the ways his defense would be prejudiced or his rights impaired). Here, Colonel Weaver neither made a motion for stay or continuance, nor filed an affidavit with the court seeking a stay. Colonel Weaver failed to make application for a stay under § 521.

Because Colonel Weaver failed to apply for a stay, "[w]e are only concerned, . . ., under this section, with the discretionary duty owed by the trial court to stay the proceedings on its own motion if in its opinion the ability of the appellant to [answer the propounder's interrogatories] was materially affected by reason of his military service." *Sharp v. Grip Nut Co.*, 116 Ind. App.

106, 110-111, 62 N.E.2d 774, 776 (1945). We recognize that "[t]he [United States Supreme Court] . . . said '[t]he discretion that is vested in the trial courts . . . is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from service." *Smith v. Davis*, 88 N.C. App. 557, 561, 364 S.E.2d 156, 159 (1988) (quoting *Boone v. Lightner*, 319 U.S. 561, 575, 87 L.Ed.2d 1587, 1596 (1943)). "With that statement no one could disagree, but the man in service must himself exhibit some degree of good faith and his counsel some degree of diligence." *Sharp*, 116 Ind. App. at 111, 62 N.E.2d at 776. Here, the only mention of Colonel Weaver's military service is found in two unverified papers signed by Colonel Weaver's attorney, "ANSWER TO MOTION TO COMPEL" filed on 20 August 1990 and "ANSWER TO FURTHER MOTION TO COMPEL DISCOVERY" filed on 5 October 1990. These papers do not indicate whether Colonel Weaver ever requested military leave to answer the interrogatories or whether leave was likely to be granted upon request. The SSCRA "cannot be construed to require continuance on mere showing that the [caveator] was in . . . military service." *Boone v. Lightner*, 319 U.S. 561, 565, 87 L.Ed.2d 1587, 1591 (1943). These unverified papers standing alone do not provide us with sufficient information to conclude that the trial court abused its discretion by failing to issue a stay on its own motion. This assignment is overruled.

B

[3] Caveator Elizabeth Green also alleges that she was unable to answer the interrogatories due to "[e]vents, over which [she] had no control." Here, too, the only mention of the circumstances "preventing" Ms. Green from answering the interrogatories is found in unverified papers denominated "ANSWER TO MOTION TO COMPEL" and "ANSWER TO FURTHER MOTION TO COMPEL DISCOVERY." In the first paper Ms. Green alleges that she was unable to answer the interrogatories because she was "in the process of a traumatic litigation concerning her divorce. . . ." However, on appeal Ms. Green did not argue that the divorce litigation excused her conduct. Rather, on appeal Ms. Green relied solely on another excuse, that there had been "a death in the family," which was stated only in the second paper. That paper does not indicate the decedent's relationship to Ms. Green, nor where the decedent had lived. Further, the uncorroborated statement that Ms. Green had suffered a death in her family does not explain why she was unable to answer a single one of the propounder's interrogatories between

the 20 August 1990 hearing and the 5 October 1990 hearing at which Judge Walker imposed sanctions. The record amply supports the court's conclusion that Ms. Green wilfully and blatantly ignored and refused to comply with the court's order. This assignment is overruled.

III

[4] In their second, sixth, seventh and eighth assignments of error, the caveators argue that the trial court lacks the authority to dismiss a caveat proceeding with prejudice as a sanction pursuant to Rule 37 for violation of an order compelling discovery. We disagree.

Caveators argue that "[t]he proceedings to caveat a will are *in rem* without regard to particular persons, and must proceed to judgment, and motions as of nonsuit, or requests for direction of a verdict on the issues, will be disallowed." (Citations omitted.) *In re Redding*, 216 N.C. 497, 498, 5 S.E.2d 544, 545 (1939). Thus, caveators contend that "[o]nce a will has been propounded for probate in solemn form, the proceedings must continue until the issue of *devisavit vel non* is appropriately answered, and no nonsuit can be taken either by the propounders or caveators."

The caveator's reading of *Redding* is overbroad and overlooks cases allowing dismissal such as *In re Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975) and *In re Edgerton*, 29 N.C. App. 60, 223 S.E.2d 524, *disc. rev. denied*, 290 N.C. 308, 225 S.E.2d 832 (1976). In *Mucci*, our Supreme Court held that a trial judge should grant a motion for directed verdict where the "propounder fails to come forward with evidence from which a jury might find that there has been a testamentary disposition. . . ." *Mucci*, 287 N.C. at 36, 213 S.E.2d at 213. In *Edgerton*, the propounders alleged that the caveator had executed a valid renunciation and release to any interest he may have had in the decedent's estate. *Id.* at 62, 225 S.E.2d at 526. Accordingly, the propounders moved for summary judgment, which the trial court granted. *Id.* This court held that because of the release the caveator did not have standing and that the propounders were entitled to judgment as a matter of law. *Id.* at 65, 225 S.E.2d at 528. Accordingly, we affirmed the trial court's entry of judgment against the caveator. *Id.*

Similarly, the caveator's argument overlooks the express power of a trial court to enforce its order compelling discovery by dismissal.

G.S. 1A-1, Rule 37(b)(2) provides that upon a party's failure to comply with the court's order, "the judge may make such orders in respect to the failure to answer as are just." The choice of sanctions to be imposed having been left by the rule in the court's discretion, we may not overturn the court's decision unless an abuse of that discretion is shown. Rule 37(b)(2) provides further that "[t]he relief granted may include . . . c. An order . . . dismissing the action."

Silverthorne, 42 N.C. App. at 137, 256 S.E.2d at 399. After careful review of the record, we find no abuse of discretion. This assignment is overruled.

Affirmed.

Chief Judge HEDRICK and Judge GREENE concur.

H. PARKS HELMS, ADMINISTRATOR OF THE ESTATE OF JESSIE HOGAN JACKSON, DECEASED, PLAINTIFF v. PHYLLIS YOUNG-WOODARD, MARCELLA BAKER, LINDA ALEXANDER AND CAROLINE ALEXANDER, DEFENDANTS

No. 9126SC31

(Filed 17 December 1991)

1. **Appeal and Error § 322 (NCI4th)— date of notice of appeal—not stamped on record copy—appeal heard in discretion of court**

An appeal in an action to determine the effect of a foreign legitimation filed after the death of the father was heard by the Court of Appeals even though the notice of appeal in the record did not have a stamp on the face of the document indicating the date it was filed. Timely appeal is noted by the file stamp on the face of the notice of appeal and all papers included in the record must show the date filed by this file stamp. N.C.R. App. P. 9(b)(3).

Am Jur 2d, Appeal and Error §§ 320, 678.

2. **Descent and Distribution § 13 (NCI4th)— foreign legitimation action—initiated after death of father**

A foreign legitimation action filed after the putative father's death in North Carolina did not qualify the illegitimate children

to inherit under North Carolina's intestate succession laws. Read *in pari materia*, North Carolina's intestate succession laws require that all legitimation actions, both foreign and domestic, be reduced to judgment prior to the death of the putative father. It does not seem reasonable to read N.C.G.S. § 29-18 as permitting a foreign illegitimate child to inherit by use of a foreign order of affiliation obtained after the intestate's death when an illegitimate North Carolinian could not obtain such relief in a North Carolina court.

Am Jur 2d, Bastards §§ 146, 150.

3. Descent and Distribution § 12 (NCI4th)— illegitimate children—6 month period for filing claim against estate

Illegitimate children are not permitted six months from their alleged father's death to prove their legitimacy by N.C.G.S § 29-19(b). The statute of limitations in that statute was intended to set a time limit for claims against a putative father's estate after legitimation, and was not meant to extend the law assuring finality of decrees.

Am Jur 2d, Bastards § 148.

4. Descent and Distribution § 14 (NCI4th)— foreign legitimation action—begun after death of father—no intestate succession—constitutionality

A trial court determination that a New York legitimation proceeding begun after the death of the alleged father did not permit the children to take by intestate succession did not violate the Equal Protection Clause or the Full Faith and Credit Clause. The North Carolina Supreme Court has held that N.C.G.S. § 29-19 and the statutes *in pari materia* are substantially related to the lawful State interests they are intended to promote. The United States Supreme Court has held that the Full Faith and Credit Clause does not require one state to give effect to another state's legitimizations which disturb interests already vested, and North Carolina determines rights of inheritance at the date of death.

Am Jur 2d, Bastards §§ 146, 150.

Discrimination on basis of illegitimacy as denial of constitutional rights. 38 ALR3d 613.

APPEAL by defendants Linda Alexander and Caroline Alexander from a judgment entered 3 August 1990 in MECKLENBURG County Superior Court by *Judge Shirley L. Fulton.* Heard in the Court of Appeals 9 October 1991.

Helms, Cannon, Hamel & Henderson, by H. Parks Helms and Christian R. Troy, for plaintiff-appellee H. Parks Helms.

Norwood, Burke, McIntosh & Edmonds, by Barry S. Burke and Robert G. McIntosh, for defendants-appellees Phyllis Young-Woodard and Marcella Baker.

Faison, Fletcher, Barber & Gillespie, by Reginald B. Gillespie, Jr.; Barbara M. Sims, for defendants-appellants Linda Alexander and Caroline Alexander.

LEWIS, Judge.

The issue in this case is whether a foreign legitimation action must be initiated prior to the death of the alleged father for illegitimate children to inherit under North Carolina's intestate succession laws.

The facts are not contested. Plaintiff-appellee, H. Parks Helms (administrator), is the duly qualified administrator of the estate of Jessie Hogan Jackson (decedent) who died intestate in Mecklenburg County, North Carolina on 8 August 1988. The administrator filed a declaratory judgment action seeking to determine which of the four parties making claims against decedent's estate are the lawful heirs. Defendant-appellees, Phyllis Young-Woodard and Marcella Baker, are decedent's legitimate children. Defendant-appellants, Linda and Caroline Alexander, claim to be decedent's legitimated children. Both Alexanders, domiciliaries of New York, obtained default orders of filiation from the New York Family Court on 24 February 1989, six months after Mr. Jackson's death. The Mecklenburg Superior Court reasoned that because North Carolina determines rights of inheritance at the date of death, only Young-Woodard and Baker were the lawful heirs. The trial court held that the Alexanders were not permitted to inherit by intestate succession because they were not legitimated, nor were they in the process of being legitimated, prior to decedent's death. The Alexanders appeal.

The Alexanders allege that it was error for the trial court to read into North Carolina's intestate succession laws a require-

ment that foreign legitimation proceedings must begin prior to the putative father's death. They allege that their exclusion from the class of heirs violates both the Full Faith and Credit (Article IV, § 1) and the Equal Protection (14th Amendment) Clauses of the United States Constitution. As their brief does not pursue their allegation of error regarding the award of attorneys' fees to defendant-appellees, we decline to address this matter. *See* N.C.R. App. P. 28(a).

[1] First we will consider the administrator's claim that this Court lacks jurisdiction to hear this appeal. He alleges that the Alexanders' appeal was not timely filed because the notice of appeal in the record does not have a stamp on the face of the document indicating the date that it was filed. Appeals must be filed within 30 days of the entry of judgment. N.C.R. App. P. 3(c). Timely appeal is noted by the file stamp on the face of the notice of appeal. All papers included in the record must show the date filed by this file stamp. N.C.R. App. P. 9(b)(3). Failure to comply with the Rules of Appellate Procedure may result in dismissal of the appeal. N.C.R. App. P. 25(b) and 34(b)(1).

We recognize that "[f]ailure to give timely notice of appeal . . . is jurisdictional, and . . . must be dismissed." *L. Harvey and Son Co. v. Shivar*, 83 N.C. App. 673, 675, 351 S.E.2d 335, 336 (1987) (citation omitted). This Court would be required to dismiss this appeal if the Alexanders failed to meet the 30 day filing deadline. However, it is within this Court's discretion to dismiss or to apply another sanction for placing an unstamped copy of a timely filed notice of appeal in the record. N.C.R. App. P. 25 and 34(b)(1). This Court has obtained a stamped file copy of the notice of appeal from the Office of the Clerk of Superior Court of Mecklenburg County which indicates that the appeal was timely filed. We take notice of this fact and hear this appeal. We caution future appellants to be more diligent in complying with the Rules of Appellate Procedure.

[2] Absent a statute to the contrary, illegitimate children have no right to inherit from their putative fathers. *Hayes v. Dixon*, 83 N.C. App. 52, 348 S.E.2d 609 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E.2d 402 (1987), *cert. denied*, 484 U.S. 824, 98 L.Ed. 2d 50, 108 S. Ct. 88 (1987). There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents,

or 3) civil action to establish paternity. N.C.G.S. § 49-10 through 49-14 (1984). Illegitimate children may inherit from their putative fathers if they have been legitimated by one of the above or if paternity has been established in an action for criminal non-support. N.C.G.S. § 29-19(b) (1984). Likewise, foreign illegitimate children must be legitimated in order to inherit from their North Carolina fathers. N.C.G.S. § 29-18 (1984).

The basis of the Alexanders' argument is that they have been legitimated by a foreign court and should, therefore, be permitted to inherit from their North Carolina father pursuant to N.C.G.S. § 29-18 (1984). Neither the trial court, nor this Court disputes their legitimacy. The issue is not whether North Carolina recognizes the Alexanders' foreign legitimation, but is whether this state recognizes a foreign legitimation which occurred after the death of the intestate for purposes of intestate succession. The issue is essentially one of timing. Read in *pari materia*, we conclude that North Carolina's intestate succession laws require that all legitimation actions, both foreign and domestic, be reduced to judgment prior to the death of the putative father.

North Carolina recognizes foreign legitimations. Under N.C.G.S. § 29-18:

> A child born an illegitimate who shall have been legitimated in accordance with G.S. 49-10 or 49-12 or in *accordance with the applicable law of any other jurisdiction*, . . . [is] entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock. . . .

N.C.G.S. § 29-18 (1984) (emphasis added). On its face, this statute does not set a time requirement in which a foreign proceeding must be completed. However, read along with the other intestate succession laws enacted with it, it is clear that the legislature set the intestate's date of death as an internal statute of limitations for the completion of an action to legitimate. *See Jefferys v. Tolin*, 90 N.C. App. 233, 368 S.E.2d 201 (1988). The internal statute of limitations is illustrated by the fact that the statutes will not permit an illegitimate North Carolinian to be legitimated after the putative father's death, much less to inherit. All of the legitimation routes authorized by the North Carolina statutes require the proceeding to be completed prior to the putative father's death. The verified petition and marriage routes of legitimation obviously require a

live putative father. The civil paternity suit means of legitimation specifically provides that "[n]o such action shall be commenced nor judgment entered after the death of the putative father." N.C.G.S. § 49-14 (1984). Even the adjudication of criminal non-support, which does not legitimate, but provides an avenue for the illegitimate child to inherit, requires a live putative father at the time of the criminal proceeding. Hence, an illegitimate North Carolina child who cannot be legitimated after the death of his alleged father, is summarily denied the right to inherit from the intestate. We reiterate the sentiments of another panel of this Court. "The [intestate succession] statute[s] mandate what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change." *Hayes*, at 54, 348 S.E.2d at 610.

Accordingly, it does not seem reasonable to read N.C.G.S. § 29-18 as permitting a foreign illegitimate child to inherit by use of a foreign order of affiliation obtained after the intestate's death when an illegitimate North Carolinian could not obtain such relief in a North Carolina court. Therefore, we hold that foreign legitimation actions must be completed prior to the intestate's death in order for the child to inherit under North Carolina law.

[3] The Alexanders claim that North Carolina law permits all illegitimate children six months in which to prove their legitimacy. We do not agree. *See Hayes* (where an illegitimate North Carolinian who was not legitimated prior to the death of the intestate was denied the right to inherit from the putative father's estate). The Alexanders base their argument upon N.C.G.S. § 29-19(b) which provides:

> Notwithstanding the above [legitimation] provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

N.C.G.S. § 29-19(b) (1984). We agree that this statute sets out a statute of limitations. However, it is incorporated within this section in order to set a time limit for claims against a putative father's estate after legitimation. The beginning word "notwithstanding" indicates that "in spite of" the claimant's ability to prevail on the legitimation issues listed above, any person who intends to file a claim must do so within the 6 month period. As it is

possible that illegitimate children, like creditors, may not be known to the decedent's survivors, this time limit assures the finality of decrees and protects "those rightfully interested in [the] estates from fraudulent claims of heirship and harrassing litigation instituted by those seeking to establish themselves as illegitimate heirs." *Mitchell v. Freuler*, 297 N.C. 206, 215, 254 S.E.2d 762, 767 (1979) (*quoting Lalli v. Lalli*, 439 U.S. 259, 58 L.Ed.2d 503, 99 S.Ct. 518 (1978)). This time limitation was not meant to extend the positive law enumerated above. Because the Alexanders did not begin their legitimation action until after the decedent's death, they are not entitled to inherit from his estate and the trial court is affirmed.

[4] The Alexanders allege that the trial court's determination that they could not inherit from decedent's estate violates the Equal Protection Clause. We disagree. Our Supreme Court has upheld the intestate succession statute's requirement of legitimation prior to the intestate's death against Equal Protection challenges. In *Mitchell*, a plaintiff whose parents never married, but whose alleged father "acknowledged him," supported him, lived with his mother, maintained insurance policies and savings accounts for him, and gave him a job claimed that North Carolina's statutory requirements of legitimation prior to death violated his Constitutional rights. Our Court held that "G.S. 29-19 and the statutes in *pari materia* are substantially related to the lawful State interests they are intended to promote. We therefore find no violation of the Equal Protection and Due Process Clauses." *Id.* at 216, 254 S.E.2d at 768.

Further, the Alexanders allege that because they have been legitimated by the laws of another jurisdiction, North Carolina's determination that they are not heirs and their subsequent exclusion from their father's estate violates their Constitutional rights. We disagree. In *Olmsted v. Olmsted*, 216 U.S. 386, 54 L.Ed. 530, 30 S.Ct. 292 (1910), the United States Supreme Court held that the Full Faith and Credit Clause did not require one state to give effect to another state's legitimizations which disturb "interests already vested." *Id.* at 395, 54 L.Ed. 533. In general, North Carolina determines rights of inheritance at the date of death. Those children who are legitimate and those who are legitimated prior to the intestate's death are lawful heirs with rights vested immediately thereupon. Mr. Jackson's only legitimate children were Ms. Young-Woodard and Ms. Baker. Ms. Young-Woodard and Ms. Baker's right to inherit were vested, under North Carolina law, at the instant

Mr. Jackson died. Therefore, no other state can divest Ms. Young-Woodard and Ms. Baker of their inheritance by a judicial or legislative act subsequent to this vesting. *Id.* at 394-95, 54 L.Ed. 533. Accordingly, we find no violation of the Full Faith and Credit Clause in the case at bar.

Affirmed.

Judges ARNOLD and COZORT concur.

BOBBY L. GUY, PLAINTIFF v. ROBERT L. GUY, DEFENDANT

No. 9113SC448

(Filed 17 December 1991)

1. **Limitation of Actions § 7 (NCI3d) — constructive trust — statute of limitations — ten years**

Plaintiff's action to establish his rights in property under the theories of resulting trust, constructive trust and equitable lien were not barred by the three year statute of limitations on claims of fraud. Constructive trusts are governed by the ten-year statute of limitations in N.C.G.S. § 1-56, and, as fraud is not a component element of either resulting trust or equitable lien, neither were affected by the statute of limitations on fraud claims.

Am Jur 2d, Trusts §§ 588, 593.

2. **Trusts § 13 (NCI3d) — resulting trust in favor of plaintiff-grantor — summary judgment for defendant — proper**

Summary judgment was properly granted for defendant on the issue of resulting trust in an action arising from the transfer of property from plaintiff to defendant. Trusts created by oral declarations, in both land and personalty, are permitted where there are three parties: a grantor, a grantee, and a beneficiary. Resulting trusts are not imposed in favor of a grantor who conveys title by deed in fee simple absolute because to do so would violate the Parol Evidence Rule.

Am Jur 2d, Trusts §§ 628, 637, 639.

3. **Trusts § 19 (NCI3d) — constructive trust — allegations of fraud — motion to dismiss — improperly granted**

Plaintiff's allegations of fraud in an action for constructive trust were sufficient to survive a motion to dismiss under N.C.G.S § 1A-1, Rule 12(b)(6) where plaintiff alleged that defendant had no intention of fulfilling his promise as evidenced by defendant's refusal to sign an agreement to reconvey the property at the time plaintiff conveyed the lots.

Am Jur 2d, Trusts §§ 221, 234, 616.

4. **Mortgages and Deeds of Trust § 1.1 (NCI3d) — equitable lien — motion to dismiss — improperly granted**

The trial court improperly granted defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where it was undisputed that defendant obtained a loan which plaintiff used to improve the lots secured by the loan; it is also undisputed that plaintiff repaid this loan; plaintiff alleges that he repaid the loan in reliance upon the defendant's promise to reconvey the land to plaintiff, that his repayment of the loan which improved the land was not meant as a gift or a windfall benefit to his son, and that defendant has been unjustly enriched by the increased value of the improvements to the land for which the defendant did not pay any consideration.

Am Jur 2d, Liens §§ 32, 34.

APPEAL by plaintiff from an order entered by *Judge Giles R. Clark* on 7 January 1991 in BRUNSWICK County Superior Court. Heard in the Court of Appeals in special session in Wilmington on 17 October 1991.

David P. Ford for plaintiff-appellant.

Stevens, McGhee, Morgan, Lennon & O'Quinn, by Alan E. Toll, for defendant-appellee.

LEWIS, Judge.

Plaintiff and defendant are father and son respectively. Plaintiff acquired four lots by deed dated 11 January 1985. Plaintiff claimed that he was unable to obtain a loan to improve the lots for residential purposes because of a poor credit record. Plaintiff alleged that he conveyed title to the four lots to defendant on

12 April 1985 so that defendant could use the lots as collateral for a loan which plaintiff could then use to improve the property. Defendant then obtained a ten thousand dollar loan secured by these lots. Plaintiff used the loan to install a septic tank on the property. Plaintiff alleges and defendant denies that part of the loan proceeds were used to purchase a mobile home that was titled in plaintiff's name and placed on the lots.

Plaintiff made all of the payments on the ten thousand dollar loan until it was discharged on 28 April 1989. Plaintiff has resided in the mobile home on the property since 1985 and has paid the property taxes for 1985 and 1986, while defendant paid the 1987, 1988 and 1989 taxes. Plaintiff alleges that defendant orally agreed to reconvey the lots to plaintiff once the loan was repaid. However, at the time of the conveyance to his son, plaintiff alleges that he requested his son to sign an agreement to reconvey the land to plaintiff; defendant refused. After the loan was paid off, plaintiff requested, by letter dated 6 June 1990, that defendant reconvey the lots to plaintiff. Defendant refused. Plaintiff filed suit against defendant on 1 August 1990 seeking to establish his rights in the property under the theories of resulting trust, constructive trust and equitable lien. Defendant's motion to dismiss pursuant to North Carolina Rule of Civil Procedure, Rule 12(b)(6) was granted. Plaintiff appeals.

[1] The defendant contends that plaintiff's suit is barred by the three year statute of limitations on claims of fraud. N.C.G.S. § 1-52(9) (1983). We disagree. "Constructive trusts . . . are governed by the ten-year statute of limitations in N.C.Gen. Stat. 1-56." *Brisson v. Williams*, 82 N.C. App. 53, 60, 345 S.E.2d 432, 436 (1986), *disc. rev. denied*, 318 N.C. 691, 350 S.E.2d 857 (1986) (citation omitted). Here, the date of the conveyance at issue, 12 April 1985, is less than ten years from the date that this action was filed. Therefore, a suit to impose a constructive trust upon the property conveyed on this date is timely. As fraud is not a component element of either, the resulting trust and equitable lien theories were not affected by the statute of limitations on fraud claims.

The case at bar was dismissed pursuant to Rule 12(b)(6). The only purpose of this rule is to test the "legal sufficiency of the pleadings." *Sutton v. Duke*, 7 N.C. App. 100, 171 S.E.2d 343 (1969), *aff'd*, 277 N.C. 94, 176 S.E.2d 161 (1970). The question for the court on a motion to dismiss is whether, as a matter of law, the allegations

of the complaint, treated as true, are "sufficient to state a claim under any legal theory." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 676, 355 S.E.2d 838, 843 (1987) (citation omitted). Hence, the question at bar is whether plaintiff's complaint alleges facts which, if true, are sufficient to support the imposition of a resulting trust, constructive trust, or equitable lien at least upon a Rule 12(b)(6) motion. We believe there are allegations sufficient to survive the motion to dismiss on the theories of constructive trust and equitable lien, but not on resulting trust.

I.

[2] Resulting trusts are based upon the doctrine that " 'valuable consideration rather than legal title determines the equitable title resulting from a transaction. . . .' " *Brisson*, at 57, 345 S.E.2d at 435 (citation omitted). Resulting trusts are created by either an express or an implied agreement. 13 Strong's N.C. Index 3d Trusts § 13; *see Taylor v. Addington*, 222 N.C. 393, 23 S.E.2d 318 (1942). The agreement is shown in a written deed or by oral declaration. *Id.*, *see Peele v. LeRoy*, 222 N.C. 123, 22 S.E.2d 244 (1942). The law presumes the intent to create a trust. *Brisson*, at 57, 345 S.E.2d at 435.

Resulting trusts are not imposed in favor of a grantor who conveys title by deed in fee simple absolute because to do so would violate the Parol Evidence Rule. *Lofton v. Kornegay*, 225 N.C. 490, 35 S.E.2d 607 (1945) (absent fraud, mistake or undue influence, a parole trust cannot be "engrafted upon a deed"). Parties to an integrated document cannot introduce either oral or written evidence which contradicts the writing. A grantor executes a deed, a written document, which he cannot later argue was created with an actual or presumed intent to create a trust. This argument would contradict the written document which on its face conveys absolute title. Trusts created by oral declarations, in both land and personalty, are permitted where there are three parties: a grantor, a grantee, and a beneficiary. *See Taylor*. In this three party situation, the beneficiary is not a party to a written deed and therefore may introduce evidence of the intended trust and this oral evidence does not violate the Parol Evidence Rule. For this reason, a resulting trust cannot be imposed in the plaintiff-grantor's favor. Summary judgment was properly granted on this issue.

II.

[3] Our Supreme Court has defined a constructive trust as:

> a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through *fraud, breach of duty* or some other circumstance making it inequitable for him to retain [title] against the claim of the beneficiary of the constructive trust. . . . [The] common, indispensable element [among the many types of constructive trust situations] . . . is some *fraud, breach of duty* or other wrongdoing by the holder of the property.

Wilson v. Crab Orchard Development Co., Inc., 276 N.C. 198, 211-12, 171 S.E.2d 873, 882 (1970) (emphasis added). Fraud is not automatically presumed by the "mere failure, nothing else appearing, to perform an agreement or to carry out a promise. . . ." *Ferguson v. Ferguson*, 55 N.C. App. 341, 345, 285 S.E.2d 288, 291 (1982), *disc. rev. denied*, 306 N.C. 383, 294 S.E.2d 207 (1982). Neither is fraud presumed by the existence of a family relationship. *Hodges v. Hodges*, 37 N.C. App. 459, 466, 246 S.E.2d 812, 816 (1978). Though a parent-child relationship does not automatically give rise to the presumption of fraud, "it is fraudulent for a child, as grantee, to make a promise which deceives a parent, as grantor, and induce(s) the parent to act when the child making the promise knows at the time [the promise] is made that [the child] does not intend to keep the promise." *Ferguson*, at 345, 285 S.E.2d at 291. Such a misrepresentation is "fraudulent and will support the imposition of a constructive trust." *Ferguson*, at 345, 285 S.E.2d 292.

As fraud is the central element underlying the imposition of a constructive trust, the question becomes what allegation of facts concerning fraud are sufficient to survive a Rule 12(b)(6) motion to dismiss. This question has been considered before in the context of a motion for summary judgment. This Court upheld the imposition of a constructive trust where the plaintiff's complaint alleged: (1) the existence of an oral agreement between the parties prior to the legal conveyance of land and (2) a promise which misled the grantor and which was made without the intention to fulfill the promise. *Ferguson* at 346, 285 S.E.2d at 292. The trial court's denial of the defendant's motion for summary judgment was upheld. This Court emphasized that it was plaintiff's allegations of fraudulent statements of intent which forecast the evidence sufficient for gen-

uine issues of material fact such that summary judgment was properly denied.

In *Martin v. Martin*, 73 N.C. App. 158, 325 S.E.2d 666 (1985), this Court affirmed the grant of summary judgment where the plaintiff failed to allege that the defendant "made *any promise* or other statement for the purpose of inducing plaintiff to convey her property to him. . . ." *Martin*, at 160, 325 S.E.2d 667 (emphasis added). This Court discounted plaintiff's allegation that "the Deed was signed with the intent that the property would be held in trust and returned to the plaintiff upon demand" as a statement of plaintiff's intention to have the property reconveyed rather than defendant's intention to defraud. *Id.* The emphasis in this case was on the plaintiff's failure to allege that the defendant made "any" promise which "misrepresented his intentions or fraudulently induced plaintiff to convey the property to [defendant]." *Id.* at 161, 325 S.E.2d 668. Hence, this Court held that the evidentiary forecast fell short of showing that there was a material issue concerning fraud.

The summary judgment questions above assumed the existence of a valid claim and looked to the pleadings to determine whether the allegations revealed a genuine issue as to whether fraud existed. A Rule 12(b)(6) motion asks whether the pleadings allege a valid claim and all of the elements necessary to support the claim. Read together, the cases discussed seem to indicate that the plaintiff must allege a false promise by the grantee made prior to the legal conveyance which caused the plaintiff-grantor to convey the land. In the case at bar, plaintiff alleged that the defendant agreed to reconvey the lots to him upon discharge of the loan. Plaintiff alleged that it was this promise which induced him to convey the lots. Further, plaintiff alleged that the defendant had no intention of fulfilling his promise as evidenced by the defendant's refusal to sign an agreement to reconvey the property at the time plaintiff conveyed the lots. We believe that these allegations of fraud make out the plaintiff's claim for the imposition of a constructive trust sufficient to survive a Rule 12(b)(6) motion to dismiss.

III.

[4] Plaintiff's pleadings also adequately state a claim for the imposition of an equitable lien.

> 'In an equitable lien there is a legal estate with possession in one person, and a special right *over* the thing held by another. . . . This special right is not an *estate* of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien.'

Fulp v. Fulp, 264 N.C. 20, 24-25, 140 S.E.2d 708, 712-13 (1965) (citation omitted). An equitable lien is applied when one party wrongfully spends another's funds to improve his own land or when one party expends his own funds to improve land which another has orally agreed to convey to him, but later refuses to do so. It is the unjust enrichment of the title holder which supports the imposition of an equitable lien against his property. *Id.* at 25, 140 S.E.2d 713. Neither a written nor an oral contract is required to recover based upon this unjust enrichment. *Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E.2d 746 (1980). It is enough that the plaintiff possess a good faith belief that he owns or will soon own an interest in the property or the improvements he makes to the property promised to him. *Id.* An equitable lien assists the plaintiff to assert his rights in the "benefit of the improvements to the extent that they increased the value of the land." *Clontz v. Clontz*, 44 N.C. App. 573, 576, 261 S.E.2d 695, 698 (1980), *disc. rev. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980) (citation omitted).

As above, to survive a Rule 12(b)(6) motion to dismiss, the plaintiff at bar is required to plead facts which state a claim for the imposition of an equitable lien. It is undisputed that defendant obtained a loan which plaintiff used to improve the four lots secured by the loan. It is also undisputed that plaintiff repaid this loan. Plaintiff alleges that he repaid the loan in reliance upon the defendant's promise to reconvey the land to plaintiff. Further, plaintiff alleges that his repayment of the loan which improved the land was not meant as a gift or a "windfall benefit" to his son. Plaintiff claims that the defendant has been unjustly enriched by the increased value of the improvements to the land for which the defendant did not pay any consideration. These allegations are sufficient to support a claim for the imposition of an equitable lien and therefore, are sufficient to survive a Rule 12(b)(6) motion to dismiss.

Reversed as to constructive trust and equitable lien.

Affirmed as to resulting trust.

Judges ARNOLD and COZORT concur.

ANDREW T. BADGETT v. DR. J. B. DAVIS

No. 9115SC133

(Filed 17 December 1991)

1. **Damages § 53 (NCI4th)— collateral source rule**

The collateral source rule excludes evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff.

Am Jur 2d, Damages § 566.

2. **Damages § 53 (NCI4th)— collateral source rule—Medicare payments—admission on court's own motion**

Plaintiff was prejudiced by the trial court's violation of the collateral source rule in this medical malpractice action when the court, on its own motion, admitted a hospital cash ledger containing references to Medicare payments of some of plaintiff's medical expenses after defendant requested that the references to Medicare be deleted.

Am Jur 2d, Damages §§ 571, 587.

Collateral source rule: Injured person's hospitalization or medical insurance as affecting damages recoverable. 77 ALR3d 415.

3. **Evidence and Witnesses § 672 (NCI4th)— objection to evidence—no waiver by introduction of similar testimony**

Plaintiff did not waive objection to the admission of collateral source references on a hospital cash ledger showing Medicare payments of plaintiff's hospital expenses when he introduced a medical clinic cash ledger showing Medicare payments of plaintiff's doctor bills where the court had made

it clear when defendant objected to the Medicare references on the hospital ledger that evidence of medical expenses would not be admitted without showing the jury how the total was computed, and plaintiff was entitled to assume that the court would make the same ruling as to the medical clinic's ledger. N.C.G.S. § 1A-1, Rule 46(a)(1).

Am Jur 2d, Damages §§ 933, 966; Trial § 420.

APPEAL by plaintiff from judgment entered 4 June 1990 by *Judge J. B. Allen, Jr.* in ALAMANCE County Superior Court. Heard in the Court of Appeals 12 November 1991.

McLeod & McLeod, by William F. McLeod, Jr., and Young, Haskins, Mann & Gregory, by Robert W. Mann, for plaintiff-appellant.

Henson Henson Bayliss & Sue, by Perry C. Henson and Lyn K. Broom, for appellee.

LEWIS, Judge.

Defendant, Dr. Davis, admitted plaintiff, Mr. Badgett, to a detoxification center on 17 June 1982 where plaintiff was given the medication dilantin to prevent seizures. Plaintiff developed an allergic reaction, toxic epidermal necrolysis, which plaintiff attributed to dilantin. Plaintiff filed suit against Dr. Davis on 23 November 1988 alleging negligent prescription of a drug which defendant knew plaintiff to be allergic. Plaintiff presented photographs of his blotched and blistered skin to prove his pain and suffering, but was unable to produce an itemized bill to prove his medical expenses as the hospital in which he was treated kept itemized bills for only five years. Mr. Badgett's bill was destroyed in 1987. The hospital had retained a cash ledger which documented the time, date, and amount of all payments made on each patient's account.

The court held a *voir dire* examination outside the jury's presence in which the ledger was examined through its custodian. During this conference, the custodian indicated that Mr. Badgett's hospital costs were reconstructed from the cash ledger entries by combining the amounts actually paid with the amounts written off. Plaintiff asked the court to mark the ledger plaintiff's exhibit 10 for purposes of identification, but did not request that it be

admitted into evidence. Defendant questioned the use of the exhibit without its being admitted. The court indicated that it would be unfair to permit testimony as to the total bill without evidence to show how the custodian arrived at this total. The ledger was admitted under Rule 803(6). Plaintiff objected to the admission of exhibit 10 based upon the collateral source rule and requested that the court's clerk delete the exhibit's reference to Medicare. This was not done. Though the record does not indicate any ruling, the court indicated that the ledger would be admitted and plaintiff could explain it in any manner which plaintiff so desired. Plaintiff excepted.

On direct examination before the jury, plaintiff asked the custodian to give the total cost of Mr. Badgett's hospitalization. She testified that the total was $17,270.52 and that Medicare had paid these bills in part. She testified that according to the hospital's contract with Medicare, the unpaid balance was written off and could not thereafter be collected from the plaintiff. Over defendant's objection the custodian testified that Medicare had a lien for the amounts it expended on Mr. Badgett's medical bills. Plaintiff's next witness was the Department of Clinics record keeper who issued the doctor bill. The same computational gyrations as above were necessary to reconstruct Mr. Badgett's final doctor bill. The Clinic cash ledger was labeled plaintiff's exhibit 11 and was admitted without objection. The record keeper indicated that the doctor bill was $1,450.87. Plaintiff specifically asked how much of the doctor bill had been paid by "Medicare." The record keeper revealed the amount which was paid by "Medicare."

During the lengthy charge conference, no jury instruction regarding the collateral source rule or the witnesses' references to the Medicare payments was requested or given. The jury awarded plaintiff $18,000.00 in damages. Plaintiff moved to set aside the damage award as having been improperly influenced by the prejudicial admission of evidence that plaintiff's medical bills were paid by Medicare and because the damage award was inadequate as a matter of law. This motion was denied. Plaintiff appeals the denial of this motion.

The case at bar is peculiar in that neither the defendant nor the plaintiff requested that the evidence containing the offensive Medicare references be admitted at trial. The court, on its own motion, admitted the initial cash ledger which contained the offen-

sive references. In this instance, we are asked to decide upon whose back the scales of justice should be balanced. The collateral source rule is a protective device normally invoked to shield a plaintiff from a defendant's attempts to lower the damage award. Because we believe that the plaintiff's shield was pierced by the court's admission of the cash ledger in unredacted form despite the plaintiff's request to the contrary, we reverse and remand for a new trial on the issue of damages. Though the plaintiff missed several opportunities to either keep the Medicare payments from the jury or to cure the prejudicial effect of the admission, plaintiff's request for the deletion of the offensive references was sufficient to invoke the collateral source rule such that the ledger's subsequent introduction in unaltered form was an abuse of discretion.

Exclusion of prejudicial evidence is the foundation of the collateral source rule. This rule provides that "evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to defendant generally is not admissible." *White v. Lowery*, 84 N.C. App. 433, 435, 352 S.E.2d 866, 868 (1987), *disc. rev. denied*, 319 N.C. 678, 356 S.E.2d 786 (1987). These benefits include payments from both public and private sources. *Young v. Baltimore & Ohio R. R. Co.*, 266 N.C. 458, 466, 146 S.E.2d 441, 446 (1966). This rule gives force to the public policy which prohibits a tortfeasor from reducing "his own liability for damages by the amount of compensation the injured party receives from an independent source." *White*, at 436, 352 S.E.2d at 868 (citation omitted). Evidence of collateral source payments violate the rule whether admitted in the defendant's case-in-chief or on cross examination of the plaintiff's witness. *Cates v. Wilson*, 321 N.C. 1, 4, 361 S.E.2d 734, 736 (1987). "[T]he erroneous admission of collateral source evidence often must result in a new trial." *Cates*, at 10, 361 S.E.2d at 739-40.

In *Cates*, a malpractice action, the plaintiff-mother of a mentally retarded infant, presented a witness who mentioned the availability of publicly funded education and residential facilities for the mentally retarded, but who testified that the future of these special education programs was speculative at best and that it was in the child's best interest to remain in his mother's home. Defendant introduced evidence that plaintiff's medical bills were paid by Medicaid, that plaintiff received child support payments, and on cross examination of plaintiff's witness that publicly funded residential facilities for the retarded were available. Defendant argued that the collateral source rule did not apply where the "plaintiffs 'opened the door'

by bringing the matter up first." *Id.* at 9, 361 S.E.2d 739. The Court disagreed and stated that "plaintiff did not 'open the door' with respect to past or future . . . benefits." *Id.* The Court rationalized that because "gratuitous government benefits" are covered by the collateral source rule and because introduction of collateral source evidence creates a " 'substantial likelihood of prejudicial impact,' " a new trial on damages was warranted. *Cates*, at 10, 361 S.E.2d at 739-40 (citation omitted). When collateral source evidence is admitted, the probability is great that "juries will consider the availability of collateral sources as indicative of the lack of any real damages." *Cates*, at 10, 361 S.E.2d at 740. A defendant's emphasis on " 'the numerous gratuitous avenues of compensation [that] existed for plaintiff['s] benefit substantially erode[s] plaintiff['s] verdict-worthiness. . . .' " *Cates*, at 11, 361 S.E.2d at 739-40 (citation omitted).

[1, 2] In summary, the collateral source rule excludes evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff. Though the case at hand does not fit within the usual application of the collateral source rule, the spirit of this rule is broad enough to cover this scenario. In *Cates*, our Supreme Court held that evidence of gratuitous government benefits was so likely to prejudice the jury that it should be excluded and its introduction would result in a new trial. Though, unlike *Cates*, there was no overt attempt by either party to have the cash ledger admitted into evidence, we nonetheless find *Cates* controlling in the case at bar. On his own motion, the trial judge admitted exhibit 10 into evidence. During *voir dire*, plaintiff requested, on the record, that the references to Medicare be deleted. The judge apparently never ruled as we find nothing in the record to so indicate. We take this request for deletion to be a motion. Therefore, like *Cates*, evidence of a gratuitous government benefit was admitted into evidence over plaintiff's clear objection. This evidentiary admission was so likely to have prejudiced plaintiff's recovery that we remand the case for a new trial on the issue of damages.

[3] The defendant argues that plaintiff's direct question asking plaintiff's own witness about "Medicare" payments and the plaintiff's subsequent admission of plaintiff's exhibit 11 without objection show that plaintiff waived his objection to the admission of the collateral source. "Exception to the admission of testimony is waived

when testimony of the same import is thereafter admitted without objection." *McNeil v. Williams*, 16 N.C. App. 322, 324, 191 S.E.2d 916, 918 (1972) (citation omitted). However, both statute and case law provide that an objection overruled assumes continued objection to the specific line of questioning. N.C.R.Civ. P. 46(a)(1); *Duke Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 234 (1980). It is the objecting attorney's duty to:

> alert the trial judge to the specific legal infirmities which may inhere in a '*specified* line of questioning.' If at that point counsel's objection is overruled, he is entitled to assume the court will continue to make the same ruling in response to subsequent objections to the same line of questioning.
>
> * * * *
>
> [T]he requirement in Rule 46(a)(1) that counsel object to a 'specified' line of questioning is obviously satisfied where, as here, the 'line' of questioning objected to is apparent to the court and the parties.

Id. In the case at bar, plaintiff objected to the admission of the cash ledger based upon the collateral source rule. The court made it clear that it would not admit evidence of the medical expenses without evidence showing the jury how the total was computed. Hence, the plaintiff was entitled to assume that the court would make the same ruling as to the Clinic's ledger which was admitted as plaintiff's exhibit 11.

As we reverse and remand this case for a new trial, we decline to consider plaintiff's second assignment of error on the issue of insufficiency of damages.

Reversed and remanded.

Judges WELLS and WALKER concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. JACKIE DEAN GRUMBLES, DEFENDANT

No. 9115SC62

(Filed 17 December 1991)

1. **Assault and Battery § 41 (NCI4th)— domestic assault—hands—deadly weapons**

The information contained in an assault defendant's indictment sufficiently states a charge amounting to the felony of assault with a deadly weapon where the indictment names defendant's hands as the deadly weapon and expressly states that defendant's hands were used as deadly weapons; defendant weighed approximately one hundred seventy five pounds at the time of the incident while the victim weighed approximately one hundred seven pounds; defendant beat his girlfriend about the head with his fists amd broke her jaw, requiring extensive hospitalization; and he choked her three separate times and left marks around her neck that were like fingerprints.

Am Jur 2d, Assault and Battery §§ 48, 53.

Parts of human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 ALR4th 1268.

2. **Assault and Battery § 41 (NCI4th)— domestic assault—hands as deadly weapons**

The trial court correctly denied defendant's motion to dismiss charges of assault with a deadly weapon with intent to kill inflicting serious injury at the close of the evidence where defendant assaulted his girlfriend with his hands; although defendant contended that there was insufficient evidence to classify his hands as deadly weapons, the State's evidence showed that the manner in which defendant used his hands to assault the victim had a devastating physical effect; defendant choked the victim so severely as to break her jaw and leave fingerprints around her neck; there was a great disparity in the size of the victim and defendant; and defendant admitted being strong enough to wrestle a gun away from a fellow construction worker after defendant had been shot in the stomach by that individual. The record reflects that the trial

court believed the issue of hands as deadly weapons to be close and the court properly allowed the jury to decide the issue.

Am Jur 2d, Assault and Battery §§ 48, 53.

Parts of human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 ALR4th 1268.

APPEAL by defendant from judgment entered 27 July 1990 in ALAMANCE County Superior Court by *Judge W. Steven Allen, Jr.* Heard in the Court of Appeals 8 October 1991.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(a) by using his hands to beat and choke his girlfriend. The State's evidence at trial tended to show the following facts and circumstances. Defendant and his girlfriend, Pamela Jean Barton, had lived together for approximately 12 years. They separated in September 1989, after defendant had hit Ms. Barton. On 25 November 1989, defendant phoned Ms. Barton and invited her to watch a basketball game with him. After several refusals, Ms. Barton accepted defendant's invitation and allowed defendant to take her to his home.

Once at defendant's home, the two began to drink and eventually went to bed together. The next day they awoke and began drinking again. The following Monday, 27 November 1989, Ms. Barton accompanied defendant to a bar in Chapel Hill, North Carolina, where she helped defendant pack equipment to be taken out of the bar. They returned to defendant's house at approximately 6:00 p.m. Defendant and Ms. Barton ate dinner and then began to drink. Ms. Barton testified that at this point they both had become intoxicated and then went to bed together.

Later that evening, defendant and Ms. Barton got out of bed and went into the living room where they began to talk. Defendant began to question Ms. Barton concerning her social activities, *i.e.*, who she had seen since they had separated. Ms. Barton told defendant her activities were none of his business. At this point, defendant "got [a] real wild look on his face." Ms. Barton became scared because she had seen that "crazy" look several times in the past when defendant would beat her. Defendant jumped off the couch where the two were seated and then hit Ms. Barton in the right

eye with his right fist. Defendant then grabbed Ms. Barton by the throat with both hands and began to choke her. Defendant stopped choking Ms. Barton, paused, and then began to choke her again. He repeated this process three times before stopping his attack on Ms. Barton.

Ms. Barton was bleeding from her nose, ear and mouth. She stopped the bleeding and went to bed. Several days later, Ms. Barton sought medical treatment for her injuries. She suffered a broken jaw as a result of defendant's attempts to choke her. Her right eye was swollen and red. She was hospitalized and could not eat solid food for approximately one month. Ms. Barton testified she was afraid to press charges against defendant or to seek medical attention because of defendant's threat to "get even with [her]." At the time of the attack, Ms. Barton weighed approximately one hundred seven pounds and defendant weighed approximately one hundred seventy five pounds. After leaving the hospital, Ms. Barton eventually decided to press charges against defendant.

Defendant's evidence at trial tended to show that his acts were in reaction to Ms. Barton's attack upon him. Defendant testified Ms. Barton sprang up from the couch, grabbed his lip and "cut down in [it]" with her fingernail. Defendant further testified he had no choice but to grab Ms. Barton by the neck as she was "clawing" at him with her arms. Defendant explained he had to do this three times to get Ms. Barton off of him.

Defendant was convicted of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to three years imprisonment, the presumptive sentence imposed for this felony.

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

G. Keith Whited for defendant-appellant.

WELLS, Judge.

Defendant brings forth seven assignments of error for our review. He does not address his third and seventh assignments of error in his brief and they are therefore deemed abandoned. N.C.R. App. P., Rule 28. In his remaining assignments, he contends the trial court erred in denying his motions to dismiss for lack of jurisdiction, failure to plead a charge, and insufficiency of the

evidence regarding the use of a deadly weapon. He also assigns error to the trial court's jury instructions regarding the use of a deadly weapon and the submission of verdict choices including assault with a deadly weapon.

[1] The thrust of defendant's argument to this Court concerns the classification of defendant's hands as a deadly weapon. Defendant's first and second assignments of error, the trial court's denial of his motion to dismiss for lack of jurisdiction, and failure to plead a charge are argued together in defendant's brief. These assignments are used to support defendant's contention that the information in his indictment is insufficient to support a felony charge. Instead, he contends if the indictment supports any charge it would be only a misdemeanor charge of assault over which the superior court would have no jurisdiction. We disagree.

Our Supreme Court noted in *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977), that it is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such as would *necessarily* demonstrate the deadly character of the weapon. (Emphasis in original.) A deadly weapon is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981). This Court has held in *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429 (1983), that a defendant's fists could have been deadly weapons given the manner in which they were used and the relative size and condition of the parties. N.C. Gen. Stat. § 14-32 classifies assaults with deadly weapons either with intent to kill or inflicting serious injury as felonies.

In the present case, the indictment more than adequately states information which would support a charge of assault with a deadly weapon. The indictment names defendant's hands as the deadly weapon and expressly states defendant's hands were used as "deadly weapons." Furthermore, it is clear by the criteria set out in *Jacobs, supra*, that this is a case where defendant's fists could be considered deadly weapons. Defendant weighed approximately one hundred seventy five pounds at the time of the incident while the victim of his attack weighed approximately one hundred seven pounds. Defendant beat Ms. Barton about the head with his fists, breaking Ms. Barton's jaw, requiring extensive hospitalization. Fur-

ther, he choked Ms. Barton three separate times and left marks around her neck that appeared to be "just like fingerprints."

Thus, the information contained in defendant's indictment sufficiently states a charge amounting to the felony of assault with a deadly weapon. It is beyond dispute that our superior courts have jurisdiction involving felony charges. *See generally,* N.C. Gen. Stat. § 7A-271 (1989). Therefore, defendant's argument regarding lack of jurisdiction is without merit and is overruled. Defendant's assignment of error concerning the failure of his indictment to plead a charge is also overruled.

[2] Defendant assigns as error the trial court's failure to grant his motion to dismiss the charges against him at the close of all the evidence. Defendant contends the evidence presented at trial was insufficient to classify his hands as deadly weapons and since the State failed to meet its burden of proof, the charges against defendant should be dismissed. Further, defendant contends that even if the State did meet its burden of proof on the element of a deadly weapon the evidence presented did not create a jury question. Therefore, defendant argues the trial court should have determined, as a matter of law, that defendant's hands were not deadly weapons. We disagree.

In ruling on a motion to dismiss, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. King,* 299 N.C. 707, 264 S.E.2d 40 (1980). A motion to dismiss must be denied if the State has offered substantial evidence against the defendant of every essential element of the crime charged. "Substantial evidence" is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Fletcher,* 301 N.C. 709, 272 S.E.2d 859 (1981).

It has long been the law of this State that "[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the court must take responsibility of so declaring.* (Emphasis in original.) *State v. Torain,* 316 N.C. 111, 340 S.E.2d 465 (1986). However, where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce [death or great bodily harm], its allegedly deadly character is one

of fact to be determined by the jury. *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978).

It is clear that under the rule set out in *State v. Jacobs*, *supra*, hands may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved. The State's evidence showed the manner in which defendant used his hands to assault the victim had devastating physical effect. Defendant choked the victim so severely as to break her jaw and leave fingerprints around her neck. Further, the State's evidence showed the great disparity in the size of the victim and defendant. Defendant also admitted to being strong enough to wrestle a gun away from a fellow construction worker after defendant had been shot in the stomach by this individual.

The record reflects the trial court believed the issue of hands as deadly weapons to be "close." Under the rule in *Joyner*, *supra*, the trial court properly allowed the jury to decide this issue. Therefore, this assignment of error is overruled.

Defendant's final assignments of error concern the trial court's instructions to the jury on deadly weapons and the submission of a verdict sheet with verdict choices including assault with a deadly weapon. For the reasons we have stated, these assignments are overruled.

No error.

Judges PARKER and WYNN concur.

STATE OF NORTH CAROLINA v. KEITH BRENT VEST

No. 9010SC940

(Filed 17 December 1991)

1. Evidence and Witnesses § 481 (NCI4th)— burglary and assault—pretrial one-photo identification—no substantial likelihood of misidentification

There was no substantial likelihood of misidentification in a burglary and assault prosecution, and defendant's motion to suppress was properly denied, where the witness was a

flight attendant trained to pay attention to passengers; her attention was directed toward defendant by his unusual behavior while a passenger under her care; his behavior was such as to cause her to immediately deny his request for a vodka and tonic without checking to see if the alcohol was available on the flight, which she would not normally have done; she had occasion to view defendant from a close distance while serving him during the flight; she specifically remembered two men who had been on that flight while reviewing in her mind, prior to talking to the detective, any incidents which may have occurred on that flight about which the sheriff might be interested; her identification of defendant's photo as being one of those men was immediate upon seeing it among the detective's materials and occurred prior to any question or suggestion by the detective; and her identification occurred five days after the flight and one day after she was notified that the Sheriff's Department wished to speak to her concerning some individual who may have been on that flight.

Am Jur 2d, Evidence § 371.8.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures. 39 ALR3d 1000.

2. **Assault and Battery § 26 (NCI4th); Burglary and Unlawful Breakings § 57 (NCI4th)— assault and burglary—sufficiency of evidence**

There was sufficient evidence to survive defendant's motion to dismiss and set aside a verdict of guilty of assault and burglary.

Am Jur 2d, Burglary § 45; Evidence § 1124.

3. **Criminal Law § 1156 (NCI4th)— burglary—sentencing—armed with deadly weapon—proper aggravating factor**

The trial court did not err when sentencing defendant for first degree burglary by finding as an aggravating factor that defendant was armed with a deadly weapon at the time of the crime. Since being armed with a deadly weapon is not an element of first degree burglary, it may properly be used as a factor in aggravation of the burglary conviction.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from judgment entered 5 March 1990 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 20 August 1991.

Attorney General Lacy H. Thornburg, by Associate Attorney General Patsy Smith Morgan, for the State.

Jean B. Lawson for defendant-appellant.

JOHNSON, Judge.

Defendant was tried before a jury and convicted of first degree burglary and two counts of assault. The evidence at trial tends to show the following. On Sunday, 23 October 1988 at about 3:30 a.m., Linda Vest was shot twice by an assailant who she encountered in her kitchen. Although both shots were fired from a distance of five feet or less, she was not able to identify her hooded and silent attacker. During the attack, however, she concluded that the assailant was her estranged husband, the defendant, based on her attacker's height and build and her belief that Keith Vest was the only person who would benefit from her death. Following the first shooting, which occurred as Linda entered the kitchen in response to the ringing of the rear doorbell, she was shot again, this time as she attempted to flee the house with her young son in her arms. Despite bullet wounds to the chest and abdomen, Linda was able to carry her son to a neighbor's house where she received assistance.

At the time of the shooting, Linda and Keith Vest were separated and Keith lived and worked in Texas. Linda had last seen defendant on 10 October 1988 at a court hearing where he was ordered to pay child support and temporary alimony and to maintain insurance and later that same day when he came to the house to take his son out for a visit.

At trial, the State presented the testimony of Cathleen LeMaster, a flight attendant for American Airlines. LeMaster identified defendant as a man she had noticed on a flight from Raleigh-Durham to Dallas-Ft. Worth, which left Raleigh at about 8:26 a.m. on Sunday, 23 October 1988. LeMaster testified that defendant was one of two men who attracted her attention on that flight; the first because he was dressed in fatigues, carried a large military duffle bag and had long hair, and the second, whom she identified as defendant, because he appeared to be nervous, sat with his

back to the rest of the passengers and requested a vodka and tonic mixed drink as the breakfast service was being cleared.

The admissibility of LeMaster's identification was challenged at a pre-trial suppression hearing. The testimony presented at the hearing showed that four days after the flight, LeMaster was advised by her base manager that the Wake County Sheriff's Department wanted to talk with her about someone who may have been on the Raleigh to Dallas flight. The next day, 28 October, five days after the flight, LeMaster was interviewed by Detective Duckworth of the Wake County Sheriff's Department. As Duckworth was arranging the various materials he had brought to the interview, LeMaster saw a color photo of defendant and without being asked, identified it as being a photo of one of the men she remembered from the Dallas flight.

I.

[1] Defendant first contends that the court erred in denying his motion to suppress the in-court identification of him by the airline stewardess. Defendant argues that the viewing by LeMaster of the single photo of defendant presented to her by Detective Duckworth was impermissibly suggestive. We disagree.

A pretrial identification procedure can be so unnecessarily suggestive as to require that an in-court identification derived from it be suppressed as violative of a defendant's due process rights. But a pretrial show up, although suggestive and unnecessary, is not *per se* violative of due process. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed.2d 140 (1977). The test is whether there is a substantial likelihood of irreparable misidentification. *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983).

> Whether a pretrial identification procedure is so suggestive as to give rise to a very substantial likelihood of irreparable misidentification must be determined by a consideration of all of the circumstances in each case. Even though a pretrial identification procedure may be suggestive, it will be impermissibly suggestive only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification. The factors to be considered include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal;

(4) the level of certainty demonstrated by the witness at the confrontation and (5) the length of time between the crime and the confrontation. (Citations omitted.)

State v. Lyszaj, 314 N.C. 256, 264, 333 S.E.2d 288, 294 (1985).

At the suppression hearing, Judge Stephens heard testimony from Ms. LeMaster and Detective Duckworth. He found that the use by Detective Duckworth of the photograph of only one suspect was capable of being suggestive and therefore improper but concluded that under the totality of the circumstances there was no substantial likelihood of a mistaken in-court identification of the defendant and that the witness's identification was of independent origin based on her observation of him during the Dallas flight. He then denied defendant's motion to suppress.

We are bound by the trial court's ruling if there is adequate evidence in the record to support it. *Lyszaj*, 314 N.C. 256, 333 S.E.2d 288; *State v. White*, 311 N.C. 238, 316 S.E.2d 42 (1984). After careful review of the hearing transcript we find that there is adequate evidence to support the court's ruling. Witness LeMaster was a flight attendant trained to pay attention to passengers. Her attention was directed toward defendant by his unusual behavior while a passenger under her care. His behavior was such as to cause her to immediately deny his request for a vodka and tonic without checking to see if the alcohol was available on the flight, something she would not normally have done. She had occasion to view defendant from a close distance while serving him during the flight. When reviewing in her mind, prior to talking with Detective Duckworth, any incidents which may have occurred on that flight about which the sheriff might be interested, she specifically remembered two men who had been on that flight. Her identification of the defendant's photo as being of one of those men was immediate upon seeing it among Detective Duckworth's materials and occurred prior to any question or suggestion by the detective. Her identification of the photo occurred five days after the flight and one day after she was notified that the Sheriff's Department wished to speak to her concerning some individual who may have been on that flight.

We find that there is adequate evidence in the record to support the trial court's conclusion that even though the one photo lineup was improper, it did not result in a substantial likelihood of misidentification. This assignment of error is overruled.

II.

[2] Defendant next contends that the trial court erred in denying his motions to dismiss and to set aside the verdict.

> A motion to dismiss tests the sufficiency of the evidence.
>
> The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is "evidence [which tends] to prove the fact [or facts] in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture."

State v. Jones, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981), *quoting State v. Johnson*, 199 N.C. 429, 431, 154 S.E.2d 730, 731 (1930).

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the discretion of the court and the court's ruling will not be disturbed absent a showing of an abuse of discretion. *State v. Gilley*, 306 N.C. 125, 291 S.E.2d 645 (1982).

Having reviewed the record and the transcript, we find there is sufficient evidence to survive defendant's motion to dismiss and set aside the verdict. This assignment is overruled.

III.

[3] Defendant next contends that the trial judge erred in enhancing his sentence on the burglary conviction. Defendant argues that the sentence could not be enhanced by the finding that defendant used a deadly weapon where the clear object of the burglary was the assault with a deadly weapon. Defendant misstates the facts. The trial judge found as an aggravating factor that "defendant *was armed* with a deadly weapon at the time of the crime." (Emphasis added.)

As properly stated, this contention has been clearly decided against defendant by our Supreme Court in *State v. Taylor*, 322 N.C. 280, 367 S.E.2d 664 (1988) and other cases. *See State v. Toomer*, 311 N.C. 183, 316 S.E.2d 66 (1984); *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983). In *Taylor* the Supreme Court considered the prohibition in G.S. § 15A-1340.4(a)(1), which provides that "[e]vidence necessary to prove an element of *the offense* may not

be used to prove any factor in aggravation" (emphasis added). In that case the defendant pled guilty to both first degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury. The trial judge found as an aggravating factor for the burglary conviction, that defendant was armed with a deadly weapon. Thus, the trial court used an element of the felonious assault to enhance defendant's sentence on the burglary conviction. Finding no error, our Supreme Court held that the phrase "the offense" clearly refers to the offense for which the defendant was convicted. Since being armed with a deadly weapon is not an element of first degree burglary, it may properly be used as a factor in aggravation of the burglary conviction.

Taylor is directly on point with the facts *sub judice*. This assignment is overruled.

No error.

Judges EAGLES and PARKER concur.

JANIE WHITMER PREVATTE, PLAINTIFF v. LLOYD LAWRENCE PREVATTE, DEFENDANT

LLOYD LAWRENCE PREVATTE, PLAINTIFF v. JANIE WHITMER PREVATTE, DEFENDANT

No. 9116DC48

(Filed 17 December 1991)

1. **Divorce and Separation § 162 (NCI4th)— antenuptial agreement—bar to equitable distribution**

A valid antenuptial agreement may serve as a bar to the equitable distribution of property acquired during the marriage.

Am Jur 2d, Divorce and Separation § 19; Husband and Wife §§ 279, 282.5.

Modern status of views as to validity of premarital agreements contemplating divorce or separation. 53 ALR4th 22.

2. Divorce and Separation § 162 (NCI4th)— antenuptial agreement—bar to equitable distribution

Where the language in an antenuptial agreement entered by the parties in Virginia clearly and unambiguously reflected the wife's intention to relinquish all of her property rights, both real and personal, which would arise out of her marriage to the husband, the agreement operated as a release of the wife's statutory right to equitable distribution, and the trial court erred in concluding that property acquired during the marriage was subject to equitable distribution.

Am Jur 2d, Divorce and Separation § 19; Husband and Wife §§ 279, 282.5.

Modern status of views as to validity of premarital agreements contemplating divorce or separation. 53 ALR4th 22.

3. Divorce and Separation § 300 (NCI4th)— alimony pendente lite—changed circumstances—premature appeal

Defendant husband's assignment of error that the trial court erred in finding that he had not shown sufficient changed circumstances to justify the termination of alimony is dismissed as premature where the record contains no order finally determining plaintiff wife's entitlement to permanent alimony.

Am Jur 2d, Divorce and Separation §§ 576, 583.

APPEAL by husband, Lloyd Prevatte, from judgment and order executed 4 October 1990 in ROBESON County Civil District Court by *Judge Herbert L. Richardson.* Heard in the Court of Appeals 15 October 1991.

In contemplation of marriage, Janie Whitmer and Lloyd Prevatte entered into an antenuptial agreement on 19 December 1968 in the State of Virginia. They were married on 21 December 1968 in South Carolina. The parties moved to North Carolina some time subsequent to their marriage and were residents of North Carolina when this action was filed. On or about May or June of 1980, the parties separated. On 4 June 1982, Janie Whitmer Prevatte, (hereinafter "wife"), filed a complaint in the District Court of Cumberland County seeking alimony *pendente lite*, permanent alimony, and equitable distribution of marital property. Lloyd Prevatte, (hereinafter "husband"), answered pleading the provisions of the antenuptial agreement executed by the parties as a bar

to wife's claims for equitable distribution and alimony. Pursuant to husband's motion to change venue, the case was subsequently removed to Robeson County by order of the District Court of Cumberland County.

On 19 April 1983, a hearing was held in Robeson County District Court to determine the issue of alimony *pendente lite*. The court declined to hear the claim for permanent alimony as husband had requested a jury trial on that issue. The trial court reserved determination of the request for equitable distribution for hearing at a later date. Judge B. Craig Ellis entered judgment on 19 April 1983 awarding wife alimony *pendente lite* and granting her the exclusive possession of the home she had occupied since moving from Virginia.

On 23 June 1983, husband filed an action for absolute divorce. A judgment of absolute divorce was entered by Judge Richardson in Robeson County District Court on 24 August 1983.

On 29 June 1988, husband filed a motion in the cause requesting, among other things, termination of the alimony he was obligated to pay under the order of 19 April 1983. Subsequently, on 14 October 1988, wife filed a motion in the cause renewing her claim for equitable distribution of the marital property. These motions were consolidated for hearing. After the hearing, judgment was deferred for some time "due to the astronomical amounts of exhibits and depositions and other things that were in the file" that the court was required to review. In the 4 October 1990 judgment, the trial court found and concluded that there was a marital estate consisting of described personal property of a total value of $9,800.00, ordered an equal distribution of the marital estate, and ordered husband to pay wife the sum of $4,900.00 to accomplish that distribution. Judge Richardson denied husband's motion to terminate alimony. Husband appealed from that judgment.

McLean, Stacy, Henry & McLean, by William S. McLean, for plaintiff-appellee.

Britt & Britt, by Evander M. Britt, III, for defendant-appellant.

WELLS, Judge.

As his first two assignments of error, husband contends the trial court erred by ruling that certain property acquired during the marriage was subject to equitable distribution. First, husband

specifically argues that since the trial court found the Virginia antenuptial agreement valid and enforceable in North Carolina, it was error to further find that property acquired by the parties during the course of the marriage was subject to equitable distribution. Second, husband argues it was error for the trial court to grant wife's request for equitable distribution since wife waited more than five years after her initial request and after the absolute divorce to pursue her claim. We agree with husband's first assignment of error and therefore decline to address his second assignment of error.

The trial court concluded that the antenuptial agreement was valid in Virginia and thus enforceable in North Carolina under the full faith and credit clause, but nevertheless concluded that the agreement did not operate to bar wife's interest in property acquired while the parties were North Carolina residents and that such property was subject to North Carolina's equitable distribution law.

"A man and woman, contemplating marriage, may enter into a valid contract before marriage with respect to the property and property rights of either or both after marriage. The term 'antenuptial agreement' or 'marriage settlement' is often applied to such agreements." 2 R. Lee, *North Carolina Family Law* § 179 (4th ed. 1980). Antenuptial agreements have long been recognized as valid in North Carolina. The legislature has enacted several statutory provisions recognizing their validity. *See, e.g.*, N.C. Gen. Stat. § 50-20(d) (1987 & Supp. 1991), N.C. Gen. Stat. § 52-10 (1991) and N.C. Gen. Stat. §§ 52B-1 to -11 (1987). The courts favor antenuptial agreements which determine only the property rights of the parties because they tend to encourage domestic peace and happiness. 2 R. Lee, *supra*, § 179. "Antenuptial agreements are not against public policy, and if freely and intelligently and justly made, are considered in many circumstances as conducive to marital tranquility and the avoidance of unseemly disputes concerning property." *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955).

[1] This Court has held that § 50-20(d) of the Equitable Distribution Act mandates that the "policy favoring property settlements continue so that a prior settlement of spousal property rights would also constitute a plea in bar to the equitable distribution of 'marital property' under Section 50-20." *Small v. Small*, 93 N.C. App. 614, 379 S.E.2d 273 (1989). This is true even if the property agreement

was executed prior to the enactment of the Equitable Distribution Act. *Small, supra*; (Citations omitted). While the agreement at issue in *Small* was a postnuptial agreement, generally speaking, the principles which apply to postnuptial agreements also apply to antenuptial agreements. 2 R. Lee, *supra*, § 186. Both are forms of property settlements. Accordingly, we find that the rationale of *Small* is equally applicable to the case at bar. In *Small*, this Court held that a valid postnuptial agreement will serve as a bar to equitable distribution. We conclude that a valid antenuptial agreement may serve as a plea in bar to the equitable distribution of property acquired during the marriage.

Husband plead the agreement in defense of wife's claims and alleged that the agreement disposed of all their property rights which they acquired due to their marriage. Thus, the question becomes whether the agreement disposed of the wife's right to equitable distribution. The right to equitable distribution is a statutory property right. *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) (*citing* N.C. Gen. Stat. § 50-20(k) (1987) and *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E.2d 668 (1985)). This right may be waived by a complete property settlement which contains a general release of spousal property rights. *Small, supra*. In construing the meaning of an antenuptial contract, if the agreement is not ambiguous, "it should be construed in accordance with its wording to effectuate the intention of the parties as it existed at the time of the execution of the agreement." *Stewart v. Stewart*, 222 N.C. 387, 23 S.E.2d 306 (1942). "In arriving at this intent words are *prima facie* to be given their ordinary meaning." *Id.* (*citing R.R. v. R.R.*, 147 N.C. 368, 61 S.E. 185 (1908)).

The pertinent provisions of the agreement in question provide:

> WHEREAS, it is the desire of each of said parties to waive, relinquish, and renounce any and all property rights, statutory or otherwise, that may arise or result from the said marriage, in the property of the other.
>
> . . .
>
> 1. Said party of the second part [Janie Whitmer] covenants and agrees that she shall, after the marriage, have no claim, demand, dower, alimony, support payments, statutory rights, or other right, title, claim or demand of, in or to the property,

real, personal and mixed, now owned, or hereafter acquired by the party of the first part.

The party of the second party [sic] does hereby sell, assign, transfer and set over unto the party of the first part, his [sic] personal representative, heirs and assigns, any claim that she, after becoming his wife or widow, may be entitled to in the property, real, personal and mixed, which the party of the first part now owns or which he [sic] may hereafter acquire.

[2] The above language of the antenuptial agreement clearly and unambiguously reflects the wife's intention to relinquish all of her property rights, both real and personal, which would arise out of her marriage to husband. Thus, we agree that the agreement released all the wife's property rights which arose out of the marriage and also operated to release her statutory right to equitable distribution. We hold that the antenuptial agreement was a valid bar to wife's claim and the trial court erred in concluding the property acquired during the marriage was subject to equitable distribution.

[3] As his final assignment of error, husband contends the trial court erred in finding that he had not shown sufficient changed circumstances to justify the termination of alimony.[1] After careful review of the lengthy record in this case, we have been unable to find any order which has finally determined the issue of wife's entitlement to an award of permanent alimony. "[O]rders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. § 7A-27(d)." *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981). Accordingly, we dismiss husband's last assignment of error as it is premature.

Reversed in part; dismissed in part.

Judges PARKER and WYNN concur.

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1. We note that wife did purport to release her claims to alimony in the antenuptial agreement. We are aware that under the Uniform Premarital Agreement Act, N.C.G.S. § 52B-4(a)(4) (1987), parties to a premarital agreement can modify or eliminate spousal support. However, the Act became effective on July 1, 1987 and is applicable to premarital agreements executed on or after that date. 1987 N.C. Sess. Laws ch. 473 § 3. Therefore, the Act is not applicable to the agreement

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. ROBYN SILVERMAN, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AD LITEM, LEESA RADJA, DEFENDANT

No. 9110SC99

(Filed 17 December 1991)

1. **Insurance § 69 (NCI3d)— underinsured motorist coverage— guest in insured vehicle—when person insured**

A guest in an insured vehicle is a "person insured" for the purpose of underinsured motorist coverage only when the insured vehicle is involved in the guest's injuries.

Am Jur 2d, Automobile Insurance §§ 314, 322.

2. **Insurance § 69 (NCI3d)— underinsured motorist coverage— guest in insured vehicle—stacking**

A guest in an insured vehicle who was injured in a collision with another vehicle was a "person insured" under the policy of the owner of the vehicle in which she was riding for the purpose of underinsured motorist coverage and was entitled to stack the underinsured motorist coverages of $100,000 for each of the owner's two covered vehicles for a total of $200,000.

Am Jur 2d, Automobile Insurance §§ 326, 329.

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

3. **Pleadings § 38.5 (NCI3d)— judgment on pleadings—absence of motion—no prejudice**

Plaintiff insurer was not prejudiced by the trial court's entry of judgment on the pleadings for defendant when defendant did not move for such relief where both parties sought a declaratory judgment concerning underinsured motorist coverage, no facts were in dispute, and the court in effect

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at issue in this case because it was executed in 1968, and the agreement did not bar wife's claim for alimony. *See, Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989), *cert. denied*, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

determined that defendant was entitled to a declaratory judgment.

Am Jur 2d, Pleading § 235.

Proper procedure and course of action by trial court where both parties move for judgment on the pleadings. 59 ALR2d 494.

APPEAL by plaintiff from order entered 30 November 1990 by *Judge Henry V. Barnette, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 6 November 1991.

Bailey & Dixon, by Gary S. Parsons and David S. Coats, for plaintiff appellant.

Taft, Taft & Haigler, by Mario E. Perez, for defendant appellee.

WALKER, Judge.

This case arises out of a traffic accident in which defendant, a five-year-old child, was injured while a passenger in a 1985 Buick owned by Henry Peter Czubek (Czubek) and insured by plaintiff Nationwide Mutual Insurance Company (Nationwide). Nationwide began this action by filing a complaint seeking a declaration of the rights, status and relations of Nationwide and defendant under the policy. Specifically, Nationwide sought a judicial determination of the amount of underinsured motorist coverage (UIM) available to defendant. Defendant answered, joining Nationwide in seeking a declaration of the rights of the parties. The facts are not in dispute.

State Auto Insurance Company (State Auto) insured the other vehicle involved in the accident and provided liability coverage in the amount of $100,000 per accident. State Auto advanced its $100,000 policy limits to all claimants who were occupants in the Czubek vehicle. Defendant was allotted $37,500 of this sum but she claimed damages in excess of this amount.

At the time of the accident, Czubek's Nationwide policy covered two vehicles, the 1985 Buick involved in the accident and a 1977 Ford. This policy provided for UIM coverage in the amount of $100,000 per person and $300,000 per accident for both vehicles named in the policy.

The trial court granted judgment on the pleadings for defendant and allowed defendant to "stack" the UIM coverage on both Czubek vehicles so that a total of $200,000 in UIM insurance was

available to defendant. On appeal to this Court, Nationwide assigns error to the trial court's order (1) allowing defendant to stack the UIM insurance coverage on both Czubek vehicles, and (2) granting the defendant judgment on the pleadings when the defendant did not move for such relief.

I.

Nationwide contends that defendant is limited to the UIM coverage of $100,000 on the vehicle she was occupying at the time of the accident. Stacking of UIM insurance coverage is governed by G.S. 20-279.21(b)(4), which in relevant part provides:

> An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means 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. . . . Underinsured motorist coverage shall be deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of such liability coverage for purpose of any single liability claim presented for underinsured motorist coverage shall be deemed to occur when either (a) the limits of liability per claim have been paid upon such claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage shall be deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant pursuant to the exhausted liability policy.
>
> 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 . . . .

Our Supreme Court has decided under this statute that the owner of the insured vehicles can stack UIM coverage. *See 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). In a recent decision involving UIM coverage, the Supreme Court dealt with the question of who are "persons insured" under G.S. 20-279.21(b)(3). Here, the Court said:

> 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. . . . This section of the statute essentially establishes 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.

Sproles v. Greene, 329 N.C. 603, 608, 407 S.E.2d 497, 500 (1991). Thus, according to the statute, the named insured and the spouse and relatives of the named insured while living in the same household are class one insureds and are covered for purposes of UIM coverage "while in a motor vehicle or otherwise." Class one insureds have UIM coverage even if they are not in a covered vehicle when injured. All other persons are class two insureds and are only covered while using "the motor vehicle to which the policy applies." *Id.*

This Court recently recognized that the stacking of coverage contemplated by G.S. 20-279.21(b)(4) flows further than to the named insured; family members of the same household of the named insured are also "persons insured." *Manning v. Tripp*, 104 N.C.App. 601, 410 S.E.2d 401 (1991); *Amos v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C.App. 629, 406 S.E.2d 652 (1991); *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C.App. 101, 404 S.E.2d 499, *review allowed*, 329 N.C. 788, 408 S.E.2d 521 (1991).

[1, 2] In the present case defendant, as a guest in the Czubek vehicle, is likewise a "person insured" under G.S. 20-279.21(b)(3).

Members of the second class are "persons insured" for purpose of UIM coverage only when the insured vehicle is involved in the insured's injuries while members of the first class are "persons insured" even where the insured vehicle is not involved in the insured's injuries. *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). This is the only distinction we find in this statute between class one "persons insured" and class two "persons insured." Once the claimant is a "person insured" the ability to stack UIM coverage is available to this claimant. There can be no artificial barriers imposed upon the privilege of stacking; once the claimant here established that she was a "person insured," then the privilege of stacking UIM coverage from both covered vehicles flowed to her. The decision of the trial court correctly recognized that Robyn Silverman, as a guest in the motor vehicle of the named insured, was a "person insured" and was entitled to stack the coverage from both Czubek vehicles totaling $200,000. *See also Leonard v. N.C. Farm Bureau Mut. Ins. Co.*, 104 N.C.App. 665, 411 S.E.2d 178 (1991).

II.

[3] Lastly, Nationwide contends the Superior Court erred in granting judgment on the pleadings for defendant since she did not move for such relief. Here, both parties sought a declaratory judgment as no facts were in dispute. Nationwide asserted defendant was only entitled to $100,000 in UIM coverage while defendant contended she was entitled to UIM coverage of $200,000. The court, in denying Nationwide's motion for judgment on the pleadings, effectively determined defendant was entitled to a declaratory judgment. While it would have been the better practice for the trial court to grant this relief after defendant had so moved, it appears that granting judgment on the pleadings was harmless error because plaintiff was not prejudiced by this action.

Affirmed.

Judges WELLS and LEWIS concur.

WALTER POST SMITH, JR., PLAINTIFF v. LINDA OTTO SMITH, DEFENDANT

No. 9128DC210

(Filed 17 December 1991)

1. **Divorce and Separation § 142 (NCI4th)— equitable distribution—retirement benefits—consideration of tax consequences**

The trial court did not err in an equitable distribution action by finding that the value of plaintiff's retirement plan was $103,445.69 where there was testimony that the value would be reduced to $77,806 if one assumed the application of the maximum tax rates and a total withdrawal. The account was awarded entirely to plaintiff and there is no evidence in the record, nor does plaintiff argue, that he would be forced to withdraw all or any part of the fund to comply with any distribution ordered by the court.

Am Jur 2d, Divorce and Separation §§ 937, 948, 949.

2. **Divorce and Separation § 161 (NCI4th)— equitable distribution—post-separation payments—sufficiency of findings**

An equitable distribution action was remanded for clarification and, if necessary, adjustment of the findings where the court awarded each party one-half of the net marital assets and found that plaintiff had made payments totaling $9,160.08 for various taxes, insurance, and reduction of principal during the separation; defendant had made similar payments totaling $4,488.02; concluded that the total net value of the marital assets of the parties was $389,273.82 and that each party, after awarding the appropriate credits, should be entitled to $194,636.91. Since plaintiff's total credit was larger than defendant's and he was awarded exactly half the net marital assets after credits, it appears that he did not receive the full amount he is due.

Am Jur 2d, Divorce and Separation §§ 915, 926.

3. **Divorce and Separation § 176 (NCI4th)— equitable distribution—equal distribution—findings**

A plaintiff in an equitable distribution action was not granted a new trial despite the failure of the trial court to enter required findings of fact where the trial court expressly concluded that an equal distribution is equitable, plaintiff does

not contend otherwise, and the issue of incorrect credits can be resolved on remand. N.C.G.S. § 50-20(j).

Am Jur 2d, Divorce and Separation § 930.

4. Divorce and Separation § 136 (NCI4th)— equitable distribution—valuation of property

The trial court did not err in an equitable distribution action in the valuation of two properties where the values adopted by the trial judge for the two properties were each within the range of the plaintiff's and defendant's valuations.

Am Jur 2d, Divorce and Separation § 937.

5. Divorce and Separation § 111 (NCI4th)— equitable distribution—stock dividends—post-separation

The trial court erred in an equitable distribution action by failing to account for dividends received by defendant from marital stock in her possession between the date of separation and the final distribution.

Am Jur 2d, Divorce and Separation § 902.

APPEAL from judgment entered 24 July 1990 by *Judge Earl J. Fowler, Jr.* in BUNCOMBE County District Court. Heard in the Court of Appeals 3 December 1991.

This is an appeal from an equitable distribution judgment. The parties were married in 1965. They separated about 24 March 1987 and plaintiff was granted an absolute divorce on 20 September 1988. An equitable distribution hearing was held in December 1989 and the judgment of the court was that an equal division of the parties' marital property was equitable, subject only to adjustments for certain payments made by both parties after the date of separation. Plaintiff appeals from the judgment entered 24 July 1990.

Riddle, Kelly & Cagle, P.A., by E. Glenn Kelly, for plaintiff-appellant.

Gum & Hillier, P.A., by Howard L. Gum, Esquire, for defendant-appellee.

JOHNSON, Judge.

[1] Plaintiff first contends (arguments I and II) that there is no evidence to support the trial court's finding that the value of the

BASF 401(k) retirement plan was $103,445.69. He contends that the testimony by Mr. Kledis, a C.P.A., established that the value of the account was $77,806 at the time of separation. We disagree.

Mr. Kledis testified that the vested value of the account was $103,445.69 at the end of March 1987 (the date of separation) and that if one assumed the application of the maximum tax rates and a total withdrawal at that time, the value was reduced to $77,806. The court found that the BASF retirement account was marital property and awarded it entirely to plaintiff. There is no evidence in the record and plaintiff does not argue that he was or would be forced to withdraw all or any part of the fund to comply with any distribution ordered by the court; thus, the fact of withdrawal and the possible tax consequences are purely speculative. *See Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985). Plaintiff's contention that the court failed to consider the tax consequences to either party in violation of G.S. § 50-20(c)(11) is not supported by the record. The court specifically noted the evidence that plaintiff advanced but found that it was "unable to determine any reduction in value as a result of the tax implications and has found the value of this asset to be $103,445.69." We find no error.

[2] Plaintiff next contends (arguments III, IV and V) that adjustments ordered by the trial court for certain payments made by both parties with regard to marital property after the date of separation, constitute an unequal division of the marital properties, contrary to the conclusion of the court that an equal division was equitable and in violation of the requirement that the court make findings of fact based on the factors listed in G.S. § 50-20(c) to support an unequal distribution.

The trial court found that an equal division of marital assets is equitable and awarded each party one-half of the net marital assets. The court also found that during the separation, plaintiff had made payments totaling $9,160.08 for various taxes, insurance and reduction of principal as to marital property and awarded him a credit in that amount. The court further found that defendant had made similar type payments totaling $4,488.02 and awarded her a credit in that amount. In conclusion of law number 4 the court stated: "The total net value of the marital assets of the parties is $389,273.82. *After awarding the appropriate credits*, each party should be entitled to $194,636.91." (Emphasis added.)

Moneys expended by a spouse on marital property during the period between separation and the distribution of marital property is properly credited to the paying spouse. *Bowman v. Bowman*, 96 N.C. App. 253, 385 S.E.2d 155 (1989); *McLean v. McLean*, 88 N.C. App. 285, 363 S.E.2d 95 (1987), *aff'd*, 323 N.C. 543, 374 S.E.2d 376 (1988). In the case *sub judice*, however, we cannot determine from the judgment whether plaintiff properly received the full credit he is due. We note that $194,636.91 is exactly one-half of $389,273.82, the net value of the marital assets. Since plaintiff's total credit is larger than defendant's and he was awarded exactly half of the net marital assets "after awarding the appropriate credits," it appears that he did not receive the full amount he is due. We remand for clarification, and if necessary, an adjustment.

[3] Plaintiff's related argument is that the trial court's failure to make findings of fact to support an unequal distribution is reversible error.

> In *any* order for the distribution of property made pursuant to this section, the court *shall* make written findings of fact that support the determination that marital property has been equitably divided. (Emphasis added.)

G.S. § 50-20(j). In *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988), our Supreme Court interpreted this statute to require written findings of fact in every case in which a distribution of marital property is ordered under the Equitable Distribution Act and expressly disapproved several of our cases in which we held that a trial court need not make findings of fact when marital property is equally divided. *Id.* at 403, 368 S.E.2d at 599. In argument IV, plaintiff contends that a new trial is required because the trial court failed to make findings of fact to support its conclusion that an equal distribution is equitable. We find that under the facts of this case, this failure does not require a new trial.

The trial court expressly concluded that an equal distribution is equitable. Plaintiff does not contend otherwise. In fact, his argument with regard to the credits is based upon his belief that an equal distribution *is* equitable and the trial court's treatment of the credits constituted error *because* it resulted in an "unequal" distribution. Because the issue of the credits can be resolved by a remand and because nowhere does plaintiff argue that the equal distribution is not equitable, we will not order a new trial despite

the failure of the trial court to enter findings of facts as required by G.S. § 50-20(j) and *Armstrong*.

Plaintiff next contends (argument VI) that the trial judge erred in failing to credit plaintiff for $2,000 which plaintiff gave to defendant from marital funds after the separation and to which fact both parties have stipulated. Defendant admits as much. This error can also be corrected on remand without the need for a new trial.

[4] Plaintiff next contends (argument VII) that there is no evidence to support the trial judge's valuation of the Candler and Pendleton properties. We disagree.

The values adopted by the trial judge for the two properties were each within the range of the plaintiff's and defendant's valuations. "This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures. Counsel is cautioned that such arguments are a waste of this Court's time." *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). This assignment is overruled.

[5] Finally, plaintiff contends (argument VIII) that the trial court erred in failing to account for stock dividends received by defendant from marital stock in her possession between the date of separation and the final distribution. There is testimony in the transcript as to the total amount of dividends received by defendant wife during this period. Since one-half of the stock was awarded to plaintiff, the dividends received from them are his separate property and should have been awarded to him in the final accounting. This can be accomplished on remand also.

In conclusion, we find no error which would require a new trial; however, we remand this case to the trial court to (1) clarify, and if necessary, correct the distribution of credits to each party, (2) award plaintiff proper credit for the $2,000 advanced to defendant from marital assets, and (3) award plaintiff as separate property one-half of the stock dividends received by defendant from the marital stock during the period of separation. These adjustments may be made from the existing record and the trial court is not required to receive new evidence.

Remanded.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. RAYMOND EDWARD BARBOUR

No. 9015SC1081

(Filed 17 December 1991)

1. **Criminal Law § 532 (NCI4th)— juror's conversation with witness—mistrial denied—no abuse of discretion**

The trial court did not abuse its discretion in denying defendant's motion for a mistrial following a juror's conversation with a police officer who was a witness for the State where the trial court questioned the juror and determined that the conversation was not related to the case but pertained to the juror's knowledge of the witness as a child, the court concluded that no other juror had heard the conversation, and the court excused the juror.

Am Jur 2d, Trial § 1609.

Prejudicial effect, in criminal case, of communications between witnesses and jurors. 9 ALR3d 1275.

2. **Evidence and Witnesses § 299 (NCI4th)— possession of firearm by felon—relevancy of prior conviction—extraneous information on judgment—balancing of relevancy and prejudice**

A copy of the judgment in defendant's prior murder conviction was admissible in a prosecution for possession of a firearm by a felon to show that defendant was a felon, and, in the absence of a motion to strike extraneous information on the document concerning defendant's not guilty plea and sentencing on the murder charge, the trial judge acted within his discretion in determining that the relevance of the evidence outweighed its prejudice to defendant.

Am Jur 2d, Evidence § 322.

3. **Assault and Battery § 116 (NCI4th)— felonious assault—instruction on lesser offense not required**

The trial court in a prosecution for assault with a deadly weapon inflicting serious injury did not err in refusing to instruct the jury on the lesser included offense of assault with a deadly weapon where the State's uncontradicted evidence showed that a bullet ricocheted off the victim's pelvis, the victim spent thirty-five days on his back looking straight up,

and the injury resulted in great pain, hospitalization and loss of work.

Am Jur 2d, Assault and Battery §§ 50, 107.

4. **Criminal Law § 757 (NCI4th)— reasonable doubt—instructions**

The trial court's instructions on reasonable doubt were sufficient, and the court did not err in refusing to give the pattern jury instruction on reasonable doubt.

Am Jur 2d, Trial § 1373.

5. **Criminal Law § 787 (NCI4th)— refusal to instruct on accident**

The trial court did not err in refusing to instruct on the defense of accident in this prosecution for felonious assault where defendant presented no evidence which would support a finding that the shooting in question was an accident.

Am Jur 2d, Trial § 1259.

6. **Criminal Law § 1156 (NCI4th)— felonious assault—aggravating factor—use of deadly weapon**

The trial court erred in finding as an aggravating factor for assault with a deadly weapon with intent to kill inflicting serious injury that defendant was armed and used a deadly weapon at the time of the crime because the use of a deadly weapon was an element of the crime for which defendant was convicted.

Am Jur 2d, Assault and Battery § 108; Criminal Law §§ 598, 599.

APPEAL by defendant from judgment entered by *Judge D. M. McLelland* on 14 June 1990 in ALAMANCE County Superior Court. Heard in the Court of Appeals 22 August 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Philip A. Telfer and Assistant Attorney General Donald W. Laton, for the State.

Van Camp, West, Webb & Hayes, P.A., by James R. Van Camp, Eddie H. Meacham and W. Carole Holloway, for defendant-appellant.

LEWIS, Judge.

Evidence at trial tended to show that on 15 December 1989 Jackie Grumbles was at home with Teresa Rodriguez and Brenda Derk. Upon hearing a knock at the door, Grumbles went to answer it. Grumbles testified that when he opened the door the defendant pointed a gun at his chest. Grumbles grabbed the defendant's arm, pulling the gun down, at which time it went off, injuring Grumbles. After a fight for the gun, defendant fled.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon by a grand jury in Alamance County on 22 January 1990. The case was tried and the jury found the defendant guilty of both charges on 14 June 1990. The defendant was sentenced to two concurrent sentences of two years each. Defendant appeals.

[1] Defendant assigns as error the court's denial of a motion for a mistrial following a juror's conversation with a police officer who was a witness for the State. Though this assignment of error was not properly preserved by a timely objection at trial, in our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we will address it here. Where juror misconduct is brought to the attention of the trial court, the trial judge has a duty to investigate the matter and make appropriate inquiry. *State v. Childers*, 80 N.C. App. 236, 244, 341 S.E.2d 760, 765 (1986). The record discloses that the trial judge questioned the juror as to the content of the conversation, that the conversation was not related to the case but pertained to the juror knowing the witness as a child and that the trial court excused that juror and concluded that no other juror had heard the conversation. The decision as to whether to grant a mistrial for jury misconduct is within the sound discretion of the trial judge. *State v. Johnson*, 295 N.C. 227, 234, 244 S.E.2d 391, 396 (1978). Our review of the record leads us to the conclusion that the trial judge duly investigated the matter and that he did not abuse his discretion in concluding that the defendant was not prejudiced.

[2] The defendant alleges that the trial court erred in admitting into evidence a copy of the judgment in defendant's prior murder conviction because that document contained irrelevant information concerning the defendant's prior plea of not guilty and defendant's sentencing on the prior charge. Evidence of a prior conviction was clearly admissible pursuant to the charge of possession of a firearm

by a felon, to show that the defendant was a felon. Documentary proof of the conviction had not previously been entered into evidence. In the absence of a motion to request to strike the extraneous information on the document, the trial judge acted within his discretion in determining that the relevance of the evidence outweighed its prejudice to the defendant. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 434-35 (1986).

[3] Defendant next asserts that the trial court erred in refusing to instruct the jury on the lesser included offense of assault with a deadly weapon in addition to the offense of assault with a deadly weapon resulting in serious injury. The State's uncontradicted evidence showed that the bullet ricocheted off Mr. Grumble's pelvis, that Mr. Grumbles had to spend thirty-five days on his back looking only straight up and that the injury resulted in great pain, hospitalization and loss of work. This testimony, uncontradicted by other evidence, is sufficient to sustain the ruling of the trial court that an instruction on the lesser offense was unwarranted. *State v. Springs*, 33 N.C. App. 61, 64, 234 S.E.2d 193, 196 (1977).

[4] Defendant assigns as error the trial court's instruction to the jury on reasonable doubt. Defendant requested the trial court to instruct the jury on reasonable doubt, using the pattern jury instruction. The court replied that the requested instruction would be given "in substance." The court then stated to the jury as follows:

> A reasonable doubt is not a vain, imaginary or fanciful doubt, but is a sane, rational doubt which arises from the evidence or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies you to a moral certainty that the defendant is guilty. It is not required that proof of guilt be beyond all doubt, any doubt, or any shadow of a doubt, but beyond a reasonable doubt.

A functionally equivalent instruction on reasonable doubt was upheld by this Court in *State v. Lockamy*, 65 N.C. App. 75, 80, 308 S.E.2d 750, 754 (1983). A jury instruction will be upheld if it is in substantial accord with those previously accepted by the courts, and where there is no reason to conclude that the jury was misled or confused by it. *Id.*

[5] Defendant argues that the trial court erred in refusing to give an instruction on the defense of accident. At trial the defendant requested a pattern jury instruction on accident. The defendant

cites two cases, *State v. Wright*, 28 N.C. App. 481, 221 S.E.2d 745 (1976) and *State v. Moore*, 26 N.C. App. 193, 215 S.E.2d 171 (1975), in which this Court overturned a conviction because the trial judge failed to give an instruction on accident. However, in both of the cases relied upon by the defendant, the defense of accident was a "substantial feature" of the case. *Id.* Our review of the record and of defendant's brief fails to reveal that the defendant presented any evidence to the effect that the shooting was an accident. Furthermore, the requested jury instruction is expressly predicated on the defendant's offering of "evidence tending to show that the alleged assault was accidental," and as such was unsupported by the evidence actually presented by the defendant at trial. Where the issue of the defense of accident was not a "substantial factor" in the case, the trial judge acted within his discretion in refusing to give the instruction.

[6] Finally, defendant asserts that the trial court erred in finding as an aggravating factor that the defendant was armed and used a deadly weapon at the time of the crime because this was already an element of the crime for which the defendant was found guilty. We agree. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." N.C.G.S. § 15A-1340.4(1). The trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defendant is convicted of a N.C.G.S. 14-32 assault. *State v. Braswell*, 67 N.C. App. 609, 614-15, 313 S.E.2d 216, 220 (1984). The defendant is therefore entitled to a new sentencing hearing.

Defendant's conviction at trial is affirmed. We remand for a new sentencing hearing consistent with this opinion.

Affirmed.

Remanded for resentencing.

Judges COZORT and ORR concur.

GERALDINE W. DAVIS, FORMERLY GERALDINE W. RISLEY, PLAINTIFF v. SILAS P. RISLEY, III, DEFENDANT

No. 915SC147

(Filed 17 December 1991)

1. **Divorce and Separation § 431 (NCI4th)— modification of child support—denied—Guidelines not applied—no error**

The trial court did not err by not applying the North Carolina Child Support Guidelines and by denying defendant's motion to reduce his child support obligation where no initial support order or modification was entered on 5 October 1990, only a denial of a motion to modify, so that the latest Guidelines revision did not apply. Furthermore, changed circumstances must be determined to exist prior to the application of the Guidelines. N.C.G.S. § 50-13.7.

Am Jur 2d, Divorce and Separation §§ 1082, 1083.

2. **Divorce and Separation § 431 (NCI4th)— modification of child support—denied—findings not required**

The trial court did not err when denying defendant's motion to reduce his child support obligation by not making findings of fact as to the children's expenses. The court's conclusion that there was no substantial change of circumstances indicated that defendant had not met his burden of proof; a court is not required to make negative findings to justify holding that parties have not met their burden of proof.

Am Jur 2d, Divorce and Separation §§ 1082, 1083.

APPEAL by defendant from a judgment entered 5 September 1990 by *Judge Elton G. Tucker* in NEW HANOVER County District Court. Heard in the Court of Appeals in a special session in Wilmington on 16 October 1991.

Shipman & Lea, by James W. Lea, III, for plaintiff-appellee.

Carr, Swails, Huffine & Crouch, by Auley M. Crouch, III, for defendant-appellant.

LEWIS, Judge.

The issue before this Court is whether or not the trial court erred when it denied defendant's motion to reduce his child support obligation.

Plaintiff and defendant were divorced on 9 August 1985. A child support order was entered on 12 June 1987 requiring defendant to pay plaintiff child support in the amount of $550.00 per month. Defendant did not appeal this order. At the time the support order was entered, defendant was a healthy able-bodied man with a net income of $1,421.00 per month. He was employed by a flooring company in which he became the sole shareholder after the equitable distribution order. In 1988, defendant voluntarily sold his business due to a physical injury which prevented his continued employment in the flooring business. Following the 1988 sale, defendant attended Fruitland Baptist Bible Institute. He has been unable to find employment in his new vocation and has remained unemployed since the sale of his business. Defendant has remarried. His monthly income is now $1,949.00 per month which includes: $1,414.00 installment payment on the sale of his business, $238.00 rent income from the building housing the flooring business, $183.00 payment on a non-competition clause (paid annually) and $113.00 dividends and interest. Despite his unemployment, defendant has remained current on his child support obligation.

Plaintiff, at the time of the support order, grossed $11,000.00 per year. Plaintiff has since begun her own business which pays her a gross income of $2,600.00 per month and which provides group health insurance for her and the children. Plaintiff has remarried. No specific findings as to the children's financial needs were made at the time of the original support order and the present needs are in dispute.

On 3 August 1990, defendant filed a motion to reduce his child support obligation. Concluding that there was no material and substantial change of circumstances to support the reduction, the motion was denied. Defendant appeals.

[1] Defendant alleges that the trial court erred by failing to apply the North Carolina Child Support Guidelines (Guidelines) and by failing to find sufficient facts. We disagree. The Guidelines were not applicable nor were specific findings required.

Child support orders may be modified upon a showing of changed circumstances. N.C.G.S. § 50-13.7 (1987). The changed circumstances must relate to "child-oriented expenses." *Gilmore v. Gilmore*, 42 N.C. App. 560, 563, 257 S.E.2d 116, 118 (1979). The moving party has the burden to show the changed circumstances, *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977), by showing the child's expenses both at the time the original support order was entered and at the present time. *Fischell v. Rosenberg*, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

The North Carolina Child Support Guidelines were enacted to direct the computation of child support. The Guidelines became effective 1 October 1987. N.C.G.S. § 50-13.4 (c1) (1987). Subsequent revisions to the Guidelines govern orders entered after 1 July 1990. N.C.G.S. § 50-13.4 (c1) (cum. supp. 1990). The date of the support order or modification will determine what effect the Guidelines will have upon the determination of child support.

The defendant argues that because the order denying child support modification was entered on 5 October 1990 that his child support obligation should be computed according to the most recent revision of the Guidelines and his obligation thereby reduced. We agree that an initial child support order or a modification entered on 5 October 1990 would be subject to the latest Guidelines revisions. Here, a motion to modify was denied. Because no initial support order or modification was entered on 5 October 1990, we disagree with defendant's conclusion that the Guidelines applied.

Further, we disagree with defendant's conclusion because it skips a very important step. Modification of a support order cannot occur until the threshold issue of substantial change in circumstances has been shown. N.C.G.S. § 50-13.7 (1987). Once this burden has been met, then the court proceeds to follow the Guidelines and to compute the appropriate amount of child support. If, however, the movant is unable to show changed circumstances, then the matter is dismissed. If the Guidelines were interpreted to apply without determining this threshold issue, then N.C.G.S. § 50-13.7 would be rendered moot. Child support orders could be modified "at will" by plugging into the Guidelines' formula the never ending cavalcade of new facts which emerge due to the passage of time as opposed to those which reveal an actual change in the child's circumstances. We do not believe that the Guidelines were enacted to remove the "changed circumstances" requirement which stands

guard at the flood gates of litigation. Requiring a "substantial and material" change of circumstances is a heavy burden of proof which was deliberately read into the statute via case law in order to protect the finality of judgments. It also engrafts a sense of stability onto child support orders. We conclude that changed circumstances must be determined to exist prior to the application of the Guidelines. Since defendant failed to meet his burden as to changed circumstances, his assertion that the Guidelines should have been applied in the case at bar is without merit.

[2] Further, defendant alleges that the trial court erred in not making specific findings of fact as to the children's expenses as required by the Guidelines. As above, the Guidelines do not apply in this case. This allegation is also meritless because the trial court was not required to make specific findings under these circumstances. The court's conclusion that there was no substantial change of circumstances indicated that the defendant did not meet his burden of proof. "[A] trial court is not required to make negative findings of fact to justify a holding that a party has not met his or her burden of proof on an issue." *Searl*, at 587, 239 S.E.2d at 308-09 (citation omitted).

Affirmed.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 DECEMBER 1991

ADAMS v. ALTMAN No. 9111SC190	Harnett (90SP183)	Affirmed & Remanded
COMMONWEALTH LAND TITLE INS. CO. v. CHUPKA No. 915SC158	New Hanover (89CVS527)	Dismissed
G W P INVESTMENTS v. CLARK No. 9113SC91	Brunswick (88CVS213)	Affirmed in part, reversed in part & remanded
IN RE JORDAN No. 9112DC364	Cumberland (91J19)	Affirmed
IVIE v. N.C. BOARD OF MORTUARY SCIENCE No. 9130SC27	Cherokee (89CVS217)	Reversed
LAKE FOREST, INC. v. WILLIAMS No. 915DC136	New Hanover (90DVM2430)	Reversed
LOGAN v. LLOYD No. 9014SC1063	Durham (87CVS02242)	Vacated
MARANTZ PIANO v. KINCAID No. 9125SC77	Burke (89CVS1038)	Appeal Dismissed
N.C. STATE BAR v. TOTH No. 9110NCSB103	(State Bar) (90DHC8)	Affirmed
REID v. REID No. 9122DC343	Alexander (90CVD73)	Affirmed
SPAINHOUR v. ETTEFAGH No. 915SC24	New Hanover (87CVS2914)	Affirmed & Remanded
STATE v. BRUDIE No. 9117SC482	Rockingham (90CRS5010) (90CRS5011) (90CRS5061) (90CRS5062)	No Error
STATE v. CAPPS No. 9118SC459	Guilford (89CRS61815) (90CRS20396)	No Error
STATE v. MARTIN No. 9126SC422	Mecklenburg (90CRS068122)	No Error

STATE v. MYERS No. 9026SC1277	Mecklenburg (90CRS21728)	Affirmed
STATE v. O'NEIL No. 915SC413	New Hanover (90CRS17182)	No Error
STATE v. RICHARDSON No. 9019SC1264	Randolph (90CRS001061) (90CRS001062)	Remanded for Resentencing
STATE v. SPENCER No. 9116SC368	Scotland (89CRS6920) (89CRS6921)	No Error
STEPHENSON v. CARTERET CONSTRUCTION CO. No. 9011SC1293	Johnston (88CVS0173)	No Error
SUMNER v. NATIONWIDE MUT. INS. CO. No. 917SC73	Nash (89CVS1637)	Affirmed

FILED 17 DECEMBER 1991

ALBEA v. SMITH No. 9127DC589	Cleveland (89CVD671)	Dismissed
BUCKNER v. MAUPIN No. 9121SC44	Forsyth (90CVS3821)	Reversed
BYRD v. MUTUAL LIFE INS. CO. OF NEW YORK No. 9110SC157	Wake (89CVS1288)	Affirmed
COHEN v. COHEN No. 9125DC851	Catawba (86CVD1107)	Affirmed
DIGGS v. DIGGS No. 9118DC815	Guilford (75CVD824)	Affirmed
FRAZIER v. BOWMAN No. 9125SC45	Catawba (89CVS688)	Reversed with directions & remanded
GAY v. BIRD No. 9126SC75	Mecklenburg (88CVS11532)	Appeal Dismissed
GILBERT v. GILBERT No. 9027DC1353	Lincoln (89CVD529)	Affirmed
HENRY v. HENRY No. 917DC633	Nash (82CVD710)	Affirmed in part, reversed & remanded in part
HOLLIFIELD v. HOLLIFIELD No. 9125DC821	Caldwell (91CVD72) (91CVD128)	Affirmed

JONES v. JONES No. 9122DC782	Davidson (89CVD281)	Affirmed
MITCHAM v. COMR. OF MOTOR VEHICLES No. 9122SC824	Davidson (90CVS1921)	Affirmed
PRICE v. SMITH No. 9018SC697	Guilford (89CVS565)	Affirmed
STATE v. BROWN No. 9126SC676	Mecklenburg (90CRS77875) (90CRS77870)	Affirmed
STATE v. BUTLER No. 9120SC579	Moore (89CRS906) (89CRS907)	No Error
STATE v. COX No. 911SC28	Dare (89CRS15039) (89CRS15040) (89CRS15041) (89CRS15043) (89CRS15139)	Reversed
STATE v. DARTY No. 9122SC617	Iredell (90CRS5459)	No Error
STATE v. HAYES No. 9127SC738	Gaston (90CRS20938)	Affirmed
STATE v. JACOBS No. 9116SC630	Robeson (90CRS11768) (90CRS11769) (90CRS11770) (90CRS11771) (90CRS11772)	No Error
STATE v. KILEY No. 903SC1249	Craven (90CRS4709) (90CRS4710)	No Error
STATE v. LEWIS No. 9129SC582	Henderson (90CRS8117)	No Error
STATE v. RICHARDSON No. 9116SC508	Scotland (89CRS2838) (89CRS6058)	No Error
STATE v. SUMMERLIN No. 918SC805	Wayne (88CRS8611)	Affirmed
WEISS v. HOLDEN No. 9110SC10	Wake (90CVS07994)	Affirmed

APPENDIX

RULES IMPLEMENTING COURT ORDERED
MEDIATED SETTLEMENT CONFERENCES

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING RULES OF MEDIATED SETTLEMENT CONFERENCES

WHEREAS, the North Carolina General Assembly recently enacted Chapter 207 of the 1991 Session Laws which amends Chapter 7A of the General Statutes by adding a new section 7A-38, and

WHEREAS, new section 7A-38 provides a means for establishing a pilot program of mediated settlement conferences in superior court civil actions, and

WHEREAS, G.S. 7A-38(d) enables this Court to implement the new section 7A-38 by adopting rules concerning said mediated conferences,

NOW, THEREFORE, pursuant to G.S. 7A-38(d), the Supreme Court of North Carolina, in conference, does hereby officially adopt the following rules concerning mediated settlement conferences in superior court civil actions.

Adopted by the Court in conference the 2nd day of October, 1991.

WHICHARD, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of October, 1991.

CHRISTIE SPEIR PRICE
Clerk of the Supreme Court

RULES IMPLEMENTING COURT ORDERED MEDIATED SETTLEMENT CONFERENCES

RULE 1. ORDER FOR MEDIATED SETTLEMENT CONFERENCE

(a) Order by Senior Resident Superior Court Judge. The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require parties and their representatives to attend a pre-trial mediated settlement conference in any civil action except habeas corpus proceedings or other actions for extraordinary writs;

(b) Content of Order. The court's order shall (1) require the mediated settlement conference be held in the case, (2) establish a deadline for the completion of the conference, (3) make a tentative appointment of a mediator certified under the Rules of the Supreme Court, (4) state the rate of compensation of the tentatively appointed mediator, (5) state clearly that the parties have the right to select their own mediator as provided by Rule 2, and (6) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(c) Motion to Dispense with or Defer Mediated Settlement Conference. A party may move, within 10 days after the court's order, to dispense with or defer the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(d) Petition for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any or all parties may petition the Senior Resident Superior Court Judge to order such a conference. Such motion shall state the reasons why the order shall be allowed and shall be served on non-moving parties. Objections may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge

shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(e) Exemption from Mediated Settlement Conference. In order to evaluate the pilot program of mediated settlement conferences, the Senior Resident Superior Court Judge shall exempt from such conferences a random sample of cases so as to create a control group to be used for comparative analysis.

RULE 2. APPOINTMENT OF MEDIATOR

(a) By Agreement of Parties. The parties may stipulate to a mediator within 14 days after the court's order. The mediator selected shall be either:

(1) A certified mediator; or

(2) A mediator who does not meet the certification requirements of these rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action. Notice of such agreement shall be given to the court and to the mediator named by the court in its order.

Notification to Court. Within 7 days after the parties select a mediator by agreement, the Plaintiff, or the Plaintiff's attorney, shall notify the court and the mediator tentatively named by the court of the name, address and telephone number of the mediator selected by agreement. Notification to the court shall also include a statement of the training and experience or certification of the mediator selected. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(b) Appointment by Judge. The Senior Resident Superior Court Judge shall appoint mediators certified pursuant to these rules who have made known to said Judge that they would like to be considered for appointment within the district in which the action is pending. The mediator shall be appointed by such procedures as may be adopted by administrative order of the Senior Resident Superior Court Judge in the district in which the action is pending.

Only mediators who have agreed to mediate indigent cases without pay shall be appointed.

(c) Disqualification of Mediator. Any party may move a Resident or Presiding Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, an order shall be entered appointing a replacement mediator pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED CONFERENCE

(a) Where Conference is to be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference is to be Held. Except for good cause found by the Senior Resident Court Judge, the mediated settlement conference shall begin no earlier than 120 days after the filing of the last required pleading and no later than 60 days after the court's order. It shall be completed within 30 days after it has begun.

(c) Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(d) The Mediated Settlement Conference is not to Delay Other Proceedings. It shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) Attendance. The following persons shall physically attend a mediated settlement conference:

(1) All individual parties; or an officer, director or employee having authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate decision making body of the agency; and

(2) The party's counsel of record, if any; and

(3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not such carrier's outside counsel and who has full authority to settle the claim.

(b) Finalizing Agreement. Upon reaching agreement, the parties shall reduce the agreement to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(c) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a person fails to attend a duly ordered mediated settlement conference without good cause, a Resident or Presiding Judge may impose upon the party or his principal any lawful sanction, including but not limited to the payment of attorneys fees, mediator fees and expenses incurred by persons attending the conference; contempt; or any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator. The mediator shall at all times be in control of the conference and the procedures to be followed.

(b) Duties. The mediator shall define and describe the following to the parties at the beginning of the conference:

(1) The process of mediation.

(2) The differences between mediation and other forms of conflict resolution.

(3) The costs of the mediated settlement conference.

(4) The facts that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement.

(5) The circumstances under which the mediator may meet alone with either of the parties or with any other person.

(6) Whether and under what conditions communications with the mediator will be held in confidence during the conference.

(7) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code.

(8) The duties and responsibilities of the mediator and the parties.

(9) The fact that any agreement reached will be reached by mutual consent of the parties.

(c) Private Consultation. The mediator may meet and consult privately with any party or parties or their counsel during the conference.

(d) Disclosure. The mediator has a duty to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

(e) Declaring Impasse. It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.

(f) Reporting Results of Conference. The mediator shall report to the court in writing whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.

RULE 7. COMPENSATION OF THE MEDIATOR.

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Court Order. When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the Senior Resident Superior Court Judge for all court appointed mediators in the district, upon consultation with the Administrative Office of the Courts.

(c) Indigent Cases. No party found to be indigent by the court for the purposes of these rules shall be required to pay a court appointed mediator. Any party may apply to the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of its obligation to pay its share of the mediator's compensation.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. The Judge may take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

(d) Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid: one share by the plaintiffs, one share by the defendants and one share by third-party defendants. Parties obligated to

pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Administrative Office of the Courts may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must:

(a) Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Administrative Office of the Courts; and

(b) Be a member in good standing of the North Carolina State Bar and have at least five years of experience as a judge, practicing attorney, law professor, or mediator, or equivalent experience; and

(c) Observe two civil trial court mediated settlement conferences conducted by a mediator certified either in the State of North Carolina or in any other state with comparable certification requirements to those outlined in these rules; and

(d) Demonstrate familiarity with the statutes, rules, and practice governing mediated settlement conferences in North Carolina; and

(e) Be of good moral character and adhere to any ethical standards hereafter adopted by this Court; and

(f) Submit proof of qualifications set out in this section on a form provided by the Administrative Office of the Courts; and

(g) Pay all administrative fees established by the Administrative Office of the Courts.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Director of the Administrative Office of the Courts that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

(a) Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences; and

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

(b) A training program must be certified by the Director of the Administrative Office of the Courts before attendance at such program may be used for compliance with Rule 8(a). Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Director of the Administrative Office of the Courts if they are in substantial compliance with the standards set forth in this rule.

(c) Payment of all administrative fees must be made prior to certification.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these rules is authorized to publish local rules implementing mediated settlement conferences not inconsistent with these rules and G.S. 7A-38.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION

§ 1 (NCI4th). Generally; definitions and elements

The evidence in an action to recover for breach of a contract for plaintiff to provide exclusive furniture design services for defendant manufacturer was insufficient to require the trial court to instruct the jury on accord and satisfaction and other defenses. *Hassett v. Dixie Furniture Co.*, 684.

ACCOUNTS AND ACCOUNTS STATED

§ 21 (NCI4th). Admissibility and sufficiency of evidence

The evidence was sufficient to warrant an instruction on an open account and the trial court erred in refusing to give such an instruction. *Franklin Grading Co. v. Parham*, 708.

ADMINISTRATIVE LAW AND PROCEDURE

§ 51 (NCI4th). Review by certiorari

The trial court correctly dismissed plaintiff's complaint for lack of subject matter jurisdiction where plaintiff sought relief for the revocation of a wastewater discharge permit but failed to properly file a writ of certiorari under which the superior court could exercise jurisdiction. *House of Raeford Farms v. City of Raeford*, 280.

ADOPTION OR PLACEMENT FOR ADOPTION

§ 49 (NCI4th). Presumptive validity of final order; collateral attack

An adoptive parent had no standing to challenge the legitimacy of the child's adoption. *In re Finnican*, 157.

APPEAL AND ERROR

§ 50.2 (NCI3d). What constitutes harmless error in instructions

Where the jury found that plaintiff did not breach its contract with defendant, defendant was not prejudiced by the trial court's instructions limiting the amount of damages defendant could recover on its counterclaim. *Hassett v. Dixie Furniture Co.*, 684.

§ 106 (NCI4th). Alimony and child support

An order holding that plaintiff was not in contempt and terminating his obligation to pay alimony was appealable. *Rehm v. Rehm*, 490.

§ 119 (NCI4th). Appealability of particular orders; summary judgment granted

Summary judgment for fewer than all defendants was immediately appealable where the trial court made no certification but plaintiffs had made the same claims against several defendants and the resolution of those claims depended upon the determination of common factual issues. *Baker v. Rushing*, 240.

A partial summary judgment for plaintiff was appealable in a declaratory judgment action arising from a lease renewal where the court's order was effectively a final judgment. *Janus Theatres of Burlington v. Aragon*, 534.

An order granting partial summary judgment for plaintiff on the issues of whether plaintiff is covered under his brother's automobile insurance policy issued by defendant and whether plaintiff is entitled to "stack" the limits of liability

ATTORNEYS AT LAW

AUTOMOBILES AND OTHER VEHICLES

COMPROMISE AND SETTLEMENT

§ 3 (NCI4th). Validity and effect generally

The trial court did not void the essential terms of a settlement agreement involving an estate's attorney fees where no written settlement agreement was filed with the court and the court merely ruled that the documents filed could not deprive it of the authority to order the costs paid. *In re Estate of Tucci*, 142.

The trial court properly ruled on its own motion that the parties' settlement could not negate the clerk's order concerning payment of attorney fees for an unsuccessful dissent. *Ibid.*

§ 5 (NCI4th). Compromise or settlement of automobile accident claims

The trial court erred by granting plaintiff's motion for judgment on the pleadings in an action which arose from the settlement of a prior wrongful death suit for the death of plaintiff's husband. *Daniels v. Hertz Corp.*, 700.

CONSPIRACY

§ 21 (NCI4th). Multiple conspiracies

Convictions for conspiracy to traffic in cocaine were vacated where the court submitted mutually exclusive conspiracies to the jury without the required instruction that it could convict defendant of only one of the conspiracies. *State v. Hall*, 375.

CONSTITUTIONAL LAW

§ 108 (NCI4th). Notice and hearing in court proceedings

An estate's contention that its right to due process was violated by the trial court's refusal to allow it to present evidence during a hearing was without merit where the estate did not avail itself of its opportunity to present evidence. *In re Estate of Tucci*, 142.

§ 153 (NCI4th). Full faith and credit; judgments against public policy

No exception to the full faith and credit clause exists to prohibit enforcement in North Carolina of a Nevada judgment against defendant predicated on a gambling debt. *MGM Desert Inn v. Holz*, 717.

§ 184 (NCI4th). Attachment of jeopardy; multiple violations of controlled substance laws

An assignment of error contending that defendant's sentencing for trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, and felonious possession of cocaine violated the prohibition against double jeopardy was not reached where the trial court unconditionally continued prayer for judgment on the three possession convictions. *State v. Maye*, 437.

§ 295 (NCI4th). Effective assistance of counsel; conflict of interest; miscellaneous circumstances

The trial court did not err by denying defendant's motion to dismiss and bar a prosecution for felonious breaking and entering where defendant's first attorney joined the District Attorney's office and the District Attorney requested and received assistance in prosecuting the case from the Special Prosecutions Section of the Attorney General's office. *State v. Reid*, 334.

CONSTITUTIONAL LAW — Continued

§ 323 (NCI4th). Waiver of right to speedy trial

There was no violation of the constitutional right to a speedy trial where defendant's failure to object to the length of his incarceration or to raise the speedy trial violation until trial indicates that his objection was one merely of form. *State v. Joyce*, 558.

§ 354 (NCI4th). When self-incrimination privilege may be invoked

The trial court's allowance of plaintiff's motion to compel defendant to respond to deposition questions regarding his sexual affairs with plaintiff and other patients did not violate defendant's right against self-incrimination on the ground that his testimony might subject him to punitive damages where there was no showing of a threat of execution against the person. *MacClements v. Lafone*, 179.

§ 374 (NCI4th). Cruel and unusual punishment; life imprisonment generally

Imposition on defendant of the mandatory life sentence for a first degree sexual offense did not constitute cruel and unusual punishment. *State v. Huntley*, 732.

CONSUMER AND BORROWER

§ 4 (NCI4th). Accounts stated generally

The trial court erred in an action on a debt by submitting to the jury the imposition of finance charges where there was no dispute that defendants owed some amount to the plaintiff and no dispute that defendants had received notification of the interest charge at some point. The trial court also erred by making the jury's consideration of an issue regarding the date of notification of the finance charge dependent upon a finding of account stated. *Franklin Grading Co. v. Parham*, 708.

CONTEMPT OF COURT

§ 15 (NCI4th). Criminal contempt; summary proceedings generally

A criminal contempt proceeding was substantially contemporaneous where the conduct occurred in the late afternoon of 14 November; the court gave the defendant a specification of contempt at his request and set the hearing for 16 November; and it was clear that the 16 November hearing was in continuation of the events of 14 November. *In re Nakell*, 638.

§ 21 (NCI4th). Recusal of judge

The trial judge did not err by denying a motion for the judge to recuse himself from a criminal contempt hearing where the contempt was committed before the judge but the record reveals no bias, prejudice, or proof that would require the judge to recuse himself from the hearing. *In re Nakell*, 638.

§ 24 (NCI4th). Criminal contempt; sufficiency of evidence and findings

The arguments of a criminal contempt defendant relating to the court's refusal to hear the defendant were meritless where the argument was based on the premise that the criminal contempt defendant had a client and there was nothing in the record to support that assumption. *In re Nakell*, 638.

CONTRACTS

§ 116 (NCI4th). Third party beneficiaries generally

Where an option to purchase land required the buyers to pay a 6% commission to the broker who negotiated the sale, the broker had a right as a third party beneficiary of the option contract to enforce the buyers' promise to the sellers to pay the commission. *Century 21 v. Davis*, 119.

§ 168 (NCI4th). Measure of damages generally

The trial court in an action for breach of a personal services contract did not err in refusing to instruct the jury that plaintiff's damages would be reduced by the costs and expenses he saved by not performing the services. *Hassett v. Dixie Furniture Co.*, 684.

CONTRIBUTION

§ 6 (NCI4th). Right to contribution generally

The three-year limitation period of G.S. 1-52(2) applies for refiling a contribution claim where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim, and the period begins to run when payment is made in the settlement of the underlying claim. *Safety Mut. Casualty Corp. v. Spears, Barnes*, 467.

CORPORATIONS

§ 207 (NCI4th). Claims against dissolved corporations

Summary judgment for defendant corporation could not be supported by the dissolution of the corporation in an action arising from the closing of a residential hotel. *Baker v. Rushing*, 240.

CRIMINAL LAW

§ 34.2 (NCI3d). Evidence of defendant's guilt of other offenses; admission of inadmissible evidence as harmless error

There was no prejudicial error in a prosecution for sexual offense where the court admitted testimony from a witness who had been sexually assaulted by defendant approximately seven years previously. *State v. Gross*, 97.

§ 34.7 (NCI3d). Admissibility of other offenses to show knowledge or intent

The trial court did not abuse its discretion in a prosecution for assault by admitting evidence that defendant had placed a gun to the head of a fourteen year old boy, not the victim, when questioning him regarding stolen cocaine. *State v. Jones*, 251.

§ 60 (NCI4th). Instructions on jurisdiction

The trial court did not err in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that North Carolina had jurisdiction over the offense of trafficking in cocaine where the State proved that the conspiracy occurred within the boundaries of North Carolina. *State v. Drakeford*, 298.

§ 61 (NCI4th). Jurisdiction of offense committed in part outside North Carolina

The trial court had jurisdiction to try a Maryland resident for conspiracy to traffic in cocaine based upon telephone calls between Wake County, North Carolina and defendant's home in Maryland. *State v. Drakeford*, 298.

CRIMINAL LAW — Continued

§ 67 (NCI4th). Jurisdiction of superior courts, generally

The superior court has jurisdiction to try a twenty-three-old defendant for arson offenses committed while he was a juvenile even though the superior court lacked jurisdiction over the juvenile defendant at the time the offenses were committed. *State v. Lundberg*, 543.

§ 86.2 (NCI3d). Credibility of defendant and interested parties; prior convictions generally

There was no error from the admission of prior larceny convictions to impeach defendant where defendant contended that those convictions were obtained in violation of his right to counsel. *State v. Hargrove*, 194.

§ 86.5 (NCI3d). Impeachment of defendant; particular questions and evidence as to specific acts

Where defendant testified that he had never possessed any cocaine, the prosecutor could properly impeach defendant by asking him about plastic bags containing cocaine residue found in defendant's vehicle at the time of his arrest. *State v. Wooten*, 125.

§ 89.3 (NCI3d). Corroboration by prior statements of witness; consistent statements

A letter written by an alleged rape and indecent liberties victim to her pastor's wife in which the victim stated that her stepfather was forcing her to have sexual intercourse with him was properly admitted to corroborate the victim's prior testimony. *State v. Hardy*, 226.

§ 113 (NCI4th). Discovery; failure to comply

The trial court did not abuse its discretion in the severity of sanctions imposed for the State's violation of discovery procedures. *State v. Joyce*, 558.

§ 150 (NCI4th). Impermissible infringements on right to plead guilty

Defendant is entitled to a new sentencing hearing where it can reasonably be inferred from remarks by the trial judge that he improperly considered defendant's failure to accept a plea bargain and the exercise of her right to a jury trial when he imposed sentence. *State v. Pavone*, 442.

§ 169 (NCI3d). Harmless and prejudicial error in admission or exclusion of evidence

Defendant in a prosecution for sexual offense and kidnapping did not preserve for appeal the question of whether the court erred by refusing to allow him to testify about his criminal record. *State v. Gross*, 97.

§ 169.2 (NCI3d). Error as harmless where objection sustained, evidence or count withdrawn, or restrictive instruction given

Defendant was not prejudiced by noncorroborative testimony where the trial court sustained defendant's objection to the testimony. *State v. Hardy*, 226.

The admission of the noncorroborative portion of a rape victim's statement to the investigating officer was rendered harmless by the trial court's curative instruction to the jury. *Ibid.*

§ 236 (NCI4th). Request for trial or custody under Interstate Agreement on Detainers

The trial court properly denied defendant's motion to dismiss the indictments on the ground that the State failed to try him within the time required by the Interstate Agreement on Detainers where defendant notified the State by mail that he was incarcerated in Florida but failed to give written notice to the prosecutor requesting a final disposition of the pending charges. *State v. Schirmer*, 472.

§ 301 (NCI4th). Consolidation of homicide count and other offense

The offenses of accessory after the fact of a murder and aiding and abetting in the murder are joinable offenses for purposes of indictment and trial even though a defendant may not be convicted of both. *State v. Jewell*, 350.

§ 318 (NCI4th). Joinder or consolidation of charges against defendants charged with the same offense; sexual offenses

The court did not abuse its discretion by denying defendant's motion to consolidate, despite defendant's contention that he was denied a fair trial because his brother was acquitted in a separate trial. *State v. Jeune*, 388.

§ 329 (NCI4th). Timeliness of motion for severance; waiver

Defendant waived his right to allege on appeal that the trial court erred in joining for trial narcotics offenses that occurred on different dates where he failed to move for severance prior to trial. *State v. Mitchell*, 514.

§ 382 (NCI4th). Conduct of judge; clarification of testimony

The trial court did not err in a robbery and kidnapping prosecution by asking a witness if he could refrain from mentioning "the cousins" where the witness was a cellmate of one defendant and was testifying about an admission by that defendant, who was a cousin of the codefendant. *State v. Joyce*, 558.

§ 425 (NCI4th). Comment on defendant's failure to call other particular witnesses or offer particular evidence

There was no error in a prosecution for assault and robbery from the prosecutor's closing argument that defendant had elected not to call certain witnesses. *State v. Billings*, 362.

§ 427 (NCI4th). Defendant's failure to testify; comment by prosecution

There was no error in a prosecution for felonious breaking and entering where the prosecutor referred in his closing argument to defendant's failure to testify. *State v. Reid*, 334.

§ 439 (NCI4th). Argument of counsel; comment on character and credibility of witnesses

There was no prejudicial error where the prosecutor commented in his closing argument that you've got to go to hell for the witnesses if you're going to try the devil. *State v. Joyce*, 558.

§ 482 (NCI4th). Communications between persons connected with case and jurors

Although remarks by the district attorney concerning the workload of the district attorney's office and the necessity of weekend work in order to prepare cases for trial, made in the presence of the jury venire in response to the trial court's remarks the previous day about disorganization and inefficient use of court

The trial court did not err when sentencing defendant for first degree burglary by finding as an aggravating factor that defendant was armed with a deadly weapon at the time of the crime. *State v. Vest*, 771.

§ 1176 (NCI4th). Financial burden imposed on victim

There are circumstances under which the financial burden imposed upon the victim may be used as a nonstatutory aggravating factor. *State v. Jones*, 251.

§ 1182 (NCI4th). Statutory aggravating factors; proof of prior convictions

Evidence supported the trial court's finding of prior convictions as an aggravating factor for murder where the State established defendant's true identity by fingerprint evidence and an officer's testimony that defendant's parents had informed her of defendant's true identity, and the State introduced certified court records from Delaware showing convictions of defendant under his true name. *State v. Stone*, 448.

§ 1183 (NCI4th). Prior convictions; alternative methods of proof

The trial court could properly consider defendant's prior conviction for driving under the influence as an aggravating factor on the basis of defendant's admission during cross-examination that he had been convicted of this offense. *State v. Wooten*, 125.

§ 1184 (NCI4th). Aggravating factors; prosecutor's unsworn allegation of prior conviction

A sentence five years beyond the presumptive term for assault with a deadly weapon inflicting serious injury was remanded for resentencing where the trial judge based his finding of the aggravating factor of prior convictions solely on the prosecutor's unsworn statements. *State v. Gordon*, 455.

§ 1188 (NCI4th). Conviction while defendant was indigent and without assistance of counsel; findings by court

There was evidence to support the findings of the trial court concerning defendant's indigency at the time of prior convictions when sentencing defendant. *State v. Hargrove*, 194.

§ 1189 (NCI4th). Prior convictions; commission of joinable offense

The trial court could properly aggravate defendant's sentence for accessory after the fact of murder by finding that defendant aided and abetted the murder where defendant was indicted on charges of first degree murder and accessory after the fact of murder but the murder charge was dismissed pursuant to a plea bargain in which defendant pled guilty to accessory after the fact. *State v. Jewell*, 350.

§ 1226 (NCI4th). Alcoholism or intoxication as statutory mitigating factor

The trial court did not err in failing to find as a statutory mitigating circumstance for accessory after the fact of murder that defendant's mental or physical condition significantly reduced his culpability for the offense where defendant's evidence showed only that he had been consuming alcohol and drugs before the crime. *State v. Jewell*, 350.

CRIMINAL LAW — Continued

§ 1237 (NCI4th). Defendant's cooperation in apprehending or prosecuting other felon

The trial court did not abuse its discretion when sentencing defendant for trafficking in cocaine by failing to find that defendant's testimony incriminating a co-defendant was substantial assistance within the meaning of N.C.G.S. 90-95(h)(5). *State v. Wells*, 274.

§ 1266 (NCI4th). Good character or reputation generally

The trial court did not err when resentencing defendant for trafficking in cocaine by not finding defendant was a person of good character or had a good reputation in the community. *State v. Wells*, 274.

DAMAGES

§ 22 (NCI4th). Physical impact requirement

The trial court did not err by permitting plaintiff to recover damages for the mental and emotional distress caused by defendant's negligence which did not involve any physical contact with plaintiff. *Ford v. NCNB Corporation*, 172.

§ 53 (NCI4th). Collateral source rule generally

Defendants' cross-examination of plaintiff's witnesses in a medical malpractice action as to educational and other public benefits available to the brain-damaged minor plaintiff did not violate the collateral source rule where it was in response to testimony offered by plaintiff that such services were not available in that area. *Shuford v. McIntosh*, 201.

Plaintiff was prejudiced by the trial court's violation of the collateral source rule in a medical malpractice action when the court, on its own motion, admitted a hospital cash ledger containing references to Medicare payments of some of plaintiff's medical expenses. *Badgett v. Davis*, 760.

§ 131 (NCI4th). Punitive damages; willful and wanton conduct

Plaintiff's evidence was sufficient for submission of an issue of punitive damages to the jury in a professional malpractice action based on a sexual relationship between defendant therapist and plaintiff patient. *MacClements v. Lafone*, 179.

DECLARATORY JUDGMENT

§ 7 (NCI4th). Requirement of actual justiciable controversy

An actual and justiciable controversy existed in an action arising from a DOT determination to sell property which it had previously acquired by eminent domain where plaintiffs were placed in a position in which their statutory rights were in peril. *Ferrell v. Dept. of Transportation*, 42.

DESCENT AND DISTRIBUTION

§ 12 (NCI4th). Illegitimate children generally

Illegitimate children are not permitted six months from their father's death to prove their legitimacy by N.C.G.S. § 29-19(b). *Helms v. Young-Woodard*, 746.

DESCENT AND DISTRIBUTION — Continued

§ 13 (NCI4th). Establishing paternity for purposes of succession

A foreign legitimation action filed after the putative father's death in North Carolina did not qualify the illegitimate children to inherit under North Carolina's intestate succession laws. *Helms v. Young-Woodard*, 746.

§ 14 (NCI4th). Illegitimate children; constitutionality of statutes

A trial court determination that a New York legitimation proceeding begun after the death of the alleged father did not permit the children to take by intestate succession did not violate the Equal Protection Clause or the Full Faith and Credit Clause. *Helms v. Young-Woodard*, 746.

DISCOVERY AND DEPOSITIONS

§ 45 (NCI4th). Requirement that matter sought be material and relevant

The trial court erred in a child support action by granting plaintiff's motion to compel document production and denying defendant's motion for a protective order. *Powers v. Parisher*, 400.

§ 55 (NCI4th). Motion for order compelling discovery

The trial court properly exercised its discretion in denying a motion to compel discovery. *In re Estate of Tucci*, 142.

DISTRICT ATTORNEYS

§ 4 (NCI4th). Powers and duties

The trial court did not err by denying defendant's motion to dismiss and bar a prosecution for felonious breaking and entering where defendant's first attorney joined the District Attorney's office and the District Attorney requested and received assistance in prosecuting the case from the Special Prosecutions Section of the Attorney General's office. *State v. Reid*, 334.

DIVORCE AND SEPARATION

§ 30 (NCI4th). Cohabitation with another

There was sufficient evidence to support the trial judge's conclusion that defendant had cohabited with someone of the opposite sex and that plaintiff's obligation to pay alimony under a separation agreement had terminated. *Rehm v. Rehm*, 490.

§ 70 (NCI4th). Separation for statutory period generally

The trial court properly excluded evidence relating to defendant wife's health and prospects for obtaining medical insurance in an action for divorce based on a year's separation. *Fletcher v. Fletcher*, 225.

§ 111 (NCI4th). The Equitable Distribution Act generally

The trial court erred in an equitable distribution action by failing to account for dividends received by defendant from marital stock in her possession between separation and distribution. *Smith v. Smith*, 788.

DIVORCE AND SEPARATION — Continued

§ 123 (NCI4th). Distribution of marital property; increase in value of separate property

An equitable distribution order was remanded for appropriate findings concerning post-marital, pre-separation appreciation of separate property. *Ciobanu v. Ciobanu*, 461.

§ 136 (NCI4th). Measure of value of property

The trial court did not err in an equitable distribution action in the valuation of two properties. *Smith v. Smith*, 788.

§ 142 (NCI4th). Distribution of marital property; pension and retirement benefits

The trial court did not err in an equitable distribution action in its valuation of plaintiff's retirement plan. *Smith v. Smith*, 788.

§ 161 (NCI4th). Application of distribution factors in particular cases

The trial court did not abuse its discretion in an action for divorce and equitable distribution by awarding defendant the marital home in exchange for his payment of the marital debt to the IRS. *Wieneck-Adams v. Adams*, 621.

An equitable distribution action was remanded for clarification and adjustment, if necessary, of the findings where it appeared that plaintiff did not receive the full amount he was due. *Smith v. Smith*, 788.

§ 162 (NCI4th). Equitable distribution; agreements dividing property generally

A valid antenuptial agreement entered by the parties in Virginia operated as a release of the wife's statutory right to equitable distribution. *Prevatte v. Prevatte*, 777.

§ 176 (NCI4th). Distributive awards; necessity for written findings of fact

A plaintiff in an equitable distribution action was not granted a new trial despite the failure of the trial court to enter required findings of fact. *Smith v. Smith*, 788.

§ 263 (NCI4th). Alimony; indignities rendering condition intolerable and life unbearable

The trial court did not err by denying defendant's motions for a judgment n.o.v. and a new trial in an action for permanent alimony where there was sufficient evidence to submit to the jury; absent a valid separation agreement waiving all alimony, post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. *Brown v. Brown*, 547.

§ 300 (NCI4th). Modification or termination of alimony; appellate review

Defendant's assignment of error that the trial court erred in finding that he had not shown sufficient changed circumstances to justify the termination of alimony is dismissed as premature where the record contains no order finally determining plaintiff's entitlement to permanent alimony. *Prevatte v. Prevatte*, 777.

§ 431 (NCI4th). Modification of support order; findings required

The trial court did not err by not making findings and by not applying the North Carolina Child Support Guidelines when denying defendant's motion to reduce his child support obligation. No initial support order or modification was entered at the hearing, only a denial of a motion to modify, so that the latest Guidelines

did not apply, and the court was not required to make negative findings to justify holding that a party did not meet its burden of proof. *Davis v. Risley*, 798.

§ 451 (NCI4th). Modification of child custody and support; jurisdiction generally

The trial court properly concluded that defendant had sufficient purposeful contacts with North Carolina to satisfy due process requirements in a child support action where it could reasonably be inferred that the parties' separation agreement as amended is a North Carolina contract governed by North Carolina law. *Powers v. Parisher*, 400.

Minimum contacts are not required in child custody actions. *Harris v. Harris*, 574.

The trial court properly denied defendant's motion to dismiss a child support action for lack of personal jurisdiction where defendant had the required minimum contacts with North Carolina. *Ibid.*

§ 458 (NCI4th). Child support; jurisdiction in connection with other proceedings; divorce or annulment action

There was no abatement of plaintiff's action for child support, even though there had been a divorce, where the divorce complaint did not ask the court to review the question of child support and the divorce judgment did not even allude to the parties' separation agreement. *Powers v. Parisher*, 400.

EJECTMENT

§ 5 (NCI4th). Requirement of landlord-tenant relationship

The trial court lacked subject matter jurisdiction to hear a summary ejectment action where the evidence showed that plaintiff acquired a quitclaim deed at a tax sale and attempted to quiet title through a summary ejectment proceeding. *College Heights Credit Union v. Boyd*, 494.

EMINENT DOMAIN

§ 6 (NCI4th). When property no longer needed for purpose for which condemned

G.S. 136-19, when read consistently with G.S. 40A-63 and 40A-65 as well as the Fifth Amendment to the U. S. Constitution, dictates that the State not profit from overreaching seizures by eminent domain, and the original landowners or their successors in interest should return the compensation they received for surplus property, plus interest, and the State should reconvey the land to plaintiffs. *Ferrell v. Dept. of Transportation*, 42.

EVIDENCE AND WITNESSES

§ 19 (NCI3d). Evidence of similar facts and transactions; in general

Testimony that defendant therapist had previously engaged in sexual relations with three other patients at a mental health center in addition to plaintiff was properly admitted to show defendant's scheme or intent to take advantage of female patients being treated by him at the mental health center. *MacClements v. Lafone*, 179.

§ 52 (NCI3d). Expert testimony as to mental capacity

The trial court did not err in the admission of expert testimony concerning plaintiff's capacity to consent to sexual relations with her therapist where the

EVIDENCE AND WITNESSES — Continued

§ 1308 (NCI4th). Time of motion to suppress

The trial court was not required to conduct a hearing on defendant's motion during trial to suppress use of his confession for impeachment purposes where the record shows the State did not intend to use the confession at trial. *State v. Schirmer*, 472.

§ 1730 (NCI4th). Videotapes; witness's testimony; criminal case

The trial court did not err in a prosecution for assault and robbery by admitting a videotape showing a reenactment of a witness's sighting of defendant shortly after the crime. *State v. Billings*, 362.

§ 2545 (NCI4th). Qualifications of children; voir dire hearing; when held

The trial court's refusal to grant a voir dire examination of a six-year-old sexual offense victim was harmless error where the victim's preliminary testimony supported a conclusion that she understood her obligation to tell the truth. *State v. Huntley*, 732.

§ 2906 (NCI4th). Redirect examination as to new issue

The trial court in a prosecution for impaired driving and speeding did not abuse its discretion in refusing to allow defendant to introduce on redirect examination evidence of his character for abiding by traffic laws where the excluded testimony did not relate to matters raised either on direct or cross-examination. *State v. Beasley*, 529.

§ 2947 (NCI4th). Basis for impeachment; psychiatric treatment

The trial court did not err by not releasing the psychiatric records of a State's witness to defendant where the judge conducted an in camera inspection of the records and concluded that the records would not have a significant effect on the case. *State v. Joyce*, 558.

§ 3003 (NCI4th). Impeachment of witnesses; time of prior conviction

Defendant invited cross-examination by the State about his prior convictions that were more than ten years old when he implied during his direct testimony that he had only one prior conviction. *State v. Mitchell*, 514.

EXECUTORS AND ADMINISTRATORS

§ 29 (NCI3d). Claims of creditors of the devisees, legatees, and heirs

The trial court erred by granting a directed verdict for defendants in an action to enforce an oral promise to pay funeral expenses not paid by the estate. *Parrish Funeral Home v. Pittman*, 268.

GAS

§ 1 (NCI3d). Regulation and rates

The Carolina Utilities Customers Association was not an "aggrieved" party which could appeal an order of the Utilities Commission amending a ratemaking formula providing for an adjustment of natural gas rates to pass cost savings to the utility's customers when the utility purchases gas from nontraditional sources and reducing the utility's rates. *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assn.*, 226.

GIFTS

HOMICIDE

INDICTMENT AND WARRANT

INFANTS

INSURANCE

INSURANCE — Continued

JURY — Continued

§ 7.13 (NCI3d). Peremptory challenges generally; number of challenges

The trial court erred in allowing each defendant in a medical malpractice action two more peremptory challenges than G.S. 9-22 authorizes, but plaintiff was not prejudiced by such error. *Shuford v. McIntosh*, 201.

§ 7.14 (NCI3d). Manner, order, and time of exercising peremptory challenge

Convictions for trafficking in cocaine were remanded for a determination of whether the prosecutor's explanation for his peremptory challenge of a juror was race-neutral where the prosecutor had asked the clerk whether there was a white male in the pool. *State v. Hall*, 375.

KIDNAPPING

§ 1.2 (NCI3d). Sufficiency of evidence

There was sufficient evidence of the first degree kidnapping of a 15 year old victim, despite defendant's contention that the victim's mother was never asked whether she had consented. *State v. Gross*, 97.

The trial court did not err by denying defendants' motion to dismiss second degree kidnapping charges where the charges arose from several robberies in which the victims were moved from one room to another, and the removals were not necessary to facilitate the robberies. *State v. Joyce*, 558.

§ 1.3 (NCI3d). Instructions

The trial court did not err in a prosecution for kidnapping and robbery by denying defendants' requested instructions. *State v. Joyce*, 558.

LANDLORD AND TENANT

§ 1 (NCI3d). Relationship generally; distinctions

Summary judgment was improperly granted for some defendants in an action arising from the closing of a residential hotel where the evidence presented, at a minimum, genuine issues of material fact regarding plaintiffs' status as residential tenants. *Baker v. Rushing*, 240.

§ 13.3 (NCI3d). Notice of renewal

The trial court erred by granting partial summary judgment for plaintiff tenant on the issue of whether exercise of a lease option by regular mail is sufficient. *Janus Theatres of Burlington v. Aragon*, 534.

LIMITATION OF ACTIONS

§ 4.2 (NCI3d). Accrual of negligence actions

An action for damages incurred when defendant bank lost a deposit made by plaintiff for his employer was not barred by the statute of limitations. *Ford v. NCNB Corporation*, 172.

§ 7 (NCI3d). Accrual of actions to enforce trust or to declare resulting or constructive trust

Plaintiff's action to establish his rights in property under the theories of resulting trust, constructive trust and equitable lien were not barred by the three year statute of limitations on claims of fraud. *Guy v. Guy*, 753.

MASTER AND SERVANT

§ 10.2 (NCI3d). Actions for wrongful discharge

An employee seeking to establish a cause of action for wrongful discharge or demotion in violation of the employee's first amendment rights must first show that the speech was protected and then that the speech was the motivating cause for the discharge or demotion. *Warren v. New Hanover County Board of Education*, 522.

The trial court properly granted summary judgment for defendant employer on plaintiff's claim for breach of her employment contract based on defendant's failure to follow the disciplinary procedures outlined in its personnel manual when it terminated plaintiff's employment where the personnel manual could not be considered as part of plaintiff's contract of employment. *Salt v. Applied Analytical, Inc.*, 652.

An employment handbook does not constitute a unilateral contract which will give rise to a breach of contract action. *Ibid.*

Plaintiff did not contribute additional consideration which would remove her employment from the scope of the employment at will doctrine where she failed to show that her move from Greenville to accept employment by defendant in Wilmington was induced by assurances concerning the duration of her employment or the discharge policies of defendant employer. *Ibid.*

Plaintiff's allegations that defendant breached its covenant of good faith and fair dealing by disregarding its promise of a permanent job and by giving third parties false reasons for discharging plaintiff were insufficient to sustain a claim for wrongful discharge. *Ibid.*

There is no independent tort action for wrongful discharge of an at-will employee based solely on allegations of discharge in bad faith in the absence of a public policy violation. *Ibid.*

§ 55.3 (NCI3d). Particular injuries as constituting accident; evidence of accidental character of injury

The Industrial Commission correctly concluded that plaintiff suffered an injury by accident where plaintiff was injured while lifting bags of intravenous solution five working days after being transferred to that position after working five years as an accounting clerk. *Church v. Baxter Travenol Laboratories*, 411.

§ 65.1 (NCI3d). Hernias

The Industrial Commission correctly found for defendants in a workers' compensation action in which plaintiff sought compensation for a hernia, and plaintiff's contention that the Commission relied on an inappropriate definition of hernia had no merit. *Pernell v. Piedmont Circuits*, 289.

§ 68 (NCI3d). Occupational diseases

The Industrial Commission did not err in finding that there was no causal relationship between plaintiff's employment as a medical review examiner and her stress-related symptoms and that plaintiff thus did not suffer from a compensable occupational disease. *Cross v. Blue Cross/Blue Shield*, 284.

§ 68.4 (NCI3d). Subsequent injury or accident; aggravation of original injury

The Industrial Commission did not err by striking the deputy commissioner's finding that plaintiff's incapacity to earn wages was due to Thoracic Outlet Syndrome, a congenital disease. *Church v. Baxter Travenol Laboratories*, 411.

MASTER AND SERVANT — Continued

§ 69 (NCI3d). Amount of recovery generally

The Industrial Commission did not err in a workers' compensation action by reducing a 100% credit for disability payments to 75% and awarding the remaining 25% to plaintiff as attorney's fees based on the full workers' compensation award. *Church v. Baxter Travenol Laboratories*, 411.

§ 93 (NCI3d). Proceedings before the Commission generally

The Industrial Commission's use of the words "reversible error" in adopting a deputy commissioner's decision refer to the decision to adopt that decision and do not indicate that a lower standard of review was utilized. *Pernell v. Piedmont Circuits*, 289.

§ 100 (NCI3d). Construction and operation of employment security law in general

The trial court did not err by failing to award attorney fees to a petitioner who was granted unemployment benefits by an appeals referee but denied benefits on appeal to a full Commission. *Doyle v. Southeastern Glass Laminates*, 326.

§ 108 (NCI3d). Right to unemployment compensation generally

An unemployment compensation claimant is presumed to be entitled to benefits, but this presumption is rebuttable. *Doyle v. Southeastern Glass Laminates*, 326.

§ 108.1 (NCI3d). Effect of misconduct

The trial court did not err in affirming the Employment Security Commission's decision to disqualify petitioner from receiving benefits where petitioner was discharged for excessive absenteeism. *Doyle v. Southeastern Glass Laminates*, 326.

MORTGAGES AND DEEDS OF TRUST

§ 1.1 (NCI3d). Equitable liens

The trial court improperly granted defendant's motion to dismiss where it was undisputed that defendant obtained a loan which plaintiff used to improve the lots and that plaintiff repaid the loan, and plaintiff alleged that he repaid the loan in reliance upon the defendant's promise to reconvey the land to plaintiff. *Guy v. Guy*, 753.

§ 2 (NCI3d). Purchase money mortgages

The trial court correctly held in a declaratory judgment action that defendants' deed of trust was not a purchase money deed of trust and that plaintiff's judgment lien is entitled to priority over defendants' deed of trust. *Slate v. Marion*, 132.

§ 26 (NCI3d). Notice and advertisement of sale

The trustee in a foreclosure had no obligation to mail the notice of sale to a party where the property being foreclosed upon was her last known address and it was known that she was in Florida, but neither the bank nor the trustee knew her Florida address. *Williamson v. Savage*, 188.

§ 26.1 (NCI3d). Personal notice

The trustee in a foreclosure exercised due diligence in attempting to locate and personally serve one of the parties. *Williamson v. Savage*, 188.

MUNICIPAL CORPORATIONS

§ 30.11 (NCI3d). Specific businesses, structures, or activities

The trial court erred in an action brought by the Town for injunctive relief and an order of abatement requiring removal of a deck by concluding that defendants' deck is not a separate structure and does not violate the zoning ordinances. *Town of Pine Knoll Shores v. Evans*, 79.

The trial court was without authority to allow defendants to avoid removal of a deck erected in violation of a zoning ordinance by payment of a civil penalty. *Ibid.*

NARCOTICS

§ 3.1 (NCI3d). Competency and relevancy of evidence generally

Defendant was not prejudiced by any error by the trial court in permitting the prosecutor to question defendant about his possession of over a thousand dollars at the time of his arrest for narcotics offenses. *State v. Wooten*, 125.

The trial court did not err in a narcotics prosecution by denying defendant's motion in limine to exclude evidence concerning drug arrests made outside her residence and the reputation of her neighborhood. *State v. Crawford*, 591.

§ 3.3 (NCI3d). Opinion testimony

The trial court properly permitted a police officer to testify that it was a common practice in drug transactions for one person to hold the money and for another person to carry the drugs so that, in the event of an arrest, one individual would not have possession of both the money and the drugs. *State v. Bunch*, 106.

The trial court did not err in permitting a chemist to state his opinion that white powder found in defendant's glove "could" contain cocaine based on a preliminary color test. *State v. White*, 165.

§ 4 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was sufficient

Evidence that defendant got out of his car and went into a store with two plastic bags containing marijuana in his shirt pocket was sufficient for the jury to find that defendant was guilty of maintaining a vehicle for illegally keeping drugs. *State v. Mitchell*, 514.

The State presented sufficient evidence of the quantity of marijuana to permit the jury to find defendant guilty of felonious possession of more than one and a half ounces where the marijuana was in evidence and the jury had an opportunity to examine it. *Ibid.*

§ 4.2 (NCI3d). Sufficiency of evidence in cases involving sale to undercover narcotics agent

The State's evidence was sufficient to support defendant's convictions of the sale or delivery of cocaine and possession of cocaine with intent to sell or deliver although defendant did not physically receive the money in the transaction with an undercover officer. *State v. Bunch*, 106.

§ 4.3 (NCI3d). Cases where evidence of constructive possession was sufficient

The State presented sufficient evidence of defendant's constructive possession of controlled substances and contraband in his residence to permit the jury to convict him of possession of cocaine, possession of marijuana, possession of drug paraphernalia, and maintaining a dwelling for keeping illegal drugs. *State v. Mitchell*, 514.

NARCOTICS — Continued

The State's evidence was sufficient to support defendant's convictions of narcotics offenses on the basis of constructive possession of marijuana, cocaine and drug paraphernalia found in defendant's trailer home. *State v. Forbes*, 507.

The evidence of constructive possession of cocaine found on a kitchen table was sufficient. *State v. Crawford*, 591.

§ 4.4 (NCI3d). Cases where evidence was insufficient to show constructive possession

Evidence that bags containing cocaine were found in the hallway near the door to the bathroom in which the sixteen-year-old defendant was found seated on the toilet was insufficient to support defendant's conviction of possession of cocaine with intent to sell and deliver based on the theory of constructive possession. *State v. Forbes*, 507.

§ 4.6 (NCI3d). Instructions as to possession

There was no error in a narcotics prosecution in the court's refusal to include defendant's proposed instruction on knowledge where the charge given correctly stated the law and conveyed the substance of the requested instruction. *State v. Crawford*, 591.

§ 4.7 (NCI3d). Instructions as to lesser offenses

The trial court in a prosecution for trafficking in cocaine by possession did not err in refusing to instruct the jury on the lesser included offense of felonious possession of cocaine. *State v. White*, 165.

The trial court in a prosecution for possession of cocaine and of marijuana with intent to sell and deliver did not err in failing to submit the lesser included offense of simple possession where defendant merely denied she was present at the premises where the transactions occurred. *State v. Pavone*, 442.

§ 5 (NCI3d). Verdict and punishment

Defendant could not be convicted and sentenced for both the sale and the delivery of a controlled substance arising from one transaction. *State v. Wooten*, 125.

The trial court acted under a misapprehension of the law when it sentenced defendant to a presumptive term of three years for each offense of sale and delivery of marijuana and possession of marijuana with intent to sell and deliver since the presumptive term for these offenses is two years. *State v. Pavone*, 442.

NEGLIGENCE

§ 57.8 (NCI3d). Sufficiency of evidence in action involving wax or oily or greasy places on floor

In an action to recover for injuries suffered by plaintiff when she fell on a newly waxed floor in a mall corridor, the forecast of evidence in plaintiff's deposition presented a genuine issue of material fact as to whether defendant's cleaning crew gave proper notice of a dangerous condition to plaintiff. *Rose v. Steen Cleaning, Inc.*, 539.

§ 59.3 (NCI3d). Sufficiency of evidence and nonsuit in actions by licensees

Summary judgment for defendants was proper in an action arising from plaintiff's fall on defendants' steps as she was leaving defendants' home. *Gray v. Small*, 222.

PARENT AND CHILD

§ 1.5 (NCI3d). Procedure for termination of parental rights

The trial court erred by granting partial summary judgment on the issue of child abuse in an action for termination of parental rights. The trial court was required to hold an adjudicatory hearing, find the facts, and adjudicate the existence or nonexistence of the statutory circumstances. *In re Curtis v. Curtis*, 625.

PARTNERSHIP

§ 9 (NCI3d). Dissolution of partnership

Summary judgment should not have been granted in favor of a partnership in an action arising from the closing of a residential hotel where the two corporate partners had merged. *Baker v. Rushing*, 240.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 5 (NCI3d). Licensing and regulation of dentists

The State Board of Dental Examiners did not err in finding that a general dentist practicing in a state mental institution was subject to the same standard of care applicable to general dentists treating private patients. *Woodlief v. N.C. State Bd. of Dental Examiners*, 52.

§ 6.2 (NCI3d). Revocation of licenses; evidence

The State Board of Dental Examiners did not err in permitting a clinical dentist at a state mental hospital to state her own "findings" based on talking to dental assistants and on the notes and reports of petitioner and other doctors where the patients were clients at a state mental hospital who were unable to testify because of their mental condition. *Woodlief v. N.C. State Bd. of Dental Examiners*, 52.

The evidence supported a decision by the State Board of Dental Examiners suspending petitioner's license to practice dentistry for two years based on its findings and conclusions that petitioner was guilty of negligence in the treatment of ten patients and malpractice in the treatment of twelve patients. *Ibid.*

§ 12.3 (NCI3d). Duty and liability of psychologists and therapists

Plaintiff's evidence was sufficient for the jury in a professional malpractice action based on a sexual relationship between defendant therapist and plaintiff patient which began while defendant was treating plaintiff at a mental health center. *MacClements v. Lafone*, 179.

The trial court did not err in failing to submit a preclusive issue of consent to the jury in a professional malpractice action based on a sexual relationship between defendant therapist and plaintiff patient. *Ibid.*

§ 15 (NCI3d). Competency and relevancy of evidence generally

The trial court properly excluded evidence of defendant's professional liability insurance policy in a professional malpractice action. *MacClements v. Lafone*, 179.

The trial court in a medical malpractice case did not err in the exclusion of two medical pamphlets where no foundation was laid for establishing the relevancy or reliability of these pamphlets. *Shuford v. McIntosh*, 201.

was void and should have been set aside pursuant to the father's motion under Rule 60(b)(4). *In re Finnican*, 157.

The trial court did not err in a child support action by finding personal jurisdiction over defendant, a New Mexico resident. *Powers v. Parisher*, 400.

PUBLIC OFFICERS

§ 9 (NCI3d). Personal liability of public officers to private individuals

A sheriff and his deputies did not breach any duty to three victims who were shot by a sniper while riding in vehicles when they misinformed relatives of the sniper about involuntary mental commitment procedures before the shootings occurred, and they were thus not liable in damages for the deaths of two victims and injuries to the third victim on the basis of negligence or gross negligence in giving the erroneous advice. *Hull v. Oldham*, 29.

No special relationship existed between three victims who were shot by a sniper while riding in vehicles and defendants, a sheriff and his deputies, which gave rise to a special duty by defendants to protect the victims from being shot after defendants had misinformed the sniper's relatives about involuntary mental commitment procedures and after defendants had learned that the sniper had shot into another person's vehicle. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 4 (NCI3d). Relevancy and competency of evidence

The trial court properly admitted expert testimony that an alleged rape and indecent liberties victim suffered from post traumatic stress syndrome. *State v. Hardy*, 226.

§ 4.3 (NCI3d). Character or reputation of prosecutrix

Any error in the court's exclusion of evidence of a rape and indecent liberties victim's school disciplinary records was harmless. *State v. Hardy*, 226.

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

There was sufficient evidence of attempted first degree sexual offense and multiple counts of first degree sexual offense. *State v. Gross*, 97.

The State presented sufficient evidence that defendant's acts of sexual intercourse with his stepdaughter were by force and against her will because the jury could reasonably infer that defendant used his position of power to constructively force the stepdaughter's participation in sexual intercourse. *State v. Hardy*, 226.

The State's evidence was sufficient to support defendant's conviction on two charges of second degree rape of his fifteen-year-old stepdaughter although the victim was unable to identify a specific date on which each of the offenses occurred. *Ibid.*

The State presented sufficient evidence of penetration through the testimony of the six-year-old victim and a medical witness to support defendant's conviction of first degree sexual offense. *State v. Huntley*, 732.

§ 6 (NCI3d). Instructions

The trial court in a prosecution of defendant for second degree rape of his stepdaughter sufficiently instructed the jury on constructive force arising from the parent-child relationship. *State v. Hardy*, 226.

RAPE AND ALLIED OFFENSES — Continued

§ 6.1 (NCI3d). Instructions; lesser degrees of the crime

The trial court erred in a prosecution for first degree sexual offense by not giving an instruction on second degree sexual offense. *State v. Gross*, 97.

Failure of the court in a prosecution for first degree sexual offense to instruct the jury on the lesser included offense of attempted first degree sexual offense did not constitute plain error. *State v. Huntley*, 732.

§ 7 (NCI3d). Verdict; sentence and punishment

Imposition on defendant of the mandatory life sentence for a first degree sexual offense did not constitute cruel and unusual punishment. *State v. Huntley*, 732.

RULES OF CIVIL PROCEDURE

§ 4 (NCI3d). Process

A deputy sheriff's delivery of the summons and complaint to defendant's brother at defendant's place of business rather than at her residence was insufficient to give the court jurisdiction over defendant. *Greenup v. Register*, 618.

§ 6 (NCI3d). Time

An estate was not entitled to five days notice of a hearing on the merits of its appeal to superior court because Rule 6(d) relates only to the hearing of motions and the hearing of the estate's appeal was not pursuant to a motion. *In re Estate of Tucci*, 142.

§ 11 (NCI3d). Signing and verification of pleading; sanctions

A natural father's motions to set aside an order terminating his parental rights and for summary judgment had a sufficient basis in fact and law to preclude the imposition of Rule 11 sanctions against him where the court that entered the termination order did not have personal jurisdiction over him. *In re Finnican*, 157.

Rule 11 sanctions were properly entered against an adoptive father for his Rule 60(b) and summary judgment motions seeking to set aside an order terminating the parental rights of the natural father. *Ibid.*

§ 12.1 (NCI3d). Defenses and objections; when and how presented

Defendants' 12(b)(6) motions for dismissal were treated as 12(b)(1) motions on appeal where the arguments focused on the trial court's authority to hear the appeal from the Board of Education. *Williams v. New Hanover County Board of Education*, 425.

§ 15.1 (NCI3d). Discretion of court to grant amendment to pleadings

The trial court did not abuse its discretion by denying plaintiff's motion to amend the complaint in which it sought damages and injunctive relief for the revocation of a wastewater discharge permit. *House of Raeford Farms v. City of Raeford*, 280.

The trial court did not abuse its discretion in allowing plaintiff to amend her complaint to allege a claim for punitive damages in a professional malpractice action. *MacClements v. Lafone*, 179.

§ 32 (NCI3d). Use of depositions in court proceedings

Where the trial court admitted as substantive evidence deposition testimony introduced by defendant, the court's subsequent instructions regarding impeaching and corroborative evidence did not deprive defendant of its right to have this

RULES OF CIVIL PROCEDURE — Continued

SCHOOLS

A teacher who is denied a promotion under the career ladder program may appeal to the Superior Court after exhausting his administrative remedies by appealing to the local board of education. *Ibid.*

§ 13.2 (NCI3d). Principals and teachers; dismissal

G.S. 115C-325(f1) does not prohibit the initiation of dismissal proceedings against a teacher who has been suspended with pay more than ninety days. *Evers v. Pender County Bd. of Education*, 1.

Plaintiff waived any objection when he failed to object in response to a specific call by the Board Chairman for objections to the testimony of two witnesses, and plaintiff teacher was not denied due process of law at his dismissal hearing where the Board of Education's attorney was allowed to act as an impartial law judge and make procedural and evidentiary rulings. *Ibid.*

There were sufficient indicia that the Board of Education acted impartially and was not influenced by rumors at plaintiff teacher's dismissal hearing. *Ibid.*

Pre-hearing communications between a school superintendent and Board of Education members did not bias the Board against plaintiff teacher at his dismissal hearing. *Ibid.*

The Rules of Evidence are not applicable to teacher dismissal hearings before a Board of Education; as long as the evidence which is proffered at a dismissal hearing can be said to be of a kind commonly relied upon by reasonably prudent persons in the conduct of serious affairs, such evidence is competent and may be admitted. *Ibid.*

There was substantial evidence from which the Pender County Board of Education could properly conclude that the grounds for the superintendent's recommendation to dismiss plaintiff were true and substantiated by a preponderance of the evidence. *Ibid.*

SEARCHES AND SEIZURES

§ 8 (NCI3d). Search and seizure incident to warrantless arrest

A motion to suppress crack cocaine and drug paraphernalia was properly denied where the warrantless arrest was lawful based on a consideration of all factors together. *State v. Mills*, 724.

§ 9 (NCI3d). Search and seizure incident to arrest for traffic violations

Cocaine was lawfully seized from defendant's car incident to his lawful arrest for operating a vehicle without a driver's license, insurance and registration. *State v. Schirmer*, 472.

The trial court did not err in a prosecution for felonious breaking and entering by denying defendant's motion to suppress evidence seized as a result of a traffic stop; it was not necessary for the officers to have a reasonable suspicion that defendant committed the particular break-in, only a reasonable suspicion of some illegal conduct. *State v. Reid*, 334.

§ 10 (NCI3d). Search and seizure on probable cause

There was probable cause to search where a reasonable person acting in good faith could reasonably believe that a search of defendant would reveal controlled substances. *State v. Mills*, 724.

SEARCHES AND SEIZURES — Continued

§ 11 (NCI3d). Search and seizure of vehicles

An officer had a reasonable, articulable suspicion of criminal activity to justify an investigatory stop of defendant's vehicle, and a search of defendant's vehicle following the investigatory stop was lawful as incident to a lawful arrest and based on probable cause and exigent circumstances. *State v. Cornelius*, 583.

§ 12 (NCI3d). "Stop and frisk" procedures

Defendant was not seized within the meaning of the Fourth Amendment during his initial encounter with police at an airport because conduct of the police would not have communicated to a reasonable person that such person was not free to decline the officers' requests or otherwise terminate the encounter, and cocaine discovered on defendant's person pursuant to a search with his consent was properly admitted into evidence. *State v. Poindexter*, 260.

An investigatory stop of defendant's vehicle did not exceed its legitimate scope. *State v. Cornelius*, 583.

§ 23 (NCI3d). Application for warrant; sufficient evidence for probable cause

There was a substantial basis for a magistrate's finding of probable cause to issue a search warrant; the law does not require absolute certainty, only that probable cause exist to believe that drugs are on the premises. *State v. Crawford*, 591.

§ 24 (NCI3d). Cases where evidence is sufficient to show probable cause; generally

A magistrate had probable cause to issue a warrant to search defendant's residence for marijuana based on the affidavit of a police officer who received information from a store clerk and a confidential informant and the affidavit of a second officer who lived next door to defendant. *State v. Mitchell*, 514.

§ 47 (NCI3d). Admissibility and competency of evidence in suppression hearing

An officer's testimony that the area in which defendant was arrested had a reputation as a high crime area for sales of drugs was admissible to show the totality of the circumstances known by the officer at the time he made an investigatory stop of defendant's vehicle. *State v. Cornelius*, 583.

SHERIFFS AND CONSTABLES

§ 1 (NCI3d). Nature of office

Sheriffs are local rather than state officers so that claims against them were not required to be brought in the Industrial Commission but were properly instituted in the superior court. *Hull v. Oldham*, 29.

§ 4 (NCI3d). Civil liabilities to individuals

A sheriff and his deputies did not breach any duty to three victims who were shot by a sniper while riding in vehicles when they misinformed relatives of the sniper about involuntary mental commitment procedures before the shootings occurred, and they were thus not liable in damages for the deaths of two victims and injuries to the third victim on the basis of negligence or gross negligence in giving the erroneous advice. *Hull v. Oldham*, 29.

No special relationship existed between three victims who were shot by a sniper while riding in vehicles and defendants, a sheriff and his deputies, which gave rise to a special duty by defendants to protect the victims from being shot after defendants had misinformed the sniper's relatives about involuntary mental

commitment procedures and after defendants had learned that the sniper had shot into another person's vehicle. *Ibid.*

STATE

§ 4 (NCI3d). Actions against the state; sovereign immunity

The trial court did not err by denying defendant's motion to dismiss, based on sovereign immunity, an action arising from a DOT determination to sell property which it had previously acquired by eminent domain. *Ferrell v. Dept. of Transportation*, 42.

§ 4.2 (NCI3d). Sovereign immunity; particular actions

The trial court correctly concluded that it lacked jurisdiction to adjudicate plaintiff's claim against the ECU School of Medicine; all tort claims against UNC and its constituent institutions for money damages must be brought before the North Carolina Industrial Commission. *Jones v. Pitt County Mem. Hospital*, 613.

TAXATION

§ 25.11 (NCI3d). Valuation and assessment; judicial redress

The Property Tax Commission properly dismissed the appeal of petitioner Forsyth County and its assessor from the State Board of Equalization and Review; it is clear that the legislature intended the right of appeal in these cases to extend only to taxpayers or those with ownership interests in the property subject to taxation. *In re Appeal of Forsyth County*, 635.

TORTS

§ 4 (NCI3d). Right of one defendant to have others joined for contribution

The three-year limitation period of G.S. 1-52(2) applies for refiling a contribution claim where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim, and the period begins to run when payment is made in the settlement of the underlying claim. *Safety Mut. Casualty Corp. v. Spears, Barnes*, 467.

TRIAL

§ 3.1 (NCI3d). Motions for a continuance; discretion of trial judge

The trial court did not err by denying a motion to continue a hearing concerning the award of attorney fees arising from an estate. *In re Estate of Tucci*, 142.

§ 6.1 (NCI3d). Particular stipulations

The parties could properly stipulate that the jury included $10,000 of plaintiff's medical expenses in its verdict for $100,000, and plaintiff is bound by that stipulation. *Baxley v. Nationwide Mutual Ins. Co.*, 419.

TRUSTS

§ 13 (NCI3d). Creation of resulting trusts

Summary judgment was properly granted for defendant on the issue of resulting trust in an action arising from the transfer of property from plaintiff to defendant. *Guy v. Guy*, 753.

WORD AND PHRASE INDEX

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